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ABSTRACT

This publication presents a model public employee collective bargaining law that is intended to aid educational administrators in securing the passage of collective bargaining legislation that protects administrators' management prerogatives while safeguarding the legitimate representational rights of public employees. The model law is written to apply to all public employees, rather than just school employees, and to meet the circumstances that prevail in most states; consequently, it will require modification to meet the special needs and conditions of individual states. The model is presented in suitable legal language and format and is accompanied by an introductory memorandum that discusses in turn each section of the model law. (JG)

AASA
Model Public Employee Collective Bargaining Law

American Association of School Administrators

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Foreword

This model state public employee collective bargaining bill and the accompanying text have been drafted as a means of implementing AASA policy on collective bargaining in education. That policy called for various safeguards for educational management in any legislation intended to provide negotiating rights for public employees. Unfortunately, experience since as well as before the adoption of AASA's policies on the subject makes it clear that there is a continuing need for guidance in this difficult and complex field.

One particularly acute problem has been that school management has not always had available appropriate statutory language to avoid the dangers that have arisen in statutes enacted or proposed to date. Hopefully, the proposed model statute will meet this need.

Two additional points are essential to an understanding of the rationale and content of the suggested legislation and the accompanying memorandum. First, this publication is not intended, and should not be interpreted to mean, that AASA supports public employee collective bargaining legislation, or that it is urging its state and local affiliates to do so. It must be emphasized, categorically and definitively, that this is not the case. What is the case is that most AASA members have already been confronted by legislation prepared by public employee unions, especially teacher unions, and that AASA believes it has a responsibility to assist its members in responding to any such proposed legislation, whatever its source. AASA's position, and the reference point for this publication, is that *if* legislation providing bargaining rights for school employees is introduced, the legislation suggested herein can be used to help protect the public interest in this matter. If no such legislation has been introduced in a particular state, we see no reason for school management to initiate efforts to enact such, even along the lines herein. The one exception might be a state in which Court decisions in the absence of statutory guidelines are so inimical to the public interest that some type of statutory initiative by management is required.

Another major point relates to the fact that the proposed legislation deals with local public employees generally, not just school district employees. As a practical matter, the vast majority of legislative proposals are intended to provide local public employees generally with bargaining rights. Despite a few exceptions, the legislative trend is clearly in this direction; because of the alliances among public employee unions, this trend is likely to become even more pronounced in the future.

For this reason, proposals that would deal only with school district employees are likely to lack credibility with legislative bodies. Although judgments on this issue must be made by school management on a state by state basis, in most states school management will have to deal with a broad bill. Where this is the case, the legislation suggested herein is likely to receive strong support from public management generally, thereby strengthening our overall objective of protecting the public interest in educational employment relations.

As noted in the memorandum, it is especially important to learn from past experience so that future legislative enactments make a more positive contribution to effective school management and sound educational policy. I believe the model legislation and the accompanying memorandum are a significant contribution to these objectives, and urge their careful consideration by AASA members in states with as well as without collective bargaining legislation.

The suggestion that AASA develop this model legislation and an accompanying memorandum was first made by Dr. Myron Lieberman, AASA's Employment Relations Consultant. Dr. Lieberman, who is Irving R. Melbo Professor of Education at the University of Southern California, also coordinated the overall development of the project. The proposed model legislation

was initially drafted by Thomas A. Shannon, AASA's Legal Adviser, and subsequently reviewed and modified by Charles L. Fine, Esq., of Clark, Hardy, Lewis, and Fine, Birmingham and Detroit, Michigan. The accompanying memorandum was first drafted by Fred B. Lifton, Esq., of Robins, Schwartz, Nicholas, and Lifton, Chicago, Illinois. The drafts were subsequently reviewed and approved by the AASA Advisers on Employment Relations and by Leston Aron, Esq., of Grotta, Glassman, and Hoffman, Newark, New Jersey. Subsequently, R. Theodore Clark, Jr., Esq., of Seyfarth, Shaw, Fairweather and Geraldson, Chicago, Illinois, played an important role in the final development of the model legislation and the accompanying memorandum. On behalf of AASA, I wish to express sincere appreciation to all of these individuals for their contribution to this important publication. Needless to add, reactions, comments, suggestions, criticisms, and questions from AASA members and others are encouraged and will be accorded careful consideration.

Paul B. Salmon
Executive Director

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Introduction

The model state collective bargaining legislation and this accompanying explanatory memorandum have been drafted in response to a widespread need for assistance from AASA members. Such assistance is needed to ensure legislation which is consistent with sound public and educational policy.

The following assumptions governed the development and dissemination of both the legislation and the explanatory memorandum:

1. Collective bargaining legislation is an employee, not a management initiative. Unfortunately, as typically introduced by teacher and other public employee unions, state public employee collective bargaining legislation invariably includes a great deal of proposed legislation clearly detrimental to good education and good management. In many cases, however, school management has not been fully aware of the potential impact of such proposed legislation until it has been enacted into law. The legislation outlined in this booklet and the accompanying memorandum are intended to alert the school management community to the most serious threats to good management and good education in public employee collective bargaining legislation sponsored or supported by public employee unions or other individuals or organizations.

2. The model legislation has been drafted to safeguard the legitimate representational rights of public employees. For reasons discussed to some extent in the memorandum, it is felt that public employees should not be accorded bargaining rights identical to those in the private sector. On the other hand, it would be futile to draft model legislation that would limit employee rights in ways that would lose credibility with legislators conscientiously trying to resolve the issues involved. For this reason, the proposed legislation includes some recommendations that school management might choose to exclude, and excludes some items that it would choose to include, given absolute freedom of choice. It is believed that legislators and state officials as well as the educational community can in good conscience support this model legislation.

3. Apart from terminological and editorial differences, it is recognized that school and public management may not be successful in achieving acceptance of every item in this model legislation. Nevertheless, any proposed variations should be reviewed carefully by experts in collective bargaining legislation and practice. Upon request, AASA will provide the names of qualified legislative consultants in the collective bargaining field.

4. The model legislation is intended to assist school management in states which have as well as those which do not have collective bargaining laws. Experience demonstrates that state collective bargaining laws almost invariably are amended within a few years after initial enactment. The model legislation is intended to be of assistance in initiating as well as evaluating proposed changes in existing legislation.

5. The drive for collective bargaining rights by public employees is clearly a nation-wide one, even though individual school districts may not be involved for various reasons. The issue, however, is now so pervasive and the political impact of public employee unions so significant that legislative bodies will continue to feel compelled to deal with the question. For this reason, it is important to utilize the considerable experience available, rather than repeat the errors of the past. There is also the need to be prepared if federal legislation which defers to state laws which meet minimum standards should be enacted.

6. The proposed model state law is designed to meet the circumstances which prevail most generally. Obviously, each state has a multitude of special require-

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ments which could affect the substance as well as the format of the proposed legislation. This model law is a beginning—a point of departure. If enacted into law, it would provide a reasonable balance between employee rights and the avoidance of undesirable restrictions upon public management. Changes which upset this balance toward greater emphasis upon the rights of public employees may be politically more appealing but they are not in the public interest.

7. It should be recognized that the administration of any state public employee collective bargaining statute can be as important as the substance of the statute itself. School management must be concerned about all aspects of statute administration, especially the personnel responsible for this task and the funding for this purpose.

8. It must be emphasized that this memorandum covers only a few key points pertaining to the various issues in the model law. A full analysis of each provision in the proposed legislation would require a large volume which could not possibly be developed and disseminated within the limits of available resources. For this reason, however, all parties responsible for legislation in this area should seek additional guidance on the subject.

9. The proposed legislation and this accompanying memorandum reflect the considered views of practitioners and legal scholars from several states characterized by public employee bargaining. For obvious reasons, any legislation proposed by public employee unions is likely to differ widely from this model. It is strongly recommended, therefore, that school management utilize the services of a qualified expert in the field, and do so early in the legislative process. If this is not done, there may be insufficient time to critique proposed legislation, disseminate analyses of it to appropriate parties, and otherwise protect the public interest in this area.

To assist educational and public management organizations which may need assistance, AASA maintains a list of qualified consultants who can provide expert assistance on state public employee bargaining legislation. All arrangements, including fees and expenses, are arranged between employing parties and the consultants; AASA serves only as a clearinghouse to bring the parties together. For further information, write or call:

American Association of School Administrators
Attn: Employment and Personnel Relations Unit
1801 North Moore Street
Arlington, Virginia 22209

Section 1. Purpose of the Act

An introductory section on purpose is frequently included in legislation to explain its rationale and intent. Any such statement should highlight the policy factors which distinguish the public from the private sector. For example, public employees, especially educational personnel, frequently have the benefit of many statutory and constitutional protections not available to employees in the private sector. Furthermore, the public employer is typically required to operate specified programs. Unlike employers in the private sector, the public employer cannot sell the business and/or move to another state. In addition, the nature of the service—for the public—creates special considerations as regards the cost of such services and assurances as to its continued and uninterrupted availability.

