

The Joint Legislative Committee on The Taylor Law

(PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT)

1971-72 Report

State of New York Legislative Document (1972)—Number 25

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The Joint Legislative Committee on The Taylor Law

Chairman:

Senator Theodore D. Day

Vice Chairman:

Assemblyman Clark C. Wemple (Resigned)

Secretary:

Senator Edward S. Lentol*

Senate Members:

John E. Flynn
Leon E. Giuffreda
Thomas Laverne
Waldaba Stewart*

Assembly Members:

Stanley Fink*
Benjamin A. Gilman
Lawrence Herbst
Charles A. Jerabek
Chester J. Straub*

* Had not signed, nor submitted a separate report, at the time of presentation of this report.

Ex Officio:

Senator Earl W. Brydges, President Pro Tem, The Senate
Assemblyman Perry B. Duryea, Jr., Speaker, The Assembly
Senator Joseph Zaretzki, Minority Leader, The Senate
Assemblyman Stanley Steingut, Minority Leader, The Assembly
Senator Warren M. Anderson, Chairman, Finance Committee, The Senate
Assemblyman Willis H. Stephens, Chairman, Ways and Means Committee, The Assembly
Senator William T. Conklin, Chairman, Senate Majority Conference

Staff:

M. P. Catherwood, Executive Director
Robert E. Doherty, Consultant
Mrs. Gertrude White, Secretary
Mrs. June Niblock, Stenographer
Michael F. Nozzolio, Research Assistant

Preface

The Joint Legislative Committee on the Taylor Law (Public Employees' Fair Employment Act) was created by joint resolution of the New York Senate and Assembly on April 20, 1970. The Committee was not active in 1970 but organized and started work in 1971. Former Industrial Commissioner and former dean of the New York State School of Industrial and Labor Relations, M. P. Catherwood was appointed Executive Director. The Committee met in Albany twice during the legislative session for informal discussion of its prospective program. The formal organization meeting for 1971-72 was held on Tuesday, June 22, 1971.

Through the cooperation of the New York State School of Industrial and Labor Relations, the Committee established an office in Room 306 of the Extension Building of the School, on the campus of Cornell University at Ithaca. This location has had the advantage that it was in close proximity to library materials and to staff members of the School, many of whom have had experience under the Taylor Law as mediators and factfinders, and a number of whom have conducted research in public employee relations in New York and in broader contexts. The location of the Committee office was also convenient for the Chairman and Executive Director and minimized travel and office expenses.

After review of a substantial amount of relevant published material by the Chairman and Executive Director, the Committee met in Ithaca on September 15-16 for discussions with faculty members from the School, and to plan further a series of discussions with the principal public employer and public employee groups under the Taylor Law.

The Chairman and Executive Director met at some length at the Committee offices with Robert Helsby, Chairman of the New York State Public Employment Relations Board and subsequently with Arvid Anderson, Director of the New York City Office of Collective Bargaining and Chairman of the Board of Collective Bargaining. The Committee as a whole subsequently met with Mr. Helsby in Albany and Mr. Anderson in New York City.

The Committee concluded that in the first instance informal discussions would be more valuable than formal public hearings in obtaining information and points of view concerning experience under the Taylor Law. Consequently, the Committee met for from one to two hours for informal discussions with each of the following public employers and representatives of public employees.

Employer Representatives

New York State Office of Employee Relations,
Abe Lavine, Director and John Hanna, Counsel
New York State School Boards Association,
Everett R. Dyer, Executive Director; B. T. McGivern,
Counsel; Stanley Hinman, Director of Employee
Relations
New York City Office of Labor Relations,
Herbert Haber, Director; John Sands, Counsel
New York City Board of Education,
Miss Ida Klaus, Executive Director of Staff Relations
County Officers Association, Herbert H. Smith,
Executive Director
New York State Conference of Mayors,
Raymond J. Cothran, Executive Director and Mr.
Galligan

Employee Organizations

Civil Service Employees' Association,
Theodore Wenzl, President; John Carter Rice,
Counsel; Joseph Dolan, Director of Local
Government Sector
New York State Teachers Association,
Francis White, Executive Director; Bernard Ash,
Counsel; Kenneth Law, Director of Field Services
New York State Federation of Teachers,
John Fallon, President
Council of Supervisory Associations,
Walter Degnan, President and Max Frankel
Council 82, AFSC&ME, William Ciuros, Jr.,
President; I. J. Gronfine, Counsel; Hollis Chase,
Correction Officer Policy Chairman; Warren Cario,
Secretary
New York State Association of Secondary School
Administrators and Elementary School Principals,
Rowland Ross, Executive Secretary
District Council 37, AFSC&ME,
Victor Gotbaum, Executive Director; Mr. Topol,
Counsel
United Federation of Teachers,
Albert Shanker, President
New York State Professional Fire Fighters Association,
A.F. of L. - C.I.O. - I.A.F.F., John T. Gray,
President; Robert Gollnick, Vice President;
Thomas P. Flynn
New York State Permanent Firemen's Association,
William Cole, Executive Board Advisor; Milton
Kuhlman, Legislative Chairman; Eben Gibbs, First
Vice President; Ed Tolsen, Larry Schroeder;
Mike Harrison
Police Conference of New York, Inc.,
Al Sgaglione, President; Ralph M. Purdy,
Vice President; Arthur J. Harvey, Counselor

Additional individual conferences were held by the Chairman and other Committee members and by the Executive Director with smaller public employers and with organizations representing other public employees, including the Operating Engineers and the

Service Workers, in order to supplement the information and points of view obtained in the Committee meetings with the public employers and the public employee organizations referred to above.

The Committee is indebted to the New York State Public Employment Relations Board and in particular to its Chairman, Robert Helsby, and his staff and to the Office and Board of Collective Bargaining in New York City and in particular to its Chairman, Arvid Anderson, and his staff for supplying information and assistance to the Committee, and for full cooperation in the discussion of issues.

The Committee appreciates the time and assistance given by a large number of representatives of public employers and of public employee organizations as well as of other individuals who have taken time to meet with the Committee and its staff or with individual members of the Committee in supplying information and points of view.

