Proceedings—

The MEYERS-MILIAS-BROWN and WINTON ACTS:

MAJOR LEGAL ISSUES in PUBLIC EMPLOYEE RELATIONS

January 21, 1971

San Francisco

Sponsored by

IIR Institute of Industrial Relations
University of California, Berkeley

PROCEEDINGS OF CONFERENCE

THE MEYERS-MILIAS-BROWN AND WINTON ACTS:

MAJOR LEGAL ISSUES

IN PUBLIC EMPLOYEE RELATIONS

Sponsored by

INSTITUTE OF INDUSTRIAL RELATIONS

UNIVERSITY OF CALIFORNIA, BERKELEY

Hilton Hotel
San Francisco, California
Thursday, January 21 1971

EDITOR'S NOTE

The conference proceedings herein are based upon the transcript of the speakers' remarks made at the conference. Some of the presentations have been expanded to include additional material the speakers were forced to eliminate due to time limitations. All editorial modifications have been approved by the speakers.

C O N T E N T S

C O N T E N T S

PROCEEDINGS OF CONFERENCE

THE MEYERS-MILIAS-BROWN AND WINTON ACTS:

MAJOR LEGAL ISSUES IN PUBLIC EMPLOYEE RELATIONS

Sponsored by

INSTITUTE OF INDUSTRIAL RELATIONS

UNIVERSITY OF CALIFORNIA, BERKELEY

--oOo--

The Conference was called to order by Lloyd Ulman, Director, Institute of Industrial Relations, University of California, Berkeley, in the Pacific Room of the Hilton Hotel, San Francisco, California, at 9:05 a.m. on Thursday, January 21, 1971.

DIRECTOR ULMAN: I would like to welcome you to this Conference on the Meyers-Milias-Brown and Winton Acts in general and Major Legal Issues in Public Employee Relations.

My welcome is extended on behalf of your sponsoring Institute of Industrial Relations. I am Lloyd Ulman, the Director of the Institute.

I should also like to say that undoubtedly never in the history of the Institute of Industrial Relations have we sponsored so expensive a conference, which is due to certain fiscal crises in the state. Nor on the other hand have we sponsored one for which the consumer demand has been obviously so exceptionally strong. The issues in this area of industrial relations are obviously assuming the importance, even intensity in some areas, of the issues that arose in the 1930s. The public sector of the economy is responding with a generation lag to developments which have occurred in the private sector. Obviously, the industrial relations issues can be immensely magnified insofar as their social importance is concerned when they occur in government and in governmental units. I suppose one could say that things are much worse in Poland, but it would be well to keep a watching brief in the United States as well.

When I said that of course the private sector has led the way and has in fact given us here today a rational base on which to analyze the problems which are so new to many people, both employee groups and government employers in the public sector, this does not mean that this kind of lag is going to be perpetuated by a long shot.

In fact, those of you who have long been interested in collective bargaining, and therefore primarily private-sector collective bargaining, now are watching the public sector for the kind of lead which it may well give in the future to collective bargaining in the more traditional private areas. Because just as precedents have been set which are bound to influence employee and employee-management relations in the public sector, so some of the distinctive characteristics of the public sector as it emerges in our State and elsewhere are bound to have in my mind an influence on the private sector as well. It may be something in the form of an extension of arbitration as a way of settling disputes or it may be going to pose the problem of wage inflation in a much more serious way than has been posed even thus far. So it would not surprise me at all if in the next few years we probably will have to sponsor a conference on the impact of public-sector bargaining on the private sector, just as today we will be considering some of the goodness of fit of the private examples on the public.

This morning's meeting, which is on "The Scope of Meet-and-Confer Requirements: What is Negotiable?" will be chaired by a Professor of Law at the University and Berkeley Campus, as indeed the second meeting will be chaired by another Professor of Law. Both of these authorities, who are indeed formidable ones, have come to the University after extensive experience in private practice in this area.

I am very pleased to introduce to you and turn the chairman duties over to Professor Jan Vetter, Professor of Law.

THE SCOPE OF MEET-AND-CONFER REQUIREMENTS:

WHAT IS NEGOTIABLE?

Chairman: JAN VETTER, Professor of Law,
Boalt School of Law, University of California,
Berkeley.

Speakers: LEE C. SHAW, Attorney at Law,
Seyfarth, Shaw, Fairweather & Geraldson,
Chicago, Illinois.

LEO GEFFNER, Attorney at Law, Geffner &
Statzman & Leo Geffner, Los Angeles.

JACK L. WELLS, Assistant City Attorney,
Los Angeles.

WALTER W. TAYLOR, Counsel, California State
Employees Association, Sacramento.

CHAIRMAN VETTER: The subject of our first panel today will be "The Scope of Meet-and-Confer Requirements: What is Negotiable?"

This is a very complicated topic on which few people would undertake to speak with a great deal of confidence. I am doubtful, however, that a group of people can be assembled who can speak with more authority on this subject than the members of our panel this morning.

Equivalent expertise does not guarantee uniformity of view; and I think that we can look forward to being exposed this morning to a diversity of view.

Our first speaker is Lee C. Shaw, Attorney at Law and senior partner of the law firm of Seyfarth, Shaw, Fairweather and Geraldson of Chicago.

Lee Shaw's public activity in the field of industrial relations include service as a member of President Johnson's National Labor-Management Panel and membership on the Illinois Advisory Commission on Labor-Management Policy for Public Employees and other public affiliations.

He is the author of numerous articles, which include "Minimizing Disputes in Labor Contract Negotiations", "Arbitration, the NLRB, and the Courts", "Labor Relations in the United States: Where are we headed?", and "Do Contract Rights Vest?"; and co-author of a series of books being published currently by the University of Michigan comparing labor law and labor relations practices in the West European countries with similar laws and practices in the United States.

A member of the Chicago, the Illinois State and the American Bar Associations, Mr. Shaw, as I said, is a partner in the Chicago law firm of Seyfarth, Shaw, Fairweather and Geraldson, and has represented companies and employer associations in various matters, including negotiation of collective bargaining agreements, and trial of cases before the National Labor Relations Board and the Federal courts.

He has participated in industrial relations and labor law programs at various universities and for several semesters taught labor law courses at the Downtown Center of the University of Chicago. He holds his B.A. from the University of Chicago and his J.D. from that law school.

Mr. Shaw!

MR. SHAW: Thank you very much.

SCOPE OF REPRESENTATION FOR PUBLIC EMPLOYEES UNDER THE CALIFORNIA LAW AND EXECUTIVE ORDER 11491

MR. SHAW: I do not know why an attorney from the State of Illinois was selected to talk about labor law in the public sector,

because we do not have a public employee law in Illinois. We made a serious effort to get a state labor law for public employees three years ago. Some of the men who served on Governor Kerner's Commission are now quite prominent. They included Ed Miller, the Chairman of the National Labor Relations Board and Roger Kelley, who is Assistant Secretary of Defense (Manpower and Reserve Affairs).

We worked hard for about three months and we finally came up with a recommendation to the Governor which later was drafted into a bill. We had the support of the State and municipal union groups of Illinois and all the employer groups, but the bill was killed in a political fight in the Assembly because it contained a flat prohibition against strikes. And even though much of the rest of the bill, if not all of the rest of it, was at least reasonably acceptable to both sides, the no-strike issue proved fatal.

When I received a telephone call from Don Vial asking me if I could be on this program, I made the bad mistake of telling him that I would like to have more information about the state of affairs in California and particularly to learn what the municipalities had done to implement the State law. About three days later I received in the mail a package containing the CPER series, State laws, ordinances, charters, personnel policies, contracts, and judicial decisions. I was overwhelmed. I did my homework, but to stand here as an expert on your State and local laws is perhaps presumptuous. In any event, what I think would be most helpful for the dialogue that will follow is to try to put the state of the law in California into perspective by comparing it to other states and to Federal Executive Order 11491. I think that by comparison a great deal can be learned about your law and, perhaps even more importantly, what it should be. I have some thoughts about that.

In discussing the California law, I will consider the Meyers-Milias-Brown Act of 1968, as amended in 1970, covering municipal employees, except the employees of public schools who are covered by the Winton Act of 1965. State employees, including employees of the University and the State Colleges, are covered by the George Brown Act of 1961.[1]

Wisconsin in 1959 was the first state to enact comprehensive legislation concerning collective bargaining for all municipal employees. Since then, over half of the states have enacted legislation covering some or all categories of public employees. The following is a summary of the legislation adopted to date:

---

[1] Fire fighters are covered by the Labor Code under provisions similar to the George Brown Act, but they are specifically prohibited from striking.

Twenty-one states have enacted somewhat comprehensive statutes:

1. California (all municipal employees, except employees of public schools, and state employees; two statutes). I do not think the California statute is really comprehensive, but I have included it in this group.

2. Connecticut (all municipal employees except teachers).

3. Delaware (all public employees except teachers).

4. Hawaii (all public employees).

5. Maine (all municipal employees).

6. Massachusetts (all public employees).

7. Michigan (all public employees except classified state employees).

8. Minnesota (all public employees except teachers).

9. Missouri (all public employees except policemen and teachers).

10. Nebraska (all public employees except teachers).

11. Nevada (all local government employees, including teachers).

12. New Hampshire (classified state employees and nonacademic university employees).

13. New Jersey (all public employees).

14. New York (all public employees).

15. Oregon (all state employees and employees of local governments that elect to be covered).

16. Pennsylvania (all public employees except firemen and policemen).

17. Rhode Island (all state and municipal employees; two statutes).

18. South Dakota (all public employees).

19. Vermont (all state and municipal employees; two statutes).

20. Washington (all local government employees).

21. Wisconsin (all state and municipal employees, including teachers; two statutes).

Thirteen states have enacted separate statutes covering teachers:

1. Alaska
2. California
3. Connecticut
4. Delaware
5. Kansas
6. Maryland
7. Minnesota
8. Nebraska
9. North Dakota
10. Oregon
11. Rhode Island
12. Vermont
13. Washington

Six states have enacted separate statutes covering fireman and/or policemen:

1. Alabama (firemen)
2. Florida (firemen)
3. Idaho (firemen)
4. Pennsylvania (firemen and policemen)
5. Rhode Island (firemen and policemen)
6. Wyoming (firemen)

On January 17, 1962, President John F. Kennedy promulgated Executive Order 10988 which extended to all federal employees at the executive level the right to join and form unions and to bargain collectively. On October 29, 1969, President Richard M. Nixon promulgated Executive Order 11491 which updated and modified Executive Order 10988. There is not too much information about how this most recent Executive Order has been applied and how effective it has been. However, the experience of federal employees and agencies under Executive Order 11491 will be carefully examined by state and municipal employees and their representatives.

A. The California Law.

The MMB Act is not a comprehensive labor relations law. Section 3505 requires a local agency to "meet and confer in good faith regarding wages, hours and other terms and conditions of employment...." California is one of the four "meet and confer" states as contrasted with fifteen states which have statutes that provide for collective bargaining or collective negotiations. The four "meet and confer" states are California, Minnesota, South Dakota and Missouri. The fifteen states which have statutes providing for collective bargaining for state and/or local agencies are:

1. Connecticut (Local)
2. Delaware (State and County)
3. Hawaii (All)
4. Maine (Local)
5. Massachusetts (State and Local)
6. Michigan (Local)
7. Nevada (Local)
8. New Hampshire (State)
9. New Jersey (All)
10. New York (All)
11. Oregon (State and Local)
12. Rhode Island (State and Local)
13. Vermont (State)
14. Washington (State and Local)
15. Wisconsin (State and Local)

The Advisory Commission on Intergovernmental Relations was established by the 86th Congress in 1959. Pursuant to its statutory responsibilities, the Commission from time to time singles out for study and recommendation particular problems which in their view enhance cooperation among the different levels of government. In 1969 the Commission examined the recent trends in the organization of state and municipal public employees and made recommendations concerning labor management relations in state and local employment.

In Recommendation No. 5, the Commission recommended that states enact labor laws "establishing the basic relationship between public employers and employees...in arriving at the terms of employment...." The Commission explained:

> There are two general routes such legislation might take: requiring public employers to meet and confer with employees and their organization, and permitting or requiring State and local employing agencies to negotiate collectively with employee representatives. The Commission finds a considerable number of variations of each of these approaches. On balance, the Commission tends to view the meet and confer in good faith approach as being most appropriate in a majority of situations in the light of present and evolving conditions in State and local employment.

Wisconsin State Senator Knowles, County Executive Michaelian of Westchester County, New York, and Pennsylvania Governor Shafer dissented from this recommendation stating:

> We believe the Commission did not give adequate consideration to the fact that a large majority of states enacting public employee labor relations laws in the last decade have turned to the collective negotiations approach. While not opposing the meet and confer concept, we do not believe it goes far enough toward effecting a meaningful and enlightened personnel policy. It is our view that public labor-management relations should be based more on the mutual determination of the terms and conditions of public employment by management and employee organizations, with equal protection ensured by the law for both parties to the negotiating process.

Maine Senator Muskie, Budget Director Mayo, and New York Governor Rockefeller also dissented or took exception to this recommendation, and the latter said:

> It is recognized that individual circumstances in some states and their outlook as to how they desire to extend to public employees a role in arriving at terms and conditions of employment may call for an approach somewhat short of collective negotiations. However, a growing number of states are turning toward 'collective negotiations.' In my judgment the Commission's

> preference should be the 'collective negotiations' approach, while offering 'meet and confer in good faith' as an alternative to those states which felt that they were not quite prepared to move into collective negotiations immediately."

Webster's Third International Dictionary defines "confer" as "to bring...together; to hold conversation or conferences...typically on important, difficult, or complex matters." Webster defines "negotiate" as:

> ...to communicate or confer with another so as to arrive at the settlement of some matter; meet with another so as to arrive through discussion at some kind of an agreement or compromise.

If Webster is correct, "confer" is to hold conversations, and "negotiate" is to arrive at a settlement by compromise. Some difference!

To further confuse what difference there may be between "meet and confer" and collective bargaining, is the definition of collective bargaining in the Labor Management Relations Act. Section 8(d) defines collective bargaining as the mutual obligation "to meet at reasonable times and confer in good faith." Based on this definition, one could argue that "meet and confer" requires the same kind of hard bargaining which the NLRB requires in the private sector. The Los Angeles Employee Relations Ordinance requires "negotiation" and defines that term as "the mutual obligation to meet at reasonable times and confer in good faith." It would seem clear that in Los Angeles County the parties in the course of their negotiations would be expected to give and take and compromise.

The MMB Act provides the following basis for public employee representation:

- The right of employees to form, join and participate, or to refuse to join or participate.
- Formal recognition of an employee organization.
- The parties are obligated to "meet and confer in good faith regarding wages, hours (etc.)" and, if agreement is reached, to draft a written memorandum of such understanding.
- Reasonable notice to recognized organizations when the appropriate public agency is considering a change in a rule or regulation which is within the scope of representation.

-- Employee representatives shall be given a reasonable amount of time off with pay to meet and confer.

-- If the parties fail to agree they may select a mediator.

-- Implementation is granted to local governments to "carry out the purposes" of the law.

The California law does not provide an agency to administer the Act; permit or prohibit final and binding arbitration of interest disputes; permit or prohibit strikes or lockouts; and does not provide for:

-- exclusive representation,

-- guidelines for the determination of appropriate bargaining units,

-- unfair labor practices for both employers and employee organizations,

-- exclusion from coverage of all persons who exercise supervisory authority,

-- procedure and authority for the resolution of union jurisdictional disputes,

-- specific enumeration of management rights which are reserved to the public agency,

-- a mediation staff,

-- fact-finding with recommendations.

However, under Section 3507 of the MMB Act, local agencies have the right to adopt reasonable rules and regulations after consultation in good faith "to carry out the purposes" of the Act[2] which has been done by a number of counties and municipalities. As far as I know, no employee organization has challanged a rule on the ground the agency did not confer in good faith. On October 4, 1968, Los Angeles County adopted an ordinance which includes most of the procedural and substantive provisions found in Federal Executive Order 11491. However, the Los Angeles ordinance permits the parties to agree to final and binding arbitration of interest disputes, whereas arbitration of impasses under

---

[2] "3507. A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of

Fn. continued -

the Executive Order must be approved by the Federal Service Impasses Panel. Marin County also permits binding arbitration by mutual consent. The Council of the City of Berkeley adopted a very strong statement of management rights which, as I read it, excludes virtually all working conditions and job security from the "meet and confer" process. This management rights clause goes beyond the rather broad one in Executive Order 11491 and indicates the extent to which a city or county can legislate under the California law.

Authorizing local California governments to implement the state law has resulted in a wide variety of local laws which I suspect has caused considerable confusion with respect to the type and scope of bargaining. In retrospect, such variety and attendant confusion is inevitable given a vague and skeletal state law which does not provide rules or even guidelines under which local implementation would be possible without changing the basic provisions of the state law.

Fn. 2 continued -

employer-employee relations under this chapter (commencing with Section 3500)."

"Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) additional procedures for resolution of disputes involving wages, hours and other terms and conditions of employment (e) access to employee organization officers and representatives to work locations (f) use of official bulletin boards and other means of communication by employee organizations (g) furnishing nonconfidential information pertaining to employment relations to employee organizations (h) such other matters are are necessary to carry out the purposes of this chapter.

"For employees in the state civil service rules and regulations in accordance with this section may be adopted by the State Personnel Board. (Amended 1968)." (Emphasis added.)

The Wisconsin law covering municipal employees gives local governments the authority to adopt fact-finding procedures as follows:

> (m) Local ordinances control. The board shall not initiate fact finding proceedings in any case when the municipal employer through ordinance or otherwise has established fact finding procedures substantially in compliance with this subchapter.

The Village of Whitefish Bay, Wisconsin enacted an ordinance which the Wisconsin Supreme Court held invalid because it contained time limitations, a tripartite panel, and required the fact-finders to be voters and property owners.

It is obvious that the Wisconsin Supreme Court reads the Wisconsin law to be a comprehensive labor law under which local implementation is very limited. New York is another state that permits implementation, but the New York law is a comprehensive law and implementation is limited by the state law.

Some state laws do not permit any local implementation. Among these are Pennsylvania, Massachusetts, Connecticut, Michigan and Hawaii. The laws of all of these states mentioned provide a state board to administer and enforce the law much the same as the NLRB acts in the private sector. I question whether a single state board could function under a home rule act. Only the Counties of Los Angeles and San Diego have established a Commission or Panel to administer their implementation of the MMB Act. Under a comprehensive state law, a state board could function and could recognize differences between small rural communities and large metropolitan cities in determining appropriate bargaining units and the experience and expertise of negotiators if a question is raised as to good faith bargaining. The NLRB has always followed a policy of determining the requirements of the Labor Management Relations Act on an ad hoc basis which has resulted in constant implementation of that Act.

B. Executive Order 11491 and the California Law.

If the Executive Order and the Postal Reform Act are indicative of the transition that is taking place, then California is going to have to adjust to the changes inevitably coming, as the state is now, I believe, five to seven years behind the times. Executive Order 11491 is considerably more comprehensive than the California MMB Act. It provides for a council to administer the Order; a Panel to resolve impasses and disputes as to the negotiability of proposals; a procedure and authority to establish bargaining units for exclusive representation by secret ballot vote; lists employer and union unfair labor practices (similar to LMRA) and the authority to decide any such charge; spells out those management rights which are not negotiable;

provides Landrum-Griffin type standards for labor organizations; and outlaws strikes and union security except for the voluntary checkoff of union dues. Except for a general statement of management rights, none of these procedural or substantive provisions is included in the MMB Act. However, with respect to the scope of representation or bargaining, the MMB Act and the Executive Order are quite similar. In both laws, the scope of bargaining is limited in two ways: First, basic management rights are excluded from negotiations[3] and, second, collective bargaining is subordinated to laws and regulations of appropriate authorities and the rules of an applicable civil service system.[4] This second limitation may be interpreted by some to mean a public agency could refuse to negotiate wages and fringe benefits

---

[3]Section 3504 of the MMB Act states:

> ...except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Section 11 (b) of Executive Order 11491 limits the scope of collective bargaining in that:

> ... the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices.

[4]Section 3500 of the MMB Act provides:

> Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed. (Amended 1968).

Executive Order 11491 provides the parties shall "confer in good faith" with respect to personnel policies, practices, and matters affecting working conditions

> ... so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order.

which were covered by civil service regulations. Of course, this position could not be taken if bargaining on wages and fringes was established by local implementation, as it has been in a majority of cases, including Los Angeles County. However, if a public agency in California does agree to a wage increase or more liberal fringe benefits than are provided in a civil service regulation, the appropriate legislative body would have to enact legislation to provide the increase.

The 1970 memoranda of understanding signed by various Los Angeles County organizations and the SEIU were really in the form of recommendations to the Board of Supervisors, and under the County Charter, I would think approval by the Board would be necessary.

Were it not for these limitations on bargaining set forth in the California law, the section of this law which defines the scope of representation would include matters which are not mandatory subjects of bargaining in the private sector under the LMRA. Section 3504 contains one of the broadest definitions of the scope of representation anyone could possibly draw, and reads in part as follows:

> ... all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment.

If the limitations on the conferring process are weakened or removed, this very broad definition of the right of representation would really open the door. If California is going to amend its law and remove some of these limitations, it had better change that definition of the scope of bargaining.

There are some interesting differences in language in the MMB Act and Executive Order 11491 involving the scope of representation, but these differences may be more indicative of the spirit of the two laws than establishing any real difference in the rights and obligations of the parties to bargain. The California law studiously avoids the use of the terms "bargain" or "negotiate" or "collective", whereas Section 11 of the Executive Order, entitled "Negotiation of Agreements" provides in Paragraph (a) that the parties "may negotiate an agreement...and execute a written agreement." The Executive Order also uses the "meet and confer" language which is found in the California law, but this language appears to be carried over from Executive Order 10988 and the apparent intent of Executive Order 11491 is to provide for collective bargaining with the limitations which have been mentioned.

Perhaps more than semantics is involved in the difference between "confer" and "bargain". In the A. C. Transit Co. case, the

Alameda County Superior Court held that the legislation creating the Transit District provided for collective bargaining and that the right to strike is an essential part of the collective bargaining process. I would have to conclude that Judge Robert Bostick was reaching to justify his belief that public employees--or at least transit employees--should have the right to strike. The use of the terms "bargaining" or "meet and confer in good faith" does not determine the question of whether public employees have the right to strike. This decision has been appealed by the transit company to clarify the right-to-strike issue.

The Winton Act is a "meet and confer" law, but the mediator's recommendation in the Los Angeles 1970 teachers' strike indicates his belief that school boards have an obligation to bargain and, what is more, to bargain about subjects which many employer-practitioners would consider protected management rights. The Superior Court for the County of Los Angeles disagreed with the agreement, which was based in part on these recommendations. This court held that the union negotiating council was not an entity which was legally qualified to enter into a contract; that the school board had no authority to enter into binding bilateral agreement; and, finally, that the board had no right to agree to abdicate its authority given exclusively to the board by the people of the district. The court found the following provisions of the agreement which the board promulgated as Rule 3700 was an improper delegation of the board's authority:

> ARTICLE IV, Sec. 3(d) The designated school representative and the local school administrator shall meet...and seek to establish procedures to resolve mutual problems involving the interpretation and application of this Rule and such other matters of interest as:
>
> 1. Assignment of teachers to extra curricular activities.
>
> 2. Promotional examination of certificated employees assigned to the school.
>
> 3. Approval of local curriculum and textbook selection.
>
> 4. Initiation of grievances and representation of an employee, if so requested by him in the first step of a grievance procedure.
>
> 5. Establishment of a pupil discipline policy.
>
> 6. Any other matters that may affect the conditions of the teachers or the welfare of the students of the school.

7. Selection of Department Chairman, Grade Level Chairman and Coordinator.

As far as the Winton Act is concerned, at least the Superior Court of Los Angeles does not believe that the school board should attempt to mutually resolve problems in the areas indicated.

The legislative history may reveal the reason why the California law uses the term"confer" instead of the term "bargain" or "negotiate", but without the benefit of reading this legislative history--if, indeed, it exists--I would hazard a guess that the draftsmen of the law were of the opinion that the right to confer was simply the right to express a point of view as distinguished from the accepted meaning of the terms "bargain" and "negotiate".

The Michigan Labor Mediation Board serves both the public and private sectors, which is unique. Its Chairman Bob Howlett expressed the views of the Michigan mediators as follows:

> 'Our mediators have found that the strategy, technique, methods, procedures, difficulties and emotions in public sector collective bargaining are the same as in private sector bargaining, with one exception. The exception is the prohibition against strikes and fact finding as the terminal point in the Michigan statute. There has been a tendency by both public employers and employees' teams to 'save one for the fact finder'. However, people are people. Emotions and interests are the same. Everyone, whether public or private employee, wants a better standard of living and a better life; or to put it bluntly, more money and greater security. Thus, our mediators have found little difference in the process of bargaining.

Executive Order 11491 in Section 12(a) subordinates any collective agreement to existing laws and also to "subsequently published agency policies and regulations required by law." The MMB Act limits negotiations only to existing laws and charters.

This could be very important, and I don't know whether your legislature intended that the law be limited only to existing laws, whereas the Executive Order carefully limits any bargaining agreement to present and to "subsequently published agency policies and regulations." However, in the implementation of the law in the Memorandum of Understanding between the Management Representatives of the County of Los Angeles and Local 601 and 434 of the Service Employees International Union, there is the following provision:

> "... is subject to all current and future applicable federal, state and county laws, ordinances and regulations, the

> Charter of the County of Los Angeles, and any lawful rules and regulations enacted by County's Civil Service Commission, Employee Relations Commission, or similar independent commissions of the County...." (Emphasis added)

It may be that where California law is going to be implemented, the future laws will be controlling and the collective bargaining agreement will be subordinate to them; however, that is not the way the Act is written.

C. Conflict with Civil Service.

Executive Order 11491 represents a compromise between the encouragement of collective bargaining among federal employees and retention of the federal civil service system. While Section 11 provides that the parties "shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions...." Section 12 states that any resulting agreements are subject, inter alia, to the following requirement:

> ... in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; ..."

I estimate that this provision excludes approximately 75 percent of those matters which are considered to be negotiable in the private sector.

The scope of the exclusion can be gleaned from an examination of the Federal Personnel Manual. The index alone consists of some 36 pages of fine print--longer than many collective bargaining agreements in the private sector.

The origins of civil service systems can be traced to passage of the Pendleton Act in 1883. This Act was viewed as the modus operandi for protecting federal employees from the spoils system. The core concept underpinning the Pendleton Act and other civil service legislation is that public employees should be selected and retained solely on merit. But, as the Report of Task Force on State and Local Government Labor Relations noted:

> In practice, many merit systems over the years have come to encompass other aspects of employee relations and personnel management not essentially related to the merit principle. These aspects include the handling of grievances, labor-management relations, employee training, salary admin-

> istration, safety, morale, and attendance control problems. [5]

Generally speaking, the development of civil service paralleled the growth of collective bargaining in the private sector. George Shultz thus observed:

> Civil service regulations set forth the law of the public workplace. The governing charter in the private sphere is normally the collective bargaining agreement. [6]

In fact, for many years unions representing public employees staunchly supported the strengthening of civil service systems. The American Federation of State, County and Municipal Employees (AFSCME) was founded in 1934 in Wisconsin in order to lobby against proposed legislation that would have gutted the state's civil service system. As late as 1955, AFSCME passed resolutions urging the adoption of stronger and better civil service laws.

Increasingly over the past 15 years, however, AFSCME and other unions representing public employees have come to view civil service as an arm of management. More and more they are demanding that matters presently covered by civil service be made negotiable.

The increasing conflict between civil service and collective bargaining raises serious questions about the continued appropriateness of the present breadth of matters covered by the Federal Personnel Manual and the rules and regulations issued by the Civil Service Commission. Perhaps the long-range solution is to limit the jurisdiction of the civil service system to matters essential to the merit principle; i.e., the recruitment, examination, and staffing of employees. Canada, when faced with the same problem a few years ago, gave the Treasury Board, management's bargaining representative, responsibility for pay, classifications, and conditions of employment--all matters over which the Civil Service Commission previously had authority. In the process, the Civil Service Commission was renamed the Public Service Commission, and its authority was limited to examinations, promotions, staffing, and career development of Canadian federal employees.

Writing in the Michigan Law Review in March, 1969, H. W. Arthurs, Professor of Law at York University in Toronto and formerly Chief Adjudicator, Public Service of Canada, had this to say about Canadian

---

[5] 1967 Executive Committee, National Governors' Conference, Report of Task Force on State and Local Government Labor Relations 18.

[6] Government Employee Relations Report (hereinafter GERR) No. 319 at F-2 (Oct. 20, 1969).

Civil Service and bargaining:

> Not directly involved in the scheme of collective bargaining, but very definitely a part of the environment of employer-employee relations at the federal level, is the Public Service Commission. This Commission administers the Public Service Employment Act, which establishes and implements the civil service or 'merit' system of appointments and promotions, and provides a vehicle for employee training and development programs. This area of responsibility is much smaller than that exercised by the old Civil Service Commission prior to the advent of collective bargaining in the public sector. However, there are still problems of delimiting the jurisdictional boundaries between the Public Service Commission and the other bodies engaged in administering the collective bargaining relationship.