Section 2. Definitions

Anyone who has ever dealt with any aspect of public sector collective bargaining will readily recognize this section as one of the most important in the Act. An effort has been made to make these definitions as precise as possible.

(a) The concept of the "confidential employee" is a narrow one in labor relations and essentially embraces those few persons, usually in clerical roles, who work directly for management intimately involved in personnel and labor relations. Note that one is not a confidential employee simply because he/she works with a supervisor.

(b) (c) The term "labor organization" is defined broadly as nothing is gained in attempting to exclude a. .nployee group. In education, many teacher associations still resist being labeled "union" or seek to distinguish themselves from the traditional connotations of a labor organization. This semantic distaste, however, is rapidly disappearing and to foster it does more harm than good because it conceals the underlying realities of the situation.

(d) It is important to exclude from bargaining those persons whose contracts with schools are peripheral or not properly subject to a collective determination of benefits or working conditions. The proposed definition is intended to forestall a legal obligation to bargain with employees such as crossing guards, whose employment relationships with school districts are too insubstantial to justify the statutory protections accorded full-time employees. The cut-off point is, of course, adjustable, but to raise it closer to the half-time level is likely to be counterproductive.

(e) An impasse does not exist if the parties are still bargaining on some items, even though they appear to have irreconcilable differences on others. In other words, an impasse exists when there appears to be no

hope of moving toward agreement on any items unresolved to date.

(f) The statutory definition of "management employee" is extremely important, since it defines the individuals excluded from bargaining because of their special relationship to the management function. It is especially important to avoid legislation which provides bargaining rights for everyone except top level management, such as superintendents. Central office staff, principals, and department chairmen with personnel responsibilities should be viewed as part of the management team, not as included in the employee bargaining unit.

(g) It is important to define collective bargaining so that the parties are not required to agree to a proposal or make a concession. Some school management negotiators have not understood this, and have even regarded themselves as obliged to make a concession or a counter-proposal on every separate proposal put forth by the unions. Note also that collective bargaining is treated synonymously with collective negotiations throughout the suggested legislation and this memorandum.

(h) The definition of "employer" purposefully includes all public agencies. As previously pointed out, school management is most likely to be confronted by legislation applying to all local public employees, and efforts to limit such proposed legislation to teachers, or to school districts is likely to be counter-productive. Such efforts may lead other public management groups to lose interest in the safeguards needed for public management generally, and are likely to damage the credibility of school management in dealing with clerical issues in the comprehensive type legislation most likely to be enacted.

(i) It is absolutely crucial to define supervisory employees and to exclude them from coverage, i.e., from having bargaining rights. In this connection, it is significant that supervisory employees in the private sector do not have bargaining rights. They did at one time, but this was found to be too destructive of effective management. It may also be of interest that neither the NEA nor the AFT bargains with their supervisory employees.

The worst possible outcome is a statute which not only provides bargaining rights for supervisors but includes them in the same bargaining as the individuals they supervise, e.g., by including principals in the same bargaining unit as teachers. Nevertheless, some state statutes have legislated this unwise result.

(j) This definition of "strike" is intended to cover job actions which constitute, in whole or in part, refusal to perform full, faithful, and proper service. The definition emphasizes the substance of a strike, so that "mass resignations" or collective resort to sick or personal leave in the context of bargaining, or concerted refusal to accept extra-curricular assignments, even for additional compensation, are also covered by the definition.

The inclusion of the definition of "strike" is important notwithstanding other statutes or court decisions making illegal such actions by public employees. Furthermore, it is crucially important to establish the right of the public employer to discipline (or even to dismiss) a striking employee under this law rather than having to resort to more cumbersome procedures in the tenure laws. In this connection, note that an employer in the private sector who bargains in good faith to an impasse has the legal right to replace employees who go on strike. In education, efforts to replace striking teachers have sometimes been thwarted by the requirements that dismissal procedures for striking teachers be subject to the state tenure law. This extra advantage, not available to private sector employees, should be eliminated to avoid giving teachers the right to strike with impunity. Tenure law procedures obviously were not enacted with strike situations in mind. For this reason, school boards could probably succeed in dismissal of striking teachers in small districts even under many tenure laws, but the procedures would be very expensive and even prohibitive if large numbers of employees are involved.

Section 3. State Public Employment Relations Board

The creation of another state agency is a disagreeable part of this proposal. Unfortunately, there is simply no feasible alternative. Some neutral agency must be available to interpret and administer the statute.

The reluctance to establish another state agency has frequently led to a legislative error which has seriously jeopardized the effectiveness of collective bargaining legislation: to wit, not providing sufficient funds to hire the number and quality of personnel that are required. Unfortunately, the most critical time for this agency is at the very outset when essential policy questions, particularly relative to recognition, must be decided.

This is another reason to support a public employee bill rather than a school employee measure. State departments of education were not established or maintained to regulate collective bargaining relationships, and efforts to add this function to their mission are not likely to be successful. As a matter of fact, their involvement in collective bargaining could seriously undermine their effectiveness in other areas. School management should do everything possible to ensure that staff of any state agency established to administer a public employment relations law should not be beholden to the public employee unions subject

to it. The most ideal legislation can be undermined by incompetent or biased administration.

Section 4. Rights of Employees

The rights of employees are commonly included in bargaining statutes. The guarantees are basic and their absence would seriously undermine the representational rights of employees.

The concept of exclusivity is also basic to the bargaining relationship. Only one bargaining agent can represent a given group of employees at one time. (This is not to say that different unions cannot represent different employee groups or that the same union cannot represent more than one bargaining unit.)

It is to the employer's advantage that *if* there is to be collective bargaining, the bargaining agent have exclusive rights to represent employees in an appropriate unit. It is not ordinarily the employer's responsibility to worry over union's duty of fair representation. The employer should not concern itself with who belongs and who doesn't belong to the union, as such concern may invite charges of discrimination based on union activity. (An unlikely exception to this could be a situation where in the union loses its support and there is no competing organization ready to step in and replace it. This situation, however, is not common and should be handled with the utmost care.)

The concept of representation in collective bargaining is analogous to the way the United States conducts its foreign relations. At any given time, the President is responsible for representing the United States. This responsibility is sole and exclusive for a stipulated time. During that time, the citizenry can try to influence what the President does, but the latter has the legal responsibility for representing the United States. At the end of a presidential term of office, the electorate can reelect or remove the President. Obviously, it would be impractical to have more than one individual in charge of foreign relations at any given time. Of course, this does not preclude presidential delegation of authority, e.g., to the Secretary of State.

By the same token, teachers (or other public employees) would have the right to choose an exclusive representative for a stipulated time. During that time the teachers could try to influence its actions, and they would have the legal right to change their exclusive representative, or even to abandon collective representation altogether if they so desire. Obviously, the rights of individuals who disagree with actions of the bargaining agent are subordinated to some extent by this system, but it is unavoidable in any system of collective representation.

Section 5. Representation of Public School Employees

An employee group should not become the bargaining agent automatically—it should be required to act affirmatively to request this and therein demonstrate actual support by a majority of the employees.

Section 6. Procedure for Verification as Exclusive Representative

Recognition can be accomplished voluntarily—and this is typically the best way to proceed if it can be done without sacrifice. On the other hand, the recognition clause is one of the most basic contractual provisions and care should be exercised not to give away any rights which are not absolutely compelled. Obviously, in order to have a determination of majority status, it is necessary to define the group to be represented, i.e., to have a unit determination. Frequently, the employer will object to a unit determination on the grounds that it includes personnel who should be excluded, or excludes personnel who should be included, or both.

In the private sector, employers often recognize and bargain with a union without any governmental intervention. The procedure suggested here allows for voluntary recognition subject to "certification," i.e., approval, by PERB. Such certification is intended to prevent situations in which the parties agree to bargaining units which are contrary to sound public policy. This can easily happen when a large number of bargaining units are being established within a brief period of time by inexperienced negotiators on both sides.

In some cases, the employer may have good faith doubts about the union's claim to majority status. In such cases, a procedure is needed to resolve the issue. Usually, the procedure is a secret ballot election by the employees in the bargaining unit. There is no need and considerable danger in having the school employer responsible for verifying majority status. As an interested party, its determinations are likely to invite charges of bias or discrimination. An even greater danger relates to employer disciplinary action outside the bargaining context. A district which fires—or merely refuses to rehire—a union member for poor teaching performance will often be accused of doing so as a reprisal against the union. Such accusations have more weight if the district is making an effort to ascertain who is a union member, or who has signed authorization cards. If the school employer lacks such information and is making no effort to get it, the accusations are more difficult to sustain.