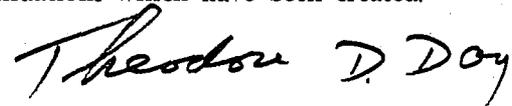
The cooperation of the New York State School of Industrial and Labor Relations at Cornell University has been extremely helpful and has given ready access not only to office facilities but to library facilities and to informal discussion with staff members. The Committee notes in particular the cooperation extended by Dean Robert B. McKersie, Associate Dean Robert F. Risley and Professor Robert E. Doherty who also served as consultant to the Committee.

The Committee and its staff have reviewed much published material bearing on public employee relations in New York. The reports of the Taylor

Committee, the reports prepared by the Public Employment Relations Board and the Office of Collective Bargaining concerning their operations, and the publications in connection with conferences conducted by the Public Employment Relations Board during the life of the Taylor Law were utilized by the Committee. Many publications of the School of Industrial and Labor Relations, and of the staff members of the School, as well as of other researchers, and the 1969 Report of the Select Joint Legislative Committee on Public Employee Relations under the Chairmanship of Senator Thomas Laverne were very helpful to the Committee.

I also take this opportunity to express my appreciation to the members of the Committee and the staff who have worked together to make possible this report which provides a general description of public employee relations under the Taylor Law and sets forth leading issues, a number of which will require legislation. I have enjoyed our association and am convinced that our report provides the foundation for constructive action.

Although I am accepting an administrative post in the New York State government and will relinquish my Chairmanship of this Joint Legislative Committee, I am confident the Committee will continue to build on the foundations which have been created.



Senator Theodore D. Day, Chairman

Introduction

Scope of Activities of the Joint Legislative Committee on the Taylor Law

The Joint Legislative Committee on the Taylor Law was created to make a comprehensive study and analysis of Article 14 of the Civil Service Law, more commonly referred to as the Taylor Law. In the joint resolution of the Senate and Assembly creating the Committee, broad powers were provided for the Committee, and it was indicated that the Taylor Law should be reviewed to determine how it can be improved and implemented to continue to assist public employers and public employee organizations in resolving problems relating to terms and conditions of employment.

Article 14 of the Civil Service Law has, therefore, been the legislative area with which the Committee has been primarily concerned. For purposes of this report, in a few instances it has been necessary to look at other provisions of law which bear a relationship to the Taylor Law. Such "other legislation" will have increased significance in the future as consideration is given to the issue of whether the scope of negotiations should be broader or narrower than presently permitted.

It should be noted, however, that the Joint Legislative Committee has not limited its approach to legal descriptions and interpretations, but has sought through discussions with employers, employees and scholars to gain a mature insight into how the Law works and into the pros and cons of various proposals for amendment. In this effort, the Committee has had extensive assistance and cooperation from public employers, representatives of public employees, researchers and administrative agencies.

A word of explanation, with particular reference to the relationship of public employee pensions to the work of this Committee, seems appropriate.

The Legislature has provided certain pension options which are subject to local negotiations. Basically, new options and changes in benefit levels, with or without negotiations, are subject to action by the Legislature, as is also true of some other benefits.

With their increasing cost in actual dollars, and in relation to payroll, public employee pensions constitute a controversial subject. Such criticisms as can be made of legislation in this area, however, cannot be attributed solely to collective negotiations or collective bargaining. Changes in pension benefits, other

than taking advantage of options already available by law, are dependent on action through legislation, and many such changes made in the past were not the result of collective negotiation or collective bargaining.

Because of concern with public employee pensions at the time the Joint Legislative Committee on the Taylor Law was being organized, it was understood early in the legislative session of 1971 that this Committee would concern itself with this subject. Subsequently, however, and before this Committee had an opportunity to undertake extensive work on public employee pensions, a Permanent Commission on Public Employee Pension and Retirement Systems was created by legislation and given broad powers to review public employee pensions and to make recommendations to the Governor and to the Legislature.¹ Accordingly, it would have been inappropriate for the Joint Legislative Committee on the Taylor Law to have duplicated the work assigned by law to the Permanent Commission on Public Employee Pension and Retirement Systems.

In the limited time at its disposal, it has not been possible for the Committee to consider and to reach mature realistic conclusions on many of the Taylor Law issues which have been identified. These require more detailed analysis and consideration. Consequently, the Committee is making recommendations at this time on a limited number of issues and is recognizing additional issues as meriting further study. The listing of issues for further consideration is not to be interpreted as an indication of the position the Committee may take, but only that the issues are of a nature which require further consideration in an attempt to reach a sound, mature appraisal, regardless of what such appraisal may turn out to be.

General Background

The predecessor of the New York State Civil Service Employees Association (CSEA) established in 1910² developed a large membership among State employees. Membership was subsequently broadened to include employees of local governments, particularly in upstate counties and cities. The New York State Teachers Association (NYSTA) was founded in 1845 as the first permanent statewide organization of teachers in the United States.³ As both organizations devel-

1. *New York State Session Laws of 1971*, chap. 733.

2. *Civil Service Employees Association, Inc., Fifty-four Years of Progress*: CSEA, 1964.

3. Emma Hodge and Lamont Hodge, *A Century of Service to Public Education: The New York State Teachers Association, 1945*.

oped, local groups became important in the structure of the organization. Neither organization had a union affiliation.

Organizations of firemen have been of long standing in local government in New York.⁴ The organization of firemen in New York City goes back at least to 1893. At the present time there are two state organizations, the New York State Professional Fire Fighters Association, AFL-CIO, affiliated with the International Association of Fire Fighters (I.A.F.F.) which represents some 58 locals throughout the state, including the uniformed firemen in New York City, and the New York State Permanent Firemen's Association representing firemen in some 51 municipalities particularly in east central New York. There is some dual membership in the two organizations.

The terms, Patrolmen's Benevolent Association and Police Benevolent Association tend to be used interchangeably by the layman under the abbreviation PBA. The organization of the patrolmen in New York City goes back to 1894. It was not until 1963, however, that policemen in New York City were given the rights to bargain afforded to other City employees. The Police Conference of New York, Inc., now represents some 221 PBA units throughout the state, including the Patrolmen's Benevolent Association in New York City and the Police Benevolent Association of the New York State Police, Inc.

In large measure the purpose of early employee associations was professional and fraternal. Some made insurance and other group benefits available to their members. In the absence of the right to strike; in the absence of legal guidelines and machinery to facilitate organization; and in the presence of other legislation such as civil service laws relating to pay and certain conditions of employment, negotiations or bargaining was slow to develop in the public sector. Such employee associations or organizations as existed sought to protect and improve the status of their members primarily through legislation and to a limited degree through the opportunity to "meet and confer."