Unquestionably, where there is this dual set of rules--one by Civil Service and one by labor agreement--the employee will have the best of both worlds. This also means that the agency and the union may be frustrated in working out a comprehensive labor agreement under which the agency makes concessions in return for which the agency has reasonable discretion in determining the qualifications and tenure of employees covered by the agreement.

D. Permissible Scope of Bargaining under Executive Order 11491.

To determine the permissible scope of bargaining under Executive Order 11491, it is necessary to analyze Sections 11 and 12 of that Order. Thus, while it is clear that an agency is not required to bargain on the mission of the agency, its budget, its organization, etc., it is not clear whether the parties can negotiate an agency's implementation of the various management rights set forth in Section 12(b). For example, does the fact that an agency retains the right to direct and assign employees pursuant to Section 12(b) mean that the parties cannot negotiate the methods and procedures which the agency may use to implement these rights? From a perusal of many contracts negotiated in the federal sector, it would appear that the parties believe that they have the right to negotiate in this area. For example, there are many contractual provisions concerning the assignments of employees to work overtime. Negotiation on these matters was apparently contemplated by the President's Review Committee. In its report dated September 10, 1969, the Review Committee stated:

> We believe there is need to clarify the present language in Section 6(b) of the Order. The words 'assignment of

> its personnel' apparently have been interpreted by some as excluding from the scope of negotiations the policies or procedures that management will apply in taking such actions as the assignment of employees to particular shifts or the assignment of overtime. This clearly is not the intent of the language. This language should be considered as applying to an agency's right to establish staffing patterns for its organization and the accomplishment of its work--the number of employees in the agency and the number, type, and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty.

Since the Review Committee's recommendation in this regard was incorporated into Executive Order 11491, it would appear that the parties are permitted to negotiate on the policies and procedures utilized by management in exercising the various management rights set forth in Section 12(b), except where such policies and procedures are specifically spelled out by the Federal Personnel Manual, existing statutory provisions, or applicable regulations. It should be noted, however, that negotiation on such matters would enter the nonpermissible area if the practicable effect of the negotiated policies and procedures negated the right of the agency to exercise a right set forth in Section 12(b). For example, while it would be permissible to negotiate a provision giving employees an opportunity to exercise a preference in the assignment of shifts, presumably it would be contrary to the letter and spirit of the Order to negotiate a procedure which in practicable effect prevented an agency from staffing a night shift effectively. It is difficult to determine how far-reaching the agreements will be and to what extent they will invade the areas reserved exclusively to management by the Executive Order.

Another difficult area is with respect to matters covered by statutory provision and/or the Federal Personnel Manual. Without question, the parties are precluded from negotiating contractual provisions which nullify applicable statutory provisions or applicable provisions of the Federal Personnel Manual. For example, the eligibility requirements and the accrual of annual leave are specifically set forth in Chapter 63, Subchapter I of Title V of the U. S. Code. Accordingly, the parties would be prohibited from negotiating any changes in the eligibility requirements or the amount of annual leave which an employee can accrue. However, Subchapter I is silent on the purposes for which an employee may utilize accrued annual leave. Assuming this matter is not covered by applicable provisions in the Federal Personnel Manual or published agency policies, it presumably would be open to negotiation. In point of fact, numerous agreements in the federal sector specify certain purposes for which annual leave may be taken. For example, several agreements specifically provide

that an employee is entitled to use accrued annual leave in the event of a death in his immediate family. Another matter not covered in Subchapter I is the procedure for scheduling annual leave. Again, the parties have assumed that this matter was negotiable and, in fact, have negotiated the policies and procedures to be utilized by the agency in scheduling annual leave.

In view of the foregoing, it would appear to be consistent with Executive Order 11491 to allow the parties to negotiate contractual provisions which supplement or add to applicable statutes and/or regulations as long as such provisions do not detract from, modify, or nullify the statute and/or regulation in question. Necessarily, decisions concerning whether certain matters are negotiable can only be determined after examining carefully all applicable statutory provisions, the Federal Personnel Manual, and any published regulations of the agency in question with the proposal.

What I have just said about the scope of bargaining under Executive Order 11491 would apply to bargaining under the County of San Diego Employee Relations Policy, January 1970, which would appear to properly implement Section 3507 of the MMB Act. The San Diego Policy includes many of the substantive and procedural provisions of Executive Order 11491.[7] Probably there will be court tests as to whether a county ordinance or policy exceeds the scope of permissive implementation. Such court action may come if an employee organization is able to persuade a local agency to permit bargaining on matters which are clearly covered by civil service regulations.

---

[7]"Section 1. Purpose. It is the purpose of this Policy to promote fully communications between the County and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between County management and employment organizations. It is also the purpose of this Policy to promote the improvement of personnel management and employee relations by providing a uniform basis for recognizing the right of County employees to join organizations of their own choice and be represented by such organizations in their employment relationships with the County. Nothing contained herein shall be deemed to supersede the provisions of existing state law or the provisions of the County Charter or the Rules of the Civil Service Commission which establish and regulate a civil service system or which provide for other methods of administering employee relations."

The April 15, 1969, 33-month agreement between East Bay Parks and the AFSCME is interesting because much of it reads like a private sector agreement. Its provisions include an agency shop, voluntary dues deductions, management rights, grievance procedure, arbitration of rights grievances, promotions and transfers, seniority for layoffs and recalls, loss of seniority, paid holidays and eligibility requirements for same, amount of sick leave and when it may be used, amount of vacations and when vacations may be taken, leaves of absence, hours of work,meal and rest periods, cleanup time, wages, overtime, insurance, call-back pay, basis for disciplinary action, and no strikes or lockouts. This agreement would indicate that full-scale negotiations are possible at the local level.

In summary, I think the Executive Order produces the opportunity for bargaining on more subjects than will occur under the California law as that law has been implemented. So California is behind the Executive Order in terms of the scope of bargaining.

E. The Postal Reorganization Act

Since the Postal Reorganization Act provides that unions accorded exclusive recognition have the right to bargain over wages, hours and other terms and conditions of employment, the scope of bargaining in the Postal Service largely parallels the scope of bargaining in the private sector[8] and is considerably broader than the permissible scope of bargaining under Executive Order 11491. Unlike Executive Order 11491, the Postal Reorganization Act does not contain a management rights provision. In fact, there is language in the Postal Reorganization Act which indicates that union proposals seeking to restrict technological changes or to prohibit subcontracting are mandatory subjects of bargaining. Thus, Section 2010 of the Act reads as follows:

> The Postal Service shall promote modern and efficient operations and shall refrain from expending any funds,

---

[8]The House Report on H.R. 17070 contains the following statement:

> Generally speaking, H.R. 17070 would bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector. Rank and file postal employees would, for the first time, have a statutory right to organize collectively and to bargain collectively with management on all of those matters--including wages and hours--which their neighbors in private industry have long been able to bargain for.

9 U.S. Cong. News '70 at 3422.

> engaging in any practice, or entering into any agreement or contract, other than an agreement or contract under Chapter 12 of this title, which restricts the use of new equipment or devices which may reduce the cost or improve the quality of postal services, except where such restriction is necessary to insure safe and healthful employment conditions. (Emphasis added.)

Chapter 12 pertains to collective bargaining agreements negotiated between unions representing postal employees and the Postal Service. The Conference Report thus notes that the phrase, "other than an agreement or contract under Chapter 12 of this title"[9] exempts collective bargaining agreements from the terms of the provision. Accordingly, it apparently would be permissible to include in a collective bargaining agreement a provision "which restricts the use of new equipment or devices which may reduce the cost or improve the quality of postal services."

In addition to allowing full-scale collective bargaining similar to that in the private sector, the Postal Reorganization Act sets forth a mandatory procedure for resolving impasses over the negotiation of a collective bargaining agreement. Thus, Section 1207 provides for fact-finding, but if the dispute is not resolved by utilization of such fact-finding within 90 days after the expiration or termination date of the agreement, Section 1207(c) (1) provides that "an arbitration board shall be established consisting of 3 members" and that "decisions of the arbitration board shall be conclusive and binding upon the parties." It is thus clear that compulsory arbitration is the mandated method of resolving impasses when the other designated means have failed to produce an agreement.

This compulsory arbitration provision for some 750,000 post office employees will have a far-reaching impact on labor relations in the federal and state sectors. Since wages are negotiable under the Postal Reorganization Act, arbitration boards will from time to time be faced with impasses involving wages. In issuing decisions on the appropriate level of wages in the Postal Service, arbitration boards presumably will be required to follow Section 101 of the Act[10] which provides that:

---

[9]Conference Report No. 91-1363, 9 U.S. Cong. News '70 at 3472, 3480.

[10]This section was not in the proposed legislation agreed upon by administration officials and representatives of the postal unions having national exclusive recognition; it was added by the House Post Office and Civil Service Committee. Although this comparability principle is not included in the Chapter 12's labor relations provisions, it was linked to these provisions during the debate on the bill in Congress. See, e.g. 116 Cong. Rec. H5584 (remarks of Representative Dulski, Chairman of the House Post Office and Civil Service Committee).

> (T)he Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States.[11]

Since Congress has adopted a similar standard for establishing wages for other federal employees, the decision of an arbitration board on the appropriate wage level for postal employees will undoubtedly have major ramifications on the level of wages for other federal employees. While there are many classifications in the Postal Service that have no counterparts in other agencies, there are nevertheless thousands of other postal employees, such as stenographers, office machine operators, clerks, messengers, janitors, etc., who have such counterparts in other federal agencies.

In my opinion there can be no question but that the implementation of the labor relations provisions of the Postal Reorganization Act will have a tremendous impact on the development of collective bargaining in the federal sector as well as on the level of wages paid federal employees. The same can be said of the impact on state, county and municipal employees. The cry of "second-class citizen" will reverberate in all public employee halls. The AFL-CIO News made the following observation on the postal agreement hammered out last April and which formed the basis for the labor relations provisions in the Postal Reorganization Act:

> (The postal agreement) paves the way for millions of federal workers not only to join a union, but to

---

[11]Conference Report No. 91-1363 includes the following statement:

> The House bill provided as a matter of policy that pay of postal employees was to be comparable to pay levels in major industries in the private sector. The Senate amendment contained a similar provision but made no reference to major industries, and the conference substitute conforms to the Senate amendment. (Emphasis added.)

9 U.S. Cong. News '70 at 3472. It should also be noted that House bill provided "that comparability of compensation and benefits with private industries could be on an area wage basis," but that this provision was deleted from the conference substitute which was subsequently enacted into law.

> bargain collectively with their employer on all issues.[12] (Emphasis added.)

Although the Postal Service is now "an independent establishment within the executive branch of the Government,"[13] the labor relations precedents established by the Postal Service and the unions with which it deals will be looked to by other unions representing federal, state, county and municipal employees.

Because of the different and far more liberal treatment of postal employees under the Postal Reorganization Act, many commentators have declared that Executive Order 11491 is outdated. Indeed, the current report issued by the American Bar Association Committee on the Law of Federal Government Employee Relations concluded that the strikes during 1970 by postal workers and the air traffic control operators made Executive Order 11491 "obsolete."[14] Not surprisingly, the AFL-CIO has stated that the task ahead is to extend full bargaining rights to to all government employees and not just to postal employees.[15] Unquestionably, the employee organizations representing state and municipal employees will jump on this bandwagon.

---

[12] AFL-CIO News, Apr. 10, 1970. George Meany, testifying in favor of the postal bill before the House Post Office and Civil Service Committee, made the following statement:

> We in the AFL-CIO hope to be back before this committee in the very near future, urging adoption of a measure that will insure genuine collective bargaining for all aspects of employment for all civilian workers of the Federal Government. We think this bill is only the beginning.
>
> As we see it, the Congress is today paving the way for a new day in Federal employer-employee relationship.

Quoted in House Report No. 91-1104, 9 U.S. Cong. News '70, 3409, 3465.

[13] House Report on H.R. 17070, 9 U.S. Cong. News '70, 3409, 3414.

[14] GERR No. 363 at A-4 (Aug. 24, 1970).

[15] GERR No. 363 at A-5 (Aug. 24, 1970). More recently, George Meany, testifying at the hearings conducted by the Federal Labor Relations Council to review the performance to date of Executive Order 11491, suggested that "all wage issues should be negotiable..." and that bargaining should "also encompass such related issues as shift premiums, hazard pay, hours, vacations, holidays and related matters." GERR No. 370 at A-7 (Oct. 12, 1970).

Wholly apart from union criticism that Executive Order 11491 is not nearly broad enough, is the view of some government administrators that the new Executive Order is an interim measure intended to bridge the gap between the more limited provisions of Executive Order 11491 and the more liberal provisions prevailing in the Postal Service under the Postal Reorganization Act. Thus, Robert Hampton, Chairman of the Civil Service Commission, made the following observations at the 1969 annual convention of the American Federation of Government Employees:

> As an aftermath of the strikes, there were those who said, before the ink was dry, that the Executive Order was out of date; and there were those who said we must adopt the policy of "full collective bargaining" from the private sector, with all the rituals, trappings and adversary conditions that it implies. We disagree. Government management is not ready for full collective bargaining and neither are the unions. Until Congress gives the executive branch the full economic package, it would be impossible anyway. In the future maybe--today it cannot be done....
>
> I am hopeful that circumstances will give us the opportunity to make the Executive Order work, for under its provision both federal managers and unions are given the opportunity to learn how to negotiate, how to build up labor management expertise which we have not had an opportunity to develop before. Then if and when the day comes, we will be better equipped organizationally and otherwise to deal further with the questions of full collective bargaining."[16]

Since the trend seems clear, if not inexorable, that the scope of bargaining will steadily move toward that allowed under the Postal Reorganization Act, the course of collective bargaining in the postal

---

[16]GERR No. 362 at A-13 (Aug. 17, 1970). Richard Murphy, former Assistant Postmaster General for Personnel, made the following observation:

> (Executive Order 11491) still has many months ahead of it. ... However, it should be regarded as transitional--as another positive and constructive step in the evolution of a modern day labor policy for the federal government.

GERR No. 367 at A-10 (Sept. 21, 1970).

service could in large part determine the future course of collective bargaining for all public employees--federal, state, county and municipal. Accordingly, public governing bodies at all levels have a large stake in the success or failure of collective bargaining under the Postal Reorganization Act.

You will note I have avoided the red-hot no-strike issue. In closing I will make some predictions about strikes, but at this point let me briefly discuss compulsory arbitration and fact-finding as alternate solutions to replace the use of economic force.

F. Compulsory Arbitration or Fact-Finding?

1. Compulsory arbitration of bargaining impasses.

The experience to date at the state and local levels with compulsory arbitration of public sector wage disputes may be a harbinger of things to come.[19] An example of this is the impact of a recent award involving the City of Detroit rendered under Michigan's Public Act 312 which provides for compulsory arbitration of police and firemen's bargaining disputes. In a dispute involving the City's police, the arbitrator awarded an 11.1% increase to patrolmen with five years of service, thereby bringing their annual salaries to $12,000. Although the decision involved only the City's policemen, the resulting impact was tremendous. At a press conference held shortly after the award was rendered, Detroit Mayor Roman S. Gribbs said that he was "dismayed at the impact of this award on the City's ability to finance its operation." He also stated that he had:

> ... considered compulsory arbitration under the existing state law worthy of experiement, but as a result of our experience it may not be the best answer to work stoppages in the public sector.

To implement the award, Mayor Gribbs said that it would be "necessary to reduce a number of city services and to lay off a number of city employees."[18] As a result, some 542 employees have already been laid off. In addition, the City increased the workweek of its employees

---

[17]Los Angeles and Marin Counties have authorized the parties to agree to final and binding arbitration. However, an arbitrator's award to increase wages or benefits may have to be adopted by the governing legislative body unless advance approval is indicated by permitting the parites to agree to final and binding arbitration.

[18]GERR No. 361 at B-9 (Aug. 10, 1970).

from 35 to 40 hours a week. Not surprisingly, these actions led to widespread unrest among the City's other employees, many of whom were on the verge of strike action. The Executive Director of AFSCME Council 77, William Van Zandt, warned that "we are going to make one hell of a fight to make sure our members are not laid off so the city could grant larger increases to another group of employees."[19] The Government Employee Relations Report made the following observation concerning the impact of the award:

> The award is also expected to have an impact on salaries for Detroit's firefighters now under arbitration, and on next year's demands by other city employee organizations, who settled for an average of 6.8 percent increase earlier this year. [20]

Philadelphia likewise learned to its dismay that an award rendered under the Pennsylvania Compulsory Arbitration Act for police and fire fighters had wide ramifications.[21] Because of its compulsory nature, the awards had a tremendous impact on the city's budget and its ability to finance other matters.

2. Fact-Finding

Professor George Hildebrand, in a highly instructive and provocative paper delivered before the Conference of the Labor Management Institute of the American Aribtration Association, strongly favored fact-finding with recommendations over compulsory arbitration, noting that:

> ... if fact-finding with recommendations is provided as part of the basic law of government collective bargaining, it can serve as a unique and highly effective means of protecting the interests of third parties, by exposing extreme demands to the full light of careful analysis and by pointing out the terms of a reasonable settlement. [22]

There is a growing body of evidence that fact-finding with recommendations works in most instances. A study conducted by

---

[19] Id. at B-10.

[20] Ibid.

[21] See generally Loewenberg, "Compulsory Arbitration for Police and Fire Fighters in Pennsylvania in 1968," 23 Ind. & Lab. Rel. Rev. 367 (1970).

[22] Hildebrand, "Collective Bargaining in the Public Sector: An Analytical View," paper prepared for discussion at the Conference of the Labor Management Institute of the American Arbitration Association, Feb. 21, 1966, p. 46.

Professor James Stern concerning the experience which Wisconsin has had with fact-finding is particularly instructive.[23] In the three-year period covered by his study, 73 fact-finding petitions were filed by the parties; of these 65 petitions, or approximately 89 percent, were settled by the parties. Professor Stern made the following observations:

> The high degree of acceptance of awards suggests that political pressures may offer an effective substitute for the conventional economic pressures in securing acceptance of positions arrived at by collective bargaining procedures.[24]

Professor Stern concluded that fact-finding with recommendations "has made a substantial contribution to the improvement of collective bargaining among public employees in Wisconsin."[25] His study constitutes an effective rebuttal to those who insist that no true collective bargaining can occur with anything short of the right to strike or compulsory arbitration.

IMPORTANT SUBJECTS NOT COVERED

There are some interesting practical matters which time does not permit me to cover. Some of them are:

-- Suggested legislation for public employee bargaining.

-- The need for a basic framework for management negotiators.

-- Management function during the term of the agreement.

-- The union's function during the term of the agreement.

-- The problem of motivating public managers to protect public interest.

-- Suggestions on how to motivate public managers.

-- Responsibility and accountability for collective bargaining.

-- And the goal of the public official must be efficiency.

---

[23]Stern, "The Wisconsin Public Employee Fact-Finding Procedure," 20 Ind. & Lab. Rel. Rev. 3 (1966).

[24]Id. at 12.

[25]Id. at 19.

PREDICTIONS.

Prediction No. 1. In time, strikes will be legal for clearly nonessential services. It will be difficult to segregate essential services from nonessential services, but it can be done. In this connection, the Canadian law is worth careful examination, although I do not believe the vast majority of public officials in the United States are ready for the Canadian approach. Under the 1967 Canadian law, following certification the union is required to choose between (i) arbitration or (ii) a process of conciliation for the resolution of any dispute. If the union declares in favor of arbitration, no strike is lawful. However, strikes are permitted where the conciliation procedure was chosen. If a union option is the conciliation process, thereby permitting a strike, the act forbids certain "designated employees" from striking because the performance of their duties is necessary in the interest of the "safety or security of the public." It should be emphasized that the act denies the right to strike only to those persons whose absence from work would imperil interests which are absolutely vital, and employees whose absence would merely inconvenience the public are still permitted to strike. Of the 53 bargaining units which elected between arbitration and conciliation as of mid-1968, only eight chose conciliation. The 45 units which elected arbitration represented 79,000 employees, while the eight strike-potential units represented 33,000 employees of which 25,000 were postal workers. Collective bargaining has not deteriorated under the conciliation process. As of mid-1968, 20 agreements had been signed in bargaining units which were under the arbitration option; only two required the assistance of a mediator and the arbitration tribunal did not receive a single case. The reason for this enviable record appears to be that the unions which chose to go the arbitration route decided in advance to bargain in a more responsible and less militant manner. It is to be noted that during this period of time, strikes in Canada in the private sector were numerous and lengthy.

Prediction No. 2. Where strikes are permitted, the scope of bargaining will eventually include all terms and conditions of employment, as in the private sector, but legislative approval will be required where the tentative agreement invades the exclusive jurisdiction of a legislative branch of government. As in the private sector, the public employer will have to bargain to retain his right to manage the business and he will not be able to ignore a proposal which, if accepted, may interfere with his right to manage. As a matter of fact, some private contracts give management as much freedom to run the business as is presently provided in Executive Order 11491, in state statutes, or in the implementation of these statutes by local charters, ordinances, etc.

Prediction No. 3. The legislative body and the public employer negotiators will learn to work together so that the public-employer negotiators will have the authority to make proposals and to arrive at tentative agreements. The tentative agreement should require approval by the legislative body with respect to all subjects where legislation is required to change the existing conditions of employment. Such ratification is essentially the same as ratification by the membership of the union. Undoubtedly some agreements reached at the bargaining table will be rejected by the legislative body which will mean more bargaining, and at this stage the bargaining probably will be with the highest public officials including the party leaders in the legislative body involved.

If I were to leave only one thought with you, I would like to leave this thought: legislative bodies can pass laws which say that certain subjects are not negotiable, but you can achieve the same result by intelligent and hard bargaining and without frustrating people because they come to the bargaining table uncertain as to what they can bargain about. This is true on both sides. I have negotiated hundreds of agreements in the private sector in almost every industry and included in these agreements are management clauses which are stronger than most management-rights provisions in state or municipal laws. Therefore, willingness to negotiate on a broad basis does not mean that public agencies have to agree to give up their right and obligation to manage the business.

Prediction No. 4. Arbitration will be used to resolve disputes with employees who are engaged in essential services and, therefore, not permitted to strike. The prevailing wage theory will be the guideline for such an arbitration. There is the distinct possibility that employees in nonessential services who have the right to strike will also agree to final and binding arbitration, again with the prevailing wage theory being the dominant guideline.

Finally, may I suggest that California needs a comprehensive labor law which will eliminate local options, or at least produce a reasonable degree of uniformity at the local level. The elected state representatives should not abdicate their responsibility by leaving to the local branches of government and the courts a job which belongs to them.

Thank you.

CHAIRMAN VETTER: Mr. Shaw's predictions give us something to contemplate whether with anticipation or with aversion.

CHAIRMAN VETTER: Our next speaker is Mr. Leo Geffner.

Leo Geffner received his Bachelor's Degree from UCLA and his Law Degree from Berkeley. He began practicing in Los Angeles in 1953 and specialized in representation of labor unions and labor relations in both the private and the public sectors. The public sector representation includes the Los Angeles County Employees Association, the Los Angeles County School Classified Employees Union, United Teachers of Los Angeles, and the Professional Peace Officers Association, among others. Mr. Geffner represented Service Employees Local 339 in the first agreement with the City of Anaheim covering Angels Stadium and Convention Center in 1967 and the United Teachers of Los Angeles in the recent Los Angeles teachers' strike in negotiations with the Los Angeles School Board.

Mr. Geffner.

MR. GEFFNER: Thank you, Jan.

Mr. Shaw said in his statement that he thought that California was five to seven years behind the rest of the country in our labor relations in the public sector. I think Mr. Shaw as a guest in our state was being too polite. Our system of public employee relations in this state is a legislative nightmare in my opinion and does not in any way meet the needs of stabilizing labor relations and furthering the objectives of a constructive labor policy. In fact, it creates a built-in vehicle for labor disputes and strikes and the chaotic conditions that presently exist in this state in public employment.

As Mr. Shaw pointed out in great detail in a very expert way, our system in California is unlike the public employment legislation in the other major urban states of the country. We do not have what is referred to as a "comprehensive" public employment statute. We have what the courts have called a "piecemeal" approach to labor legislation in the public sector. Which means that the Meyers-Milias-Brown Act sets forth certain basic guidelines, certain basic rights of public employees and employee organizations, and certain rights in terms of representation and entering into memoranda of understanding and creating impasse procedures. Other than setting out general guidelines, the concept of Meyers-Milias-Brown is to allow local options and local systems to flourish. Consequently, out of the system we have a whole host of local ordinances and statutes in counties and cities throughout the state. The leading one, of course, is the ordinance in Los Angeles County which went into effect in late 1969 and just predated the enactment of Meyers-Milias-Brown.

Following the Los Angeles County ordinance, there were ordinances enacted in Marin, Alameda, Sacramento, and a few other counties and a

number of cities in the state, including Berkeley and Torrance and, just last week, the City of Los Angeles. Most of the ordinances have followed a general pattern on the topic that we are to discuss this morning: the scope of negotiations; and they follow pretty much the pattern of the Los Angeles County ordinance, with various degrees. What they do is create two built-in limitations in terms of the scope of "meeting and conferring" or "negotiations," or whatever term may be used. They specifically exclude items that are covered by service programs, merit programs, promotion, disciplinary procedures, civil service systems, and all of the concepts and procedures that come under the traditional and the standard civil service systems that exist in many counties and cities. These are all specific exclusions from the bargaining process. In other words, they are prohibited by the ordinance from even being discussed between the labor organizations and the public agency. Another pattern that runs through all of these ordinances is a typical management-prerogative clause. When I say "typical," I mean that they have taken the language of the management-prerogative clauses that exist in most private-sector collective bargaining agreements and inserted these clauses into the ordinance as matters that are specifically excluded from the scope of bargaining.

Unfortunately, the national pattern is not too much different. Even the model Hawaii Public Employment Law, which has been looked up to as being the most comprehensive of all the laws, and the Pennsylvania law that was enacted last year also contain specific management-prerogative exclusions. As Mr. Shaw pointed out, the real change and the real milestone are coming with the Postal Reorganization Act, which goes into the concept of the full scope of negotiations which has been developed in the private sector under the National Labor Relations Act.

What does this mean in terms of the current situation? And in practical bargaining, how is it affecting public agencies and public-employee organizations in the state?

What it means is that we are operating under a delusion for the most part because the concept of the public-employment negotiations is now so different than the concept of negotiations in private industry, although we talk about collective bargaining and we talk about negotiations. In the private sector these items that are excluded specifically by the ordinances are matters of negotiations between the labor union and the employer. These items, as Mr. Shaw said, as excluded civil service concepts, cover something like 75 per cent of the subject matters that are traditionally and typically negotiated in the private sector.

A management-prerogative clause is a very much negotiated item in the private sector. There is a fundamental difference between being able to negotiate a management-prerogative clause in a contract in the private sector and negotiating in the public sector in California where

you cannot even negotiate these items because they are excluded by ordinance.

As every negotiator in private industry knows, when you are negotiating, particularly on a first contract, there are two items that management always insists upon and which are true and dear to their hearts. These are a no-strike clause and a management-prerogative clause. Every union negotiator knows this. Most contracts that are negotiated in the private sector have a no-strike clause and a very broad management-prerogative clause. In fact, as Mr. Shaw pointed out, they are much broader than some of these exclusions in the ordinances. But the point is that they are negotiated. When the union has negotiated these clauses and they exist in the contract, you can be sure the union got something in return for giving up these provisions or for agreeing to insert a management-prerogative clause in the contract. It might be a binding-arbitration procedure, it might be a seniority procedure, it might be many other items that are negotiated and make a substantial difference in the formate of negotiations.

What this means is that, as I see it, in most of the counties and cities in California that are in the process now of going through the supposed format of negotiations and bargaining, we are heading on some sort of a collision course between the labor organizations and public administrators and city managers, city attorneys, and all of the public people who are responsible for representing their cities and counties in negotiations. We even have the problem of language, of semantics. We know in private industry after thirty years under the Wagner Act that at least when the union and the employers sit down to negotiate they know the rules, they know the language, and they can communicate. But how many times have those of you who have been involved in negotiations sat down and the public agency talks about "meeting and conferring" and the union representative sitting across the table says: "We are bargaining?" You are talking about "meeting and conferring" and the union negotiator is saying "bargaining." They don't even have the same language. The public administrator, the city manager, says: "We have an agreement. Let's put it into a Memorandum of Understanding."

The union negotiator says: "What are we talking about? We have an agreement. Let's sign the agreement."

So you have this problem of people using words in a different sense. If you don't have communication, you don't really have true bargaining that people in this area desire and need.

Because of these restrictions in the ordinances, what has been happening is not really good-faith bargaining as we know it in the private sector. A pattern is being established. I know this is true

in Los Angeles County, and I think it is true in other counties and cities that have been involved in negotiations. The county or the public agency takes the position that "We have conducted a survey," which is traditional in terms of prevailing wages, or "We have taken a position in Los Angeles County that the county is not ready for binding arbitration on grievances," for example, although the Los Angeles County ordinance does authorize binding arbitration. The county takes a countywide position that the county is not ready for compulsory or binding arbitration, but it is ready for advisory arbitration. So you have the situation where there are thirty or forty units that have been certified in the county, and in the neighborhood of ten or fifteen labor organizations negotiating, but the county has one uniform position: advisory arbitration, but no binding arbitration. And they walk into the negotiating sessions with that fixed position.

