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ABSTRACT

The discussion in this report focuses on the state-level structures and processes for the administration of teacher bargaining in four very different states: New York, Minnesota, California, and Kansas. Sections on each state are based on interviews with personnel in state labor relations agencies or boards. Each state's structure is described and the process for implementing the law is discussed with an emphasis on representation procedures, impasse resolution, and unfair practice charges. Brief conclusions follow. Appendices include a "model report" for state labor relations agencies to consider as a format for reporting data, and paper number 31 of the Education Commission of the States (ECS) Center for Education Finance and Law entitled "Administrative Agencies: Issues and Problems in Public Education Collective Bargaining." The latter paper is a discussion, based on a literature review, of administrative agency behaviors and includes a description of several models of behavior. It is available separately from ECS. (Author)

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STATE-LEVEL IMPLEMENTATION OF BARGAINING LAWS

In 1980, there are 31 states (plus the District of Columbia) with bargaining laws that cover elementary/secondary teachers alone, and there are probably at least 31 different ways in which the state-level administration of these laws can be handled. Five of the states with teacher bargaining laws avoid state involvement for the most part. Three states provide for some administration by the state education agency or state board of education. Eight states have assigned the process to a state entity or agency that existed before the onset of teacher bargaining (five of them are agencies that handle private labor relations as well and three are agencies devoted only to the public sector). About half -- fifteen -- of the states with bargaining laws have provided governing structures (eleven with exclusively public responsibilities and four with private sector assignments as well) commonly known as public employment relations boards (PERBs) or labor relations commissions. These facts are revealed by an examination of the state bargaining laws for teachers and other public employees.

But the situation is not that simple. A closer look at the boards, commissions and agencies reveals that the state-level administration of K-12 teacher bargaining is sometimes spread over a number of agencies or special entities, in compliance with state law, by delegation, memo of agreement or contract. Further, public employment relations boards vary widely in composition, structure and responsibilities -- much more so than long-established state labor relations agencies.

PERBs have from three to five members who are most often appointed by the governor with senate confirmation, and who may take an active full-time part in the administration of teacher and/or other public employee bargaining, or who may be part-time public servants whose involvement is limited to, for example, hearing appeals on certain kinds of decisions issued by agencies more actively enmeshed in the bargaining process.

Criteria for selection as a PERB member varies from state to state. Some states require that board members be broadly representative of the public; some require that they have expertise or background in labor relations; some require that representation on the board be divided among those who are labor oriented, those who are management oriented, and those who may be perceived as neutral, etc. Terms on almost all of the boards are set for a specific number of years, and are staggered to insure continuity.

In some states careful provisions are made in the law to insure the autonomy and independence of the PERB, and in other states such provisions are minimal. Providing for autonomy and independence, of course, is much easier when a special board, commission or agency is set up than it is when the administration of public employee bargaining is assigned to an agency that is already a part of state government and that has additional responsibilities either within or outside of the public sector.

In an effort to better understand the structure and operation of the state-level agencies and boards that administer K-12 teacher bargaining, we selected four states for on-site visits and interviews. In selecting these states, we considered the following criteria:

1. Geographical location
2. Type of bargaining law
3. Degree of state-level involvement in the administration of the law
4. Degree of maturity of bargaining activity
5. Types and numbers of state entities involved in the bargaining process
6. Travel constraints

The states selected were:

NEW YORK: The state-level administration of public employee bargaining is almost totally in the hands of one agency, the public employment relations board (PERB). Public employee bargaining relationships have been well-established over the past 13 years. Strikes are prohibited.

MINNESOTA: The state has a fairly comprehensive public employment bargaining law and bargaining relations have been conducted under it for the past nine years. Administration of the law is split three ways among a PERB, the state bureau of mediation services and the courts. Certain strikes are permitted.

CALIFORNIA: The state is working with a law that was enacted in 1975 for K-14 education personnel, and which replaced a meet and confer law. Administration is divided two ways, between a PERB and the state mediation and conciliation service. Strike activity may or may not be "protected."

KANSAS: The state is undergoing rapid changes in the administration and conduct of K-14 teacher bargaining. Professional employees of school districts do not bargain under a public employee law. There is a special law for them, with a separate administrative process. In the past few years, this administration has moved rapidly from implementation primarily at the local level with some state education agency involvement, through an administrative split between the state labor relations agency and the courts, to primary administration by the state's single, and very small, labor relations agency.

New Jersey, Wisconsin and Pennsylvania, all major bargaining states worthy of investigation, were not selected for special investigation because the state-level entities within them that handle bargaining relationships have recently been subjected to an intense evaluation. The reports emanating out of the evaluations were made available to us by the Public Employment Relations Services, Albany, New York, and were used as background information, providing valuable insight to us for our investigation.

Prior to embarking on the site visits, an interview guide was developed to provide a skeletal framework for the areas of information we wished to cover. These areas included:

1. The structure of the board and/or agency
2. The organization and assignment of staff
3. The internal decision-making process
4. The functions executed by the board or agency
5. The process followed in handling key points in bargaining relationships
6. Policies, procedures, style and neutrality

With these basic areas in mind, and in fact, with cue cards in hand, we conducted our interviews, limiting them to two hours for the most part. All of the persons interviewed were extremely cooperative and discussed their operations freely. The interview style was passive. After a preliminary explanation of what we wanted to know, we assumed a nondirective stance, saying in essence, "Tell me about your operation." We confined our interruptions in the interview to questions designed to keep the interviewee on track and requests for clarification or expansion. In all of the interviews, areas came up that were not listed on

our cue cards, and we used our own judgment to either redirect the conversation or to permit it to continue, depending on the significance of the topic to the overall investigation. Thus, while the basic information sought is fairly well covered in each of the state reports, parts of each report cannot be compared or contrasted with the other reports. Indeed, the reader will find it difficult to make many valid comparisons from state to state because of the vast differences among them. However, we have attempted to make some inferences and draw some conclusions from the reports.

Each interviewee had an opportunity to review and comment on the reports in draft form, and they were subsequently amended before being put into final form.

By way of contrast to the four state reports, we conducted brief telephone interviews in Ohio and Illinois. Both have no bargaining laws for teachers and school boards and thus, no specified involvement for state boards or agencies. It should come as no surprise, however, that state education agencies do have some part to play in the local bargaining process. Interview reports for Ohio and Illinois are included in this report.

There are two appendices in this report. The first one, Appendix A, is a trial format for a model state report. It is a preliminary design aimed at helping labor relations boards and agencies to develop a report format that will provide comparable state-by-state information for use by the agencies themselves as well as by policy and decision makers. Appendix B is a paper by Wayne Wendling of the Education Finance Center of ECS. It summarizes an examination of the literature on the behavior of administrative and regulatory agencies. Because there is little available information of this sort on state-level agencies, the examination is focused on the behavior of selected federal agencies. Several models of behavior are explored and the reader may find it useful to compare and contrast the operations of the agencies in the four states that were visited with these models. However, any conclusions that could be drawn from such an effort must be regarded as tentative since the four state reports are based on a short, superficial and incomplete examination. There are many unanswered questions and perhaps the most important thing this entire effort does is to raise them for consideration.

NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD
Albany, New York

THE STRUCTURE: Board, Staff, Jurisdiction and Responsibility

On April 21, 1980, Anthony M. Cresswell and Doris Ross interviewed* Ralph Vatalaro, Executive Director of the 13-year-old New York Public Employment Relations Board (PERB), which administers the Taylor Law governing bargaining relationships in the public sector. Vatalaro proved to be an articulate and knowledgeable spokesman for the agency, and conducted a skillful discussion of its operation.

The main offices of the board and its staff are housed in an office building (not a state facility) some distance away from most of the state offices in Albany, New York. Satellite offices are maintained in Buffalo and in New York City. These satellite offices are each staffed by "a couple of mediators and a clerical person."

The three members of the board are a full-time chairman, Harold R. Newman, and two part-time members; Ida Klaus and Canon David C. Randles. The chairman of the board serves as chairman for his entire six-year term and, like the other two members, is not necessarily dependent on the incumbent governor for a new term. The PERB positions, says Vatalaro, are not "a catch-all for people who need to be placed somewhere." Since 1967, all board members have been professional labor relations practitioners. The chairman of the board is salaried and serves full-time. The others are compensated on a per diem basis (currently $250 per day), and all are reimbursed for necessary expenses.

To date, each governor has made appointments to the board with an eye toward insuring board neutrality, fairness and integrity. Recommendations for board appointments come from a variety of places and persons, and from both union and management interests. But there are no legal provisions that require the governor to make board appointments on the basis of any outside recommendations. The Taylor Law (public employment relations act) does require that board members be "representative of the public," that they hold no other public office or employment and that no more than two be of the same political party.

Vatalaro perceives the agency as "a very simple agency, with a very simple mission . . . the resolution of disputes in the public sector . . . ." As a professional organization, Vatalaro stated, PERB enjoys a good reputation:

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*Interview time was limited to two hours.

> I think people in school districts on both sides of the table view us as a competent, flexible and efficient organization . . . we have critics among those same people who see us that way, but who don't like what we do. In other words, they see us as being efficient and competent, but they don't like a particular section of the law, for example, and they feel that we're responsible for that because we should lobby to get the law changed.

Vatalaro indicated that the board does have the option to recommend changes in the Taylor Law, but rarely exercises it because of a desire to remain strictly neutral. This is particularly true regarding penalty provisions.

The chairman of the Public Employment Relations Board heads the 54 professional and support persons who serve the board. Deputy chairman of the board (a staff position) is also the counsel for the board, and a staff person serves as a secretary to the board.

The remaining staff is divided into five units: The employment practices and representation unit, the legal services unit, the conciliation unit, the administrative services unit and the research unit. (See the structural diagram, Figure 1, on page 5). The executive director interviews and/or recommends for hiring all staff personnel with the exception of the unit directors who are hired directly by the chairman. In addition to the board, its counsel/deputy chairman, secretary and five directors, the professional staff includes four economists in the research unit, nine mediators in the conciliation unit (with a panel of 140 qualified per diem mediators), nine hearing officers in the employment practices and representation unit, and four attorneys in the legal services unit. The executive director heads the administrative services unit, and is the liaison for the satellite offices in New York City and Buffalo. There are 22 "support" staff members.

Of the 32 professional staff members, 16 have law degrees. Turnover is small, but the agency does lose staff members in the lower pay brackets to other jobs, even though the salary scale, by state standards, is "pretty good." The PERB has been engaged for the last two or three years in a new program, hiring new attorneys as apprentice hearing officers (interns) and providing them with an opportunity to move up the ladder to full-rank professional status in a three-year time period. In addition, the agency is involved in a training program for mediator panelists that is aimed at minorities and women. Staff members are civil service employees but do not bargain. For additional discussion of staff background and training, see page 21.

NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD

September 1, 1978

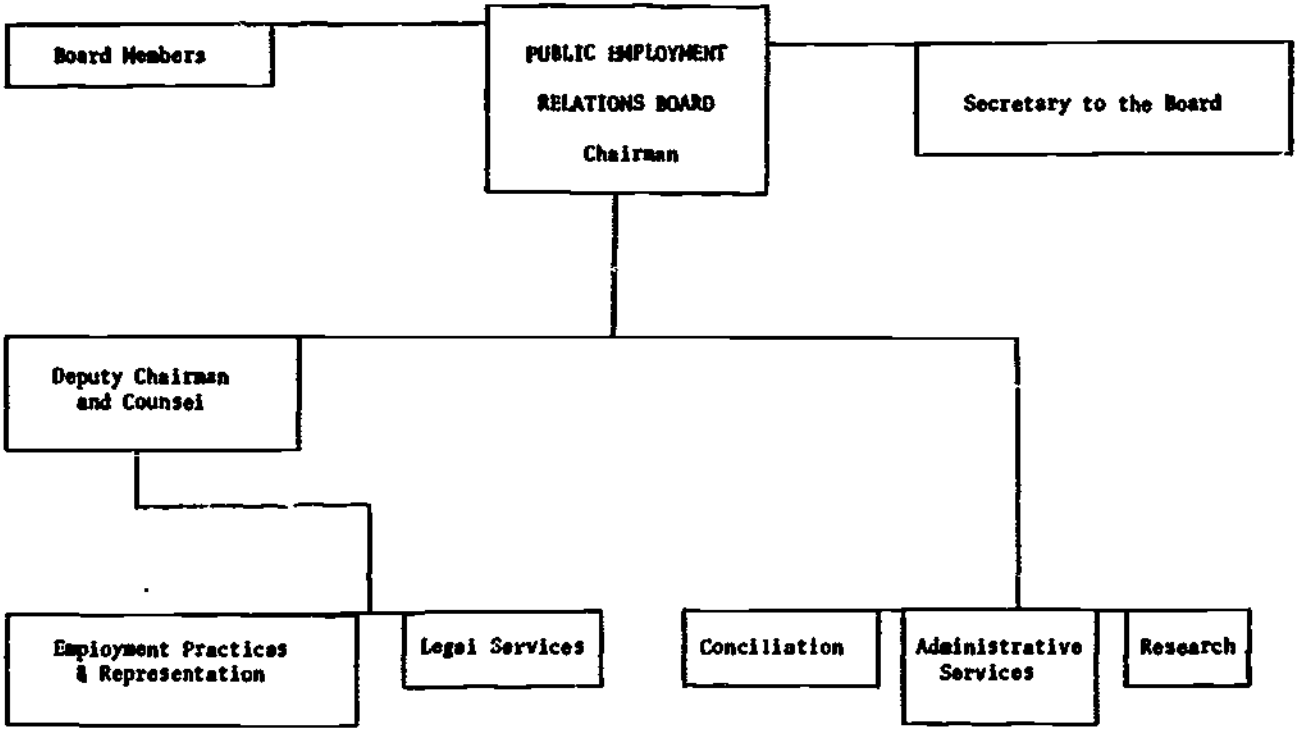

Figure 1

For fiscal 1980, the legislature appropriated $1,879,880 to the board, with an expenditure ceiling of $1,862,509. Vatalaro indicated that the funding process, under the governor's budget office, has been satisfactory and "throughly professional."

The responsibilities of the New York PERB are broad. The agency handles a mediation function as well as an adjudicative one in which it imposes decisions, rulings and penalties upon the bargaining parties. Vatalaro's view of combining these functions is in opposition to the school of thought that claims that the combination of the mediation and adjudicative functions in one agency (at the federal level and in a majority of the states, the functions are separated) can taint a determination to be neutral as mediators with the decision-making aspect of the adjudicative function. He said:

> One of the reasons we believe that our agency is good at this business is because we have both types of units under one umbrella . . . There's a back and forth that some critics tell us is not good, but we see it differently.

Where the functions are separated, Vatalaro added, "there isn't this kind of fexibility that we think of as being good for the process, good for the system." But, later on in the interview, Vatalaro indicated some discomfort with the law's requirement that the board impose specific penalties for violations of the law's "no-strike" provision:

> We're kind of schizophrenic. On the one hand I've been telling you about how well we do in resolving disputes. On the other hand, I tell you that we're also an executioner. When the time comes that we find somebody who has violated the law, our board has to impose a specific penalty, the suspension of the dues check-off.

In order to administer the law and function efficiently as a board and agency, the PERB is charged in the Taylor Law with rule-making responsibilities. These rules are intended (1) to clarify the intent of the law and (2) within that intent, to provide an efficient mechanism for implementing the law. Rules, or changes in rules, are developed by the PERB board and staff as the need arises. Before they are formally adopted, however, they are put out to public hearings, where interested parties are given an opportunity to comment, suggest changes or object. This input is considered in the final development of the rules. In addition, the PERB operates under a state administrative procedures act.

By law, the PERB has jurisdiction or responsibility that includes the following areas*, to be discussed more extensively later in this report:

1. Recognition/Representation Disputes
2. Unit Composition Disputes
3. Conduct/Supervise Elections
4. Unfair/Improper Practive Rulings and Application of penalties
5. Interest/Impasse Disputes
6. Rights/Grievance Disputes
7. Data Collection, Research and Studies

In addition, this report will include some commentary on PERB's style, image, problems and special interests.

Eighty percent of the cases handled by the New York PERB are related to K-12 education, and involved not only teacher units, but units of support staff (bus drivers, clerical, food services, etc.) as well.

THE PROCESS: Unit Determination, Representation, Elections and Recognition

The prelude to the exercise of bargaining rights is the organization of a group of similar public employees for that purpose. The Taylor Law provides that public employers must recognize a bargaining unit that meets the criteria and follows the procedures required by either the Taylor Law or a "substantially equivalent" local law. This means that the bargaining unit must reflect a "community of interest" among its members and be "compatible with the joint responsibilities of the public employer and public employees to serve the public." Further, the bargaining unit must provide evidence, i.e., with signed dues deduction authorizations, that a sufficient number of its members wish to be represented by a specific union.** If evidence of union support is deemed

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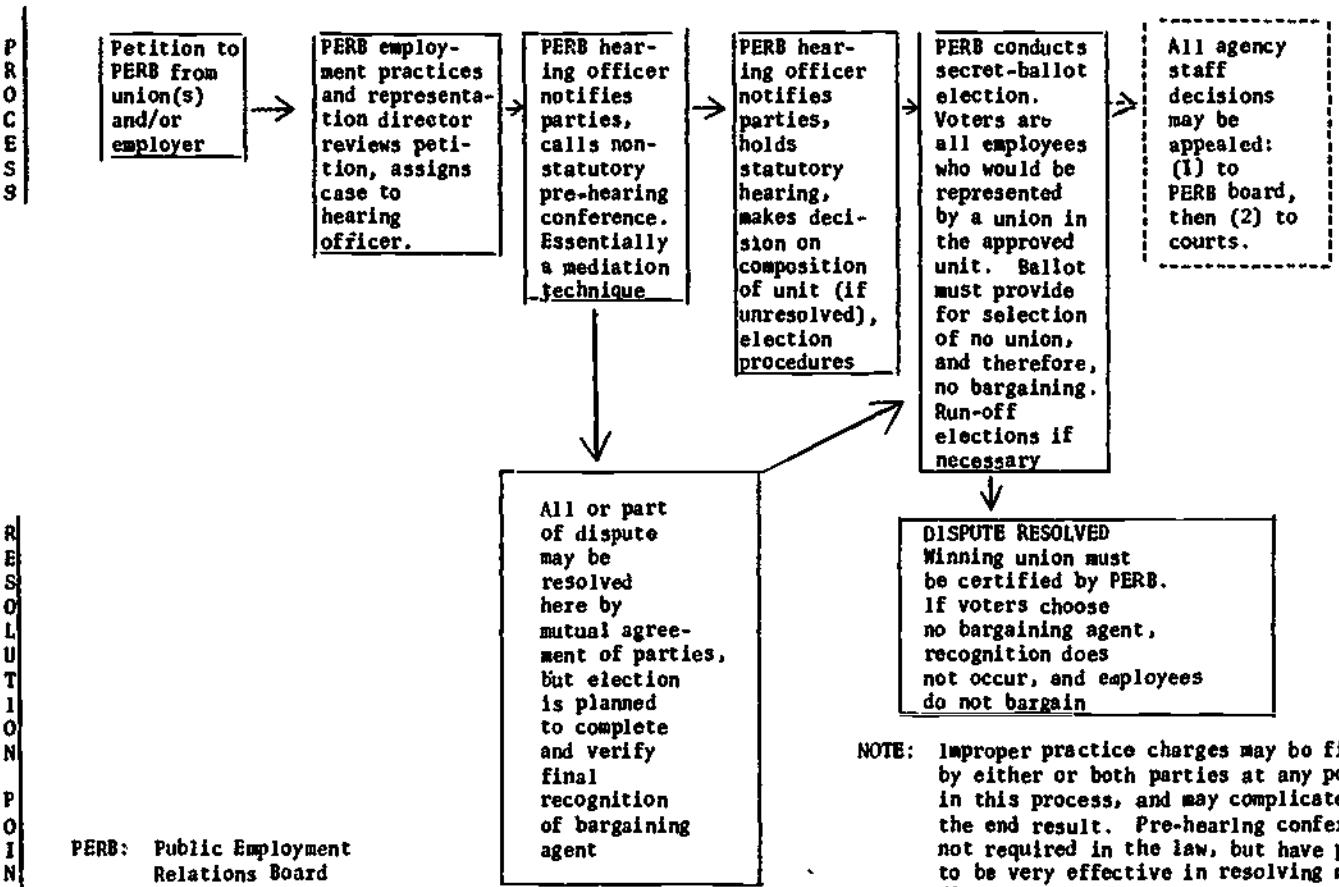
*Under the Taylor Law, local government entities may enact their own "substantially equivalent" procedures for the bargaining process and, indeed, may set up their own "mini-PERBs." At an earlier point in time, there were as many as 32 of these "mini-PERBs." In 1980, there are 11, with four actually functioning. Vatalaro says that he would like to see the portion of the law permitting "mini-PERBs" repealed because the "mini-PERBs" often do not have the expertise necessary in labor relations.

**The major unions are affiliates of the National Education Association (NEA) or the American Federation of Teachers (AFT).

NEW YORK

UNIT DETERMINATION, REPRESENTATION AND RECOGNITION DISPUTES
(for K-12 Education Sector)



PERB: Public Employment Relations Board

NOTE: Improper practice charges may be filed by either or both parties at any point in this process, and may complicate and delay the end result. Pre-hearing conferences are not required in the law, but have proved to be very effective in resolving many disputes at an early stage.

Figure 2

sufficient by the employer, and no other union is seeking to represent the same group, and if there are no other unresolvable disputes, the unit, having affirmed that "it does not assert the right to strike," is recognized by the employer and in a position to begin bargaining. The PERB has not been involved.

However, if a dispute arises, the PERB may be called in. Such disputes may be related to the composition of the bargaining unit (the kinds of employees to be included) or to the selection of the union to represent the unit of employees (representation). For example, the PERB's employment practices and representation unit will be notified of a representation dispute via a "petition from one or more parties." PERB's job is to implement a process (most often at the site of the dispute) that will decide which union will represent the unit. Arrangements must be made for either an on-site or mail secret ballot election at the discretion of and conducted by PERB. Barring complications, the winner of the election is certified by PERB.

But complications can and do arise, either during or after an election. For example, there may be prohibited practice charges by the losing union that the winning union used fraudulent means, i.e., forged signatures, to get on the ballot or that the employer influenced the results of the election by providing more privileges, i.e., use of facilities and mail boxes for campaign purposes, to the winning union.

In the process of handling representation disputes, the director of the employment practices and representation unit is responsible first for reviewing the petition to make sure it is timely and within the scope of the Taylor Law and PERB jurisdiction, and second for assigning the case to an available* hearing officer. This person, an attorney, contacts the disputing parties and within two or three weeks a non-statutory pre-hearing conference is held. The purpose of this conference is to clarify the facts in the case, to pinpoint the areas on which the parties agree or disagree and to work out how the conflict will be resolved and, indeed, to resolve the dispute on the spot, if at all possible. Questions that may be dealt with in such a conference include (1) Is there agreement on the composition of the bargaining unit? (2) Should the election be held on site or by mail?** (3) Are the competing unions qualified to be on the ballot; that is, do they meet the law's definition of employee organization?

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*See discussion of generalists on page 18.

**According to Vatalaro, in New York, the AFL-CIO (teachers may be AFT) prefers on-site elections. Less costly mail ballots are used most often by very large bargaining units.

While a majority of cases are resolved at this informal level, some are not (Vatalaro: "less than 10 percent"), and these are moved into the formal hearing stage for resolution. The proceedings for these formal hearings are recorded (service is contracted), and a decision on the issues in dispute is rendered by the hearing officer in the director's name. If one or both of the parties is dissatisfied with the decision, it may be appealed to the board itself, which will review the case and affirm or reverse the decision. Almost always, the courts are a last resort for a dissatisfied party, but Vatalaro indicated that PERB decisions survive court review far more often than not.

THE PROCESS: Unfair/Improper Practices

In the preceding section, the PERB involvement in the representation process has been discussed. Implicit in, but not exclusive to, the representation process are unfair/improper* practice charges, made when the party or parties feel that the letter or intent of the law has been violated.. Improper practice charges may be filed by the employer, the union or an individual employee at just about any point in the bargaining relationship, but the nature of the charges must "fit" under one or more of the four broad categories listed in the Taylor Law:

1. Interference, restraint or coercion of public employees (by the employer or other employees) in the exercise of their rights** for the purpose of depriving them of such rights.

2. Domination or interference (by the employer) with the formation or administration of any employee organization for the purpose of depriving them of such rights.

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*For the research project that generated this report, the term unfair practices has been selected as generally appropriate terminology. However, New York's term is improper practices and for the purposes of this specific discussion, the New York terminology will be used.

**Employee rights are defined in Section 202 of the law: "to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing."

3. Discrimination (by employer) against any employee for the purpose of encouraging or discouraging membership in, or participation in, the activities of any employee organization.

4. Refusal to negotiate in good faith (by the employer or the "duly recognized and certified representative of the employees").

The most frequently used category for improper practice charges is number 4 above -- the refusal to negotiate in good faith.* Says Vatalaro:

> Now in the education establishment we get this all the time. A school board does something unilaterally. Somehow, its conduct has turned around the contract that was in place because it has acted in a way that the union says was unilateral and in bad faith.

Or the school board may have changed a long-established practice not addressed in the contract, but well-entrenched and universally recognized over a long period of time.

As in representation questions, the PERB's employment practices and representation unit would be notified of the improper practice charge. The filing, by the aggrieved party or parties, describes the charges and includes other information necessary to PERB to institute some kind of action. After review of the petition by the director of the unit, the case is assigned to a hearing officer, who proceeds along the same lines as those described for the representation process.

First, the parties (petitioner and respondent) are brought together for an informal non-statutory pre-hearing conference. According to Vatalaro:

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*According to the handbook, What is the Taylor Law?, issued by PERB, in scope of bargaining disputes which come under this category, "either party may petition PERB to forego the hearing officer stage. The board may conduct an oral argument or may resolve the issue upon submission of briefs."

> The effort here again is a mediation effort. The hearing officer makes a major thrust to get the thing withdrawn, to get it resolved. Sometimes, he or she will get it withdrawn by being familiar with the law, by being familiar with precedent, by being familiar with how we practice . . . A union or employer will almost always back off if it is a no-win situation and if a hearing officer can demonstrate that satisfactorily . . . that's the easiest way for a good hearing officer to get a case settled . . . there are other ways, but basically the whole thrust is to get them to agree on a settlement and we wash the thing out.

In the past, about 70 percent of the improper practice cases were settled in pre-hearing conferences, Vatalaro added, "but our settlement rate today is not nearly as good as it used to be." He speculated that reasons for the drop in the settlement rate at pre-hearing conferences might include:

1. Changes in the nature of the charges being filed, with a tendency to avoid filing charges in areas where precedent decisions have established guidelines for settlement, and a move toward filing untested, unprecedented and possibly more complex charges that are less easily resolved with pre-hearing conference techniques.

2. The fluctuating state of the economy may cause the opposing parties, in a "survival mode," to be less likely to back off from their positions.

3. An improper practice charge may be used more frequently to attempt to obtain a condition of employment that couldn't be gotten at the bargaining table.*

Regardless of the nature of the charges and the reasons for filing them, they must have a formal hearing if they are not resolved or withdrawn earlier. In the formal hearing, the proceedings are recorded, and, said Vatalaro:

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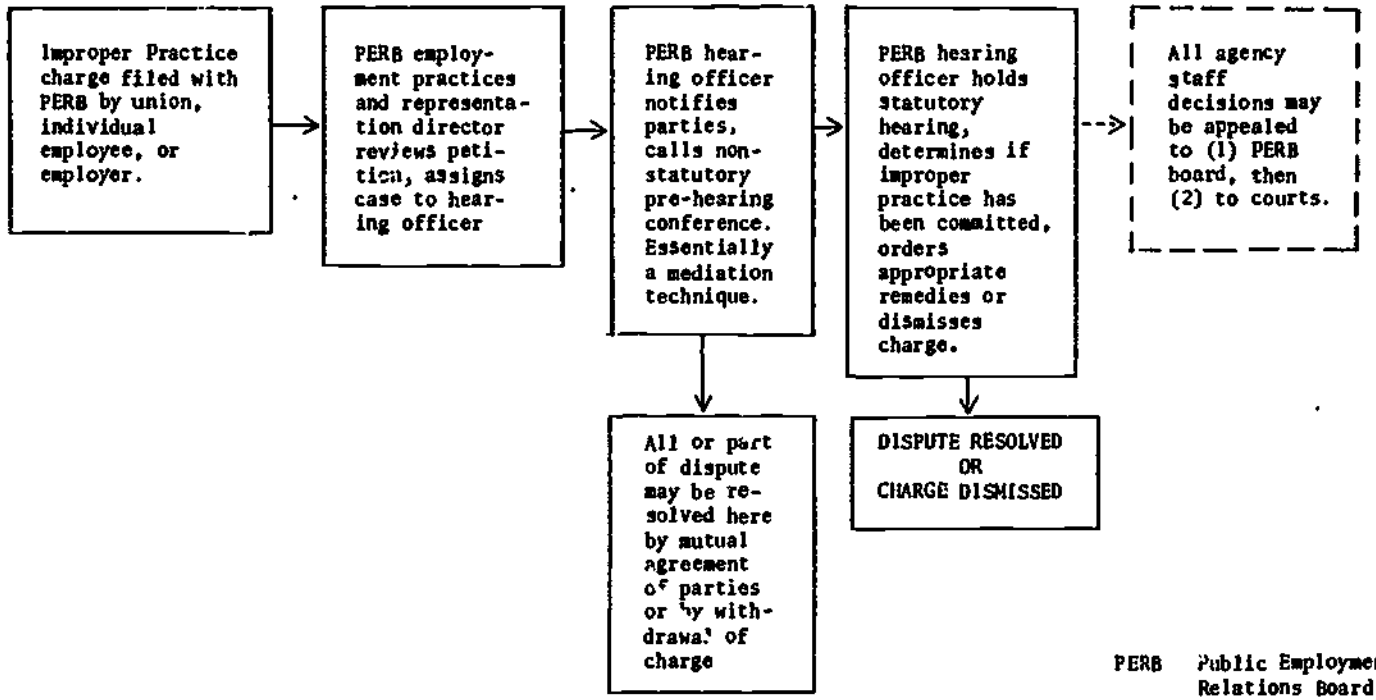
*When such an improper practice charge is filed during bargaining sessions, PERB uses its own discretion, always aimed at a resolution of the dispute by the parties and not by the PERB, to slow down or speed up the processing of the change.

NEW YORK

UNFAIR PRACTICE CHARGES
(for K-12 education sector)



PERB Public Employment Relations Board

Note: Unfair Practice charges may be filed at any tiue. Pre-hearing conferences are not required in law, but have proved to be very effective in resolving many disputes at an early stage.

Figure 3

> We provide the arena. A hearing officer sits and referees this match between the attorney of the employer and the attorney of the union. She/he will interrogate witnesses if she/he believes that the record is not complete, or that more is needed in the record for she/he to make a good sound judgment at the end.

Decisions are made by the hearing officer in her/his own name, are appealable to the board and, as a last resort, to the courts.

One emerging improper practice issue directly tied to the representation question is that of the appropriate use of the agency shop fee -- a sum of money equivalent to or proportionate to union dues that, by mutual agreement during contract negotiations,* must be paid to the union by a non-member for the services the union provides. More and more unfair practice charges are being filed in this area, according to Vatalaro. Complaints, most often filed by an individual employee, generally revolve around whether or not a portion of the agency shop fee is being used for "political or ideological" purposes (forbidden in the law) and, if so, the speed (or lack of it) with which the union makes the appropriate refund to the non-member employee (required by law). Or, an employee may charge that services or benefits (i.e., insurance) covered in union dues for members are being denied to the non-member even though he/she is paying for them through the agency shop fee.

THE PROCESS: Impasse Resolution

Mediation

> The cutting edge of the [conciliation] unit is its effort to mediate successfully in difficult contract negotiations . . . The mediation section has a great deal more visibility because the media people out there are [interested in] heated controversies between employers and unions. And news media people are far more interested in things they can get their hands on and touch and feel than they are in complex legal issues [i.e., improper practices charges, representation], -- Vatalaro.

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*Negotiable at the local level, mandatory at the state level.

The conciliation unit, as noted before, is staffed by nine professional mediators (four in satellite offices) and augmented by a panel of about 140 per diem ($150) mediators. It is responsible not only for mediation, but for supplying lists of fact-finders and arbitrators as well. Mediation cases, the majority of which are related to education, average 750 to 800 cases per year. The PERB's all-time handled; the low occurred in the past year, when 560 mediation cases were handled.

When a request for mediation comes to the conciliation unit, the director, after the paperwork is reviewed, selects an available mediator either from the staff roster or the list of per diem mediators to perform the desired services. Often, assignments mediators are made on a "who's available" basis, but there are many times when the unit director exercises considerable discretion in the selection of a mediator. Criteria for the selection might include the nature of the cases, issues involved, personalities, of the respective negotiators for the parties, the style of the mediator and the wishes of the parties.

Vatalaro explained that mediation is not a nine-to-five job. He said:

> The public sector . . . is what we think of as after-dinner-hour negotiations. We have so many part-time village, town and school board officials who obviously earn a living in another area, but who also serve the public . . . They are not usually available during normal business hours, so that our staff of people who work in the office for much of the day are out mediating in the evening hours . . . The panel people work much the same way.

It is the mediator's responsibility to assist the parties in every possible way to come to an agreement in the dispute. To do this effectively, he/she must identify the issues upon which there is disagreement and become thoroughly familiar with them. He/she must understand the setting and context of the dispute; he/she must become well-acquainted with the parties and establish a trust relationship with them. He/she cannot promise the parties any kind of special treatment. But beyond these basic responsibilities, Vatalaro said:

> . . . everybody has a different technique; everybody has a different style. Some situations require an aggressive mediator; others require less aggressive natures, but somebody who can handle conflict and not push the parties around.

The mediator may act as an errand-runner between the parties, transmitting proposals and counter-proposals. He/she may deal with the parties separately or together. He/she may push and shove, coax and sooth, suggest compromises and trade-offs. He/she may conduct long or short sessions, on a 24-hour basis or with cooling-off periods placed appropriately in the process. While he/she is attempting to mediate, the union may conduct a strike; improper practice charges may be filed or other unforeseen complications may arise that require extreme sensitivity and delicate handling on the part of the mediator. Most impasses are resolved at the mediation point.