In addition to associations, some of which prided themselves on the fact that they were not unions, unions became increasingly active in the field of public employment. In some instances craft unions existed in special local situations such as in power plants and in sizable maintenance operations, even though the structure and administration of government was not such as to generally encourage craft unions. In some situations groups of employees depended primarily on the prevailing wage provisions of the New York State Labor Law.

4. Emma Schweppe, *The Firemen's and Patrolmen's Unions in the City of New York*, Columbia University, 1948.

In comparatively recent years, the American Federation of State, County and Municipal Employees, AFL-CIO, founded on a national level in Wisconsin in 1932⁵ has been active in New York. District Council 66 represents the employees of a number of cities and counties outside New York City. District Council 82 represents the Security Unit employees in the State government. District Council 50 included in its membership a substantial number of employees of the Department of Mental Hygiene and of some other State departments but lost out in the competition for negotiating representative in the elections held in the broad units established by the Public Employment Relations Board under the Taylor Law. District Council 37 represents a large number of New York City employees.

The United Federation of Teachers, Local 2 in New York City⁶ affiliated with the American Federation of Teachers, AFL-CIO, represents the teachers in New York City. The United Teachers of New York State, a new title for the State organization includes the United Federation of Teachers in New York City and the locals of the American Federation of Teachers in upstate communities. Teachers in a majority of upstate communities are represented by affiliates of the New York State Teachers Association. One of the subjects of interesting discussion and speculation at the moment is the possibility that the NYSTA and the United Teachers can combine in one organization and that a merger might also be achieved at the national level between the National Education Association and the American Federation of Teachers, AFL-CIO.

In the New York City schools, the United Federation of Teachers represents para-professionals whose duties are closely related to teaching. Most of the non-pedagogical employees are represented by District Council 37. The custodians are represented by the Operating Engineers; the cafeteria managers by the Teamsters; the para-professionals whose work is closely related to social services, by District Council 37; the supervisors by the Council of Supervisors and Administrators, etc.

Upstate, various categories of non-teaching personnel in various school districts are represented by the CSEA, by District Council 66 of the AFSME, and by the Teamsters. There are some other unions and also a very substantial number of independent or unaffiliated organizations.

In State government the CSEA represents four of the five units into which state employees generally are grouped: the Institutional Services Unit; the Adminis-

5. *Labor's Paradox, American Federation of State, County and Municipal Employees, AFL-CIO*, John Wiley & Sons., 1962.

6. Thomas R. Brooks, *Toward Dignity: A brief history of the United Federation of Teachers*, 1967.

trative Services Unit; the Professional, Scientific and Technical Services Unit; and the Operational Services Unit. As already indicated District Council 82 AFSME represents the employees in the Security Services Unit. Aside from the five general units, employees of the Professional Services Negotiating Unit of the State University are represented by the Senate Professional Association, affiliated with NYSTA-NEA. The members of the Division of State Police, below the rank of lieutenant, are represented by the Police Benevolent Association. Lieutenants and captains are represented by the CSEA.

In local units other than schools, the uniformed services in New York City are represented by separate organizations. District Council 37 represents employees constituting a majority of the employees in the career and salary plan. Under the complex bargaining structure in New York City, however, titles in which District Council 37 is not the recognized bargaining representative are represented by a wide variety of organizations including independents and affiliates of the International Brotherhood of Electrical Workers, the Operating Engineers, the Communication Workers, the Newspaper Guild, the Teamsters, the New York State Nurses Association, and many others.

In local government, in upstate areas, the CSEA is strong in counties and in some cities and other units. District Council 66, AFSME, represents employees primarily in some of the larger cities and suburban areas. Several other unions, including the Service Workers and Teamsters, represent employees in some municipalities. In many instances the local public employees in unions in New York City and Upstate are in occupations somewhat far afield from the trade or craft normally associated with the parent union. Organization of employees in local government follows an irregular pattern in the sense that one union will have organized employees in one municipality or area of the state while different unions will have organized similar employees in other parts of the state.

Over the years as state and local governments became huge and complex, and as the concept of "participation" gained public acceptance, pressures arose for employees to have a role in determining "terms and conditions of employment." The trend was accentuated by the move in New York City toward the recognition of unions by Mayor Wagner's "Interim Order" of 1954 and subsequent regulations providing a grievance procedure but in the early stages stopping short of bargaining.⁷ It was not until 1960 that New York City moved toward bargaining on salaries in any broad sense, but on a cumbersome and limited basis. Title or class of position became the basis for union

7. Alice Cook, "Public Employee Bargaining in New York City," *Industrial Relations*, vol. 9, no. 3 (May 1970), p. 249.

determination for bargaining on compensation and where a title or class or position included employees in several departments, it was frequently difficult for any union to obtain a majority.

Although there was the historic absence of the right to strike in the public service, and the New York State Condon-Wadlin Act enacted in 1947 provided stiff penalties for a strike, strikes did occur from time to time both in New York City and Upstate. Controversies have continued for years as to whether strikes continued to occur because of the lack of vigorous enforcement of the penalties under the Condon-Wadlin Act or whether they resulted because there were root causes which required something more than penalties if strikes were to be eliminated.

Over the years, many of the associations representing public employees became more militant. With relatively few exceptions, it became difficult to distinguish them from unions on the basis of their mode of operations and the issues on which they appealed for membership. A number now militantly advocate that public employees should have the right to strike. Opinions differ as to the degree to which this position is based on conviction or on what may be felt to be the necessity of taking an aggressive and militant position in appealing for support of public employees who are also being courted by unions.

Since the adoption of the Taylor Law there has been a large increase in membership of public employees in associations and unions, a large increase in the number of agreements and a dramatic increase in the number of employees covered by collective agreements. The Public Employment Relations Board estimates that approximately 90% of all State and local public employees in New York are working under conditions established by negotiated contracts. In the competition to represent employees some organizations have lost out here and there, but most of the strong organizations have a larger membership than they had before the Taylor Law.

Although there were exceptions prior to the Taylor Law, the activities of many employee organizations, both of the union and association type, emphasized legislation of interest to members and the opportunity to "meet and confer," rather than negotiation or bargaining in a meaningful way on "terms and conditions of employment" in order to reach a mutual agreement incorporated in a written contract. Thus the Taylor Law has led not only to a increase in the organization of employees, but also to a more significant level of negotiations or bargaining.