You can imagine what kind of good-faith bargaining proceeds from that basic premise. Very, very little bargaining. And that holds true on many other items. The county will come in and say: "We have a uniform position on sick leave because sick leave affects every county employee," or vacation benefits or health insurance. You have a number of labor organizations that are trying to negotiate for their unit. The county has one fixed position. So consequently the parties are not really negotiating on the items that they should be discussing, and we enter into what we call in private industry "Bulwarism." That is the concept developed by the General Electric Company many years ago where General Electric took a survey based on the cost of living, on productivity, and on technology, and said: "We feel that this year a three per cent increase is proper and fair and equitable." And they said to the union: "This is our one and only position. You can take it or leave it. We are not going to bargain any further beyond this three per cent increase." This has been highly criticized in the private sector and in fact has been held to be bad-faith bargaining by the National Labor Relations Board.

This is exactly the concept that is developing in California in many of the public agencies. They are taking the position that "This is what we feel is right" and "We made our study, we have taken our position." Then we just go through the mechanics, the formalities, of sitting across the table and supposedly negotiating. This is really a hangover from the old concept that even predates the collective-bargaining statute that started in Wisconsin in the late '50s. The public employer has a certain concept of sovereignty which allows it to make the decisions in dealing with its employees without allowing the employees to have necessary participation in the decisions that affect the employees. This concept, which was repeated over and over again throughout the decades in answer to requests for collective bargaining, is still with us. It is in a diminished form and it is rapidly dying, but it is still with us and I think it is coming with us in this disguise of the so-called bargaining technique.

At this stage of the union organizations, many of the unions and associations are accepting this concept. They are accepting it because they are going through a process of transition as well. The traditional county and city associations, that had a low dues-structure and mainly appealed to members because of insurance and consumer programs and really had nothing to do with collective bargaining, are changing their image rapidly. They are not only affiliating with traditional AFL-CIO unions, as in L. A. County and other areas, but they are becoming more and more the traditional trade-union organization. They are raising their dues so that they can function operationally in terms of staff organizers and negotiators, and they are accepting the concept of collective bargaining. Of course the traditional AFL-CIO unions in this area, such as the Service Employees Union, have a long history of dealing in private industry, and they are trying to bring those concepts over into public employment. They are meeting with a great deal of frustration because they want to talk about "bargaining" on anything, they want to talk about "agreements," and the public agency wants to talk about "meeting and conferring" and "memorandums of understanding."

In certain areas the problem is becoming acute and I think will become even more serious. For instance, the county and the social workers in the welfare department where there is a tremendous drive to deal with subject matters that the counties feel are within the area of management prerogative--the area of caseload, the area of type of performance that a social worker gives in terms of satisfying a client, as well as meeting the budgetary and the philosophical needs of the county as far as the welfare program is concerned. The welfare workers throughout the Social Workers Union are pushing hard in this area for what management considers to be traditionally within management prerogatives and are in many cases excluded by the ordinance and even by indirection under Meyers-Milias-Brown. But the point is that they are pushing. The fact that it may not be a proper scope of negotiation has little meaning because if they push and there is a need, then eventually it gets discussed and they become matters of negotiation.

Now to turn to the area of teachers. If the Meyers-Milias-Brown Act and the local ordinances are a legislative nightmare, I have not been able to find the correct description for the Winton Act. It is an absolute impossibility in terms of traditional concepts of collective bargaining. Its concept of proportional representation between rival organizations acting on a negotiating council to sit down and negotiate with a school board is an absolute absurdity. It is just impossible to function. You just can't get rival organizations such as the CTA and the AFT, as well as many smaller professional and specialized associations and organizations in the school district, to sit down and somehow harmonize their differences and forget their organizational rivalry and negotiate with the school district.

In the area of the scope of negotiations, which is the topic here, the Winton Act, which was originally enacted in 1965, did go quite far to include matters that concerned teachers in the "meeting and conferring" process, whatever that might mean. The basic section of the Education Code, Section 13085, prescribes that for "meet and confer" matters, in addition to the standard and traditional items of wages, hours, and conditions of employment, the items of education and professional standards, curriculum, textbooks, and so forth, were to be discussed.

In the 1969 amendments to the Winton Act the legislature seemed to have taken one step backward. They kept the same concepts of educational programs and professional standards about which teachers could negotiate, but they added the word "procedures"--procedures involving textbooks, procedures involving standards, and so forth. Whether that has any substantive meaning I don't think anybody knows, and I would suspect on the practical level it would not make too much of a difference.

But the current and acute problem is the necessity of good-faith bargaining in all areas that are traditionally accepted in the private sector. The schools' problems are like the problems of all cities and counties, which are also facing serious financial crises. We all know the problems of providing greater services, the problems of welfare costs and the budgetary problems that most of the big cities and the counties are facing today; but the school districts, at least in the urban areas, are facing a more serious crisis that really borders on bankruptcy. This situation, with the greater need for education, with the tremendous problems of integration and the problems of minority groups and the idea of furnishing quality education to children, which is a desirable objective on the part of everyone, has created a crisis in terms of the labor relations between a school district and teacher organizations.

The pattern of negotiations throughout the country has been somewhat different with the teachers in facing this problem (and it does not matter whether it is a CTA affiliate or an AFTA affiliate) than it has been in other public agencies. In the typical teacher contract where there has been a pattern of collective bargaining in New York and in New Jersey and Pennsylvania and Chicago, a third of the contract or more is devoted to these areas of professional standards, of quality education, of items that are traditionally considered to be part of the prerogative of the school district in running a school district and in providing education. The remainder of the agreement covers the traditional items of wages, seniority, vacations, sick leave, sabbaticals, and so forth, but at least a third, if not more, of the contract talks about class sizes, textbooks, setting up standards of education--all the items that are of interest to a teacher, which are dear to the hearts of people who believe in management prerogatives. And this is a

pattern throughout the country. You can pick up any teachers' contract in almost every part of the country, whether it is an AFT or NTA affiliate, and the pattern is the same. The same drive exists in California, but the drive is meeting a more formidable obstacle in the Winton Act.

In the Los Angeles Teachers' strike of last year we had a stiuation where a strong CTA affiliate and a smaller AFT affiliate decided to reconcile their differences and merge themselves into a new organization known as United Teachers of Los Angeles. They took a very militant and activist position as far as teachers were concerned and demanded a contract, negotiated for a contract, and ended up in a 28-day strike against the Los Angeles School District. You had a situation where you had fifteen thousand or so teachers out of twenty-five thousand teachers on strike for almost a full month. It didn't really make too much sense to talk about what the Winton Act allowed or did not allow or whether the scope of negotiations was restricted or not restricted. The realities of the demands, the realities of the problem, were far greater than what the technicalities of the law might have been at that time.

The emphasis of the strike, the momentum of the teachers that were on strike, was a highly idealistic one which had to do with changing the School District into a new program of quality education, of in effect proceeding upon some type of planning which meant a deficit-budget program; following the pattern of New York where they negotiated a three-year contract without the slightest idea where the money is coming from, and Chicago where they just negotiated a 16 per cent increase without the slightest idea where the money is coming from. But the idea in Los Angeles was to take a school district and cut class sizes and plan reading programs and maintenance programs, to take the antiquated, old buildings and reconstruct them, and so forth; but they ran into the stone wall with a school district that would not proceed with that type of planning, with that type of budget program. So the emphasis during the strike changed and the end result, which culminated in a settlement through the efforts of Ben Aaron as a mediator, was to negotiate an agreement which in effect gave the teachers a high involvement in the programs and in the planning of various items of education in the Los Angeles School District, the creation of many joint committees that would allow future planning. But the key and the emphasis were on the question of involvement. And that was the item that basically settled the strike.

The teachers were relatively content that they had accomplished something; the majority of the School Board was relatively content that they had negotiated a fair agreement; but then the contract ran right smack into the provisions of our Winton Act. The Superior Court, as Mr. Shaw pointed out, held a few months ago that not only was the whole bargaining process illegal under the Winton Act, but that the District did not have the authority to enter into an agreement with the Negotiating

Council, and also that the provisions of the agreement which were later incorporated into a Board rule, such as the concept of joint committees which allowed teachers' involvement and joint participation in District policy decisions, was an unlawful delegation of the School District's authority under the Education Code, as well as holding that the binding-arbitration procedure was also an unlawful delegation of the authority of the School District under the Winton Act.

It seems to me that this type of confrontation, this type of crisis, has to result in some substantial changes. A law cannot exist long if it does not meet the needs of the people who are involved in the law. The Meyers-Milias-Brown Act is, I think, not only antiquated but, as I said before, I think it is not helping us to resolve our labor problems in a way that will help create stability in the public sector. It has created a vehicle for foment and dissension, as has the Winton Act even more.

It seems to me that the legislature, public administrators, and public agency officials at some point are going to have to face this problem, that something has to be done and done quickly; and whether it be a comprehensive law such as Hawaii or Pennsylvania or whether it be something even broader as the Postal Reorganization Act, I think it is something to which everyone is going to have to give some very careful thought in the future. I don't think that we can function much longer under Meyers-Milias-Brown and under the Winton Acts.

In closing, I just want to say that I am glad Mr. Shaw gave some predictions, because I agree wholeheartedly with his predictions. I think that the momentum is in the direction that he is talking about. And I would just add one other prediction to the ones that he mentioned. And that is, unless the states (not even to talk about California, which is so far behind, but the other states) move further into the area of the concept of the Postal Reorganization Act, that is to accept the concept of complete good-faith bargaining which has been developed in the private sector, I think that we are going to find a very serious move to enact a federal labor policy to do what the Wagner Act and Taft-Hartley Act did in the private sector. Before 1935 we had a whole series of state laws in labor relations. Each state varied in how they treated their labor relations in the private sector. Finally it became so serious and so acute, it created so many problems, that Congress decided that there would have to be one national federal labor policy. That was expressed in the Wagner Act and later in the Taft-Hartley Act. There are so many respectable sponsors of legislation in Congress today, and although it seems far in the future for a federal public employee labor law, I think that unless the states, not only California but the other states, not only the urban states but the rural states that have not enacted any kind of laws, move quickly and move into the area of a comprehensive law that provides for the needs of public employees, in the next five years or so it is not inconceivable that we shall have a federal national labor law that will cover public employment for all agencies, teachers, cities, counties, and the districts of all kinds.

Thank you.

CHAIRMAN VETTER: Our next speaker will be Mr. Jack Wells.

Mr. Wells is an alumnus of Berkeley, receiving his Law Degree from Boalt Hall Law School in 1961. He joined the office of the City Attorney of Los Angeles in 1962 and is now Assistant City Attorney in that office. His responsibilities include advising city management on employee relations, personnel and civil service matters, and the handling of litigation relating to these subjects.

Mr. Wells.

MR. WELLS: This morning I am going to attempt to partially answer two of the questions which have been suggested by your Conference program: namely, (1) whether or not charters and other applicable laws restrict the scope of representation; and (2) whether or not there is a preemption issue in connection with the application of the Meyers-Milias-Brown Act.

Section 3504 of the Government Code defines "scope of representation" to include all matters relating to employment conditions and employer-employee relations. As it has been suggested to you earlier, that is a very, very broad definition.

Section 3505 of the Government Code requires public agencies to meet and confer with recognized employee organizations on matters within the scope of representation.

A problem which has immediately arisen in charter cities is whether the representatives of the public employer need meet or should meet and confer on terms and conditions of employment that are set out by the explicit terms of that city's Charter. To give you an example:

The Charter of the City of Los Angeles provides that an employee who has successfully completed his probationary period and who has been removed by his appointing authority or has been suspended by his appointing authority for a particular period of time has the right to appeal his termination or suspension to the Board of Civil Service Commissioners. The Charter provides that the Civil Service Commission shall hold a judicial-type hearing to hear the evidence of all parties concerning that disciplinary action. Following a hearing by the Civil Service Commission, it has the power to either sustain or not sustain the action of the appointing authority.

Furthermore, the Charter provides for a more elaborate procedure for the review of disciplinary actions which are taken by either the Chief of Police or the Chief Engineer against the uniform personnel of their departments. The Charter has therefore established a citizen board, the Civil Service Commission as the final arbiter of the propriety

of disciplinary actions of this sort, subject of course to judicial review.

The same is true with respect to boards of rights established by the Charter for purposes of reviewing the disciplinary actions taken by the Chiefs of the Fire and Police Departments. These final administrative decisions are not subject to review by any other administrative officer or body of the city and, as I have stated, just are subject to review by the courts, at least at the present time.

From various statements that have recently been made by representatives of labor organizations representing employees of the City of Los Angeles, I believe that there is some dissatisfaction, to say the least, with procedures whereby the final administrative review and final administrative decision of actions that are of this importance to employees are in the hands of city officers and officials or even in the hands of citizen boards appointed by elected officials of the city. There have been some suggestions that this sort of review is stacked against the employee and he really has no true opportunity to be heard. Therefore it has been suggested that disciplinary measures taken by a city official should be reviewable by an unbiased third party having no ties whatsoever with city government. In other words, it has been suggested that the imposition of discipline as well as all other management decisions affecting terms and conditions of employment should be reviewable by means of a grievance procedure and that the final step of the procedure should be binding arbitration.

Without commenting on the utility of binding arbitration to adjudicate such disputes, it is my view that no purpose would be served in meeting and conferring upon the ways and means of making administrative changes in the terms and conditions of public employment which are set forth explicitly in the charters of charter cities inasmuch as, I believe, the parties simply do not have the power to implement any decisions that they might make respecting such changes.

If a charter reposes the exercise of discretion upon the particular body or officer, that discretion must be exercised by that body or officer and may not be delegated. Therefore, as in the example that I have given, where a charter gives an appointing authority the discretionary authority to hire and fire, for example, that authority cannot be delegated. Where a charter empowers a particular officer or body to conduct a quasi-judicial review of the firing of any employee, for example, that body or officer may not delegate such power to a third person. The adoption of a grievance procedure requiring the submission of unresolved grievances of this type would amount in my judgment to an impermissible delegation of authority.

In the case of the City of Los Angeles v. Los Angeles Building & Construction Trades Council (1949), 94 Cal. App. 2d 36, which is

certainly an old decision, the general comments made in that decision are every bit as applicable today as they were at the time that they were made. The Court held that an injunction was properly issued to prohibit unions from coercing or encouraging city employees to strike. The Court stated that: "To the extent that the conditions of employment commonly arranged by contract or covered by the provisions of the City Charter, those provisions are controlling and neither the Board of Water and Power Commissioners, nor any other city officers, may deviate therefrom by contract. Furthermore, to the extent that the City authorities are vested by the charter with continuing discretionary powers such as the power to establish, classify (or exempt from the requirements of the classified service), and fix salaries for the various positions in public employ, and direct the conduct of the work, such discretion may not be lawfully abdicated or delegated."

One of the cases cited by the Court in the City of Los Angeles case as authority for this restriction was Mugford v. The Mayor and the City Council of Baltimore, 44 A. 2d 745 (1946 Md.). And again what the Court had to say in that case is, I think, of current interest with respect to delegation. It stated in its decision that "It was admitted by appellees...that the Department of Public Works could not bind the City, by contract, in any particular relative to hours, wages or working conditions.... To the extent that these matters are covered by the provisions of the City Charter, creating a budgetary system and a civil service, those provisions of law are controlling. To the extent that they are left to the discretion of any City department or agency, the City authorities cannot delegate or abdicate their continuing discretion...."

Except for the memorandum of intended decision of the trial court, in the case that has been alluded to by the speakers who have preceded me here, in Citizens Legal Defense Alliance, Inc. v. Los Angeles City Board of Education, a Los Angeles Superior Court case wherein a judgment has not yet been entered, I have not been able to find a case dealing with agreements of public agencies to submit to binding arbitration of future disputes. However, in that Citizens Legal Defense Alliance case, the Court has indicated that it will rule that the rule of the Los Angeles City Board of Education constitutes an invalid delegation of the Board authority for quite a few reasons, among which is the reason that the grievance procedure provided for therein permits the submission of unresolved grievances to final and binding arbitration.

Notwithstanding what I have just told you here, the Council of the City of Los Angeles has adopted this past week an ordinance requiring management representatives to meet and confer to develop a grievance procedure and requiring that this grievance procedure have as its final step mandatory binding arbitration. This ordinance has

not yet become effective. As far as I know, it has not yet been signed by the Mayor.

Prior to the date that the Council acted on this ordinance, several councilmen received a number of reports prepared by authorities in the field of labor law. The general tenor of these reports was that binding arbitration of grievances poses no legal problems. I believe that inasmuch as the City of Los Angeles has adopted the ordinance that I have just mentioned, similar demands will quickly be made of other cities and jurisdictions for like concessions. And I think it might be of some value to briefly discuss some of what I believe to be the basic flaws in the reports that were submitted to the Los Angeles City Council. Both of the reports about which I am going to speak were submitted by attorneys.

In the first report the writer quotes a portion of a decision of the Connecticut Supreme Court to the effect that arbitration as a method of settling disputes is growing in importance and in a proper case deserving of the enthusiastic support of the courts (Norwalk Teachers' Assoc. v. Board of Education, City of Norwalk 83 A. 2d 482 (Conn. 1951).

You can't really find any fault with a statement like that, but you have to ask yourself: How does it aid in the resolution of the problem that was before the City Council; namely, whether or not they could require the general managers and boards of the various city departments to engage in binding arbitration?

The portion of the decision which the writer of that report chose to omit is instructive, however. For the Court went on to say that "Agreements to submit all disputes to arbitration commonly found in ordinary union contracts are in a different category. If the department entered into a general agreement of that kind, it may find that it is committed to surrender its broad discretion and responsibility reposed in it by law. For example, it could not submit to an arbitrator the decision of a proceeding to discharge a teacher for cause."

In another report there is the following statement:

"The notion of illegal delegability is receiving short shrift in most recent decisions of the State Supreme Courts. Thus, the Pennsylvania, Rhode Island, and Wyoming Supreme Courts have each in recent months had occasion to treat that notion with the back of the judicial hand. The Wyoming Supreme Court has succinctly disposed of this conventional but puny legal threat by declaring that, 'As is true in the industry of private sector, arbitrators are empowered to execute the law, not to make it.'"

However, again if one looks at the decision of the Wyoming Court that was quoted from, the rationale for its decision becomes apparent quite quickly. The Court stated in State v. The City of Laramie, 437 P. 2d 295 (Wyo. 1968): "A City as a creature of the legislature has only such powers as has been granted to it by the State. If that is so, then certainly the state can direct cities to submit labor disputes with firemen to arbitration and the consent or lack of consent of the city would be immaterial."

Obviously such statements by courts of states not having constitutional municipal home rules, as we have here in California, are of very little assistance in attempting to resolve this issue.

This last report also states the case of Harney v. Russo, 255 A. 2d 560 (Penn. 1969) as authority for the propriety of binding arbitration of grievances. In that case the Court upheld the state statute requiring the submission of labor disputes between certain public employees and public employers to arbitration. However, the Pennsylvania Constitution specifically permits the legislature to pass such laws. It is interesting to note that just seven years prior to the decision in the Harney case, in Erie Firefighters Local 293 v. Gardner, 178 A. 2d 691 (Penn. 1962), the same Court held that the state law providing for binding arbitration of firemen's grievances violated that provision of the Pennsylvania Constitution prohibiting the legislature from delegating to any special commission any municipal function. It was only after the Erie Firefighters' decision that the electorate of the State of Pennsylvania amended the State Constitution to provide the authority for the legislature to pass that legislation which was upheld in the Harney case.

Another issue raised but not resolved by the several reports that were submitted to the members of the City Council is that of preemption by the Meyers-Milias-Brown Act. And quite frankly, I don't understand what preemption has to do with the specific problem that we had at hand. So again I will quote from one of these reports:

"Whereas in the Meyers-Milias-Brown Act, the State has enacted legislation covering a subject of statewide concern, the State law preempts the field, City Charter provisions to the contrary notwithstanding; State law, which is preemptive, may not be restricted or narrowed by the provisions of a City Charter."

It was therefore argued that the provisions of the Charter that required certain bodies and officers to perform particular functions could not stand in the way of Council action which would tend to derogate those powers given to those particular officers and bodies by the Charter.

Of course, again I say, I don't know what this has to do with pre-emption because, as was stated in the Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal. 2d 276, by the California Supreme Court: "The doctrine of state preemption becomes a determining factor only when a political subdivision attempts to legislate under its admitted police power (Article XI, Section 11) on a subject also that the state has legislated upon...."

As has been pointed out by the speakers who preceded me, the Meyers-Milias-Brown Act is not very specific in the sense that it does not provide for an all-encompassing scheme on employee relations. The Meyers-Milias-Brown Act does not specifically allow or require arbitration, binding or otherwise. It does afford public employees some basic and uniform organization privileges. Therefore public entities are pre-empted from imposing limitations on the public employees' rights to exercise those specified privileges. I think that that is what the Professional Fire Fighters case stands for. Since the Meyers-Milias-Brown Act makes the matter of the resolution of grievances the subject of local rule, it is obvious that there is no intent on the part of the legislature to obtain statewide uniformity or preempt this particular portion of the field of labor relations.

In closing, I would like to observe that in this particular area of employee relations, that is, the area of arbitration, the Legislature would have several serious constitutional obstacles if it were to attempt to require all local entities to submit to binding arbitration. I think that the problem here in California is the same as was faced by the Pennsylvania Court in the Erie Firefighters case, where the Court held that the Pennsylvania constitutional provision against delegation to a special commission to perform municipal functions precluded the legislature from adopting a law providing for the binding arbitration of grievances. As you probably all know, the Constitution of the State of California in new Article XI, Section 11, provides much the same thing: that the Legislature may not delegate to a private person or body the power to perform any municipal functions. I would suggest, therefore, that the constitutional prohibition restricts the powers of the Legislature to broaden the Meyers-Milias-Brown Act in that area.

Thank you.

CHAIRMAN VETTER: The final participant in our Panel discussion this morning will be Walter Taylor.

Mr. Taylor holds an M.A. from Berkeley in Political Science and Public Administration and his J.D. from McGeorge College of Law. He served as Personnel Analyst in the State Personnel Board and since 1956 as Attorney for the California State Employees' Association, where his principal activities are representing State employees in grievances and legal matters. Mr. Taylor has developed and drafted legislation with respect to public employee relations, which included working with other interested parties in the drafting of the Meyers-Milias-Brown Act.

Mr. Taylor!

MR. TAYLOR: I think that I had better tell you before I even get started that I am biased, I am prejudiced, and maybe even a little one-sided--and the only people I know who aren't are those who agree with me.

I represent and have represented the State Employees Association for a considerable period of time and have had, I think, a unique opportunity to be present when some of these laws were made. I am going to disagree with some of my predecessors here.

Mr. Shaw, Mr. Geffner and others said that the Meyers-Milias-Brown Act was an "absurdity" and a lousy piece of legislation. I want to say this, and I say it in all pragmatic honesty: the Meyers-Milias-Brown Act was the very best possible piece of legislation. Now let me qualify that.

The law that was passed, in consideration of the time and the place and the circumstances and the various contending forces, was the only possible law. You wouldn't believe the scratching and the biting and the political tearing and pulling that went on while this law was being passed through the legislature. Every line and every word was fought over; and when we got through, it was the very best possible piece of legislation under the circumstances. Which doesn't alter in the least the fact that I think it <u>is</u> really lousy!

Unlike some of the others, I think that I will make my predictions first. And while you are looking for things to throw at me, I shall go on and give you some of the reasons why.

My first prediction (and as my predecessor said, I make it without endorsement, which means that I am just throwing it out for what it is worth): I would suggest that public management (and many of you are public management) will continue to sing the song of

sovereignty and they will continue to label public employees as some kind of revolutionaries who want to change the system and who really want to govern the cities and the counties and the states through their process of collective bargaining. And I say that this is "stuff and nonsense". These people are not revolutionaries. Quite the opposite. They are about as concerned people as you can get. They like the system; they want to preserve it. They just want a fair share of it.

My second prediction is this: that the prevailing-rate gap (and by that I mean the difference between the salaries which the public jurisdictions pay their employees in comparison to those salaries and the wages paid private employees for similar work) will continue to widen. It is pretty wide now and it will get wider; and the taxpayers on their side will be stoutly resisting parity between public and private employees and the public employees for their part will be equally militant in demanding that that gap be closed up.

My third prediction is this: Strikes are not going to be made legal in the State of California. And let me say as an aside that I think the issue is irrelevant in any event. It makes no sense whatever to argue about whether strikes should be legal or whether they should not be legal while across the street and down the road the strike is going on. And this has been happening, as you well know.

I submit that the issue is irrelevant; that lawyers and judges can argue as long as they wish (and of course they will), but the result in the end is going to be determined by what happens. I say and I predict that the successful strikes in the State by public employees will be rewarded and that the unsuccessful strikes will be punished, and as a result the hypocrisy will grow and grow and grow, and so will the militancy. Because there will be a concerted effort on the part of the employees to have only successful strikes. And, of course, you can't win them all. So chaos, I suspect, of this sort will grow.

Leo Geffner said (and beat me to it, but unfortunately for him Santayana beat him to it many years before) something to this effect: that "Those who forget their history are doomed to repeat it." And the fact is that in this country we have a long, violent, bloody history in labor in the private sector, and we had many years of it, as we all know; and finally the national government had to step in with the National Labor Relations Act, the Wagner Act, as you remember, to bring some degree of order to that chaos. Nobody in his right mind is going to say that the Wagner Act and its successors are great. They are not. But they are the best possible under the circumstances. They have taken what was bloody and violent and converted it to what is sometimes violent but seldom bloody. It is a miserable, painful,

time-requiring process, this collective bargaining, but it works. And I say, if it works, even though it takes time, it is better than the blood and the violence. It makes some sense.

And so my last prediction will be this: that this will have to be resolved ultimately by some kind of national legislation which will cut across all of this stuff and nonsense about whether a legislative body can delegate its power to legislate and whether the constitutional prerogatives of the Governor can be delegated.

This is stuff and nonsense, my friends. We are faced with a practical situation in which we have got to find some kind of a resolution of the fact that we are treating public employees generally like second-class citizens.

Now, you may or may not agree with that, but they <u>are</u> being treated like second-class citizens. And until those public employees and every one of them enjoy the same rights to participate and take part in the determination of their working conditions, then, my friends, we are going to have trouble.

Now let me go back and give you some of the reasons for the things that I said. Ordinarily I would save that big finish until the last, but I wanted to get it out before my time ran out.

I was involved, it was noted, in the drafting of the Meyers-Milias-Brown Act. Keep in mind at the time and place that this came about back in 1960 the Act applied to all public employees in the state, including state employees.

Now, state employees, as you probably know, have been very active in the legislature in the field of lobbying and we pride ourselves on being fairly effective. Not always, but usually.

At the time that this Act was proposed, the state employees were very concerned because their Association, which I represent, considers itself one of the bastions, the mainstays if you will, of the civil-service merit system in this state. The Association constitution and by-laws are written around support of the merit system and all of the good things that go with it. As a matter of fact, if you will take a look at that very first section of the Meyers-Milias-Brown Act (and keep in mind that it was the George Brown Act until in 1968 the amendments got all mixed up so that you can't tell which is which), Section 3500 makes a reference to the civil-service merit system and, very frankly, supports it.

That brought to focus what I think is the real problem in this type of legislation. You have, on the one hand, in California very

strong employee associations. These are not affiliated with organized labor. They are independent and they are by-and-large oriented toward legislative and civil service and merit systems. On the other hand, you have the organized-labor people, the AFL affiliates and others who are oriented in the other direction. They believe in collective bargaining and all that goes with it. These two philosophies, at least at that time, met head-on. The Associations were powerful enough to keep a frank collective-bargaining bill from passing, but they were not powerful enough to keep the George Brown Act from passing. So what we had was a compromise. We have been living with that compromise ever since. And I think it came to a focus back in about 1968 when the Associations, having seen what was happening nationally, began to realize that this process of collective bargaining was going to come into the public sector and, whether they liked it or not, this was the way it seemed to go. So the CSEA and other associations began thinking about sponsoring legislation in this area.

Well, came 1968 and amendments to the George Brown Act were proposed. There were two bills in the legislature at that time. One of them was Assembly Bill 1182 and then there was SB 1228. 1228, which is the Senate Bill, was co-sponsored by the entire Committee in the Assembly on Civil Service and Personnel.

Now, the Bills moved rather quickly. 1182 moved through its House and through its Committees and over to the Senate side. These were parallel Bills, you understand. This often happens. You put the same Bill on each side and it moves very quickly, and then you can consolidate them.

The Assembly Bill moved through its House. The Senate Bill had gone through the GE Committee and was coming up for hearing before Senate Finance.

At this time the CSEA, which I represent, had its own bill in. This was Mr. Bagley's 2045, which I drafted. And it never went anywhere. I made the mistake of putting too much in it, too many targets. Anyway, that bill died and it became pretty obvious that either 1182 or 1228 was going to pass, and it began to look as though it would be 1228.

If you take a look at the George Brown Act as it <u>was</u> and the Meyers-Milias-Brown Act as it <u>is</u>, and take a look at Section 3504 (this is the one on which the previous speakers have focused because it is the nub of what we are talking about: What is Negotiable?), as the provision first stood it was beautiful: "The scope of representation shall include all matters relating to employment conditions, employee-employer relations, including but not limited to wages, hours and other terms and conditions of employment."

