official position of the association with respect to the sponsorship of state legislation to require negotiations in education.

The 1975 AEA Assembly of Delegates, conducted January 31-February 1, 1975, was charged with the responsibility for the formulation of the association's official policy regarding statutory mandates for professional negotiations. Thus the 1975 Assembly of Delegates was perceived as critical by both proponents and opponents of such state legislation. Resolution 75-43 specified that AEA would sponsor and support state legislation in the 1975 legislature requiring negotiations and binding arbitration for public education in Alabama. Wide publicity was given to resolution 75-43 and the implications for public education in Alabama were discussed in educational settings throughout the state.

Resolution 75-43, prepared by the Legislative Commission of AEA, read as follows:

> AEA supports the principle of negotiations with governing boards of school systems and institutions and is directed to develop, introduce, and support acceptable legislation in this area. Any legislation to be developed by AEA must provide the following: (A) All professional personnel except Superintendents and their assistants may be included in a single bargaining unit. Principals and Supervisors may: (1) Be a part of the teacher negotiating unit; or, (2) Choose to have their own negotiating unit; or, (3) Choose not to be a part of the negotiating process. Such decision shall be made by a majority vote of the principals and supervisors using secret ballots in each county and city school system. (B) The right to strike is forbidden, however, provision must be made for resolving impasse in negotiations by a three member committee, one appointed by the local school board or institution, one by the negotiating unit, and a third being mutually agreed upon by the board and the negotiating unit. The decision of this panel will be final providing such decision does not violate the Fletcher Budget Act.

Educational organizations in Alabama and their positional leaders became polarized with regard to the provisions of resolution 75-43. Vigorous, concerted opposition to the enactment of the resolution was generated by the Alabama Association of School Administrators through its 1974-75 president, Dr. Wayne Teague. A brochure containing the entire text of an address delivered by Dr. Teague at the annual summer conference of AASA on August 4, 1974 in Gulf Shores, Alabama, was given wide distribution to educators, legislators, and school reference groups throughout Alabama. Professional negotiations were deplored by Dr. Teague in his address as typified by the following quotations:

> "The possibility of a teacher negotiations law, in my opinion, is the biggest threat to public education that any of us have encountered."
>
> ". . . let's make sure that all educators in Alabama, and yes all legislators and citizens, know the facts about negotiation laws and their bad effects."

In full support of AASA's vehement opposition to any proposed legislation mandating negotiations in education were the Alabama Association of School Boards, Dr. Randy Quinn, Executive Secretary, and the Alabama Congress of Parents and Teachers, Mrs. Harry Nelson, Executive Secretary.

The Alabama Association of Classroom Teachers, the largest division of AEA, and the entire salaried staff of the AEA vigorously supported the provisions of resolution 75-43 and exerted concerted energy in an effort to secure its enactment. A pamphlet entitled "The Truth About Professional Negotiations" was prepared and circulated widely in Alabama by the Classroom Teachers Association. Typical of the contents of the pamphlet are the following quotations:

"Professional negotiations does not mean strike! No one is asking for a law to legalize strikes or work halts. The proposed AEA resolution on professional negotiations contains a no strike clause. (a stiff penalty will be inserted into any legislation.)"

"Professional negotiations does mean freedom from scare tactics and intimidation."

Prior to the 1975 Assembly of Delegates, a majority of local educational associations in Alabama, as affiliates of AEA, engaged in a formalized process of instructing their elected delegates regarding the issues and resolutions to be supported and opposed. At the invitation of numerous local associations, Dr. Wayne Teague, AASA President, and Dr. Paul Hubbard, Executive Secretary, AEA, debated the issues related to professional negotiations in education and the provisions of resolution 75-43. Articles supporting and opposing the proposed state legislation regarding professional negotiations appeared regularly in the Alabama School Journal (AEA Publication) prior to the 1975 Delegates Assembly.

tary and an annual dues structure of $50.000 per member. The like-

A guest editorial authored by Dr. Truman Pierce, Dean, School of Education, Auburn University, in which major philosophical and educational implications of professional negotiations were examined critically, was published in *The Birmingham News* on Thursday, January 30, 1975, one day prior to the 1975 AEA Assembly of Delegates. Data obtained through the research conducted by Mr. John Kupice and subsequently reported in the form of a doctoral dissertation provided one information base for the views expressed by Dr. Pierce in his timely and highly instructive editorial.

The foregoing activities and conditions support the contention that the issues inherent in resolution 75-43 generally were well understood by the delegates to the 1975 AEA Assembly of Dele-

gates. The floor debate on resolution 75-43 was animated and heated exchanges occurred. Proponents of the resolution attempted unsuccessfully to obtain a secret ballot for determining its fate. Charges of delegate intimidation by administrators were heard frequently by those who opposed a standing vote on the issue at hand. Opponents of resolution 75-43 were successful in upholding the motion for a standing vote by AEA Uni-serve districts. By the narrow plurality of 9 votes, 337 for and 346 against, the 1975 Assembly of Delegates defeated resolution 75-43. Thus, for at least one year, the AEA would not officially support the legal institutionalization of an adversarial model for professional negotiations in Alabama public education.