Under the National Labor Relations Act and many state statutes, the required majority is of those voting in a secret ballot election to determine whether or not a majority desire to be represented by a particular bargaining agent, or desire no representation.

A prior threshold question is this: How many employees must express support for an organization as the bargaining agent before an election should be called to determine whether there is majority support for it?

If the figure is set too low, a relatively small number of employees will be able to initiate elections in which they have little or no chance of winning a majority vote. If the figure is set too high, the statute would inhibit collective bargaining even in cases where a majority of employees desired it. The 30 per cent "showing of interest" is the figure used in the National Labor Relations Act and many state statutes.

Section 7. Procedure for Representation Election

This section outlines more of the procedures incident to determining representation, both originally and as a challenge to established bargaining agents. The thirty per cent minimum showing of interest is quite common in state statutes and prevails under the National Labor Relations Act.

One of the advantages of a collective bargaining statute is that it eliminates virtually all work stoppages aimed at achieving recognition. In the absence of a statutory procedure, unions sometimes strike to force the employer to "recognize," i.e., to bargain with the union.

Section 8. Appropriate Unit

One of the important functions of the state regulatory agency is to resolve disputes as to whether there is in fact support by a majority of employees, and most significantly, what is the appropriate *unit* of employees. The bargaining unit is the grouping of employees for purposes of representation. It is extremely important to avoid a proliferation of bargaining units. The more bargaining units, the more the school employer must bargain with different unions and the greater the danger that none will agree for fear of getting less than the others. For this reason, it is strongly recommended that avoidance of unit fragmentation be specifically included in the criteria for unit determination.

Another criterion to be avoided in both the statute and in practice is the extent of organization. For example, suppose the secondary school teachers but not the elementary ones are organized. This should not be reason to regard secondary education teachers as a separate bargaining unit. Frequently, unions try to get unit determinations that will enhance their chances of winning a representation election. This is done by excluding groups likely to vote against the union, and by including groups likely to vote for it. Management should resist such gerrymandering by insisting upon unit determinations which are consistent with effective management.

Section 9. Representation Elections

It is left to the state regulatory agency to formulate the detailed rules and regulations incident to the conduct of an election. Frequent challenges should be prohibited because any challenge to an incumbent bargaining agent, or to a prior vote of "no representation," tends to disrupt school operations. For this reason, reasonable restrictions on the right to challenge the status quo concerning representation are to the mutual advantage of the school employer as well as the incumbent bargaining agent, if any exists.

Under the proposed language, elections to determine whether a majority of the employees desire exclusive representation could not be held more than once every two years. That is, if a representation election results in a vote for "no representation," there would be at least a two year interval before another election could be held. This is admittedly longer than the one year period in the NLRA and some state statutes, but the disruptive effects of such elections in the public sector justify a longer interval.

Section 10. Unfair Labor Practices

A listing of unfair labor practices is to be found in every collective bargaining statute. These are the rules to which both sides are supposed to adhere if the process is to work effectively. Their practical effectiveness is another matter, but they are a necessary ingredient of any law.

Attention is particularly invited to paragraph (b)(5), which makes it an unfair practice for a union to take any adverse action against a member for doing his/her job despite union opposition.

Public employee unions have frequently put pressure on public employees to support strikes, slowdowns, or other job distractions which impair full and faithful work performance. Since any such impairment would be illegal under the proposed statute, it should likewise be illegal for a union to put pressure on employees to participate in such activities.

Section 11. Unfair Labor Practices; Remedies and Procedures

To the layman this section might appear to be a morass of procedures and legalisms, but the inclusion of unfair labor practices is vital to any collective bargaining statute. Since such legislation is typically initiated by public employee unions, however, it is likely to include a long list of *employer* unfair practices but few, if any, union ones. Any such omission of union unfair practices will be disastrous and should be adamantly opposed. The listing of unfair labor practices should be included in the statute and not left to the future determination of the state regulatory agency.

The proposal does contain one factor that is somewhat atypical, but which is believed will prove to be valuable. This is right of either party to initiate action in the courts without having to first exhaust the administrative remedies of the statute—a process which can sometimes induce exhaustion. There are risks as well as benefits to such an arrangement, but on balance this would appear to be beneficial to the employer.

Section 12. Scope of Representation

The scope of representation is an item of the utmost importance. Essentially, this section defines what *must* be negotiated. "Good faith" negotiations require a willingness to talk and consider and to be persuaded on mandatory subjects of bargaining but it does *not* include any obligation to reach agreement on a specific issue.

The primary thrust of any negotiations law is to *mandate* bargaining on certain subjects if requested by either the employee union or the employer. A refusal to negotiate these items constitutes an unfair labor practice. For this reason, it is very difficult to avoid some inclusion of these matters in the collective agreement. Obviously, if the mandated items of bargaining can be limited, disagreements between the parties can likewise be limited—not to speak of the avoidance of problems by the exclusion of subjects from the negotiated agreement and leaving these to the sole discretion of the employer.

A major difficulty with scope clauses in most collective bargaining statutes is a lack of precision, i.e., uncertainty over whether specific items sought to be bargained are or are not mandatory subjects of bargaining. This is especially true because the phrase "terms and conditions of employment" or "working conditions" is subject to conflicting interpretations and applications in certain situations. The model law does not totally escape this dilemma, though it does seek greater specificity than is usually found in such statutes. Insofar as possible, the scope should be confined to wages and related economic matters, and grievance and negotiations procedures, preferably on specific enumerated topics. Attempts to narrow the scope will inevitably generate union opposition, but it is better to make an all out effort to overcome this opposition at the legislative level than to be confronted by endless bargaining on a host of items which are not normally or appropriately subjects of bargaining.

To this end, the model law sets forth as management rights a number of basic functions or prerogatives which are made expressly non-negotiable. This is, appropriately, the other side of the coin to the mandating of certain subjects as bargainable. These management rights are, of course, easily expandable. Note, however, the enormous risk if the phrase "but not limited to" were omitted from the model, as no enumeration of rights without this reference would ever be complete.

These activities defined as non-negotiable have generally been treated as within management's sole authority, so the concept is neither revolutionary nor unusual—although many employee groups in the public sector have sought strenuously to avoid this outcome. This has been due in some instances to naivete as to the proper function of bargaining, and in others to a union effort to assume a partnership role with management though, of course, without the concomitant responsibilities. In most cases, however, these other issues are a smokescreen to obscure the primary economic objectives. The unions seek to appear more altruistic in motive in order to engender public support.

The proposed legislation would also repeal benefits which are bargainable under the suggested scope, but which in effect have been given away by earlier legislative enactment. One of the most difficult problems in public sector bargaining is that much of what is typically won grudgingly at the table over a period of years has already been given away by the legislature (e.g., tenure, mandatory minimum salaries, workmen's compensation benefits, liability insurance benefits, sick leave, retirement programs, etc.). Logically, if unions desire the right to bargain, they ought not to be entitled to this kind of statutory head start. This is not likely to be accepted by public employee unions, especially teacher unions, since teachers appear to be the beneficiaries of more state legislature than any other group of public employees. Nevertheless, the repeal of statutory benefits is justified and even essential on both public policy and equity grounds. Bargaining assumes that employment relations are to be determined by contract between the parties. Legislatures should avoid the establishment of both legislative and contractual systems of employee benefits.

Note that in the private sector, this dual approach does not exist except in a marginal way. Employees get retirement benefits, sick leave, holidays, and other benefits—if they get them at all—by bargaining for them. To superimpose bargaining rights on a statutory system of benefits is to give public employees much more than equity and to burden the public and public management with two systems of employee benefits.

Section 13. Duty to Bargain

Obviously, if a particular union is the exclusive representative of a bargaining unit, the employer should bargain only with the exclusive representative. To bargain with any other organization would undermine the status of the duly elected bargaining agent and frustrate the bargaining process.

By the same token, however, the employee union should bargain only with the duly designated representatives of the public employer. This is a particularly acute problem in education, where teacher unions frequently attempt to persuade individual board members to weaken the position of their bargaining team. Neither party should be permitted such "end runs" around the bargaining team.

At the same time, however, organizations other than the bargaining agent should have the right to express their views to the public employer, and the latter should maintain the right to receive or hear such views, as long as it does not bargain over such views with any-

one other than the exclusive representative. If there is any doubt on this matter, it may be advisable to add a clause such as the following: "Nothing in this Act shall be construed to prevent any official from meeting with employee or other organizations other than the exclusive representative for the purpose of hearing its views so long as any changes in terms and conditions of employment are made only through bargaining with the exclusive representative."