Fact-finding

Those disputes that are not resolved with the assistance of a mediator are moved along to a fact-finder at the recommendation of the mediator. Most often, fact-finding is done by a per diem person (selected from a PERB list) as opposed to a staff member. This is a matter of policy, said Vatalaro, who explained:

> We determined long ago that it was kind of unseemly to have a state [staff] fact-finder assigned by PERB . . . recommending a school board what they ought to be paying their teachers. We don't mind that a per diem person could do that as a fact-finder, but a state employee [a regular employee of PERB] doing it would always leave an impression that our board doesn't want and doesn't like.

Vatalaro indicated that he did not personally agree with that policy, seeing little difference between staff and per diem fact-finders who are both paid by and represent the PERB.

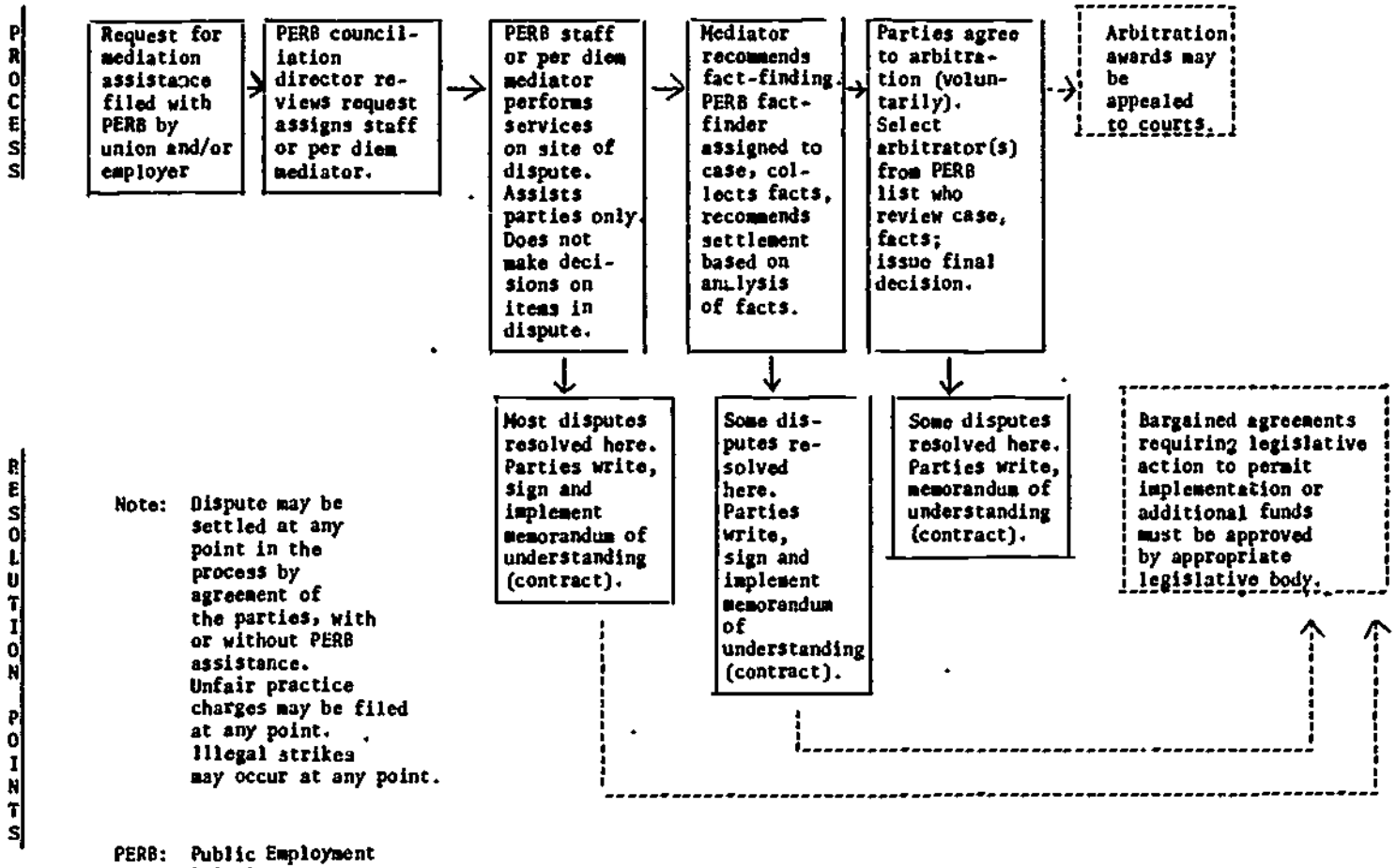
Essentially, the mission of a fact-finders is to gather all of the relevant facts related to the case -- economic and legal and, on the basis of these facts, make fair, impartial and viable recommendations for settlement of the issues of the dispute. He/she may gather these facts from the employer, the union, the research/data collection arm of the PERB, and/or other appropriate resources.

As an aside, Vatalaro noted:

> . . . the state of New York . . . is better prepared with facts than any other client we have. The state does a superb job of gathering facts and thorough research. They don't always get what they want . . . but they take the whole question of labor relations very, very seriously. They have professional people engaged in it on their behalf and I suppose they win as many as they lose.

NEW YORK

INTEREST/IMPASSE RESOLUTION
(for K-12 education sector)



Note: Dispute may be settled at any point in the process by agreement of the parties, with or without PERB assistance. Unfair practice charges may be filed at any point. Illegal strikes may occur at any point.

PERB: Public Employment Relations Board

Figure 4

Arbitration

The conciliation unit also provides the administrative machinery for the two types of arbitration in New York. Interest arbitration occurs when the arbitrator or panel of arbitrators, after conducting a hearing to review the facts and final positions of the parties in a dispute that has not been resolved by legal prior techniques, present "an award of substance" (makes a decision on the issues and/or positions) as a basis for the contract. It is required for police and fire bargaining disputes. For other public employees the decision to go to arbitration may be bargained along with other impasse resolution procedures, and the PERB is not necessarily involved, although it will supply a list of arbitrators if so requested by the parties.

Rights/grievance arbitration, which involves a decision by an arbitrator on whether or not the rights of an employee have been violated and the application of an appropriate (and legal) remedy also is administered minimally by the PERB.

The parties select an arbitrator using the "strike-out" process. From a list supplied by PERB they alternately strike names until they have only one (or more if the parties want a panel) left, and this person or panel is given the case to decide.

THE PROCESS: Strikes, Penalties and PERB

Strikes by public employees are illegal under New York law, and when a strike occurs, three government entities, including the PERB, are involved in the assessment of penalties.

The public employer may remove or discipline a striking employee for misconduct, and must withhold two days' pay for each day the employee is on strike. The employer also must apply to the court for injunctive relief against the strike. The court, if its injunction is ignored by the strikers and if the employer initiates proceedings to cite the violator for contempt of court, may apply a variety of financial penalties or even order the strikers to jail.

PERB's mandate is to order the suspension of the dues and agency shop fee checkoff (payroll deduction) privilege of the union for a specific or indefinite period of time.

A hearing officer (from the employment practices and representation unit) presides as judge at a hearing. The prosecuting (and charging) attorney is from the office of the PERB counsel (legal services unit) or the employer. If a charge of violation of the strike prohibition is ruled valid, PERB board members must apply the checkoff penalty mentioned above. No waivers are permitted.

Problems with PERB-imposed penalties

All of the required strike penalties are aimed at unions, and there are none as such for employers. However, PERB can act to remedy situations in which an employer has acted in violation of the law. For example, an employee improperly fired can be reinstated by PERB. PERB members are uncomfortable with this situation. but, said Vatalaro:

> That's the way the law is written and it would be hard for PERB to be out there lobbying to change it. It's just not a very comfortable position to put a neutral body in -- that of saying that PERB should not be engaged in penalties any longer. If we back away from the duty to impose them, that immediately says to the employer that we're union-oriented. And that is not the message . . . our preference would be to be regarded exclusively as a conciliation agency rather than a so-called executioner.

THE PROCESS: Appeals

As indicated in preceding discussions, all decisions issued by PERB are appealable to the courts. The four attorneys in the counsel's office "have, as their primary responsibility, litigation in the courts -- defending PERB's decisions," said Vatalaro.

THE PROCESS: Data Collection, Research and Studies

Responsibility for data collection, research and studies lies with the research unit. By law, the PERB must collect statistical data relating to wages, benefits and employment practices in public and private employment. It also must conduct studies and analyses of conditions of employment of the public employees of the state.

"We are a clearinghouse," said Vatalaro:

> We're supposed to collect and use and make [data] available to not only the parties but to neutrals [mediators, fact-finders, arbitrators] . . . . What we have relied on over the years is getting the information from the parties. We require them to send contracts to us and that's our biggest single resource. But it is a manual effort; if we want to know what 750 school districts settled for, we have to manually check our files . . . .

> We are starting to experiment with some computerization of data. We used to buy computer time ocasionally . . . . I think we have reached a point now where we can afford and should have our own equipment.

The staff of the unit also researches issues and questions, and on occasion, "contracts out" research. One piece of contracted research, for example, is a study done by Cornell University on the effect of arbitration on police and fire disputes.

THE PRESSURES: The Case for Generalists

As indicated previously, specialization among staff members does occur occasionally, and Vatalaro himself prefers not to encourage it. The agency does not have a policy on specialization, but Vatalaro discussed his

> proposal that's been ten years without coming to fruition . . . . We would not have hearing officers, we would not have mediators or fact-finders, we would have generalists throughout the staff. This is the Wisconsin model and the Michigan model. In Wisconsin, a person can, in one day, wear a mediator's hat in the morning; in the afternoon go out and hold a hearing; and in the evening do an arbitration. We've made a little inroad because our mediators have been permitted for the last five or six years to do the kind of pre-hearing conference work that the hearing officers do. And when our workload really goes off the edge of the page in the improper practices section . . . we permit our mediators to hold some of these conferences, because it's basically a mediation technique that is utilized. My personal view is that we should do more of that, but we would need a change in the statute.

If staff members were generalists, Vatalaro said, they could be used more efficiently:

> We have peaks and valleys in workload, and in our valley we have things for people to do. For example, there's a public relations responsibility, where our people go out and handle training seminars, speaking engagements to major clientele and participate in other things that are just not top priority when we have major disputes to deal with. During the busy season when teacher disputes are coming to a peak, we don't have enough mediators to go around. We could use people in other sections to fil those gaps.

THE PRESSURES: Time and Coordination

While the Taylor Law does provide time lines and time limits for certain procedures within the bargaining relationships, it does not provide many deadlines for dispute resolution processes. In general, Vatalaro indicated that, given the size and responsibilities of its statt, the agency was responsive to the needs of the parties to resolve disputes quickly. Explaining, he said that a bargaining impasse that is complicated by unfair practice charges or strikes could be settled "in three or four months," with simpler cases taking much less time.

Hearing date delays do occur in the normal course of agency business. Hearings must be scheduled with a number of factors in mind:

1. The availability of a hearing officer. Junior staff members handle up to 30 cases simultaneously, and senior staff juggle as many as 60.

2. Transportation costs and coordination. In order to keep costs down, hearing dates may be delayed until there are a number of cases in the same part of the state that one or more hearing officers can handle.

3. The availability of hearing recorders, whose services must be contracted for.

However, the staffs of different units do coordinate their efforts in the interest of the parties by exercising some control over timing. Vatalaro illustrated this point. The coordination that comes into play is between two shops: conciliation and employment practices and representation. For example, an unfair practice hearing may be postponed if, after a conference, the directors of the units feel that the charge of unfair practice may be resolved

or withdrawn if the parties are given enough time at the bargaining table. While the PERB often has operational reasons for delaying a hearing, some delays may be "contrived" in order to, in the long run, close the case more quickly, and even more important, to arrive at an amicable, mutually agreed-upon settlement between the parties.

THE PRESSURES: The PERB and Outside Pressure

The Taylor Law provides the PERB structure with independent status, and PERB members with insulating conditions relating to their selection, and outside pressure to sway board actions is rare. How does the PERB respond to such rare pressure? Vatalaro answered the question:

> I think the biggest thing we have going for us is the fact that our board members have never caved in to that kind of pressure and it's widely known. There have been some big cases that have meant many dollars to one union or another, in terms of an employer-perceived need to do something one way because it would save millions of dollars in that particular employer's tax money . . . . We have never caved in under pressure like that, which would cause the agency to lose any of the character or integrity that it's properly perceived as having.

THE PRESSURES: The PERB as a State Agency

Despite PERB's state-granted insulation and independence and its demonstrated determination to remain neutral, a touchy question needs to be answered. Can an agency of the state really perform with impartial neutrality, when one of its clients, indeed, is the state, and when PERB employees are state employees? Vatalaro responded:

> There's no hiding from that. Our budget comes out of the executive branch, which is also involved in state-level negotiations. But our PERB chairmen have always believed that the professionalism of the division of the budget would always be intact. We always have a fair hearing. People are not vindictive against PERB for decisions the governor might not like. There's a very long history . . . where we have made decisions that have been appealed by the governor all the way to the court of appeals, and he has lost . . . . That says a lot for

> the people who have been governor and the people they have appointed as their staffs . . . . They know what our mission is; they know what the law says and they face up to it.

THE TECHNIQUES: Staff Selection and Training

As mentioned earlier, the nucleus of the professional staff members have backgrounds in labor relations. Vatalaro expanded this statement:

> In 1967 Bob Helsby* put together a small staff of six or seven people who were all people that he knew personally and had known as subordinates in the labor department, where he had been executive deputy commissioner. This nucleus put the rest of the staff together with Helsby. We got them from a lot of places. From state service agencies we picked up some; from private law practices we picked up many of our attorneys.
>
> Our mediators come from both sides [labor and management] . For example Harold Newman** had worked for a few years as an organizer for American Federation of State, County and Municipal Employees (AFSCME). Irwin Kelly, current conciliation director, was an industrial labor relations manager. Our chief regional mediator in Buffalo came out of union."

Seven or eight of the PERB staff, said Vatalaro, have had undergraduate and graduate training in industrial labor relations.

Of the 16 staff members who are attorneys, nine are hearing officers, and four are in the counsel's office (where competence as an attorney takes precedence over a background in labor relations). Four of the attorneys are serving internships with the PERB. Said Vatalaro:

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*Dr. Robert Helsby, First chairman of the New York PERB, now serving as director of a Carnegie-funded project, Public Employment Relations Services (PERS), to evaluate and assist state public employment relations agencies.

**PERB's current chairman, formerly conciliation director and a mediator.

> This is one of the things I feel personally good about . . . we are able to take an attorney who is not even admitted to the bar, who is recently out of law school, and hire him or her at approximately $15,000 (a competitive salary) and in the space of three years, develop that person into a hearing officer, with a potential salary of $30,000. We believe that three years with us is worth five or six years of private, or law firm practice.

The program, begun three years ago, has one "graduate" so far, with four more coming along.

Three of the PERB's current interns are women, and Vatalaro said that the agency was actively involved in efforts to recruit more women and minorities in all staff areas as vacancies occur. One special program of the agency, begun two years ago, is the recruitment and training of minorities and women to serve as per diem mediators, fact-finders and arbitrators. Vatalaro said:

> What we did is recruit from various sources approximately 25 minority people -- mostly black and many women. We ran them through three weekend seminars and prescribed all kinds of outside reading. We required that they be observers in each of our processes -- mediation, fact-finding and arbitration. For fact-finding in particular, we required that they go out with our fact-finders, sit and watch the process, learn what they could and ultimately, write reports [independent of the hired fact-finders' reports] for critique.

Several (all black women) of the trainees have been put on panels of mediators, fact-finders and arbitrators; others are still working as apprentices; and some have dropped out.

Vatalaro noted that historically, the profession has not attracted many minorities or women, although "most of the experienced women who are in it were in it from day one." Vatalaro further commented that

> . . . we could usefully put to work more blacks, particularly where whites are suspect . . . . We have some school districts that are practically all black, where a white mediator is going to have difficulty with both parites, in that he can't easily relate.

In addition to the special training program for minorities and women, Vatalaro explained that all per diem panel members are required to attend a PERB-operated training seminar at least once a year. He said:

> We held one on arbitration, a one-day program. Then we held three sections of a two-day conference during which we exposed them to what's new in terms of the law, our rules, court cases, determinations by other jurisdictions that have some impact on us . . . . A year ago, we had seminars dealing with the economy: how a fact-finder can judge the ability to pay, for example.

MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

AND

BUREAU OF MEDIATION SERVICES

St. Paul, Minnesota

INTRODUCTION: The Administrative Relationship

Public sector labor relations in Minnesota has its public policy basis in the Public Employment Labor Relations Act of 1971, as amended (PELRA). The PELRA is implemented by the Bureau of Mediation Services (BMS), the Public Employment Relations Board (PERB), and the courts. The BMS is an independent state agency having the responsibility to establish the structure of bargaining (determination of appropriate bargaining units and the conduct of representation elections) and to provide impasse resolution services in the form of mediation. PERB serves as an appelant body for appeals of BMS appropriate unit decisions and provides lists of neutral arbitrators for bargaining impasses that have been referred to arbitration. The court's role is as an appeal level for PERB decisions and certain BMS actions as well as having initial jurisdiction over unfair labor practices.

This review and evaluation will center on the role of the BMS and the PERB as they impact labor-management relations in K-12 education.

THE STRUCTURE: Board/Bureau, Staffs, Jurisdiction and Responsibility

On May 14, 1980, Doris Ross interviewed* Claudia Hennen, Executive Secretary and only employee of the Minnesota Public Employment Relations Board (PERB). Hennen began serving the board eight years ago, and was appointed to her present position of Executive Secretary in 1975. She came from the State Bureau of Mediation Services.

Offices for the PERB are located near the offices of the State Department of Labor and Industry, but the PERB and Hennen have independent status. The Bureau of Mediation Services (BMS) also with independent status, is located in another state office building, closer to the capitol building and some distance away from PERB offices.

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*Interview time: 45 minutes

The PERB has five members, who by statute are required to be representative of labor (2 members), management (2 members) and the general public (1 member). Members at the time of the interview were: Don Bye, chairman and an attorney who represents labor organizations; Thomas Arneson, a director of employee relations for a school district; Lorraine McCloud,* a machinist and union member; Karen Olsen, a consultant representing employers; and Sidney Feinberg, an attorney in general practice and the neutral member of the Board. Members are appointed by the governor, serve four-year overlapping terms and therefore are not necessarily dependent on the original appointing governor for additional terms of office. A new chairman is selected by PERB from its membership every May 1. All serve on a part-time basis, meeting at least once a month, are paid on a per diem basis ($35), and are reimbursed for necessary expenses. Budget for the PERB, a separate item in the state's general expenditure fund, is $45,300 and includes Hennen's salary, at the top of its range of $18,000 to $22,000.

The balance of interests on the PERB, Hennen indicated, makes it possible for the board to maintain its neutrality in its decision making, although, often, the neutral member (Feinberg) tips a final decision one way or another. Other than the constraints on board structure discussed above, there are no other specific statutory provisions to insure board independence and neutrality.

The PERB's primary function is that of appeals tribunal and it handles 25 to 30 appeals of BMS decisions in an average year. PERB appeals are limited to unit determination and fair share fee issues only, and "not many" of these are from the education sector.** In addition, the PERB maintains a list of arbitrators for use by public employers and employees in the resolution of disputes.

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*Replaced in June, 1980 by Karl Landholm, a business representative for a school services employee local union.

**Fair share fees may be assessed against nonmembers designated "exclusive representative" (employee organization) for services rendered in an amount equal to the regular membership dues. . . less the cost of benefits financed through the dues and available only to members. . ." and may not exceed 85 percent of regular membership dues, according to the Minnesota law. In Obermeyer's opinion the education sector is the source of 90% of the BMS case load in the fair-share challenge area.

MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

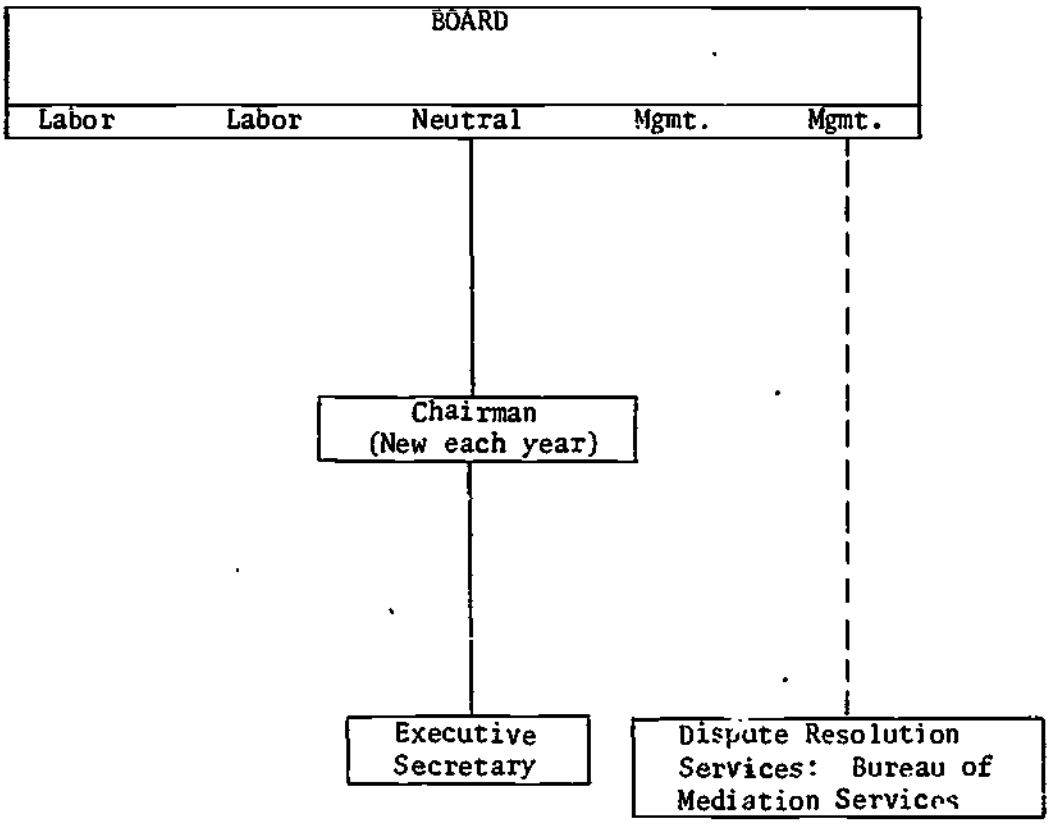

Figure 1

By law, the PERB's responsibilities are:

1. "to hear and decide issues relating to the meaning of the terms, 'supervisory employee', 'confidential employee', 'essential employee,' or 'professional employee';

2. to hear and decide appeals on unit determination decisions by the Director of the Bureau of Mediation Services (BMS);

3. to adopt rules governing its own procedures;

4. to hear and decide, on the record, appeals of the decisions of the Director of the BMS related to fair share fee challenges;

5. to maintain a list of arbitrators for use by the parties in a dispute; and

6. in absence of other procedures, review grievances of individual employees "arising out of the interpretation of or adherence to terms and conditions of employment."

These responsibilities will be discussed further in subsequent sections of this report that deal with the process of state-level administration of bargaining relationships.

Hennen, as sole employee of the PERB, has a wide range of duties. These include filing and docketing cases, recording case histories, and drafting and indexing decisions, which are not summarized. She handles all PERB correspondence, and sets up the mechanics and paper work for board hearings. On rare occasions, she conducts "very informal" non-statutory pre-hearing conferences with appellants, if she feels appeals are based on a lack of understanding of the law. Her purpose in these instances is to get the appeal withdrawn, and she is sometimes successful. In addition, Hennen serves as day-to-day liaison person with the director and the staff of the BMS.

The Minnesota PERB and the Bureau of Mediation Services must also keep abreast of new developments in state bargaining law. In Minnesota, a legislative commission on employee relations has the responsibility to develop and recommend changes in the PELRA. In 1980, through the efforts of this commission, the Minnesota law was substantially amended to make major changes in bargaining procedures for state employees (including postsecondary education employees) and in the expansion of strike rights and constraints for most public employees, thus setting the stage for a temporary ballooning of the case/work load of both the PERB

and the BMS, who are required to implement the changes in the law.

The changes in the law are briefly described below in an excerpt from ECS Legislative Review, Volume 10, Number 12, May 2, 1980.

> Minnesota's big bargaining bill, SF 2085, has passed and, as a result, major changes will be made in public employee bargaining. Many sections of the current law have been amended or repealed and replaced. Among the significant changes are:
>
> 1. The state department of personnel will be reorganized and retitled the department of employee relations with two divisions: the division of personnel and the division of labor relations. The deputy commissioner for the latter division will be the chief state labor negotiator with a myriad of attendant responsibilities.
>
> 2. The definition of public employees has been expanded to include part-time teachers who have taught at least 30 consecutive working days and to exclude undergraduate work/study students. The definition of essential employees, who may not strike, has been refined as well.
>
> 3. Major amendments to provisions for permitted and prohibited strikes have been made with separate sections for permissible strikes by nonteachers and teachers. In a tiny nutshell, both groups may strike if their negotiated agreement has expired, if impasse is properly declared, if mediation procedures have been exhausted, if a binding arbitration request is rejected and if written notice is served 10 days before the strike occurs. Penalties for illegal strikes are extensive but may be reviewed or appealed.
>
> 4. Existing units for state and university employees will be abolished and replaced over the next year or two with: (a) 12 statewide units for University Minnesota personnel and (b) 16 statewide units covering all other state and university personnel. Certain groups eligible for coverage in some of the units may opt for nonrepresentation, thus replacing their bargaining rights with meet-and-confer privileges only.

Portions of this extensive bill are effective immediately and other portions have effective dates ranging to July 1, 1981. Generally, existing contracts are grandfathered in and provisions for transition periods are included.

While the PERB supplied testimony to the commission during the development of the new law, Hennen indicated that they, PERB members, were not entirely satisfied with parts of the legislation. Board members feel that unorganized state employees are not adequately protected under the amendments, and that provisions mandating specific unit composition for state level employees were unnecessary -- that, while the units mandated by statute might have emerged eventually in practice, the legislature should not have had a hand in their determination.

Most of the state-level administration of public employment labor relations in Minnesota is handled by the Bureau of Mediation Services (BMS), under the direction of Peter Obermeyer. Obermeyer, interviewed* on May 13, 1980 by Doris Ross, indicated that he was an original management member of the PERB before he was appointed by the governor (confirmed by senate) to serve a four year term as Director of BMS. In addition he was previously a staff mediator and director of the bureau from 1962-68. He is the only appointed employee in the bureau; that is, he is not a state civil service employee. He has direct responsibility for the entire bureau, and the bureau responsibilities listed in the public employment bargaining law are almost always referred to as the responsibilities (power, authority) of the "director" [of the Bureau of Mediation Services].

Obermeyer is a professional mediator and a committed public servant who thoroughly understands his role as director of a neutral, independent agency. He still serves as a mediator for some of the cases that are filed with the BMS.

Legislation establishing the Bureau of Mediation Services was enacted in 1939 as part of the Minnesota Labor Relations Act. Nine years ago, the Public Employment Labor Relations Act was enacted, and the BMS was designated as the agency to administer the public bargaining process in addition to the private sector, and to provide certain services to the staffless PERB. As noted above, PERB functions primarily as an appeals avenue. The Bureau of Mediation Services may be perceived as thoroughly experienced in the broad area of labor relations -- public, private, and non-profit sectors.

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*Interview time was limited to two hours.

Obermeyer, as Executive Director of BMS, sees the agency as separate from and independent of the state government of which it is, structurally, at least, a part. Staff members, except Obermeyer, are in the civil service of the state, but are excluded from bargaining by PELRA.

The state public sector labor relations legislation designates to the "director" (of the Bureau of Mediation Services) the following responsibilities:*

1. Determination of appropriate bargaining units
2. Conduct of union representation elections
3. Certification of a union as an exclusive representative
4. Mediation services
5. Determination of bargaining impasses
6. "Fair share" fee decisions
7. Distribution of grievance arbitration lists
8. Promulgation of rules and regulations and "forms of petitions, notices, orders and conduct of hearings and elections"
9. Data collection: "all orders and decisions" of the PERB, all arbitration panel decisions, all grievance arbitration decisions, and all director's orders and decisions.

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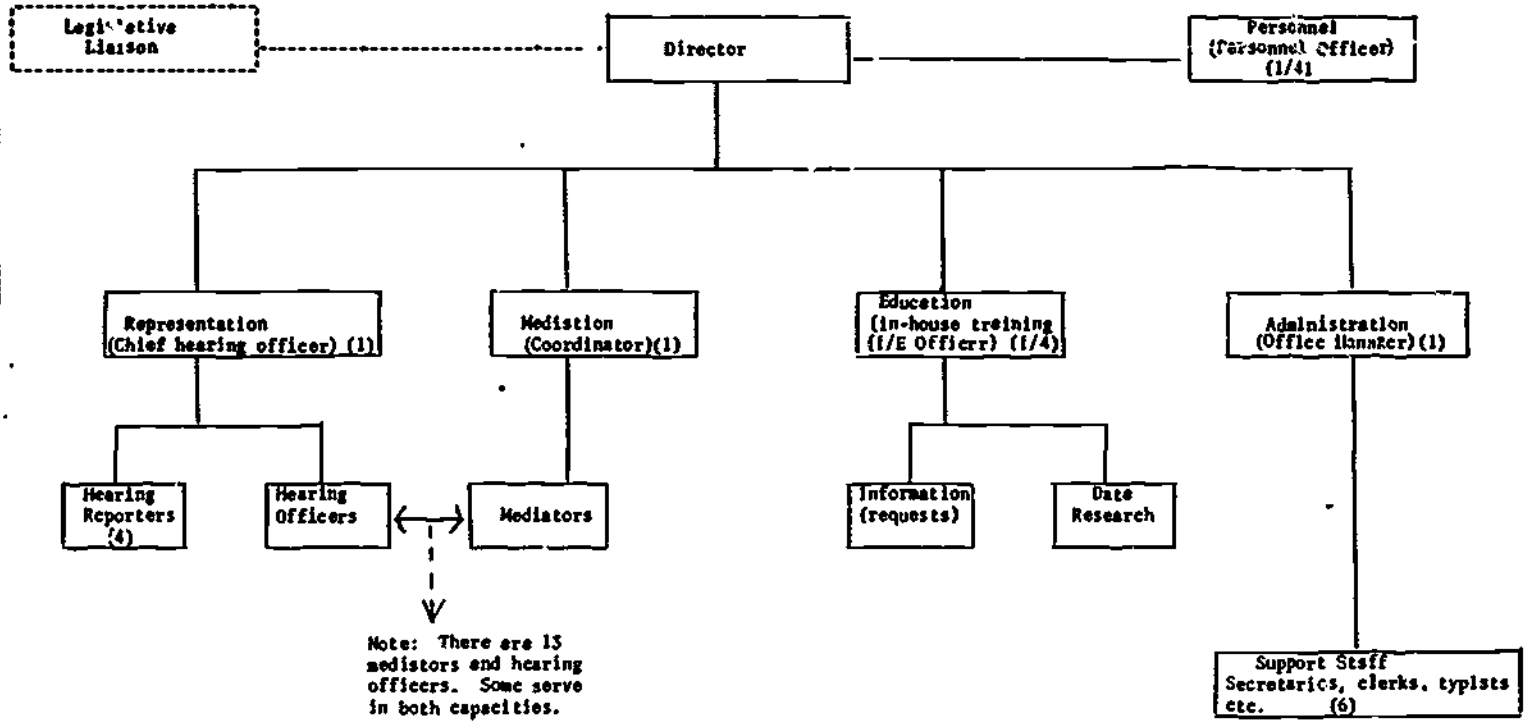
*Administration of the law is totally at the state level. The Minnesota Public Employment Labor Relations Act neither specifically prohibits nor permits voluntary recognition of a union as exclusive representation by an employer without the involvement of BMS. Obermeyer indicated that lack of BMS certification as exclusive representative would put the bargaining unit in a tenuous position for exercising at least some of the organizational (union) rights granted in the law. Some of these rights are contingent upon certification by BMS. In addition, Obermeyer said, lack of BMS certification might leave the uncertified organization vulnerable to a premature challenge from another union seeking to represent the same group of employees. Another possible local option not provided in the act is negotiation of or agreement on impasse procedures other than those detailed and assigned to BMS/PERB in the law.

MINNESOTA

BUREAU OF MEDIATION SERVICES



Note: Legislative Commission on Employee Relations oversees state bargaining, may recommend legislative changes.

Professional Staff	14
Support Staff	11
Total	25

Figure 2

Additional responsibilities are listed in the law, but this report will focus primarily on the items listed above.

In order to execute his responsibilities, the director employs a staff of 25, of which 14 may be regarded as professional, with the remainder supplying clerical and technical support services. The bureaus is divided, essentially, into four major units: A representation unit under the direction of a chief hearing officer, a mediation unit guided by a coordinator, an education unit (for in-house staff training as well as training and information for clients) headed by an information education officer, and an administration unit headed by an office manager. In additon, the personnel function is considered a separate one, and is executed by a staff mediator assigned the personnel function. The director interviews and/or recommends the hiring of all staff members. See the structural diagram, Figure 2.

As Figure 2 indicates, there is some "cross-pollination" of the staffs of the representation and mediation units. Obermeyer noted: ". . . probably our largest commitment of personnel is to the mediation function." But, he explained, the 13 mediators also may be hearing officers:

> The job classification (for both) is mediators. Some tend to specialize more in hearings, some tend to specialize more in pure mediation, and some do both. . . We like to have upwards of four to five people that have hearing officer skills. We have probably three people that spend 75 percent to 95 percent of their time on hearings (representation and/or fair share fee challenges) . . .There are about three that have dual skills. . and there are some mediators that do nothing but mediation. . . It seems to be easier to develop the basic mediation skills than it is to develop the hearing officer's skills. . . but they can all go out and hold a hearing in a pinch.

BMS mediators/hearing officers tend to be "experienced individuals," said Obermeyer:

> We have hired, generally, in the 40-50 age bracket, people who come from labor or management, having actual backgrounds in negotiation and contract administration. . . We have not attracted those individuals that are young with a vast amount of education as opposed to experience. . . although we do have an individual working on a doctor's degree and one who is an attorney.

However, Obermeyer continued, the education background of the mediators/hearing officers can run from an eighth-grade education on up. Experience is of primary importance. For a discussion of staff training opportunities, see page 49.

The education unit is divided into two functional areas, each served by limited professional and support staff: an information and training function, and a data collection and research function.

The total budget for the BMS, submitted directly to the governor and the legislature as a part of the state budget, is about $990,000 for fiscal 1981.