As a result of his analysis of the Alabama environment relative to collective negotiations in the public sector, Mr. John Kupice concluded that the state of Alabama lacks a readiness for the enactment of a state law mandating professional negotiations for public education in the state. The action taken by the 1975 Assembly in rejecting the resolution calling for a state negotiations law lends credibility to the conclusion reached by Mr. Kupice.

Although the AEA's policymaking body officially refused to sanction a state collective bargaining law for education, there seems little or no hesitancy on the part of the delegates to support the enactment of state legislation designed to guarantee to teachers the right to participate in the development of policy at the local school district level.

A delegate representing the Gadsden Education Association, Ms. Janet Davis, submitted a resolution calling for state legislation to require local school boards to "meet and confer" with local educators in conducting the policy-making function. Copies of the resolution were distributed to the delegates during the registration period just prior to the Assembly's opening session. The "meet and confer" resolution came up for consideration by the Assembly on Saturday, February 1, 1975 and was worded as follows:

"AEA believes that school boards and educators should meet and confer on all matters of mutual concern. These meetings should be more than just perfunctory – they should deal with issues about which teachers and principals are vitally concerned.

They should result in cooperatively developed solutions which attack the problem at hand. These proposed solutions should be placed in writing and studied further by the board and teachers. Once agreed upon they become official policies not subject to change until done through the same process.

While it is felt by A.E.A. that few boards would object to this procedure, it is recommended that the Legislature pass and AEA will develop proposed statutes to require any board which refuses to meet and confer with its teachers and principals to do so.

Good faith efforts should be required of both the board and educators. Failure to meet when requested, or any action designed to thwart good faith efforts or to prohibit discussions by either the board or educators, should carry penalties of law."

The "meet and confer" resolution was adopted by the 1975 Assembly of Delegates with but token opposition noted.

With the adoption of the "meet and confer" resolution, the AEA created a potential base of support of significant proportions for the alternative to a state negotiations law as advocated by John Kupice as a result of his research effort. Mr. Kupice contends that the most appropriate course of action for Alabama would be to amend two sections of the existing Code of Alabama, Sections 73 and 166 of Title 52, thereby requiring local school boards to meet and confer with teachers prior to the adoption of educational policies. Further, the proposed amendments would require the development and implementation of a four-step grievance procedure in each local school system to deal with potential disputes resulting from the implementation of local school personnel policies.

There seems little doubt that efforts during the 1975 regular session of the Alabama Legislature to enact "meet and confer" legislation with added provisions for impasse resolution will meet with formidable opposition. The March 17, 1975, edition of the Birmingham News quoted Dr. Randy Quinn, Executive Secretary of the Alabama Association of School Boards as having said publicly that the AASB will fight any bill introduced in the 1975 state legislature which seeks to promote formal and institutionalized educational negotiations in any form. It is not unlikely that the Alabama Association of School Administrators also will oppose any legislation perceived as hazardous to the ultimate power and authority of local school boards and administrators. The rationale for such opposition implies that "meet and confer" statutes merely are points of departure leading ultimately to full blown bargaining legislation including binding arbitration.

The degree to which all educational personnel in Alabama will be guaranteed the right to participate in the development of educational policy and the extent to which collective bargaining will be institutionalized in Alabama public education are issues to be determined by the Alabama Legislature. Decisions made ultimately no doubt will depend in no small measure upon the political influence capability of the two opposing forces within the total educational "family" in Alabama.

Three recent events seem collectively to have reduced significantly the political power of the Alabama Education Association and

its capability to influence legislation affecting education in Alabama. First, the advocacy position with respect to collective bargaining in Alabama education assumed by AEA's staff and officers was rejected by the 1975 AEA Assembly of Delegates. This action raises a politically potent question – who really speaks for the majority of Alabama's public educators? Second, organizational and financial steps have been implemented to combine into a single inclusive professional organization four constituent organizations as follows: The Alabama Department of Elementary School Principals, The Alabama Association of Secondary School Principals, The Department of Supervisors and Directors of Instruction, and the Alabama Association of School Administrators, commonly referred to as the superintendents' group. The new "umbrella" organization is known as the Alabama Council of School Administrators and Supervisors and effective July 1, 1975, will have a full time salaried Executive Secretary and an annual dues structure of $50.00 per member. The likelihood exists that substantial numbers, perhaps a majority, of the administrators and supervisors will withdraw from membership in the AEA as a result of the formation of a new association more representative of their collective interests and concerns. Third, additional local professional associations may be organized as alternatives to the local affiliates of AEA. Two such organizations are now in existence: The Huntsville Organization of Professional Educators, and The Alexander City Organization of Professional Educators. The new organization in Alexander City was organized in March of 1975 following the 1975 AEA Assembly of Delegates.

The foregoing events on the contemporary educational scene in Alabama indicate the emergence of a political balance of power the results of which are highly speculative. Irrespective of the decisions relating to collective bargaining in public education ultimately to be made by the Alabama Legislature, the State of Alabama enjoys currently an enviable position. The opportunity exists now to develop patterns and techniques of communication, cooperation, and shared decision-making among local school boards, administrators and teachers not available to those states in which adversarial models of bargaining in the public sector have been institutionalized by state law. The most appropriate course of action for Alabama should be determined only after informed participation by those responsible for the formulation and implementation of public educational policy.