Section 14. Duty of Fair Representation

The rationale for exclusive representation is predicated upon the duty of fair representation for everyone in the bargaining unit. For example, the bargaining agent cannot (or at least is not legally permitted to) process grievances for members but not for non-members. It must not discriminate against minorities or certain sub-groups within the bargaining unit.

The duty of fair representation does not mean that everyone in the bargaining unit must receive the same salary increase or that bargaining benefits be distributed equally. It means that everyone in the unit has an equal procedural claim on the bargaining agent, and that the benefits of the agreement and the way it is administered not vary vis-à-vis members of the unit without good reason.

Section 15. Exclusion of Management, Supervisory and Confidential Employees

It is vitally important to exclude management, supervisory, and confidential employees from any bargaining unit, i.e., from having bargaining rights. Where this has not been done, management is severely handicapped, in preparation for bargaining, in bargaining, and in contract administration.

To illustrate, if principals are included in the same bargaining unit as teachers, the ability of principals to operate their schools effectively will be dealt a crippling blow. After all, principals would be reluctant to insist that teachers adhere to board established work rules when the salaries and working conditions of the principals themselves are negotiated by the teachers they supervise.

It can be safely asserted that any legislation which provides bargaining rights to any management, supervisory, or confidential employees will be a major obstacle to effective administration and should be opposed to the utmost. Significantly the AFT does not allow membership to any individual who can entertain a grievance. To do so would involve the union in representing both management and the employees. Neither the union nor management should be placed in any such conflict of interest situation.

Section 16. Impasse Procedures

It must be frankly acknowledged that opinions vary widely as to the desirability of including formal impasse procedures in a collective bargaining statute. Many practitioners in public sector labor relations strongly oppose such inclusions. They view these procedures (particularly fact-finding on a mandatory basis) as a crutch, and therefore a deterrent rather than an aid to reaching settlement.

On the other hand, most legislatures which have dealt with the question have opted to include impasse procedures, most often mediation and fact-finding, in that order. Apparently, many legislators see these procedures as a trade-off for barring strikes. (See Section 17.) Others ignore what really settles collective bargaining agreements—the economics and other pressures which are the alternatives to settlement—and assume some machinery must be provided in the public sector to avoid a confrontation at almost any cost. For this reason, the proposed legislation includes an acceptable management position on impasse procedures, leaving open the question of whether impasse procedures should be included at all in the statute.

The impasse procedures recommended herein differ somewhat from the typical statutory treatment of the subject. Mediation is provided. Of all the impasse techniques, this is clearly the one which is most desirable and most often valuable (though as a mandated procedure it may be unnecessary and even detrimental). Note that the appointment of mediators is not limited to those designated by the regulatory agency. Aside from private mediators on a stand-by basis the Federal Mediation and Conciliation Service, which also serves the public sector at no direct cost to the parties, is also available.

There is also a reference to fact-finding if mediation does not succeed, but note that its use is contingent upon either the agreement of the parties, or to a determination by the mediator that fact-finding would be helpful. (Actually, fact-finding is a poor name for the procedure, which is essentially a compromise finding device which can be devoid of any relationship to facts of equities.) In any case, the avoidance of fact-finding altogether or going no further than this model is strongly recommended.

Because fact-finding is included, advisory arbitration is not. All too frequently, advisory arbitration is seen by the legislature as a reasonable alternative to a no-strike provision. Advisory arbitration (if it must be included at all) should never be mandatory on the parties. To do so means having a third party write the agreement for the parties and spend the public employer's funds, although such third party has no continuing responsibility of any kind to live with or to administer his decision. This is so even though the award is only "advisory."

Avoid any fixed impasse date. Such artificial time limits are ineffective, if not seriously damaging. On the

other hand, a 30 day limit on mediation is included to prevent this process from being strung out indefinitely.

Also, avoid by all possible means any statutory obligation or any date by which bargaining must be completed. This does not mean that school employers should never agree to bargain more than 15 days before a budget submission date (although normally this would provide ample time with competent negotiators on both sides.) The recommendation is to avoid a *statutory* obligation to bargain more than 15 days before a budget deadline. In many states, a substantial number of impasses have lasted beyond budget submission or budget approval dates. Teacher unions are apt to contend that the impasses are due to insufficient time to bargain, and in some states they have been successful in enacting statutes which mandate initiation of bargaining as much as six months before budget submission dates. It must be stated, clearly and emphatically, that such early initiation dates are unwise and self-defeating.

Fact finders should be appointed and paid by the parties using their services. This policy should be incorporated in any statute so that fact-finding is not an excuse for evasion of bargaining responsibilities. Also, if fact-finders are paid by the parties instead of by the state, the fact-finders are more likely to be accountable for the quality of their work. The statute should make clear that each side is responsible for preparing its own case and paying the costs of its own experts, witnesses, documents exhibits, and so on. Normally, the only expenses to be shared are fees, travel and per diem of the fact-finder.

Where the public employer pleads inability to pay and the fact-finding disagrees, the fact-finder should be required to state the basis of his disagreement, specifically, where the available funds are to be found. Such a requirement should help to reduce awards which are not responsive to management's position.

Section 17. Strikes

This model follows the pattern of most of the collective bargaining laws that have been enacted to date by including strong prohibitions and penalties against strikes. The only defense included herein is where the employer has committed substantial violations of the law which provoked the strike.

Although legislative prohibitions of strikes have not been completely effective in eliminating them, it is absurd to say, as many union leaders do, that legislatures might as well legalize strikes since public employees will strike anyway. This is as logical—or illogical—as asserting that laws prohibiting theft are useless because such laws are not completely effective in eliminating theft. The fact is that what legislatures enact on this issue does not have a very considerable bearing upon the incidence of public employee strikes. It is no accident, for example, that Pennsylvania, which legalized public employee strikes in 1971, experienced almost one-third of all teacher strikes during the next two years. With very few exceptions, states which prohibit strikes have experienced none or very few.

It is recognized that many management negotiators would recommend or accept granting a limited right to strike (along with equalizing measures such as eliminating the requirement to operate schools a given number of days in a year). Many who abhor formal impasse procedures would probably agree to eliminate them in exchange for granting the right to strike and then deal with the strike problem through economic pressures on the employees (lost wages) and the threat of loss of the job. Certainly, the prohibition against strikes should not be conceded away, and most definitely is preferable to compulsory arbitration of impasses.

This section of the model law emphasizes management's right to deal with strikers, including the right to dismiss, pursuant to this law rather than to any other. As this is written, some question has arisen in the courts of some states as to possible due process violations in having the board of a public agency sit in review of a decision to dismiss certain persons. The opinion of competent counsel should be sought on this question to insure compliance with local court decisions, as well as with future federal determinations, including a possible ruling on this issue by the United States Supreme Court.

The model law does provide for a variety of possible responses by the employer in the event of a strike, but this should not be interpreted as a recommendation to use any or all of them in any particular controversy. The tactics and procedures involved in strike management are topics and complexities well beyond the scope of this document.

Section 18. Certification of Estimated Costs

One of the significant differences between public and private sector bargaining is the great temptation to "end load" agreements in the public sector. That is, public management is often tempted to achieve agreement by generous pension and retirement benefits so that the unsuspecting public has its taxes raised and discovers the real cost of the agreement only after the individuals who negotiated for the public have been elected to higher office, or have otherwise left the scene.

Although no protective clause is likely to be completely effective, a requirement that the ratifying body certify the estimated costs and the basis thereof should be viewed as a minimal safeguard. Certainly, ratification without such estimates is a dangerous practice which should be avoided even in the absence of a statutory requirement to certify the estimate.

Section 19. Employee Organizations—Political Contributions

Unions should not be permitted to use union funds or resources to support political candidates. This principle is incorporated in the NLRA and should be applied to any union not subject to the NLRA which represents public employees. The wording here is taken verbatim from the Iowa statute. There are, therefore, precedents for the suggested clause in both federal and state statutes.

Section 20. Conflict of Interest Prohibited

In some states, teacher organizations have made a special effort to elect teachers to school boards. Even where such service is in a district other than the district in which service is rendered, such school board membership by members of teacher unions constitutes a clear-cut conflict of interest. Teacher organizations quickly become aware of board strategy and bottom line positions. Furthermore, regional or state management cooperation is not possible when someone on the management side is a member of an adversary union. Just as management should play no role in the determination of union leadership, union members should not be allowed to undermine management by membership on a school board.

The proposed clause on this issue is taken verbatim from the Pennsylvania statute, except for the addition of the last two sentences. Management should press vigorously for a conflict of interest clause to forestall situations wherein a representative of management at any level has membership at any level in a union which bargains with the same management.