My friends, that is the whole thing in a bucket. But now read the amendment that went in, in 1968, which said: "... except, however, that the scope of representation shall not include consideration of the merits, necessity or organization of any service or activity provided by law or executive order." Which turned around and took that all out of the bucket except a few things.

Now I am going to tell you how it got that way. This is some little-known and, hopefully, soon-forgotten legislative history, but it may aid you to understand how it got that way.

Laws sometimes come out of the rough and tumble of legislative negotiation. At the point at which the State employees and the other groups saw that SB 1228 was probably going to pass, they all began scurrying around in tight little circles. The State Personnel Board was screaming "Oh My God!" because they have been utterly, absolutely, unequivocally against anything that seems like collective bargaining. And so they were scurrying around trying to line up votes against the Bill. Our group, on the other hand, was scurrying around in the opposite direction, but in the same circles, trying to scare up votes in the other direction.

Now, as part of that negotiation we had a conference with the Governor and with the Governor's representatives. And at that time it was Earl Coke for Agriculture and Services and Ken Hall, who was his employee liaison representative, and with the Governor himself. And it came to a focus on this particular section. The Governor did not want employees to negotiate on matters that had to do with organization or mission. And you hear the ringing down across the years, because he said then, as he says now, he didn't want "those social workers negotiating with the welfare people on the level of benefits to the clients." This was the theme. He did not want that. He would not sign a Bill that would even appear to permit such negotiation.

And so "little old me" was sent out to do some drafting. And I came back with those words "except, however,...". And the Governor said: "Well, with that in the Bill, I will sign it." "Reluctantly", he said, "but I will sign it."

So we marched back over to Senate Finance. And it was one of those occasions, you know, where the Committees go until late at night. I think it was about 11:00 o'clock at night by the time they called up SB 1228.

So I marched up bravely to the rostrum to make CSEA's presentation on behalf of the Bill. Senator George Miller, whom some of you may have known, gave me a cross examination the like of which I will never forget. He was a master at cross examination; he simply flayed the skin off and beat you to death with it. And he did that to me.

I tried to explain why it was that state employees were in favor of this particular Bill. And when he got through, the Personnel Boardman came up to me and made a couple of short remarks that I considered irrelevant--and then they took the vote. And the Bill passed with an amendment. They put in Section 3510, which said that "The state employees will be excluded from the coverage of this Bill." And so there we stood, you see. All of the other public employees were deprived of the scope of representation, which had everything in it, and they didn't give us anything.

Now, this is how laws get passed. Laws are not always passed through wisdom of the legislators.

One of the problems of being last in a group like this is that I have to rewrite my speech so that I don't repeat what everybody else said. But I would submit that California is unique in a sense. The employee associations have been and still are very strong in the public sector. A battle is developing between those unaffiliated associations and the affiliated labor unions. And I suspect that until it becomes fairly clear which one of those is going to win out, neither the Meyers-Milias-Brown Act nor any other act is going to provide for exclusive representation or any of those provisions calling elections or anything else, because the organizational rivalries are going to be sufficient to prevent it.

This is the point at which I would have thrown in my predictions, but I suspect that you will now have a chance to ask some questions and I shall shut up, as I should have done some time ago.

CHAIRMAN VETTER: We shall have time before we adjourn for lunch to invite a short comment from Mr. Shaw on some considerations that may have been raised by the speakers who followed him and who preceded him.

MR. SHAW: To get down to a very practical problem. Mr. Geffner does not like the bargaining apparently that the Los Angeles County does with the various associations and unions; and I think perhaps the structure in which that bargaining takes place may explain some of the real problem. The county officials are bargaining really with ten to fifteen different unions and thirty to forty different bargaining units. In the private sector, where we wheel and deal and compromise and have what I think is adequately described as full-scale bargaining, we don't have that problem except in rare situations. We are dealing with one union and one bargaining unit, and we can compromise because we know what we are getting for what we are giving. You look at the whole proposition and on balance you feel that at some point you got a reasonable solution. But if you have to deal

with one union and one bargaining unit and you know that the results of that settlement are going to be a precedent for a number of future negotiations, you are going to be extremely reluctant to let go of anything that may be a much bigger problem in the negotiations to come.

In the City of New York there are over a hundred unions and over a hundred bargaining units; and Arvid Anderson and other men who are seasoned veterans in the business of negotiating feel that this is the greatest obstacle to settling the problems because of the fracturing that has taken place and where what you do with respect to pensions for policemen becomes a precedent for penions for everyone else--and each group is out to outdo its counterpart and the employer negotiators feel extremely frustrated. In fact, a proper designation of bargaining units on the broadest possible scale could be, in my humble judgment, one of the most meaningful steps that could be taken to have the kind of bargaining that I sense the public employees are looking forward to, and the kind of bargaining which, again in my humble judgment, I think is workable and meaningful. But as long as you have got this great number of units and different associations or unions to deal with, the employer has an extremely difficult job.

Thank you.

CHAIRMAN VETTER: We have time, I am afraid, for only one or two questions.

MR. ROBERT SMITH: My name is Robert Smith. I am Assistant City Attorney of Glendale.

I shall direct the question to Mr. Taylor.

Mr. Taylor, you mentioned that strikes would in effect continue to exist and that in fact this problem of how the law is going to go is going to be based, or what is going to happen in bargaining sessions is going to be based, upon what in fact happens; and, as I understood you to mean, that despite the fact that strikes are not permitted by law, strikes will occur and the negotiation will be based on that. And the thought occurred to me that here we have people in the educational field or, for example, for our younger generation, we have policemen in New York who have just gone on strike.

How do we prevent a mass breakdown of law if we take this philosophy?

MR. TAYLOR: I knew that you were going to ask that question, so I had my reply all prepared. The question is: How do we prevent a mass breakdown of the law if the law continues to forbid strikes and strikes continue to occur?

Well, Gentlemen, let me remind you that it has not been many generations ago that we had a U. S. Constitutional Amendment which said "Thou shalt not drink alcoholic liquors." And what happened to that?

Now, this is in the same category. Unless the law reflects the needs of the people, then the law will either be ignored or violated or it will be changed. And in this case I think that we will simply have to recognize that all the laws in the world are not going to stop employees from stopping work, whether it be by concerted resignation, by work stoppage, by walkout or any of a thousand ways that employees can make it uncomfortable for management. You can't stop it with laws. You can stop it by treating them fairly. You can stop it by giving them salaries that are reasonably comparable. You can stop it by setting up procedures whereby they can talk to their management. And you can stop it by setting up arbitration procedures. You can't stop it with laws that say: "Don't strike." You are silly to try it. We learned that in the cordwainer strike in Philadelphia two hundred years ago. It was unlawful, remember, to even form a union in those days.

The answer is simply that unless the laws reflect the needs of the people, they have got to be changed--and they will be changed.

CHAIRMAN VETTER: It would be desirable to have more time for additional questions and to invite further comments from other members of the Panel, but I am sure that as civilized people we wouldn't like to intrude on the time set aside for lunch.

GENERAL LUNCHEON SESSION

The General Luncheon Session was called to order by Lloyd Ulman, Director, Institute of Industrial Relations, University of California, Berkeley, at 1:10 p.m.

DIRECTOR ULMAN: Before we proceed to our luncheon session, I would like to introduce to you briefly the people at the head table.

From my left, Mrs. Newman, who is the wife of Harold R. Newman, the Director of Conciliation of the New York State Public Employment Relations Board;

Mr. Walsh, who is a member of the Michigan Employment Relations Commission;

Mr. Lefkowitz, whom I shall introduce presently;

Mr. Shaw, our stimulating speaker of this morning; and

Harold R. Newman, Director of Conciliation, New York State Public Employment Relations Board.

I would like at this time to convey our thanks to our distinguished visitors and to the people who participated as speakers and who have participated and who will participate as speakers in today's discussions. And especially our thanks to those people who are visiting with us from out of state. Of course, we know, all being public employees in this room, we are not allowed to travel out of the state. So we are very fortunate that some people have been able to visit us. We incur a very heavy deficit in our state budget.

Our luncheon speaker is Mr. Jerome Lefkowitz, who is the Deputy Chairman of the New York State Public Employment Relations Board. Prior to assuming this position in 1967, he had been Deputy Industrial Commissioner for Legal Affairs in the New York State Department of Labor.

Mr. Lefkowitz was graduated from New York University in 1952; attended the Jewish Theological Seminary from 1947 to 1950; received his Law Degree from Columbia in 1955. He has maintained his ties with his more advanced alma mater in the sense that he teaches labor law at Columbia University Law School and he has been Chairman of the Columbia University Seminar on Labor.

The position that he holds and the institution in which he holds this position are both of sufficient importance not only for the extremely tangled and crucial experience in New York State, but

certainly a very important precedent for all states in the rest of the country. So I personally look forward with very great interest to his comments. I thank him for coming to make this trip at the last moment and in the wake of the New York police strike.

Mr. Lefkowitz!

CRITICAL UNRESOLVED ISSUES IN PUBLIC EMPLOYMENT RELATIONS

MR. LEFKOWITZ: I am afraid that I must begin this talk by making an apology, which my teacher in public speaking way back in college told me is unforgivable. I must apologize for Bob Helsby, who is listed as your speaker on the program. As your newspapers keep you well informed, you know that we have a "few" labor-relations problems in New York State. You know about the ones in New York City. We have others in Albany. The day before yesterday I got a call from Bob, who was monitoring the negotiations for the New York City policemen, asking me whether I could fill in for him. And when your boss asks you for a favor, you try to be accommodating.

The problem of public employment is the most fascinating one in the field of labor relations and, indeed, as a lawyer I can't think of being as fortunate in any other field, because I don't know of any other field that is quite as exciting in law or in labor as the labor relations of public employment. It is a vital, moving field and one that I have enjoyed thoroughly. And any of you who will be involved in it professionally is bound to find it stimulating and exciting.

Things are happening. When things happen around you, there are problems. But it is clear to me that the problems of dynamism are a blessing. There is nothing as exciting as being where things are happening. Certainly it is to be preferred over the stagnation of accepted norms and procedures. Nevertheless, it is important to know what is happening, what are the problems, and what are the vital nerve centers which they will touch or are touching. At this stage, much of this is conjectural.

We do know that public employees in the United States have a right to organize. This is an absolute, constitutionally protected right--protected by the First and the Fourteenth Amendments of the United States Constitution. In the last three years the Seventh Circuit and the Eighth Circuit Courts have both come down with decisions saying that public employees have an absolute right to organize, to form unions and to be active in their unions; that this is protected by the Constitutional freedom of assembly.

Some state laws, such as laws in some of our southern states like the Carolinas, would prohibit that right. But the day when public employees can be restrained from organizing is past. There is an enforceable right in federal court. An employee who is discriminated against because of his organization activities on behalf of public-employee unions may now sue in court for damages. This is of great significance.

There is certainly not yet and there may not be an absolute legal right to collective bargaining, but one must wonder if the right to organize is protected, how long it will be before every public employee in a sizable community will have that right to collective bargaining. Once he can organize, he can muster the forces which will make collective bargaining inevitable. If this is true, then we have two alternatives. We can let it grow by itself; or we can devise by legislation or regulation or some other legal procedure a formula to guide its development.

In a number of states today and in the federal government today there are attempts at disciplined guidelines for the development of negotiations. Some are better than others. They vary considerably. But there are legal formulae for it. In other states there is a more haphazard approach, or more "flexible" approach might be the way to describe it if you endorse that approach. The type of thing that you have in California is closer to the latter. There is much to be said for both. Flexibility gives us a possibility of coming up with that magical, perfect solution. You can try different things, you can experiment and maybe you are going to hit it just right. Not very likely. The greater likelihood is that if you have too flexible an approach, you are simply going to stumble; not stumble on that magical right answer, but stub your toe and find that you are hurting yourself in many ways. Much more likely you will find that your procedures are based upon the old cliche "Might makes right." In that community where government is strong and powerful it is going to run roughshod over its employees. In that community where the unions are well established and the employees are well organized, government will not be able to assert what is rightfully theirs.

It is not very different from the example of the shortstop. He sees the ball coming at him. He can charge that grounder, pick it up at the right time and play it and get the man out; or he can wait for the grounder to come to him and let the ball play him. And those of you who played infield know that when the ball plays you, you are much more likely to make an error.

If you are going to have a program, the possibilities are varied, and, again, answers must be forthcoming from you. There are only two strong words of advice that I will give with respect to the program, and these are procedural rather than substantive. You have to have an agency

that administers the program. In New York State, we call it the Public Employment Relations Board. In Wisconsin, it is the Wisconsin Employment Labor Relations Commission. You have to have an agency that administers the law because there is no purpose in opting for a disciplined procedure if you don't have an agency that is going to maintain that discipline.

Secondly and probably even more importantly, government management has got to devise and develop its own procedures to protect its own interests. The neutral agency can't do it. As we have seen in New York State, the unions will often come in well prepared, with trained and skilled negotiators. Very often, especially in the first round of negotiations or in that first round of adjudication where units are set, the government will try to be nice and it will give too much away. They won't have thought through what they want, they will just want to get along well with their employees.

If you move in the direction of a comprehensive program, the two words of caution are: Have an agency which is "truly neutral" to administer the program. Don't count on that agency to help government. The administrators at each level of government should think through what it wants to do and devise its tactics to protect itself. It won't always get what it wants. The agency will often decide against it, but at least it has to know what it wants to ask for and how to present its most effective case.

I recognize that many states (your state is one of them and my state was to a certain extent four years ago) are anxious to preserve local prerogatives. Home rule is one of these magical watchwords and it has great value.

In New York State when we wrote the Taylor law, local governments were allowed to establish their own labor relations board which administered the law locally. This looked very attractive in the early stages. Probably thirty of these were established when the law went into effect and in another month another ten or so were established. It did not turn out to be as attractive as people expected, and today there are only about ten. Those that remain exist, in some instances, because of the opportunities for patronage dispensation. Whenever they do get a case, which is rare, they call us up and ask us what to do.

You have a few of the communities that are big enough and substantial enough to run legitimate programs. One is New York City; it has a traditional relationship between government and management that we might well have upset for them, not being privy to what went on in the past. Some of these communities, such as Syracuse and New York City, do a good job. In other instances they exist only because either management or the union feels that it might be able to control a local

agency and pervert its activities to its own use.

Most of the local boards have been withdrawn because they did not provide the benefits that local governments expected. Primarily they found that the State government agency wasn't quite as perverse as they thought a state government agency would be; that we came down with decisions that bore at least some reasonable resemblance to the expectations the parties had, and therefore they didn't need the protections of the local agency. They found that they couldn't control the local agency as much as they expected to. They found that their attempts at imaginative flexibility were not satisfactory either, because the nature of people is to want certainty which means reliance on precedent. This is just as true of litigants as it is true of the administrators. The administors of some of the mini-PERB's look to see what precedents the state PERB has set. It is much easier to follow the precedents, as the lawyers well know. The kind of flexibility that local home rule promised was aborted, and one by one all but some of the biggest of the mini-PERB's dropped out. Finally, the administration of local boards cost the sponsoring communities money.

In deciding what kind of a law that you want, the eye has to be on the sparrow. And the sparrow in this case is hovering between the public and private sector and noting the differences and similarities between them. There are plenty of both. Certainly, the advocates of one position or another are quick with fairly glib arguments. "The public sector is the same as the private sector; a worker is a worker; and any law that treats him differently, gives the public employee less privileges than a private-sector employee, is a slave labor law." On the other side, the advocates harp on arguments of sovereignty and essentiality of service which to them would justify depriving public employees of almost all those techniques that were developed in the private sector.

I would like to discuss with you some of the particulars of public employment which may be the same as or different from private-sector employment, so that we can see where we are and what the problem is. The solutions involve value judgments that you, through your legislators, and other states through their legislators, are going to have to make, each in its own way. There is no magical answer that I have to offer, but what I can offer to you is a presentation of some of the relationships with which you have to deal, and you can decide whether or not private-sector procedures fit.

The main difference between public- and private-sector labor relations is the political implications, the fact that in public-employment labor relations you have an added dimension of political rights and duties that do not exist in the private sector.

What are the implications of these? Sovereignty calls to mind the maxim: "The king can do no wrong." Obviously if the government can do no wrong, then all its acts are right; and if you don't like it, then you just don't understand. Not only that. It is inappropriate for the sovereign to have to negotiate and consult you before it decides what he is going to pay you, because it is sovereign. "Sovereign" means "dominant control and power". For many, many years that was the approach of government. Government employees were not so quick to organize because they respected and accepted this idea of sovereignty and its implications.

I think it was Mr. Taylor this morning who mentioned the cordwainer's case in Philadelphia, in which it was held to be a criminal conspiracy just to organize. Forget bargaining. Just to organize in the private sector was once a criminal conspiracy in restraint of trade.

The sovereignty doctrine does not hold much water today. First of all, there is not one of us here who believes that the king can do no wrong. As to that other part, that it is unseeming that a sovereign should negotiate with his subjects, I think of an early case in which a man named Abraham was negotiating with the Sovereign on behalf of the people of Sodom and Gomorrah; and somehow or other that Sovereign found it entirely possible to go through a rather complicated negotiation which is beautifully recorded in great detail in the Book of Genesis. That is as good an indication to me as any that there is no inconsistency between negotiation and sovereignty. Another lesson from that negotiation, however, that some unions have yet to learn is that it is possible to negotiate with a sovereign and not win.

A second essential attribute of government is that it has the power to tax and control the purse. This is quite important because it appears from this power that government has unlimited resources, you can always tax a little more. It is not a question of running at a profit or you go out of business. Government is not going to go out of business. It can always get a little more. That is not actually true. We all recognize that there are limits to what government can pay but they are so unclear that it is very easy for each and every union to say: "The limit of what government can pay is just a little bit or a lot beyond what we are asking."

One of the limits on what government can pay is public outrage. But public outrage is something that can be manipulated, and it can often be manipulated jointly by an employer and a union. The threat of a strike is probably one of the best manipulations of it. It may be in the best interests of the employer as well as of the union to so manipulate public opinion.

In New York City, four years ago Mayor Lindsay had some very, very difficult negotiations with the Transit Workers and with the Teachers. Two years later he went into negotiations with them and gave them very handsome contracts, which would have occasioned great public outrage if it were not for the fact that the public was afraid of and wanted to avoid the strikes that they had two years earlier. The threat of strike overcame public outrage. The Mayor on the other hand had the support of these two unions in the ensuing election when he needed every bit of support he could get. He may have been motivated in granting the increases by fear of another strike, or he may as well have been motivated by the thought that this was a way of buying support and that he would join with them in manipulating public opinion. I don't know why he went along, and I am not trying to suggest that there was anything behind it under the table. I do mean to point out the possibilities of games being played in the public sector that do not exist in the private sector that may have implications for the type of law that you want to come up with.

Another important attribute of government is the unique budgetary procedures in most governments. We don't have here a parliamentary form of government. The negotiator is an executive often who can agree with the union on everything, legitimately be persuaded and agree with it; and then he goes to get an allocation from the legislative body, which is not bound by that contract. In the private sector things don't work out in quite that way. And that too is an important difference, especially in some school districts where the budget must be voted on by the public itself. Can the negotiators bind that budget-making process? And if it can, what happens to our entire concept of representative government? These are some of the differences that have important implications.

Government also has certain political obligations. It must furnish certain services. Many of these are essential; others are not. An awful lot has been made of the fact that essentiality of government services makes things different. I am not convinced. In Albany, New York, sanitation is handled by a private company; transportation is handled by a private company. I believe that sanitation and transportation are just as essential in Albany as they are in New York City, where they are government services. I am not convinced by the argument of essentiality. We have a problem in trying to make the distinction between what is essential and what is nonessential, because everything that we are used to is essential. Transportation is very essential if we are used to it. We are not willing to give up what we have. We have no guidelines. The only system of which I know that has a guideline for essentiality is Jewish ecclesiastical law. Its guideline is called pikuah nefesh, the saving of life. An essential service is one that is directed toward the saving of one or more lives. If it is not so directed, it is not an essential service. I don't think any of us

would accept so narrow a definition. Where we would draw the line is a difficult determination which we may yet have to make. One which, as we were told this morning, Canada is making.

A second obligation of government (one that I think is very important and yet is given scant attention) is the obligation of government to satisfy diverse constituencies. There are public employees who want more money; there are welfare recipients who also want more money; there are people who want to clean up the air, and there are people who want to clean up the water. These will cost money. There are people who want better schools, and this will cost money. There are taxpayers who say: "We want to keep the money. Let the government spend less." There are ecologists now who say: "Let's shrink the entire economy by cutting out power and cutting out expansion so that there will be less money to go around to everybody."

How do we resolve these problems? Typically and traditionally we have done so through a political equilibrium. Each group pressures the representative legislative body. That pressure is conditioned by the size of the group and by the strength, conviction and militancy of its members. This equilibrium has worked reasonably well for a couple of hundred years--imperfectly, by all means, but nevertheless reasonably well to get us through major decisions without the violence that many other countries have.

What public-sector collective bargaining does (and there is no way of getting around it) is to pick one of these groups, the public employees, and say to them: "In addition to all of the political weapons that you have, which are the same as everybody else has, we give you an additional weapon of collective bargaining." It may include the right to strike, as it does in Hawaii and Pennsylvania. It may include the right to compulsory arbitration, as it does in Michigan and Rhode Island. It may include the ability to put pressure on the government by charging it with unfair labor practices by reason of its refusal to negotiate in good faith, as it does in New York State and in the federal government. Or it may have none of these and simply give them the ability to exert pressure through fact-finders who make public reports. Other groups can't use any of these techniques to put pressure on government.

This serves the equilibrium, and it has serious implications and dangerous ones. I am not suggesting that on the basis of this problem we can't or shouldn't move into collective bargaining for public employees. On the contrary, I think that we must. First of all, I think it is quite legitimate because the public employee has a relationship with government that no other group of citizens has. He has

the contractual relationship with government. Individually or collectively he is providing services in return for commitments and promises regarding working conditions and wages. The terms of contractual relations are spelled out during negotiations, whereas the vocabulary of normal citizen relationships are spelled out by legislative and lobbying procedures.

I think that we have to move in the direction of bargaining, but I don't think that we can move headlong and say: "That's what they have got in the private sector. This is what is going to happen out here." There are differences, and none is more important than the political equilibrium that you have in a public sector which collective bargaining does disturb.

Governments have other legal obligations. They have usually in most states a merit system. A merit system means impartial recruitment, promotion based upon performance, protection against arbitrary discipline. Usually the same agency (a Civil Service Commission) that administers it also is responsible for job classification, for the allocation or reallocation of jobs, and quite usually these are excluded from collective bargaining as management prerogatives.

This may be good or bad. In a community where you don't have collective bargaining, obviously a merit system is a vital protection for those who have to work for government. In a community where you have collective bargaining but don't have the strength to really use it, they are still very important. In other communities where you have real collective bargaining, they may be detriments to the employees. The same is true of the many other statutes that touch on labor relations and restrict governments. In New York State civil service, we have statutory provisions about merit awards and attendant rules--all designed to protect the employees in the old days. We have in the Social Security law, provisions about retirement benefits. In the General Municipal Law we have provisions about grievance procedures imposed on local government. Every single law that establishes an educational corporation or a municipal corporation has limitations on the power of that corporation or that local government which necessarily inhibits its labor-relations freedom, usually designed to protect the employees. These provisions may inhibit collective bargaining so that an employee may be unable to bargain for something that he wants a lot more than what is in the statute, because the employer will say: "I can't give you "A" unless I take "B" back; I don't have the freedom to take "B" back and give you "A" in its place; so you just can't get it."

The logical position, I suppose, would be for employers and public employees jointly in communities where there are strong

collective bargaining laws and traditions to support the repeal of many of these protective laws. But that's just not going to happen. Public-employee groups cannot be expected to agree to yield statutory protections even if it might be helpful to them. To explain this, I cite two cliches which you might use, one or the other, depending on your point of view. You might, for instance, if you were a public employer, complain that "They want to have their cake and eat it, too;" and if you were a union leader, you would probably exclaim that "A bird in the hand is worth two in the bush."

Public employees do have important rights. They have the right to lobby; they have the right to vote, and I have explained before the implication of these. Probably the outstanding example of the power of public employees took place in New York State about eight years ago. Mayor Wagner at the time was repudiated by the county leaders of the Democratic Party of the five counties comprising New York City. He decided to run in the primary. He had much goodwill; some badwill, too, as any Mayor is likely to have. But he didn't have an organization, and he went out and got one. The Sanitation Workers of New York City decided to support Mayor Wagner, and they went around doing the door-knocking and bell-ringing as effectively as any political organization in the City. Mayor Wagner won over the opposition of his party leadership in that primary.

There is no union in the private sector that is likely to influence corporate policy the way a well-organized union can in the public sector. Of course, there are limitations, such as the Hatch Act and the Little Hatch Acts that restrict some political activities of public employees. Generally, public employees manage to get around them by having the active politicking performed by ladies auxiliaries or paid union officials who are not under the Hatch Act. These do detract from this equation that I am drawing of the political powers of the public employees.

By the way, there are some limitations on unions in the private sector. The federal Corrupt Practices Act makes it unlawful for any union to make contributions to support political candidates in a federal election, but obviously these limitations are much narrower than those of the Hatch Act.

Generally speaking, public employees and even federal public employees with the Hatch Act through the years have been able to use great lobbying muscle to get many of the things that they want. By contrast, private-sector unions have been less successful. They do get occasional manimum-wage or industrial-safety protection that deals with them on the job. They are very good about lobbying for and getting general social protection such as unemployment insurance and

workmen's compensation and social-security benefits, but they can't get the particular protections on the job that public-sector unions can. And that is quite significant.

Under these circumstances, where does that leave us? We have got two different sectors with many differences and many similarities. Different judgments can be made by different people as to whether the similarities and differences are the more important. Which way do we want to go?

Certainly to suggest that the private-sector experience should be ignored because we are in the public sector is absurd. I would suggest that we would be making an error to say that just because a practice exists in the private sector we have to adopt it too. First of all, it may not fit the conditions; second of all, it may not even be working very well in the private sector. And why borrow their mistakes along with their successes? They are married to it. The lawyers and other professionals in the field know just what to expect; whether it is good or bad it is better to get what you expect rather than to be surprised.

In the public sector we have a chance to take a fresh look. And that is what I urge you to do: Take a fresh look at the factors and come up with what you think is right.

Just one final word. Some states (only four in number) permit a strike--and one of them under very narrow conditions. I believe that others will in the future. Right now, strikes are not permitted in most states. Many of the states do offer alternatives that may or may not be quite as good. But there is an obligation that we work within a legal framework. Certainly, if one group has a right to arrogate to themselves the right to break any law, then why should other groups sit back and wait?

A strike in public employment, if it is against the law and only if it is against the law (I am not arguing against a legal right to strike, but a strike against the government where it is illegal), is civil disobedience. Again, there may well be a place for civil disobedience. That place was probably best articulated when it was originally articulated by Thoreau. Let me quote from him.

"If one were to tell me that this was a bad government because it taxed certain foreign commodities brought to its ports (that is to say, his financial well-being might have been prejudiced), it is most probable that I should not make an ado about it, for I can do without them. All machines have their friction; and possibly this does enough

good to counterbalance the evil. At any rate, it is a great evil to make a stir about it. But when the friction comes to have its machine, and oppression and robbery are organized, I say, let us not have such a machine any longer. In other words, when a sixth of the population of a nation which has undertaken to be the refuge of liberty are slaves, and a whole country is unjustly overrun and conquered by a foreign army and subjected to military law, I think it is not too soon for honest men to rebel and revolutionize. What makes this duty the more urgent is the fact that the country so overrun is not our own, but ours is the invading army."

What Thoreau was talking about is that there is a place for civil disobedience when questions involve the dignity of people. Where laws are so corrupt that people have no chance, where you have a closed society, then by all means consider taking the law into your own hands through non-violent means. But we don't have that kind of closed society here. We do have available to us legislative action. Maybe it is not as quick as we like it, but it is available. And public employees do have available to them in many instances not only government pressures and lobbying pressures and political pressures, but often labor-relations procedures such as fact-finding.

They may not be good enough. Maybe we do need the right to strike. But as long as we have an open society, there is an obligation upon each and every one of us to live within the laws of the government, to do our best to make them work and, if we don't like them, to do our best to change them through legal and peaceful means.

DIRECTOR ULMAN: Ladies and Gentlemen, I take it from your applause that you appreciate that I am not being perfunctory in an after-dinner manner in thanking our speaker for one of the most thoughtful sets of insights that I have heard on this subject.

THURSDAY AFTERNOON SESSION

The Thursday Afternoon session was called to order at 2:05 o'clock p.m. in the Plaza Room of the Hotel Hilton by David E. Feller, Professor of Law, Boalt School of Law, University of California, Berkeley; Moderator.

"GOOD FAITH" IN MEETING AND CONFERRING: WHAT ARE THE IMPLICATIONS?