VIII. A Comparison Between Private Sector And Public Sector Collective Bargaining And Its Effect On Public Policy

In sampling the Alabama Environment, Kupice explored in some detail the altitudinal dimensions relative to public employee bargaining in the private sector including both the industrial and business components. Further, he considered specifically the thinking of leadership personnel as reflective of the organizational positions in the non-educational public sector and in the educational component of the public setting. Kupice also focused in his ainalyses of existing state laws upon components of bargaining legislation as a basis for projecting a possible state law for Alabama. The material presented in this extending chapter will revisit some of these same areas but from a comparative analyses purpose.

The process of collective bargaining as commonly practiced in the private sector cannot be transplanted into the public sector, even though collective bargaining in both sectors have several common characteristics, e.g. activities during negotiations, recognition of exclusive bargaining agents, use of written agreements, etc. But distinct differences between these sectors cause insurmountable limitations in applying private sector collective bargaining to the public sector.[1] Now at a time when many states are developing or refining their state statutes and Congress is considering federal legislation, these differences must be dealt with effectively in public sector legislation if the public sector is going to avoid repeating the mistakes made in the private sector in the 1930's. To provide the understanding of these complex differences and possible problems forthcoming, this chapter will focus on the comparison between private sector and public sector collective bargaining and its effect on public policy.

Unique Characteristics of Public Employment

Before developing an appreciation for the differences in the public sector, one must understand the general framework of public employment. Clyde Summers has appropriately identified unique characteristics that provide the foundation for several of the limitations of public sector collective bargaining. First, he explains that the decision-making process is a political process. Although influenced by market forces, social influences, etc., the process largely

[1] Morton R. Godine, *The Labor Problem in the Public Service*, (Cambridge: Harvard University Press, 1951), p. 84.

remains political. Secondly, in ultimate political theory the public is the employer. It is the voters to whom the public administrators are responsible and these voters consist of two overlapping groups: (1) Those who use the services provided and (2) those who pay for those services through taxes. Thirdly, there are more voters who share the economic interest of the public administrators, e.g. lower costs, improved services, etc., than those who share the economic interests of the public employees, e.g. higher wages, greater security, better working conditions, etc. Last, public employees are able to participate in the decision-making process that affects their own terms and conditions of employment with or without collective bargaining; they have a right as citizens of their governmental unit to present ideas and to be heard by the elected officials.[2]

Opinions of Differences

A wide range of opinions have been expressed concerning the differences between public sector and private sector collective bargaining and these opinions differ not only in the elements of difference but also in opinions regarding the degree of importance. For example, Shaw and Clark concluded: "The non-profit nature of most public services and the political atmosphere are the most important differences between public sector and private sector collective bargaining."[3]

Louis V. Imundo differed and concluded: "The most important and widely discussed difference between private and public sector labor relations lies in the concept of sovereignty."[4]

Without expressing his opinion on their relative importance, George Hilderbrand recognized four main elements that distinguish collective bargaining in the public sector from bargaining in the private sector.

1. The right to strike or lock out is usually taken away by law or face public opinion or is relinquished by the union itself.

2. Most of the services are supplied with no additional cost and are financed by taxes. Thus, there is no substantial loss of revenue during a work stoppage even though public opinion may be an influential factor in times when the service is essential.

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[2] Clyde Summers, "Public Employee Bargaining: A Political Perspective," *Yale Law Journal*, Vol. 83, 1974, pp. 1156-1157.

[3] Lee C. Shaw and R. Theodore Clark, Jr., "The Practical Differences Between Public and Private Sector Collective Bargaining," *UCLA Law Review*, Vol. 19, No. 6, 1972, p. 885.

[4] Louis V. Imundo, "Federal Government Sovereignty and Its Effect on Labor-Management Relations," *Labor Law Journal*, Vol. 26, No. 3, March, 1975, p. 146.

3. The public administrator may lack the final authority to reach an agreement. Instead, he may be required to gain the consent of higher levels of political authority and ultimately seek approval from the relevant lawmaking body.

4. Legislative bodies ordinarily want to retain as much jurisdiction as they can and treat the legislative process that governs the relationship in the public service as reserved territory — excluded from collective bargaining. Thus, many of the traditional bargainable topics are exempt by statute from negotiations in the public sector.[5]

These opinions and priority evaluations are important for a general overview, now more specific comparisons are required to gain an accurate appreciation of the differences between public sector and private sector collective bargaining.