Obermeyer estimated that 20% to 25% of the BMS case load was related to K-12 education. This figure cannot be compared, however, to figures from a solely public agency, because the BMS handles cases for the private sector as well. And since teacher contracts can only be negotiated for two-year periods that begin and end in July of odd years, the agency is faced with an enormous balloon in its work every other year. Over a five-year period, then, the number of K-12 education mediation petitions filed and the number of cases arbitrated with BMS looks like this:

CALENDAR YEAR	MEDIATION PETITIONS	IMPASSES ARBITRATED
1975	342	22
1976	32	5
1977	282	6
1978	8	11
1979	243	16

The number of representation cases filed is decreasing from year to year, since bargaining units have been in place for a number of years and challenges from other unions do not exceed 30-40 every odd year.

The figures above should be viewed in the context of the entire BMS operation, both public and private. Obermeyer estimated the work load of the BMS, dividing the public and private sector, and then narrowing the public sector load to the K-12 area (teachers and other school personnel) only:

	Public Excluding K-12	Public K-12 only	All Private
Representation Cases	67.5%	22.5%	10%
Mediation Cases	40%	25%	35%

THE PROCESS: Unit Determination, Representation, Elections and Recognition

After a group of teachers in a school district has organized for the purpose of bargaining with their school board on their terms and conditions of employment, they generally seek official certification from the BMS. The first step in this process is the filing of a representation petition.. As is usually the case, the petition must identify the parties, provide appropriate proof of support (showing of interest) of the teachers* and otherwise conform to the time, format and information requirements of the BMS. In Minnesota, the signatures of at least 30% of the employees in a proposed bargaining unit are considered adequate proof of a showing of interest.

Joint requests for certification are encouraged by the BMS, particularly if the certification request is a "cut-and-dried" one, where the union and the employer are in agreement on all the issues. In a joint request, both parties apply for the certification. Obermeyer illustrated:

> "The employer and the union literally say to us (1) we jointly agree to the description of the appropriate unit, (2) we jointly agree as to the employees and positions excluded from the unit, (3) we jointly agree upon the employees who are included in the unit, and (4) the employer stipulates that if the union can demonstrate authorization cards for more than 50% of the eligible employees the union can be certified as the exclusive representative."

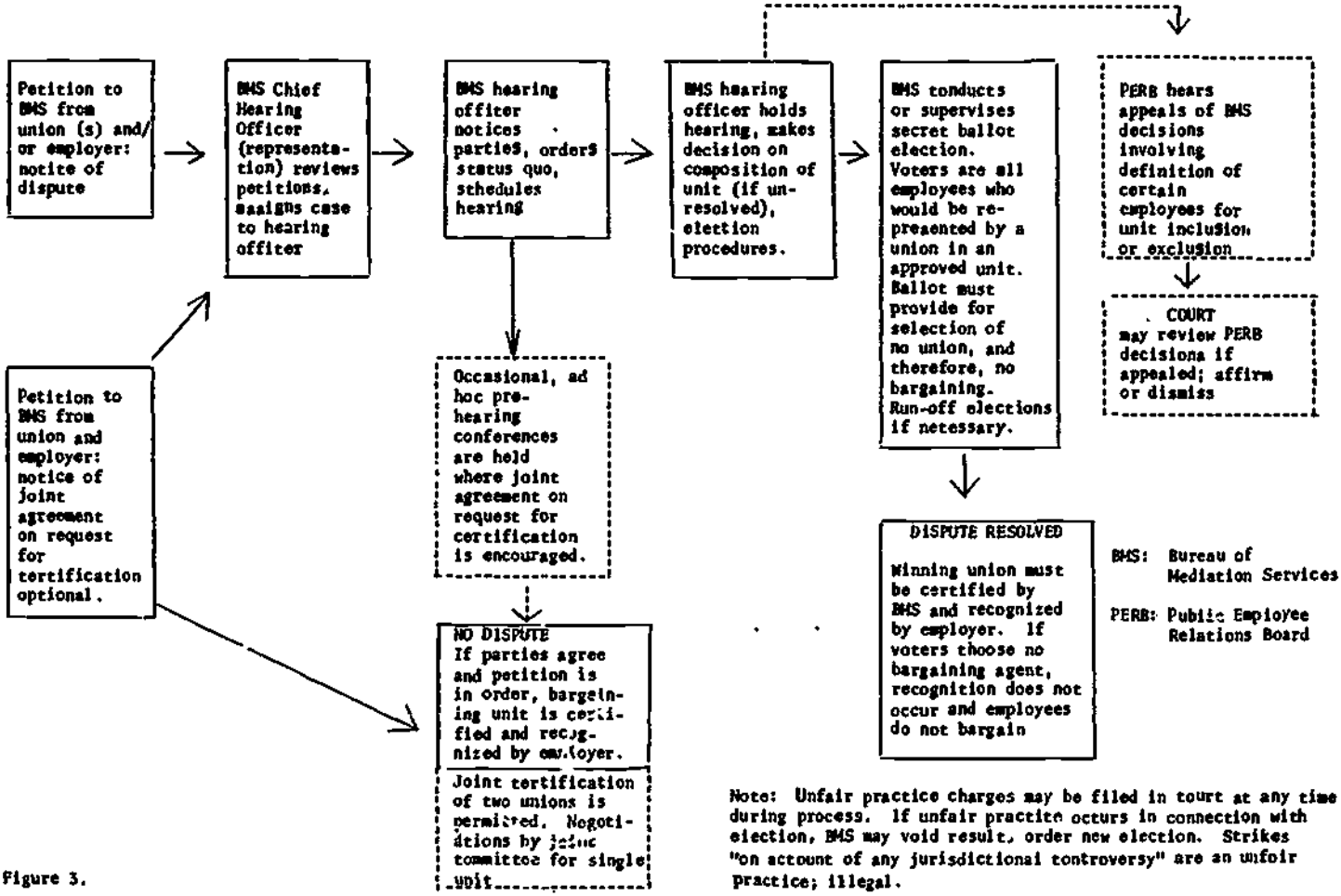
A joint request for certification is disposed of quickly in a pro forma process. The BMS representation unit reviews the paperwork, ascertains that the showing of interest is adequate and that no other union holds valid certification as an exclusive representative, sends out a notice of intent to certify, and if no one objects within a 10-day period, the union is certified by

*Minnesota Law (179.63, subd. 13 and 17) requires that only licensed teachers be included in a unit of teachers.

MINNESOTA

Unit Determination, Representation and Recognition Disputes

(for K-12 Education Sector)



Note: Unfair practice charges may be filed in court at any time during process. If unfair practice occurs in connection with election, BMS may void result, order new election. Strikes "on account of any jurisdictional controversy" are an unfair practice; illegal.

Figure 3.

the director, and is eligible to begin bargaining. That is the easy way to begin a bargaining relationship!

Conflict, of course, can and does arise in some cases. A petition by a union for a proposed bargaining unit may be complicated by a lack of agreement between the union and employer on the composition of the unit -- the kinds of employees who will be included in the grouping that is seeking representation. This is a unit determination dispute. Additional common points of conflict are a doubt expressed by the employer that the union has an adequate showing of interest, a challenge by another union (with at least a 30 percent showing of interest) wishing to represent the same group of employees, or a dispute as to the supervisory or confidential status of certain employees.

The presence of these indications of conflict -- differences over unit composition, insufficient proof of union support, and a valid challenge by another union -- almost inevitably requires that the parties follow through on procedures that lead to an election and final resolution of the dispute. Of course, there are other possible areas where conflict may surface as well; some of these are enumerated in a section on unfair practices later in this report.

What happens at the BMS when a representation conflict occurs? Disagreements surface when, or shortly after, the petition for certification is filed, either in person or by mail. After a clerk checks the petition for completeness, accuracy and validity, it is passed on to the chief hearing officer of the representation unit in the format of a case file. The officer again reviews and verifies the file before assigning the case to a hearing officer (or to himself).

Assignments are most often based on the availability of a hearing officer, and with coordination of geographically proximate cases and hearing officer/reporter travel schedules as important determinators. Obermeyer explained:

> We may sit on a case for two weeks, if, for example it's on the Canadian border, hoping we will get another case up there so we can financially justify sending two people [hearing officer and reporter] out. But we won't let it sit for very long. Generally, we've been able to tie our travel and time commitments together fairly well. We feel that the questions raised by a representation petition must be answered on a timely basis for everyone involved.

A BMS cease-and-desist order is issued after the petition is reviewed and verified, telling the parties not to make "any changes in the terms and conditions of employment until the matter is completed." Then hearings are scheduled and held. Obermeyer was asked if pre-hearing conferences were used. He replied: "The pre-hearing is something we will do on an ad hoc basis, but it is not a procedure that is built into our system."

During the representation hearing, which is "just like any other administrative hearing," the object is to:

> . . .identify the areas of agreement and disagreement, and to satisfy the hearing officer that the evidence and testimony that have been submitted are sufficient. . . The hearing officer retains the right to seek additional information in the form of a direct examination or subpoenaing additional information."

When the hearing officer and reporter (team) return to the St. Paul office, they prepare a preliminary report of the hearing along with a "draft order" -- the hearing officer's decisions on the items in dispute and those the parties are in agreement on. Obermeyer reviews the report and order with the team, and a final decision is issued in his name, as director of the bureau. This final order will describe the composition of the bargaining unit, identify the employees who are eligible for inclusion in the unit, identify those employees excluded from the unit, and include arrangements and procedures for a representation election (on-site if possible and desirable) to be conducted by BMS staff.

Obermeyer prefers that appropriate units - whether he considers the composition good or bad - be agreed upon by the parties. He explained that:

> "I have a basic philosophy that in labor relations, labor and management know what is best for them or at least what they can live with. Although I see some stipulated units that I would never agree to or determine, I'm not going to substitute my judgment for that of the parties, provided the unit stipulated to is not illegal."

Unit composition decisions are appealable to the PERB, which will review the appeal and issue decisions based on the BMS record and written and oral briefs. But the PERB does have the authority to request additional evidence.

The BMS, as indicated above, conducts and/or supervises elections to determine whether a union, if any, will represent a "unit" of employees. The representation function," said Obermeyer, "is a state function, to hopefully establish the foundation for constructive labor-management relations." The election results will identify the decision of the employees for certification by BMS. The stage is set for the bargaining relationship. See Figure 3 on page 35.

Of course, the possibility exists that employees will choose no union, and therefore no bargaining. Run-off, or even new elections may be necessary before the process is completed. Unfair election practice charges, filed before, during, or after an election, may complicate and delay the establishment of a bargaining relationship.

THE PROCESS: The Fair-Share Fee Issue

An issue associated with representation, and indeed, handled by both the BMS and the PERB, is the fair share fee challenge.* According to Obermeyer, 90% of the fair share cases involve teachers. Said Obermeyer:

> I suggest the reason is primarily the rivalry between the organizations, NEA and AFT, frankly doing battle with each other. This becomes another forum for them to do battle in. . . What traditionally happens is one individual raises the question on behalf of himself and two. . . or forty other people. The organization that's "out" challenges the organization that's "in". The next time the roles will be completely reversed. . . The problem is it's requested a commitment of an awful lot of time that is not frankly particularly productive.

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* A fair share fee is defined in the Minnesota law as a salary deduction made "for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative," not to exceed 85 percent of regular dues (Sec. 179.65 (2)). A fair share fee challenge "means any proceeding or action instituted by a public employee, a group of public employees, or any other person, to determine their rights and obligations with respect to the circumstances or the amount of such a fair share fee assessment. . ." (Sec. 179.63 (19)).

Nonetheless, challenges are received, hearings are held, BMS decisions are made and sometimes appealed to the PERB and on to the courts.

THE PROCESS: Unfair Practices

The Minnesota law places jurisdiction for unfair practice charges with the courts, and the BMS and the PERB have little to do with them. Because a description of court activity is not within the boundaries established for this report, we will do no more than discuss briefly some of the unfair practices listed in the Minnesota law.

The Minnesota Legislature has chosen to list, rather specifically, behaviors that are considered unfair practices in the law. Including the "umbrella provisions" used in most public employee laws -- (protection of employees' essential rights to join and participate in the activities of an organization that has bargaining with an employer as at least part of its purpose, and a requirement that the parties bargain in good faith), the Minnesota law lists a total of 11 employer unfair practice behaviors and 15 for employees.

For the employer, this list includes not only the umbrella provisions, but also:

1. refusal to comply with bargained grievance procedures
2. blacklisting to prevent individuals from obtaining or retaining employment
3. refusal to provide budget information to the exclusive representative

The employee list, in addition to the requirement to meet and negotiate in good faith, includes:

1. influencing the employer's selection of personnel to conduct bargaining and adjust grievances
2. calling strikes or boycotts against public employers because of a jurisdictional dispute (representation)
3. engaging and/or picketing in an illegal strike
4. committing acts designed to damage property or endanger personal safety during a strike
5. forcing employers to assign work to members of a particular organization (union) as opposed to another organization (union)

6. causing or attempting to cause an employer to pay for services that are not rendered

7. seizing, occupying or destroying an employer's property

Both employers and employees are required to comply with the orders/rules and regulations of the director of the BMS or PERB and both are required to comply with the provisions of "a valid decision of a binding arbitration panel or arbitrator."

Violations of the unfair practice items listed in the Minnesota Public Employment Labor Relations Act may be the subject of an action by "any employee, employer, employee or employer organization, exclusive representative, or any other person or organization. . . in the district court of the county wherein the practice is alleged to have occurred for injunctive relief and for damages caused by such unfair labor practice." (Sec. 179.68, subd. 1)

THE PROCESS: Interest/Impasse Resolution

"We've got to be careful with defining impasse, because impasse can have a very technical definition in terms of what can happen by law if we declare it." -- Peter Obermeyer, BMS director.

Mediation

The bargaining relationship begins between the representatives of the school board and the teachers union. If all goes well, they meet, agree on the issues to be bargained, negotiate compromises, and write and sign a contract. If this were universally the case, bargaining laws would not need to be as comprehensive as they generally are. While smooth and trouble-free bargaining does occur, particularly in mature relationships, there are enough cases where snags are hit to suggest a need for legal or negotiated provisions for dispute resolution. In Minnesota, such provisions are written into the Public Employment Labor Relations Act, and the Bureau of Mediation Services and the Public Employment Relations Board are charged with specific implementation responsibilities. What happens when the bargaining parties have problems -- reach a point at which they feel mediation is necessary?

"They notify us," said Obermeyer, "and request that we enter the negotiations." The petition for mediation assistance may be filed by either or both the union and the employer, with, on the average, unions filing 60 percent of the time, employers, 20 percent;

and both, 20 percent.*

The coordinator of the BMS mediation unit (himself a working mediator) reviews the request and assigns the case to a mediator, applying generally the same criteria for assignment that are used in the assignment of hearing officers for the representation function: availability, travel coordination, and on occasion, the wishes of the parties or personal characteristics of the mediator. The BMS, incidentally, does not use ad hoc, or per diem, mediators. It does have the authority to employ per diem mediators, but apparently has not experienced a truly pressing need to do this to date and in fact, is concerned about the availability of qualified ad hoc mediators in the state.**

After the mediation coordinator schedules the first meeting between the parties and the mediator, the conduct of the case is left totally in the hands of the assigned mediator. Said Obermeyer:

> It literally becomes up to the individual mediator to schedule and contact and keep track of the parties -- when and where they are going to meet. . . The case has been assigned. They establish a place where they will meet. The mediator generally arrives 15-20 minutes ahead of time, to make sure the facilities are arranged, to identify and meet the parties. . . In many cases he knows them from the past. . .and then the process starts.

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*Obermeyer on mediation petitions:

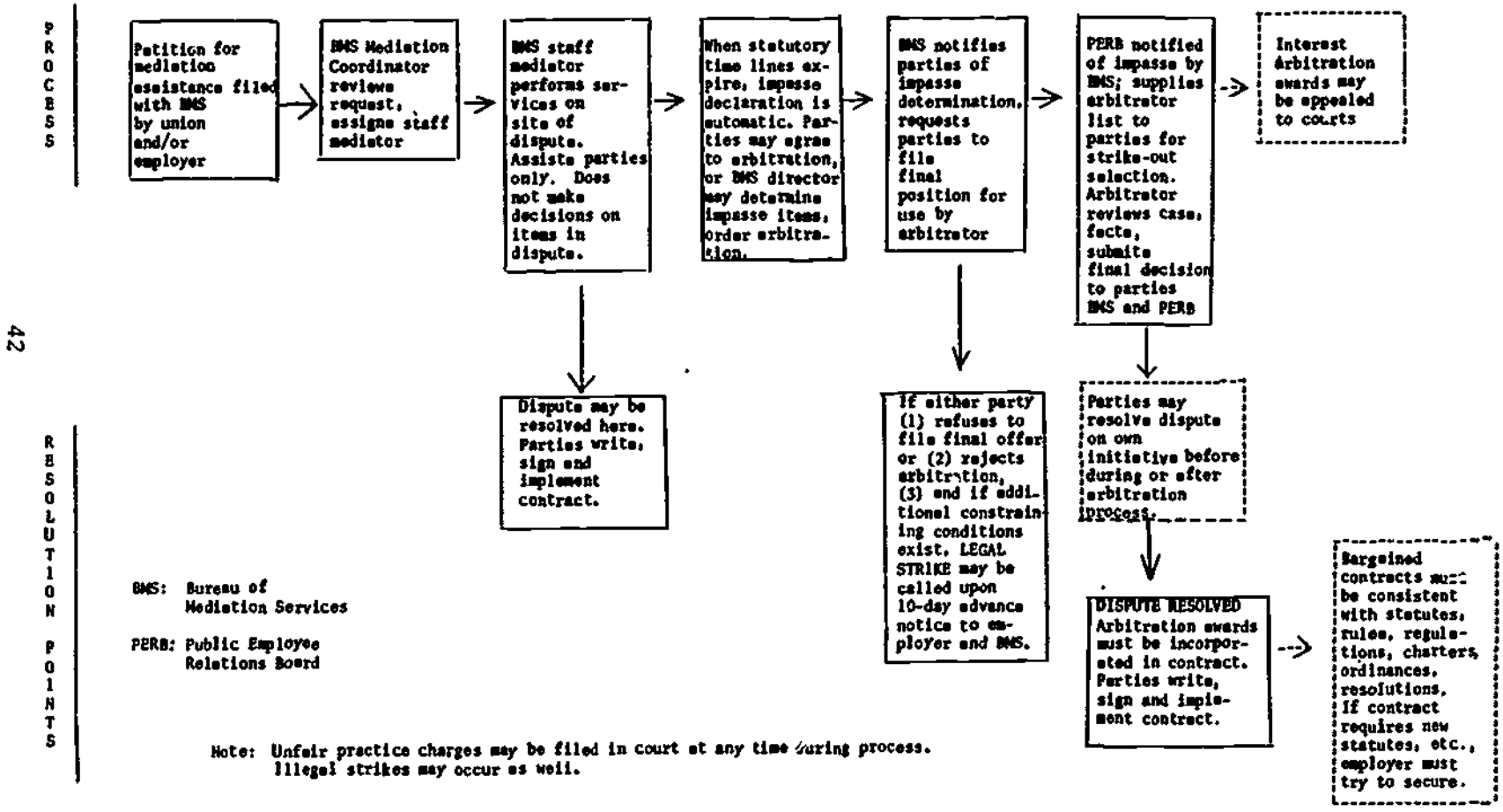
> "Who files, why, and how is generally not a big issue. The parties get to a point where they're just not getting anywhere, look at each other and say, 'Do you want to file, or shall I?' There may be some game playing with the requesting of mediation, but very little."

**Obermeyer on per diem mediators:

> "We have the right to hire them. . . The problem with the ad hoc is, where do you go to get them? There are some arbitrators who are former mediators, but they are getting $200 to $350 per day for arbitration. They are not going to be overwhelmed at coming to the Bureau at $100 per day."

MINNESOTA

INTEREST/IMPASSE RESOLUTION
(For K-12 Education Sector)



BMS: Bureau of Mediation Services

PERB: Public Employee Relations Board

Note: Unfair practice charges may be filed in court at any time during process. Illegal strikes may occur as well.

Figure 4

> The process is basically informal. . . There is really no limitation on time except when the mediator has to be someplace else. . . From there on in there could be meetings between the two spokesperson from each party, separately or with the mediator at different times, different dates. He/she may suggest lunch the following day, for example. . . Hearings are much more structured, while mediation is a very informal type of operation. . . it begins with the process of gaining trust, offering alternatives, suggesting areas of settlement, trying to get some insights, into where the parties will go. . . In some cases, fatigue is a factor; there are all sorts of dimensions that come into play. Obviously, there may be recurring meetings--two or three or four or twenty--but we don't like to encourage the twenty-meeting thing. . . if the mediator is effective, the contract will be resolved, ratified and the mediator goes on the the next dispute.

For an impasse declaration in teacher bargaining, mediation must be conducted for 60 days, with 30 of those days occurring after the expiration of an existing contract. If either or both parties do not petition the director of the BMS for a declaration of impasse before the expiration of the 60-day period, the parties are by law are declared to be at impasse.*

Arbitration

Minnesota law does not provide for the use of fact-finding process, so, when impasse occurs, the provisions leading to arbitration of a dispute or the right to strike are activated.

There are two conditions under which public sector unions and employers proceed to arbitration after impasse has occurred by the expiration of statutory timetables or determination by the director:

1. upon the voluntary agreement of the employer and exclusive representative of "other-than-essential" employees to arbitrate their impasse.

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*These provisions are contained in SF 2085, Chapter 617 of 1980, an act that significantly ammended Minnesota's bargaining law. Note that in Minnesota, "impasse" is declared after the mediation process has failed, and not, as in most other states, when mediation is authorized.

2. upon the director determining impasse based on the belief that further mediation would be useless for essential employees and their employer,

Where arbitration is implemented the parties are so notified and must submit their "final positions" on the items or issues determined by the director to be at impasse.

When the final positions of the parties are submitted to BMS, they are forwarded to PERB, which supplies the parties with a list of potential arbitrators. Seven names are forwarded to the parties, and, using a strike-out process, they select a panel of three, or (most often) a single arbitrator. From that point on the arbitrator is totally in charge of the case.

The arbitrator contacts the parties, sets a date for and conducts a hearing, proceeding much like a BMS hearing officer. He/she takes in the information, evidence and testimony, gathers up data and briefs as necessary, and writes the award, which is binding on the parties.

While, as indicated above, the parties must submit their final positions to the arbitrator, he/she is not required to include either position, in its entirety, or specific item positions, in the final award.* Further, the parties may agree to exclude certain items from arbitration, and indeed, have the latitude to settle, between themselves, all or part of the dispute before and even after the arbitration award is transmitted to the PERB, the BMS and the parties.** These binding awards may be subjected to court review.

On rare occasions, Obermeyer indicated, an arbitrator will send the parties back to the bargaining table. He illustrated:

> We've had cases where the arbitrator said, "I'm not going to hear this case. You've got too many remaining issues. Go back

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*Arbitration for "essential" employees is final offer item by item as opposed to "conventional arbitration".

**The settlement of disputes by the parties is encouraged by the statute, which states: "The parties to an arbitration proceeding may at any time prior to or after issuance of an order of the arbitration panel, agree and settle upon terms and conditions of employment regardless of the terms and conditions of employment determined by the order." (Sec. 179.72 (11)).

and resolve some of them." Not many of them have the guts to do that, but it is done every once in a while. . . We once had a case with 63 items, with only two really in dispute. But the parties said "all or nothing" and the arbitrator lumbered through three days of hearings. Then the parties reached a settlement after the hearings and before the arbitrators award. Fortunately this is an exception.

THE PROCESS: Legal and Illegal Strikes, Penalties

In Minnesota, certain strikes are legal. The state's law, as amended in 1980, continues to prohibit any strikes by employees who are defined as "essential": firefighters, peace officers, guards at correctional facilities, employees of non-state hospitals, certain state and university personnel, and certain supervisors. Other employees covered under the bargaining law may strike under specified conditions. The special conditions under which K-12 teachers may strike are:

1. They must be in a unit that is certified as an exclusive representative for bargaining;

2. The collective bargaining agreement between the unit and the employer (school board) must have expired;

3. Mediation must have been conducted for at least 60 days, including at least 30 days after contract expiration;

4. Arbitration has been offered by one party and rejected by the other or 45 days has expired from the expiration of the 30 day mediation period;

5. The employer has refused to implement an arbitration award; and

6. The union has in writing given the director and the employer a 10 day notice of intent to strike.

All other strikes by public employees are illegal. For example, public employees may not strike because an employer has committed an unfair practice (the one exception is the employer's refusal to comply with a binding arbitration award), or because of a dispute arising out of the unit determination, representation and recognition process. Illegal strikes may be enjoined by the court.

Penalties for strikers under the Minnesota Public Employment Labor Relations Act are not particularly strong. One reason for this may be because the courts have jurisdiction over unfair practice charges (an illegal strike is one) and thus, exercise some discretion in the selection and imposition of penalities not only on strikers, but unions and employers as well. Penalties included in the law are:

1. No employee shall be entitled to "daily pay, wages, reimbursement of expenses or per diem" for strike days; and

2. Employees participating in illegal strikes may be terminated, but subsequently may be rehired on a two-year probationary basis; further, such terminated employees have appeal rights that may extend to the state supreme court.

THE PROCESS: Data Collection, Research and Studies

By law, the BMS is required to catalog and file orders and decisions of PERB, arbitration panels, grievance arbitrators, and the BMS director. Obermeyer discussed this function along with others:

> We collect contracts as well. The information is gathered for use internally, for the public, and for budget requests. That's one of the areas where we could do a better job. . . I think we could provide data to the parties that would serve the process a lot better. For example, we should provide digests of grievance and interest arbitration awards. We could well provide valid wage and basic fringe benefit information on some benchmark job classifications,. . . but this kind of data would have to be carefully monitored and reviewed, with precise and exact definitions of what it is.

Obermeyer expressed his view that, as far as data collection goes, the kind of data that aids the state and local bargaining process is not national data, or 50-state data, but concrete and specific regional (in-state and contiguous-state) information. Data collections covering the nation, he noted, are more useful to researchers, and to state administrators who, like himself, are interested in exchanging information with like officials/agencies. He indicated that knowledge of other states' operations might help him to improve and refine the operation in his own state.

But his primary concern as a state administrator is to:

> . . .collect information the parties can use. . . whatever makes the process easier or better for them should be our initiative. . . we should be advocates of the process of bargaining.

Research efforts in the BMS are limited. The Legislative Commission on Employee Relations, said Obermeyer, had done some basic research, mostly related to the 1980 amendments to the Minnesota law. The BMS does participate in and cooperate with research and training efforts at the university level within the state.

THE PRESSURES: Neutrality as a State Agency

"We're a free standing, separate agency in the state government," said Obermeyer. And this statement was borne out by a look at the statute, the Minnesota Labor Relations Act, that set up the Bureau of Mediation Services. But it is never possible to separate such an agency entirely from the state connection if it is funded by the state and staffed by state civil service employees. We asked Obermeyer if he had problems maintaining neutrality. He responded:

> No. The arguments have been raised by both labor and management (at the state level) and it goes like this: The union will say, "How can you be a truly effective mediator when you are an employee of the boss?" The employer will say, "How can you be a truly effective mediator when you are going to receive the same increase as negotiated in this process?" We're aware of the possible concerns, we face them, and we lay them out to the parties so that everyone knows what possible concerns can be raised with the mediator. Our mediators are not subjected to any influence because they have the right, if anyone even tries to influence them, to turn around and say "That's none of your business. I'm handling the case and the parties are going to decide, given the forces

of the market, or the strategy, how this will come out."* .

BMS clients generally consider the mediators of the agency professional "in the sense that their object isn't to grind anyone's ax," said Obermeyer. In addition, he pointed out that mediators who demonstrate biases would very quickly "poison the wells" -- destroy the trust relationship that is so vital for the mediator to have with both parties -- that they would be ineffective as a mediator. And such mediators, he pointed out, would not survive because the parties would be reluctant to use them. In other words, he explained, the mediator's maintenance of a position of neutrality is his or her job insurance. The one bias must be the bias for a voluntary settlement between the parties.

The Minnesota Bureau of Mediation Services carefully separates its mediation function from the representation function, and with the unfair practice charge function delegated to the courts, it is organizationally easier to do. The representation process must have been completed before the bargaining process -- hence mediation -- begins. Unfair practice charges which may be filed at any point in either process are out of the agency's hands. Therefore, there is at least a point of separation between the representation function and the mediation function of the BMS.

THE TECHNIQUES: Arbitration as an Exclusive Function

As noted earlier in this report, some of the BMS staff members function, at separate times, in both the roles of the hearing officer and the mediator in a system, which, in practice, is dedicated to keeping the functions separated. Another area where responsibilities, roles and functions should be separated, according to Obermeyer, is that of arbitration; arbitrators should confine themselves to arbitration and not be permitted to attempt

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*In addition to the right to reject attempts at influencing them, mediators are also prohibited by statute from exerting political influence on anyone else. Section 179.03 Minnesota Labor Relations Act reads "Any mediator. . . who exerts his influence, directly or indirectly, to induce any other person to adopt his political views or to favor any political candidate for office or to contribute funds for political purposes shall forthwith be removed from his office or position by the authority appointing him . . ."

mediation while they are functioning as an arbitrator. Obermeyer said:

> I don't care how you mix them around, but when it comes to someone who is going to make binding decisions on the terms and conditions of employment based on "evidence," that person should not have been or should not be in a position where he is trying to find the level of settlement for the parties. I think that is a conflict of interest. It's not that some of them are not very effective as mediators, but ultimately they have to make a decision based on the evidence alone. I disagree with a system like Wisconsin's where arbitrators are encouraged or required to mediate the same case they have been assigned to arbitrate. [Wisconsin Public Employment Relations Act].

THE TECHNIQUES: Staff Assignment and Training

Hearing officers and mediators are provided with periodic internal training, said Obermeyer. In addition, the agency is participating in a Midwest Consortium that provides training for personnel in these roles.* Training is also provided for support staff members (non-mediator/non-hearing officers) and hearing reporters. Said Obermeyer:

> We like to try to send the clerical people out on hearing cases -- what is a hearing, how does it operate? They should be comfortable with the process so that they can handle the written material. The more they know in terms of what goes on, let alone what is in the file drawer, the better.

The BMS has a general policy of encouraging staff members to move up through the organization but apparently has no specific programs to accomplish this purpose. Obermeyer said that the agency had one individual who started as a stenographer and is now a mediator but:

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*The Midwest Consortium was initiated by the Public Employment Relations Services project of Albany, New York, under the direction of Dr. Robert Helsby.

> . . . to date there has not been a very identifiable bridge between the support functions and the professional level. We may be able to break through on that very soon because we have a very talented support individual who has developed very good hearing skills but still needs to work on her mediation skills. This is the reverse of our usual staff development pattern. Traditionally what we get is people who are very skilled with mediation and negotiation and then have to teach them the hearing function. We very seldom hire a new person who has both skills.

The salary range for mediators/hearing officers is from $24,000 - $32,000. Obermeyer said that if he were given an option he would like to "break up the system of compensation a little bit, "into a two-or- three-tiered system so that "apprentices" or "trainees" could be introduced into the Bureau of Mediation Services at between $20,000 and $24,000 a year with an end point of journeyman status at the top of the mediators/hearing officers scale. With that kind of a system for some but not all of the mediator/hearing officer staff, Obermeyer speculated "you could hire two for the price of one. That would be advantageous. It has been hard to attract experienced mediators." Obermeyer reiterated that the agency was "fairly committed to experience as opposed to training in terms of value for ranking or rating mediators/hearing officers." Although, he added, "I suppose I was the only exception when I started (as a mediator) in the sixties. I came right out of college."

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento, California

and the

CALIFORNIA STATE MEDIATION AND CONCILIATION SERVICE
San Francisco, California

THE STRUCTURE: Board/Service, Staff, Jurisdiction and Responsibilities

When the California legislature in 1975 passed its Education Employment Relations Act, it not only moved the bargaining status of K-14 education personnel from meet and confer to the traditional bargaining stance, but it provided for the establishment of an education employment relations board, later renamed the Public Employment Relations Board (PERB). The legislation took effect in 1976 and the PERB was to provide the state-level implementation and administration of the law. A few years later in 1978, the legislature granted bargaining rights to state employees and following that, in 1979, extended these rights to personnel in state four-year postsecondary education institutions. PERB was given the additional responsibility for these sectors.

On June 4, 1980, Doris Ross interviewed* Janet Caraway, chief of operations for the California Public Employment Relations Board, in order to learn how this fairly new board was executing its burgeoning responsibilities. Caraway, with less than a year in her present position, has a working background in labor relations, having served as a supervisor of the representation staff in the PERB's Los Angeles regional office before she was moved into her present position** -- newly created in 1979. Her responsibilities include the coordination of the regional office services, the writing of policy manuals and regulations and the execution of special projects for the PERB members. Her discussion of the PERB operation was both comprehensive and insightful.

The PERB offices are located in a private building in downtown Sacramento somewhat removed from other state offices. Caraway indicated that, as far as she knew, the only reason the PERB was not located in a state office building was because there was no available space. When the PERB was first established, it

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*Interview time was limited to two hours.

**In August, 1980, Caraway was promoted to the position of director of the Sacramento PERB office. She is currently serving in the position half time, while continuing to function as chief of operations for the main PERB office.

served only the local education sector, and location in or outside of state facilities was not a concern because the agency was not involved in state-level disputes. But today, with additional responsibility for state-level agencies and institutions, board members prefer to be located in a non-state facility.

California's Education Employment Relations Act outlines the responsibilities and powers for the public employment relations board that it established. These include:

1. Unit determination disputes

2. Scope of bargaining disputes

3. Conduct/supervision of representation elections

4. Maintenance of lists of mediators, arbitrators and fact-finders for use by the parties in disputes

5. Within its discretion, the conduct of studies, the collection of data relating to wages, benefits and employment practices, the recommendation of legislation, and the contracting of research and training programs for bargaining parties

6. Adoption of rules and regulations

7. Unfair practice charges

8. Recognition, certification or decertification disputes

9. Within its discretion, delegate its powers "to any member of the board or to any person appointed by the board for the performance of its functions . . ."

By law, the PERB is not permitted to employ mediators, fact-finders and arbitrators as staff members. So the board, recognizing the long history and experience of the State Mediation and Conciliation Service (SMCS) with school disputes and interest and rights arbitration, has assigned the job of providing neutrals to the SMCS, by memo of agreement. There are additional powers and duties for the PERB listed in the law, but it is primarily those listed above that we will deal with in this report. In addition, this report will note some of the special interests and concerns brought out in the interviews with Caraway of the PERB and Edward Allen of the State Mediation and Conciliation Service.