Moderator: DAVID E. FELLER, Professor of Law, Boalt School of Law, University of California, Berkeley

Speakers: LEO WALSH, Member, Michigan Employment Relations Commission

J. D. BURDICK, Attorney at Law, Carroll, Burdick, & McDonough, San Francisco

THOMAS A. SHANNON, Schools Attorney, San Diego Unified and Community College Districts and Legal Counsel, California Association of School Administrators

MODERATOR FELLER: As your program indicates, I am the Moderator. My name is David E. Feller. I am now a Professor of Law at the University of California in Berkeley. Prior to that incarnation, I spent considerable time representing labor unions--a fact which many people are unwilling to let me forget in my new role of impartial public servant. But you will note that your program says that I am the Moderator.

In the morning session you had my colleague and good friend Jan Vetter, who teaches at the same institution and has the office next to me. He was listed as Chairman. You may inquire, as I did: What is the difference between a chairman and a moderator?

The difference, I am told, is this: A chairman chairs. As moderator (and don't confuse that with mediator, for I am not yet a mediator), I am supposed to give a short description of what "good faith" in meeting and conferring is in the private sector as a kind of background to the discussion which your Panel participants will give you as to the extent to which these concepts are transferable. That puts the participants of the Panel at some disadvantage because they haven't the slightest idea

of what I am going to say as to what "good faith" means in the private sector. In the succeeding discussion we will see how fast they are in comparing the transferability of a concept that they haven't heard yet enunciated.

To shorten things rather than going into extensive introductions which mostly waste time, a commodity of which we have very little at the moment, I am going to introduce now the other members of your Panel of speakers and then we shall simply call them in the order listed in your program after I have finished my introductory statement.

The first member of the Panel is Mr. Leo Walsh, who is a member of the Michigan Employment Relations Commission. All the members of the Panel were asked to give me biographical sketches. Mr. Walsh gave me the minimum (which I can't even put my hands on at the moment), which specified date of birth and place of education--matters which I can think are of very little interest to anyone. What is important is that he has been involved for many years in public employee relations as a member of the Michigan Employment Relations Commission. And that is all you really need to know.

Mr. Burdick is, as indicated on the program, a lawyer. He gave me quite extensive biographical information, none of which I shall transmit to you other than to say that he represents unions. That, again, is what you really need to know.

And Mr. Shannon gave me an equally long biographical sketch, the most important part of which, I shall simply tell you, is that he represents management. He is last because management always has the last word. His primary experience has been in representing school districts. So he brings not only a management point of view, but a management point of view in a very particular sector of the public sector.

And with those "elaborate and very complimentary" introductions, I shall now proceed immediately, as I have been asked to do, to a brief description of the concept of good faith bargaining as it has been developed under the National Labor Relations Act for the private sector.

The basic statute, of course, is the National Labor Relations Act, which in Section 8(a)5 imposes on employers under the Act, and in the private sector only, a duty to bargain collectively with the representative of the majority of the employees in the appropriate unit, and imposes equally a duty upon the employee organization to bargain collectively. There was no definition of the duty under the Wagner Act. When, in 1947, Congress first amended the statute in accordance with the 12-year cycle of amendments (which is about to be violated since the last amendments were in 1959), there was an attempt to define the duty

to bargain collectively in language which has become critical and which built on the law which was developed prior to the Taft-Hartley Act. The definition was written in Section 8(d) of the Act and defines the duty as (and here the words are familiar, for they are comparable to the California statute) "a duty to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment," and to do certain other things which are not really critical. It also contains a proviso, among a number of other provisos that are not relevant, that such obligation does not compel either party to agree to a proposal or require the making of a concession.

So there is a duty to meet at reasonable times and confer in good faith, but no duty to make a concession or to agree to anything that is presented.

Out of that simple prescription (and there are many, many other things in the statute, most of which I do not think are relevant at this time) have come a number of subsidiary rules. The best way to describe those rules, perhaps, is to describe what violates the duty. What kind of action is forbidden by a statute which requires you to meet and confer in good faith?

The first no-no is refusal to meet. Obviously, an employer in the private sector who refuses to meet with the representative of a majority of the employees in an appropriate collective-bargaining unit violates the statute. There are, surprisingly, a number of such cases. The reason is that the duty is only to meet with a representative of the majority in an appropriate bargaining unit. We have a great many cases involving employers who refuse to meet after a union has been duly certified by the agency endowed with the power to determine the appropriate bargaining unit and also with the power to conduct elections to determine the majority representative, where the employer believes that there is something wrong with the process or that the unit is not appropriate, and wants to test his contention. The only way that he can test it is by refusing to meet. There are, also, of course, the simple fellows who don't believe that the law means what it says and refuse to meet. Those are the easy cases.

I suppose, drawing on one of the things that was said at noon, the implication of the duty to meet goes a little further. You simply can't send in a lawyer who has no authority to bargain. You cannot send a lawyer in who says to every question that comes up: "I will have to confer with someone else." The duty to meet means meeting with someone who has at least some limited powers to agree to something, to bargain, subject perhaps to ratification on the other side. On the union side it has been clear that it does not constitute a refusal to bargain in good faith to make any argument the subject of ratification by the membership. But, on the employer side, there is an obligation to give at least some power to the person who bargains. The extent to which that

is transferable to the public sector is a matter on which, I suppose, the speakers following me will enlighten you.

What does "good faith" mean? That is probably the most difficult concept. It has been restated in a half a dozen ways, most of which come down to pretty much the same thing. It means a "sincere desire to reach agreement," which is just another way of saying "good faith", but it does not mean that you have to make a concession; i.e. it does not forbid hard bargaining.

How do you, then, distinguish between the hard bargaining in which the employer has the right to engage, sticking adamantly to his position, and lack of good faith? He has a right to be adamant because the statute clearly says that he does not have to make a concession but at the same time he has to act in good faith. This is one of the puzzles with which the Board struggles daily or weekly. The basic principle, I suppose, is that when an employer takes positions in bargaining from which it is possible to infer a state of mind such that he does not really want to reach agreement, then you can say he is taking positions not for the purpose of advancing his position but for the purpose of frustrating an agreement.

Of course, the classic case is a case in which you find a memorandum in the file saying: "I am perfectly willing to grant a five-cent wage increase, but I am not going to do it in this case because I am not going to say anything which the union can accept, because I don't want to enter into an agreement." You will, of course, never find such a statement in the file. But the Board frequently will find the equivalent in a certain pattern of bargaining. When an employer makes a proposition which he does not expect the union to agree to, but the union does agree to it, and then he says: "Wait a minute. I want to re-think it," and he then comes back and wants to change the proposition; the Board in such cases says: "Obviously, his whole course of conduct was designed to avoid reaching an agreement and the positions that were taken were not taken in good faith, but were taken for the purpose of frustrating an agreement." Sometimes this conclusion is reached by looking at the substance of the proposals and saying that these proposals are obviously proposals which no respectable, self-respecting union could accept and were designed to be such by the employer. He was, therefore, not bargaining in good faith.

In a classic case which went to the Supreme Court and was decided last year, an employer refused to agree to the checkoff of union dues. When asked in collective bargaining, "Why?" he said: "I just don't want to give any help to the union." All the other plants in that company had agreed to the checkoff. Indeed, in a related case in which there was the same pattern, a prior union had been given the checkoff. The Board was able to say that the refusal to agree to that concession indicated not a desire to avoid the concession <u>per se</u>, but a desire not to have an agreement at all. And on that basis you can find a lack of good faith.

The question then is: What do you do? What is the remedy in the private sector? The remedy in the private sector is to issue a cease and desist order and tell the employer: "Go back and have good faith." Since it is very hard to change the state of men's minds even by an order from the National Labor Relations Board enforced by a Court of Appeals, it may be said that the remedy is a futile one, though in the private sector there are other consequences, which I shall sketch out briefly, which do make a difference. The Supreme Court has told us, most recently in that same checkoff case that the Board cannot, as a remedy in a situation in which the employer has refused to agree to a proposal simply because he wanted to frustrate agreement, order him to agree to that proposal. What the Board can do is to order him to go back and bargain in good faith about it; and then presumably if he denies it in good faith, he is simply taking the adamant position which the statute gives him a right to do.

The concept of subjective good faith has lead, however, to the development of a number of per se rules. As cases develop you begin to get certain rules which come to have a life of their own. For example, suppose that an employer in negotiation says: "I can't afford what you are asking. I don't have that money. We are losing money in this business. There are no profits." Suppose that the union says: "Well, let us look at the books to see whether that is so."

When this first arose, the Supreme Court said the Board could find the failure to provide that information indicated a lack of good faith in making the assertion. Although first premised, therefore, on a finding of bad faith, the rule has now become pretty much of a per se rule. If you plead inability to pay, the union can come in and say: "Well, what are the facts and figures? If you don't have the ability to pay, we want the substantiating data to show that you can't pay," and you violate the duty to bargain if you don't supply the data, whatever the state of your mind.

There are certain other kinds of data to which the union is entitled as a matter of course. If the union wants to bargain about wages, it may want to know what wages are being paid, what are the job schedules, what are the various data which the employer has which he uses to determine rates. The duty to bargain requires him to supply this information on request.

If the employer says, "We don't like your pension proposals because it would cost us too much and our pension proposal has less cost," the union is entitled to get the cost figures that the employer has. In addition to the wage data, there are data as to how jobs are evaluated. Refusal to provide that information is almost per se a refusal to bargain in good faith. It is a rule which was derived from the original notion of good faith and which now has a life of its own.

Similarly, in the case of an employer (and this is the easy case you start with) who says, "No, I won't give you five cents an hour. My position is not five cents an hour," and then announces to the employees that "There is a wage increase of ten cents an hour." That is a clear indication that what he was saying at the bargaining table was dishonest, i.e., not in good faith. We have developed from that concept the notion that unilateral action in changing terms and conditions of employment without first offering the changes and bargaining about the subject with the union constitutes a per se refusal to bargain in good faith, even with the best state of mind. And that in turn leads to some other concepts.

Suppose you are an employer, and you have an agreement which says nothing about pensions. You decide you want to establish a pension plan. If you establish a pension plan without first going to the union and offering to bargain about it, you are dealing directly with the employees and you therefore violate the duty to bargain with the union in good faith. But that leads to another question. In what areas do you have to bargain with the union before you can lawfully make a unilateral change?

That leads to an area of real controversy (I have skipped over much that has been the subject of controversy): What is the area in which you have to bargain?

Suppose the union comes in and says: "We want to bargain about prices." It is easy to say that prices are not within the area of wages, hours and conditions of employment and the duty to bargain only runs to wages, hours and conditions of employment, and that the employer can therefore refuse to bargain on the subject of prices. But other cases are not so easy.

There has been much written in the literature about how much the concept of wages, hours and working conditions includes. The classic case is the Fibreboard case which involved the contracting out of maintenance work in a plant without bargaining with the union. The Supreme Court in that case said that contracting out was a mandatory subject of bargaining, at least under certain circumstances. But the context in which the case arose was not one in which the union came in and said: "We want to bargain about contracting out." Most employers under those circumstances will bargain although they may be unwilling to agree. Similarly, where unions want to bargain for retired employees, most employers will bargain, although there is a question now pending before the Supreme Court as to whether an employer is required to bargain with the union representing its employees about people who no longer are employees, and are now on pensions, about their increases in their pensions.

Most situations do not arise where the union wants to bargain about a subject and the employer refuses. The more significant situations are those in which the employer acts, and the union complains that this action was within the scope of the mandatory bargaining area. Then we have a remedy with teeth in it. If the Board finds that the action, because it is unilateral action with respect to a matter within the compass of the phrase "wages, hours and conditions of employment," is a refusal to bargain, it may order him to restore the status quo, sometimes with back pay, as in the case where maintenance was contracted out without first bargaining with the union. The Board ordered the Fibreboard plant over here in the East Bay to put back all the people who had been displaced by the contracting out, to get rid of the contract with the contractor and pay the people back pay and only then to bargain with the union as to whether the contracting out should take place or not, with no restrictions on what result would be reached. The duty to bargain thus had consequences far broader than just bargaining.

I should add another word about the consequences of a finding of a refusal to bargain in good faith. I have already indicated one. In the unilateral action cases, the employer is obliged to restore the status quo, at least in some cases. And this may involve some back pay as well as some changes in operation. But most of the litigation that has occurred under the National Labor Relations Act occurs because there is another consequence, which is perhaps not relevant to public employees but which has done much to color the law.

Why does a union go to the Board and try to get a finding that an employer has a lack of sincere desire to reach an agreement, if all it is going to get, in a straight-bargaining case, is an order directing the employer to change his state of mind? Although there are some signs that even that kind of an order has some impact, there is a more important reason. If the union went on strike, after bargaining failed to produce an agreement, the rights of strikers to get their jobs back are significantly different if the strike resulted from a refusal of the employer to bargain in good faith. In that case, replacements are required to be discharged and the strikers are entitled to get their jobs back. In the case where it is a so-called economic strike not caused or prolonged by the employer's unfair labor practice, i.e., by a failure to bargain in good faith, strikers who are replaced lose their jobs.

So you have to look at the private sector experience with the knowledge that many of the cases that are litigated are not really litigated for the purpose of getting an order directing the employer to bargain in good faith. Indeed, the way in which the bargaining itself is conducted in the private sector sometimes reflects the attempts of the parties to affect the rights of potential strikers. I have engaged in bargaining with employers in which the lawyers on the other side and I, on my side, were playing games. He knew what I was doing and I knew what he was doing.

I was asking questions, asking for certain information and making certain propositions solely in the hope that he would misstep and do something which would later be found to be a refusal to bargain in good faith. If he did and we subsequently ended in a strike, the rights of my clients (the workers in that plant) would be protected in the sense that they would have the right to get back their jobs if the strike were lost. And he knew perfectly well what I was doing. On his part, he was trying to avoid reaching an agreement but he was going through certain forms to make sure that it didn't look like it so that if my clients went out on strike, he could replace them and my clients would be out of a job. You don't have, at least as far as I know, that kind of situation in the public sector. But the litigation that has developed out of that situation has given us an enormous number of decisions defining and refining the concept of bargaining in good faith.

Having overstayed my time by just a few minutes, I shall proceed to introduce to you without introduction the three members of the Panel who are going to discuss the question: What are in the implications of "good faith" in the public sector? And the first is Mr. Walsh.

GOOD FAITH IN COLLECTIVE BARGAINING

MR. WALSH: I have been asked to give you the Michigan experience. In order to do that, in spite of the shortage of time, I should give you at least the basic background information on employment relations legislation in Michigan.

We have had a private sector Act since 1935 known as the Michigan Employment Relations Act. This primarily was a mediation Act, although it contains some provisions for determination of representation and of the makeup of bargaining units--but little more than that. We have had a very extensive mediation service in Michigan since 1935 under a statute which imposes the obligation on us to mediate all labor disputes where mediation is needed; therefore, we have perhaps more background and experience in that area than any other state in the Union.

We also had a Public Employment Relations Act since 1945, but it was a very inept and ineffectual Act. It provided primarily for petitioning by a majority of people in a unit for mediation, and if that were unsuccessful, to be followed by fact-finding, with no real teeth in it.

In 1965 our legislature drastically amended both of these Acts. They are still the same Acts, with the same numbers, but the similarity stops right there. Our private sector Act, of course, takes up where the jurisdictional standards of the National Labor Relations Board leave off and is very similar to the National Labor Relations Act, with two exceptions which I shall explain in a moment.

The 1965 amendments to our Public Employment Relations Act resulted in our now having an Act which is also patterned after the National Labor Relations Act. One of the two exceptions mentioned is found in both laws, i.e., unfair labor practices for employers and none for unions and individuals. The other exception in the Public Employment Act is the prohibition against strikes.

I might explain the reason for the failure to insert unfair labor practices for unions and individuals in both of our Acts. When the amendments occurred back in 1965 we had a rare situation in Michigan; we had a majority of Democrats in both Houses of the Legislature. It was a labor oriented legislature. As a result we have unfair labor practices for employers but not for individuals and unions.

We have had, of course, extensive experience in the public sector in the five and a half years that we have had this broad, comprehensive Act. We have developed a tremendous amount of business in that area--more so than in the private sector. We are probably as experienced as any state in the Union in the public sector. We were, of course, in the vanguard of the "atomic explosion", as one of my associates has called it. Wisconsin was the first state to adopt a comprehensive act and we were the second. We are, of course, an industrial state, a state that is largely unionized, and the home of the UAW, one of the most militant of all unions. Consequently, we have a very labor oriented background in Michigan.

The Michigan Public Employment Relations Act in Section 9 authorizes public employees to organize for the purpose of engaging in lawful concerted activities. It is similar to Section 7 of the National Labor Relations Act. Section 10 of PERA makes it an unfair labor practice for an employer to refuse to bargain collectively with the authorized representative of its employees.

Section 15 of the Act states that public employers shall bargain collectively with representatives of its employees, and authorizes public employees to enter into collective bargaining agreements with such representatives of its employees and to confer in good faith regarding wages, hours and other terms and conditions of employment. It further provides that when agreement is reached, it shall be reduced to writing and adopted by the employer in the form of a resolution or ordinance if requested by the employee representative.

From the foregoing, it is apparent that our legislation does not provide a "meet and confer" type of labor negotiations, but requires good faith bargaining as under NLRA.

Some states have adopted "meet and confer" types of legislation. These statutes are usually not comprehensive legislation governing all aspects of public employee labor-management relations; they are generally

limited in their scope and generally only apply to one class of employees. They simply authorize public employers to meet with representatives of their employees without imposing any duty to bargain in good faith. This would normally be proper and legal without any legislation. Nor do they contain punitive provisions for a refusal to bargain in good faith.

In a recent paper written by Samuel J. Sharkey, Jr., Editor of the Newhouse National News Service and published by Labor-Management Relations Service of the United States Conference of Mayors, he describes the difference between good faith bargaining and meet and confer in this manner:

> There are two general approaches to these legal codes covering public employee relations: 'meet and confer' and 'collective negotiations.' The basic difference between the two is the status of the employer. Under a 'meet and confer' system he has the authority to make the final decisions, on the assumption that the basic differences between public and private employment require different methods, specifically providing greater protection for management prerogatives in the public sector. Under a collective negotiation system, the two sides meet more nearly as equals, with management's rights reduced from those in the 'meet and confer' method, and the employees' position stronger.

I don't believe Mr. Sharkey's description of the differences are comprehensive enough. It strikes me that the fundamental difference is that "meet and confer" does not require good faith on the part of the employer; whereas, good faith collective bargaining does.

An in-depth study of labor-management policies for state and local government, made by the Advisory Commission on Intergovernmental Relations, an agency of the federal government, has recently been completed. The Commission is made up of private citizens, members of the U.S. Senate and House of Representatives, officials of the executive branch of the federal government, governors, mayors, state legislators, and elected county officials.

One of the problems they studied was whether the regulatory function of public employment management relations should be undertaken by the federal government or the state and local governments. The Commission in its report recommended that this function be performed by state and local governments. At least two of the speakers at this conference have said that the only solution to this problem is to have federal uniform legislation, a position with which I must disagree. I believe it is the duty of the states to legislate and to protect the rights of public employees. I am opposed to sitting back and letting the federal government run the show. We have a good start with eleven states that have enacted comprehensive public employment relations acts, and there is no reason

why we should not have them in all states. I refer to the Commission's report because it unanimously recommended that public employment relations legislation be a matter for the states and not the federal government. And remember, this is a commission established by the federal government and comprised of senators, representatives, mayors and representatives of county governments and citizens.

In the area of bargaining, the Commission recommended legislation requiring public employees to "meet and confer in good faith" as being the most appropriate in a majority of situations; however, in a minority report, Senator Knowles and one of the county executives on the Commission joined in opposing this recommendation. They said:

> We believe the Commission did not give adequate consideration to the fact that a large majority of states enacting public employee labor relations laws in the last decade have turned to the collective negotiations approach. While not opposed to the 'meet and confer' concept, we do not believe it goes far enough toward effecting a meaningful and enlightened personnel policy. It is our view that public labor-management relations should be based more on the mutual determination of the terms and conditions of public employment by management and employee organizations, with equal protection insured by the law for both parties to the negotiating process.

Senator Muskie in a separate minority report agreed with Senator Knowles and the county executive who joined him in their minority report.

Governor Rockefeller, also dissenting, stated that he preferred a "collective negotiations" recommendation, although he agreed "meet and confer in good faith" could be used as an alternative in states which felt they were not prepared to move into collective negotiations immediately.

I believe I detect an uncertainty in the minds of many people dealing with the subject as to what "meet and confer" really means. I conclude that for the most part those who advocate it feel it will be interpreted to water down the rights of employees in negotiating with their public employers. I suspect they are hopeful, if not confident, that it will leave the employer in a position of having the last word; that, as Mr. Sharkey suggests, the parties will not come to the bargaining table as equals; the employer will be in the position of summarily rejecting union proposals. Such a situation would be most unfortunate. It very well might increase the already tense situation that exists in public employee labor-management relations.

The public employee under such circumstances may despair of improving his lot. He may very well feel that he is no better off than he

was before when, with rare exceptions, management unilaterally determined his wages, hours and working conditions.

With the rising tide of dissatisfaction among public employees as evidenced in the Report of the Advisory Commission on Intergovernmental Relations and the rapid increase in public employee work stoppages in recent years which is apparent to all this country could very well be faced with a crisis in public employee relations in the near future.

The recommendation of the Advisory Commission adds a dimension to the "meet and confer" approach to bargaining in recommending that public employers be required to meet and confer in good faith. This removes some of the uncertainty from the meet and confer concept, because it requires that the employer confer in a good faith effort to reach agreement.

As stated earlier, a good faith approach to bargaining is essential if there is to be effective collective bargaining. The lack of it in meet and confer statutes makes them wholly ineffectual in resolving differences in public employee labor-management relations. The California statute in 1969 was amended to add the words "good faith" to "meet and confer," and this changes somewhat the meaning of the legislation. But I don't believe it confers the same kind of a duty to bargain in good faith that our legislation in Michigan nor the National Labor Relations Act requires.

It should be borne in mind that public employees (with the exception of Pennsylvania and Hawaii) are in a far less advantageous position than employees in the private sector because they may not strike. This weapon in the hands of private employees produces more settlements, even though not resorted to, than any other single factor, as you well know.

The great advantage in using the duty to bargain language found in NLRA is that it has been tried and tested by NLRB and judicial construction over the years, and most of us know what it means and can apply it with reasonable accuracy to any situation that may arise.

In Michigan, with some exceptions which are peculiar to public employment, we have relied heavily on interpretation of the duty to bargain under our statute on precedents established under the NLRA. This is a distinct advantage. It gets any state or local government adopting the federal concept on the duty to bargain off to a head start in resolving problems that arise in this area.

The basic issues involved in negotiations are the same in the private and public sectors, with a few exceptions. One of those is in the teaching profession. Teachers in Michigan have insisted on the right to bargain on class size, curriculum, textbooks and learning aids, length of

school year, provisions for special education and other areas peculiar to teaching. This issue was raised in the North Dearborn Heights Board of Education case, which came before us and was reported in 1967 MERC L.Op. 434. The Trial Examiner agreed with the teachers' bargaining representative that all of these areas were subject to bargaining and found the board in violation of its duty to bargain in good faith for refusing to bargain over them. No exceptions were filed to this decision, so it became the decision of the Commission and the law of Michigan. It is perhaps unfortunate that this important issue was not appealed through the Commission and the courts so that it could have been laid to rest once and for all.

We have held that to refuse to bargain over inclusion of arbitration as the final step in the processing of grievances is an unfair labor practice under Section 10(e). This issue was raised and decided by the Commission on exceptions filed to the decision of the Trial Examiner in Oakland County Sheriff's Department and American Federation of State, County & Municipal Employees, reported in 1968 MERC L.Op. 1. This was a landmark decision of our Commission, in which we also concluded, in a split decision, that agency shop union security was an obligatory subject of bargaining.

The Sheriff's Department urged as a defense that the Michigan Sheriff's Statute, which gave sheriffs the right to discharge deputies without cause, superseded the rights of collective bargaining accorded public employees under our Act. We disagreed, holding that the Sheriff's Statute was special legislation which was superseded by the later-enacted Public Employment Relations Act. There was no appeal to the courts.

We also had problems in conforming the Michigan Teachers' Tenure Act to our Act. The Tenure Act provides that teachers may attain tenure after serving either two or three years as probationary employees. It also provides that teachers who have gained tenure may not be dismissed except for just cause. On two occasions where teachers have been discharged by the board of education for failure to pay service fees under an agency shop union security provision, the Teacher Tenure Commission held that there is no conflict between the Teachers' Tenure Act and PERA. The Tenure Commission has also held that the dismissal of a teacher for refusal to pay the service fees is just cause for discharge under the Tenure Act. Viera v. Saginaw Board of Education, Michigan Tenure Commission Docket No. 68-14, and Hargreaves v. Saginaw Board of Education, Michigan Tenure Commission Docket No. 68-15.

The same conclusion has been reached by several Michigan trial courts.

Another problem that has confronted us on numerous occasions in the area of good faith collective bargaining is conflict between PERA and city employee rules and regulations and city charter provisions.

In City of Detroit and Detroit Board of Fire Commissioners, 1970 MERC L.Op. 953, we were confronted with a charge against the Fire Commission involving three issues: (1) Could the Fire Commission change unilaterally the rules governing promotion in its Training Academy? (2) Was it necessary for the Commission itself to participate in bargaining to meet the good faith bargaining requirements of the Act? (3) Did one meeting between the Fire Chief and a management committee and the bargaining committee for the Fire Fighters constitute good faith bargaining?

We found that promotional rules were a subject of bargaining and could not be changed by the Board of Fire Commissioners unless they had engaged in good faith bargaining to an impasse.

In this case and another case involving the Detroit Common Council and the Detroit Police Officers Association, we found it was unnecessary for the Board of Fire Commissioners or the Common Council to participate directly in collective bargaining; provided there had been good faith bargaining carried on by designated representatives of the governing body who had been given sufficient authority to bargain effectively.

We concluded that one meeting called by the Fire Chief at the specific direction of the Board of Fire Commissioners, where the proposal to change the promotional rules in the Training Academy was discussed briefly along with several other items of business did not constitute good faith collective bargaining.

The Detroit Common Council case mentioned above is too recent to have been given a page number in 1971 MERC Labor Opinions. That case also involved a conflict between the Michigan Home Rule Cities Act, the Detroit City Charter and our Act. The Home Rule Cities Act authorizes cities to adopt by a vote of the electors charter pension plans for firemen and policemen. Detroit had established such a plan several years ago, and the Mayor recommended certain changes in it. The Detroit Labor Relations Bureau attempted to negotiate the proposed changes with the Fire Fighters and the Police Officers Association bargaining committees. The City insisted on negotiating the changes with both bargaining committees separately from other unresolved issues in the collective bargaining agreement. The Fire Fighters' bargaining committee refused to do this. At this point and without further discussion, the Common Council took action to submit the charter changes to the voters. The vote was favorable, and the changes were made a part of the charter.

The Police Officers filed charges with us claiming a refusal to bargain. The City contended that the Michigan Home Rule Cities Act provided for charter pension plans for cities upon approval of the electorate and for that reason they were not required to bargain over changes in the plan with the Police and Fire Fighters.

We found the City had violated Section 10(e) of the Act on two counts.

We held, as we had previously, that the selection of certain unresolved issues and insisting on bargaining on them to a settlement before bargaining on other unresolved issues is not good faith bargaining as required by the Act.

We also concluded that the provisions of the Home Rule Cities Act regarding charter pension plans for fire fighters and police were in direct conflict with the requirements of PERA to bargain in good faith over wages, hours and other conditions of employment. We determined that where such a direct, irreconcilable conflict existed, the latter statute in point of time of adoption prevailed; that PERA having been adopted subsequent to the Home Rule Cities Act, the conflicting provisions of the Home Rule Cities Act were repealed by implication. This conclusion is supported by several Michigan Supreme Court decisions. Nonetheless, you can be assured it will be appealed to the courts.

We were faced with another situation involving a charter conflict in City of Flint, Hurley Hospital, reported in 1970 MERC L.Op. 348. Here, the City and the union representing non-professional employees of a city-operated hospital ran into difficulty in contract negotiations over a provision in the city charter requiring all city employees in the same job classification to receive the same rate of pay. The union involved was one of several representing different bargaining units of city employees. The City refused to consider bargaining over wages where other bargaining units contained identical job classifications unless negotiations were undertaken to change the rates with all of those unions. The union representing Hurley Hospital employees refused to do this, and filed a complaint with us charging a Section 10(e) refusal to bargain violation. We decided that the charter provision was in conflict with our Act for the same reasons as in the Detroit charter case discussed above and found a refusal to bargain violation by the City. This case is now in the Michigan Court of Appeals, an intermediate appellate court.

A most interesting case came before the Commission recently: Saginaw Township Board of Education, reported in 1970 MERC L.Op. 127. The Commission found, in a 2-1 decision, that the refusal to bargain charge by the union had been sustained. The union, in violation of the no-strike provisions of PERA, engaged in a strike against the employer during negotiations on a new contract. Our mediation service attempted to mediate the dispute and the employer refused to meet. The union filed a complaint of violation of the good faith bargainig provisions of PERA.

Commissioner Milmet and I agreed that the charge was sustained. Our reasoning was that it is the announced policy of the State of Michigan

in the Michigan Labor Relations Act (the private sector act) that a mediation service be established to minimize work stoppages; that the condoning of a refusal to negotiate under such a policy was contrary to the wishes and intent of the Legislature and should not be tolerated. We also based our decision in part on the court and NLRB decisions in like situations in the private sector.