Section 21. Internal Conduct of Employee Organizations

Up until 1959, the internal conduct of union affairs was largely ignored by legislators and courts. Then as a result of extensive Congressional hearings, widespread abuses were brought to light. Such abuses included union collusion with employers to enrich union leaders at the expense of employees, misuse of union funds by union officials, unreasonable unfair limits on member rights, and inadequate reporting and disclosure requirements.

Although most unions are now subject to the Landrum-Griffith Act, which is the major federal enactment intended to prevent such abuse, some public employee unions, most notably the NEA and its affiliates, have resisted coverage. Minimal concern for the rights of employees requires that there be some protection against union as well as employer abuse of employee rights. It may well be that the more opposition to this section encountered from union sources, the more imperative it is that the proposed safeguards be enacted into law. Management should emphasize the protections accorded *employees* under this proposed section, and the fact that the greater power and legal privileges of public employee unions over employees under a state public employee bargaining law requires provisions to ensure the responsible democratic exercise of their prerogatives.

Section 22. Appropriation

Obviously, the amount to be appropriated should vary according to several factors, chiefly the size of the state and the number of public employee bargaining units. Nevertheless, although it is in management's interest to have the regulatory agency adequately funded, the public should not support a large staff of full-time mediators and arbitrators on the public payroll. The costs of services of impartial third parties should be borne or at least shared by the parties.

Some authorities recommend that mediators be regular full-time staff of state agencies, but arbitrators not be. The rationale is that mediation is more unpredictable in emergence and duration, hence the parties cannot get mediation services as needed from third parties who free lance at the process. Even on this view, however, there is no reason why the parties to a dispute should not be required to pay for their services, rather than placing the burden upon the state payroll.

Some idea of the funds required may be gotten from the experience of the New York State Public Employment Relations Board. In its ninth year of operation (1975), the board has a budget of about $1.8 million. The board's jurisdiction covers about 1100 public employers (including 750 school districts) and 2500 public employee bargaining units in the state. The annual work load involves about 900 impasses and 500 charges of improper practices. A research budget of $200,000 is also included. Of the $1.8 million, approximately $1.1 million goes to 64 full-time staff and $400,000 to part-time mediators and fact-finders.

Section 23. Effective Date

Obviously, the proposed legislation must be carefully drafted to comply with state rules as to the effective dates of statutes. If the majority of public employers in the jurisdiction have had little experience in collective bargaining, the obligation to bargain should be deferred for at least one year after the statute is enacted. Examples abound of problems which arose because the parties were thrust into the negotiations process before they were prepared to deal with it.

It is therefore recommended that considerable time be devoted to management training concerning the process, and to this end, the appropriation of funds should be sought. Obviously, the amount will vary according

to such factors as the size and population of the state; such funds should, however, be available strictly for agencies and individuals representing the public. They should not be made available for training union negotiators in the art and science of extracting more benefits from the public. Aside from the fact that the public employee unions already devote large amounts to this purpose, it hardly makes sense for a legislature to assist a private interest group in getting the upper hand in dealing with public management.

Section 24. Separability

A separability clause such as the one included herein is routinely included in legislation of this kind.

Section 25. Title

A short title is routinely included in legislation of this kind.

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Model State Law

Sec. 1. Purpose of Act

It is the purpose of the "Public Employment Relations Act" (hereinafter called the "Act") to provide orderly and constructive procedures for the representation of public employees on terms and conditions of public employment, subject to the overriding need to protect the interests of the public, including the interests of individuals and groups particularly affected by or dependent upon public services.

The legislature finds that the essentiality of public services and the unique features of public employment justify and require an approach to public employment relations, especially in the area of impasse procedures, which differs from the approach in the private sector. A paramount consideration is that public employees enjoy certain employment rights, benefits, and protections due to various laws, both state and federal, and pursuant to the U.S. and state Constitutions, which are not enjoyed by employees in the private sector. Likewise, public employers are more closely governed and regulated by the political process and by state and federal laws than are employers in the private sector. For these reasons, an additional purpose of the Act is to provide representational rights for public employees which take into account their statutory and constitutional rights, benefits, and protections.

Within the foregoing limitations and considerations the legislature has determined that overall policy may best be accomplished by:

1. granting to public employees certain rights to organize and choose freely their representatives;

2. requiring public employers to meet and negotiate with employee representatives of appropriate bargaining units and providing for the execution of a written contract incorporating any agreement reached if requested by either party; and

3. establishing rights, responsibilities, procedures and limitations regarding public employment which will provide appropriate protection of the rights of the public as well as of public employees.

Sec. 2. Definitions

As used in this Act:

(a) "Confidential employee" means any employee engaged in personnel work in other than a purely clerical capacity or who assists and acts in an intimate capacity

to persons who formulate, determine, and/or effectuate management policies in the fields of labor and/or personnel relations, or any employee who has access to information subject to use by the employer in collective bargaining.

(b) "Labor organization" means any organization, agency, or committee, which includes employees of a public employer and which exists for the primary purpose of dealing with public employers concerning wages, hours and conditions of employment, as defined herein.

(c) "Exclusive representative" means the labor organization recognized or certified as the exclusive bargaining representative of public employees in an appropriate bargaining unit of a public employer.

(d) "Employee" means any person employed by any public employer on a full-time or regular part-time basis (whose services exceed an average of 15 hours a week or 40 percent of the normal work week in the appropriate bargaining unit), but shall not include persons elected by popular vote, appointed officials, management, supervisory, or confidential employees, emergency, temporary or irregular part-time employees, volunteers, students-in-training, or any individual whose work has ceased as a consequence of, or in connection with, any labor dispute which is illegal hereunder.

(e) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in bargaining at which their differences in positions are so substantial or prolonged that future meetings are not likely to result in progress toward a mutually acceptable agreement.

(f) "Management employee" means any employee in a position having managerial, executive, or administrative responsibilities for formulating, effectuating, and/or administering employer policies and programs, or making effective recommendations concerning same; or any individual who acts as a representative of an employer in collective bargaining or in responding to grievances or against whom a grievance may be filed.

(g) "Bargaining" means meeting at reasonable times and places and conferring in good faith on matters within the scope of representation, and the execution, if requested by either party, of a written agreement incorporating any agreements reached; provided, however, that such obligation to bargain does not require the employer or the exclusive representative to agree to a proposal of, or to make a concession to, the other party.

(h) "Employer" means any local public employer.

(i) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, evaluate, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or

effectively recommend such actions, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Public employees whose duties include both supervisory and non-supervisory functions shall be classified and treated as supervisory personnel under this Act.

(j) "Strike" means the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, including but not limited to slowdowns, and interference with or interruptions of the operations of the employer. Mass resignations, or widespread or unusual resort to sick or personal leave in the context of a labor dispute, or any other collective effort by public employees to interfere with or interrupt the operations of the employer in order to affect the outcome of a labor dispute, shall be illegal. In any situation wherein the public employer can show a prima facie case of collective action by public employees to interrupt or interfere with or otherwise adversely affect the operations of the public employer, the public employer shall be authorized to take appropriate disciplinary action, including discharge and/or loss of retirement and seniority rights, and the burden of proof of non-participation in any such collective effort shall rest upon the individual public employees challenging such action by the public employer.

Sec. 3. State Public Employment Relations Board

There is hereby established the (state) Public Employment Relations Board (PERB). The Public Employment Relations Board shall provide assistance to employers, employees and labor organizations in a fair and impartial manner in the administration of this Act under rules and regulations which it shall adopt and publish. Such assistance shall include procedures, and the enforcement thereof, pertaining to the representation of employee organizations as exclusive representatives under this Act, the resolution of impasses, and the remedying of unfair labor practices, which are consistent with the provisions of this Act.

(a) The Board shall consist of three members appointed by the Governor, with the advice and consent of the Senate. One member shall be designated by the Governor as Chairman. Not more than two members of the Board shall be members of the same political party. Each member shall be appointed for a term of four years, except that the initial appointments shall be: one member shall be appointed for a term to expire two years following the effective date of this Act, one member for a term that shall expire three years following the effective date of this Act, and the Chairman member for a term that shall expire four years following the effective date of this Act. A member appointed to fill a vacancy shall be appointed for the un-

expired term of the member who he is to succeed. Any member of the Board may be removed by the Governor for misfeasance, malfeasance, or nonfeasance in office, after hearing. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board. Two members of the Board shall at all times constitute a quorum; but official orders shall require concurrence of a majority of the Board.