The three members of the California PERB are appointed by the governor, with senate confirmation, for 5-year staggered terms. They are salaried ($53,540), reimbursed for necessary expenses, and serve in their positions on a full-time basis. They are prohibited from holding other jobs. There are no particular qualifications laid out for board members in the law nor is there a method outlined in the law by which the governor must make his selections. Practically, of course, when a vacancy occurs on the board, the governor does receive ad hoc suggestions from representatives of both labor and management. Caraway noted that the process was essentially political. Recommendations for appointments are made by various groups and organizations and individuals seek a board appointment on their own. It is up to the governor to evaluate people and decide on an appointment.

The current chairman of the board, named by the governor, is Harry Gluck. He has an extensive background in labor relations on both the management and labor sides, and came to the board from a position as general manager of a local union for county employees. He holds a law degree, as does Barbara Moore, who came to the board out of a legislative background, having served as chief assistant to the assembly majority leader for a number of years. The third member of the board at the time of the interview was Ray Gonzales, who had just announced his resignation and who left in mid-June. Gonzales was a former legislator and college professor.

The agency that serves the board is structured to perform "as a neutral agency in every sense of the word . . . we do not have a branch of the agency that acts as prosecutor in any manner," said Caraway. She explained that the agency personnel had two major responsibilities: representation and unfair practices. The term representation, in California, covers everything other than unfair practices, i.e., requests for recognition, interventions, decertification, unit modification, requests to conduct organizational security elections, public notice complaints, compliance issues, mediation, fact-finding and arbitration.*

Work in the representation area (as identified by Caraway) is divided among three regional offices located in Sacramento (apart from the main office), San Francisco and Los Angeles, with the mediators being provided by the State Mediation and Conciliation

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*For the project of which this report is a part, we have divided state-level implementation and administration of bargaining laws into three major areas: representation, impasse resolution and unfair practice charges. While we will discuss the operation of the California PERB as it is designed to function, we will separate unit determination, representation and recognition from impasse resolution (mediation, fact-finding and arbitration).

Service through an interagency agreement with PERB. The mediation function as explained by Supervisor Edward Allen in an interview at the SMCS facility in San Francisco will be discussed later in the context of this report.

Caraway explained the staffing of the PERB's regional offices:

> Each of these has a regional director and, under the regional director are representation staff members. These people are non-attorneys who are skilled in the handling of representation disputes and related matters. Also in the regional offices are attorneys who are responsible to the chief administrative law judge in the Sacramento office, and who handle unfair practice charges.

A minor area of responsibility for the regional office staff members is the processing of "public notice complaints." The California K-12 bargaining law requires that initial bargaining proposals be made in a public meeting; that subsequent proposals must be made public within 24 hours and that the public must have the time and opportunity to express its views on these proposals. A significant amount of time is taken up with this activity, especially in the Los Angeles office, where Caraway estimated that one-half the time of a staff person was involved each week.

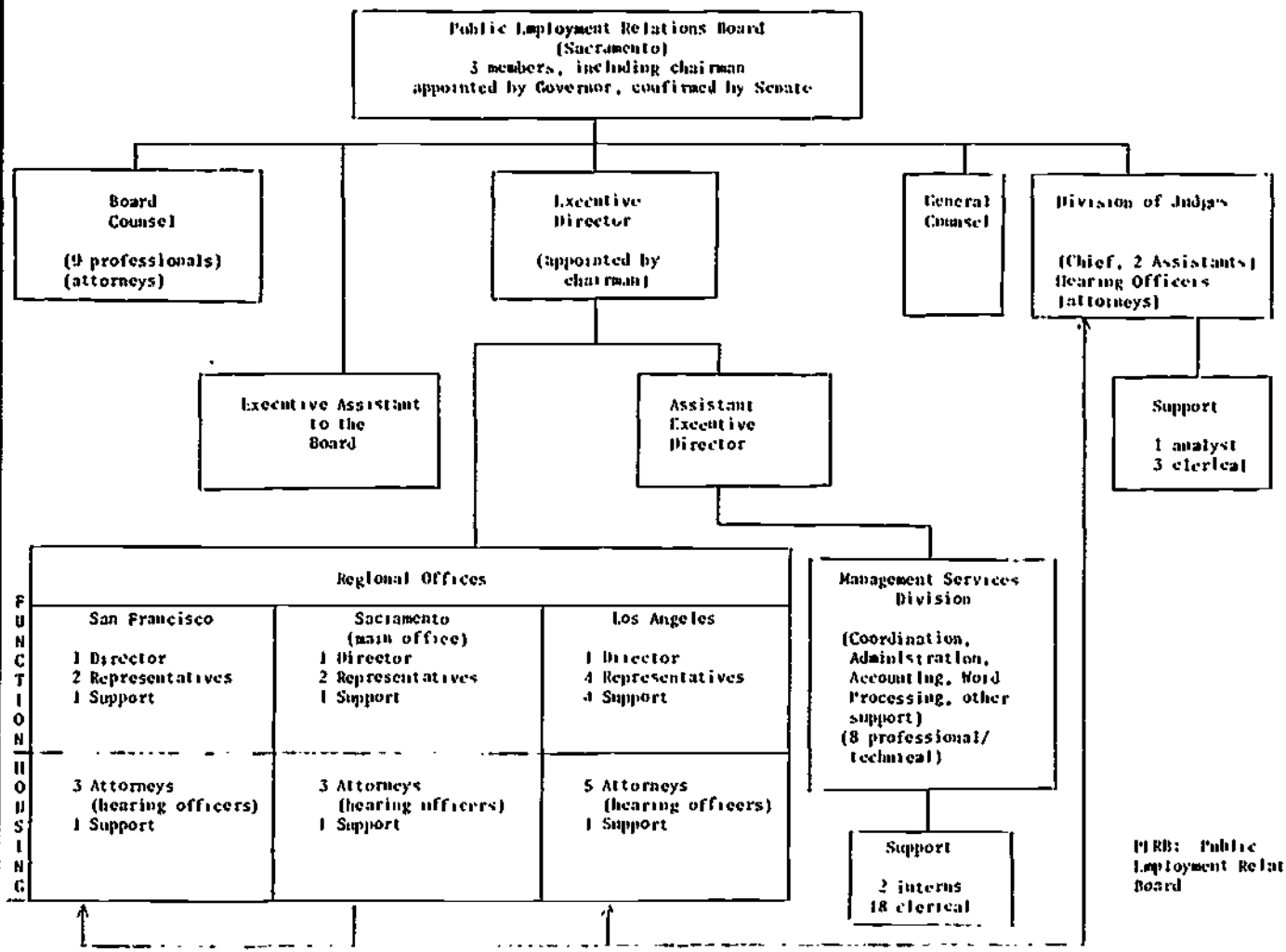
The executive director of the PERB, housed in the main office, has overall responsibility for the representation function in all three of the PERB regional offices and for the management services division that provides necessary coordination, administration and support to the entire operation. See Figure 1 on page 55.

As Figure 1 indicates, the unfair practice function is exercised in all three regional offices, but overall supervision of the process is assigned to the Division of Judges. This division is staffed by a chief administrative law judge and two other attorneys. It is under the direct supervision of the board.

In general, the board itself acts directly as an appellate body for matters related to the representation and unfair practice areas. Support for this activity is provided by "board counsel" and "general counsel." Under California law, each PERB member is entitled to three attorneys to provide legal advice and assistance (i.e., researching and reviewing appeals). These nine attorneys (three for each board member) constitute the board counsel identified in Figure 1. General counsel is a single attorney who assists and represents the board when it is necessary

CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD



PERB: Public Employment Relations Board

Note: Regional attorneys process unfair practice charges.
Representatives handle representation matters, impasse resolution.
General counsel works with Board on areas of direct board responsibility.

105 employees; not all represented on chart

Figure 1

to seek compliance with board orders, when the PERB is faced with litigation and when requests for judicial review are made. The general counsel also investigates requests for injunctive relief and, as necessary, reviews the rules and regulations of the board.

The PERB uses a careful process to develop its rules and regulations. Caraway explained a recent comprehensive revision:

> The board members or the executive director at any point can propose a new rule or rule change. About six months ago, the board decided to do a comprehensive review rather than a piecemeal changing of our regulations. And we had some new statutes to implement. The staff embarked on a comprehensive redraft of our regulations. These were first presented to the board in February; extensive public testimony was taken at the March and April meetings. The regulations were adopted by the board itself at the May meeting. The rules, along with appropriate documentation, are filed with the office of administrative hearings for review and subsequent filing with the secretary of state.

The board and its agency also operate under a state administrative procedures act.

Board members, the general counsel, board counsel, the executive director and the assistant executive director are not civil service employees, but the remainder of the staff is. They do not bargain for themselves.

The PERB is funded by the state as a separate and independent agency. Its budget has grown, along with its increased responsibilities related to the administration of two new areas of public sector bargaining -- state employees and employees of four-year state postsecondary education institutions. The budget for the board and its agency in 1976, at its beginnings, was $3.2 million and for the 1979-80 year, the figure stands at $5.2 million, which includes $1.238 million for this year to fund the increased work load associated with the board's new responsibility for additional areas of the public sector. Extra funds will be allotted in the following year as well.

Prior to 1980, the PERB's duties were focused on the K-14 education sector -- school districts and community colleges. Of the 450,000 school employees in California, some 88-90 percent are organized into bargaining units. At the time of the interview,

Caraway indicated that no units had yet been certified for bargaining by state and/or postsecondary employees, but that the agency was gearing up for the "crunch."

In passing, we will note here that the PERB's frustration level was elevated even further this year, when a state appeals court declared the bargaining law for state employees unconstitutional. New legislation is pending.

THE PROCESS: Unit Determination, Representation, Elections and Recognition

When teachers in a California school district have been organized and are ready to begin a bargaining relationship with their school board, they must, through their employee organization representative, file a request for recognition with their employer, and concurrently, send a copy of the request to the appropriate regional PERB office. This request must be accompanied by evidence of majority support of the teachers (and/or other personnel) to be in the proposed bargaining unit (signature cards, for example) for the employee organization wishing to represent them. When the state's Education Employment Relations Act was first passed in 1975, it did not require PERB involvement in undisputed representation matters but a few years later the law was amended to provide that the PERB "track" the process, at least. Caraway explained:

> We make sure the employer posts the request for recognition. We also check the showing of support. If the employer agrees with the unit proposed by the employee organization and we determine that there is majority support and there are no intervenors [i.e., another organization petitioning to represent the same unit], the employer is free to grant voluntary recognition, and the bargaining relationship begins. However, if the employer doubts that there is majority support, if there is an intervenor, or if the employer questions the composition of the unit, then PERB gets involved in the dispute resolution process.

Voluntary recognitions have occurred in some 75 percent of the approximately 2,000 school district or community college units (teachers and/or other school personnel) that are in place. Such recognitions, however, are not always granted by the employer on the spot, but after the PERB has initiated an informal dispute resolution step: the pre-hearing conference. These conferences, not required by statute, bring the parties together in an informal setting with a PERB regional representative, and, very often, enable them to discuss and come to an agreement on items in dispute. Caraway elaborated:

> Our staff has had really good success in resolving a lot of disputes at the informal level. And our emphasis is on every attempt to do that, while recognizing that the parties have an absolute right to a formal hearing, should they choose to have one. Usually, though, the parties are interested in trying to settle their disputes themselves, if they can, and they have been receptive to assistance from our staff.
>
> For the PERB, it is certainly much more cost-effective for us to meet with the parties a few times and resolve a dispute informally rather than go to a formal hearing and develop transcripts and have our staff spend time researching and writing a formal decision. It is just better all the way around. We like the idea of the parties resolving their own disputes, and living with what they have agreed to, rather than what someone else imposes on them.
>
> They're the ones that have a continuing bargaining relationship. They're the ones who know what their own problems are. And to the extent they can decide who their supervisors are, who their managers are, who their confidential employees are, so much the better. Our emphasis is really on settlement.

How does a disputed request for recognition get from its initiation point to a resolution? We have already indicated that the PERB gets involved early. When the request reaches the appropriate regional PERB, it is funneled from the regional director to a PERB representative who, after the tracking process is completed, notes the absence or presence of a dispute. In the absence of a dispute or when there is no other employee organiza-

tion involved, PERB's involvement is finished and the employer grants voluntary recognition to the employee organization. But when a dispute is present, the PERB representative brings the parties together for informal conferences, which, as discussed above, may resolve the dispute and end the PERB involvement.

If, however, a dispute still exists (over the composition of the unit, over majority support, or over which organization will represent the group of teachers), the case must be scheduled for a formal hearing. Normally, the representative who has held informal conferences with the parties does not conduct the formal hearing, although he or she may get the case back later. Caraway said:

> If a person has conducted an informal conference, and learned the positions and attitudes of the parties -- unless the parties request that person to conduct the formal hearing, which doesn't happen often -- it is turned over to a different staff member.

The person who serves as the hearing officer may be another PERB regional representative. If the representation dispute is complicated by unfair practice charges, those charges are handled by regional PERB attorneys. Thus, two processes can be occuring simultaneously for the same employer and employee organization. The role of the regional PERB attorneys will be discussed further in the following section on unfair practices. PERB regional representatives are not attorneys, and are not officially classified as hearing officers, even though they do conduct hearings. Caraway explained:

> They have developed a good deal of expertise on representation issues: who is a manager, who is a supervisor, who is a confidential employee, and also all of the community-of-interest questions where teachers and classified employees are involved. So, likely as not, such hearings are conducted by a representation staff member. In the beginning, representatives were concentrating on the settlement of early representation disputes and the conduct of elections. For this reason, our hearing officers(attorneys) conducted those early hearings.

A representation hearing is no different, procedurally, than any other administrative hearing. The parties present their cases, provide evidence and testimony, and argue the matter. The person conducting the hearing makes sure that a good record is established and, in fact, may subpoena documents and witnesses on his/her own motion. It is possible for the parties to settle their disputes on their own during the course of a hearing, but if the case doesn't settle, the person who conducts the hearing writes the decision in his or her own name.

The hearing officer's decision may include a determination of who will be in the proposed bargaining unit (personnel classification or categories) and, if appropriate, will order a representation election. The parties have twenty days to file "exceptions" to the decision in an appeal to the PERB board itself. If the decision is not appealed, it becomes final and the case is returned to its original PERB representative for follow-up.

The voters in a representation election are those who will be in the bargaining unit. The "candidates" include one or more employee organizations seeking to represent the bargaining unit, and "no representation." Regional staff members consult with the parties and then determine election details -- date, hours, on-site or mail, before a directed election order is issued by the regional director. A PERB representative runs the election, counts the ballots and issues a tally. The winning employee organization is certified as the exclusive representative and the bargaining relationship is born, or, the voters have chosen "no representation" and there is no bargaining relationship, at least for a time. See Figure 2 on page 61.

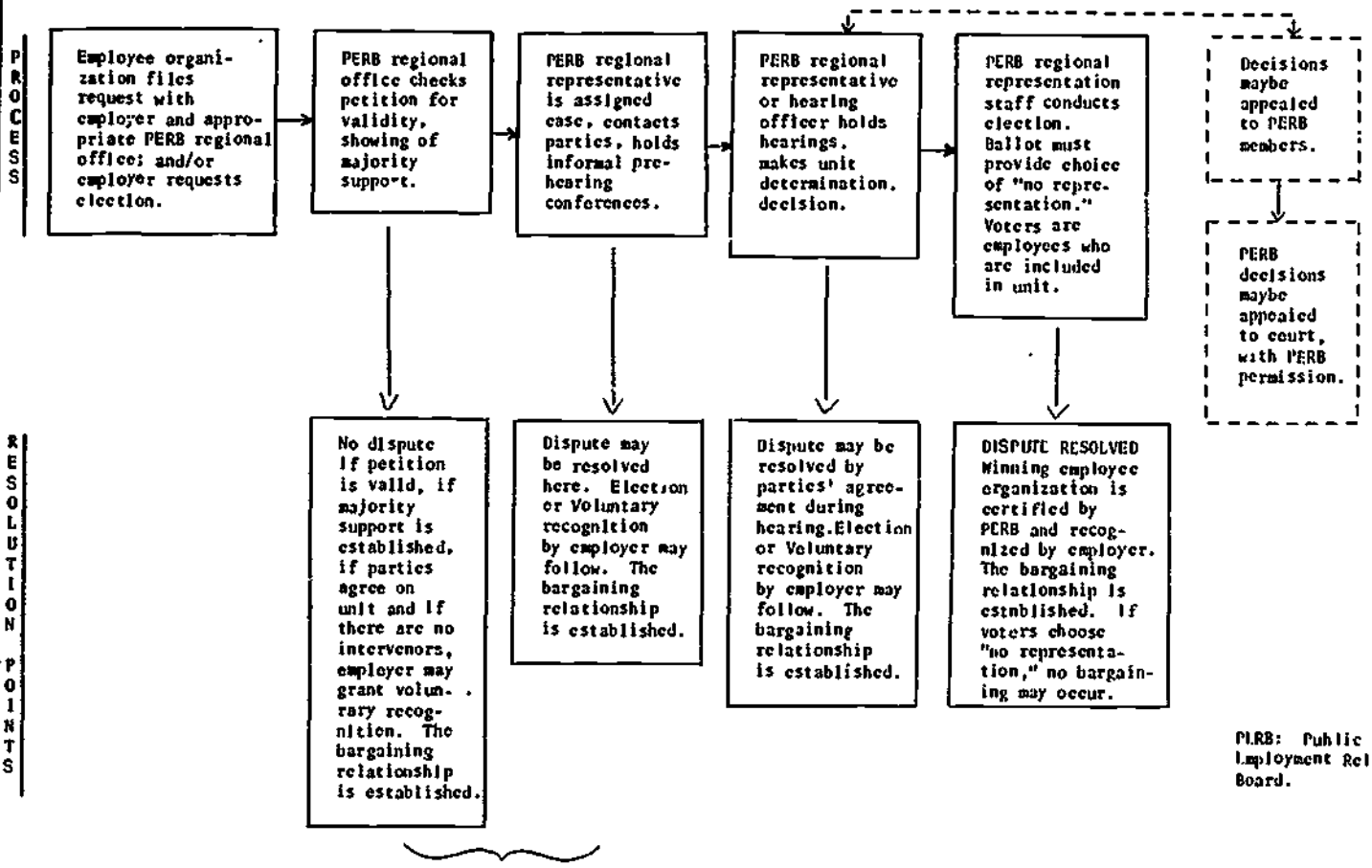
Caraway, pointing out that initial bargaining relationships are generally established in K-14 education in California, said that the PERB is now dealing increasingly with:

> . . . a whole series of second generation things that are going on now, which are handled by the regional representation staff. Some complex questions come up: What if a district unifies and takes portions of high school districts and elementary school districts? Questions of new positions and what to do with them, or old positions that nobody wanted to include before . . . . What if an employee organization affiliates with a national or international union of some kind? What if somebody files a a severance petition, which is a request for recognition of <u>part</u> of a unit? These are changes that PERB has to deal with.

CALIFORNIA

UNIT DETERMINATION, REPRESENTATION AND RECOGNITION DISPUTES

(for K-14 education personnel)



PERB: Public Employment Relations Board.

Note: Unfair practice charges may be filed during process. Strikes may occur.

Figure 2

The PERB has not been involved in agency shop fee challenges because they are not addressed in the law. In 1979, the PERB received 75 requests for recognition, and conducted 122 elections related to representation -- certification, decertification, organizational security -- totals that are coming down each year as organizations and school boards establish and settle into ongoing relationships. The board itself issued decisions in 20 representation cases. Unfair practice charges related to education in 1979 totaled 922, with 740 settled prior to hearing.

Are clients satisfied with the PERB's performance in the representation area? Caraway felt they were:

> I think we are perceived as good at getting representation disputes settled and getting clean elections conducted. Our overall reputation, I think, is very good in that area.

THE PROCESS: Unfair Practices

Practices listed as "unlawful" (unfair) in the California education bargaining law include the usual protections listed in many of the other state bargaining laws:

1. Unlawful employer behavior includes the threat of, or actual, reprisals or discrimination against employees who exercise the rights granted to them in the law, or actual denial of those rights. Employers may not dominate, interfere with, or make contributions, financial or otherwise to an employee organization, nor may they encourage employees to join one organization over another. They must meet and negotiate in good faith with an exclusive representative, and may not refuse to participate in the impasse procedure outlined in the law.

2. Unlawful employee organization activity includes causing or attempting to cause an employer to commit an unfair practice; and imposing or threatening to impose reprisals or discrimination against employees who exercise the rights granted in the law. They must bargain in good faith with the employer, and may not refuse to participate in the impasse procedure outlined in the law.

While the division of judges provides the funnel through which unfair practice charges must pass, the ultimate responsibility for them lies with the board itself. The process is succinctly explained in the PERB's annual report for 1979:

An employer, an employee organization or an employee may file a charge alleging an unfair practice. Upon receipt, the charge is docketed, assigned a case number and screened to see that it states a prima facie case. A copy is served on the party alleged to have committed the unlawful act. The respondent then files an answer to the charge.

If it is determined that the charge fails to state a prima facie case, the charging party is informed of the determination. If the charge is neither amended nor withdrawn, the chief administrative law judge may dismiss the charge. The charging party has a right to appeal the dismissal to the board.

When an answer to the charge has been received, a hearing officer [attorney] calls the parties together for an informal conference. At this time, efforts are made to settle the matter by mutual agreement. At the informal conference, the parties are free to discuss the case in confidence with the board agent.

If it becomes apparent that a voluntary settlement is unlikely, a formal complaint is issued and a formal hearing is scheduled. A formal hearing may be held at a PERB regional office or in the local community.

At the hearing, the hearing officer rules on motions, takes sworn testimony and receives other evidence. The hearing officer then studies the record, considers the applicable law and issues a proposed decision.

Hearing officers' proposed decisions are made in accordance with precedential board decisions. In the absence of a board decision on the same or similar facts, the hearing officer will decide the issue(s) applying such other legal precedent as is available.

After receipt of the proposed decision, any party to the proceeding may file a statement of exceptions with the board itself and submit briefs in support thereof. This method provides any party with the opportunity to appeal the

proposed decision before it would otherwise become effective. The board, after reviewing the record, may affirm the decision, modify in full or in part, reverse or send the matter back to the hearing officer for receipt of additional testimony and evidence. At any time during the above process, the board may elect to transfer a case from the hearing officer to itself.

Hearing officers' proposed decisions become final decisions of the board if not appealed and are binding on the parties to the particular case.

An important distinction exists between hearing officer decisions and decisions of the board itself. Board decisions are precedential and bind not only the parties to that particular case, but also serve as precedent for similar issues until modified or reversed by the board itself. They are approximately cited as precedent. Hearing officers' decisions bind only the parties to that particular case and not precedential.

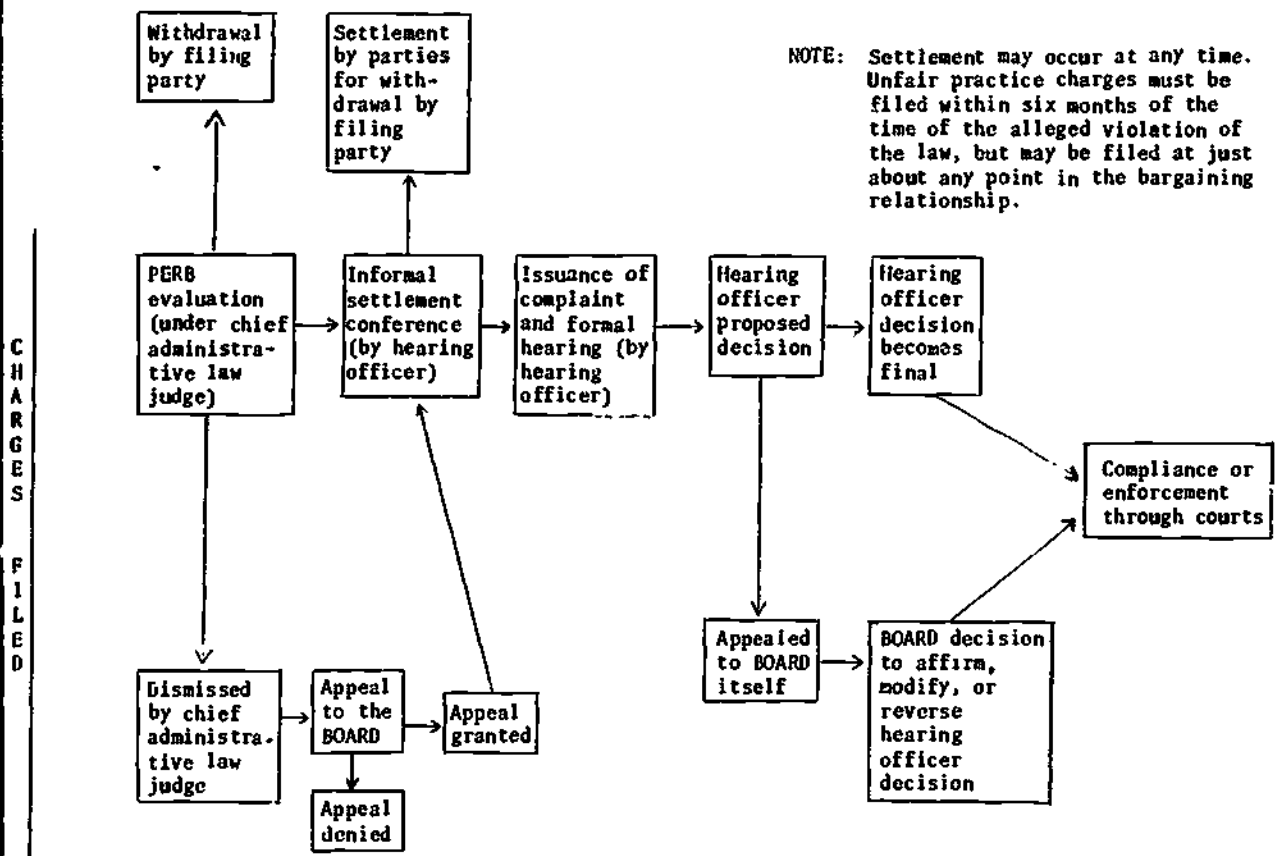
In 1979, 962 unfair practice charges were filed. Of these, 740 were voluntarily settled prior to hearing. During the year, hearing officers issued 53 dismissals prior to hearing and 34 proposed decisions after hearing . . . .

. . . board agents were extremely active in working with the parties in informal conferences, attempting to work out mutually acceptable solutions to the problems giving rise to the charges. In the vast majority of cases, this resulted in withdrawal of the charge by settlement.

Figure 3 on page 65, a flow chart for the California PERB unfair practice procedures, was taken from the PERB's annual report, and modified only slightly to enhance its use in this report. Its format is a departure from the general format developed for flow charts for this report, but it provides a clear picture of the operation that was developed by PERB staff.

CALIFORNIA

UNFAIR PRACTICE PROCEDURES



NOTE: Settlement may occur at any time. Unfair practice charges must be filed within six months of the time of the alleged violation of the law, but may be filed at just about any point in the bargaining relationship.

PERB: Public Employment Relations Board

BOARD: The three-member governing body for the PERB agency

Figure 3

Scope questions arise, said Caraway, largely through the unfair practice route, because a refusal to bargain charge is usually filed by the aggrieved party. The scope of bargaining clause in the law is, ". . . subject to hot debate as to whether or not certain aspects or certain things are or not within the scope of bargaining."

The California K-12 law is quite specific on scope of bargaining. Section 3543.2 begins by limiting scope to "matters relating to wages, hours of employment and other terms and conditions of employment." But then it goes on to define terms and conditions of employment rather specifically as:

> . . . health and welfare benefits . . . leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security . . . procedures for processing girevances . . . and the layoff of probationary certificated school district employees . . . . In addition, the exclusive representative of certified personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

Scope is further defined in several ways: through unfair practice decisions of the PERB, through appeal decisions routed through the courts, and in negotiated contracts. The scope, during negotiations, may or may not follow the guidelines established by law or decision. If the parties agree on contract items, and if no one objects officially, the scope of the contract stands.

Unfair practice charges may be filed in connection with a strike. This aspect of the unfair practice procedure will be discussed in the section below.

In addition, unfair practice charges may be filed in connection with a grievance. See THE PROCESS: Grievance Arbitration on page 77.

Thirty percent of the unfair practice cases that are filed are ultimately appealed to the board.

THE PROCESS: Strikes -- Legal or Illegal?

An issue without an answer in California is whether or not teachers have the right to strike. PERB has exercised its right to grant requests for injunctions when strikes occur. But the PERB's actions have been questioned, and indeed, the PERB members have been split on the issue themselves. Two cases in point illustrate the dilemma.

In San Diego Teachers Association et al., v. Superior Court of San Diego County (California Supreme Court, Case No. 399394, April 10, 1979), the court ruled that PERB has exclusive initial jurisdiction to determine if a work stoppage or lockout is an unfair practice under the education employment relations act. The case began in June 1977 when the San Diego school board requested, and got, injunctive relief from a threatened strike by the San Diego Teachers Association. But the court order did not avert a two-day strike, which ended when the school district assured the teachers that the issues would be resolved and that striking teachers would receive amnesty. But the superior court judge fined both the teachers association and its president, claiming that the injunction was violated and that the teachers association was in contempt of court. In addition, the president received a ten-day jail sentence. When the appeal of the employee organization reached the state supreme court, the contempt order was vacated, but only narrowly, in a four-to-three decision. The majority opinion noted that the lower court's contempt action assumed, on the basis of some precedent, that public employees may not strike in California. Further confusing the issue, though, is the section (3549) of the education employment relations act:

> The enactment of this chapter shall not be construed as making the provisions of Sec. 923 of the Labor Code applicable to public school employees . . . .

Section 923 guarantees employee organizations freedom from employer coersion in "concerted activity" -- which has been interpreted to include, among other things, the right to strike.

The court did not rule on the legality or illegality of strikes by teachers. Instead, the majority opinion noted that the PERB had the jurisdiction to decide whether or not a strike was an unfair practice; what, if any, remedies should be sought; and that

the legislative intent was that the PERB, not the courts, had exclusive initial jurisdiction in this area. The minority, in sharp disagreement, claimed that, "No statutory right to strike was granted to public employees" in the education employment relations act. Rejecting the majority opinion on PERB's exclusive initial jurisdiction, the minority said, "It is inconceivable to me that the legislature would seriously have intended such public impotence."*

A more recent case highlights and complicates the continuing controversy. Board members were philosophically split on the strike issue in Modesto City Schools v. Modesto Teachers Association, CTA-NEA and Modesto Teachers Association, CTA-NEA v. Modesto City Schools (PERB Case Nos. S-CO-48 and S-CE-318, 319, 320, March 10, 1980). Again, the issue of jurisdiction was a point of contention. During a strike by the teachers' association, a superior court judge, after first refusing to issue an injunction, responded to a second request for injunctive relief filed by the PERB general counsel, and ordered the strikers back to work. Both parties had filed unfair practice charges, over which the PERB has undeniable jurisdiction. The employer had claimed that the strike was an illegal pressure tactic and the association charged the school board with making unilateral changes in the teachers' terms and conditions of employment, with refusing to resume bargaining, and with discrimination against employee organization members. Two board members, Gluck and Moore, felt that the strike, as possible unfair practice, needed further investigation before, or if, a request for injunctive relief was made. The third member of the board, Gonzales, reasoned that since the strike was not clearly an unfair practice (requiring further investigation, according to the other two members), the PERB did not have jurisdiction, and " . . . therefore cannot furnish relief equivalent to that available in a court action." Gonzales summarized his opinion:

> . . . a decision to legalize strikes far exceeds the authority given to PERB by the legislature. Such a major decision should be made by the legislature or the courts and not by three members of an administrative board who are neither elected nor subject to removal from office for anything short of malfeasance or dereliction of duty. My decision in this case would place the ultimate issue of whether a strike that is

*Government Employee Relations Report, The Bureau of National Affairs, Inc., 809:18, May 7, 1979.

not an unfair practice is illegal in the more appropriate forum of the courts.*

Is there, or is there not, a right to strike in California? At the time of the interviews (June 1980) no one was sure.

However, since the San Diego case, the PERB has adopted regulations covering how someone confronted with a strike files an unfair practice charge and a request for injunctive relief with the PERB. The board has adopted an expedited procedure for evaluating requests and making determinations, most often within 48 hours, on whether or not they will request a strike injunction from the court. And since then, Caraway elaborated:

> PERB has gone to court on several cases. The majority of them have been those in which they have found that the statutory impasse procedures had not been exhausted. But we still have the difficult question of what happens if they have been exhausted.

THE PROCESS: Interest/Impasse Resolution

Mediation

As noted earlier in this report, the California Public Employment Relations Board delegates, by memo of agreement, the provision of mediators and other neutrals to the State Mediation and Conciliation Service (SMCS). The SMCS main office is located in San Francisco, and is augmented by regional operations in San Diego, Los Angeles and Fresno. It is part of the Department of Industrial Relations, but located in a private office building in downtown San Francisco. On June 10, 1980, Doris Ross interviewed** Edward Allen, Supervisor, State Mediation and Conciliation Service, in the San Francisco office. Allen came to the SMCS from a private labor background, that is, he was employed by local employee organizations before he went to work for the state. He discussed his operation with an easy, quiet assurance that spoke of considerable competence.

The SMCS provides mediation services as requested by PERB for the statutes under the board's aegis: the Education Employment Relations Act, the state employee act (declared unconstitu-

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*Government Employee Relations Report, The Bureau of National Affairs, Inc., 863:24, May 26, 1980

**Interview time was limited to two hours

tional) and the higher education employee act. As indicated in a prior section, the last two statutes have not yet been the subject of much activity. In addition, the SMCS provides dispute resolution services, and even conducts some elections, for the remainder of the public sector (cities, counties and special districts) as well as the private sector. Rules and regulations are not developed by the SMCS.

The agency is staffed by Allen, an administrative assistant, a few clerical support people (5 ½) and 20 professional mediators who are dispersed among the four locations mentioned above. Of the regional operations, three of them have a "presiding conciliator" in charge, with San Diego being staffed by one conciliator (mediator) and a stenographer. The mediators, the majority of which come from labor backgrounds, are selected through the state civil service system, are paid from $27,684 to $33,468 per year, and have chosen not to bargain for themselves. The agency does not use ad hoc or per diem mediators. For additional discussion on SMCS mediators, see the succeeding section entitled, THE PRESSURES: Work Load and Coordination on page 78. For a graphic illustration of the SMCS, see Figure 4 on page 71.