Chairman Howlett disagreed, reasoning that a comparable situation is an illegal strike in the private sector when a union has struck during the term of the agreement, where it contains a no-strike clause. In that situation, the NLRB and the courts have determined that the employer's duty to bargain is waived.

This case caused us considerable concern. There was no appeal taken from our decision. It presents a situation which should be resolved in the courts.

The following are some selected situations in which we have found that there was no refusal to bargain on the part of the employer:

In the Saginaw case discussed above, another issue was raised. The union requested the school board during negotiations to furnish it with audited financial statements for the preceding year, the proposed budget for the ensuing year, a list of teachers who had left the school system, and a list of new teachers who had been hired for the ensuing year. We held that this was information needed by the union in conducting negotiations, and which should have been furnished. This conforms with NLRB decisions on the subject of furnishing pertinent bargaining information.

We have found that issuance and return dates of individual teacher contracts is not a mandatory subject of collective bargaining, as they are fixed by statute. Bullock Creek School District, 1970 MERC L.Op. 112.

Contract construction is not a subject for bargaining where the contract provides a dispute settlement procedure. City of Flint, 1970 MERC L.Op. 367.

A refusal on the part of the employer to accept a fact finder's recommendation for settlement is not a refusal to bargain. City of Ionia, 1970 MERC L.Op. 451.

Failure to agree on elimination of job inequities is not a refusal to bargain where the parties met and discussed the problem in a good faith effort to resolve it. Michigan State University, 1970 MERC L.Op. 505.

The withdrawal of an offer to settle an unresolved issue in negotiations does not constitute a refusal to bargain. Grand Valley State College, 1970 MERC L.Op. 558.

It is not a refusal to bargain to decline to sign an agreement with an illegal union security clause. City of Saginaw, 1969 MERC L.Op. 293.

Failure to make proposals and counterproposals when an impasse has been reached is not a refusal to bargain. Taylor Township School District, 1969 MERC L.Op. 656.

The issuance of individual contracts to teachers does not constitute individual bargaining where the Teachers' Tenure Act requires individual contracts and provides that any individual contract terms which do not conform to the provisions of a later master agreement are superseded by it. Bullock Creek School District, 1969 MERC L.Op. 497.

Payment of scheduled wage increases without consent of the union during protracted negotiations and where they were explained to the employees in a letter did not constitute a refusal to bargain. East Lansing Board of Education, 1968 MERC L.Op. 209.

A public employer is not required to furnish a meeting place for collective bargaining. City of Menominee, 1968 MERC L.Op. 383.

A refusal to open negotiating sessions to the public is not a refusal to bargain. This issue was decided in the case referred to immediately above.

A refusal to live up to the terms of an executed contract is not a refusal to bargain. City of Detroit, 1968 MERC L.Op. 798.

Where rival unions each qualify to petition for a representation election, there can be no refusal to bargain on the part of the employer until an election is held and a majority status determined. East Grand Rapids Board of Education, 1967 MERC L.Op. 355.

Inability of meeting because employer's attorney is snowbound is not a refusal to bargain. Eaton County Road Commission, 1967 MERC L.Op. 303.

Refusal of school board to ratify agreement negotiated and agreed upon by the bargaining committees of both parties is not a refusal to bargain. North Dearborn Heights School District, 1967 MERC L.Op. 673.

Refusal of employer to discuss employee's grievance without union's presence is not a refusal to bargain. Avondale School District, 1967 MERC L.Op. 680.

There is no refusal to bargain where an employer declines to sign an agreement where all bargaining issues were not agreed to and others were agreed to only tentatively, until all issues raised had been agreed upon. Benton Township, 1966 MERC L.Op. 466.

We have found generally that as public employers and public employee organizations (but mostly the former) have experience in the field of collective bargaining, they tend to level off in their relationship. They learn, they gain expertise, and as a result they reduce the number of strikes that occur. We have had a great many strikes in Michigan, and certainly we cannot recommend our type of legislation because it stops strikes, because it hasn't. I do feel, though, that had we not had such legislation for the past five years, we would have had pandemonium in the public sector. Surprising to us, most of the strikes have been by teachers, where we least expected them, but the teachers were very militant. They were completely without expertise in collective bargaining when our Act went into effect, but they have learned and learned fast, and the number of teacher strikes has reduced every year since the Act has been in effect.

Our Act does not contain any punitive provisions. It simply says: "The right of public employees to strike does not exist." But it doesn't say what happens if they do strike. We have had some litigation in this area which has largely resolved that problem, if it is a problem. The fact of the matter is the omission was a good thing, although unintentional, I am sure. The effect has been that public employers, when they have been faced with strikes, have gone to the courts. This was early in our experience.

We had one case (the City of Holland Board of Education) in which the teachers struck. The Board of Education want to the trial court in Michigan for an injunction. The trial court issued an ex-parte injunction without a hearing, just on affidavits. The teacher organization appealed to the State Supreme Court, which established the criteria for the issuance of injunctive orders in the illegal strike situations in the public employment sector: First, if the public employer comes into court for an injunction, he had better come in with clean hands. This is a court of equity; therefore the court shall look into the question of whether or not the public employer has bargained in good faith, as he is required to do under the statute. Secondly, the equity courts of Michigan will not issue strike injunctions willy-nilly; before the courts will issue such injunctions, they must be satisfied that the strike will endanger the public health and will cause irreparable damage. This is a typical equity court criterion in injunction cases.

Since that decision in 1968 there have been very few applications for injunctive relief by employers in Michigan in strike situations.

It is rather interesting to note that in spite of the great number of public employee strikes we have had in the last five years, very few of them are municipal or county groups. They are largely in the area of

the teaching profession. We do not have any real explanation for this except that in many situations collective bargaining existed in the cities and counties to a limited degree before the law was changed to make it mandatory.

MODERATOR FELLER: I think it is one of the great misfortunes in conferences like this that the schedule always gets squeezed down to the point where people who do have a lot of information which would be helpful to the participants do not have time within which to give it. And I have more apologies to Mr. Walsh, rather than for the shortness of the introduction, for the shortness of time in which to give us the Michigan experience.

MODERATOR FELLER: The next speaker on the program is Mr. Burdick, who is an attorney representing unions in San Francisco. Without further ado I give you Mr. Burdick.

MR. BURDICK: Professor Feller, Ladies and Gentlemen. I arrived just at the luncheon meeting, so I have been treated to presentations by three objective and impartial people in a row. I hope that I am not going to be the first one who cannot lay claim to that kind of total impartiality and objectivity. I might as well confess that the type of "meet and confer" legislation that we have in California is no favorite of mine. It is more or less like the modest man who was the subject matter of a conversation between two fellows. They were talking about a mutual friend of theirs, discussing his abilities, his failings and his redeeming virtues. When they got all through, one guy said: "Well, he is not much, but he is a modest fellow." The other guy said: "Well, he has a helluva lot to be modest about!"

We have a modest Act in California. I say that because I think it bears heavily on the question of good faith in collective bargaining.

At the risk of extreme oversimplification I shall tell you my own theory about how the "meet and confer in good faith" or "collective bargaining in good faith" right relates to other essential rights of public employees. This is an oversimplification. I shall have to ask Professor Feller to excuse the extent to which it is oversimplified, but I think it is important.

Fundamentally, private employees have three basic and essential rights that are necessary to their effectiveness in labor-management contests. The first of these and the most basic, of course, is the right to organize. As our luncheon speaker told us today, that is a constitutional right in the United States, guaranteed by the First and Fourth Amendments. I don't think, at least in the year 1968, that we needed the State Legislature of the State of California to assist us in attaining the bare right to organize. I think those nine gentlemen in Washington, D.C. would have taken care of that if it had to go that route.

It is not just the bare right to organize, of course. The statutory protection of the right to organize is a significant and important right, both under the NLRA and under the State Acts; the Meyers-Milias-Brown Act gives important additions to the bare right. That is the No. 1 right: the constitutionally and statutorily protected right to organize.

The next right in this triumvirate of rights is the right to bargain collectively. Professor Feller has admirably outlined what the duty of good faith in collective bargaining is and I won't go into that. The third right is the right to engage in concerted economic activities to enforce or, if you will, pressure acceptance of your demands in the event that you cannot reach agreement.

Of these three rights, it appears to me (and I think that most people who operate both in the private and public sectors would agree with me) that the second one (the right to bargain collectively) is not nearly as essential as the other two. When you are out representing a union with a lot of muscle, well-organized, a lot of history, good leadership, and they have the right to engage in concerted activities, the right to strike if you will, it just seems that employers don't play many games with the right to bargain collectively. That seems to solve itself pretty well.

I know the books are full of cases where the good-faith-bargaining thing has been attacked; and, as Professor Feller explained, it certainly has a strategic and technical significance in the conduct of labor negotiations in the private sector.

We do not have the right in the public sector, we are advised by our courts in California, to engage in concerted economic activities, i.e., to strike. I am sure that they tell us that we do not have the right to have a massive attack of the "blue 'flu", slowdown or like activities. This changes, in my opinion, the importance of the right to "meet and confer in good faith" in relation to the other two labor rights mentioned.

I see some of my friends out there from the management side who, if they are within fifty yards of the Courthouse and you ask them about "Let's get down and bargain collectively," there is an immediate effort to insure that "bargain collectively" is pronounced "meet and confer". They love that euphemism. But at any rate, we all here know it is extremely important because fundamentally we don't have anything else under the Act. We have no concerted economic activity to which we can resort, and therefore we have to take each and every right that the Act does confer on us that we didn't have before and work them to death, if we can. And the rights conferred by the court are very minuscule, in my opinion.

As I see it now, just confining ourselves to good faith in collective bargaining ("meet and confer", as my friends like to call it), there are some unique problems with which we are faced in the public sector that do not exist in the private sector. Professor Feller indicated to you at the outset of his remarks that one of the obvious violations of the duty to bargain collectively in good faith under the NLRA that has been developed in the private sector is the so-called "messenger-boy" concept. In other words, the boss sends some flunkey down there, you sit around for weeks and, as the Professor put it, every time he reads some points of law he has to go back and talk to the boss. In other words, a man who comes in with no authority at all. Strangely enough, it seems to me that the California Act (and I can't understand it, for the Michigan Act does not do this) sort of institutionalizes that concept, to inject it into the

fundamental scheme of the law. It says (I forget what the language of the Act is) that after you have negotiated with the county or city negotiating team and have reached an agreement, you may reduce it to writing, which specifically says "shall not be binding."

I don't know why the state had to jump in and dictate that the agreement should not be binding except as a hangover of some of the things that the luncheon speaker mentioned today. I think at the minimum the legislature would have been wise to leave it up to the city. If they wanted to send some negotiator down there, give him some authority as they do in the private sector day in and day out, and let him sign an agreement that would be binding, why didn't they leave him alone? Let him do it? This invokes an important difference between the private and public sectors and one with which I anticipate we are going to have a lot of difficulty. I think this "messenger-boy" concept is going to be the most difficult thing in the "good faith, meet and confer" problem in California.

The problem is attributable to a variety of historical factors, one of which our luncheon speaker mentioned to us today: the whole concept of the sovereign. These sovereigns that we have around our state, and I believe in other states as well, like that sovereign authority and they are not going to give it up very quickly. It is a legal concept as well as a political or historical concept in this country. For instance, the lawyers here will know that in most jurisdictions there is a rule that the government cannot be estopped on some screwy theory that if you estop the government, somehow the taxpayers are being hurt; that is one example of the sort of super-legal protection given to the sovereign. A similar theory is that there cannot be, except under well-defined legal situations, any delegation of so-called legislative authority. Every time you mention or suggest to any government, i.e., entity in the State of California, that they might agree to a compulsory-arbitration ordinance, the city attorney, I can guarantee you, rushes out with an opinion which says: "That would be an unlawful delegation of the legislative authority. Don't even consider it. You're dead!"

Other historical matters which are interfering with the "good faith meeting and conferring" in this state are, strangely enough, a hangover of the civil service system. Every public employee who is here and is active in the affairs of his organization knows that for years and years each governmental agency had either a civil service commission, employee board, personnel board, who whatever they want to call it, and generally that board is a quasi-judicial body in the State of California. Appointment to it is generally a political appointment. It is attendant with some supposed honor and dignity to be appointed to these boards. It is usually a plumb of the mayor or the chairman of the board of supervisors.

If you really are having honest-to-God "meet and confer" sessions, the civil service board is just as useless as the appendix. But it is there.

I see some friends from San Joaquin County out there. We have a case going which is before the courts. I won't get into it in too much detail, but down in San Joaquin County the stated position of the County is that they have a county negotiating team; the employees meet with that negotiating team; if they can't reach agreement, then you go the the Civil Service Board; if the Civil Service Board can't iron it out, then you go to the County Board of Supervisors. Why they have got the Civil Service Board in there certainly escapes my understanding. I haven't heard anybody give a good explanation for it except that you always have had a Civil Service Board down there. The politicians don't like to disband voluntarily, so you have to give them something to do even though a new scheme has been imposed.

Another problem that we have is the political nature of governing boards. By definition most governing boards of employing agencies in the State of California are rather dominated by politicans. These politicians were not elected because they were skilled in labor negotiations. They were elected because they were popular for some other reasons, depending on where you are and what time, for any variety of reasons. Maybe because they were a good baseball player twenty years ago.

If these people zealously wish to preserve their sovereign power, if they possess no individual or collective skill or experience in the problems presented by collective bargaining, you have got a problem to begin with. These people are not like the manager or the owner of a productive enterprise. The County of San Joaquin is not competing to attract the citizens of the adjoining county to come over and live there, as the XYZ Manufacturing Company would like to get the customers of ABC. If ABC goes on strike or if ABC adopts a stupid and ineffective labor-management program, maybe all the good employees will go over to XYZ and they will pick up some customers and prosper.

Mistakes in collective bargaining techniques or outdated, inadequate, unsuccessful labor-management relations programs in a county or a city are not attendant with that dire economic effect. In other words, they are not brought to heel really. They don't really have to compete. They don't have to be smart. I think that this has had a distinct influence on the manner and method by which many of these things are being conducted.

Obviously these remarks are not true of each and every employing entity. Some of them have obtained the services of professionals who are skillful in these problems, but they are in the long run subjected to control by a political board that, in my humble opinion, is often not well equipped to handle the problem.

Finally, it was interesting that our luncheon speaker mentioned the political power of public employee groups in New York and, as I understood his remarks, perhaps commending to the public employees here that even though they are in a period of "meet and confer" collective bargaining situations, they should not forget the old-time politics approach.

I have found in the twenty years that I have been doing this work that my clients come to me because they don't want to be in politics. I am constantly being advised by city governments and county governments that the employees should not be in politics; that it is improper. It is expensive for the employees to be in politics and in my experience it is entirely unsuccessful except in the largest cities, with the longest history, where they are plentifully equipped with good, Irish politicians on the employees' side.

But this situation still exists. Many, many members of the governing boards of employing agencies in this State have an attitude, which they often express by saying: "I can't do anything for you. We have been trying to take care of you boys for years. Look at what we did for you last year." They have always done you some favor. If it is an election year, you had better figure out whom you are going to support. Let him know that you are supporting him. Make a campaign contribution directly, indirectly, backwards, forwards, sideways, some way. It is expected. It is done everyday.

However, I think it is a very bad investment because you generally don't get much out of them anyway after they get the contribution. But that paternalistic, political attitude still exists today, and it cannot be ignored when you are trying to determine what is going on in the "good faith, meet and confer" sector.

There is one other difference that I am going to talk about and then I am going to sit down. Professor Feller mentioned the ability-to-pay argument that you have in the private sector. We experience this in California, and I suspect in Michigan and I know in New York, because I was just reading the New Yorker Magazine which talked about the "horrendous" situation there. The whole City is "going to come tumbling down" because the policemen and firemen want a living wage.

Take the difference between the ability-to-pay argument in the public and private sectors. For years every time it gets down to budget time and something has to be decided, you get the argument: "Well, we have run out of money." For six months that same employing entity has been fooling with the budget. They didn't invite you in to see how many chuckholes should be fixed out on the county highway or the city streets; what fences should be repaired; whether they should spend a million and a half for a new corporation yard; or refurnish the Mayor's office, and all those kinds

of things. They bring to you a budget which leaves just so much. There are always maybe three or four hundred thousand dollars, depending upon the size of the city, floating around that they can move over there. When they lay the completed budget before you, an interesting problem arises. If they do it at the end of the budgetary process, can you argue that the duty to bargain collectively or "meet and confer in good faith" requires that they do it at the beginning? Maybe we should participate throughout the whole budget session from beginning to end. Maybe it should be a negotiable item as to whether they fill the chuckholes down on Maple Avenue, because if they fill enough chuckholes before they get to the end of the budget, there may be nothing left for needed improvement of salaries and fringe benefits.

I am serious about that. I suspect that it is a legal problem, and I suspect that somebody will put a suit on one of these days to say that it is not bargaining in good faith to commit 95 percent of the budget or 50 percent, or whatever it is, and then come to the employees and say: "Well, this is all there is, boys. Within this framework we can negotiate."

These are a few of the ideas that I have to convey. Let me emphasize that I think some progress is being made. I think the effort should be made to push it faster.

I certainly disagree with Mr. Walsh. This is an exciting world we live in, but it is frustrating to represent employees. I don't care where the act comes from. All I want is a good act and to get it fast before everything blows up.

MODERATOR FELLER: Our next speaker is Mr. Shannon, who has had very great experience in this area on the school side. I cannot resist, since schools have already been mentioned in connection with the Michigan experience, interjecting for just a moment a bit of my own experience.

I once was involved in teacher negotiations in the City of New York. It was at the time of the original formation of the United Federation of Teachers and their first strike. I discovered that one of the reasons, perhaps, for the militancy of school teachers is that they read about this subject, and since they read about it, they want to live it. I had the unfortunate experience of coming to a meeting of a Delegated Assembly of the United Federation of Teachers. The meeting was scheduled for 10:00 o'clock at night. We didn't get there until 1:00 o'clock in the morning because we had been engaged in very extensive negotiations with the Mayor which resulted in a temporary settlement. The teachers had previously authorized a strike to begin that morning, and we tried to bring that settlement before the teachers so that they could call off the strike. The only issue was a legal one--whether the city had authority to take certain action the union wanted--and we had obtained the Mayor's agreement to submit that issue to a group of favorable lawyers. But we met a group of people who clearly were having their first experience with labor relations. Their knowledge and their feeling about it were based upon having seen "Waiting for Lefty," and they were going to act without waiting for Lefty. Our chance of selling that settlement to that group of assembled teachers was less than the selling of a settlement to any experienced collective bargaining group. They were much tougher, much more radical, much more excitable, and much more anxious to go out and demonstrate muscle on the picket line than any group of steelworkers or coal miners that I have ever seen.

And with that introduction I now give you the man who has had to deal with, I suppose, those kind of people: Mr. Thomas Shannon.

MR. SHANNON: Thank you, Professor. Ladies and Gentlemen, I believe that the concept of good-faith bargaining in the private sector under Taft-Hartley is closely interwoven with several things: first of all, the scope of bargaining; secondly, the duty to bargain; thirdly, representation in bargaining; fourth, the recognition that there is at law a certain parity between the parties at the bargaining table. That is, the law attempts to insure as a matter of law, not often as a matter of practice, that both parties are equal, each having certain defined options; fifth, the end result of good-faith bargaining; and sixth, sanctions which can result if good-faith bargaining is lacking.

Stated another way, private-sector, good-faith bargaining encompasses what you must bargain about; the extent to which you must bargain; with whom you bargain or with whom you refuse to bargain; the fact that neither party has by law the final decision-making power over a bargainable subject; the fact that good-faith bargaining leads to bilateral

collective-bargaining contracts enforceable by either party; and if good-faith bargaining is lacking, the fact that unions in the private sector may lawfully strike or they may complain to a third-party, enforcement administrative agency.

Any analysis of the extent to which the private-sector, good-faith-bargaining concept is present in employer-employee relations under the Meyers-Milias-Brown Act, which applies generally to local governmental agencies except school districts, and the Winton Act, applying to school districts, depends, I believe, on an examination of these statutory duties governing public agencies. Insofar as these duties are similar in the public and private sectors, the private-sector concept of good-faith bargaining will apply. To the extent these factors are different or these duties are different, a new case law will emerge on the issue of good faith, or in the alternative the law will change. Accordingly, let us look in a very brief and summary fashion at the several dimensions of the good-faith concept in the private sector, without trying to be redundant, of what Professor Feller said earlier.

Taft-Hartley says that the employer and the unions have the duty to meet at reasonable times and confer--not bargain, but confer--in good faith with respect to wages, hours, and conditions of employment. It also requires execution of a written contract incorporating any agreement reached, if requested by either party, but no requirement exists to either agree to a proposal or to make a concession.

Around these few simple words and this relatively simple complex a whole body of case law has emerged. And as Professor Feller indicated to you, the lack of good faith includes such things as delaying tactics, the overall conduct which shows bad faith on the part of an employer both at and away from the bargaining table. And that is the principal thrust of the famous General Electric case: the idea of unilateral actions on matters which are the proper subject of bargaining; a refusal to consider proposals made by the unions; and bargaining with individual employees despite the union request to bargain; and of course a refusal to provide data to unions, to permit the union either to bargain understandably or, in the alternative, to police their collective-bargaining contract.

Of course under Taft-Hartley there are essentially three types of bargaining subjects: the illegality subjects, about which no bargaining is necessary and of which no inclusion in the collective-bargaining contract is necessary; the so-called mandatory subjects which the law says must be bargained about and must be included upon request of either party in the collective-bargaining contract; and the so-called voluntary subjects which may or may not be bargained about, depending upon how the parties feel about it and there is nothing illegal if it goes into the contract.

Keeping in mind these few brief remarks and Professor Feller's description of what constitutes good faith in the private sector, let us look at these factors under the Meyers-Milias-Brown Act and the Winton Act which bear on good faith.

First of all, let's consider the elements of good faith in the Winton Act, which governs public-school districts and other local public-education entities in California. First of all, the definition of "meet and confer"; it's a brand-new definition. Up until November 23 of 1970 we had no definition of "meet and confer," and it was a scramble as to what you really wanted it to mean. It means now that there shall be a mutual obligation to exchange freely information, opinions and proposals, and to make and consider recommendations in a conscious effort to reach agreement by written resolution, regulation, or policy of the governing body effectuating such recommendations.

Now, there is an irony here because there is a mutuality once the "meeting and conferring" process begins, but no mutuality as commencing the "meeting and conferring" process. Only the employee group may do this under the law by making the appropriate request. Secondly, the good-faith concept of Taft-Hartley is missing--and it is intentionally missing. It was intentionally deleted on several different occasions by the legislature, but this year it is replaced by the "conscious-effort" concept.

Now, it may very well prove to be that the "conscious-effort" concept is going to be far more stringent from an employer's point of view than is the "good-faith" concept. I think that we are going to have to wait for interpretive litigation on that score, but it seems to me that the words "conscientious effort" imply a great deal more than the words "good faith," especially when you consider the fact that no court in my opinion would permit the converse of good-faith bargaining. That is, bad-faith bargaining.

Firstly, the new definition of "meet and confer" contemplates a writing, that is to say, that any agreement reached will be reduced to writing; but this writing, it should be noted, is adopted unilaterally by the governing agency. Effectively you meet and confer to a degree upon a recommendation which is implemented by the school board; not on its authority to enter into a collective-bargaining contract or a contract to provide services between, as far as the school board is concerned representing the people, the school district and the employee organizations representing the employees, not on their legal right to enter into this kind of a contract but, rather, on their authority to adopt rules and regulations as part of the governing process in the law.

Secondly, let's consider the definition of the scope of "meeting and conferring" under the Winton Act. We have to take a double approach

to this. First of all, for both certificated and classified employees, both the teaching and the nonteaching employees in other words, the scope of representation includes all matters relating to employment conditions and employee-employer relations, including but not limited to wages, hours, and other terms and conditions of employment. This definition is considerably more broad than the Taft-Hartley, and it should be pointed out that it is open-ended, that is, it implies more than it actually states. Presumably the private-sector case law developed on what constitutes the terms and conditions of employment which will be used to litigate this particular section.

The second approach under the scope of "meeting and conferring" is applicable only to certificated employees, that is, the teachers. In addition to employment conditions, wages, hours, and other terms and conditions of employment, the professional employees of the school district may meet and confer on procedures relating to the definition of "educational objectives," the determination of the content of courses and curricula, the selection of textbooks and other aspects of the instructional program to the extent that these matters are within the discretion of the public-school employer under the law. This opens up the educational policy matter to the "meet and confer" process. It is a 1970 change in the law. Prior to that, when the Winton Act was first enacted in 1965 and it was first moved out of the Government Code, the law said "all educational policy matters." It has been restricted to include now only "procedures relating to educational policy matters." What "procedures" means is probably anybody's guess and again that will be the subject of litigation.

I think a serious question arises as to school districts which have already worked up rules and regulations based on an agreement as a result of a fruitful "meeting and conferring" session in which they have what amount to rules and regulations which contain a great deal of policy, certainly more than procedures relating to policy. How is the clock going to be turned around? How is the whole thing going to be turned around? That is an adventure that some school districts in California will be facing during the ensuing months.

Thirdly, there is the provision for the persistent disagreement in the Winton Act. It includes any "meet and confer" subject which has not been resolved to the mutual satisfaction of the parties within a reasonable period of time. This is an impasse procedure, but it is strictly advisory only. Strictly advisory. In that sense it is inconsistent with the Taft-Hartley Law because, as we know, arbitration there on this sort of thing may be binding.

Fourthly, the final decision is in the school board under the Winton Act, under the provision which states that the adoption of the Winton Act shall not be construed as prohibiting a public-school employer from making the final decision with regard to all matters in the

"meet and confer" process. This is a specific section of the Winton Act, and it is exceedingly significant; and I might say it is totally inconsistent with the provisions of the Taft-Hartley Law.

Fifthly, there is the specific statutory authority which places responsibility for decision-making in specifically named entities or offices. In deciding the Los Angeles City School Teachers' strike on October 20 of last year, the Los Angeles County Superior Court declared invalid the School Board rule purporting to adopt the provisions of a negotiated strike-settlement agreement by holding, among other things, that the School Board rule contained unlawful delegations of legislative authority over educational policy matters to teacher-employer organizations. In effect, the Court said that the law contemplates that educational policy of the public schools in California be set by politicians elected by and directly responsible to the people.

The sixth similarity or difference, as the case may be (and that, incidentally, is entirely inconsistent also with the Taft-Hartley Act), are the sanctions when there is a refusal to "meet and confer" in the public sector. There are provisions for neutral third-party assistance, but, as I indicated before, it is only advisory. Your resort to court orders is immediate. There is no administrative agency and the strike is illegal. In the main, these are inconsistent with the law in the private sector.

And lastly, individuals may represent themselves and for classified employees there is no sole agent. You have what amounts to a multibargaining effort, which was discussed this morning. And this also is inconsistent with the private sector.

If you look at these same factors in the Meyers-Milias-Brown Act, you have the definition of "meet and confer." Here the "good-faith" concept is carried over, at least recently, and also the term "wages, hours and other terms and conditions of employment" seems to be carried over also from Taft-Hartley.

An interesting part of the Meyers-Milias-Brown Act is that, unlike the school-district situation, that is, the Winton Act, there is no attempt to give professional employees in municipal or county governments any more enlarged scope of "meeting and conferring" rights than are allowed to the so-called nonprofessional employees. The same situation applies with mediation as far as impasse is concerned, but again it is only advisory and the individuals may represent themselves.

Tying this together, it would seem that the "good-faith" concept of bargaining in the private sector has some application, but probably only a limited application, to public-sector "meeting and conferring." This is primarily due to the fact, I believe, that

California law on public agency employment relations, be it the Meyers-Milias-Brown Act or the Winton Act, recognizes or attempts to recognize, perhaps in a somewhat fumbling way, the duality of the nature of local governmental agencies, including school districts. That is, it views a governmental agency both as a political entity governed by the political representatives responsible to the people and as an employer of persons who have legitimate and pressing job concerns. The extent to which "good-faith," private-sector concepts are applied will depend in my opinion on the intermeshing of a particular good-faith concept with this dual nature of the public entity. Generally, I believe that the lack of good faith under the Meyers-Milias-Brown Act and the lack of conscientious effort under the Winton Act will be found, as in the private sector, if there are delaying tactics, if there is overall negative conduct, to name just a few. Since there is no administrative agency to which to complain, I think the courts will be resorted to. But this is kind of a cumbersome way to administer an Act. The law that is devised by the courts usually takes several years before it bubbles up through the appellate levels. I think the amicable relationship is going to depend more upon a realistic appraisal of the "meeting and conferring" situation at the local level than it is in any reliance upon an administrative agency, because the administrative agency, as it has been pointed out several times today, does not exist in the public sector for "meeting and conferring."

Thank you very much.

MODERATOR FELLER: I have been kind of taking notes here. I suppose that is the result of my recent acquaintance with the academic profession, where I always see people taking notes when I am speaking. So I think that there must be some utility in that function. I shall now find out whether there is or not by making a few observations. But first I would like to ask whether any member of the Panel feels that he wants to make some comments on what some other member of the Panel had to say. I think there have been some elements of controversy here which might be interesting to explore. And then I shall open the floor to questions directed to the members of the Panel from people in the audience.