(b) Members and employees of the Board shall receive such compensation as is appropriated by the Legislature. Members and employees of the Board shall be entitled to actual and necessary traveling and other expenses incurred in the performance of duties under this Act. The compensation and expenses of members and employees of the Board shall be paid in accordance with the accounting laws of the state.

(c) Members shall hold no other public office or employment by the state or other public agency or public employer, or be an officer or employee of any labor organization or any of its affiliates, or represent any public employer or public employee or labor organization, or its affiliates; however, this restriction shall not be interpreted to exclude persons who are knowledgeable in employment relations, public administration or labor law so long as they are not actively engaged, other than as a member with any management, employee or labor organization.

(d) To accomplish the objectives and to carry out the duties prescribed in this Act, the Board shall have the following powers:

(1) to adopt an official seal and prescribe the purposes for which it shall be used;

(2) to hold hearings and make such inquiries as it deems necessary to carry out properly its functions and powers;

(3) to establish a principal office which shall be in the City of _____;

(4) to meet and exercise any or all of its powers at any other place in the state;

(5) to conduct in any part of this state any proceeding, hearing, investigation, inquiry, or election necessary to the performance of its functions. For the purpose of Secs. 7 and 11 of this Act, the Board may designate one of its members or an agent or agents, as hearing examiners.

(6) to subpoena witnesses and issue subpoenas requiring the production of books, papers, records and documents which may be needed as evidence in any matter under inquiry; and to administer oaths and affirmations. In cases of failure or refusal to obey a subpoena issued to any person, the _____ Court of the county in which the investigations or the public hearings are taking

place, upon application by the Board, shall issue an order requiring such person to appear before the Board and produce evidence about the matter under investigation; subject to a determination that the evidence sought is relevant and material. A failure to obey such order may be punished by the _____ Court as a contempt. Any subpoena, notice of the hearing, or other process of the Board issued under the provision of this Act shall be served in the manner prescribed by the state's Administrative Procedures Act;

(7) to adopt, promulgate, amend, or rescind such rules and regulations as it deems necessary and administratively feasible to carry out the provisions of this Act. Such rules and regulations shall be adopted in accordance with the provisions of [*the statutory reference to publication of rules and regulations*];

(8) to request from any public agency such assistance, services, and data as will enable the Board to properly carry out its functions and powers;

(9) at the end of each year to make a report in writing to the Governor and the Legislature in detail the work it has done in hearing and deciding cases and otherwise, and to publish and report in full an opinion in every case decided by it;

(10) to appoint such staff and attorneys as it may from time to time find necessary for the proper performance of its duties. The attorneys appointed under this Section may, at the discretion of the Board, appear for and represent the Board in any case in court;

(11) to appoint a Chief Administrator who is authorized to and shall perform those duties delegated and/or designated by the Board. The Chief Administrator shall accept, investigate and process all petitions and complaints for: (a) certification or decertification as the exclusive representative of an appropriate bargaining unit; (b) mediation and impasse resolution services; and (c) unfair labor practice charges.

Sec. 4. Rights of Employees

Employees shall have the right to form, join, or participate in the activities of labor organizations of their own choosing for the purpose of representation for wages, hours, fringe benefits, and other terms and conditions of employment, as set forth in Section 12 of this Act. Employees shall also have the right to refuse to join, support, contribute financially or otherwise to, or participate in the activities of labor organizations; provided, that any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the exclusive representative, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect.

(a) Labor organizations shall have the right to represent members of appro-

priate bargaining units in their employment relations with employers, except that once a labor organization is recognized or certified as the exclusive representative of an appropriate unit, only such employee organization may represent the employees on matters within the scope of representation. The exclusive representative shall be the exclusive representative of all the public employees in such unit for the purposes of bargaining in respect to wages, hours, and other conditions of employment within the scope of representation. Labor organizations may establish reasonable regulations regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Sec. 5. Representation of Public School Employees

A labor organization may become the exclusive representative for the employees of an appropriate unit for purposes of bargaining by filing a request for recognition with the employer wherein a majority of the employees in an appropriate unit have expressed their desire to be represented by such organization. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include bona fide support or evidence that a majority of the employees desire the organization to be their exclusive representative.

Sec. 6. Procedure for Verification as Exclusive Representative

If the employer has no objection to a request for recognition pursuant to Section 5 above, the employer shall forward such request, together with the employer's assent thereto, to the PERB within 60 days of the employer's receipt of the request for recognition. Copies of the employer's assent shall be sent also within 60 days to the labor organization requesting recognition.

Within 60 days of receipt of such request by a labor organization and the employer's statement of assent thereto, the PERB shall certify the labor organization as the exclusive representative unless the Board shall find reason to withhold such certification. Such reason may be a bargaining unit which is inconsistent with the purposes of this Act, or any other question concerning the request for recognition and/or the employer's approval thereof. Should the Board find reason to withhold certification, it shall so inform the labor organization and the public employer within a reasonable time, and seek to resolve any issues pertaining to recognition by informal means within a reasonable period of time. In no case, however, shall a public employer have a duty to bargain with a labor organization which has not been certified as the exclusive representative of a specified bargaining unit by PERB.

If the employer believes it has legitimate reason not to grant a request for recognition, it shall, within 30 days of receipt of such request, notify the labor organization of its refusal to recognize. If recognition is not granted, a question of representation may be deemed to exist and either the labor organization or the employer may notify

the PERB, which shall determine the exclusive representative, if any, pursuant to the representation procedures herein and the rules and regulations adopted by the Board.

Sec. 7. Procedure for Representation Election

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the PERB:

(a) By an employee or group of employees, or a labor organization acting in their behalf, alleging that 30% or more of the employees within a unit claimed to be appropriate for such purpose wish to be represented for bargaining and that their employer declines to recognize their representative as the representative defined in Section 5, or assert that the labor organization, which has been recognized or certified as the exclusive representative, is no longer a representative as defined in Section 4; or

(b) By an employer alleging that a labor organization has presented a request to the employer to be recognized as the exclusive representative, the PERB shall investigate the petition and, if it has reasonable cause to believe that a question of representation exists, shall provide an appropriate hearing after due notice. If the PERB finds upon the record of the hearing that such a question of representation exists, it shall take such action as may be necessary to resolve the question, including an election by secret ballot and it shall certify the results thereof. Nothing in this Section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules and regulations of the PERB; or

(c) by an employer alleging that the certified or recognized bargaining agent no longer represents a majority of the employees in the bargaining unit.

Sec. 8. Appropriate Unit

The PERB shall decide in each case the most appropriate unit for the purposes of bargaining. Effective management, especially the avoidance of unit fragmentation, and employee community of interest, including such factors as interchange, commonality of job duties and functions, interrelationships, common supervision, similar wages, hours, fringe benefits and terms and conditions of employment, shall be considered; and provided further that management, supervisory and confidential employees shall not be included in or form the basis of any appropriate unit; and provided further that an appeal of PERB's findings and determinations of the appropriate unit may be made by any party and must be filed within 10 days from the date of such findings and determinations with the _____ Court under the provisions of the State Administrative Procedures Act, and the Court review of the PERB's findings, determinations and record shall be completed within 60 days after receipt of the filing of the appeal.

Sec. 9. Elections; Time for Holding; Determining Eligibility; Runoff

An election shall not be directed in any appropriate unit or any subdivision within which, in the preceding 24-month period, a valid election has been held. The PERB shall determine who is eligible to vote in the election and shall establish rules governing the election. In an election involving more than two choices, where none of the choices on the ballot receives a majority of those voting, a runoff election shall be conducted between the two choices receiving the two largest numbers of valid votes cast in the election. No election shall be directed in any appropriate unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration; provided, however, no collective bargaining agreement shall bar an election upon the petition of labor organizations not parties thereto where more than three years have elapsed since the agreement's execution or last timely renewal, whichever was later.

Sec. 10. Unfair Labor Practices

(a) It shall be an unfair practice for an employer to:

(1) interfere with, restrain or coerce employees in the exercise of the rights set forth in Sec. 4 of this Act;

(2) dominate, interfere or assist in the formation or administration of any labor organization or contribute financial or other support to it;

(3) encourage or discourage membership in any labor organization through discrimination in regard to hiring or tenure of employment or any term or condition of employment;

(4) discharge or otherwise discriminate against an employee because he has given testimony or instituted proceedings under this act;

(5) refuse to bargain collectively with a certified representative as required by any provisions of this act;

(b) It shall be an unfair practice for a labor organization or its agents to:

(1) interfere with, restrain or coerce (a) employees in the exercise of the rights set forth in Section 4 of this Act, or (b) an employer in the selection of its representatives for the purpose of bargaining collectively, discussing or adjusting grievances. This paragraph shall not impair the right of a labor organization to prescribe reasonable rules with respect to the acquisition or retention of membership therein.