Market Restraints

A principal difference between public sector and private sector collective bargaining results from internal financial management and the economic environment in which both sectors operate. In the private sector, the market economy acts as a constraint on demands of workers for higher wages and better working conditions. These benefits gained by employees must be offset by higher worker productivity, lower employer profits, and or higher prices to consumers.[6] Furthermore, since a degree of substitutability of various products and services exists in the market economy, a price increase in one product or service without a concomitant increase in the substitutable product or service causes a shift in purchases as customers adjust their preferences away from the higher priced product and service. In this reduction in the demand for the product which their union members produce, they may face a trade-off between benefits extracted for the employer and fewer hours of employment for the membership. Even when this does not occur, there continues to be a threat of substituting capital equipment (machines) for labor that is priced high. In addition, union negotiators have to be aware of the possibility of plant shut downs, plant movements to other locations, and management's flexibility in shifting production from plant to plant (none of which is a choice of the public employer). Further, unions must be continuously cognizant of the

[5] George Hilderbrand, "The Public Sector," *Frontiers in Collective Bargaining*, ed. John T. Dunlop and Neil W. Chamberlain, (New York: Harper and Row Publishers, 1967), pp. 126-127.

[6] Michael Moskow, J. J. Loewenberg and E. C. Koziara, "Collective Bargaining in Public Employment," (New York: Random House, 1970), pp. 14-18.

non-union labor in different locations which may offer their services at a lower price (wage). Thus, with all these interwoven factors to be considered, costs of collective bargaining must be kept within the limits of the market system.[7]

In the public sector, trade-offs between increased benefits and employment by employees are not as prevalent. Services provided by the public employer rarely have close substitutes and are generally not subject to competition from non-union organizations. Where there are close substitutes, e.g. private schools, selection is made on the basis of factors other than costs. Consumers in the public sector usually do not have a real choice in the purchases of their services, e.g. garbage collection, and they usually are required by law to pay for these services through taxes, regardless of the extent of their use, e.g. pay school tax even though children attend private schools or no children attend school. Unlike the private sector, government in effect has a monopoly, reduction in services will be resisted by the voters and work stoppages will not be tolerated. Thus, many times government officials are forced to settle labor disputes under pressure. Then, after settlement, they must seek new sources of revenue or shift funds from other services causing a redistribution of income by government rather than the allocation of resources by the market forces.[8] In the final analysis, the public employer has a limited number of choices that are available to the private employer.

Doctrines of Sovereignty and Illegal Delegation of Power

The doctrine of sovereignty means that supreme power is inherent in the political state[9] and the doctrine of the illegal delegation of power is a constitutional doctrine which forbids government from sharing its power with others except under certain conditions. Because these doctrines require that certain discretionary decisions be made solely on the basis of the judgment of a designated official, subjects of vital interests to public employees cannot be resolved through the collective bargaining process because authority to make these decisions are by law non-delegable.[10]

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[7] Harry T. Wellington and Ralph K. Winter, Jr., "Structuring Collective Bargaining in Public Employment," *Yale Law Journal*, Vol. 79, No. 5, April, 1970, p. 806.

[8] *Ibid.*, p. 807.

[9] Imundo, *op. cit.*, Vol. 26, p. 146.

[10] Harry H. Wellington and Ralph K. Winter, Jr., "The Limits of Collective Bargaining in Public Employment," *Yale Law Journal*, Vol. 78, No. 7, June, 1969, p. 1108.

Because of this limitation, collective bargaining as practiced in the private sector is not applicable to the public sector. Union negotiators do not know whether their counterpart can or cannot make binding decisions. For example, if the superintendent agrees to certain issues, e.g. class size, book supplies, additional resources, but the school board, city council, or state legislature refuse to supply funds, has anything been accomplished in negotiations? Who is the employer? Who has the authority to bargain?

State statutes and federal executive orders continue to be carefully shaped around preserving the sovereignty doctrine, and most public employees still are denied certain rights, e.g. the right to strike and to bargain over certain subjects classified under wages, hours, and other terms of employment.[11] On the other hand, federal statute in private sector has assured that the parties bargain as equal with certain rights guaranteed. In the public sector, the sovereignty doctrine continues to make bargaining equality impossible[12] and few will argue that the collective bargaining process is seriously limited.

In regard to the sovereignty issue in public sector collective bargaining, serious questions remain: How much sovereignty does the government require? Is it necessary for the government to apply the sovereignty doctrine to all areas of decision-making? National security, health, and welfare would find little argument, but is it necessary to continue to use the doctrine of sovereignty to support unilateral decision-making power of the government in determining wages, terms and conditions of employment? The federal government has already enacted legislation limiting its sovereignty immunity in tort and contract cases; but in the areas of labor-management relations, governments at all levels have remained inflexible and have carefully worded executive orders and statutes to protect government sovereignty.[13]

Political Process and Right to Strike

One of the most controversial issues in public sector collective bargaining is the right to strike. Since the right to strike has been traditionally limited or made illegal by the statutes, this subject will be coupled with the political processes for explanation.

Proponents favoring the right to strike in the public sector con-

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[11] Louis V. Imundo, Jr., "Some Comparison Between Public Sector and Private Sector Collective Bargaining," *Labor Law Journal*, Vol. 24, No. 12, December, 1973, p. 812.

[12] *Ibid.*, p. 810.