Does anybody here feel that anything that has been said here impels him to make additional comments?

MR. BURDICK: I should like to ask Mr. Shannon a question: In his legal judgment is there any legal bar to any employing entity, after having provided appropriate guidelines, appointing agents to go out and conduct negotiations and reach agreement within the parameter set forth in the guidelines laid down by the governing body?

MR. SHANNON: I think that as far as the actual power of a board to delegate the "meeting and conferring," it is going to rely more on

a moral concern than a real concern. I don't think that a school board or any other governmental agency, but especially school boards because they are the most limited kinds of legal organizations under the law, can tell somebody to go out and reach an agreement that will be final and binding at that time. I don't believe that it becomes final and binding until the board actually acts on it at public meetings duly noticed, called and held for that purpose. This is the same for cities and counties. I don't think that anybody has the power in advance to bind the board in that way, especially under some recent case laws involving several purported land purchase contracts entered into by school districts. The contracts were completely repudiated by the school board despite the fact that the individual realtor suffered greatly by the repudiation. The courts held that there was no contract at all because the board had not acted upon it.

I don't think that if the board sends somebody out with a general proposal, and the individual agrees to it, it can be held that the board has been bound from the time the individual has sat down and met with him. I think that what I believe you unfairly call the "messenger-boy" concept is going to be with us for many years to come.

MR. BURDICK: Don't sit down, Tom.

Mr. Walsh gave us some of the history of the jurisdictions that do provide for compulsory arbitration. His own state permits it in the field of police and fire. I take it that you agree with me that those matters have been tested through the courts of those states. If a third-party arbitrator can determine what the pay scale is going to be, why can't the city just designate one of their own boys (somebody more than a "messenger boy") and let him do it?

MR. SHANNON: Well, you introduced the concept of a binding arbitration and I think that you get into the same thing. I think that there are two reasons for it:

1. There is a legislative scheme, a statutory plan, for employer and employee relations in the state. I am talking with particular reference to the Winton Act. It sets forth a certain kind of a scheme or a plan, and under the law you are expected to conform to that plan.

2. The idea of binding arbitration has been tested. Of course it was tested in the Los Angeles Superior Court with reference to labor relations, and the Los Angeles Superior Court has thrown it out. However (and I think that this is very interesting), with respect to a construction contract in the Santa Barbara Union High School District case, the court upheld binding arbitration. So apparently we are not so hung up today on the concept that governmental agencies may not agree to be bound in the future as we are under the concept as to what is

contemplated in the statutory plan--in the school districts, the Winton Act, and in other entities, the Meyers-Milias-Brown Act.

So what you are asking me is more of a policy question than a legal question because the law has been settled, at least unless the Los Angeles Superior Court is overturned on this matter. I don't think by any stretch of the imagination that the policy question has been settled because this is an area of evolving developments. The 1970 session of the Legislature illustrated very dramatically that different days are here today than were here just a few months ago because of the 1970 amendments to the Winton Act, which I think are going to spur new amendments to the Meyers-Milias-Brown Act, which are going to spur new amendments to the Winton Act. It is a matter of whipsaw. I have watched this shipsaw go on for several years--and I don't think that we are at the end of the road yet.

MODERATOR FELLER: I think this discussion has stimulated Mr. Walsh to put what I am sure will be more than his two cents in.

Mr. Walsh.

MR. WALSH: I just want to say that we have wrestled with this "messenger-boy" concept in Michigan on at least two occasions. I think that it is due largely to lack of experience and understanding on the part of public employers. But this has happened in Michigan, particularly in the larger cities. We have had two instances in Detroit where the Office of Collective Bargaining, which is an office under the direct supervision of the Mayor in Detroit, has negotiated long and finally fruitfully to reach agreement and then the Common Council has simply ignored it and gone ahead with the adoption of a resolution nullifying what the Bargaining Office has carefully worked out. This is a problem.

We have had another instance also in Detroit where the same thing happened with the fire fighters and the Fire Commission. We have decided both of those situations, and we have reached this conclusion (when I say "we" I am speaking of our Commission, because these matters come to us on appeal from the decision of the Trial Examiner): We have held that the public governing body must not only appoint representatives to bargain for the City or the municipality, but must give them authority to bargain effectively. We haven't had to decide yet what "authority to bargain effectively" is, and we no doubt will in the future.

MODERATOR FELLER: It seems that this is like an atomic pile. You pull out the rods and the explosion starts.

MR. SHANNON: I would just like to make it very clear that the "messenger-boy" concept applies equally well to both parties at the "meet and confer" table. The fact is that this is one of the key holdings

of the Los Angeles case; and I think it has been generally agreed upon that under the Winton Act the Certificated Employee Council, which used to be called the Negotiating Council, does not have legal authority to enter into any kind of a binding contract anyway. So even if you sent not the "messenger boy" but the General himself, he could not enter into any kind of meaningful contract because the person or the party with whom he is dealing (and this is true for the employee organizations) is equally impotent.

So if there is going to be any kind of change here, it is a two-way street, Ladies and Gentlemen.

MR. BURDICK: I am going to ask the good Professor, who is much more skilled and informed in the private sector than I am, if it is not actually the case that there is a different rule applied as to the employer and the employee. The Board under the NLRA recognizes the different problems faced by unions as opposed to those faced by management. It has held on repeated occasions that it is not a refusal on the part of the union to bargain collectively if it insists that it has to submit any proposals in the end to its membership at the meeting of the membership. Isn't that correct?

MODERATOR FELLER: As a good lawyer, you never ask the witness a question, on cross examination particularly, unless you know what the answer is.

The answer is, of course, as you indicated, as I thought that I did state.

MR. SHANNON: All I can say to that is: this is one of those situations where our luncheon speaker, I think very eloquently, set forth that there are differences between the private and the public sector in employment. One of the differences, I submit, is that the power of a school board or the power of a city council or the power of a board of supervisors is set by law, and these bodies do not have the free-wheeling kind of authority that the chairman of the board of a private corporation or the president of a private corporation has to make these judgments. Therefore I think, if the matter comes to the courts (and indeed it has in some form or another), especially under the statutory plan--not under all conditions or under all laws everywhere in the United States or in Canada or everywhere in the world, but I am saying under California law--the courts will hold that from this standpoint the Negotiating Council, Certificated Employee Council, or the employee organization, depending upon what Act you are working under, is more in tune with the school board than they are with private industry. Therefore, I think that this is one of those places where we would have to use the razor and chop it. There is a big difference between the public and the private sectors in this case.

MODERATOR FELLER: We have now reached the allotted overtime limit. I should like, however, to add a few words. It seems to me that particularly this discussion at the end has focused on what the legal situation as to public employees is now as distinguished from the private sector. I think it is very important to recognize that what is written in the statutes and court decisions today is not going to be in the statutes and decisions a year from now or two years from now. I wouldn't want to make bets on it, but a Superior Court Decision is, after all, only a Superior Court Decision and it may not be the decision of the Court of Appeal or the Supreme Court of California. So we are resting on sand if we make our judgments based on that immediate decision.

It seems to me that there are certain common threads that have been put together here which I would like to endorse:

1. I did not say this in my opening remarks, but I implied it when I told the story about how I was negotiating with that employer on the other side of the table and he was very concerned that I was trying to create a refusal to bargain and he was trying to avoid it. The reason that we were engaged in that game is that my client (the union) had no power to strike and the employer knew it. The union had the legal right to strike, but if the people went out they would be replaced. You don't have litigation about the duty to bargain in good faith in United States Steel or General Motors. You have it where unions are weak and they rely on the good-faith concept in the law to get them something which they can't get with their muscle, because they haven't got any. By definition, given the existing state of the law, public employees don't have that muscle. What that means is that the public-employee lawyers are going to do what any good lawyer representing private employees who have the right, but not the power, to strike does: use whatever leverage they can get out of the law as it is. Those who have looked at all the litigation about what is "good faith" or what is not "good faith" and despair of its utility and deplore the fact that it creates play-acting at the bargaining table, should look seriously at that possible consequence. I am just not predicting. But it seems to me that, if I were representing a public-employee union and I had no right to strike, I would play the "good faith" thing for all it was worth because that is all I have got. I would use it in the courts both affirmatively and defensively when I am charged with having violated the law by going on strike. Here I defer to Mr. Walsh's recitation of what happened in the litigation involving the City of Holland.

2. There is another theme which I think has been involved here. I agree there clearly are differences in the concept of good faith. But I would not be as confident as Mr. Shannon is that the difference between an advisory board whose recommendations are not binding and an arbitration board whose recommendations are is really very significant in relation to the bargaining process. I should have talked about the experience under the Railway Labor Act, where we have advisory boards

whose recommendations are not binding. The net effect of those boards has been to stultify bargaining. It is not only that the union representative, who knows that if he disagrees can go to a board which might possibly give him more, is very unlikely to agree. More importantly, if you know that the dispute is going to go to a board if you do not agree, it does not pay to make concessions in an effort to reach agreement. If you are on the union side, a concession simply lowers the plateau from which you are going to present your case to the board. From the employer's side, if you give away anything, you can never take it back when you get before the impartial board that is going to hear and make recommendations. So there is no incentive on either side to narrow the areas of disagreement before the dispute gets to the board, whether it is final and binding or merely advisory. The net effect on the railroads is that no real bargaining takes place before the emergency board proceeding because there is a board there and each party wants to preserve its maximum position for presentation to the board. Then, after the board makes its recommendations, the employer always has to pay more to settle it. I think that that has been the universal experience. Eventually such a mechanism, whether it is advisory or final, tends to stultify the process of bargaining. I think perhaps the real choice is between that kind of stultification and a system of bargaining which has more similarities to the private system than the present California system does.

One thing which I got out of Mr. Burdick's remarks which I should like to emphasize, as a man sho used to represent unions, is that the most dreadful thing in the world for a union negotiator is to deal with an employer negotiator who is not competent in his own interest. He may concede things that he shouldn't and, indeed, that the union cannot live with. It is very difficult to say over the bargaining table that a management's representative has given up too much. Contrariwise, the inexperienced negotiator very often tends to stick at things which he should concede because they are important to the employees but do not really have a substantial effect on management.

My favorite story to illustrate this point involves a very large company having a great number of plants producing, in each plant, a diversified line of products. We had always asked for a provision in the master agreement requiring plant-wide seniority in each plant. We asked for it because we recognized that no reasonable company would ever give it to us but it made our members happy to ask for it. During one negotiation, we worked out a supplemental unemployment benefit program. That year, the company put in charge of its negotiations an experienced benefits man who was very conscious of costs and, indeed, very good at negotiating benefit programs. To save costs he insisted, and we agreed, that only employees with two years of seniority would be entitled to supplemental unemployment benefits.

Then, when we came to the seniority provisions in the agreement, he shocked us by agreeing to our long-standing proposal for plant-wide seniority. That meant that if one of the operations in a plant were shut down they had to lay off not the employees engaged in that operation but the junior employees in the whole plant and they then had to move all of the rest of the employees around in order to man the available jobs. They would have to move twenty people to lay off the youngest man. We asked why this sudden concession, and he replied: "In order to cut down the cost of the unemployment benefits." Well, once he had conceded a union demand we could not go back and say we really didn't want plant-wide seniority. It went into the contract, even though we knew that the hidden costs in terms of loss of efficiency would be enormous. That was ten years ago. Year after year afterward the company negotiators have come back and said: "Can't we get rid of this?" We replied: "Well, you agreed to it once, and there it is, and we can't ever go back."

So even in the private sector, management has to be protected from inexperienced and short-sighted negotiators. And I gather that, from both management and union points of view, this is even more true in the public employee field. I gather from Mr. Walsh's remarks that he concurs most strongly in that view.

It is also true that you tend to get the most strikes with those who are just beginning to bargain. That is why, I think, you tend to get the most strikes with the school teachers, who are just beginning. Once you learn about the system of collective bargaining, learn how to operate it and get responsible and trained people, not "messenger boys," you are less likely to get explosive disputes. Whatever the state of the law now may be, I would hope it would move in the direction of fostering the kind of mature and responsible bargaining which is the only way to avoid reaching the end point of either the legal strike or the kind of explosion which occurs when you do not permit that organized method of expression. I think I detect almost a unanimity of feeling on that point here, although I am not sure from Mr. Shannon's statement whether he entirely concurs on the necessity of giving authority to negotiators in order to achieve that result.

Now having gone minutes past the allotted overtime, I want to thank the participants and the members of the Panel for their contributions and for your very attentive listening.

With that I declare this session adjourned.

RESOLVING IMPASSES OVER MEMORANDA OF UNDERSTANDING

MODERATOR: HAROLD R. NEWMAN, Director of Conciliation, New York State Public Employment Relations Board.

SPEAKERS: JOHN LIEBERT, Deputy City Attorney, Sacramento.

DONALD H. WOLLETT, Professor School of Law, University of California at Davis.

MR. DON VIAL: My name is Don Vial. I am with the Insitute of Industrial Relations. My only purpose here is to introduce Harold Newman, who will take over this session. Like Dave Feller, Mr. Newman will perform double duty here. He will make some opening remarks on the subject of "Resolving Impasses Over Memoranda of Understanding" and then introduce the speakers and moderate any discussion that may follow.

I should announce at the outset, however, that Walter Kaitz, who is listed on the program as one of the speakers, is unable to be here.

Harold Newman is Director of Conciliation for the New York State Public Employment Relations Board. He is a career state employee, and I guess at some point in his career he decided to jump from the frying pan into the fire, because in his post he is responsible for administering the impasse procedures of the Taylor Act and directs the activity of a 200-man Panel of Mediators and Fact-Finders who assist in the resolution of impasses in contract negotiations. He joined PERB's staff back in 1967 as the Director of the New York City office and served in this post for one year before coming to PERB's Albany headquarters. He is well known in the field of industrial relations. He has lectured extensively in the labor relations field at New York University, Cornell University and other institutions of higher learning. Prior to his government career he specialized also in trade-union public relations.

I should point out further that Mr. Newman is a member of the Labor and Community Disputes Panel of the American Arbitration Association and is also a member of the Professional Standards Committee of the Association of Labor Mediation Agencies.

Mr. Newman.

MODERATOR NEWMAN: I think the most important thing to remember is that I have the most spiritual title in the United States. To be a Director of Conciliation should conjure up in your mind the picture of somebody who is not just a neutral, but such a total neutral that, as he walks, you can listen to the rustling of his holy garments across the floor. And I assure you I am such a person. I am completely objective. It has been said at various times during periods when I have been involved

in some unhappy disputes in New York State that I walk on water. I encourage that talk. And now I shall proceed to disenchant you completely by telling you that after listening to that very lively colloquy we had a few minutes ago, I have decided that to teach somebody about good faith bargaining under a "meet and confer" statute is like putting a eunuch in a bordello and giving him a manual on sex instruction! Because we might as well start out by being a little bit honest. Those are my feelings. If my cloak of holy neutrality has slipped from my shoulders, you will have to accept that. Those are my feelings honestly.

I have not come here, though, to say unkind things about your statutes. God knows and the media know that we have "a few problems" in New York state. But I think that the first thing that we had better get straight, Ladies and Gentlemen, is that there ain't no place nowhere where you are going to get a law which is strike proof. Absolutely nowhere. If you want a strike-proof statute, you had better seek for bayonets. Because, as Count Cavour once said, "You can do anything with a bayonet except sit on it!" I would suggest to you that the Taylor law (and I hope that I shall have an opportunity later to tell you about some of the good things that have happened in New York State), chauvinistically, is a very excellent statute. It is not without blemish. If I had my druthers, I suppose that I would be among those who would want to make some changes. But I hope you understand that If I have any unkind things to say about a "meet and confer" statute, this is a deep-held philosophical thing and not because I am from New York and you are from California.

I do have some other quarrels with your statutes which have nothing to do with the legality of them. They have to do with your "Alice in Wonderland" language. The person who wrote the Winton Act and the person who wrote the Meyers-Milias-Brown Act obviously got their language degree at the University of Budapest. I will tell you further that those kind of statutes make it very easy indeed for lawyers to make a lot of money. The language is so totally obscure that almost every sentence in both of those statutes can be interpreted any way you like. Which is the lawyers' delight. So an astronomically overpaid profession becomes even more overpaid in California. But this is a problem to which you will have to address to yourselves. It has nothing to do with me.

I shall tell you that even though I am from outside the state, we have among labor relations practitioners a very small universe. There are not that many of us who are full time in the business. In meeting Leo Walsh and me today, you probably have met 20 percent of the total of the United States. But the fact of the matter is that we do have an opportunity not to be parochial, not to be involved only with our own laws because of meetings like the one the National Academy of Arbitrators will be holding within a few days in Los Angeles. In June I shall be at Fresno to lick wounds with others at the meeting of the Association of Labor Mediation Agencies. So we do have an opportunity to learn from each other and about each other.

I think that the most certain thing that I can say about public employment labor relations is that in the 1970s it is a mine field; it is full of booby traps; there are so many problems and so few solutions; there are so many panaceas; everybody has a nostrum--you know, "this-is-the-answer" kind of thing. I am really quite cynical about there being a specific conciliation tool that is the answer. I really don't believe that. But I do believe that instead of wringing our hands we can, in the first place, enjoy ourselves in the very volatile and exhilarating field of public employment labor relations and accept the fact that all labor negotiation is superheated. By its very nature it must be. In fact, the oldest story in labor negotiations is about the midwest manufacturer who suffered a heart attack and whilst he was convalescing in a hospital he got a telegram from his faithful employees which went: "THE MEMBERS OF LOCAL 237 WISH YOU A SPEEDY RECOVERY BY A VOTE OF 44 TO 26."

If you would take that story to heart; if you would understand it; if you would appreciate that the guy on the other side of the table from you is indeed an adversary, you will have done much to improve the quality (and I mean this in all seriousness) of labor relations in the public sector in the State of California. Of course he has a constituency. And to those of you who represent the government side (and I think that you are the preponderance of this audience), I wish that you would appreciate that a union is a political constituency the same as a county or a municipality. A union officer represents a political constituency; and if that union officer does not deliver, he is going to be voted out of office--even as you might be. And there ain't no villains and there ain't no heroes! The fact of the matter is that there are very serious questions which have to be entertained in terms of fiscal responsibilities on the part of the governments and the way in which their budgets will be allocated. By the same token, the public employee has a right to expect that he will at least be able to keep pace with the cost of living and with his confreres in private industry and that he will get recognition for whatever his particular mechanical or professional skill shall be.

If you come to the table expecting that there are going to be harsh words exchanged as apropos of that story that I told you about the manufacturer, I think that you can accept without blowing your cool what the other guy is speaking about as not being a personal attack on you. When you have gotten that far in negotiations you have gone a long way, I think, towards resolving impasses. It requires a certain maturity to be a negotiator. Maybe one of our major problems in the public sector has been our lack of experience and, therefore, the lack of maturity in negotiations. After all, in the private sector they have had at least thirty-five years' experience since the Wagner Act and with us it is far,

far less. And if in New York State we have only begun to crawl, I would suggest that in California you are prenatal.

Of the various tools that are available in the resolution of disputes, the one which is perhaps the most attractive, at least to my mind, is that of mediation. Mediation is in essence an extension of the collective-bargaining process and the parties have not engaged in a "cop out." They have not said: "Well, here, you (some outside person) settle this." They are instead employing something like a marriage counselor; somebody who turns a flashlight into dark corners and helps to bridge differences; somebody who hopefully has very excellent antennae and by listening with a third ear can grasp what it is that the parties are really saying. You know, that part of the mystique of collective bargaining. This is repeated over and over again.

I realize that I am using the words "collective bargaining", which are kind of subversive here, but eventually you will be coming to collective bargaining, call it what you like. But one of the things that happens in collective bargaining is that the union comes to the table usually asking for a good deal more than it expects to receive, and the employer in this peculiar dance starts out by offering less than he finally expects to settle for. It is important for the mediator to be able not only to recognize, but to obtain confidentially, if that is what is required, the real positions of the parties. Over and above that, he must understand levers. There are always issues which are more important to one side or the other than are the other issues. You can put down forty, fifty or a hundred demands on the table, and that is not unusual in teacher disputes, as Don Wollett can tell you. You can have a hundred demands on the table--economic and noneconomic--but there are always some demands which are pivotal. It takes the third party, the mediator, to find out where these things lie and where the compromise can be reached. The role of the mediator, to my mind at least is perhaps the most salutary one--if, of course, it works. But that kind of caveat has to go to anything we say. If mediation works, it is the optimum way of meeting success with third-party assistance.

We heard speakers this morning speak about arbitration. Is it good? Is it bad? The answer to that is, of course, you have to be the eternal pragmatist. What works is good; what fails is bad. If in certain instances arbitration works, fine, even if there is arbitration and the arbitration is binding.

You heard the story of an arbitration award involving the police in Detroit which convinced the Mayor that it would be necessary for him to lay off, I think the figure was 500 municipal employees. I have heard this

horror story in at least twelve states. This is a decision which the Mayor had to make, and I suppose he knew what he was doing. But I don't think that we should hold up a single arbitration experience as being indicative of what binding arbitration really means. You could point certainly to the situation in Montreal in which a year or two ago the police in Montreal struck following a binding arbitration award and hold that up as a flaming banner and say: "See? Arbitration is no damn good!" But by the same token, there are arbitrations which are carried on successfully throughout the country which work very well.

The question which really raises its head all the time in connection with arbitration in the public sector is the very real question of legality. In my own state I doubt that the legislature would be prepared to say that any public employer had the right to legislate away his responsibilities. Under certain circumstances there might be constitutional questions. We have, as a matter of fact, in the Taylor law the right of employers and employees jointly to voluntarily seek arbitration of contract terms. I would tell you that although we had 28 grievance arbitrations in New York state last year, we had exactly one on contract. So governments do sort of shrink from that and unions don't find it a very attractive thing either, because I suppose there is a long-standing tradition that that is an abandonment of collective bargaining. We have a tendency in the labor force, as in every other field, to become in love with shibboleths and symbols, and you have heard somebody say: "That is giving up collective bargaining." Well, maybe it is, but consider the alternatives. If one had their druthers as between a police strike and binding arbitration, I think that most rational people would accept binding arbitration.

Fact-finding is something which we use a great deal under the Taylor law in New York state. And fact-finding, of course, is a euphemism for advisory arbitration. The fact-finder is making recommendations rather than an award which is enforceable in court and binding on the parties. He is making recommendations on the issues placed before him. Quite unlike the mediator, who mediates by meeting with the parties separately and together and has complete freedom to carry on whatever mysterious actions he wishes in order to achieve a settlement, the fact-finder meets with both parties, rules on the items which are presented to him jointly by both parties on the basis, hopefully, of substantive data, statistics, witnesses, and so on. In New York state we publish the fact-finder's report and hold it up and say: "Here is the recommendation of the neutral. So how can you, Mr. Government, how can you, Mr. Union, reject these recommendations from this highly qualified, outstanding person (who is probably a college professor or somebody respectable like that, or maybe even a lawyer) and who knows all things and has ruled thusly?" Although I say this with tongue in cheek, I don't mean it that way. Fact-finding can be and very often is a very effective weapon in conciliating disputes in the public sector, because the public should be concerned with people who work

for the government, with their own taxes certainly, and it is good for them to know the issues which are before them.

We get pressure from time to time from newspaper publishers associations, and so on, who demand to know why negotiations in the public sector, since public moneys are involved, should not be carried on in a goldfish bowl atmosphere. You know, let the reporters in. Of course, that is an asinine question, because anybody who knows anything about labor negotiations knows very well that parties take positions. If they had to take those positions in front of reporters, they would never be able to go back from those positions and absolute rigidity would set in and the strikes would be yea high.

I spoke of mediation, I spoke of arbitration, and I spoke of fact-finding. Let me remind you again that in speaking about arbitration, I am talking about arbitration of contract terms. I am not talking about grievance arbitration. I hope that we have reached the point where we can accept binding arbitration of grievances without anybody getting uptight about it. You don't expect that in the final out in the ballgame there will be unilateral determination. Otherwise it has this "Alice in Wonderland" quality: "I will be judge; I will be jury." I am talking about contract arbitration.

Let me tell you that in New York State last year we had seven hundred impasses brought to my office. We have the same experience that Michigan does: the preponderance of our impasses involve teachers and school boards. In New York State they involve almost 80 percent of our cases; 79 percent, to be exact, involve teachers and school boards. Those are the real rough ones. We are having a bad time this year with policemen and firemen, but teachers and school boards are the big ones.

Let me take 1969 rather than 1970, because my 1970 figures are not completely up to date yet, In 1969 we had almost seven hundred impasses. We got two thousand contracts, with or without our assistance, signed in New York State in the public sector; and of the impasses that came before us, half were settled by mediation and half were settled by fact-finding.

Now, when I say "settled by fact-finding", I want to caution you. They were not settled by fact-finding in the sense that in each of those cases the fact-finder's report was written and both sides said: "Gee! Isn't that great! We accept." For those of you who are cynical types, that did happen in half the cases. But in the other half it was necessary for us to do something beyond the fact-finder's report. I sometimes had to ask the fact-finder to stay on and use his fact-finding report perhaps as a framework. Then through some modification of the fact-finder's report there was a settlement, or the fact-finder became persona non grata, which is always a risk. One side or the other was mad at him, so he got out of the picture, and I had to send one of my staff guys in to conciliate post-fact-finding.

I suppose that when your statutes in California reach this point, these essentially will be the same kinds of tools that you will be using: mediation; fact-finding; and, who knows. Depending on the vagaries of your legislature and Governor, there may be arbitration of some sort.

Actually, I am cheating a little bit, because your program says "RESOLVING IMPASSES OVER MEMORANDA OF UNDERSTANDING". Now let me say to you that I am talking about resolving impasses over memoranda of understanding. You have to work with what you have got. When you are working under a "meet and confer" statute and you are talking about memoranda of understanding, that, with some necessary modifications, is going to be like having discussions over impasses involving contract terms.

From reading your statute, there is one thing about which I am not absolutely certain: where do these mediators come from? I hope this will be clarified for me. Can someone tell me?

AUDIENCE: "We use the Conciliation Service."

MODERATOR NEWMAN: You use Ralph Duncan's people. O.K. You have conciliation and you have some familiarity with mediation. I would caution you about the way things are. I realize that I am looking sort of over your heads at the way things will be. You statute may not change to something which necessarily looks like the Michigan law, the Wisconsin law, the New York law, the Jersey law, the Hawaii or Pennsylvania laws, or any other laws for that matter; but I am convinced that there will come a time in the question of "What do we do about the memoranda of understanding?" but "What do we do about the contract?" And I would urge on you that you gird yourself for that period because it is not that far away.

I would close with just one word about the question of strike. I really said it before. Is a statute ineffective because there are strikes? As Leo Walsh said, there have been many strikes under the Michigan law, there have been strikes under the New York law, there have been strikes under the New Jersey law, and there have been strikes under the California law. I would point out to you that in Kentucky and Florida, where there is no law at all and where one theoretically could be boiled in oil for striking against the state, the teachers went out state-wide in both states. So not having a statute resolves nothing. To talk about failures of public-employment statutes or comprehensive statutes because strikes occur is like saying that the laws against arson or homicide should be repealed because people burn and commit murder. Quite obviously, that is absurd.

I think it is necessary in California, as is necessary everywhere else, that we continue the kinds of things that this seminar represents; to try to study the problem as closely as possible and to seek the kind of legislation which will make conciliation as effective as possible.

And with that I would like to introduce the speakers on the program.

MODERATOR NEWMAN: The first speaker that we have is John Liebert. Mr. Liebert is currently the Deputy City Attorney and Labor Relations Counsel for the City of Sacramento. He did his undergraduate work at the University of California at Berkeley and he has had a very successful career in business management. He has been manager of foreign operations for a Los Angeles manufacturer and then became director of this firm's foreign-based subsidiary in Switzerland. In 1963 his career was redirected toward the law, when he entered Hastings School of Law in San Francisco. Upon receiving his J.D. in 1966, he entered the general law practice in Sacramento and was then appointed Deputy City Attorney in 1969. I would like to interpolate here that the first thing I was told when I arrived here last night was about a fire fighters' strike in Sacramento in June. In that position Mr. Liebert was delegated the responsibility for planning and developing the City of Sacramento's employer-employee relations ordinance. Subsequently, he was appointed a member of the City's negotiating team along with the Assistant City Manager and Personnel Officer, and he has been substantially involved in labor relations matters ever since.

And so it is with great pleasure that I give you John Liebert.

MR. LIEBERT: Good afternoon, Ladies and Gentlemen!

Mr. Newman indicated that we had a strike in Sacramento. I suspect that that may not have been news to many of you. About two weeks ago the President of our Fire Fighters Local in Sacramento came up to me and said, "John, I notice that you are going to give a presentation on effective impasse procedures." And then he indicated--I think good naturedly--that it seems kind of peculiar for a guy who is involved in an impasse that deteriorates into a strike to talk on this particular subject.

I am rationalizing that comment on the basis that failures do, after all, stimulate a search for better answers.

First of all, the subject matter is "RESOLVING IMPASSES OVER MEMORANDA OF UNDERSTANDING". As has been indicated by Mr. Newman, I interpret that to mean interest type situations; that is, negotiation impasses, and I shall not be referring to grievance situations.