(2) cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a);

(3) refuse to bargain collectively with an employer, if the labor organization is the exclusive representative;

(4) fail or refuse to comply with any provision of this Act;

(5) coerce, attempt to coerce, or discipline, fine or take other economic

sanction or adverse action against a member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his work-performance, his productivity, or the discharge of his duties owed as an officer or employee of the public employer.

(6) bargain to impasse on any nonmandatory subject of bargaining or any form of organizational security, including a demand that the public employer provide released time with pay for the purpose of representing a labor organization in bargaining or in processing grievances.

(c) Nothing herein shall in any way restrict the right of either the employer or the labor organization to bring suit for specific performance and/or breach of performance of a collective bargaining agreement in any court having jurisdiction thereof.

(1) Any labor organization which represents employees and any employer covered by this Act shall be bound by the Acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of this state. Any money judgment against a labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his/her assets.

(2) For the purposes of actions and proceedings by or against labor organizations in the district courts of this state, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(3) The service of summons, subpoena, or other legal process of any court of the state upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(4) For the purposes of this section in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for these acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Sec. 11. Unfair Labor Practices; Remedies and Procedure

Violations of the provisions of Section 10 shall be deemed to be unfair labor practices remediable by the PERB in the following manner:

(a) Whenever it is charged that an employer or labor organization has engaged in or is engaging in any such unfair labor practice, the PERB, or any agent designated by the Board for such purposes, may issue and cause to be served upon the person a copy of the charges filed with the Board, and containing a notice of hearing before

a designated hearing examiner, at a place therein fixed, not less than ten days after the filing of the charges. No charges shall be based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made. Any charge may be amended by the hearing examiner conducting the hearing at any time prior to the closing of the hearing. The person against whom the charge is filed may submit an answer to the original or amended charge and appear in person or otherwise and give testimony at the place and time fixed in the notice of hearing. In the discretion of the hearing examiner, any other person who has demonstrable interest in the outcome may be allowed to intervene in the proceeding and to present testimony. Any proceeding shall be conducted in accordance with the provisions of the state's Administrative Procedures Act.

(b) The testimony taken by the hearing examiner shall be reduced to writing and filed along with a recommended findings of facts, decision and order to the Board. Thereafter, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the competent, material and substantial evidence taken, the Board is of the opinion that any person named in the charge has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of this Act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the evidence taken the Board is not of the opinion that the person named in the charge has engaged in or is engaging in the unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the charge. Costs and fees may be assessed against the charging party where it is believed that the charges were filed for vexacious or harassing purposes or were without a bona fide basis for such charge. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause. The hearing examiner's recommended findings of facts, decision and order shall be served upon the parties to the proceeding, and shall be filed with the Board. If no exceptions are filed within 20 days after service thereof upon the parties, or within such further period as the Board may authorize, the recommended order shall become the order of the Board and become effective as prescribed in the order.

(c) Until the record in a case has been filed in the _____ Court, the Board at any time, upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any finding or order made or issued by it.

(d) The Board may petition the _____ Court for injunctive relief during the pendency of a hearing on the charges or for the enforcement of its order and for appropriate temporary relief or restraining order, and shall file in the Court the record in the proceedings. Upon the filing of the petition, the Court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction of the proceeding and shall grant such injunctive relief during the pendency of the hearing and/or such temporary or permanent relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, or its hearing examiner, shall be considered by the Court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by competent, material and substantial evidence on the record considered as a whole shall be conclusive. If either party applies to the Court for leave to present additional evidence and shows to the satisfaction of the Court that the additional evidence is material and that there were reasonable grounds for the failure to present it in the hearing before the Board, or its hearing examiner, the Court may order the additional evidence to be taken before the Board, or its hearing examiner, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file the modifying or new findings, which findings with respect to questions of fact if supported by competent, material and substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the Court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court in accordance with the general court rules.

(e) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in the _____ Court by filing in the Court a complaint praying that the order of the Board be modified or set aside, with copy of the complaint filed on the Board, and thereupon the aggrieved party shall file in the Court the record in the proceeding, certified by the Board. Upon the filing of the complaint, the Court shall proceed in the same manner as in the case of an application by the Board under subsection (d), and shall grant to the Board or appellant such temporary relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the Board. The findings of the Board with respect to questions of fact if supported by competent, material and substantial evidence on the record

considered as a whole shall be conclusive.

(f) Complaints filed under this Act shall be heard expeditiously by the Court to which presented, and for good cause shown shall take precedence over all other civil matters except earlier matters of the same character.

Sec. 12. Scope of Representation

(a) The scope of representation shall be strictly limited to wages, hours, and/or other terms and conditions of employment, but only to the extent that any or all such matters are within the discretion of the employer and not governed by other statutory enactment or regulations.

The following statutes, dealing with terms and conditions of public employment are hereby repealed as of the effective date of this Act, and public employees shall not be deemed to have any vested or residual right to the benefits provided therein, as of the date of repeal.

(List Repealed Statutes)

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

Sec. 13. Duty to Bargain

An employer or such representatives as it may designate shall bargain only with representatives of labor organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of bargaining. An exclusive representative, or such representatives as it may designate, shall bargain only with the duly authorized representatives of the public employer with regard to matters within the scope of bargaining.

Sec. 14. Duty of Fair Representation

The labor organization recognized or certified as the exclusive representative for the purpose of meeting and negotiation shall fairly represent each and every employee in the appropriate unit.

Sec. 15. Exclusion of Management, Supervisory, and Confidential Employees

No person serving in a management, supervisory, or confidential position shall be represented by an exclusive representative, nor shall this Act be applicable to such persons.

Sec. 16. Impasse Procedures

(a) After making a reasonable good faith effort to reach agreement, either an

employer or the exclusive representative may declare that an impasse has been reached between the parties in bargaining over matters within the scope of representation and may request the Board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the dispute on terms which are mutually acceptable pursuant to rules and regulations adopted by the Board. Nothing in this Section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure.

(b) If the mediator is unable to effect settlement of the controversy within 30 days after his appointment and if the mediator declares that fact-finding is appropriate to the resolution of the impasse, by written notice to the Board which shall contain a summary of the issues in dispute, either party may, by written notification to the other, request that their differences be submitted to a fact-finder pursuant to rules and regulations adopted by the Board.

(c) Fact-finding. The purpose of fact-finding is to give a neutral advisory opinion concerning the issues in dispute between the parties. The Board shall establish a panel of part-time fact-finders. When a fact-finder is required under this Section, the board shall submit a list of three names to the parties. The party initiating the request for fact-finding shall strike one name, and the other party shall subsequently strike one name. In case the request for fact-finding is made jointly, the order shall be determined by chance (e.g., flip up a coin). The fact-finder shall make such investigation and hold such hearings as he/she deems necessary in connection with any dispute, may restrict his/her findings to those issues which he/she determines significant, may use evidence furnished by the parties, by the Board, its staff, or any other state agency. The fact-finder shall set forth his/her findings and recommendations as to the settlement of the disputes over which he/she has jurisdiction, which findings and recommendations shall be submitted to the parties to the dispute and publicized to the public insofar as practicable. In determining the facts and recommendations, the fact-finder shall utilize the following factors:

(1) past agreements between the parties;

(2) comparisons of wages and hours of the employees involved, with wages and hours of other employees working for other comparable public employers doing comparable work, giving consideration to factors peculiar to the employer;

(3) the public interest and welfare;

(4) the financial ability and/or impact upon the employer and whether any settlement will cause such employer to engage in deficit financing or deplete reserve funds set aside for emergencies or other unexpected expenditures;

(5) the overall compensation, fringe benefits and/or working conditions presently received by the employees;

(6) comparisons of compensation, fringe benefits and/or working conditions of other employees of the employer; and

(7) attitude and/or position of either party taken during the bargaining;

(8) in any case wherein a public employer asserts inability to pay as a reason not to accede to a union demand, the fact-finder shall resolve this issue as follows: If the fact-finder agrees with the public employer on this issue, the award shall so state and it shall be unnecessary to deal with any other issues in the dispute. If the fact-finder disagrees with the position of the public employer, the award shall include a specific rebuttal of the employer's position.

(9) the effect on other employees of the public employer, whether represented or unrepresented;

(10) the fact-finder shall have no jurisdiction or authority to entertain any matter or issue which is not a subject of bargaining as defined in this Act.

Sec. 17. Strikes

(a) It shall be unlawful for any employee, labor organization, or any affiliate, including but not limited to state or national affiliates thereof, to take part in, assist in or encourage any strike as defined in this Act.