[13] Imundo, *op. cit.*, Vol. 26, p. 150.

tend that this right has been accorded legal status as a social and economic weapon in the private sector since 1935. But, law-makers have essentially prohibited the right to strike in the public sector for two reasons: (1) government sovereignty (explained above), and (2) the essentiality of services.[14] Law-makers contend that any disruption of essential services would repudiate the fundamental function of government. On the other hand, proponents argued that a ban on the strike negates collective bargaining in the real sense of the word because the impasse procedure, e.g. arbitration, fact finding, etc., is substituted for the right to strike, and the parties find themselves preparing not for collective bargaining but instead for the arbitration or fact finding procedure. Thus, proponents conclude that the ban of a strike accompanied by a predetermined impasse procedure destroys any possibility of effective bargaining.[15]

Others do not view the right to strike very favorably because they believe the right to strike will allow unions to exercise a disproportionate share of power in the decision-making process. They contend that if public employee unions are allowed the right to strike, they also will use various methods of political pressure to allow them to accumulate more than an equal share of bargaining power. If they can do this, other interest groups which do not have the ability to strike but which do have competing claims for funds and appropriations will be competitively disadvantaged and the political process will be distorted.[16] For example, if teachers, firemen, policemen, or any other public groups were allowed to strike and the public employer consented to a collective bargaining agreement which raised salaries and other benefits substantially, the funds would have to be shifted from other government divisions unless additional funds can be obtained. (Lately, citizens have not supported tax increases.)

Another possibility in which the collective bargaining process will be seriously undermined in the political decision-making arena rests with the union's ability to make an "end-run"[17] either during or after negotiations. Since unions are often potent political forces, elective officials tend to be receptive to political approaches from

[14] Means the demand for the product is inelastic.

[15] Imundo, *op. cit.*, Vol. 24, pp. 815-817.

[16] Wellington and Winter, *op. cit.*, Vol. 79, p. 807.

[17] "End-runs" involve an attempt by the union to circumvent the collective bargaining process by making a direct appeal to the legislative body that is responsible for making the final decision. For example, teachers negotiate a 10 percent supplement to their salaries with the school board, then go directly to the city council and plead for a 12 percent increase.

union officials. But, the process of collective bargaining cannot work effectively in the public sector when "end runs" are used by unions and allowed by public officials.[18] In comparison to the private sector, the negotiators are delegated authority to make decisions within limits which are specified prior to negotiations. In these cases, decisions concerning wages, hours and conditions of employment are made during negotiations and top management deals with the union only through representatives selected for the negotiating team. Any attempt by the union to circumvent the negotiations would be classified as "bad faith" bargaining and without a doubt be rebuked by top management. Thus, in the private sector the "end-runs" are not tolerated and are not considered an issue.

Scope of Bargaining and the Merit System

The scope of bargaining involves the issues which are considered to be negotiable in collective bargaining. In the private sector these issues have been divided by the National Labor Relations Board into three categories: (1) unlawful, (2) mandatory, and (3) non-mandatory or permissive.[19] Unlawful issues, e.g. closed shops and hot cargo clauses are forbidden by law from negotiation and are unenforceable. Mandatory issues, e.g. wages, pensions, bonus, no-strike clause, etc., are bargainable and negotiation in "good faith" over these issues is required by statute. In this case either party can demand a mandatory issue and refuse to sign an agreement unless its demand is satisfied. Non-mandatory issues, e.g. demand that a superior be discharged, demand for withdrawal of an unfair labor practice, etc., involves subjects which the two parties agree to negotiate, even though they are not required by law to do so.[19] Specific designation of issues into these three categories are made on an *ad hoc* basis by the National Labor Relations Board and decisions on these categories continue to be updated.

While the private sector has an administrative and judicial procedure established for determining the scope of bargaining, in the public sector the line of distinction between issues is often not clear and laws that exist do not usually specify exclusionary issues. Thus, in comparing the public sector with the private sector, much less is generally accomplished by statute and administrative decisions

[18] Shaw and Clark, *op. cit.*, p. 872.

[19] Edwin Beal, Edward D. Wickersham, and Phillip Kienast, The Practice of Collective Bargaining, (Homewood, Illinois: Richard D. Irwin, Inc., 1972), pp. 498-499.

regarding the subject matter of collective bargaining.[20] Without statutory or administrative guidance, much time will be lost in negotiations trying to determine the negotiable issues. Further, without distinguishing between mandatory, permissive, and illegal issues, difficult and frustrating problems will be faced.

Possible Conflict with Merit System

Collective bargaining in the public sector has been restricted by the merit system in many states and few would argue that collective bargaining has the potential for minimizing or eliminating some of the basic principles underlying the merit system in public employment.[21]

Before discussing the conflicts between collective bargaining and the merit system, a distinction between the merit system and the merit principle must be made. David Stanley explained this distinction clearly:

> The merit principle [is a concept] under which public employees are recruited, selected, and advanced under conditions of political neutrality, equal opportunity and competition on the basis of merit and competence.[22]

Warner and Hennessy also presented their interpretation of the merit principle:

> The merit principle means that personnel decisions regarding selection, assignments, career progression, promotion, layoff and discharge should depend solely upon a person's merit with no consideration given to either personal or political support.[23]

In practice, the unions have generally accepted the merit principle and have done little to weaken it; however, they view merit systems as unilateral programs designed to exclude important personnel policies, rules, and procedures from collective bargaining. For example, reliance on seniority in determining personnel matters or discharge of employees for refusing to pay dues under a union shop clause are viewed as being inconsistent with merit system procedures. Since unions are definitely interested in negotiating over these issues, they definitely view merit systems as conflicting with

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[20] Harry T. Edwards, "The Emerging Duty to Bargain in the Public Sector," *Michigan Law Review*, Vol. 72, April 1973, pp. 885-934.