In preceding sections, we have traced the bargaining process through to an establishment of the bargaining relationship, with PERB executing direct jurisdiction over the representation and unfair practice activities. The SMCS enters the picture after the parties have negotiated for a time and have failed to reach an agreement. One or both of the parties may decide that help is needed. The PERB's Caraway outlined the typical process:

> The statute provides that they can apply to PERB to appoint a mediator. We have five working days to approve or deny any request for declaration of an impasse, so we assign top priority to those when they come in. Our regional representation staff will evaluate the request, which can be made by phone, but must be followed by a written request where we have signatures from both parties saying, in essence, "We agree. We're at impasse."

In the beginning, Caraway explained, the parties were reluctant to make joint requests. She speculated that this reluctance stemmed from the fact that, since the parties did not agree on the issues, they felt they should not agree on the need for a mediator. But, as the parties get more bargaining experience, they become more amenable to making joint requests. And, Caraway added, "the representation staff has really been superior in their abilities

ORGANIZATION CHART
STATE MEDIATION/CONCILIATION SERVICE
DEPARTMENT OF INDUSTRIAL RELATIONS

CALIFORNIA

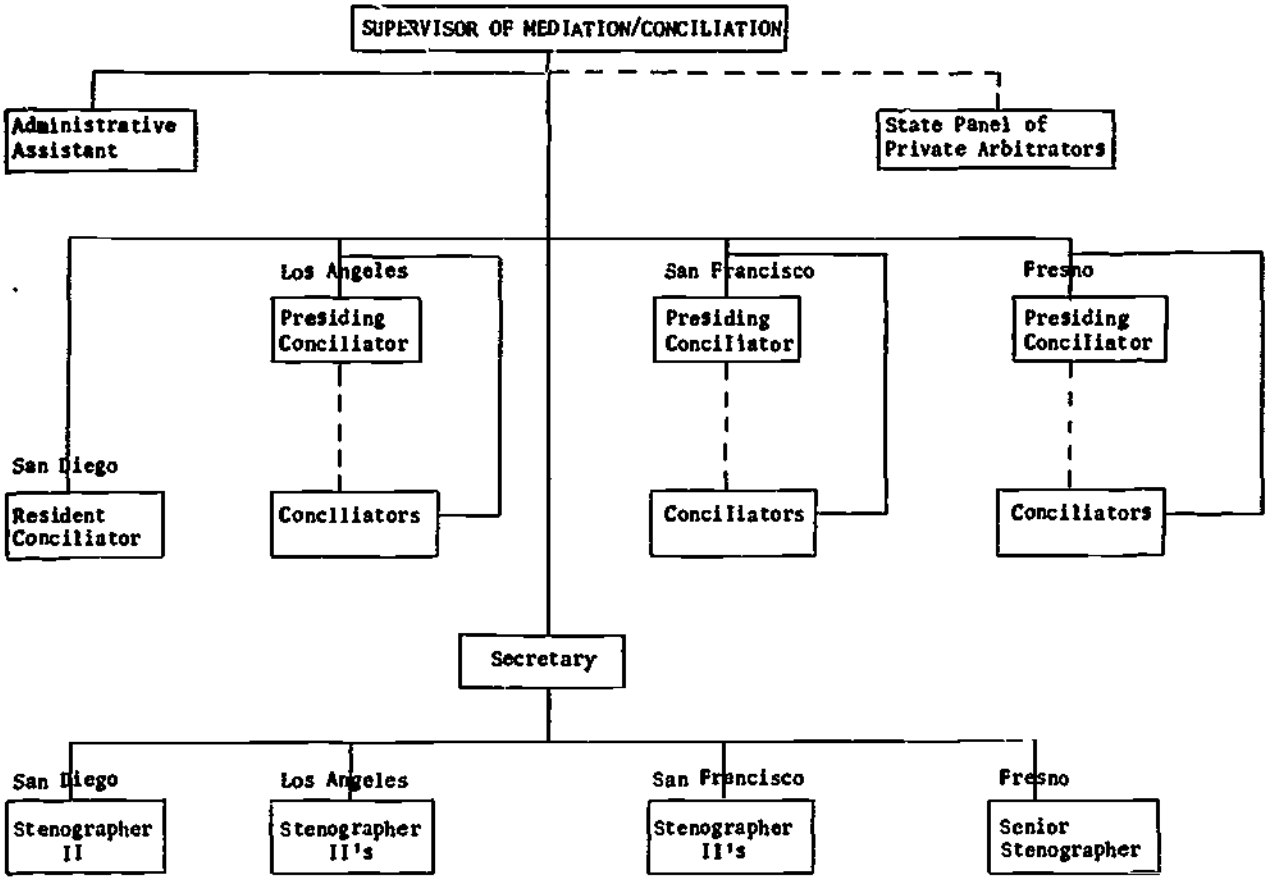


Figure 4

to either convince both parties to take a mediator or to go back to the bargaining table and try again without a mediator." If the parties agree to go back to the table for one more attempt, Caraway said:

> Often as not, we never hear from them again. They settle their dispute without us. If, two or three or four weeks later, they still want a mediator, we require them to file a new request.

Once an impasse is approved -- determined -- by PERB, the case is referred by telephone or mail to the State Mediation and Conciliation Service, which, according to Caraway, resolves 85 percent of the disputes that are sent to them, with the remaining 15 percent being certified by the mediator for fact-finding. Allen, of the SMCS, questions these figures:

> If you read through PERB's annual report, they show 85 cases going to fact-finding or something like 15 percent. Our numbers show 37 cases went to fact-finding for that calendar year . . . I think the number really lies someplace between 37 and 85. I don't think it is quite 15 percent, but a lesser number.

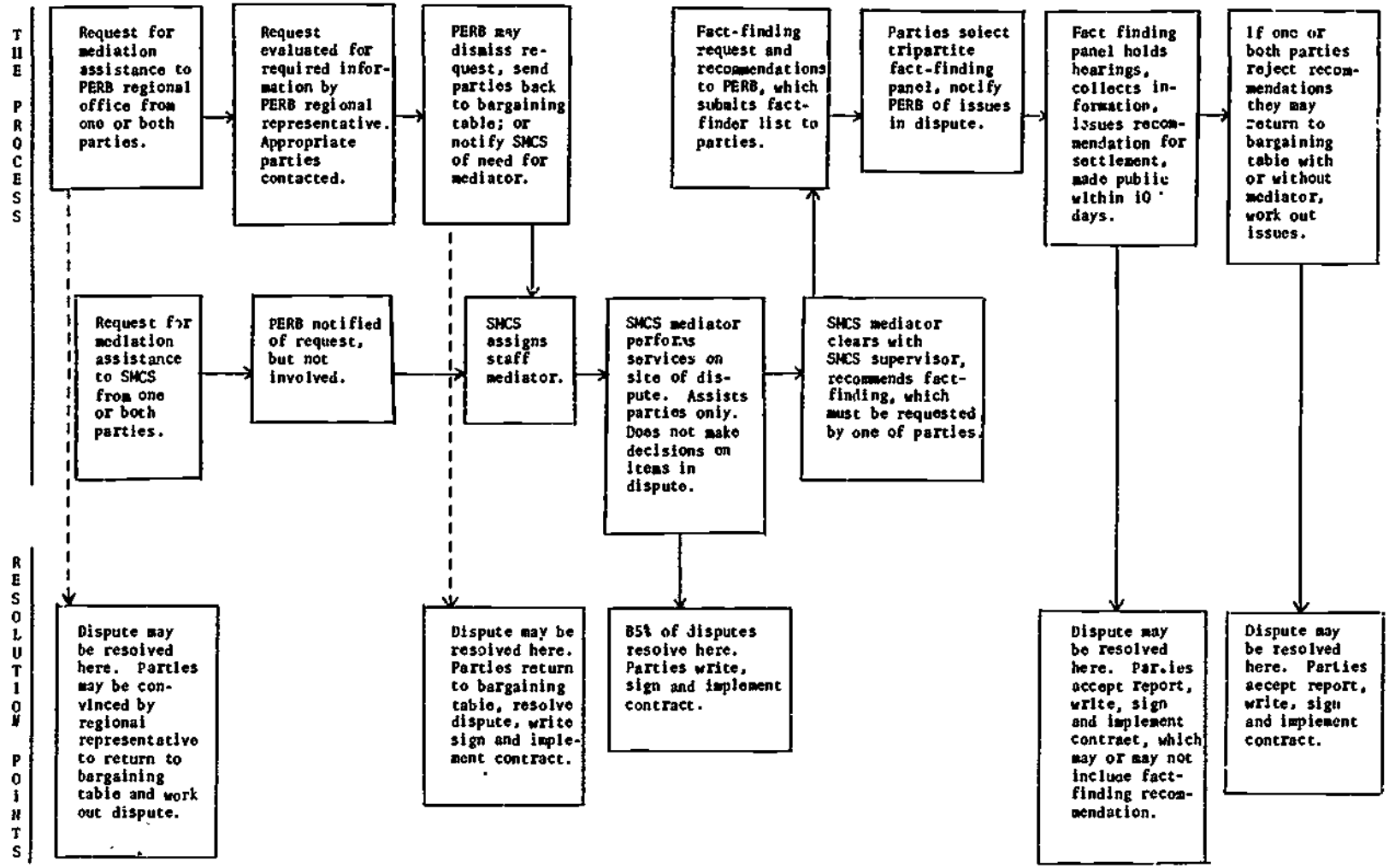
Not all bargaining impasses for K-14 education are routed through PERB, said Allen. The law permits the parties to select their own impasse procedures and occasionally, they choose to go directly to SMCS, although PERB must be informed of such a decision. Why? Allen's opinion is that:

> . . . for some reason, occasionally, the parties don't really want to say they're in an impasse -- not for the record, at least. Or they may feel that they just need some help and that they are not really at the stage of an impasse where they want it on the record. Another thing is that PERB requires from them a certain amount of information, such as whether they have complied with the open meeting act, how many meetings they have had, what are the issues, how many hours have they spent negotiating, how many counter-proposals . . . . If they come to us, we don't ask them any of those questions . . . all we do then is work out time, date and place that is convenient for them and the mediator.

CALIFORNIA

INTEREST/IMPASSE RESOLUTION

(for K-12 Education Sector)



Note: Unfair practice charges may be filed at any time during process. Strikes might occur, and may or may not be a protected activity. Statute has no provisions for arbitration if bargaining disputes.

PERB: Public Employment Relations Board
SMCS: State Mediation and Conciliation Service

Figure 5

Roughly half* of the mediation cases coming to SMCS are related to K-14 education, and this estimate includes support personnel such as clerical persons, bus drivers, janitors, maintenance, etc. These cases are handled on a regional basis.

An important element in the assignment, coordination and supervision of the mediation cases in all of the regional offices but one is the presiding conciliator (mediator). The function of this ad hoc position (the state personnel board does not recognize the title) is, according to Allen:

> . . . to watch over the work load, try to see that it is evenly distributed, take care of problems that arise, and oversee the training of new people. I rely on those persons to be aware of bargaining activity in their regions . . . .

Most often, mediators are assigned to cases at random. Allen explained that the SMCS classified cases into five categories: private, schools, the public sector excluding schools, transit districts and agriculture. He added:

> . . . in any given time, it is entirely possible for a mediator to have a case in each of those five elements. We don't have any specialists. We cannot afford it with the small staff that we have. Some mediators obviously prefer certain kinds of cases, but they will work on all of them . . . . Of course, the parties may request a certain mediator, and if the time schedule permits it, and the mediator is within the geographical area, we will assign that particular mediator.

The sole job of the mediator is to assist the parties in reaching a mutually agreeable settlement, which takes, on the average, from two to four months (50 to 60 hours of mediator time). The process may require the mediator, even one with a universally effective style, to indulge in some role-playing. Allen said:

> I think that the very good mediators have several styles that they can call up whenever they want them. I know they can be very passive; they can be very forceful, they can be in-between; they can be inquisitive; whatever the situation demands.

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*Allen: "In 1979, for the calendar year, we had a total of 42,850 hours of work, of which 23,772 were in schools."

There are times, of course, when the mediator and/or one of the parties realizes that the dispute cannot be resolved with conciliatory techniques. This is the point at which, according to Caraway, "at least one party must request fact-finding, and the mediator must certify that fact-finding is appropriate." Allen indicated that there is an additional step here:

> . . . before the mediators can send cases to fact-finding, they must discuss them with me first. And although the law says the mediator has the final authority, . . . I want to be sure that the criteria have been met; that the 15 days have elapsed, why the mediator thinks it should go, how many meetings have been held with the parties, and just where is the thing. How did it get there? . . . this has a couple of advantages. Sometimes the parties prefer not to put it all out to the public. Or having to talk to me may allow the mediator who is being pressured by one of the parties to recommend the case for fact-finding a little more time to effect a settlement without fact-finding. The mediator can blame me for the delay in going to fact-finding, and in the meantime, he may be able to bring the case to a settlement.

The law in California requires that fact-finding be conducted by a tripartite panel. PERB's role is to supply a list of fact-finders to the parties so that they may select a neutral to serve as chairman. Caraway said:

> Our role is merely to insure that the process moves along . . . our office sends a letter to the parties that includes the names of seven neutrals off of our panel. We send that to each party and then it is up to the parties (if they are able) to "strike off" the list until they have selected one neutral to chair their panel. Each party also selects its own panelist . . Then they notify us of their selections and the issues to be submitted to fact-finding.
>
> The chairperson is a contractor for services. PERB pays this person a daily rate for handling the case. Each party is responsible for the costs of its own panel member.

Caraway further explained the fact-finding process by noting that there are time lines in the statute (30 days) that must be followed unless the parties agree to a longer time. During the fact-finding period, the chairperson meets with the panelists, convenes a hearing for one or two days and then issues a written report. But the fact-finding process is not regulated very much, Caraway said:

> We do not have a procedure manual that tells fact-finders how to conduct their business . . . Basically, they are professional neutrals and they are on their own to guide their panel and to conduct their business and issue a report.

Of the cases that go to fact-finding, approximately one-third are settled before a report is issued. The remainder of the cases are subjected to the fact-finding panel's report, which contains recommendations for settlement on each of the issues. The statute provides that the report be made public by the employer within 10 days of issuance. But the issuing process is a careful one, said Caraway:

> It is more of a focal point than it once was because the board has had to determine when the so-called "end of the impasse procedures" takes place in order to determine whether a strike is an unfair practice. We instruct our chairpersons, when they are circulating their draft report or their initial impressions, to make sure that these do not appear to be a signed final report.

After the official fact-finding report has been issued and made public, the California statute provides that post-fact-finding mediation may take place, if the parties so desire. Such mediation is conducted, usually, by the same mediator who was originally assigned to the case. And the final agreement reached by the parties, if there is one, may or may not follow all or part of the fact-finding recommendations. But what happens if the parties reject the fact-finding recommendations and still are unable to settle their differences? Caraway said that the statute does not provide further procedures; and further, that:

> We do not have any studies that show how long after a fact-finding report it takes the parties to reach an agreement, or whether or not the parties ever reach an agreement, or whether the employer unilaterally implements the terms and conditions of employment. We can point to cases where unfair practice charges have been filed surrounding those circumstances.

When asked about the possibility of legislation permitting or outlining procedures for arbitration as a third step in the dispute resolution process, Caraway remarked:

> . . . this is such a highly charged political issue, and the parties are quite polarized on it. As far as recommending and supporting legislation goes, the board has chosen to stay out of that arena . . . because almost be definition, if you propose anything you are stating a position on the issue, and I think the board is attempting to remain neutral . . . .

THE PROCESS: Grievance Arbitration

While the California statute does not provide for arbitration of bargaining disputes, it does provide for arbitration of grievance disputes. Procedures for arbitration of grievance disputes may be negotiated at the local level, or the disputes may be submitted to the PERB by agreement of both parties. If only one party wishes to submit to arbitration, he/she may seek a court order to compel the other party to cooperate. Unless the grievance is related to an unfair practice charge, PERB's involvement is limited, essentially, to occasionally supplying the parties with a list of arbitrators, at their request. Enforcement of arbitration awards is up to the courts.

THE PROCESS: Data Collection, Research and Studies

Data collection by the PERB is currently quite limited. Contracts are collected and filed, but neither summarized or analyzed. Simple representation statistics -- ballot tallies, who wins elections and is certified as exclusive representatives -- are maintained. Cases are counted, but not analyzed. Caraway explained that there has never been enough staff to conduct analyses, but that the agency was in the process of developing a management information system, and that, at the request of PERB, the Department of Industrial Relations was doing a contract study.

Allen of the SMCS indicated that his agency did not collect much data either, but relied on information collected by the Division of Labor Statistics within the Department of Industrial Relations. The division, he said, would, within reason, collect or develop particular information if requested, and therefore:

> We do not feel that it is our place to do it. Because if we develop it, we are responsible for it . . . It's not what the answer is, it is what people want it to be. For example, if we develop some information and say that the source was so-and-so, there will be someone who says, "Why didn't you use this source, or why didn't you include that? Why did you put this item in here?" The combinations are endless . . . particularly in the public sector, because you can collect information on the basis of the size of the school district, you can do it by location, by average daily attendance, by number of teachers . . . it just depends philosophically on which system you are going to use.

So the SMCS has backed away from data collection and the conduct of studies, and the PERB, while willing to address the area, and with statutory authority to both collect data and make studies, has not been able to devote resources to more than maintaining simple records.

THE PRESSURES: Work Load and Coordination

Both the PERB and the SMCS are carrying heavy work loads, according to Caraway and Allen. Both mentioned Proposition 13 (tax limitation) as a possible constraint on staff numbers. And Caraway pointed to the "start-up" burden generated by the passage of two new laws for PERB to administer. Her feelings were mixed on the adequacy -- or lack of it -- of the current staff size:

> I can see so many possible projects that we don't have the staff for. There have been times when the regional offices and the hearing officers have been dramatically overworked. But things are settling into a routine of an ongoing work load, even though it is nearly impossible to make on-point work load projections . . . In all fairness, I would not suggest that not having enough people in the last few years means we won't have enough in the next few years.

Allen expressed some frustration with the SMCS mediator work load. In terms of the hours worked by his 20 mediators, he estimated a need for at least six more people. He explained that the mediators worked many overtime hours and did not have the opportunity, because of case load, to take compensatory time off within a state-imposed three-month limit. Therefore, he said, his mediators were not being paid for much of their

overtime. In spite of this, he said, "very few have left, they like their job."

THE PRESSURES: Pre- and Post-Law

Before the Education Employment Relations Act was passed, and before the establishment of PERB, K-14 teachers were premitted to meet and confer under the Winton Act. Caraway commented:

> A lot of things were permissive -- mediation, fact-finding. Representation did not have to be exclusive. Under the Winton Act, employees in a school district had a certificated employees' council of seven to nine persons who represented various organizations. Now, the PERB handles the process for determining exclusive representatives.

Allen indicated that the Ecucation Employment Relations Act had caused a substantial increase in the SMCS work load:

> In the last year of the Winton Act, we had about 3,000 hours with schools, or about two mediator years . . . Now, it seems to have leveled off in the neighborhood of almost 12-1/2 mediator years, or something over 22,000 hours . . . One reason for this is that bargaining has become more sophisticated, more items are negotiable, more is appropriate for negotiations . . . Before and during the Winton Act, teachers addressed their concerns through the legislature, recognizing that a lot of them would never reach the table . . . Another reason for more mediation now is that it used to be permissive, but now, if one party wants it and PERB okays it, it is required . . . I would guess that, under the Winton Act, many school boards [with final decision-making power] were not agreeable to mediation, and so it didn't happen.

THE PRESSURES: The PERB/SMCS and Outside Pressure

Pressure exerted by interested parties on board and staff members, to influence decisions or case processing, is always a possibility in neutral agencies. Caraway of the PERB said that board members were careful to be aware of attempts to pressure them and had, in fact, developed rules to deal with ex parte communications. She observed that:

> Both the board and the staff bend over backwards to consider all the facts in the record before they make their determinations . . . Being neutral, we don't care who wins an election, who wins a charge . . . We spend a lot of time discussing issues, how we should rule on certain things, questions that come up in regional offices . . . My impression is that the staff is absolutely committed to making informed neutral decisions on everything.

Allen expressed similar opinions about the SMCS staff. It was noted earlier in this report that the mediators had chosen not to bargain. This choice was made when they were given bargaining rights as state employees. The 20 mediators on the staff at that time signed a petition requesting that they be excluded from the coverage of the state employees' bargaining act. They felt that bargaining for themselves would affect their neutrality as they deal with employers and employee organizations, that they might be perceived as being more sympathetic to employee organizations if they themselves were members of a bargaining unit, and that they might, on occasion, be faced with mediating a dispute in which their employee organization represented one of the parties -- an uncomfortable position from which to maintain a neutral stance. They preferred to be under the Brown Act (meet and confer). A bill was passed that removed them from coverage under the state employee act, and, said Allen, "I assumed they would form their own organization . . . but they haven't."

SMCS mediators are quite aware of the fact that, if they appear to be biased in their mediation activities, the parties will see such biases, and the mediator will immediately lose his or her effectiveness -- the ability to communicate with the parties. So, said Allen:

> We don't care what the parties sign . . . It is their business. If the employer gives away the shop and the key to the front foor, that's his business. Our sole job is to assist the parties in reaching a mutually agreeable settlement, not to pass judgment, not to interpret. That is for the parties to do. We're not an enforcing agency. For example, if one side or the other wants to take a position that something is not within scope, we'll do what we can to help the parties put it in a form that is acceptable to both of them as a scope item in order to try to get the thing resolved. If that can't be done, we are not going to pass judgment on whether it is within or outside

> scope -- only PERB can do that when presented with an unfair practice charge. In fact, when a situation goes to fact-finding, the question of scope is not allowed to be put to the fact-finding panel.

THE PRESSURES: The PERB/SMCS as State Agencies

As Caraway indicated in a prior section of this report PERB members are careful to resist or circumvent attempts to influence their decisions. As political appointees, she said, they are not totally insulated from political pressure, but they take their neutral positions seriously from the standpoint of the cases that come before them.

When Allen was asked about his agency's resistance to political pressures, he said he never had had to deal with it in his four and one-half years as a supervisor. And, he added, "Even if the governor wants to suggest guidelines for increases, as far as I'm concerned, none of our mediators should pay any attention to them."

THE TECHNIQUES: Staff Selection and Training

Recruitment of representation specialists for the PERB is becoming somewhat difficult, said Caraway:

> Now that the laws in education have been in effect for nearly five years, salaries for representatives are no longer competitive . . . when a representative leaves, it is difficult to find a person experienced as a negotiator for labor or management who is willing to work for the salary . . . A lot of employer or employee organizations are paying very good salaries now, and our salaries are lower . . . But this has not driven out representatives. Some of our good people, fortunately, have stayed with us -- it's interesting, working for a new agency and we can still get people from smaller counties and places where they don't pay as well . . . We have had minimal turnover.

Hearing officers (attorneys) fare a little better. They can be hired at several levels, said Caraway, and:

> Once you get beyond legal counsel to hearing officer I and II, salaries become very attractive, and they are definitely competitive with entry level at private law firms.

The agency, Caraway explained, is interested in facilitating upward mobility for its personnel, and has established para-professional positions in the main office. But in order to do this within budget constraints, they "have to take one of the existing professional positions [representative] and downgrade it." This has been difficult because there are so few representatives in both the main and regional offices, and the agency can't afford to "lose a half or a third of them in order to create a technician position." Further, while the agency is"absolutely committed to the concept, sometimes the work load just doesn't permit it because it involves so much training." Even so, a number of secretarial/clerical people have been promoted, not to representative positions, but to technical levels.

The PERB, as indicated in a prior section, maintains lists of fact-finders and arbitrators for use by the parties. Services of these people are contracted and they are not considered agency employees. One of Caraway's tasks is to help in the employment of new neutrals by processing applications, checking references and evaluating people for placement on the panel. Generally, fact-finders and arbitrators are selected on a case-by-case basis by the parties. How are they chosen? Caraway said:

> I think the parties choose fact-finders or arbitrators for different reasons. There are a lot of practical considerations . . . They're going to take a look at the qualifications and abilities of arbitrators; it depends on how they view their positions.

Mediators on the staff of the State Mediation and Conciliation Service are civil service employees. Presumably, the rigid selection process would provide a guarantee of competency, and Allen, supervisor of the SMCS, indicated that he was well-pleased with these people.

He said that very few people with management orientation take the civil service exam. Most of the mediators have a labor background and some of them have mixed backgrounds. He added that the state salary schedule for mediators was probably not attractive enough for people with management experience.

KANSAS DEPARTMENT OF HUMAN RESOURCES

DIVISION OF LABOR MANAGEMENT RELATIONS

LABOR RELATIONS SECTION
Topeka, Kansas

Kansas teachers began their bargaining relationships under a permissive meet and confer law that was enacted in 1970. This beginning law left control of the bargaining relationsnip primarily in the hands of the local school board with some small involvement of the state board of education. Therefore, there was minimal state involvement in the implementation and administration of the law. Since then, however, the Kansas Legislature has moved not only the teachers but all public employees into a true bargaining arena. When the public employment law (the "PERB law") was enacted in 1971, it established a public employment relations board to administer that law, which excluded teachers because they were covered under their own law, still with minimum state involvement. But by the end of the 1980 Kansas legislative session, the teacher law had been significantly amended and the administration and implementation of it had been moved substantially to the state level.

THE STRUCTURE: Secretary of Human Resources/Labor Relations Section

The major administrative responsibility for the law lies with the state's Secretary of Human Resources, who has designated that authority to the chief of the Labor Relations Section of the Division of Labor Management Relations under the secretary. On Wednesday, August 13, Doris Ross interviewed* Jerry Powell, Labor Relations Chief and Executive Director for the Public Employee Relations Board. In his capacity as Labor Relations Chief, Powell administers, almost totally, the teacher bargaining law. The PERB is in no way involved in teacher bargaining. Powell's involvement with public employee bargaining has expanded in a seven-year period from an initial responsibility for providing mediation services to include: overseeing and providing dispute resolution services in representation and unit determination disputes, conduct of elections, determination of impasse, provision of fact-finders, and hearings, decisions and remedies for unfair practice charges. Additionally, Powell performs comparable services under the PERB law (other public employees). He views his agency primarily as a conciliation mechanism:

*Interview time was limited to 2 hours.

> Actually, we conciliate everything, unfair labor practices, you name it. Our number one target is to get the parties to agree on anything, and then it is easier for them down the road. We don't like to make winners and losers and that's what we do when we hold a hearing.

Powell has authority to recommend legislation, granted in his job description as PERB Executive Director. And he said that he did exercise that authority fairly consistently. On occasion he has been asked to help write provisions in proposed legislation and to serve as a witness during a bill's hearing. "My concern," he said, "is almost always with the procedures, not the hot potatoes."

As the designee of the Kansas Secretary of Human Resources, Powell is responsible for promulgating rules and regulations in his area. And because the laws in recent years have been changed often and substantially, he has found it necessary to spend a considerable amount of time on that effort. The process is similar to that employed in most states.

The proposed rules and regulations are developed and then submitted to the department of administration, which approves them for form. Then they are submitted to the Attorney General, who reviews them for legality. The Attorney General's office is also given a list of the parties to be notified about the forthcoming rules and regulations, and this office has the authority to approve, amend, correct and add to the list. After this, the parties are notified of a public hearing fifteen days in advance. The hearings are used to explain the proposed rules and regulations to the parties and to give them an opportunity to comment, object or approve. Finally, the rules and regulations are put in final form, signed by the Secretary of Human Resources and moved on (during a legislative session) to a rules and regulations committee of the legislature for approval. If the legislature is not in session when rules and regulations are developed, an emergency rules and regulations committee provides temporary approval until the legislature convenes again. This emergency committee is composed of the Secretary of State, the Attorney General and the revisor of statutes.

The Labor Relations Section is staffed currently by Powell, a conciliator and a secretary. These people are located in a private office building in downtown Topeka, primarily because state facilities are not available. The building does contain other offices under the Secretary of Human Resources. Because the Section recently assumed the unfair practice function, a conciliator and a clerk-typist will be added to the staff this year. The agency has been granted a budget of $152,005 for fiscal

year 1981. Staff salaries (all three are classified personnel) are about $30,000 for Powell, $19,000 for conciliators, and $9,000 to $11,000 for clerical personnel. Although most of the budget will be spent in the K-14 labor relations area, it also covers Section responsibilities for other public employee labor relationships: agricultural labor relations, state labor-management relations, private employment agencies and the child labor law.

Powell's background is management-oriented and he served as a mediator in California before coming to Kansas. His conciliator first came to the agency as a student intern, after which he was hired as a full-time employee.

Powell was placed into the civil service system of the state because initially it was thought he would need some protection as a neutral from the pressure that inevitably occurs when labor relations decisions involving his employer, the state, are made. But he said he has never needed that protection and that pressure to influence his decisions had never been exercised. He elaborated on his views:

> I wear two hats really. When I am doing PERB work, I work at the direction of the board and the Secretary of Human Resources can't tell me anything. . . However, I've got to be a little careful because the Secretary is the one that hires me and fires me and gives me my raises. But he is an employer, and unfair labor practice charges can be filed against him. So when they are filed, I put on my PERB hat and go out and find him guilty or not guilty knowing full well that next year he gives me a raise or doesn't give me a raise. It hasn't bothered me. I've worked under two secretaries now, and due to the personalities of the gentlemen I've had no big problem. . . They say it's your area, we'll keep our hands off it, you do it. . . The Secretary we have now is a former school superintendent and the teacher organizations were for a long time against his confirmation. But he assured them that he wouldn't interfere and he doesn't. . . But if someone ever tried to exert pressure on me, I would personally tell him to go to hell, and then I would go to the press.

The state of Kansas has about 30,000 elementary/secondary teachers in 306 school districts. About 280 of the districts have recognized teacher organizations for bargaining. In

KANSAS DEPARTMENT OF HUMAN RESOURCES
Division of Labor-Management Relations

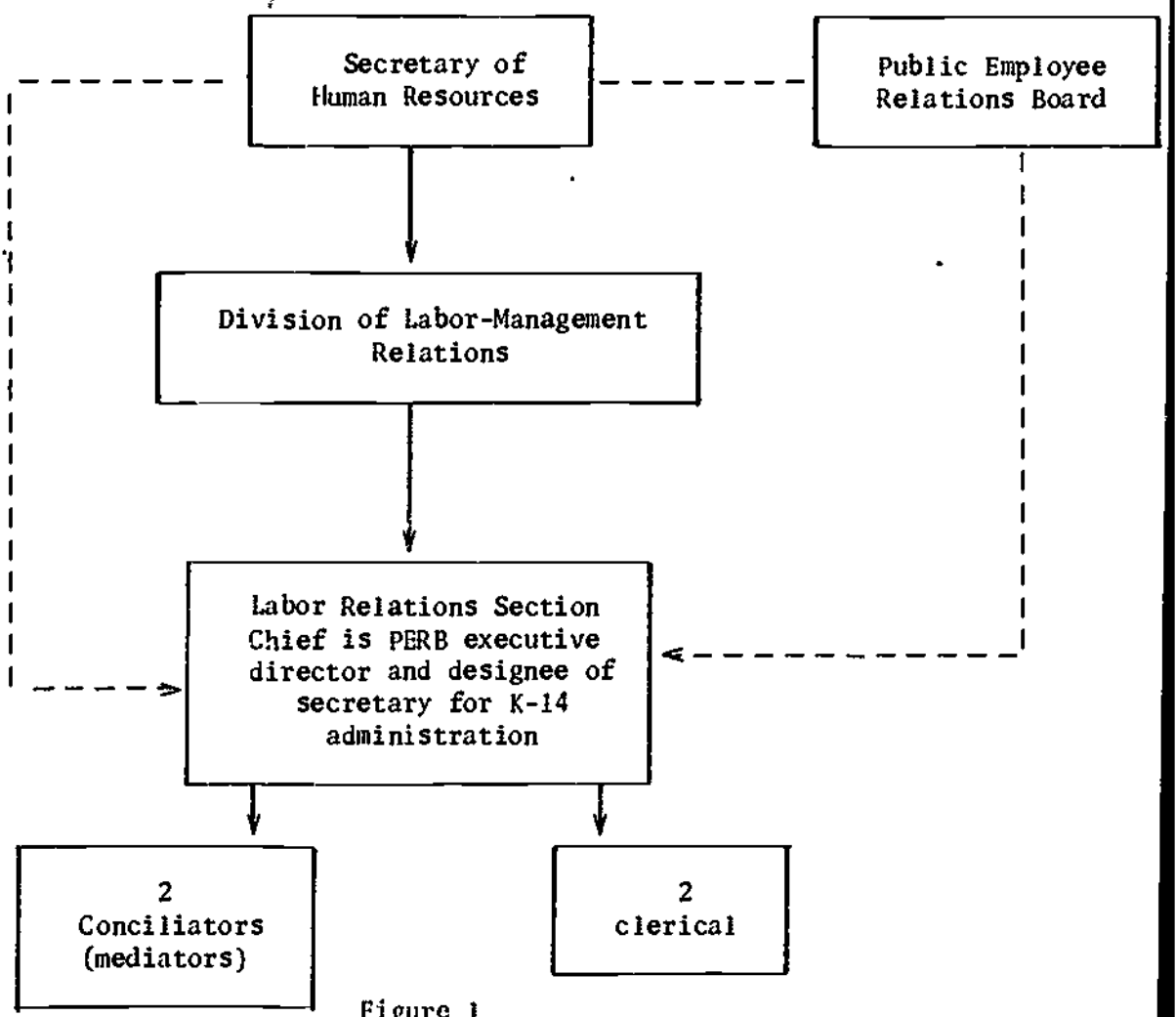

Figure 1

addition, there are 18 junior colleges in the state, with 12 of them bargaining. Although area vocational/technical schools do come under the teacher law, personnel in them are not yet bargaining. Four special education cooperatives are bargaining under the law.

Powell said that the K-14 law occupied much of the time of himself and his two staff members:

> On the K-14 law, my time is probably 50 percent, but you have got to understand that I have a fellow who works for me who devotes 80 percent of his time to that area. It is tough to estimate because we are just getting into the unfair practice area and I don't know what is going to happen. I am planning on devoting 10C percent of the new position's time to the K-14 area. Most of our time now is spent in answering questions and rendering unofficial opinions. People call and ask what they can and cannot do. We always give them our disclaimer (at least we did before the law was amended to give us instead of the courts the unfair practice responsibility) and they still want an answer. For the whole operation, 75 percent of the total time is a good guess for K-14. We have far more organized units under the teacher law than we do under the PERB law.