Second of all, I would like to comment that I think there is unanimity on the question of whether a strike is legal in California. Clearly it is not. I am not going to address myself to whether or not strikes should be legal or illegal. I am taking the law as I find it. And the law in that regard is clear.

Initially, I would like to define the terms that we are using under the first subheading. It says: "What available procedures are legal and effective in the public sector?" We have to define the terms "legal" and "effective".

Taking first the term "effective", I assume we are referring to procedures which induce the resolution of impasses without disruption in public service, and which tend towards equitable results both from the standpoint of the public employer and his constituency and the public employees involved.

We use the term "legal". By that I assume we refer to public policies laid down by constitutions, charters, legislatures and the courts in this area.

With those definitions in mind, I think the first conclusion must be that achieving those objectives fully is Utopian. The best we can do is to strive towards them; and that striving has to be a process of compromise--responsible compromise on the part of the public employer, the public taxpayer, and of course, the public employee.

I do want to note in that regard that Mr. Taylor this morning made a number of predictions. One of them was that he envisions that public entities will forever more cry "sovereignty!", and the implication was that they will use that as a shield so that they will not have to enter into meaningful negotiations with public employee organizations. The opposite extreme of that proposition is that there is no difference between labor relations in the private and public sectors. I believe both are indefensible positions. For government to hide unjustfiably behind "soveriegnty" is not going to provide any satisfactory answers; for public employee organizations to insist that everything in the private sector is applicable to the public sector is not going to serve us any better.

I should like to address myself to the specific impasse procedures, and for ease of discussion let me divide them into three groups: Group I will be mediation. Group II will be a term that we have heard a great deal of here: "compulsory, binding arbitration". And Group III will be other procedures: essentially, fact-finding and other forms of arbitration.

Taking first mediation: Mr. Newman has indicated that he believes this to be the most promising of the impasse procedures. However, he put a very important qualification on it: "if it works." I agree wholeheartedly. When we say "mediation" we are talking about a process that is part and parcel of negotiation, and is therefore wholly consistent with it. It undoubtedly is, and I suspect will continue to be, the "work horse" of impasse procedures. But as we in Sacramento learned, when the going really gets tough it may not work. You can go to a certain point with mediation, and up to that point I think it is essential. Beyond that, the lack-of-effectiveness element comes into the picture.

Compulsory, binding arbitration: Mr. Burdick made reference to City Attorneys, who, when they hear that term, automatically respond:

"No. Can't do it. It's illegal". There is no question that there is serious question as to the legality of compulsory, binding arbitration of interest disputes. First of all, city-charter requirements generally vest exclusive jurisdiction in many of these areas, and most particularly the determination of budget expenditures, in the City Council. Beyond the question of delegation of legislative authority within the context of charter provisions, there are legal issues even in the absence of charter provisions. Reference as made by Mr. Wells to a provision on our State Constitution (Article XI, Section 11). It is substantially identical to a provision that at one time was in the Pennsylvania Constitution and was the basis for that State's highest court initially striking down their compulsory, binding arbitration statute. If that approach were to be used in California on the state level without a change in our Constitution, it would clearly present serious legal issues. Beyond that, I think that there is yet another legal issue implicit in compulsory, binding arbitration, and that is the Meyers-Milias-Brown Act. That Act, among other things, mandates that the terms and conditions of public employment shall be determined by communication between the public employer and the public employee. Compulsory, binding arbitration is arguably, not consistent with that kind of a legislative policy.

I don't think that I would be quite as all-encompassing and as emphatic perhaps as Mr. Wells was this morning, but I would certainly point out that these are formidable legal issues that represent some rather basic public policies. The public policy that is involved here, among others, is that compulsory, binding arbitration is inconsistent with our representative form of government. To what extent can our elected representatives delegate away their duties and their responsibilities? The California courts have been fairly liberal in allowing delegations by legislative bodies, but whether under the law you can go as far as compulsory, binding arbitration of interest disputes might take you is highly questionable. That is the legal question implicit in compulsory, binding arbitration.

Is compulsory, binding arbitration effective? I would point out that at least in certain sectors of the public employee community, compulsory, binding arbitration is viewed as a kind of panacea, something that is going to solve all our problems. I don't think the evidence supports that. Certainly, we don't have enough evidence to come to that kind of conclusion. Yes, we can stand here and point to the Montreal police strike after an arbitration award. We can point to other police strikes in the State of Michigan under their compulsory, binding arbitration statute. Nor is there assurance that it will be effective in the sense of providing an equitable result (and I think that this is part of effectiveness). Will it be fair to the taxpayer as well as the public employee? Reference has been made to an arbitration award in Detroit which would indicate serious question on that score.

I don't think that compulsory, binding arbitration is consistent with collective negotiation. Actually, it is the opposite to it. And there are serious questions as to its legality and effectiveness. That really leaves us with fact-finding and advisory arbitration.

In Sacramento we have a procedure that allows for these kinds of impasse procedures if the parties agree to them. Unfortunately, we didn't have a chance to test their effectiveness because in the case of the one impasse that we reached in our first round of negotiations, the only choice that was given to the public employer was compulsory, binding arbitration or a strike. So we have never had an opportunity to see just how effective these procedures might be.

I think there is probably a tendency to conclude that because fact-finding with recommendations and advisory arbitration (and they are basically the same thing) are not magic formulae, because they are not always successful, that the soundest approach doesn't lie in that direction. But I would wonder whether we should not give a great deal more serious thought to that.

First of all, Mr. Newman made reference to the experience in New York under their Taylor law, which provides for these procedures, and it is my impression that their "batting average" is pretty good. It doesn't provide an answer in every case, it doesn't eliminate strikes, but it seems to be working in a substantial number of cases in New York and, I suspect, in other jurisdictions.

There is no question as to illegality in this area. I think it is consistent with collective bargaining, collective negotiations, because it seems to me what we are saying here is that you are giving the public employee group an additional tool with which to bring political pressure to bear. But in the last analysis the final determination, subject to these kinds of pressures, will be made by the parties themselves.

In that regard I suggest this: I think that, at least at this stage in our development in Sacramento, the most appropriate impasse procedure does lie in the general area of fact-finding, advisory arbitration, and we should give a great deal of thought as to how we might be able to make those procedures as effective as possible. One thought (and I raise the question without attempting to answer it) would be that many of the compulsory, binding arbitration statutes in other states (the one to which I make reference particularly is Michigan, where you have compulsory, binding arbitration for police and firemen) set forth standards to guide the arbitrators. I wonder whether we should not give more thought to the possible application of that approach to the area of advisory arbitration. We might give consideration to the possibility that instead of providing very broad standards in legislation, which in effect give "carte blanche" to the arbitrators, of attempting to see whether we can develop specific standards

that would bind the advisory arbitration panel and which would then also be binding on the legislative body. I think this has certain things to recommend it. For one thing, it would make judicial review of the final determination of the legislative body more practical. And I think to that extent it addresses itself to the criticism that is directed at advisory arbitration: that, after all, once the arbitrator comes out with his recommendations, the public employer is free to ignore them, but the public employee union can really only do one of two things; namely, accept them or go out on an illegal strike. I think that bringing the courts into the act to this extent has merit and is worth giving further consideration to.

Generally, in California, arbitration and fact-finding proceedings are undertaken by an ad hoc board. As an impasse arises, you appoint one or more arbitrators. Each dispute or each impasse would have different arbitrators involved. I think that this is a problem. In addition to labor relations know-how, it seems to me that that kind of a board should have some background in local government operations and finance. I would think that this is somewhat difficult to do if you don't have some sort of a permanent or semi-permanent board of umpires.

The next subject that is noted on the program is: "How useful are injunctions?" And then the final subject is: "Strike penalties: What kinds and are they effective?"

I would like to combine those because I don't want to cut into Mr. Wollett's time and I think that they are closely related.

Are injunctions effective? Well, judging from our experience in Sacramento, which I think is indicative, not particularly. In Sacramento we initially secured a temporary restraining order on an exparte basis, which was not complied with. Subsequently, after a hearing, a preliminary injunction was issued. But by that time, the strike had been going for more than two weeks and had run out of steam. I do not believe that the strike ended then because of the preliminary injunction.

But if injunctions are not effective, I suppose we have to ask ourselves: Why aren't they?

Well, there may be any number of reasons, but it would seem to me that certainly one of them is that we as public employers have not prosecuted their violation, and certainly have not done so on a consistent basis. And how can a law act as a deterrent if it is not enforced?

I think the problem is that on the one hand, again looked at from the standpoint of the public employer, we owe an obligation to the process of the court, and on the other hand, we must be concerned with such things as our employee relations. Are we going to treat our employees as criminals?

Then there are problems of tactics. Are we going to make martyrs out of union leaders? All too often injunctions are dismissed as a part of the granting amnesty to settle the strike. So that as public employers we are being subjected to a number of pressures which are not consistent with our obligation to the process of the court. But I would submit that if public entities are going to secure injunctions, they do have an obligation to the court. I think this should indicate to us as public employers that perhaps we should be more discriminating than we have been in the past in making the decision of whether to secure an injunction. Because once we have made that decision, we should carry through on it.

I suppose as a corollary to that, it may be that the courts are going to become a bit more discriminating in their willingness to grant injunctions in these kinds of situations. And in that regard, as a matter of fact, reference was made this morning by one of the speakers to the Holland case in Michigan which in effect held that if a public employer comes to their courts seeking an injunction to stop a strike, that injunction should not be granted without the court satisfying itself that the public employer comes into court with "clean hands". This is probably not in line with the California law and I am not aware that there has been a specific case on it. There was a case arising out of the Sacramento Social Workers' strike some years ago which would seem to infer that the California courts would not take that kind of view; that the California courts would be prepared to enjoin strikes once they are threatened or happen irrespective of the questions of good or bad faith on the part of the employer. But that part of the law is not settled yet.

"Strike penalties: What kinds and are they effective?" is the question on the program.

I think the first part is relatively simple. "What kinds...?" I suppose there you have to ask yourself: Penalties as against individual strikers? Penalties against the union? Contempt proceedings if there has been an injunction that has been violated? Civil service disciplinary procedures if those are provided within the given jurisdiction? Possible damage action against the union? Those, I suppose, are the kinds.

Are they effective? Well, I suppose the answer to that is: probably not in most cases. But here again, I think at least part of the reason for this is that they have not been consistently applied by public employers. When you are talking about penalties, you are talking really about a deterrent, or what hopefully acts as a deterrent.

There is a need to make a very considered decision as to what penalties, if any, should be imposed in the first instance because otherwise you have the problem of a credibility gap. If the public employer, in the case of an illegal strike, imposes penalties and those penalties are then pulled back on at a subsequent time as part of a settlement or

under other circumstances, then they don't serve their purpose as a deterrent. So I think that some of the answers as to the lack of effectiveness of penalties certainly are that the public employer has not acted with sufficient consistency and pragmatism. In most cases penalties that are imposed should be monetary and in the economic area. Ideally, I suppose that they should be the kind of penalties that do not linger on, because these are your employees and you are, after all, going to be negotiating with them across the bargaining table again. They have to be reasonable. But I would conclude that so long as the strike is illegal in California, I don't think that we should in effect change that law by ignoring it in time of crisis. It seems to me that that kind of an issue deserves more considered judgment than that.

Therefore, I would say that on the issue of penalties, the public employer, as he gains more experience, is going to have to give more thought as to its practicality and utility in terms of deterring future strife and stimulating more meaningful labor relations between the parties.

Thank you.

MODERATOR NEWMAN: Our final speaker for today is Donald H. Wollett.

Don Wollett is currently a Professor of Law at the University of California at Davis, it says here. And I would reinforce it from my own personal and professional knowledge of Don, for he is one of the outstanding authorities in the field of labor relations law. He has authored a number of books and articles in connection with that and he was between 1961 and '68 co-Chairman of the Committee on the Law of Government Employee Relations of the Public Employees Section of the American Bar Association. He is also an Arbitrator with both the Federal Mediation and Conciliation Service and the American Arbitration Association. Much of his work in recent years has been with teachers, but as a law professor he keeps involved with the whole field of public employment relations.

And so it is with great pleasure that I give you Donald H. Wollett.

Professor Wollett!

MR. WOLLETT: Thank you, Harold.

There is one relevant credential that I would like to mention before I make my remarks. And that is that since I have been in California, I have been continuing my work with teachers and I have been and presently am a negotiation consultant with the California Teachers Association. So I am trying to keep my finger where the action is and where I think the action will be.

Harold Newman is indeed a God-like figure. When I was practicing law in New York (I have only been out here a couple of years), I had many matters before Harold in connection with the Taylor law. And I want you to know that I had many occasions to refer to him in terms commonly identified with the Diety!

Our subject is "RESOLVING IMPASSES OVER MEMORANDA OF UNDERSTANDING" and my thesis is a very simple one. It is this: That the basic, catalytic forces working at the bargaining table are fear and anxiety over what will happen if agreement is not reached. Accordingly, the most effective mechanism for resolving an impasse is a credible strike threat. However, with the exceptions of the enlightened jurisdictions of Hawaii, Pennsylvania and possibly Vermont, we seem to be hung up on the notion that all strikes by public employees are a species of insurrection. Therefore, I will not dwell on this subject. Instead, I will turn to the principal substitutes that are being used either by statute or by agreement between the parties. And they have already been mentioned several times: mediation and fact-finding.

Curiously, the two California statutes which concern us here authorize one but not the other and each statute makes a different choice.

Maybe this is one of the things that Harold Newman was referring to when he talked about some of the remarkable draftsmanship and thought that seem to underlie these statutes. In any event, Meyers-Milias-Brown specifies that the parties may agree upon the appointment of a mutually acceptable mediator, costs to be split evenly. There is no mention of fact-finding.

The 1970 amendments to the Winton Act do not mention mediation, but explicitly provide for fact-finding either by agreement or pursuant to statutory provisions calling for the establishment of a tripartite committee to report findings and make recommendations. However, it seems clear that the language of both statutes is broad enough so that the parties may by agreement establish both procedures if that is what they choose to do.

Mediation is a familiar process to most of you. Fact-finding, I suggest or suspect, is not so familiar. Therefore, I shall focus my remarks on the fact-finding process and my conception of what it is, what its utility is, what its disutilities are, and so on.

In the first place, the name fact-finding is misleading. The fact-finding process does have an evidentiary function which the title suggests it has, but it is not essentially evidentiary. It is judgmental. The purpose of fact-finding is not to find facts, although there is no objection to finding a few along the way. The purpose is to facilitate settlement by making recommendations. And that is the way it really works in the public sector throughout this country.

A caveat as far as the Winton Act is concerned under these 1970 amendments: the statute says that this tripartite committee that gets involved after a persistent disagreement between a school board and a teacher organization "may report recommendations to the parties at a public meeting upon the prior written agreement of both parties."

Now, that is a quote. That is exact language. And that raises this question: Does this language foreclose the fact-finders from making <u>private</u> recommendations <u>without</u> the consent of both parties? I shall assume that it does not so foreclose or that if it does, the parties will give their consent; or that if they do not give that consent, the fact-finders will be sufficiently innovative to read the term "findings" expansively so that they may come in with a finding such as: "We find that the parties in carrying out their statutory obligation to engage in a conscientious effort to reach agreement should do the following things: ...". And that will be a "finding," but not a "recommendation."

I make these assumptions because in my opinion fact-finding will not be effective in California, or any place else for that matter, if the fact-finding process is stripped of this judgmental aspect. If the fact-finders are foreclosed from making judgments, I don't think it will work. It will

be simply a sterile process of finding facts. There may be exceptions to that and clearly there are cases where there are factual disputes that underlie persistent disagreements, but usually the dispute cannot be settled without some judgment and some discretion with respect to priorities: whether you spend your money for this rather than for that, and so on. Most of the disputes have inextricably entwined in them some questions of facts and many questions of judgment. If the fact-finder is confined simply to the sterile area of finding facts on the basis of some kind of evidence adduced in some kind of hearing, I think he has lost the great area of effectiveness. Now let me be more specific about the fact-finding process because that is my focus.

Since I am now an academic type, I have pretentions to scholarly research. So I wrote to a lot of guys that I know in this business around the country to find out what they thought about fact-finding so that I could come here and say that I did some research. I admit that my samples are biased, but nevertheless I have got evidence. And there is one area of general agreement, I think, at least among my sources, and that is that the orthodox conception of fact-finding is nonsense. And what is the "orthodox conception of fact finding"? The "orthodox conception of fact-finding" is that a public employee organization and a public employer get into a dispute; it persists. They get to something that we call in the trade an "impasse". They look around for a way out. They try mediation--and that doesn't work. Then they pick a prestigious guy to be a fact-finder and to make recommendations. Or maybe they have a panel of three guys to do this, and these prestigious people come into the community and they have hearings. Maybe they are public; maybe they are private. In any event they have some kind of hearing. And they listen to evidence--some of it testimonial, some of it documentary. They make findings and they make recommendations. These are provided to the parties privately. And if the parties accept them within the next day, the next five or eight days, whatever it may be, fine! If they don't, the threat is that they will be made public. And if they are made public, public opinion will rally around the recommendations of these prestigious people and public opinion will be galvanized and pressure will be brought to bear on the public employer and the employee organization to accept these recommendations as the basis for settlement.

That is the orthodox theory. It is expressed in perhaps its most articulate form in the 1966 Taylor Report which formed the basis for the New York Statute--and it is one of the more entertaining pieces of mythology. I have never seen it happen that way. This is not to say that it has never happened that way, but I am willing to stand on the proposition that it does not happen that way very often. It does not happen that way often enough to take it very seriously.

A more realistic view would be found, in my opinion, in this quotation from one of my research sources. And this is the quote: "The

notion that when the public really appreciates the ultimate facts of a dispute it will generally respond constructively and compel a solution along the lines recommended is, of course, a romantic delusion. Fact-finding reports are rarely publicized, rarely heeded by anyone other than the parties, and their intellectual quality has generally been so low that neither party is persuaded, though one or the other may accept for political or strategic reasons. The existing system of fact-finding in this State is little more than a Chinese drama to which unions appeal for an air of legitimacy before striking or because they are too weak to strike."

I don't know what "a Chinese drama" is. With the rest of it I agree.

Now, this does not mean that fact-finding is useless. It does have utility. It does have a record of effectiveness. Not having been here most of the day, for I did not get here until a little after 3:00 o'clock, I don't know if you have had statistics on fact-finding in New York. I heard Mr. Newman say that in 1969 he had almost seven hundred impasses brought to his office and that half of them were settled by fact-finding where the parties grabbed onto those recommendations. If that be true, there were 350 cases where fact-finding had utility. I did not hear Leo Walsh speak either, but I am sure that there are instances where fact-finding has had utility in Michigan. I know that there also have been such instances in Wisconsin. There are also many instances where fact-finding has failed, if by "failure" you mean that it did not produce a settlement. And "failure", but the way, is a word we need to use carefully when we evaluate fact-finding. I shall talk a little bit more about that in a few minutes.

In order to be realistic and fair in our evaluation of fact-finding as an impasse-resolving technique, I should like to present (and now I am beginning to talk like a professor, I guess) three major situations where the realistic expectations of what you can get out of fact-finding differ.

My first situation on a continuum would be one where the parties have substantially reached agreement. They know on what they are going to settle or they are very close, but one or both of them, either the employer or the employee organization or both, are afraid to take full responsibility vis-a-vis their respective political constituencies. And, of course, they both have political constituences, as Harold pointed out. If it is a school board, the school board may be anxious because property taxes will go up if this settlement becomes a reality. The teacher group may be nervous because a rival organization in a neighboring district did better. In this kind of situation the role of the fact-finder (here you only need one of them ordinarily, and he ought to be a neutral without any axes to grind--one who can fairly make the claim of impartiality) is to come in, review what the parties have agreed to, and, if he can in good conscience, apply his stamp of approval and say "I think that this is

fair"; he serves as kind of lightning rod for the parties in terms of the reaction of their respective constituencies. If you want to be crude about it, you might say that "He gets a per diem to be a fall guy." Some people might put it that way. That is a legitimate function of the fact-finding process, in my opinion, and it very often works in that kind of situation.

My second position on the continuum would be as follows: the situation where the employee organization has made a credible strike threat. A strike hasn't occurred, but it has been threatened, and the threat is believable. And it is important that it be believable. A strike threat that is not believable has no meaning at all. But if you have a credible strike threat, both parties are now afraid of what will happen if agreement is not reached. Neither of them wants a strike if he can reach agreement on something that he can live with; in this situation they expect the fact-finder to help them reach a settlement. The search on the part of the fact-finder should be for positions which are mutually acceptable; and the function of the fact-finder in that situation is essentially mediative. The process in this situation is alien to arbitration; it is alien to adjudication. The fact-finder is not expected to dispense justice. He is expected to arrange peace.

Here the "just" settlement is one that correctly assesses the relative bargaining power of the adversaries and persuades them that it is better to make a treaty than to go to war. And sometimes that doesn't work either, because you don't assess correctly or because the particular dispute is not susceptible to settlement at that time through the fact-finding process. Let me give you an example.

Last June, Morry Myers, an arbitrator here in San Francisco, and I served as fact-finders in the A/C Transit dispute in Oakland. It involved a bus strike. We came in first as mediators and wore that hat for a few days over a weekend, and then we put on our hats as fact-finders. The strike began just as we began to function as fact-finders. After three days (we had committed ourselves to an unrealistic deadline in advance), we found facts and made recommendations. Frankly, this was a mediative type of fact-finding. That is what the parties expected and that is what we undertook to give them, trying to find a realistic basis for settlement which both could accept and live with.

We made our recommendations. Management rejected them on the ground that they were too fat, too rich. The union for tactical reasons took no position. And the strike went on for, I believe, 12 days. I don't remember exactly. I think it was 12 days. Then the parties settled substantially on the basis that Morry and I had recommended, with minor variations. One of the variations involved re-submitting the whole thing to binding arbitration--essentially a face-saver for the District. The arbitrator (Adolph Koven of San Francisco) recently came in with an award which substantially conformed to the recommendations we had made back in June.

I would suggest to you that this was a situation where you can't tell whether fact-finding was a failure or not. The parties were not ready for settlement via fact-finding. They had to have a strike, which softened up both sides. They had to have a judge tell the management of the Transit District: "The strike is legal and I am not going to issue an injunction," which softened up management. Then the settlement went to the membership and was ratified by a vote of about 425 to 445. So a proposal which was too fat for management when first made was, even after a strike, barely fat enough to gain employee acceptability. Fact-finding may have facilitated settlement. I don't know how to assess that. But I think it is too easy to say in a given situation that fact-finding is a failure solely because it did not prevent a strike. Certainly Harold Newman (and others, I am sure, have also said it) is right: no procedure will guarantee the absence of strikes.

Even in this mediative type of fact-finding you may have questions of procedure. How do you go about it? The procedure followed should largely be responsive to what the parties want. If they want the trappings of a fair hearing, arbitration type, quasi-judicial type, fine!; give it to them. You may mediate some issues as they come up in the hearing; others may have to be the subject of the formal report.

In this kind of fact-finding (still my situation No. 2), you find maximum utility in "tripartite" fact-finding, where each side has a guy on the panel and then there is a middle man, a neutral. If you are looking for accommodations in terms of relative power, it is helpful to have the guy in the executive session room who can give you that assessment, who can say: "They won't buy this;" "They will buy that." Otherwise, you have to guess or meet around the corner or rely on whatever your antenna tell you.

Before I get to the third situation, one other comment: Employee organizations that are unable to strike (and this is leading into the third position on my continuum) do not like this conception of the fact-finding process. They are on the light side of the power scale; as a practical matter, if they don't have any muscle, they know the fact-finder is not going to worry very much about what they will accept because, like other essentially powerless groups, they will take what they are given. But the public employer, who has the ultimate right to impose settlement on its own terms, is something else. The fact-finder in this situation of power imbalance must gravitate toward the employer's position if his work is to be acceptable and the dispute is to be settled.

This moves me to my third and final position on the contimuum where you have the power imbalance. If you look to the expectations of the parties, certainly of the employee organization, they will want the fact-finder to be jury and judge, to find the veritas and shed the lux, to dispense justice, to do what is right--whatever that may be. Here the process is arbitrable or quasi-judicial, without of course the finality which goes with an award or a court judgment.

The school board or other public agency will probably reject the fact-finder's recommendations if the fact-finder conceives of his functions in this way. One of the early cases I had in New York was not with a powerless teacher group. They had quite a lot of muscle, as they demonstrated with an effective strike. We got a report from a fact-finder that was glorious. The teachers read it and they were ecstatic. "What a victory!"

Well, it was a victory. If one ever wins victories in labor relations, I suppose that this was one. But it was a victory before the fact-finder--and there was one trouble with it. The school board said: "Go to hell!" It took a nine-day strike to get a settlement.

So the employer may reject the fact-finder's recommendations. But from the point of view of an essentially powerless employee organization, powerless because it cannot mount a credible strike threat, fact-finding is better than capitulation. It may be that the fact-finder's recommendations will form a higher base for further and final negotiations than the organization could manage on its own. There is always the chance that the employer will get weary and concede something. As you know, there is substance to the "war-of-attrition" theory of collective bargaining, even in "meeting and conferring". As a matter of fact, there may be more in "meeting and conferring" than there is in collective bargaining.

That is my continuum. There are lots of situations that fall in between the three situations that I have identified; this is a very pragmatic approach to fact-finding in terms of its realities, in terms of what you can expect from it. I think that in California we are going to move into fact-finding in a rather extensive way. We are moving into it in some counties and cities and school districts now--and I think that will continue. What can we foresee?

I have a couple of more quotes--quite antithetical--from my research sources. One is from a guy who says: "What we would like to do is to have a combination of mediation and arbitration, as in the settlement of a grave diggers' dispute here. The fact-finder's award should be presented to the parties to the dispute as a basis for their final settlement which, if not accepted by them in a reasonable period, is made compulsory by designated statutory authority. The recognition that an arbitration award could be forced upon the parties ultimately would in most cases find the parties coming to agreement prior to arbitration or with the arbitrator's award as the compromise settlement."

I think he means "the fact-finder's award as the compromise settlement." He is conceiving of the fact-finding process as essentially quasi-judicial, really a species of compulsory arbitration. Perhaps we could resurrect that euphemism of the Johnson Administration: "mediation unto finality."

That is one employee organizational leader's concept of fact-finding.

Then I have another quote with respect to fact-finding and its role in public employee bargaining:

"A good lawyer for either side can live with any system of 'fact-finding', however idiotic, ritualistic, socially wasteful or nonproductive it may be. As public unions gain self-assurance, they will pay little attention to the process. I think now it is largely an opiate of the people charged with statutory administration. Occasionally, lotus eaters on each side of the table are willing to take a sample, but it has not yet demonstrated to me that it provides, to vary the metaphor, any main highway to labor relations peace in the public sector."

Which one of these people is right? I suggest that they are both right. I know both of them. I know the states they are in. I know the organizations they represent.

The first guy is in a state where the political and legal environment is essentially hostile and where his organization is weak in its ability to exert muscle. He needs help, and he envisions the fact-finding process, as it evolves, moving toward some kind of arbitration process which will be an instrument to get for him and his people things that they are unable to get for themselves because of their environmental situation and their own incapacities.

The second guy, who talks so tough, is in a completely different kind of milieu, where the trade-union movement is strong, where the statute is favorable, where the political, legislative and judicial environment (and that is very important) are congenial, and where his organization has lots of muscle and doesn't blink an eye at exerting it. In fact, they are doing so well, I think that they are even scaring themselves. In that kind of situation they don't have much interest in fact-finding. They don't need it. It has no real meaning to them.

One final comment since the subject is "RESOLVING IMPASSES OVER MEMORANDA OF UNDERSTANDING". And I am going to preface this comment by saying that I am making it facetiously. I say that because I made this suggestion once before and I got quoted as if it were a seriously held proposition. I want to go back to my basic thesis, which is that the catalytic force that provides the motive power for agreement at the bargaining table is fear, apprehension, anxiety. What happens if we don't get together, if we don't bargain in good faith and reach a mutually acceptable agreement here? What is going to happen to us? What is the alternative?

My suggestion is this: Why don't we provide for compulsory arbitration under a statute administered by an agency like Harold Newman's, which

would appoint a panel of arbitrators? Let's say that we start out with a hundred (which probably would be enough to start with) arbitrators who are the biggest "klutzes" we can find, make a search for the one hundred biggest jerks of the year, put them on that panel, and assign them in rotation. If the parties don't settle at the bargaining table, the dispute goes to this "klunk" here, and so on. You rotate it around. So you have, you see, put fear onto the bargaining table: "If we don't settle, we get Glotz!"

There is another thing. As you could tell from Harold Newman's introduction of himself, he is a waggish fellow with a sharp tongue. I just want to anticipate what he may come back at me with. He may tell you that that is what he had in mind when he put me on his fact-finding list back in 1968!

MODERATOR NEWMAN: Let me assuage Donald's fears. I did not plan to say anything as unkind as that at all. What I would really say, and with all sincerity, is that while he raised that, he says facetiously, let me tell you that I know empirically that there have been situations, and I am sure Leo Walsh and other people in this business know of situations, where the parties did come to agreement because they were so terrified by the ineptitude of the neutral. I am not kidding you; I do know of such situations.

Session adjourned by Don Vial at 5:30 p.m.