Constitutional and Statutory Background

A New York State Constitutional provision adopted in 1938 provided that "employees shall have

the right to organize and to bargain collectively through representatives of their own choosing."⁸ Whether this actually provided any new rights in the private and in the public sector, it was nevertheless a broad declaration of policy which presumably applied to public as well as to private employees. In the absence of legislation spelling out the procedure whereby public employees might organize, be recognized, and participate in determining the terms and conditions of employment, however, the growth of negotiation or bargaining in the public sector was very slow until comparatively recent years, and lagged behind the growth of employee associations and unions.

Public employees are excluded from the protections of the National Labor Relations Act. The states therefore have not had the problem of federal versus state jurisdiction which has existed in the employee relations field in the private sector. It is to be noted, however, that currently Congress is considering proposals for federal legislation concerning public employee relations which would extend to employees of state and local government. If enacted, such legislation may raise the issue of federal vs. state jurisdiction.

In line with the concept of the Taylor Committee that public employee relations must be somewhat different from employee relations in the private sector, the Taylor Law provides special governmental machinery for the determination of disputes concerning the negotiating unit, for the determination of the negotiating representative, for the determination of improper practice charges and for facilitating the resolution of an impasse. Consideration was given to the use of previously existing mediation and labor relations boards services which are available in the private sector, but this alternative was not accepted.

In considering the structure of the Taylor Law and in appraising potential changes, it is well to recognize that it reflects the position of the Taylor Committee that public employee relations must be somewhat different than in the private sector. The Taylor Committee therefore refers to "collective negotiations" rather than to "collective bargaining." The Taylor Committee felt that there were good reasons why strike action by governmental employees could not be tolerated. Consequently, the Taylor Law prohibits the strike and, in the absence of the right to strike, necessarily provides certain procedures which differ from those found in the private sector. Among these are elaborate impasse resolving procedures, penalties for striking, and recognition of the ultimate responsibility to unilaterally resolve, through the Legislature, an impasse which cannot be resolved by the parties.

Prior to the Taylor Law which became effective

8. *New York State Constitution*, Art. I, sec. 17.

September 1, 1967, New York City had gone much further in the formal recognition of unions than had the State and most upstate municipalities. The recognition by New York City of approximately 400 bargaining units, some representing only a handful of employees, posed substantial problems inherited by the present Office of Collective Bargaining — for example, the problem of bargaining with a multiplicity of organizations on a variety of issues, while at the same time maintaining a degree of uniformity on key issues, without which the result would be chaotic.

The Scope of Negotiations*

The scope of collective bargaining in the private sector has been in large degree determined over a long period of years as a result of experience with the collective bargaining process, and through determinations by the various labor relations boards and the courts. The Taylor Committee recognized the difficulty of defining the scope of negotiation in detail, and in effect permitted negotiations on the "terms and conditions of employment." Such a term in the public sector, however, runs afoul of other provisions of law such as those found in the Civil Service Law, the state Finance Law, and the Education Law. The degree to which collective negotiations under the Taylor Law in fact supersedes other provisions of the Law is still in some degree not clear. Even where there are not obstacles presented in other laws, the precise definition of what is included and excluded from the "terms and conditions of employment" is not always clear. The uncertainties are being resolved in part by determinations of the Public Employment Relations Board and by the Office of Collective Bargaining through rulings on improper practices charges; in part by court decisions; and in part by negotiations between the parties.

Adding to the complications in determining scope of negotiation has been the absence in the Taylor Law of any management rights clause staking out areas which are subject to unilateral management determinations and therefore are not mandatory subjects for collective negotiation. The absence of extensive employer experience in negotiating in the public sector has in some cases been responsible for acceptance in contracts of features which would normally not be considered negotiable. In New York City, the local government procedures which implement the Taylor Law include a management rights clause and authority for the Office of Collective Bargaining to safeguard these rights through limiting the issues which may go to impasse panels or to arbitration concerning the interpretation of the agreement.

* See Issue, No. 9 of this report, entitled, "Scope of Negotiations and Management Rights Clause."

The Taylor Committee⁹

The Condon-Wadlin Act of 1947¹⁰ which prohibited strikes in public employment and provided penalties for public employees who did strike had been the subject of much controversy. The penalties under the Condon-Wadlin Act were moderated in 1963 on a temporary basis for two years. The statute reverted to its original form in July of 1965. The Legislature passed the Rosetti Bill¹¹ in 1965 which would have replaced the Condon-Wadlin Act with a very different scheme. The Governor vetoed the Rosetti Bill in a memorandum indicating it "would set up an involved and ineffective procedure which would (1) undermine the deterrent to strike by public employees; (2) be unworkable and probably unconstitutional in certain aspects; and (3) impair vital functions of state and local government."¹² Matters came increasingly to a head in 1966 during which a number of strikes in New York City centered attention on the public employee relations problem. The unworkability of the Condon-Wadlin Act was demonstrated by the aftermath of the twelve day strike of New York City Transit Authority employees at the beginning of 1966. After the Transit workers returned to work, it seemed clear that invoking the Condon-Wadlin penalties would result in a second strike and legislation was hastily enacted granting amnesty.¹³

In this situation, Governor Rockefeller appointed a blue ribbon committee on January 15, 1966, requesting it "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees." The Committee was chaired by George W. Taylor of the Wharton School of Finance and Commerce of the University of Pennsylvania. It included in addition, E. Wight Bakke of Yale University; David L. Cole, prominent labor relations expert; John T. Dunlop of Harvard; and Frederick H. Harbison of Princeton. All of the members were distinguished in the field of labor relations. The Committee issued its "Final Report" on March 31, 1966,¹⁴ recommending legislation in the form of the so called Taylor Bill. This bill was supported by the Governor and passed by the Senate on June 7, 1966.¹⁵ Concurrently, the Assembly passed a modified version of the Rosetti Bill.¹⁶ The differences between

the two bills were not reconciled during the 1966 session so neither became law.

During the 1967 session of the Legislature compromises were reached and the Taylor Law was enacted.¹⁷ The Law as enacted in 1967 was largely, although not completely, in line with the recommendations of the Taylor Committee. Subsequently, the Taylor Committee was reconvened to consider possible amendments to the original statute. It issued a "Preliminary Report"¹⁸ with recommendations in 1968, and on January 23, 1969 made its last and final report.¹⁹ The several amendments made to the Taylor Law in 1969 were basically in line with the original report of 1966, the preliminary report of 1968 and the final report of 1969. Several significant further amendments were made in 1971 based largely on experience, but these implemented rather than modified the basic approach inherent in the recommendations of the Taylor Committee.