This report will cover not only the major state-level responsibilities for K-12 teacher bargaining, but will include some special concerns as well.

THE PROCESS: Unit Determination, Representation, Elections and Recognition

Teacher organizations that seek recognition from school boards should have defined an appropriate unit and demonstrated majority support through verified membership lists. If they are not challenged by another union or individual and if their school board accepts their evidence of majority support, their timely request for recognition must be honored by the school board. After recognition occurs, the union and the employer may begin their bargaining relationship.

Prior to 1977, the state board of education had a loosely defined authority over representation matters but the legislature, in 1977, amended the teacher law and assigned the administration of the representation process to the Secretary of Human Resources. At this point, Powell, as the Secretary's

designee, immediately began collecting information on existing recognized units of teachers in the state. He was surprised to find that many of the units reported to him were not specifically defined:

> I sent a form around to the school districts in the state and I was amazed that probably 85 percent of the contracts simply said "all professional employees" were to be in the negotiating unit without clearly defining teachers, librarians, counselors, nurses, social workers, etc. So I traveled the state back and forth, visiting and talking with various groups. I told them how important it was to define their units carefully.

As noted above, state-level involvement in the representation process is not necessary unless the parties do not agree on the composition of the unit, if a question of majority support exists, or if another union or individual employee(s) challenges the recognition request. When such disputes occur, either one or both parties may request assistance from the Labor Relations Section. Ideally, said Powell, if the dispute merely revolves around the school board's doubt that the organization requesting recognition has enough membership support behind it,* he could order and conduct an election. But, in most cases, he said, the process has not been that cut and dried:

> Normally, with every group that has come to me I have had to say, wait a minute, let's stop action and go back and define your unit, because they have not done that. I don't know how they can bargain for a group of employees if they don't know who is in the group. I certainly cannot conduct an election until I know which groups of people are eligible to vote. So in every representation dispute we have processed since 1977, about 15, we have had to put everything on the back burner as far as the election goes and go back to the unit determination process.

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*An election will be ordered, too, if more than one teacher organization requests recognition from a school board. Thus far, in Kansas, the National Education Association has dominated the scene. Powell said there were no recognized American Federation of Teachers' (AFT) units.

Powell's handling of representation disputes is based on carefully written, specific procedures included in the rules and regulations. As problems in implementation arise, Powell has worked out a system for dealing with them which includes forms for "just about everything". These forms, of course, include petitions for dispute resolution on unit determination and representation elections. But, the agency is very small, and, as might be suspected, the implementation of the procedures is often informal. Powell explained what happens when a dispute arises:

> Normally, what happens is I will get a telephone call. They will say, "We've got a problem out here." I will say, "We'll send you a form, you file it and we will take it from there." When I get the form I will file it with the other side and they have 20 days to answer with their own description of the problem.

After Powell or his conciliator reviews the specifics of the case, the files are manually searched to see if decisions have been issued in similar cases. The next step is an informal conference or two with the parties, in which mediation techniques quite frankly are employed. Said Powell:

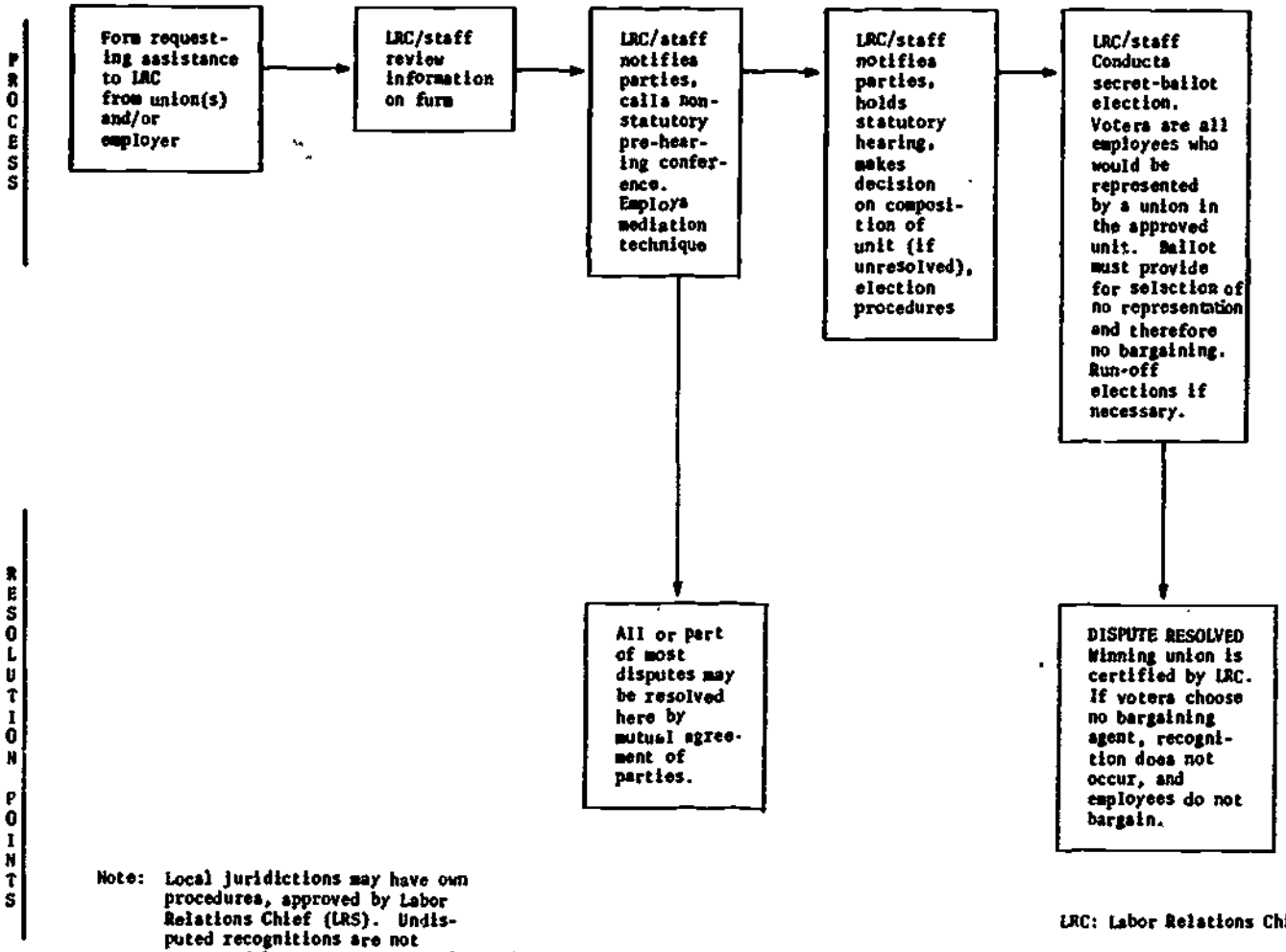
> We will call the parties together and flat mediate -- for example, get one party off to the side and say, "Look, you haven't got a prayer on this issue. Here is a case that was substantially the same thing and here is our ruling. Read it, figure out how much money you are going to spend on it." We use every mediation technique we have. We try our darndest to conciliate and 80 percent of all of our disputes are resolved this way.

In the remaining 20 percent of the cases, the dispute is not resolved, and further procedures must be employed. If the issue is one of unit determination, Powell or his conciliator holds a hearing and issues an order defining the unit and clearing the way for an election. The election, ordered and conducted by Powell's agency, is preceded by a meeting of the parties and observers in which they are briefed on the rules and election procedures. The secret ballot election is held either on-site or by mail and the "candidates" are one or more unions (if there is a challenge) and "no representation." Barring complications such as objections to the election procedures or the conduct of the election, the winning union is certified by the agency and recognized by the employer. See figure 2 on page 90. The stage is set for the beginning of bargaining.

KANSAS

UNIT DETERMINATION, REPRESENTATION AND RECOGNITION DISPUTE

(for K-14 professional employees)



Note: Local juridictions may have own procedures, approved by Labor Relations Chief (LRS). Undisputed recognitions are not processed by agency, only registered.

LRC: Labor Relations Chief

Figure 2

THE PROCESS: Interest/Impasse Resolution

Although, by law, the parties are free to begin contract negotiations at any time during the school year, they may not amend a contract or lay new items on the bargaining table after February 1. Powell indicated that this provision of the law has been misinterpreted in the past and that most often the start of negotiations is delayed by the parties until that date. For additional discussion on this problem see a succeeding section: The Pressures: Statutory Time Lines on page 101.

Mediation

If one or both of the parties in the negotiations feel that progress is not being made, they may request the Labor Relations Section to declare an impasse and to provide a mediator. As of 1980, the legislature has mandated that impasse be declared no later than June 1. Powell commented that this time limit may be troublesome:

> On June 1, if an agreement hasn't been reached, impasse must be declared. This is going to have an effect, I think, the same as Iowa's law. They had a lot of false impasses. We will have parties that are under an obligation to tell me that they are at impasse, but if bargaining is progressing well, they are going to call me on the telephone and say, "Don't hurry now, we are still bargaining." Nevertheless, they will have met the letter of the law. The legislature seemed to think that by putting that date in there they could bring finality to the process. But it will not necessarily bring negotiations to a swift end, because school boards and teachers sometimes need more time to bargain.

But parties who are genuinely at impasse do get the attention of the agency. Powell outlined the process:

> Either party could write me a letter or give me a call saying: "We would like for you to investigate. We think we are at impasse." So I investigate, either by telephone or by traveling out there. . . Ninety-nine percent of the time, when the parties think they are at impasse, they really are not. There is a lot of room left. They just don't know where to look. They can't communicate. So, I go out and

> say, "Hi, folks, I'm here to investigate, where are you?" I caucus with them just like a mediator does and try to show them where they can go and we take a crack at it. A lot of times I will leave them with a direction to go in, with instructions to call me back in a week or so if they can't make it. Finally, however, there are a few that really are at impasse. That's when I officially bang my gavel and say they are at impasse.

Prior to 1980, impasse in teacher negotiations had to be declared by the district court. Only since the first of the year has the Labor Relations Section dealt with this step in the teacher negotiations process. Powell speculated that his agency does not handle requests for impasse declaration in the same way that a court does. He expanded the statement:

> It's a little different than a district court judge declaring an impasse because it is my practice to employ mediation myself at any point. So, we probably will not send as many back to the table as a district court judge will, because when I am through with the parties, I am pretty sure of the situation. I will either give them some guidance and send them back to the table or I will declare impasse if I feel that is as far as they can go. A district court judge would simply say, "I don't think you are at impasse" -- period. No guidance. . . in 99 percent of the cases, when they come to me, they are not really at impasse, they are just mad at each other and all we have got to do is calm them down, get them back to talking, go fishing with them, maybe. There are a lot of things we can do. Fifty percent of them I will send back to the table with guidance, 10 percent will be resolved on the spot and the others we will bring on through the impasse process.
>
> Then I will contact the Federal Mediation and Conciliation Service (FMCS). . . They will assign a mediator, as they have done for the past seven years. They have given me a mediator on every case except one. In that case, I had to hire an ad hoc mediator. . . We do not have a panel of ad hoc mediators. I have never spent money on

> training mediators since I think it is a waste of taxpayers' money. We have the Federal Mediation and Conciliation Service available. . . it is all tax dollars and if the feds can handle it and they are well-trained, I don't want to get into it. However, when the day comes that they refuse me service, I will have to. But why should I spend taxpayers' money in Kansas when federal dollars will provide the same service?*

Although Powell's agency performs informal mediation services at every opportunity, once the request for a mediator is given to the FMCS, the state agency is out of the picture. The case is totally in the federal mediator's hands. The conciliatory process may continue officially until June 1, when a statutory impasse must be reported to the Labor Relations Section by both parties.

How long does it take to mediate the average dispute? Powell said that in Kansas it is generally a very short time:

> I mediate a lot of labor disputes and I think any good mediator can, within a very few hours, depending on the number of issues, tell whether or not he will be able to resolve the dispute or whether or not he is going to be able to get them closer together and where he is not going to be able to help. . . Anyway, our mediators conduct two sessions at the most, with a few exceptions.

---

*The General Accounting Office (GAO) of the federal government recently suggested in a draft report that the Federal Mediation and Conciliation Service back away from state and local public employee disputes. The GAO noted that the Taft-Hartley Act, which established the FMCS, specifically excludes state and local government disputes from its coverage. It was recommended that Congress make a determination on whether state and local public dispute mediation is within the purview of the FMCS. The FMCS annual report for fiscal year 1978 reveals that the agency was involved in 641 state and local cases, or nine percent of the agency's total case load. Over 60 percent of the cases were education related. Kansas logged 39 cases for all public employee disputes.

Fact-Finding

Kansas law provides that either party may request fact-finding as soon as seven days after the appointment of the mediator. Powell has further defined this time constraint by rule, since he has no control over the date upon which a FMCS mediator is appointed. The date has been pinned down to seven days after the mediator first meets with the parties.

When the form requesting fact-finding is received by the Labor Relations Section, the other side is notified and given an opportunity to respond. Both parties must provide the agency with a list of the issues that are at impasse, their last best offers on each issue and their preferences on procedures for appointing fact-finders. A single fact-finder or a panel of three may be selected from an agency-maintained panel, either by Powell or by the parties. For additional commentary on fact-finding time lines see The Pressures: Statutory Time Lines on page 101.

The agency has 30 to 40 fact-finders available. These people are not agency employees, but are merely funneled through the agency for use by the parties. To insure prompt payment of fact-finders, the agency initially pays them for their services and then bills the parties. Fact-finders are paid $200 for each six-hour day.

As with mediators, fact-finders, once assigned, are totally in charge of their cases. They will collect the necessary facts, relevant data and hold hearings as necessary. The process must take place very quickly, said Powell:

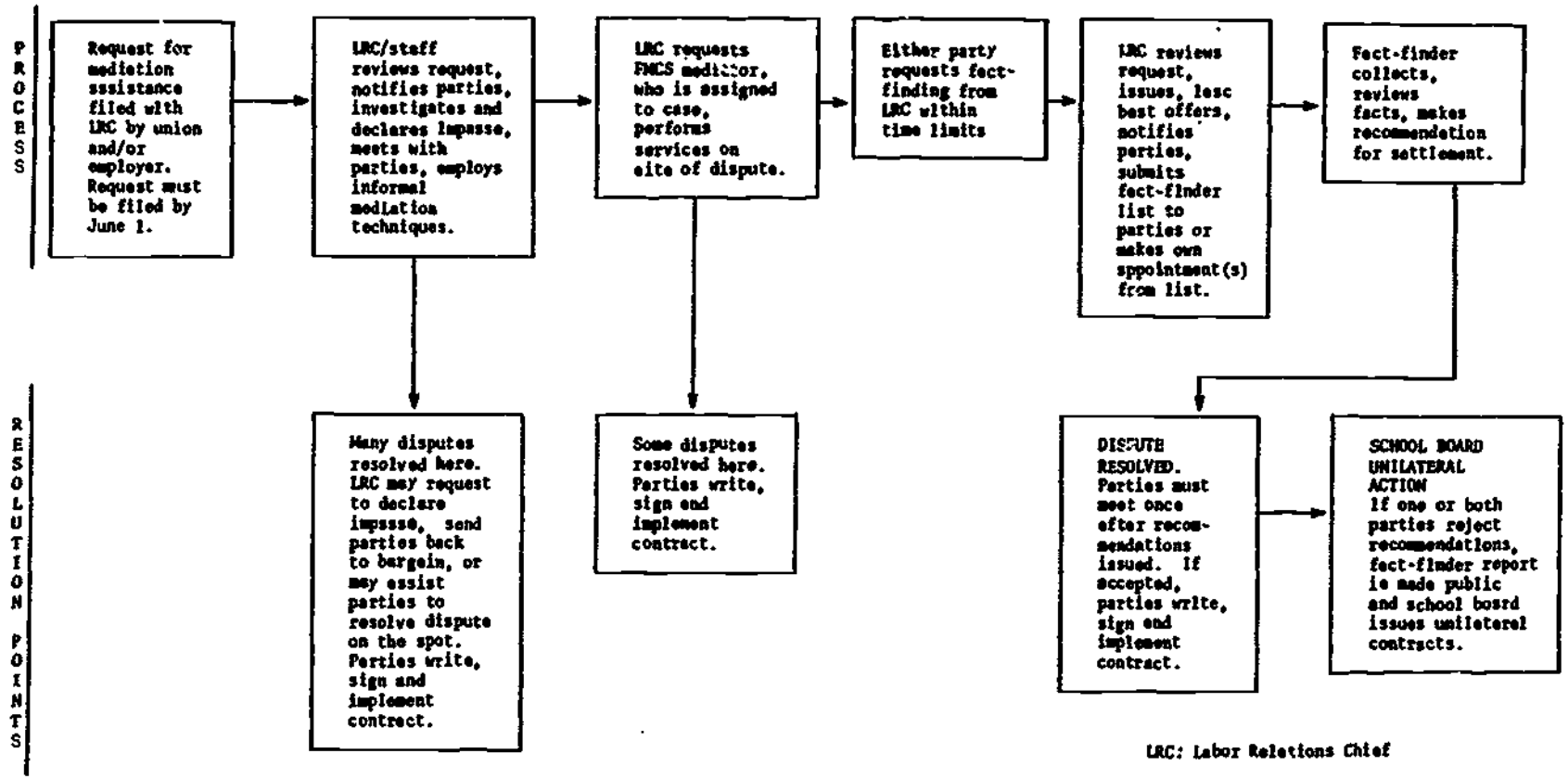
> The fact-finder is locked into making recommendations ten days after the first meeting -- with a possible extension of seven days. Once the recommendations are given to the parties, they have an obligation to meet once within a ten-day period. . . The law says that they have to have that one meeting, that either party can make the report public and that after the report is made public the employer can take unilateral action in the best interest of the public and the employees.

Since fact-finding reports are always advisory, the employer, who may issue a unilateral contract after procedures have been exhausted, really has the power to make the final decision on the contract items. The union's legal recourse is limited. Powell said that under the 1980 amendment to the teacher law, teachers dissatisfied with a unilateral contract could legally resign

INTEREST/IMPASSE RESOLUTION

KANSAS

(for K-14 professional personnel)



LRC: Labor Relations Chief

Note: Unfair practice charges may be filed at any point in process.
Illegal strikes may occur.

Figure 5

within 15 days of the unilateral contract's issuance. See figure 3 on page 95 for an outline of the impasse resolution process.

Strikes

Teacher strikes are prohibited as an unfair practice in the state of Kansas, but of course, they do occur. And Powell's new responsibility under the 1980 amendments to the Kansas law is to deal with these strikes as unfair labor practices, thus assuming what was a district court function. Powell indicated that the transfer of this function from the courts to his office was not yet well understood by the parties -- either under the PERB law (covering most public employees) or under the K-14 law (covering teachers). Even though the unfair practice responsibility for both laws has been shifted to Powell's agency, employers faced with a strike tend to continue to follow procedures no longer in effect. Powell explained:

> If there is a strike, it is an unfair labor practice and I would hope that the first thing the teachers or the school board would do would be to call me, but that hasn't been what has happened under the PERB law. For example, we have had several strikes where they have gone directly to district court to try to get an injunction, and they have always gotten one. But the employer doesn't understand that when they go to court and get an injunction he [the employer] is the bad guy. If I go to district court and get an injunction, I am the bad guy and this makes it easier for them [to resume a broken bargaining relationship and eventually resolve the dispute].

While judges are very good fact-finders -- they analyze information and hold hearings, Powell continued, they are not mediators. They can issue a strike injunction, order the parties to resume bargaining, and determine and apply penalties if their orders are ignored. But, said Powell, "What you need when you have a strike situation is a mediator." While he has not yet been involved in a teacher strike under the amendments to the K-14 law, he assumes that he will proceed as he has under the PERB law for other public employees:

> First of all, under the PERB law, I have never gone to court [to request an injunction]. I have never had to. I go in and resolve the strike. If you put somebody in jail you strengthen the strike -- that's

> ridiculous. I don't approach it from that angle at all, only as a last resort. I first go in, sit down and talk turkey with the union. I tell them that if they will get their people back on the job I will guarantee that we will get back to the table. I tell them they have, say, eight hours to do it or I will decertify them and cut off their dues deduction privilege.* Those dues are the lifeblood of an organization, and when they are on strike and faced with the loss of dues deduction, they think carefully. In the few cases where the court has levied fines, they've all been dismissed so the fines don't mean anything. But if I say I am going to do away with dues deduction for a year, that is effective.

Powell said that he would like to have the authority to levy and rescind fines, but that it was not granted in the current law. By combining "those clubs" with skilled mediation techniques, he said, almost any strike could be resolved:

> I could go in and find out exactly what the problem is and get the parties back to the table. A district court judge goes in, sits the parties down and says, "Bargain. I'm going to lock the door of my chamber until you reach an agreement." And the parties sit there and continue the bickering that led to the strike. This has happened in Kansas. . . Resolving a strike after the parties have gone to court is particularly easy for me because I don't push myself in, I wait until they call me -- until they both know they need help. This has always been three or four days down the road when the strikers realize that they are not going to eat next month if they are out there carrying picket signs.

Kansas law is silent on interest arbitration of contract impasses, therefore, Powell said, it is possible that the parties might agree to arbitration of such disputes. But, he said:

---

*Powell was asked if he had the authority to decertify an organization and remove dues deduction privileges in a strike situation. He indicated that the law was silent on the question.

> Seldom do you get an agreement to arbitrate. . . In my seven-year experience in the state of Kansas I am aware of one instance where we had interest arbitration, and it wasn't called that because if the employer -- a city commission bargaining under the PERB law -- had known what it was they never would have agreed to it. They lost. It was a gentlemen's agreement which really was made by the press.

In Powell's opinion, arbitration probably does reduce the number of public employee strikes, but it will not eliminate strikes. He pointed out that the only difference in the state of Kansas between fact-finding and arbitration is that the first is a recommendation and the second is a binding settlement. And if the union doesn't like the bottom line -- binding or not -- they may strike anyway. Binding arbitration might force the parties -- give a little more onus -- to settle, he said, but "I don't think anybody knows."

THE PROCESS: Unfair Practices

As previously noted, in 1980, the Kansas legislature moved the processing of unfair practice charges from the courts to the Secretary of Human Resources and thus to his designee, Jerry Powell, chief of the Labor Relations Section. The law states that: "The commission of any prohibited practice as defined in this section, among other actions, shall constitute evidence of bad faith in professional negotiation." The items listed constitute fairly standard actions:

1. Public employers are prohibited from interfering with the bargaining and organizing rights of professional employees, may not discriminate in the hiring or employment of personnel in order to encourage or discourage membership in an organization and may not discharge or discriminate against employees who file complaints, give information or testimony or who are involved in an organization. In addition, the employer must bargain in good faith as well as submit to mediation (as provided in the law) or arbitration (as provided in an agreement). The employer is further prohibited from instituting lock-outs.

2. Employees or employee organizations and their representatives may not interfere with professional employees' rights granted under the law or with the rights of the Board of Education granted under the law. They may not refuse to negotiate in good faith or to participate

in the mediation process provided by law or the arbitration process agreed to in negotiated contracts. Employees and their organizations also may not strike or picket.

Powell indicated that unfair practice charges filed in the education arena would be handled in much the same manner as other disputes under his authority. The aggrieved party must file a complaint after which the other party will be notified. Powell will bring the parties together on an informal basis and make an attempt to mediate the dispute and get it resolved promptly. Only if this informal process is unsuccessful will he conduct a formal hearing and either dismiss the complaint or issue an order affirming that a prohibited practice has occurred and granting or denying appropriate relief.

It is up to the district court to enforce the unfair practice order, which is issued in Powell's name as the official designee of the Secretary of Human Resources. In addition, all unfair practice orders may be appealed to the courts for affirmation or reversal. See figure 4 on page 100.

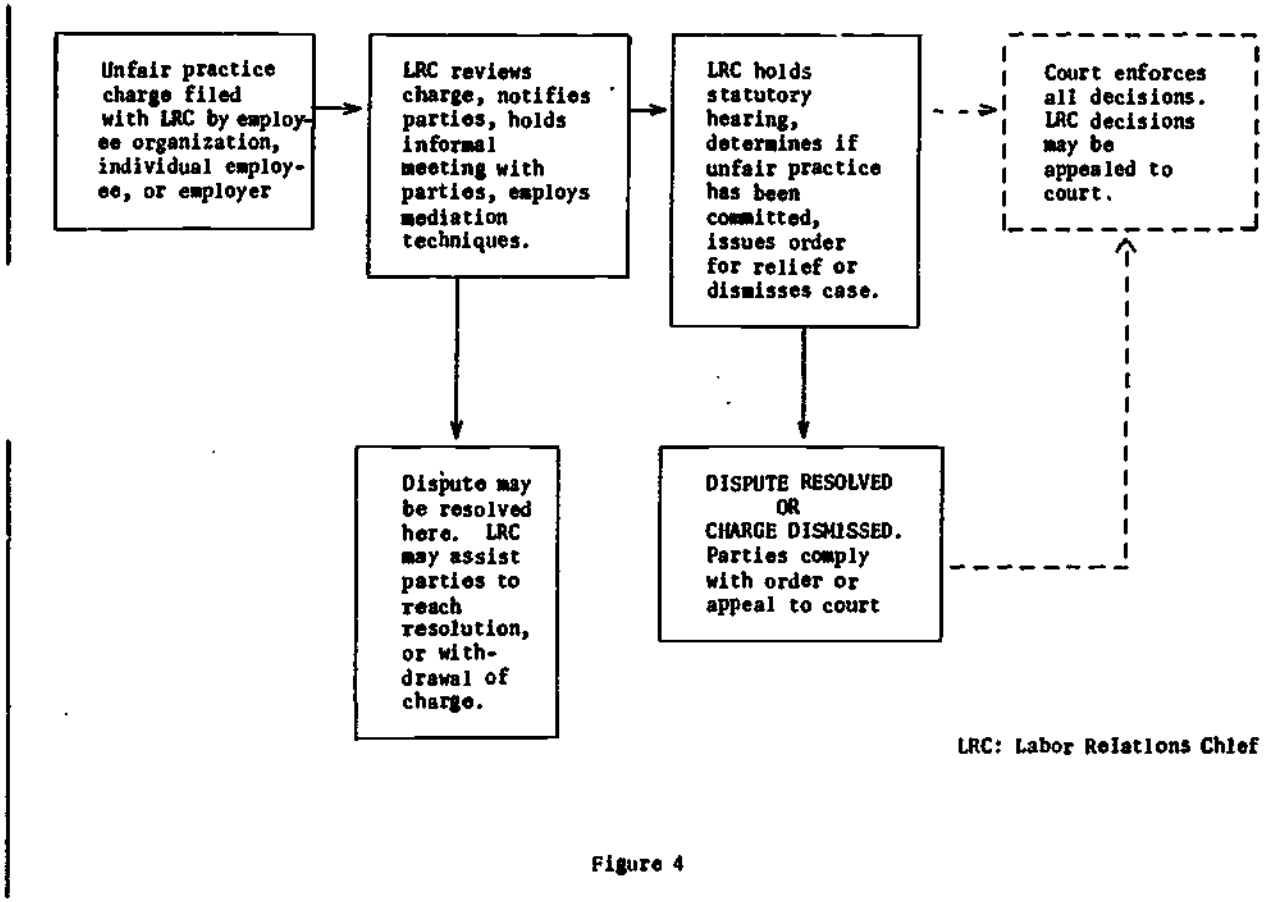
THE PROCESS: Data Collection, Research and Studies

Neither the public employee statute nor the teacher statute in Kansas requires the Secretary of Human Resources or his designee to collect any particular data. And the tiny size of the Labor Relations Section has precluded most of that kind of activity. But Powell expressed a concern for the collection of useful data:

> I don't have the time or the resources so what I have done is entered into an agreement with the state people to feed me all the state contracts. . . We recently received a $25,000 Intergovernmental Personnel Act (IPA) matching grant which I am co-directing with some people at Kansas University. They are in the process of setting up an information retrieval system. They are collecting contract data, statistics on comparability to be used in preparation for fact-finding and arbitration hearings, salary data, all types of information. . . They are also going to catalog all of our PERB cases and all of our teachers' cases as they come along, and will include arbitration awards and grievance awards. Another portion of the grant will be the publication of a newsletter. . . If they get it all set up, then it should be self-sustaining. I am sure the parties will

KANSAS

UNFAIR PRACTICE CHARGES
(for K-14 professional personnel)



LRC: Labor Relations Chief

Figure 4

use it. We have been assured by the IPA people that they will give us a second year if we don't get it set up in one year.

Powell was asked if he had any use for multi-state data, and he responded by saying that the multi-state statistical data was of little interest to him, but that the parties that he served did use the information. The agency, he said, did subscribe to a number of information services for state labor relations, and made it available at the request of the bargaining parties.

THE PRESSURES: Statutory Time Lines

As noted throughout this report, the legislature, in an attempt to bring finality to the bargaining process, has mandated time constraints in a number of areas. Sometimes problems arise because the parties misinterpret the time lines. For example, in the representation area, Powell said:

> A large majority of the districts see the February 1 date as a starting date for negotiations, rather than a date after which the parties must have all of the items to be negotiated on the table. . . Therefore, a lot of the districts wait until that date before they begin to bargain. I have tried to get them away from that because obviously if you have such a short period of time, it gets very hectic. If they can take their time, have enough meetings, they are a lot better off. But very few have gone to this, except for the larger districts. . .
>
> [The date] causes a lot of headaches with decertification elections and challenges. . . For example, with a contract that expires in July, an existing organization lays a proposal on the table February 1, after which a challenge is lodged on, say, March 20. But they have been bargaining during that time, and if another organization bumps them, they are just out the door. The bargaining process with the new organization starts all over again. . . I have tried to solve this with new rules and regulations, not effective yet. For example, there will be a contract bar -- if a contract has been in existence for two years, it may not be challenged during its first year. And in the

> second year they can only be challenged between July 1 and December 1. That way I can conduct the election and get it out of the way and certify to the employer before February 1 who they have to bargain with.

As noted before, the fact-finding process has been carefully timed by the legislature, but Powell indicated he expected to have some problems with the three-day period that is granted the parties to provide him with the necessary information after one of the parties makes a request for fact-finding. Said Powell:

> The rules originally required that the requesting party had to supply this information when they made their request, and the other party had three days. But the Attorney General the other day said I couldn't do that. The law says that both parties have three days from the time the second party is notified.

The potential problem here, Powell illustrated, is that there is really no guarantee that the second party (most often the school board, since the union initiates the fact-finding process in 99 percent of the cases) will inform the first party that notification has been received, and confusion over the proper date for submission of last best offers may result in the failure of one of the parties to file before the deadline. And of course, a notification could be lost or delayed in the mail. The law does not deal with the possibility that the time limit might expire before the last best offers of both parties are received. Therefore, Powell speculated that, if one of the parties last best offer was not received before the perceived deadline, the other party might declare the process at an end, and take unilateral action. New rules and regulations are being developed to deal with this eventuality, but until they are made effective, Powell has informally requested the parties to be sure to file the necessary information along with their requests for fact-finding. He explained: "I've learned to figure every bad thing that could happen and make provisions for it."

THE TECHNIQUES: Staff Selection and Training

Powell is generally pleased with the pattern of staff development in the Labor Relations Section. He said that while salaries initially were very low, staff members had recently gotten "some pretty good increases" because:

> . . . we are making inroads to make the power structure understand our value, . . They are finding out that we can resolve strikes. . . and that the number of disputes that we can stop before they hit the strike stage is increasing.

Powell is looking forward to adding a conciliator to his staff through the civil service system, but he has some very definite ideas about the kind of person he wants:

> I don't want to hire somebody from back East with a Ph.D. or a lot of experience. . . The state of Kansas differs drastically from a lot of other states. . . What I would like to do is what I did with my present conciliator. He spent six months in an internship here, and then I hired him full-time. He didn't take a lot of labor courses. He learned his job from what I taught him, and from direct experience.

At another point in the interview, Powell claimed that "any reasonably intelligent person can be a fact-finder or arbitrator, but it's a different story on mediation. Give me a good old honest John and he'll make a good mediator."

Fact-finders are not directly employed by the state but are listed on a panel maintained by the agency and are provided with periodic training -- at least once a year. Powell described a fact-finder training session conducted by the Midwest Consortium (of labor relations agencies):

> The first day of the training session is a synopsis of everything that we are going to teach the fact-finders in the next two days. We invite the bargaining parties to come in with the idea that if the parties understand what we are going to teach the fact-finder, when they go to fact-finding themselves they will know what to expect. We have anywhere from 150 to 300 people representing bargaining parties. We like to let the neutrals mingle with the parties so that the parties will not regard fact-finders and arbitrators as God-like people. Then in the next two days we tell the fact-finders what it is we want them to do, and how to do it: how to conduct a hearing and the criteria for making their determinations. After they go through that three-day

training session, we require each person to go out on a fact-finding hearing with an experienced fact-finder. We require them to attend at least one day of the hearing, and to pick out a couple of issues and write us a mock report on those issues. Then we go back to our group of four people [who review applications from potential fact-finders] and contrast the mock report with the actual report. Then we either list them as fact-finders or send them back for more training.

STATES WITHOUT BARGAINING LAWS COVERING K-12 TEACHERS

ILLINOIS

In Illinois we conducted a brief interview by telephone in July with Leighton Wasem of the Research and Statistics section, Planning, Research and Evaluation Department, Illinois State Board of Education. Although the state does not have a statewide bargaining law covering teachers, bargaining activity is extensive in local school districts, and covered in the city of Chicago by state law.

In 1978 the state education agency received a one-year grant from the National Center for Education Statistics to develop a data collection system for the teacher collective bargaining process. The effort is being continued with state funds. Wasem served as principal investigator for the project and worked under Sally Pancrazio, Manager of the section.

Building on an existent activity, the collection, organization and publication of a yearly salary schedule study for the state, Wasem asked school districts for copies of contracts and other agreements related to the bargaining process along with the usual information on salaries, fringes and policy, and began developing a comprehensive data collection system that includes:

1. Information on representation activity; and
2. a breakdown of the provisions in negotiated contracts.

This comprehensive collection of information is used not only by policy makers and state education agency administrators but by the bargaining parties and those who are called in to assist in the resolution of disputes (mediators, fact-finders and arbitrators). The 1979-1980 report* indicates that 45% of Illinois school districts (456) have a signed written agreement which recognizes the teacher organization for the purpose of bargaining. All districts with enrollments of over 12,000 have such agreements and include 4/5 of Illinois teachers. The number of districts with representation and/or scope agreements has increased from 388 in 1974-75 to 456 in 1979-1980. A majority of the representation agreements are also reported to contain negotiated agreements on working conditions, salary and fringe benefits along with "procedural" items. The implementation and administration of these agreements is left almost entirely at the local level, but the state education agency has developed an ad hoc procedure for assisting the parties when they are faced with a dispute.