[21] I. B. Helburn and N. D. Bennett, "Public Employee Bargaining and the Merit Principle," *Labor Law Journal*, 23, No. 10, October, 1972, p. 619.

[22] David Stanley, "What Are Unions Doing to the Merit System?" *Public Personnel Review*, XXXI, April, 1970, pp. 108-109.

[23] Kenneth Warner and Mary Hennessy, *Public Management at the Bargaining Table*, (Chicago: Public Personnel Association, 1967), p. 284.

their approach to establishing personnel practices and procedures by collective bargaining.[24]

Accommodation Between the Merit System and Collective Bargaining

An appropriate issue is whether or not conflicts between collective bargaining and the merit system can be reconciled. Helburn and Bennett have recommended that accommodation can be achieved under the following conditions:

1. Exclusion of the esssential elements of the merit principle from the scope of collective bargaining. This condition is required to protect the merit principle from possible compromises that can result from collective bargaining.

2. Restriction of the unilateral authority of the merit system commissions to those matters essential to the implementation of the merit principle. This condition is necessary to provide a scope of bargaining sufficiently broad to encompass a number of non-merit personnel matters which have traditionally been within the unilateral authority of these commissions.[25]

In addition, effective accommodation would require two separate laws: (1) a merit system law which would be limited to the strict application of the merit principle and (2) a public employee collective bargaining law which would provide the exclusion of merit system matters from the scope of collective bargaining.[26]

Determination of the Appropriate Bargaining Unit

The appropriate bargaining unit in the private sector is determined by the National Labor Relations Board as the unit which is deemed most appropriate for collective bargaining purposes and which will contribute most toward accomplishing the objectives of the Labor-Management Relations Act. The composition of these units are determined by previously established NLRB standards, e.g. community of interests, bargaining history, extent of organization. In addition to administrative guidelines, certain categories of employees are required or allowed to be included in separate units, e.g. professional employees, guards, and categories, e.g. supervisors, confidential employees, are exempt from the bargaining unit.

In the public sector the question of appropriate bargaining unit is much more complex. With such variation in state statutes or with no statute at all, decisions in this area are difficult. Certain

[24] Helburn and Bennett, *op. cit.*, pp. 622-623.
[25] *Ibid.*, p. 626.
[26] *Ibid.*, p. 627.

states having Commissions or Boards to provide guidance in this area and after a considerable experience, decisions on appropriate bargaining unit in the public sector become less difficult. Without statutory regulations or administrative guidance, difficult issues must be resolved. For example, should supervisors be included in the same bargaining unit as line employees? Should principals be included in the same unit as teachers? Should the bargaining unit encompass a broad range of agencies or division of government or include only one or equivalent agencies? Should the bargaining unit be local, county-wide, or state-wide? These questions and others are difficult to answer and without statutory and administrative guidance, they are even more complex.

Conclusions

Any comparison of collective bargaining in the public sector and the private sector involves a wide range of differences, even though structurally many of the concepts of collective bargaining that are prevalent in the private sector are transferable to the public sector. The purpose of this section was not to focus on the common characteristics of these sectors but to investigate the major differences in order to provide an appreciation for and understanding of the possible conflicts that may be faced in the public sector. Subject differences include market restraints, doctrines of sovereignty and illegal delegation of power, the political process and right to strike, the scope of bargaining and merit system, and determination of the appropriate bargaining unit.

Serious thought must be given to each of these issues by legislators and policy-makers at each level of government and in a variety of divisions of government to anticipate problems and to ward off the mistakes and serious conflicts that occurred in the private sector in the 1930's. Many alternatives and choices are available; even more ideas and recommendations has been presented by many astute individuals. Now that Congress is considering a federal law and over 30 states have some type of legislation dealing with public sector collective bargaining, considered attention must be given to these critical issues and these most perplexing problems. Moreover, legislation must be passed to set up administrative procedures to assure that collective bargaining works where the parties desire it or to assure that collective bargaining is avoided where the legislators do not sanction it.

States seem to have the choice now of passing a law applicable to their specific environment and peculiar characteristics (an alternative raised by the Kupice study) or eventually face legislation by

the federal government. At the federal level the choices now seem to be whether or not to pass a federal law to encompass all public sector employes. If Congress favors legislation, the choices seems to be: (1) to amend the Labor-Management Relations Act to remove the exemption of public employees, or (2) to pass legislation that will apply specifically to public employees. If a special law is passed, Congress may allow individual states to pass their own legislation under specific guidelines. Congress has sanctioned in the past state statutes in other personnel management areas, e.g. Equal Employment Opportunity Act (EEOA) and Occupational Safety and Health Act (OSHA); several states took advantage of the opportunity, although Alabama was not among this number, and now administer the laws themselves with financial support from the federal government. If these statutes, e.g. EEOA and OSHA, can be any predictor of the future for public sector collective bargaining, state legislature should be giving serious thought to the choices available to them.