Comparison With Other States

The development of a system for representation and recognition of public employees in New York and the right to participate in the negotiation of the terms and conditions of their employment is not unique to this state. This trend has been developing in a large part of the nation and in many other countries. Such developments have not been uniform, but New York State has participated since 1967 in the tide which started earlier.

"At the end of 1970, 40 States had legislation authorizing some form of union activity by public employees, while eight had no legislation and two prohibited such activity. Mandatory negotiations, in either the "meet and confer" or collective bargaining form, were required in twenty-five States, with the remainder divided between statutes permitting bargaining or conferring and statutes merely permitting the presentation of proposals. With the statutes enacted by Pennsylvania and Hawaii in 1970, and by Minnesota in 1971, seventeen states now have comprehensive mandatory collective bargaining laws. The approaches to employee coverage varied widely among the States: in some, all State and local employees were covered; in others, there were separate statutes or, more frequently, statutes covering local employees only. Teachers, covered in a few States under general statutes, were more frequently covered by special statutes, as were firemen and, less frequently, police."²⁰

9. *The Taylor Act*, (Ithaca: New York State School of Industrial and Labor Relations, Cornell University), Bulletin 59.

10. *New York State Session Laws, 1947*, chap. 391.

11. *Assembly Introductory No. 5342*, Print no. 7266, 1965.

12. *New York State Legislative Annual, 1965*, p. 556.

13. *New York State Session Laws, 1966*, chap. 6.

14. Governor's Committee on Public Employee Relations, *Final Report*, March 31, 1966.

15. *Senate Introductory No. 4784*, Print no. 5689, 1966.

16. *Assembly Introductory No. 4078*, Print no. 7058, 1966.

17. *New York State Session Laws, 1967*, chap. 392.

18. Governor's Committee on Public Employee Relations, *Interim Report*, June 17, 1968.

19. Governor's Committee on Public Employee Relations, *Final Report*, January 23, 1969.

20. Joseph P. Goldberg, "Public Employee Developments in 1971," *Monthly Labor Review*, (January 1971), p. 63.

Several states have gone as far as to provide for compulsory arbitration for specified categories of employees and under specified circumstances. Recent legislation in Pennsylvania and Hawaii permits some public employees to strike in limited instances and after appropriate alternatives have been pursued. Vermont and Montana are also cited as states in which strikes by public employees may be legal under certain circumstances.

Although the Taylor Law in New York has not functioned perfectly, and strong differences of opinion can be expected to continue concerning some of its features, it is generally recognized to be more comprehensive in its treatment of employee relations in state and local government than are the laws of most other states. It applies not only to the employees of state and local units of government but also to public employees of authorities. It applies both to employees whose services are considered critical and to those whose services are considered non-critical. It provides governmental machinery to facilitate, where required, the definition of the bargaining unit, the determination of the representative of the employees, the disposal of improper practice charges, the establishment of procedures for resolution of an impasse, and requires both the employer and the employee representatives to negotiate collectively in good faith. Many other states have legislation concerning one or more aspects of public employee relations, for all or for some state and local employees, but few states approach the relatively comprehensive treatment provided in the Taylor Law.

Differences Between Public and Private Sector

The Taylor Law reflects the basic position of the Taylor Committee that employee relations in the private sector are not completely transferable to the public sector. Among the more important differences are the following:

1. The absence of the right of public employees to strike in the public sector. This position was based not alone on legal history or political philosophy, but in fact on a number of practical considerations. These included the maladjustments in the allocation of limited public resources which could result from a strike by one or more strong employee organizations; the critical importance of continuity in certain governmental services; and the vulnerability of the public employer which cannot close down, cannot move away and cannot tolerate long interruptions in services such as tax collection, unemployment insurance payments,

welfare payments, etc., not to mention police, fire, sanitation and correction services.

2. In absence of the right to strike, the Taylor Law provides that there would be the power in the legislative body, or the legislative process, to unilaterally determine the disposition of unresolved issues when it was not possible to reach an agreement by negotiation or by other means. The Taylor Committee recognized that this was a departure from long accepted concepts in the private sector but felt that in keeping with our representative form of government it was essential to provide such a "final" step to resolve the disputed issues. The Taylor Committee indicated a friendly interest in arbitration as a means to resolve an impasse but did not propose that this be mandated on a broad basis.

3. An additional substantial difference between the public and private sector was recognized by the Taylor Committee in the existence of "other legislation" such as Civil Service, Education and State Finance Laws which treat some of the issues that in the private sector would be handled through bargaining. The Taylor Committee recognized this as an area which would require additional attention.

The Taylor Committee also recognized other differences between the public and private sector, including criteria for the establishment of units for negotiating, criteria for the exclusion of managerial employees and criteria for determining the scope of negotiations.

The Taylor Committee felt so strongly concerning the distinction between employee relations in the private and the public sector that it adopted the term, "collective negotiation" for the public sector in place of the term, "collective bargaining" which is used in the private sector.

Because the term, "collective negotiations" is used in the Taylor Law, it is probably best to follow this usage as far as possible even though a substantial case can be made for the concept that the Law provides for collective bargaining in the public sector, but of a somewhat different type than in the private sector. In this report, however, when discussing public employee relations under the Office of Collective Bargaining in New York City, the term, "collective bargaining," is used because this is the term utilized in the local legislation providing for the New York City procedures. In conversation, however, the technical distinctions tend to disappear and even those who accept the Taylor Committee distinctions frequently tend to use the term "collective bargaining," in place of "collective negotiation."