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*Illinois Teacher Schedule and Contract Provision Study

Leo Hennessy, Assistant Superintendent for Recognition/Supervision for Schools in the state education agency plays a dual role in state and local negotiations. A former labor negotiator, he is the designated negotiator for the state in its bargaining relationships. For school districts, he acts as a neutral mediator in disputes and in his role, keeps a close eye on strike activity. In order for him to perform as a neutral mediator, both parties must request his services, although he may proffer his services during a strike. He indicated that such requests often came to him after the districts had already employed the services of neutrals from the American Arbitration Association (AAA) or, less often, the Federal Mediation and Conciliation Service (FMCS). His tactic here, he explained, often is to join those already involved as neutral parties and to bring to the situation additional information with a bearing on the issues in dispute. He noted that there were not enough mediators in the state who understand school business and that school districts are wary of neutrals who are not education-oriented.

While the services of Hennessy are not imposed on the parties in a dispute, when a strike occurs, Hennessy, in his role as a monitor, watches the activity carefully and, after allowing some time for the parties to settle their dispute on their own, notifies them that his services are available.

Another function that Hennessy performs is that of training neutrals. This is accomplished through regional workshops using state education agency field staff (12-15 people) to train regional superintendents (mostly former administrators) to perform as neutrals in bargaining disputes. Hennessy also indicated that his services as a neutral were being used on an increasing basis in disputes of all kinds, i.e., the superintendent vs. the board of education or the school district vs. the community. As the practice of bargaining increases in the state, Hennessy noted, "recognition disputes are down" because many bargaining relationships are already in place.

Both Hennessy and Wasem felt that the state did not need a comprehensive bargaining law that covered K-12 teachers since the bargaining relationships were developing without one. However, both agreed that a law providing impasse resolution procedures would be useful.

OHIO

Ohio, without a bargaining law for teachers, but with authorization for bargaining as a result of case law, has focused its concern on the strike issue. Roger J. Lulow, Assistant Superintendent of Public Instruction, was interviewed by telephone in July and followed his interview with a letter and documentation

summarizing the state-level policy in this area. All but two or three of the 615 school districts in Ohio have bargained contracts, and "since 1968 the number of teacher strikes has fluctuated between 15 and 25 each year."

He expanded this information:

> There is no apparent trend but the evidence does indicate that the average length of strikes has been increasing. Empirically, we have concluded that the reason behind the increase in the length of strikes relates to the fact that while in the earlier years work stoppages occurred over either recognition of a bargaining agent or dollar amounts which were relatively easy to compromise, the strikes today are occurring over issues of control which are more philosophical and difficult to compromise.

In response to the strike problem the Ohio State Board of Education has issued a resolution setting forth a procedure for the Department of Education to use in dealing with strikes. Lulow's summary of the procedure follows:

> In implementing the State Board resolution on work stoppages, our procedure is, once notified of a strike, to send a formal letter to the school superintendent and school board president informing them that if they choose to keep the schools open for instruction during the work stoppage, they must adhere to all applicable statutes and standards. Following that letter, a regular monitoring procedure and log of contacts between department staff and school representatives, union representatives, media and parents is maintained.
>
> If a board or union representative requests, members of our staff are available to review the financial status of a district or to assist in clarifying the issues. In the event that we receive written evidence of an alleged violation of statutes or the minimum standards for Ohio schools, our office will also conduct an investigation of those allegations. That investigation could include an on-site visitation. In the past year, no on-site visitation took place. In two districts we had prepared to send in a team of inspectors, however, the

schools officially closed the day of our planned visit. They also remained closed for the duration of the strike. In the past three years, one school district has been visited during the midst of a work stoppage.

One of the major reasons for the evolution of our policy was the advice we received from our Attorney General's office which indicated that we had an obligation to make sure schools met standards during a work stoppage. The major state organizations have all been supportive of our board action. In some isolated cases, school boards have concluded that our action places an undue burden on them without taking any action against the teachers. Complaints, interestingly enough, have not come from school districts which have experienced strikes.

Under the Ohio law, the only option which the Board of Education has when teachers go out on strike is to terminate the striking teachers. Requirements for due process have made that option virtually impractical. Some boards have attempted to get back-to-work orders but that has not met with great success.

It is our belief that since virtually all of Ohio's 615 school districts have developed collective bargaining agreements, which are relatively comprehensive in nature, that a statewide collective bargaining bill is probably not needed. (During the last session of the General Assembly, such legislation was passed but vetoed by our Governor.) What would probably be most helpful in Ohio would be a kind of state-mandated impasse procedure which could be invoked prior to any work stoppage. At the present time, our State Board of Education is considering the possibility of making that recommendation to the General Assembly. The receptiveness of the legislature to such a proposal is, at this time, unknown.

As implied in the above paragraph, Lulow does not see the need in Ohio for a comprehensive bargaining bill covering teachers and in fact stated that he felt such a bill "would generate strikes."

CONCLUSIONS

On the basis of a limited examination of four states, it would be both presumptive and irresponsible to come up with hard-line conclusions on any aspect of state-level involvement in teacher/school board bargaining. However, we can conjecture a bit:

1. The structures in the boards and or agencies are quite different. PERB members' qualifications appear to be mostly undefined. The three states with PERBs (New York. Minnesota. and California) have assigned work loads that range from very small to large to PERB members. All of California's PERB members are full-time public servants. In New York, the chairman is full-time while other members are part-time. In Minnesota all PERB members are part-time. Full-time board members are amply salaried, while part-time members are paid on a low to medium per diem basis. But in all four of the states, the staff members interviewed felt that board members functioned knowledgably, and with integrity. Questions that arise here are:

    a. Are there specific and identifiable models of qualification standards for board members that perhaps should be applied in the selection process?
    b. What is the rationale behind the composition, time assignment, power and responsibility of each of the boards?
    c. Are full-time board members more knowledgable/effective than part-time members? How involved are board members in actual agency operation? How much involvement is desirable?
    d. Are the salaries/per diem payments commensurate with the powers and duties of board members? Is compensation adequate to hold competent, dedicated and impartial board members?
    e. What is the best way to preserve the neutral stance required of PERBs and other labor relations agencies? It appears that this valued neutrality is present (even in the absence of state provisions designed to insure it), but very much a function of the individuals holding the positions.
    f. Should the state-level administration of public employee bargaining be embodied in one

agency or should different parts of the process (i.e., adjudication and conciliation) be assigned to separate agencies? Is one structure more effective than another? More neutral?

g. Should state boards and/or agencies be granted the power to determine and/or apply penalties for violation of bargaining law? Does the possession of such power affect a board/agency's effectiveness as a neutral agent?

2. In three of the four states examined, the organization and function of staff members quite logically follows the separation of areas in the bargaining process. But there are some interesting cross-pollinations in New York and Minnesota, where persons with multiple skills are called upon to cross functional lines when work loads become very heavy. There is virtually none of this in California, and very probably a great deal of it in Kansas, where the agency is very small. Is cross-pollination good or bad for the bargaining process and its outcomes? Whatever the setup in each of the four states, it appeared to be satisfactory to those who were interviewed.

3. The processing of the three major bargaining areas in each of the four states is essentially the same, and agency personnel who were interviewed expressed two common goals:

   a. to implement and administer state bargaining laws in a responsible, responsive and completely neutral manner; and
   b. to foster harmonious management/labor bargaining relationships by facilitating, wherever possible, the settlement of disputes by the parties themselves.

   There appeared to be little desire on the part of those interviewed to influence legislative decisions in substantive policy areas, to exercise more decision-making power than is absolutely necessary, or to intrude on the local bargaining process without either a legislative mandate or a request from one or both of the parties.

4. That the decisions that these boards and/or agencies are called upon to make affect teacher/school board relationships is an established fact. We have examined the process (the mechanics) of how these

decisions are made, but we have not attempted to track the process interactions between state and local levels for specific cases, situations, and decisions. This leaves a host of policy development and impact questions still unanswered.

5. The boards/agencies in the four states examined do play a part in the development of case law. Every unit determination, fair share fee ruling, scope of bargaining decision, unfair practice ruling, fact-finder/arbitrator recommendations/ decisions adds to the body of case law that interprets state bargaining laws. And as these decisions are made, affirmed, reversed or reaffirmed, issues are laid to rest. As issues change, so do the function and structure of the involved state-level agencies. In states where bargaining is mature, the representation function gets less emphasis than the conciliatory and adjudicatory areas: units have been determined and bargaining relationships are in place. And as disputes are resolved and adjudicatory decisions are made, certain issues melt away and others surface. As local bargainers become more skilled, issues may change and disputes may become less (or more!) complicated. Perhaps it can be said that teacher bargaining is an evolving process at both state and local levels that may not look, 20 years from now anything like the enigma it is today.

Appendix A

MODEL STATE REPORT

For Fiscal Year 19____

For Calendar Year 19____

IMAGE

1. The state statutes under which this agency is empowered to operate are:

_____

_____

_____

2. Statutes that have been enacted or amended since the last report of this agency that affect the operation of this agency are:

_____

_____

3. Changes in the agency's responsibilities that have occurred because of the statutes or amendments are:

_____

_____

4. This agency is responsible for administering collective bargaining and labor relations of employees in these sectors:

Elementary and Secondary School Districts	Yes_____	No_____
Community Colleges/Junior Colleges	Yes_____	No_____
Higher Education (Four-year and graduate institutions)	Yes_____	No_____
Fire and Police Services	Yes_____	No_____

Other Municipal Services Yes_____ No_____

County Services Yes_____ No_____

State Services other than Higher Education Yes_____ No_____

Nonpublic Nonprofit Institutions Yes_____ No_____

All Private Industry Yes_____ No_____

5. This agency is:

Organizationally Independent Yes_____ No_____

Located in the Department of _____

_____

6. The annual budget of this agency is determined through:

Direct Legislative Appropriation Yes_____ No_____

Indirect Appropriation through Department listed above Yes_____ No_____

Statutory Formula (explain) Yes_____ No _____

_____

_____

_____

7. The annual budget of this agency for this fiscal year is:

$_____

8. The following categories account for these dollar amounts of the annual budget:

Salaries $_____

Personal Services Contracts (Consultants) $_____

Travel $_____

Equipment (Word Processing and Retrieval) $_____

Goods and Services (Time Sharing) $_____

Employee Benefits $_____

9. The following programs (functions) account for these dollar amounts of the annual budget:

Administration and Support Services $_____

Representation and Recognition $_____

Mediation, Fact-Finding and Arbitration $_____

Grievance Resolution $_____

Research $_____

Other $_____

10. The number of entities in the following sectors that this agency has statutory responsibility for is:

	Total Number in Sector	Number that Bargain	Number of Units for:* Super-visory	Profes-sional	Other
Elementary and Secondary School Districts					
Community College/ Junior College					
Higher Education (Four-year and graduate institutions					

* Supervisory personnel should have direct management/administrative responsibility. Professional should include only those with a stipulated set of training requirements to hold the position, such as teachers.

	Total Number in Sector	Number that Bargain	Number of Units for: Super-visory	Profes-sional	Other
Fire and Police Services					
Other Municipal Services					
County Services					
State Services other than Higher Education					
Nonpublic Nonprofit Institutions					
All Private Industry					

11. The case load of this agency during the past fiscal year has been distributed among the sectors as follows:

	Total Cases
Elementary and Secondary School Districts	_____
Community Colleges/Junior Colleges	_____
Higher Education (Four-year and graduate institutions)	_____
Fire and Police Services	_____
Other Municipal Services	_____
County Services	_____
State Services other than Higher Education	_____

Nonpublic Nonprofit Institutions _____

All Private Industry _____

12. The sectors for which this agency maintains a contract file are:

Elementary and Secondary School Districts	Yes_____ No_____
Community Colleges/Junior Colleges	Yes_____ No_____
Higher Education (Four-year and graduate institutions)	Yes_____ No_____
Fire and Police Services	Yes_____ No_____
Other Municipal Services	Yes_____ No_____
County Services	Yes_____ No_____
State Services other than Higher Education	Yes_____ No_____
Nonpublic Nonprofit Institutions	Yes_____ No_____
All Private Industry	Yes_____ No_____

Elementary and Secondary Education

13. The distribution of cases by type and who initiated them for elementary and secondary school districts is as follows:

Case Type	Union	Employer
Unit Composition		
Election		
Prohibited (Unfair, Improper) Practice Complaint		
Mediation		
Fact-Finding		
Arbitration		

Case Type	Union	Employer
Grievance Resolution		
Declaratory Ruling		
Imposition of Penalties		
Other _____		
_____		
_____		

14. The number of contracts settled for elementary and secondary school districts that did not require the assistance of this agency is: _____

15. The number of contract negotiations of elementary and secondary school districts that were brought to this agency for assistance and how they were disposed is:

Total Number	_____
Disposition	
Impasses Resolved	_____
Settled by Mediation	_____
Number Going to Fact-Finding	_____
Settled by Mediation by Fact-Finder	_____
Acceptance of Fact-Finding Report	_____
Additional Negotiations Based on Fact-Finding	_____
Arbitration	_____
Work Stoppages	_____

16. Maintaining a contract file is:

An ongoing activity not mandated by statute	Yes_____	No_____
An ongoing activity mandated by statute	Yes_____	No_____
Restricted to contracts involving more than 100 employees	Yes_____	No_____
Sporadic, and contracts are collected as the need arises	Yes_____	No_____

17. The number of permanent full-time or part-time employees of this agency, excluding Commissioners, is:

_____

18. The number of permanent full-time or part-time employees in the following agency job categories is: *

Counsel	_____
Mediator	_____
Fact-Finder	_____
Arbitrator	_____
Hearing Officer	_____
Representation/Recognition Specialist	_____
Executive Secretary	_____
Recorder	_____
Agency Support Staff	_____

* If responsibilities cut across categories, please indicate and prorate time spent on task.

19. The salary range and steps for the following categories is:

Job Category	Steps	Minimum	Maximum
Counsel			
Mediator			
Fact-Finder			
Arbitrator			
Hearing Officer			
Representation/Recognition Specialist			
Executive Secretary			
Recorder			
Agency Support Staff			

20. The following job categories are civil service positions:

Counsel	Yes_____	No_____
Mediator	Yes_____	No_____
Fact-Finder	Yes_____	No_____
Arbitrator	Yes_____	No_____
Hearing Officer	Yes_____	No_____
Representation/Recognition Specialist	Yes_____	No_____
Executive Secretary	Yes_____	No_____
Recorder	Yes_____	No_____
Agency Support Staff	Yes_____	No_____

21. The number of individuals who voluntarily left this agency in the past fiscal year in the following job categories are:

Counsel _____

Mediator _____

Fact-Finder _____

Arbitrator _____

Hearing Officer _____

22. Individual staff members are assigned to work in one sector, rather than being assigned cases across all sectors that fall in the responsibility of the agency:

Yes____ No____

23. Individual staff members are rotated among types of cases and client members rather than being assigned to one set of cases and clients:

Yes____ No____

24. This agency has an Advisory Council Yes____ No____

If yes, name of Council: _____

_____

25. Members of the Advisory Council are selected by _____ (whom) according to the following criteria:

_____

_____

_____

26. The Advisory Council has _____ (number) members whose term of office is _____ years.

27. The duties of the Advisory Council include:

_____

_____

_____

28. Data-gathering efforts of this agency, in addition to the contract file, include:

Area Wage Surveys	Yes____ No____
Frequency of Provisions in Contracts	Yes____ No____
Lost Workday Statistics	Yes____ No____

29. Data, arbitration decisions, examination decisions are maintained on a computerized system:

Yes____ No____

30. Consultants have been used for the following purposes during the past fiscal year:

Mediation	Yes____ No____
Fact-Finding	Yes____ No____
Arbitration	Yes____ No____
Recognition and Representation	Yes____ No____
Agency Research	Yes____ No____
Internal Organizational Development	Yes____ No____

31. The percentage of the following tasks in which consultants rather than agency permanent staff have been used is:

Mediation	_____
Fact-Finding	_____
Arbitration	_____

Recognition and Representation _____

Agency Research _____

32. Cite the major court decisions issued during the past fiscal year that have affected the operation of this agency or bargaining policy of its clients and provide a short description of the ruling:

_____

_____

_____

_____

_____

PERS

PUBLIC EMPLOYMENT RELATIONS SERVICES
1215 Western Avenue Albany New York 12203

Robert D Helsby
Director
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(518) 438-6836

September 9, 1980

Doris Roas, Director
Collective Bargaining Projects
Department of Research and Information
Education Commission of the States
1860 Lincoln Street
Denver, Colorado 80295

Dear Doria:

As I discusaed with you recently, I am very much interested in your "Model State Report". I would like your permission to use it as a starting place for hopefully achieving a standard reporting system for our public employment labor relations boards, commissions and agencies.

As you know, for the past three years PERS has tried to synchronize, orchestrate and coordinate the information from the various public employment agencies. As we have worked with various facets of this, one crucial need has continued to crop up - the need for a atandardized reporting ayatem and procedures. Each state has developed ita own terminology, its own syatem and procedurea and ita own methods of timing and reporting. This often makes comparisons difficult. Indeed, this has also caused us difficulty in attempting to develop some national standards and guidelines. Your beginning efforts are certainly to be commended.

I am taking the liberty of sending a copy of your "Model State Report" to the current President of the Association of Labor Relations Agencies, Mr. Herman Torosian. I have also suggested that a special committee might be formed to study your report and to use it as a beginning basis for the work of that committee.

Again I commend ycu and your colleagues for taking on a tough assignment and one which I think could provide the start of good things to come.

Sincerely,

Robert D. Helsby

Funded by Carnegie Corporation Fiscal Agent: American Arbitration Association

Appendix B

ADMINISTRATIVE AGENCIES: ISSUES AND PROBLEMS IN PUBLIC EDUCATION COLLECTIVE BARGAINING

by

Wayne Wendling

May 1980

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INTRODUCTION

The structure of administrative agencies and their clients in the arena of collective bargaining between public school employees and school boards differs from the structure seen in other administrative/regulatory situations. Generally, the industry to be regulated consists of a few firms and the agency acts on requests for rate changes and alteration of services. The industry members negotiate with the agency and among themselves over the requested changes. The industry also may interact with numerous individual consumers, who seldom are organized sufficiently to be a strong bargaining partner. Therefore, the primary interrelationship is between the industry and the agency. The structure for public school negotiations and agency behavior instead has two main groups, the labor organization and the school board, and the administrative agency oversees the process between the two. Since competing groups are before the agency at all times, the agency is less likely to be captured by one side, a concern which dominates much of the existing literature of administrative/regulatory agencies./1

The behavior of administrative agencies should be an important concern for the public. Specifically, the maturation of teacher collective bargaining (Perry, 1979) and the growth of bargaining for administrators will result in the need to rule on disputes that fall outside traditional bilateral negotiations but, instead, require the interpretation of statutes and a sense of the public well-being. Furthermore, the numerous bargaining parties on both sides -- teachers, principals, other administrators and assistants all negotiating with the school board -- require that a third party maintain uniformity in the decisions on scope and the interpretation of bargaining limits.

The purposes of this paper are: (1) to review the major studies of administrative behavior -- both theoretical articles and individual case studies -- and (2) to address the issue of what features of these agencies, either in their structure or patterns of organization, have been associated with their successful operation. Since the literature on these administrative agencies is quite limited, the theories of interorganizational behavior should provide a framework for analyzing the existing operations and speculating about future issues.

The final product will include an analysis of research and its implications for administrative agencies that oversee collective bargaining between school boards and their employees. Section I discusses alternative theories of interorganizational relations. These theories include: (1) the political economy approach, (2) the organization set model, (3) the exchange theory, (4) the power dependency approach, and (5) an integrated model employing both the exchange and power dependency theories. Section II describes a number of the case studies of agency behavior and the implications for elementary/secondary education negotiations are analyzed in Section III. Conclusions are presented in the final section.

THEORIES OF INTERORGANIZATIONAL BEHAVIOR

The starting point of any analysis of administrative agencies must be theories of interorganizational behavior. These theories address the nature of the interaction between the parties and, in some instances, predict the outcomes of these relationships. The structural relationship being studied here differs from that of many other administrative situations, such as the economic regulation of surface transportation, airlines or the public utilities. In those circumstances, the interorganizational relationship is established when the agency is assigned to monitor and regulate the behavior of an industry, ostensibly with the public interest in mind. In the situation under consideration here, an interorganizational relationship already is in place between the bargaining unit and the school board. The agency generally is charged with monitoring the formalized relationship and settling disputes between the parties. There are some similarities in the activities, however, such as new service proposals for freight transport relative to representation elections in school districts.

Five general theories will be presented and discussed in terms of the interorganizational structure under consideration. Two of the theories probably are most salient because they analyze the structures already in place. These are: (1) the interorganizational network as a political economy and (2) the organization set model. The other approaches -- the exchange theory, the power dependency approach and the integrated model employing both the exchange and power dependency theories -- will be presented but used mostly to analyze the interaction between subgroups of this network or set of organizations.

The Political Economy Model

Benson (1975) suggested the interorganizational network can be viewed as a political economy. The network of organizations is the basic unit of analysis. The organizations within the network are characterized by having a significant amount of interaction with each other. In this respect the network appears to be very similar to the organization set as defined by Evan (1972), which will be discussed later.

Resource acquisition is the fundamental basis of interaction among organizations in the network. Two scarce resources are distributed in this economy: money and authority. The orientation towards resource acquisition may become the operational definition of the purpose of the organization and the explicit responsibilities of the decision makers. Activities that lead to the acquisition and defense of resources are legitimized by authority and money permits the necessary functions./2 Domains are the result of legitimized resource acquisition and defense activities.

Organizations in a network may have different levels of power. Differential power may arise either from the structure of the internal network or from external linkages to the network that an organization may possess. The internal network may be structured such that one organization has a strategic location. This organization may be able to assign resources ostensibly controlled by other organizations or may simply own control over the actual resources. For example, the department in a governmental agency or series of agencies that controls the assignment of offices and the purchasing of equipment can exert more influence than is commensurate with its responsibility. An external linkage, such as being part of a much larger labor organization, may result in a differential flow of resources to the network. For instance, consider an interorganizational network to consist of the teachers' bargaining unit, the school board, the administrative agency and possibly the state legislature. If the teachers' bargaining unit is part of a politically powerful union in that state, the state level organization may be able to influence the legislature to direct more resources to education. In summation, "the primary effects of interorganizational power lie in the control of network resources, including the flow of resources to other agencies" (Benson, p. 234).

Equilibrium is another characteristic of the interorganizational network. Benson asserts that it occurs when organizations in the same network are engaged in cooperative and coordinated interactions based on consent and respect. Four dimensions of interorganizational equilibrium are suggested:

1. Domain Consensus, which is the agreement among participants in organizations regarding the appropriate role and scope of an agency;

2. Ideological Consensus, which is the agreement among participants in organizations regarding the nature of the tasks by the organizations and the appropriate approaches to those tasks;

3. Positive Evaluation, which refers to the judgment by workers in one organization of the value of the work of another organization; and

4. Work Coordination, which refers to the patterns of collaboration and cooperation between organizations. Work is coordinated to the extent that programs and activities in two or more organizations are geared to each other with a maximum of effectiveness and efficiency.

Benson asserts that dimensions should be balanced in order for equilibrium to persist, e.g., if one dimension moves in one direction, the other components should move in the same direction. However, this definition of balance seems simplistic and is not intuitively obvious. First, causality is not recognized. Ideological consensus probably is a precondition for work coordination. A definite goal or series of goals is necessary before the separate elements will agree on the work coordination. Without an agreed upon goal, individuals will use resources to achieve their separate goals rather than the organizational one. Without this directional association, one is assuming the "invisible hand" approach./3 Conversely, it is possible that the more necessary condition for equilibrium is that some dimensions move in the opposite direction. For instance, if domain consensus decreases then positive evaluation must increase in order to maintain equilibrium. A decrease in domain consensus could ultimately stifle an organization network as more resources are expended to establish turf. However, as the positive evaluation of the organization where domain is in question increases, other organizations are more likely to demur to that organization's domain and the network can retain its balance.

Finally, the operation of the interorganizational network is affected by the environment in which it

operates. The environment may affect the availability of resources to the network or it may alter the method of distributing resources within the network. For instance, the antiregulation environment in the United States today probably has affected the flow of resources to the Federal Trade Commission (FTC). This in turn, should alter the critical linkages in the FTC's network.

The political economy approach may be one framework for analyzing administrative behavior towards the collective bargaining process between school district bargaining units and school boards. Specifically, it is possible to conceive of an interorganizational network consisting of local boards, the local teachers' bargaining unit, the PERB or other administrative agency, the state teachers' organization, the state association representing school boards and the state legislature. The importance of the state legislature in the input set probably is related to the proportion of education expenditures provided at the state level relative to those provided locally. The state legislature has the primary access to monetary resources, but the teachers' union and the state organization of school boards can offer to trade one resource (votes) for another resource (education spending). The local teachers' bargaining unit and the local school board may vie over the distribution of the additional resources with the PERB entering if a dispute arises over whether the distribution favors one side over the other.

Organization Set Model

The organization set model was developed by Evan (1966, 1972). The model has four components: (1) the focal organization -- the one to be analyzed, (2) an input organization set -- those which provide resources, cues and constraints to the focal organization, (3) an output organization set -- those which tend to receive resources, cues and constraints from the focal organization and (4) feedback effects -- the flow of information from the output set to the input set. The dimensions of the organization set are determined by the size of the set, the diversity of the input and output sets and the configuration of the network -- the pattern of relationships between and among the input set, output set and focal organization. Evan describes a network according to Benson's formulation, but the organization

set model is distinguished by its focus on a focal organization.

The organization set may have a number of configurations. Four examples provided by Evan include a dyad, a wheel network, an all channel network and a chain network. Each is graphically portrayed in Figure 1. A dyad is characterized by the focal organization interacting only with an individual organization in either an input or output set. One example of this is the traditional collective bargaining model in which the teachers' bargaining unit and school board interact directly. Either one could be considered the focal organization, depending on the interests of the researcher. The wheel network has the focal organization interacting with a number of organizations but none of them have independent interactions with each other. An example of this could be when a school board negotiates with a series of bargaining units representing different classifications of employees, but the bargaining units are affiliated with different unions and no coalition bargaining takes place.

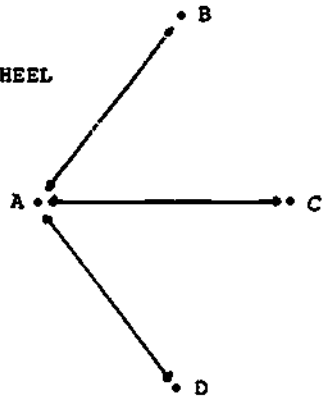
The all channel network is characterized by all members of the organization set interacting with each other as well as with the focal organization. This relationship could depict the interaction among several bargaining units that are all affiliated with the same union and which meet formally to establish bargaining goals or that bargain as a coalition with the focal organization. Finally, the chain network links all organizations but all organizations do not have direct contact with each other. Further, the focal organization is the only one to initiate action. This configuration does not appear to represent a structure currently in use in collective bargaining. Instead, it could characterize the relationship between a contractor and a subcontractor who also has a subcontractor.

One of the more innovative features of the organization set model is the emphasis on the role of boundary personnel, the persons who tend to interact directly and most frequently with other organizations. Boundary personnel can enhance the performance of the agency or undermine the entire administrative structure. Evan suggests that special care should be taken in recruiting boundary personnel. If selected appropriately, they

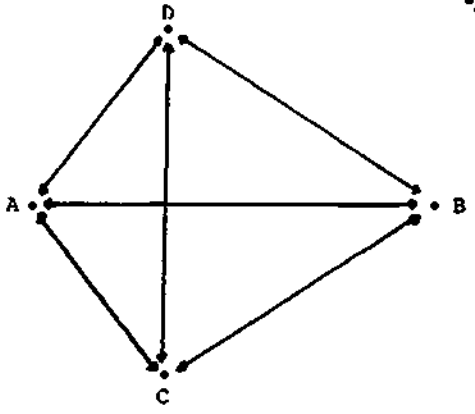
Figure 1.

I. DYAD

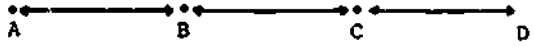
II. WHEEL



III. ALL-CHANNEL NETWORK



IV. CHAIN



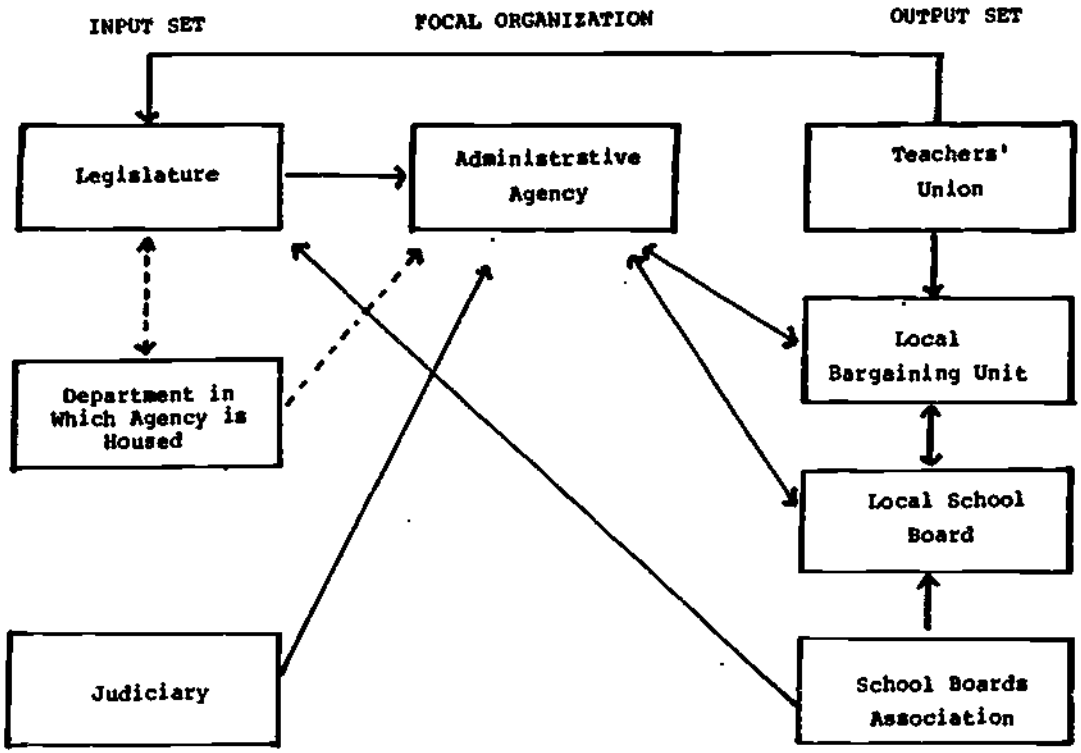
SOURCE: Evan, William M. "An Organization-Set Model of Interorganizational Relations," Interorganizational Decision Making. Edited by Matthew Tuite, Roger Chisholm and Michael Radnor. Chicago, Ill.: Aldine Publishing Company, 1972.

will be speaking the same language (have similar training) as their counterparts in the organization they are administering, and therefore, be more effective. One of the potential problems is that boundary personnel, after having substantial interaction with other organizations, may adopt the viewpoint of those organizations, and thereby, become co-opted. This has been a particular problem for boundary personnel of regulatory agencies and has been cited as one reason for the failure of regulatory agencies to effect the public interest (Hilton, 1972). One manifestation of the above is the movement of agency employees to the payrolls of firms that they formerly regulated. The move, it is argued, usually is preceded by less than rigorous regulation.

An alternative way of stating the above is that the boundary personnel adopt the agency to be regulated as their normative reference group rather than as their comparative reference group. A normative reference group is one whose values or goals (in some form) have been adopted by the focal organization or by key persons in the organization. A comparative reference group is one that serves as a standard of comparison, a competitor. Thus, if the firm to be regulated becomes the normative reference group, discretionary interpretations of regulations may be favorable to the regulated rather than meeting the spirit of the law.

The organization set model is an appropriate framework for the present study. One approach would be to view the administrative agency as the focal agency with the legislature as part of its input set and the teachers' bargaining unit and school board comprising the output set (see Figure 2). Its behavior also may be affected by its size and the number and type of bargaining relationships it must monitor. Does the agency monitor just labor relations in the education sector or does it oversee all public sector labor-management relations? If it monitors just labor relations in the education sector, the above may be an accurate description of the organization set. But if the organization set includes all public sector labor-management relations, the elements of both the input and output sets will change and possibly produce different interactions. On the other hand, is the administrative agency the focal organization or would it be more accurate and fruitful to concentrate on the legislature as the focal organization? These issues will be addressed in more detail in Section IV. The two theories of interorganizational

FIGURE 2. AN ORGANIZATION SET



behavior discussed above provide guidelines for analyzing the interorganizational behavior of this network or set of organizations. A key feature within this set is how organizations interact with each other. There are a number of possible bilateral relationships which may impact significantly on the functioning of the network. Three theories that address the bilateral relationships are discussed below.

The Exchange Theory

The exchange theory posits that mutual benefits or gains can be derived from interacting (Schmidt and Kochan, 1977). Generally, the relationship between parties is characterized by cooperation rather than bargaining because joint benefits can be maximized by the cooperative approach. Thompson (1967) analyzed exchange in terms of interdependence. Specifically, in the context of interdependence, an increase in the power of one party does not mean that the other party has lost power. Rather, it is possible that the new power of both combined may increase as a result of increasing interdependence. Tuite (1972, p. 11) indicates that the recognition and implementation of the joint decision-making process is composed of three steps:

1. Recognition that interdependencies exist between the decision units,

2. An intervention which facilitates consideration of these interdependencies in the decision-making process, and

3. Selection of a technology for making the decision.

The exchange perspective implies that both parties are self-impelled to interact rather than being forced to by statute.

Initially, it may appear that the exchange perspective has no role in the study of collective bargaining, particularly in regard to the behavior of administrative agencies. This may not be the case. Consider the situation characterized by declining resources for education. In this situation the traditional bargaining adversaries may join to lobby for greater resources, the split of the incremental resources between the union and

the school board being determined as a result of the technology (Tuite). The administrative agency may be incorporated into this process by affirming the results of the bargaining process which have led to increased resources targeted for this sector, through mediation procedures or through developing a list of arbitrators who are known for their generous recommendations. This could be considered an example of co-optation. A more jaundiced perspective could suggest that the actual bargaining between teachers and school boards is an exchange process, with the administrative agency providing legitimacy, in which the interdependence has been designed to extract more resources from the public fisc than the school boards could individually. A more traditional view suggests that the exchange perspective is not germane to administrative agency behavior with respect to collective bargaining in elementary/secondary education.