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Appendices

Appendix A

QUESTIONNAIRE

Organization ..... Date ..... Official .....

Interview questions on "Professional Negotiations" in Alabama

1. From your organization's viewpoint, where do professional negotiations or collective bargaining stand in the state of Alabama?

2. If your organization testified at hearings before the Senate or the House in the last session of the legislature, has your position changed since that time?

3. Is a print but available of the testimony at the hearings?

4. Where is the best resource for information on negotiations in the state?

5. What form, if any, should a negotiations law for public employees in Alabama be?

6. If you support a law in No. 5 should the teachers be covered under a separate law?

7. What is the attitude of the people of Alabama toward a negotiations law for public employees?

8. What is the present status of the Solomon Act?

9. If a law is passed, should supervisors and teachers be in the same bargaining unit?

10. Do you know of negotiations with public employees being in existence in Alabama?

Appendix B

October 15, 1973

Honorable Lawrence G. Sides
Mayor, City of Fairfield
Fairfield, Alabama

Dear Sir:

We received your request for an opinion dated October 8. The City of Fairfield had previously requested an opinion on the check-off of Union dues on September 11, 1973. The opinion was requested by the Hon. Henry Hardy a member of the Fairfield City Council. We replied to Mr. Hardy that the City of Fairfield has the right to check-off Union dues. We are enclosing a copy of our letter to Mr. Hardy.

You seem to be concerned about whether or not the employees are classified employees hired through the Personnel Board of Jefferson County. We do not see that it makes any conceivable difference whether the Union members are classified or unclassified.

We are also asked if the Mayor of a city may enter into a contract with regard to wages, hours, and working condition of city employees. The Supreme Court of Alabama, in two recent decisions, have held that public agencies cannot enter into binding bargaining agreements with Union members. See *International Union of Operating Engineers vs. Water Works Board of City of Birmingham* 276 Ala. 462, Ala. 463, 163 So. 2d 619 and *Nichols vs. Bolding*

277 So. 2d 868. These cases hold that public agencies can enter into such agreements only where they have express constitutional or legislative authority to do so. This does not mean that the Mayor and the City Council cannot meet and confer with members of the Sanitation Workers Union. It does not mean that agreements cannot be reached and carried out as a result of such meetings. It does not effect the power of the City of Fairfield to participate in a dues check-off. The city, in its discretion, may participate in the check-off. The Supreme Court decisions merely say that bargaining agreements reached between public agencies and public employees Unions are not enforceable in a court of law. In other words, the agreement would be terminable at will by the city of the Union members.

It is our recommendation that the City of Fairfield enter negotiations with the Sanitation Workers Union, and that the city bargain with the Union in good faith. As a result of such bargaining, the city should carry out any agreement with the Union that is within the power of the city. Even though such an agreement might not be binding in court, it is encumbent upon government officials at this time in our history to grant to public employees the same rights and freedom granted to Union members in the private sector.

In summary, it is our opinion: 1) that the city may, in its discretion, check-off Union dues; 2) that the Mayor and City Council may bargain with Union members; however, any agreement reached as a result of such bargaining is not legally binding on either party.

Sincerely,
WILLIAM J. BAXLEY
Attorney General
By—
WALTER S. TURNER
Chief Assistant Attorney General

WST/sw

Appendix C

ALABAMA PROFESSIONAL NEGOTIATIONS ACT

Section 1. Alabama Professional Negotiations Act; Purpose. — In order to promote the growth and development of education in Alabama which is essential to the welfare of its people, it is hereby declared to be the policy of the state to promote the improvement of personnel management and relations with professional employees within the public school districts of the state by providing a uniform basis for recognizing the right of public school professional employees to join organizations of their own choice. The State of Alabama has determined that the overall policy may best be accomplished by (1) granting to professional employees the right to organize and choose freely their representatives; (2) requiring public school employers to negotiate with professional employees organizations representing professional employees and to enter into written agreements evidencing the result of such negotiations; and (3) establishing procedures to provide for the protection of the rights of the public school professional employees, the public school employer and the public at large.

Section 2. Professional Public School Employees; Participation. — Profes-

sional public school employees shall have the right to form, join, and participate in the activities of organizations of their choosing for the purpose of representation on all matters of employment relations, but no professional public school employee shall be completed to join such an organization.

Section 3. Coverage: A professional public school employee means any professional employee of a school district, except the chief administrative officer.

Section 4. Representation: When a majority of the professional employees in a school district have designated an educational organization of their own choosing to negotiate for them, the organization shall be recognized by the school board as the exclusive negotiating agent for all the professional staff, except the chief administrative officer. The membership of any such recognized educational organization shall be composed principally of those employed in the teaching profession in Alabama, and certificated by the Department of Education.

Nothing in this section shall be construed to prevent certificated administrative personnel groups, including principals and assistant principals, from having the right to negotiate independently of the other professional personnel if they choose to do so as the result of a secret ballot.