Arguments for and Against the Prohibition of Strikes by Public Employees*

A basic purpose of the Taylor Law is to protect the public interest while at the same time providing procedures to assure public employees of fair treatment by means other than resort to the strike. According to the Taylor Committee in its *Interim Report*, "under the Taylor Law public employees were not deprived of any of their rights. Indeed, their rights were extended. Employees were guaranteed the right to organize, to have their chosen representatives recognized, to engage in collective negotiation with their employer, to have and use effective grievance procedures. . . Legally, in the State of New York, most of these were new or substantially enlarged rights."²¹

It is perhaps inevitable that even in the face of substantially increased rights achieved by public employees under the Taylor Law, the major issue raised by employees is the absence of the right to strike. The private sector background and connections of many employee organizations; the competition among organizations for membership, and the consequent inclination to take a militant stand; the permissiveness in the early history of public employee bargaining in New York City which permitted adoption of procedures from the private sector without the same emphasis on the illegality of the strike as characterized New York State policy; and the delay in the enactment of legislation establishing rights, duties, and procedures until after the organization of public employees and bargaining was well under way, may all be among the reasons that the absence of the right to strike continues as an issue. Nevertheless, most employees and employee organizations accept the law, even though they may not like the prohibition of the strike, and comply with it under most circumstances. Furthermore, it is not rare to find among labor leaders both in the public and in the private sector those who recognize some of the complications which would result if the legislation which is applicable in the private sector were completely applied to the public sector.

Arguments against and for the legalization of

* The arguments presented are summarized from a variety of sources including the reports of the Taylor Committee and from discussion with representatives of employees and employers by this Joint Legislative Committee.

21. Governor's Committee on Public Employee Relations, *Interim Report*, June 17, 1968.

strikes by public employees are numerous and varied. Except for a limited number of strikes in the private sector involving a major public interest, a work stoppage in the private sector involves costs primarily to the direct participants, employee and employer. If the settlement goes too far and goods and services are priced out of the market, jobs can be lost and production cut back to the disadvantage of both parties. In the public sector, however, an increase in the cost of the product is likely to cause no curtailment in the demand. For the most part the services of government must continue on whatever basis of settlement is reached. The public employer, unlike the employer in the private sector cannot go out of business, cannot move elsewhere, and normally cannot curtail operations.

This makes the public employer particularly vulnerable to the demands of a strong employee organization particularly if it were to be backed by a legal right to strike. It is alleged that to permit the right to strike under such circumstances would enable strong unions to force settlements which place unfair burdens on the taxpayer. It is also argued that the result would be reallocation of the limited funds available and unfairness in treatment of those groups of public employees who for one reason or another do not have the power or the inclination to strike. On the other hand some feel that if public employees had the right to strike, the public employer would be in stronger position, politically, to take a strike rather than to be forced to make concessions in an effort to avoid a strike.

Many feel that the critical importance of continuity in certain government services such as police, fire, sanitation, etc., make strikes in these areas intolerable and that alternate means of resolving differences of opinion must be found. Governments cannot long tolerate interruptions in other functions such as toll collection, tax collection, unemployment insurance payments, welfare payments, etc., and bridge tenders have recently demonstrated that services which tend to be taken for granted may in fact be critical. By its very nature, the strike in public employment must inflict hardship on an innocent public, including to a great extent fellow employees, rather than on what would be regarded in private industry as the "recalcitrant employer."

The argument that strikes should be permitted in non-critical services has been met by the insistence that such a distinction would be administratively impossible and that to allow some employees the right to strike would be incompatible with our democratic form of representative government in which relative political power is the final determinant of the allocation of resources.

Some who argue in favor of the right of public employees to strike, do so on the basis of what they feel to be inalienable personal rights which they consider are not properly subject to limitations in any type of employment. They also argue that collective negotiations, without the right to strike, is not collective bargaining, and that there cannot be significant participation by employees in determining terms and conditions of employment without the right to strike. It is argued that a strike frequently has a therapeutic effect in clearing the air of accumulated tensions which in the absence of a strike may seriously interfere with the effectiveness of operations. No small part of the arguments in favor of the right to strike represent a desire to transfer to the public sector the concepts which have developed in the private sector.

Some insist that if the right to strike were provided, the result would be not an increased number of strikes but an actual decrease because public employers would not be able to withhold appropriate wages and working conditions by exploiting the inability of the employees to strike.

Some employee representatives insist that the ban on strikes and the provisions by law for punitive measures for violations have encouraged public employers to be arbitrary, and thus have contributed to increased friction in governmental employee relations. It is also argued that such employers will not seriously undertake the development of effective substitutes for strike action as long as strikes are illegal and employees and employee organizations may be punished for violations. It is argued that under some circumstances employers encourage a strike because of financial savings on salaries and wages.

Some presentations before the Committee raised very interesting points which in some instances go beyond the jurisdiction of the Taylor Law. One presentation, in particular, suggested that strikes in critical services, whether in the public service or in the private sector, should be made subject to injunction by court action and that arbitration should be provided in such instances. Otherwise, it was argued, employees should have the right to strike.

It is easy to understand why organizations of public employees, which have a close relationship with unions in the private sector, tend to follow the concept of the right to strike as an article of faith. Likewise it is understandable that many associations of public employees, which historically did not advocate the right to strike, are now undistinguishable from unions. It comes as no surprise that they too now vigorously advocate the right to strike. Some attribute this change to competition from unions; others attribute it to changing times and social conditions.

In the final analysis, it is to be expected that the position of the public, (difficult as it is to determine this on complex issues with limitless implications such as those involved here) expressed through political processes, will determine whether there is to be any significant move away from the present prohibition of, and penalties for, striking by public employees. Various groups, including the Legislature, the political parties, citizen groups, and the mass media have had in the past, and can be expected to have in the future, a significant influence on the interpretation and representation of the public position.

Various individuals appearing before the Committee have made reference to legislation in Pennsylvania and Hawaii permitting public employees the right to strike under certain conditions. Although such legislation is a significant departure from the almost universal absence of the right to strike in the various states, some limitations should be noted.

In Pennsylvania, strikes by guards at prisons or mental hospitals of employees directly involved with the functioning of the courts are prohibited as are strikes by employees subject to mandatory arbitration, such as policemen and firemen. If a strike by other employees occurs after other procedures provided by law for mediation and factfinding have been exhausted, the strike "shall not be prohibited unless or until such a strike creates a clear and present danger of threat to the health, safety or welfare of the public."²² In such cases the public employer shall initiate court action for equitable relief, including but not limited to the injunction.