The Power Dependency Approach

The power dependency approach assumes that the motivation to interact is asymmetrical: one party desires to interact, the other does not (Schmidt and Kochan, 1977; Mindlin and Aldrich, 1975). The inter-organizational relationship forms when the party desiring to interact is strong enough to induce the reluctant party to do so. Another perspective of dependence is provided by Emerson (1962), who suggested that one party's dependence on a second was "directly proportional to [one party's] motivational investment in goals mediated by [the other party], and inversely proportional to the availability of those goals to [the first party] outside of [this two party] relation."/4

The implication of dependency is that one party would have little or nothing to gain from the relationship. Therefore, the motivation to interact must be generated by external forces such as legislative fiat. Since the basis of the relationship is not to maximize a joint product, the power dependency relationship probably is characterized by bargaining and conflict.

The power dependency approach may be an appropriate construct for evaluating administrative agency behavior. The motivation for either the teachers' union or school board to establish a relationship with the agency is uncertain and depends on the powers granted to the agency. Specifically, if the administrative agency has

some control over additional resources or the distribution of existing resources, both parties may be motivated to interact with the agency. If the agency has little control over additional resources, the motivation may lie in statutes requiring local school boards and bargaining units to take their disputes to the administrative agency. The effectiveness of the administrative agency probably is dependent on the substitutes available. For example, are the union and state school board association likely to obtain more resources by going to the legislature and governor or should their efforts be concentrated on local officials, particularly in fiscally dependent school districts?

Integrated Power Dependency and Exchange Models

The integrated power dependency and exchange model recognizes that the same organization can have a symmetrical (exchange) relationship with one organization while simultaneously having an asymmetrical (power dependent) relationship with another organization in its same set (Schmidt and Kochan, 1977). Furthermore, it suggests that the interaction between two organizations may move from being largely exchange to a power dependency one, and viceversa.

The combined approach appears to be an explanatory device for the study of the interaction between school boards, labor unions and administrative agencies. During the early days of recognition and bargaining, the union may have been in a power dependency relationship with the school board. Management controlled the resources and the union sought to effect a different distribution of resources. Absent bargaining statutes which required collective bargaining, there was little or no incentive for school boards to negotiate. Threats to withhold labor were sanctioned by statute in only a few states. However, market conditions provided the incentive for the school boards to interact. The quantity of teachers supplied tended to be less than the quantity demanded and in order to assure a continued supply of personnel, certain concessions had to be made. The changing market conditions may also have been accompanied by changing philosophical conditions as manifested by increased militancy. As the bargaining process has matured and particularly as the education industry has had access to a dwindling quantity of resources, the interaction may be moving closer to the

exchange model.

The administrative agency enters this model in the following manner. PERBs are established by statute in individual states and their responsibilities vary. PERBs generally can only respond to requests, so a power dependent relationship may be the rule. As PERBs become more established, the relationship may change, however. Specifically, if the PERB is effective at settling disputes with a minimum resource cost, and if the PERB becomes adept at locating potential problem areas, the relation may be characterized by the exchange process as the parties seek out the PERB. However, if the PERB is perceived to be ineffective, the relationship will be a power dependent one as the only interaction will be that mandated by statute. Therefore, one way to establish what type of relationship exists is to tabulate the number of interactions between the PERB and its clients. A relatively high degree of interaction should indicate an exchange relationship whereas a low degree of interaction should indicate a power dependent relationship (Schmidt and Kochan).

THE BEHAVIOR OF ADMINISTRATIVE AGENCIES

The presentation and discussion of the theories of organizational behavior, particularly the political economy approach and the organization set model, have provided a framework for studying the behavior of administrative agencies and for predicting the response of the network of organizations to certain changes. Some researchers have already studied regulatory/ administrative agencies through the case study method. A number of these studies will be discussed in this section. Furthermore, evaluations of several PERBs have been completed recently and those findings also will be described.

Federal Regulatory Agencies

Federal Trade Commission (FTC)

One administrative agency that has been the subject of a number of studies is the Federal Trade Commission (FTC). The FTC is an independent regulatory commission which is charged with fostering competition between firms and protecting consumers from unfair business practices by firms. The FTC accepts complaints from individuals and business organizations relating to noncompetitive or unfair practices. Staff attorneys study the complaints and decide whether the complaint should be investigated further. If it is determined that the complaint has merit, it may be prosecuted by agency staff and adjudicated by FTC hearing examiners. If not resolved, the case is argued before the FTC commissioners. Bureau staff can also initiate an investigation.

Nystrom (1975) modeled the dynamics of the budgeting, workload and performance of the FTC. He related input and output information to form a dynamic model of the organization. Nystrom chose six variables for in-depth consideration. These were (1) the funds requested, (2) the funds appropriated, (3) the investigations completed, (4) the number of formal complaints, (5) the cease and desist orders issued and (6) the number of litigations. Among the more interesting findings were those showing that funds appropriated were almost a constant proportion of funds requested and that the number of litigations were negatively related to the aggressiveness of the business against whom the order

had been issued.

Aggressiveness was measured by the ratio of contested orders to total orders. Perhaps the more interesting aspect is what factors were not related at a statistically significant level to these variables. Funds appropriated were not related to labor productivity, nor capital productivity./5 In some respects, the nonsignificance may be interpreted as an indication that the environment and the activities of the agency are not relevant to the budgeting process. A specification not utilized but having import for our consideration was the effect of the aggressiveness index on the funds appropriated. If a high proportion of the cases are contested, it could indicate that the FTC was filing spurious cases or was guilty of sloppy investigation before filing. Feedback from business interests to Congress could result in reduced appropriations to the FTC.

One feature that characterizes some Public Employment Relations Boards is the combination of the dispute settlement and adjudicative functions in the same agency (Helsby and Tener, 1979). PERBs often provide assistance during the negotiation such as conciliation or mediation services. As such, they become partners of the bargaining process. Some of them adjudicate charges of unfair labor practices or failure to negotiate brought by either labor or management. In this capacity they may become an adversary of one of the parties. Further, by adjudicating disputes, their effectiveness in the dispute settlement process may be impaired because of the reluctance on the part of the bargaining unit or school board to provide or exchange information which may be used in the future adjudicative process./6 Although this aspect of PERBs has not been subjected to rigorous investigation, a related aspect, the combination of the prosecution and adjudication functions in the FTC was analyzed by Posner (1972).

The debate in the administrative law literature is that "the combination of prosecution and adjudication in a single agency contaminates adjudication." This point was raised by Elman (1971), who pointed out three potential problem points related to the combination of functions in a single agency:

1. A high rate of dismissals is a confession of ineptitude on the part of the members of the

agency, who authorized the bringing of the cases in the first place.

2. It is a rebuff to the staff that investigated and prosecuted the case on the agency's behalf -- a staff on which the members of the agency depend.

3. It encourages noncompliance with the statute that they are committed to enforcing.

To assess this issue, Posner collected and analyzed dismissal rates, judicial review of cases and resource constraints for both the FTC and the National Labor Relations Board. The FTC always has maintained control over the issuance of complaints as well as their adjudication. On the other hand, the National Labor Relations Board (headquarters) approved all complaints and adjudicated them prior to 1942. After 1942 the National Labor Relations Board (NLRB) instructed its regional directors to authorize them without obtaining Board approval. Thus, prosecution and adjudication were effectively separated.

Analysis of the dismissal rate indicates that the FTC's has always been higher than the NLRB's but the dismissal rate (dismissed in entirety) did not change substantially after the change in the organizational responsibilities. With respect to judicial review, for 1962 the proportion of cases reversed by judicial review were very similar: 33 percent and 37 percent for the NLRB and FTC respectively. Looking at the Board's figures over time, the proportion of NLRB cases overturned increased considerably since it separated functions. Simple examination of the dismissal rate can be misleading since it does not take account of the resources available. Posner examined this aspect and determined that the dismissal rate increased as the available resources per case decreased. As a result, Posner concludes that combining the two functions does not bias adjudication.

Evan (1972) also discussed the FTC. Using the organizational set model, he suggested that the members of the input set may include Congress, the President, the U.S. Court of Appeals and the U.S. Supreme Court, but that its output set includes almost all business and consumers since it is charged with counteracting monopoly practices and consumer fraud. Evan concentrated on two

factors in his analysis. First, the boundary personnel hired tend to be of lower quality than are available. "In recruiting attorneys, the FTC evidently attaches more significance to regional background, old school ties and political endorsement of applicants than to their ability as reflected in grades or in the quality of the law schools they attended" (p. 198). Second, the FTC has not recruited and placed personnel according to the needs of the specific tasks of the agency. For instance, the Bureau of Deceptive Practices in the Division of Food and Drug Advertising had no physicians or scientists to advise it. The more recent controversy surrounding the FTC -- the attitude on the part of some businesses that they are overregulating -- indicates that they have altered their recruitment practices by hiring more activist attorneys.

Evan also analyzed the organization set of three other regulatory agencies: the Securities and Exchange Commission (SEC), the Interstate Commerce Commission (ICC) and the Food and Drug Administration (FDA). Hilton also discussed the regulatory behavior of the ICC and Friedman (1978) analyzed a number of changes undertaken by the FDA.

Securities and Exchange Commission (SEC)

The SEC is charged with regulating the securities industry. Using the organization set model, members of the input set may include Congress, the President and the U.S. Court of Appeals and the Supreme Court. The output set may include the public corporations whose issuance of securities is regulated by the SEC and the brokerage firms. As discussed in the analysis of Nystrom's research, those who are regulated may appeal to members of the input set to alter the manner of regulation. Thus, a potential feedback effect does exist and as a result, the focal organization must be concerned with both elements of its input and output set.

Interstate Commerce Commission (ICC)

The ICC is charged with establishing rates and conditions of service for common carriers engaged in interstate surface transport of goods and services. Evan pointed out that the input set of the ICC is identical to that of the SEC but its output set is smaller since it consists primarily of the 17,000

railway, trucking, shipping and pipeline companies engaged in interstate commerce. Actually, the output set may be even smaller because each mode of transport has its own trade organization representing it before and in almost daily contact with the ICC. Evan suggested that "[t]hrough these informal and formal contacts, members of the output set become, in the course of time, members of the input set, influencing information gathering as well as policy formulation," (p. 195).

The boundary personnel problem is particularly relevant for the ICC. Because of the nature of regulation, boundary personnel get to know the industry and at times individual firms within the industry. These boundary personnel may develop a common normative reference group orientation with the members of the output set. As evidence for this point, Evan documented that of eleven Commissioners to leave the ICC in the late 1960s and early 1970s, six took jobs as top executives with firms in the transportation industry, three became practitioners before the ICC and two retired./7

Hilton commented on the boundary personnel problem but restricted his discussion to the behavior of the Commissioners. Specifically, he indicated that the regulatory system does not provide incentives to the regulators to take a long run perspective. They generally are appointed out of political consideration, seldom serve longer than a decade and "must be mainly concerned with what they will be doing when they leave office, rather than what their industries will be doing after they have left office," (p. 48). Hilton also established that regulatory agencies cannot act to protect the regulated industries interests at all times. If they do so, their actions may receive negative publicity from consumers and may feed back to the input set (legislatures and courts) and result in budgetary cuts or the overturning of decisions.

Food and Drug Administration (FDA)

The FDA is not an independent regulatory agency in the same sense that the above two are since it is a division of the Department of Health and Human Services. Thus, that department is part of its input set in addition to Congress, the President and the Federal Courts. Evan

stated that the output set consists of about 50,000 food manufacturing firms, approximately 1,000 pharmaceutical firms and several trade and professional associations.

The interorganizational problems of the FDA differ slightly from those of the other agencies. Specifically, the technical and scientific demands on the agency are greater (Friedman). This has occurred because in 1962 the FDA was charged with evaluating the safety of drug products sold over the counter, of medical devices for human use and the curative value of the drugs. Since the FDA did not have the reputation as a top notch scientific agency, it needed some mechanism to meet its requirements under the law.

There are several dilemmas involved in the change in responsibility. To hire a top notch scientific staff, particularly in 1962, would have been extremely expensive. The size of the staff also was a concern. If the staff is of insufficient size to handle the regular flow of new products, some useful products could be kept off the market, and business interests might pressure the House and Senate to relax the new requirements. If the staff developed is not adequate scientifically, then the scrutiny of new products will be a sham and the agency will lose respect, stature and most likely power.

The solution to this dilemma was the establishment of advisory committees (66 were active in a recent year) to provide expertise not available in the agency. The committees generally consisted of nine members: seven professionals in the field, one a representative of industry and one representing consumers. However, only the scientific members had voting privileges.

The effect of the advisory committee was to place a buffer between the FDA and the industry group it regulates. Although the purpose of the advisory committee was to compensate for the limited in-house scientific expertise, it also might have eliminated the potential for a boundary personnel problem. With access to top notch scientific personnel, the FDA scientists might have adopted them (advisory committee members) as their normative reference group, rather than adopting the industry boundary personnel./8

Public Employment Relations Boards

Evaluations of the operation of the administrative agencies in New Jersey and Pennsylvania recently have been issued by the Public Employment Relations Services. The evaluations address a number of the issues raised in the sections reviewing the theories of interorganizational relations and the findings with respect to other administrative agencies. Among these are the internal organization, the quality, salaries and promotion opportunities of the staff. The public employment administrative agencies in Massachusetts, Montana and Wisconsin also are being evaluated by the Public Employment Relations Services, but will not be addressed here.

New Jersey Public Employment Relations Commission

Known as the Public Employment Relations Commission, it is composed of a Chairman and two part-time Commissioners. The Chairman also is the chief administrative officer of the Commission. Although dispute settlement and adjudication functions are housed in the Commission, they are separated internally into a division of Unfair Practices and Representation and a division of Conciliation and Arbitration. These divisions are separate and there is no overlap of personnel between them.

The evaluators (the Public Employment Relations Services Review and Evaluation Team, 1979) have mixed feelings about this separation. First, they feel that the separation permits the mediators to immerse themselves fully in the mediation process. Second, the separation can lead to some idle capacity, rivalries and jealousies which are not constructive. It does not recommend that the divisions be combined at this time, but suggests that the Commission devise a method to share information.

The other issue the evaluators considered in detail was the quality, salaries and promotion prospects for the staff, particularly the boundary personnel. There was the explicit recognition that the performance of the agency would be only as good as the staff and that competitive salaries were needed to attract competent people. Further, they were concerned about the advancement opportunities of the staff. Given that organizationally, the Commission is rather flat, promotion needed to be reflected in compensation rather than title.

The method of assigning staff to cases is such that it should minimize the normative reference group problem. A rotation method of assignment is used such that the next person on the rotation automatically is assigned the case even if the individual has never worked on the topic before. Moreover, once a case reaches a certain point, it moves to a person in the next hierarchy of the organization. Thus, the same person does not handle the case all the way through and the individual does not build up a special interest with any member of the output set.

In conclusion, the evaluators consider the New Jersey Commission to have succeeded -- the clients of the Commission "perceive the Commission as (1) fair in its judgments, (2) honest in its decisions and operations, (3) responsive to the needs of the parties, (4) relatively prompt in its determinations (with the exception of some adjudications) and (5) minimizing bureaucratic red tape"(p. 18). However, they also conclude that the success of the Commission is not a function of the structure, but rather, it is due to the high quality of the Chairman of the Commission.

Pennsylvania Labor Relations Board, Bureau of Mediation

Two agencies are involved directly in public employment services in Pennsylvania: the Pennsylvania Labor Relations Board and the Bureau of Mediation. The Pennsylvania Labor Relations Board is headed by a Chairman of the Board. There are two other Board members and an Executive Director. Further, there is a Regional Director located in Pittsburgh and another Regional Director located in Philadelphia. The Bureau of Mediation is headed by a Director plus there are four Regional Directors.

The evaluation team studied essentially the same factors as they did for New Jersey. The key point of their evaluation pertained to the relationship of the agency to members of the input set. Two elements are emphasized. First, the Board and the Bureau are contained in the Department of Labor and Industry. As such, their budgets are determined by the Department and funds may be transferred to other agencies in the Department for other purposes. Thus, the resources available to the Bureau and Board are subject to intradepartmental

political manipulation. The evaluation team recommended

> "that both the Board and the Bureau be removed from the Department of Labor and Industry. The Commission should be a completely independent agency with an opportunity to prepare its own budget like the other departments of the Commonwealth" (p. 21).

Second, the attorneys who work for the Board are employees of the Attorney General. This creates a conflict of interest because the Attorney General is the top legal officer of the State and occasionally the State will be party to a suit before the Board. Thus, since the Attorney General also supervises the work of the Board's attorneys, it may affect the impartiality, and therefore, the credibility of the Board, particularly when the State is party to a complaint before the Board.

A literature search did not reveal any specific case studies of the interorganizational relationships between teachers' unions, school districts and PERBs. One study (Chauhan, 1977) did point out possible implications for administrative agencies vis-a-vis the courts. In Sampson v. Murry (42 U.S.L.W., 1974), the U.S. Supreme Court indicated that courts should not become involved in public employee personnel problems until all avenues within the administrative process have been exhausted. This case, combined with the findings in another case, Christian v. New York State Department of Labor (42 U.S.L.W., 1974) indicated that the Court prefers that the administrative agencies be used before the Court will be willing to entertain complaints. Chauhan wrote:

> These decisions have led to a speculation that the Supreme Court may be advising "lower courts" to back off on public employee cases and stop interfering with the administrative functions of federal agencies (p. 361).

Although directed to federal employees, these rulings may serve as precedents for state employees.

IMPLICATIONS FOR PUBLIC LABOR RELATIONS AND ADMINISTRATIVE AGENCY BEHAVIOR

Since our concern is the behavior of the administrative agency, the organization set model appears to be the most appropriate analytical device because it permits concentrating on the agency as the focal organization. Evan (1966) proposed five hypotheses about interorganizational relationships that should provide a good starting point for consideration of the implications for this organization set.

> 1. The higher the concentration of input organizational resource, the lower the degree of autonomy in decision making of the focal organization (p. 180).

The input set provides legitimacy, legality and resources for the focal organization. A Public Employment Relations Board would not exist without the authorization and appropriation of the legislature, nor could it continue to operate without the continued budgetary support of the legislature. Therefore, it would appear that the decision-making autonomy of PERBs is somewhat limited. This is even more of a problem when a PERB is housed within an existing department and does not have to go before the legislature to receive its appropriation. There are also feedback mechanisms to consider. The concentration of input resources in the legislature suggests that all operations of the PERB probably take place with careful consideration of the original mandates of the authorizing legislation since it may be a good indicator of the expected behavior. If the relationships of the PERB with members of its output set is unsatisfactory, the output set may go to the input set and express dissatisfaction with the PERB. Consideration of this possibility could reduce the autonomy of the PERB even more./9 Hilton stated that Commissioners adopt a "minimal squawk" behavior to reduce the likelihood of negative feedback.

The feedback mechanism also can work in the opposite direction -- output set members praising the performance of the PERB. The interpretation of this feedback is unclear. Positive feedback could indicate impartial and high quality actions by the agency or it could also indicate that the PERB has been co-opted, bringing the effectiveness of the PERB into question. This is not a

problem if the output set is expanded to include the public and it is the public which is seeking to have more resources directed to that agency. Because the PERB is serving at least two client groups, which tend to have opposing views, it is unlikely that both would provide positive feedback if the PERB has been co-opted.

One mechanism that would increase the autonomy of the PERB is if it had its own and relatively stable revenue source. Taxing power should not be vested in the agency, but its autonomy would be increased if the funds from one tax source were designated as automatically going to the agency. This would insulate the agency somewhat from the annual appropriations process, although it would still be accountable because the tax source could be removed by legislation.

> 2. The greater the size of the organization set, the lower the decision-making autonomy of the focal organization, provided that some elements in the set form an uncooperative coalition that controls resources essential to the functioning of the focal organization, or provided that an uncooperative single member of the set controls such resources (p. 181).

Consider the possibility that the Public Employment Relations Board is responsible for monitoring all public sector labor relations, thereby making the organization set very large, particularly on the output side. This may either increase or decrease the number of constraints. For instance, if the output set is stable, similar decisions will have to be rendered in somewhat similar cases even though the exact facts of the case may warrant a different one because the output set members will notice any deviations. Therefore, the decision-making autonomy has been diminished. Conversely, if the agency's output set is expanding, the agency may have more discretion as the interests of current members can be balanced against those of potential members.

The caveats raised by Evan create even more difficulties. Specifically, it is easy to envision either all public sector labor groups or all public sector management groups forming a coalition to lobby the legislature if the decisions are perceived to favor one group or the other. If the PERB adopts a decision-making policy that continuously splits the difference,

they may escape the formation of a negative coalition, but they may appear to be inconsistent and probably are ineffectual.

The above dilemma probably is very real, given the finding by McDonnell and Pascal (1979) that statewide teacher groups have attained considerable power in legislatures and state administrative agencies through political action. The power in the legislature is particularly critical since it is the key member of the input set and the controller of resources. The reader will have noticed that the implicit assumption so far is that the administrative agency is an independent agency rather than being housed in a department of the state government. The second case would expand the input set even more and may reduce access to resources.

3. The greater the degree of similarity of goals and functions between the organization set and the focal organization, the greater the amount of competition between them, and hence the lower the degree of decision-making autonomy of the focal organization (p. 182).

This hypothesis appears to have only limited applicability to the operation of PERBs except in the circumstance where the legislature also tries to enter into dispute resolution./10 Since the legislature can accommodate the positions of the parties to the dispute by making the resources available, and since it also controls the resources of the PERB, parties to the dispute will go to that organization from which they feel they can extract the best deal. Thus, the autonomy of the PERB will be undermined.

Another perspective to this issue employs the exchange theory of interorganizational relations. Consider the possibility that the primary goal of the focal organization and members of the output set is to increase the resource flow into the education sector. Although the teachers' union and school board may be natural adversaries, with the PERB as a neutral and prohibited from lobbying, they may join forces lobbying, de facto, for additional dollars rather than the normal posture. The question may arise as to why the PERB would enter into a coalition to obtain more resources./11 The PERB may simply want to develop its own constituency and to expand its authority, which could be accomplished by more resources moving into this sector.

4. The greater the overlap in membership between the focal organization and the elements of its set, the lower its degree of decision-making autonomy (p. 184).

This hypothesis also appears to have only limited relationship to this sector. Trade unions, school boards and PERBs tend to be mutually exclusive sets. There are a number of exceptions, however. First, the case when the appointees to the PERB are nominated according to whether they represent the interests of unions or employers. Second, the situation when certain legislators, who are important elements of the input set of the focal organization, are identified very closely (and draw their support from) either public sector unions or management groups. Third, the case when staff members of a PERB also are unionized./12

5. Normative reference organizations have a greater constraining effect on the decisions of the focal organization than do comparative reference organizations (p. 185).

Evan is referring to the boundary personnel problem in this hypothesis. Recall that a normative reference group is one whose values or goals (in some form) have been adopted by the focal organization. Specifically, the effectiveness of regulatory/administrative agencies may be impaired if the boundary personnel adopt the group that they are to regulate as their normative reference group.

Which organizations would the PERB adopt for comparative reference and which ones would it adopt for normative reference? If the PERB is an independent agency or a branch of a department, it probably accepts other agencies or branches in its department as its comparative group since it is competing for resources with those organizations. Normative reference organizations may include the legislature or other members of the input set. For the boundary personnel the normative reference group may consist of the union or the school board. Through repeated contacts with one or the other they may adopt that organization's goals./13 Their effectiveness may be impaired because they would no longer be impartial and would not be able to decide cases on their merits. Therefore, it is possible that normative reference groups may constrain the decisions

of the focal organization.

The hypotheses suggested by Evan brought out many salient questions about the operation and structure of the administrative agency. Three issues still need to be addressed. They are: (1) initiative versus reactive posture, (2) the insulation of boundary personnel and (3) measurement of effectiveness. Each is discussed in turn.

The power dependency approach asserts that the motivation to interact is asymmetrical. Unions and school boards probably would not approach PERBs except that they are required by statute to do so. PERBs do not control additional resources, but can only redistribute existing resources. If the PERB can initiate complaints, such as imposing arbitration, rather than just responding to them, the relationship between the focal organization and the members of its input set could change significantly. Specifically, when the PERB redistributes resources in the reactive mode, it is affirming a current distribution or redistributing them within a range that parties have agreed to. But in the initiative mode, the redistribution may not fall within a range that is acceptable. Therefore, the power dependency relationship would shift from the PERB being dependent on the bargaining partners to the bargaining partners being dependent on the PERB.

The boundary personnel problem has been discussed in a number of instances, but the functions and structure of the PERB suggest a possible solution. Some of the main functions of a number of PERBs are conciliation, mediation, fact-finding and arbitration, activities which occur during the actual bargaining process. In some instances, these functions are being handled by consultants rather than by staff members. If staff members are not involved directly in the actual distribution of resources, but are involved only in the coordination, research and data gathering functions, the incentive to adopt the union or school board as the normative reference group may be reduced. As Evan suggested and Hilton asserted, the effectiveness of regulatory agencies has been impaired by boundary personnel making decisions that favored the companies they were regulating with the anticipation of being offered employment with that firm as a reward for their actions.

Another point for consideration when analyzing the performance of regulatory agencies is the number of cases (complaints, requests for action) brought and the distribution of who brings the cases. If the number of cases brought is small relative to some expected norm it could be indicative of strong dissatisfaction by members of the output set with the PERB or it also could suggest that the output set is going directly to some member of the input set for resolution of complaints. If the distribution of cases brought indicates that only one faction of the output set is utilizing the services of the PERB, it might indicate that the PERB is redistributing resources exclusively in one direction, rather than being neutral. This may be occurring because the boundary personnel have adopted one faction of the output set members as their normative reference group or because the entire collective bargaining environment (statutes, rules and regulations) favors one side relative to the other. Therefore the disfavored side, rather than utilizing the system, may be concentrating its resources on changing the environment.

For instance, consider the Massachusetts Labor Relations Commission, which in its 1979 Annual Report, reported the distribution of cases brought and who brought them in during the four fiscal years from 1976 through 1979. Between 1976 and 1979 the number of complaints filed by or against a municipal employer increased from 305 to 433. The distribution of cases changed, however. The ratio of complaints filed by the municipal employer to complaints filed against the municipal employer was .186 in 1976, .305 in 1977, .191 in 1978 and .104 in 1979. Although it is expected that the employer would tend to file fewer cases, the substantial decrease in the proportion filed is the real issue. This trend could be an indicator of disenchantment by the municipal employers with the services provided by the agency and should cause the agency to reexamine the way it is interacting with members of its output set.

CONCLUSIONS

The limited number of studies of Public Employment Relations Boards makes deriving inferences and recommendations about those aspects of the agency that have contributed to its successful operation extremely difficult. This situation is compounded by the limited number of studies that have been generally favorable to the performance of any regulatory agency or that have found any agency to have carried out its duties successfully. In addition, the structure of the administrative agency-client groups is somewhat different from that commonly observed in other sectors. In spite of these obvious handicaps, several findings or implications are possible. The first finding is the foundation for all of the others. Specifically, the organization set approach seems to be the most appropriate theoretical construct for analyzing the relationships between school district employees, school districts and the administrative agency.

Resources are the key, not only to autonomy, but also to decision-making that is impartial and in the interest of the general public. The agency must also be accountable since public monies are being used. Among the structural aspects that might lead to autonomy and still maintain some accountability are to establish the PERB as an independent agency in the state government and provide it with a relatively stable source of income. The PERB should not have its own taxing power, but perhaps it should receive a fixed share of some tax source -- such as one mill of the tax levy placed on property in all school districts in the state. A fixed share would insulate them from the yearly budgetary process and the problems involved in that, yet it would still make the PERB ultimately accountable. It would be more difficult for the input set to abolish the PERB for making an unfavorable decision by eliminating its fixed revenue source than it would be to cut its budget. It is always more difficult to make discrete changes rather than incremental ones.

One possible solution to the problem of the size of the organization set would be to maintain one PERB, but to separate its functions along product lines. For instance, one separate division of a PERB could devote its energies exclusively to education collective bargaining, another to municipal services and a third to

other special taxing districts. This could encourage decision-making autonomy within divisions.

Related to autonomy is the necessity of neutralizing the members of the input set so that unions or school districts do not whipsaw the PERB. The establishment of well written and detailed procedures and requirements for the use of the PERB is one aspect along with a court system that does not intervene in the administrative procedure until the established procedures have been exhausted.

The appointment of Commissioners is an extremely important area. Should a Commissioner have a constituency or should the post be nonpartisan? Hilton discussed the problem of the Commissioner generally taking the short run perspective because their appointments are political and they need to have an alternative employment opportunity when the fixed term ends. Perhaps appointments of nonpartisan individuals for life may circumvent the short run perspective adopted and lead to decisions that are made in consideration of the welfare of the public as a whole. Judicial review would be available to maintain quality control, and therefore, the accountability of the Commissioners.

Boundary personnel are another important consideration. To avoid the normative reference group problem, rotating them among types of cases, as is done in New Jersey, may be a solution. The use of consultants in sensitive situations where the distribution of resources is of a certain magnitude may short circuit the incentive for boundary personnel to make decisions consistently favorable to one group or the other. Further, obtaining the most qualified individuals possible for these positions should be a high priority. Trading off salary for job security may lead to perverse results. The importance of salary and promotion possibilities for the successful performance of an agency was also emphasized in the New Jersey report.

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FOOTNOTES

1/According to the recently published Rand Corporation study, Organized Teachers in American Schools, statewide teachers' groups have attained considerable power in legislatures and state administrative agencies through political action. If the political action is strong enough, they may be able to attain favorable legislation. In fact, a charge being heard more often is that the regulatory agency -- irrespective of the activity to be regulated -- has come under the influence of those to be regulated (Stigler, 1971; Hilton, 1972; Evan, 1972; Noll, 1975; Peltzman, 1976). Others would argue that, in some instances, the legislation establishing regulation/administration has been demanded by those to be regulated (Stigler; Peltzman; Wendling and Werner, forthcoming).

2/Benson described this relationship as follows: "Authority to conduct activities is generally assumed to imply a claim upon money adequate to performance in the prescribed sphere," (p. 232).

3/The invisible hand of economic theory is credited with leading to utility maximization on the part of consumers and productive efficiency on the part of producers. However, the key feature is that all individuals are assumed to respond in the same way in order to achieve utility maximization and the actions of one person do not interfere with the actions of others. It is questionable whether this last aspect is met. Furthermore, the economy as a whole does not have a goal, whereas the organization network does or should.

4/These criteria are quite similar to Marshall's (1961) measures of bargaining power which are: (1) the degree of substitutability among factors, (2) the elasticity of demand for the final product, (3) the ratio of costs of this operation to total costs and (4) the elasticity of supply of cooperating factors. Elasticity is a measure of response. In these instances it is referring to the response to changes in price.

5/Nystrom suggested that labor productivity, defined as the ratio of agency output -- formal complaints + cease and desist orders + litigations -- to the number of employees was negatively related to appropriated funds. That is, as the output of each employee increases, the

agency should receive less funds. The fact that the estimated relationship was positive, although insignificant, instead may suggest that Congress was allocating funds to those agencies most efficient in utilizing them.

6/"The concern has been that the parties will not trust mediators if the agency assigning mediators has adjudicative responsibilities and they will not have confidence in the decisions of an agency that sends out staff who must deal with the parties on a private and confidential basis. The experience of the states that use a single agency indicates that when the agency is properly administered, these problems seldom arise," (Public Employment Relations Services Review and Evaluation Team, 1978). Even if the two functions are not combined, the principals in the adjudicative process most likely have subpoena power, so that access to information can also be obtained through that mechanism. Furthermore, although some statutes require that certain information be supplied to the agency, it is likely that the statutory demands would generate less sensitive information than that garnered through direct participation in the mediation process.

7/The Ethics In Government Act of 1978 is an example of trying to reduce the incentive for boundary personnel to adopt the output set as their normative reference group. Specifically, effective February 1, 1980, former federal workers are prohibited, for the two-year period after leaving the federal government, from acting as a representative before the government on matters in which the employee had official responsibility.

8/The Labor Relations Commission of Massachusetts has an Advisory Council on Employment Relations. Although the activities of this Council have not been determined by the author, it is possible that the Advisory Council helps to keep the staff members abreast of new developments in this field and may suggest concerns with recent decisions.

9/A case in point was the Hospital Rate Commission for the state of Colorado. This Commission was created in 1977 by the Colorado legislature in response to increased consumer and governmental concern over the rising cost of hospitalization. The Commission's authorization was rescinded by the legislature in 1979 after members of the output set -- hospitals regulated

by the Commission -- went before the legislature and expressed extreme dissatisfaction with the performance of the Commission.

10/This case is similar to elected officials not directly responsible for the operation of the school district, particularly a mayor, entering into local negotiations. Such intervention undermines the position of either the public management bargainer or an arbitrator, particularly since the mayor has access to additional resources, rather than just being able to redistribute an existing pool of resources.

11/The following quote addresses this point.

> "A number of participants at a public sector labor relations conference in Washington earlier this month predicted conditions in this decade will bring management and labor closer together by necessity. Economic restraints such as tax and spending limitations and double-digit inflation mean less job security for public employees and a greater need for local governments to keep costs down, they agreed..... These mutual problems make it more essential that labor and management develop a stable bargaining relationship and end their adversarial one, many said." Education USA, vol. 22, No. 22 (January 28, 1980).

12/One example of collective bargaining by employees of the agency administering public labor relations is that of Montana. The Montana Board of Personnel Appeals, which was established before public collective bargaining and assigned administration when a statute was enacted, permits its employees to bargain. In 1979, however, it restricted representation to a labor organization unaffiliated with a "labor organization that represents any employees other than employees of the board."

13/It would appear that this problem would be more acute for boundary personnel if they were in contact with the same members of the organization set most of the time. If they were rotated among members, the goals or values might not seem as homogeneous and might be more difficult to adopt.

The Education Commission of the States is a nonprofit organization formed by interstate compact in 1966. Forty-seven states, American Samoa, Puerto Rico and the Virgin Islands are now members. Its goal is to further a working relationship among governors, state legislators and educators for the improvement of education. The commission offices are located at Suite 300, 1860 Lincoln Street, Denver, Colorado 80295.

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