Section 5. Administrative Agency: Alabama Education Employer-Employee Relations Commission.

(a) There is hereby created a commission to be known as the "education employer-employee relations commission," hereinafter called "the commission," which shall consist of three members, one to be appointed by the superintendent of public instruction, one by the governor, and one by the attorney general. The appointee of the superintendent of public instruction shall be the chairman of the commission. The members of the commission shall be persons experienced in educational activities. The original appointment by the superintendent of puhlic instruction shall be for a term of three years. The original appointment by the governor shall be for a term of two years. The original appointment by the attorney general shall be for a term of one year. Their successors shall be appointed for terms of three years each, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. At all times, two members of the commission shall constitute a quorum.

(b) Members of the commission shall receive compensation as established by enabling legislation for their attendance at regular or special meetings of the commission or in the performance of such duties as the commission may direct. In addition to such compensation, they shall receive an allowance for actual and necessary travel and subsistence expenses while performing commission functions away from their places of residence. Mediators and fact finders, appointed by the commission, including commission members when so serving, shall be reimbursed for expense and shall receive such compensation as the commission shall from time to time establish.

The commission shall exercise those powers and perform those duties which are specifically provided for in this act.

The commission shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this act. Such rules and regulations shall be effective upon publication in the manner which the commission shall prescribe.

The commission shall establish after consulting representatives of teacher

organizations and of governing boards, panels of qualified persons broadly representative of the public to be available to serve as mediators, fact finders and members of fact finding boards.

Section 6. Scope of Negotiations: The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's burget-making process, and shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment, and which are to be embodied in a written agreement, but such obligation does not compel either party to agree to a proposal or make a concession.

The employer or the exclusive representative desiring to initiate negotiations shall notify the other in writing, setting forth the time and place of the meeting desired and generally the nature of the business to be discussed, and shall mail the notice by certified mail to the last known address of the other party sufficiently in advance of the meeting.

Section 7. Grievance Procedures. Governing boards shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the governing boards and the representative organization. Such grievance procedure shall provide for binding arbitration as a means for resolving disputes.

Section 8. Impasse Resolution. Parties to the dispute pertaining to the interpretation of a professional negotiations agreement may agree in writing to have the commission or any other appointing agency serve as arbitrator or may designate any other competent, impartial and disinterested persons to so serve.

Mediation. — The commission may appoint any competent, impartial, disinterested person to act as mediator in any dispute either upon its own initiative or upon the request of one of the parties to the dispute. It is the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute but neither the mediator nor the commission shall have any power of compulsion in mediation proceedings.

Fact Finding. — If a dispute has not been settled after a reasonable period of negotiation and in no case to exceed sixty (60) calendar days, and after the settlement procedures, if any, established by the parties have been exhausted, the representative, which has either been certified by the commission after an election, or has been duly recognized by the employer, as the exclusive representative of employees in an appropriate negotiating unit, and the employer, its officers and agents, after a reasonable period of negotiation, are deadlocked with respect to any dispute existing between them arising in the negotiating process, the parties jointly, may petition the commission in writing, to initiate fact finding under this section, and to make recommendations to resolve the deadlock.

If the parties do not mutually agree to make the findings and recommendations of the fact finder final and binding, the governor shall have the emergency power and authority, at the request of either party, after investigation, to order that the findings and recommendations on all or any specified issues of a fact finder in a particular dispute will be final and binding. The exercise of this authority by the governor shall be made on a case by case consideration

and shall be made on the basis of his evaluation regarding the overall best interests of the state and all its citizens, the potential fiscal impact both within and outside the school district, as well as any danger to the safety of the people of the state or a subdivision.

Section 9. Unfair employer-employee practices. (a) A governing board or its agent may not (1) interfere, restrain or coerce an employee in the exercise of his rights; (2) dominate or interfere with the formation, existence or administration of an organization; (3) discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization; (4) discharge or discriminate against an employee because he has signed or filed an affidavit, petition or complaint or given testimony under this chapter; (5) refuse to negotiate in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative; (b) A labor or employee organization or his agents may not (1) restrain or coerce (A) an employee in the exercise of the rights guaranteed in this chapter, (B) a governing board in the selection of his representative for the purposes of negotiating or the adjustment of grievances; (2) refuse to negotiate in good faith with a governing board, if it has been designated in accordance with the provisions of this chapter as the exclusive representative of employees in an appropriate unit.

Section 10. Strikes. — It shall be unlawful for any school employee, school employee organization or any affiliate, including but not limited to state or national affiliates thereof, to take part in or assist in a strike against a school employer.

A school district shall not pay any school employee for any day when the school employee fails as a result of a strike to report for work as required by the school year calendar, and he shall be fined an equal amount for each day missed.

Section 11. Severability. If any provision of this act or the application thereof to any person or circumstance is invalid, such invalidity shall not affect the other provisions or applications of this act, which can be given effect without the invalid provision or application, and, to this end, the provisions of this act are declared to be severable.

Section 12. Effective Date: This law shall take effect on January 1, 1977.