In Hawaii it is provided by law that it is illegal for an employee to strike who is not in a bargaining unit with exclusive representation, or who is in a bargaining unit in which final and binding arbitration is required. It is lawful for employees who are not subject to these prohibitions, and who are in a bargaining unit involved in an impasse, to participate in a strike, but only after appropriate mediation and factfinding procedures have been followed, and sixty days have elapsed since the factfinding board has made public its findings and recommendations. It is provided, however, that "Where the strike occurring, or is about to occur, endangers the public health or safety, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger."²³

Although any mature and definitive conclusions concerning the significance of the statutes in the states

22. *Laws of Pennsylvania - Act no. 195*, Art. X, July 23, 1970.
23. *Revised Laws of Hawaii, Act 171*, Sect. 12, 1970.

permitting public employees a limited right to strike must await more complete analysis and review of experience, it seems clear that because of the limitations, including exemptions, the required exhaustion of pro-

cedural steps, the required elapse of time and the availability of injunctions to protect the public, the right to strike conferred by statute in these two states is more limited than sometimes assumed.

The Taylor Law Today

What is the Taylor Law?

From a legal standpoint, the Taylor Law is Article 14 of the New York State Civil Service Law, constituting the Public Employees' Fair Employment Act designed to provide a system of public employee relations applicable to the State and local units of government and their employees.*

Although the Taylor Law is found in the New York State Civil Service Law, it is made clear in the statute that the Civil Service Commission and the Civil Service Department are prohibited from supervision, direction or control over the system for public employee relations except that such prohibition does not exempt employees of the Board from the provisions of the Civil Service Law.²⁴

For a brief expression of the objectives of the Taylor Law, it is hard to improve on the "Statement of Policy" constituting Section 200 of the Law as follows:

"The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation; (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized; (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes; (d)

* Those interested in the Taylor Law in some detail may wish to examine Article 14 of the New York State Civil Service Law which can be found in the usual legal sources or of which a copy can be obtained from PERB, and a copy of PERB's "Rules of Procedure," and other sources listed in this report.

24. *Taylor Law*, Sect. 205.6.

creating a public employment relations board to assist in resolving disputes between public employees and public employers; and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition."²⁵

The Taylor Law provides a rather comprehensive system for public employee labor relations in New York State. It covers state and local public employers and their employees. Under the Taylor Law, important rights and responsibilities are given to public employers and to public employees. Where there is no controversy between the public employer and the public employees in the establishment of a negotiating unit, in the recognition of an employee organization, in the conduct of negotiations, or in connection with "improper practices", the need for intervention by an administrative agency is minimal. Where disputes arise, however, it is necessary to have machinery for their resolution. The Taylor Law provides such machinery.

The key agency for providing interpretations and procedures designed to resolve disputes under the Taylor Law is the Public Employment Relations Board (PERB)²⁶. Public representatives holding no other public office constitute this three member board appointed by the Governor for fixed overlapping terms. They are not selected on a tripartite basis. The Chairman serves on a full time basis.

The major responsibilities of the Board relate to: the resolution of disputes concerning the representation status of organizations of state and local employees; the enforcement of Section 209-d. concerning improper employer and employee organization practices; assistance to employers and employee organizations in the settlement of disputes. The Board has broad powers within the scope of the statute to obtain assistance, to make studies, to obtain and to supply information, to hold hearings and to adopt rules and regulations.

Many of the provisions of the Taylor Law, including the prohibition of strikes by public employees and defining rights of organization and representation, are applicable to all New York State and local public

25. *Taylor Law*, Sect. 200.

26. *Taylor Law*, Sect. 205.

employers and their employees in the State. Some flexibility and the opportunity for local initiative is provided, however, through Section 212 which permits local government procedures on some issues such as the resolution of disputes.

The local systems established under Section 212 in a number of upstate areas, to take advantage of this opportunity, are usually referred to as mini-PERBS. Under this section, any government other than the State or a State public authority may adopt its own local provisions and procedures providing these have been determined by PERB to be substantially equivalent to the provisions and procedures set forth in the Taylor Law.

Early in the life of the Taylor Law a number of local governments adopted such procedures. Upstate, however, the trend has been toward acceptance of PERB, and the procedures provided through PERB, for resolution of disputes. Of the 34 mini-PERBS approved at one time or another by PERB, only 18 are now in existence. The most common reasons given for dissolution are the ready availability of assistance through PERB, the lack of local expertise on the procedures involved in impasse settlements and the disadvantages inherent in the usual practice where the only staffing of a mini-PERB is by part time staff supplied by the public employer.

Also under Section 212, New York City is empowered to adopt local government procedures and provisions through local law. It is not required that these procedures and provisions have approval in advance by PERB. They shall be of full force and effect unless and until they are found by a court of competent jurisdiction in an action brought by PERB in the County of New York not to be substantially equivalent to the provision and procedures of the Taylor Law. New York City local procedures are administered through a local Office and Board of Collective Bargaining. (The term, OCB, is an abbreviation for Office of Collective Bargaining and is frequently used to refer to the Office of Collective Bargaining in combination with the related Board of Collective Bargaining). The flexibility thus provided to New York City has made it possible for the City to continue, with some important changes, the public employee relations system which predated the Taylor Law. Although the potential of legal action by PERB in connection with any New York City procedures and provisions not substantially equivalent to those of the Taylor Law, is not the equivalent of requiring advance approval from PERB, as in the case of the upstate mini-PERBS, this potential does provide some assurance that departures from the Taylor Law will not be extreme.

The Right of Organization and Representation

Section 202 of the Taylor Law gives public employees the right to "form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing." Section 203 provides that "public employees shall have the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder." Criteria concerning the definition of the negotiating unit, and for the determination of the negotiating representative where controversies arise, are provided in Section 207.

Section 204 empowers public employers to recognize employee organizations and to negotiate and enter into written agreements with such employee organizations in determining terms and conditions of employment. Where an employee organization has been recognized, or pursuant to other provisions of the Taylor Law has been certified, the public employer is required to negotiate and to enter into written agreements determining terms and conditions of employment. (Section 204.2).

Section 204-a. requires that any written agreement determining the terms and conditions of employment shall contain the following notice: "It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval." It is also required that every employee organization submitting such a written agreement to its members for ratification shall include such notice in the documents accompanying such submission and shall read it aloud at any membership meeting called to consider such ratification. These provisions reflect the importance of recognizing that the responsibility of the legislative body concerning appropriation of funds, as well as some other issues, is not superseded by a collectively negotiated agreement between the executive branch and the organization representing the employees.