(b) Any employer may, in an action at law, suit in equity, or other proper proceeding, take action against any labor organization, any affiliate thereof, or any person aiding or abetting in a strike, for redress of such unlawful act, including injunctive relief, which shall be granted if a strike is proven; and no legislation limiting injunctive relief in employment disputes shall be applicable to strikes by public employees.

(c) Notwithstanding any other provision of law, when any employee organization engages in a strike, or aids or abets therein, it may be liable to the employer for damages, costs and fees as determined by the _____ Court and may be subject to loss of dues checkoff and other and further penalties as determined by the Board, as provided in Section 11 of this Act.

(d) Notwithstanding any other provision of law, any employee who violates the provision of this Section may have his appointment or employment terminated by the employer effective the date the violation first occurs. Such termination shall be effective upon 10 days' written notice served upon the employee, with proof of service.

(1) For purposes of this subsection, an employee who is absent from any portion of his work assignment without permission, or who abstains wholly or in part from the full performance of his duties without permission from his employer on the date or dates when a strike occurs is prima facie presumed to have engaged in a strike on such date or dates. Any concerted use of resort to employee rights in the context of a labor dispute, such as the right to sick or personal leave, shall be deemed a strike and employees participating in any such collective action shall

be deemed to have participated in a strike and be subject to the penalties thereof.

(2) An employee who knowingly violates the provisions of this Section and whose employment has been terminated pursuant to this section may, subsequent to such violation, be appointed or reappointed, employed or reemployed, but the employee shall be on probation for two years with respect to such employment status, tenure of employment, or contract of employment, as he may have theretofore been entitled.

(3) No employee shall be entitled to or paid for any daily pay, wages or per diem for the days on which he engaged in a strike.

(4) Any employee, upon request, shall be entitled, as hereinafter provided, to establish that he did not violate the provisions of this Section. Such request must be filed in writing with the employer, within 10 days after notice of termination is served upon him; whereupon such employer, shall within 10 days commence a proceeding at which such person shall be entitled to be heard for the purpose of determining whether the provisions of this Section have been violated by such employee, and if there be laws and regulations establishing proceedings to remove such employee, the hearing shall be conducted in accordance therewith. The proceeding may upon application to the _____ Court by an employer, an employee, or labor organization and the issuance of an appropriate order by the Court include more than one employee's employment status if the employees' defenses are identical, analogous or reasonably similar. Such proceedings shall be undertaken without unnecessary delay. Any person may secure a review of his termination by serving a written notice of review upon the employer within 20 days after the results of the hearing referred to herein have been announced. This notice, with proof of service thereof, shall be filed within 10 days after service to the employer, with the clerk of the _____ Court in the county where the employer has its principal office. The Court shall thereupon have jurisdiction to review the matter the same as on appeal from the Board's representation determination, as provided in Section 8 of this Act. This hearing shall take precedence over all matters and may be held upon 10 days written notice by either party. The Court shall make such order in the premises as is proper; and an appeal may be taken therefrom to the Supreme Court.

(5) A labor organization which has been found to have violated this Section may upon such finding lose its status, if any, as exclusive representative for a period of up to two years following such finding; and the Board may also order such other penalties, including but not limited to fines, loss of dues check-off, deprivation of access to employer facilities, and ineligibility of individuals to serve as officers, agents, or staff members of exclusive representatives.

(6) A finding and determination of a violation of Section 10(a)(5) of this Act by the Board may be a defense to a violation of this Section. As to all employees, no other unfair labor practice or violation of this Act by an employer shall be a defense to any of this Section, but may be considered by the Court in mitigation of any penalties imposed upon employees and/or labor organizations.

Sec. 18. Certification of Estimated Costs

Within 30 days of ratification of any collective agreement, the public employer shall prepare and certify its estimate of the costs of the agreement. The required estimate shall include not only the dollar amounts but the basis thereof in sufficient detail to provide an adequate basis for evaluating the estimated costs. Estimates of pension, retirement, and other deferred benefits such as payments for unused sick leave upon retirement or severance pay, shall include the actuarial assumptions underlying the estimated costs.

Sec. 19. Employee Organizations—Political Contributions

An employee organization shall not make any direct or indirect contribution out of the funds of the employee organization to any political party or organization or in support of any candidate for elective public office. Any employee organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall, upon conviction, be subject to a fine of not more than ten thousand dollars. Any person who willfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall, upon conviction, be subject to a fine of not more than one thousand dollars or imprisoned for not more than thirty days or shall be subject to both such fine and imprisonment. Each individual required to sign affidavits or reports under this section shall be personally responsible for filing such report or affidavit and for any statement contained therein he knows to be false. Nothing in this section shall be construed to prohibit voluntary contributions by individuals to political parties or candidates. Nothing in this section shall be construed to limit or deny any civil remedy which may exist as a result of action which may violate this section.

Sec. 20. Conflict of Interest Prohibited

(a) No person who is a member of the same local, state, national or international organization as the employee organization with which the public employer is bargaining or who has an interest in the outcome of such bargaining which interest is in conflict with the interest of the public employer, shall participate on behalf of the public employer in the collective bargaining processes with the proviso that such person may, where entitled, vote on the ratification of an agreement.

(b) Any person who violates subsection (a) of this section shall be immediately removed by the public employer from his role, if any, in the collective bargaining nego-

tiations or in any matter in connection with such negotiations. Any violation of this section, or participation in the bargaining on behalf of the public employer process by a person whose interest is adverse thereto shall be grounds for invalidating the agreement. For purposes of this section, resignation from an employee organization shall not be deemed to remove or eliminate a conflict of interest unless such resignation was in good faith and occurred prior to the time the person resigning assumed the public office or position creating the conflict of interest.

(c) In any case in which a public body cannot muster a legally adequate number of public officials to take action as a result of the effects of (a) and (b) above, the Governor shall designate an individual to act on behalf and in the place of the local public employer.

Sec. 21. Internal Conduct of Employee Organizations.

(a) Every employee organization which is certified as a representative of public employees under the provisions of this Act shall file with the board a registration report, signed by its president or other appropriate officer. The report shall be in a form prescribed by the board and shall be accompanied by two copies of the employee organization's constitution and bylaws. A filing by a national or international employee organization of its constitution and bylaws shall be accepted in lieu of a filing of such documents by each subordinate organization. All changes or amendments to such constitutions and bylaws shall be promptly reported to the board.

(b) Every employee organization shall file with the board an annual report and an amended report whenever changes are made. The reports shall be in a form prescribed by the board, and shall provide the following information:

(1) The names and addresses of the organization, any parent organization or organizations with which it is affiliated, the principal officers, and all representatives and staff members.

(2) The name and address of its local agent for service of process.

(3) A general description of the public employees the organization represents or seeks to represent.

(4) The amounts of the initiation fee and monthly dues members must pay.

(5) A pledge, in a form prescribed by the board, that the organization will comply with the laws of the state and that it will accept members without regard to age, race, sex, religion, national origin, or physical disability as provided by law.

(6) A financial report and audit.

(c) The constitution or bylaws of every employee organization shall provide that:

(1) Accurate accounts of all income and expenses shall be kept, and annual financial report and audit shall be prepared, such accounts shall be open for inspection by any member of the organization, and loans to officers and agents shall

be made only on terms and conditions available to all members.

(2) Business or financial interests of its officers and agents, their spouses, minor children, parents, or otherwise, that conflict with the fiduciary obligation of such persons to the organization shall be prohibited.

(3) Every official or employee of an employee organization who handles funds or other property of the organization, or trust in which an organization is interested, or a subsidiary organization, shall be bonded. The amount, scope, and form of the bond shall be determined by the board.

(4) The governing rules of every employee organization shall provide for periodic elections by secret ballot subject to recognized safeguards concerning the equal right of all members to nominate, seek office, and vote in such elections, the right of individual members to participate in the affairs of the organization, and fair and equitable procedures in disciplinary actions.

Sec. 22. Appropriation

There is hereby appropriated from the General Fund to the Public Employment Relations Board the sum of $ for the support of the board.

Sec. 23. Effective Date

(a) This Act shall have immediate effect upon the signature of the Governor or becomes law without the Governor's signature, except that Section 3 shall become effective nine months and Section 4 through 17 shall become effective one year after it is signed by the Governor or becomes law without the Governor's signature.

(b) In anticipation for the effectuation of Section 4 through 17 of this Act, $ is appropriated to various colleges and universities and nonprofit organizations in the state to provide education and training of public employer personnel in collective bargaining and in the administration of the provisions of this Act.

Sec. 24. Separability

If any clause, sentence, paragraph or part of this act, or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act and the application of such provision to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this act would have been adopted had such invalid provisions not been included.

Sec. 25. Title

This Act shall be known and may be cited as the "Public Employment Relations Act."