After an employee organization has been recognized or certified, it is entitled to represent the employees in negotiations concerning terms and conditions of employment and in the settlement of grievances as provided in Section 208. It is also entitled to membership dues deductions upon presentation of dues deduction authorization cards signed by individual employees. Details concerning the period of unchallenged representation status, normally until seven months prior to the expiration of the written agreement, are spelled out.

Thus, these provisions of the Law give the employee the right to organize and the right to representation in negotiating terms and conditions of employment and the handling of grievances. The public employer is authorized to recognize the employee organization and is required to negotiate with an employee organization which has been recognized by the employer or which has been certified. It may be noted in passing that in many instances there is no dispute between the employer and employees concerning the definition of a unit, the recognition of the organization to represent the employees, or in the negotiation of an agreement. Under such circumstances, neither PERB nor any mini-PERB need be involved in such cases. PERB does, however, require that a copy of each agreement be filed with it.

The Law contemplates that the public employer may recognize an employee organization for purposes of bargaining. In effect such an approach permits the employer and the employee organization to define the negotiating unit in the first instance. If there is disagreement in the first instance, or in subsequent instances, the employee organization or the employer may appeal to PERB which pursuant to Section 205.5 resolves such disputes unless the parties are subject to the provisions of Section 206.

Section 206 gives governments or employers, other than the state or a state public authority, the power to establish local procedures through legislation to resolve disputes concerning representation. Such local procedures have rarely been established and as a consequence such disputes normally go to PERB or to a mini-PERB. The special local procedures permitted under Section 206 are considered as alternatives to those permitted under Section 212 which can also include the machinery to resolve disputes concerning representation.

Improper Employer and Employee Organization Practices²⁷

The improper practices provisions of the Taylor Law are found in Section 209-a. The original Act had no specific provisions concerning improper practices and the Section in question was added in 1969.

Prior to this Amendment, PERB recognized certain practices as implicitly prohibited by the Law. For example, reprisal in the form of discriminatory treatment of a public employee by a public employer because of the employee's exercise of his right to join or not join an organization would be impossible to reconcile with the rights granted under the Act. Refusal by an employer to negotiate with a recognized or

certified employee organization, or refusal to negotiate by an employee organization, would defeat basic features of the Act.

Consequently, PERB took steps against such unfair and improper practices even though they were not prohibited by the language of the Act, except by implication. PERB was criticized on the one hand for having legislated under the guise of rule making and on the other hand it was accused of not having provided adequate remedies. The result was the enactment in 1969 of Section 209-a.

Under Section 209-a. it is an improper employer practice for a public employer "(a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; or (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."

It is an improper employee organization practice for the organization deliberately "(a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so; or (b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer."

PERB is authorized in Section 205-5-(d) to establish procedures for the prevention of the improper practices prohibited in Section 209-a. In connection with a claimed violation of the obligation to negotiate in good faith, it is made clear that PERB's procedures shall provide only for the entry of an order directing the public employer or employee organization to negotiate in good faith. PERB exercises statewide jurisdiction over the handling of improper practices charges except in New York City where the Office of Collective Bargaining exercises jurisdiction in accordance with a provision in the Taylor Law which has been extended from year to year, (Section 215-5-(d)).

Although improper practices proceedings are required in those occasional circumstances where employers or employee organizations allegedly encroach on representational rights, or otherwise violate the provisions of Section 209-d, the major issue in connection with improper practices concerns charges of refusal to negotiate in good faith.

Even if the scope of negotiations were spelled out

27. Kurt Hanslowe, Walter Oberer and Robert Doherty, *Taylor Act Amendments of 1969*, (Ithaca: New York State School of Industrial and Labor Relations, Cornell University), Bulletin 62.

in the law, the nature of the negotiation process is such that employers can be expected to claim frequently that employees insist on negotiations on issues which are not mandatory subjects for negotiations. Employee organizations on the other hand can be expected to insist that employers are refusing to bargain on issues which are subject to mandatory negotiations. On occasion, however, the roles are reversed.

The term, collective negotiation, assumes a genuine effort to consider the merits of the issues in dispute and to try to reach mutual agreement. The term does not carry any implication that a concession must be made. Consequently, it is not always easy to determine whether there has been negotiation in good faith. In the absence of definition of scope of negotiations in the law, however, determinations concerning improper practices charges alleging failure to negotiate, supplemented by occasional court decisions, constitute the major procedures in accordance with which the scope of negotiations is gradually becoming defined.

The Settlement of Disputes in Collective Negotiations²⁸

After a government recognizes an employee organization as representing the employees in a unit agreed to by the parties, or after the unit has been determined and the organization representing the employees has been certified by PERB, the parties in most instances negotiate an agreement and record it in written form. Employee organizations recognized by the employer, in the absence of certification, substantially outnumber those which have been certified.

There is always the possibility, however, that negotiations do not result in ready settlement; consequently appropriate procedures need to be readily available in the event of an impasse. Public employers are empowered to enter into a written agreement with recognized or certified employee organizations setting forth procedures to be invoked in the event of disputes which reach an impasse, (Section 209.2). Such agreements may include the commitment by each party to submit unresolved issues to impartial arbitration. In the *PERB News* for March 1972, constituting an annual report for 1971, PERB indicates that in only one instance did the parties submit their differences to contract arbitration. Such arbitration is not to be confused with the commonplace arbitration of grievances concerning the interpretation of a contract. As indicated elsewhere, local procedures for settling disputes are a normal part of local government procedures permitted under Section 212. New York City and a number of other communities have made use of this option.

28. *New York Civil Service Law*, Sect. 209.

Where local procedures have not been developed, however, (and this would include the great bulk of the collective bargaining arrangements upstate) PERB's procedures play a major role. An impasse may be deemed to exist if the parties fail to achieve agreement at least 120 days prior to the end of the fiscal year of the public employer. The purpose behind this proviso is to provide adequate opportunity for reaching agreement or utilizing provisions for "finality" in time to permit necessary adjustments in appropriation schedules and in the tax program before the beginning of the new fiscal year.

When PERB, after a request from either party, or upon its own motion, determines that an impasse exists, the first step is normally the appointment of a mediator from a list maintained by the Board to assist the parties in effecting a voluntary resolution of the dispute.

If the impasse continues, the next step is fact-finding. Usually a single factfinder is appointed, but on occasion PERB appoints a three member board. As in the case with mediators, factfinders are selected from a list maintained by PERB. The factfinder, in addition to other functions, may make public recommendations for the settlement of the dispute. Some persons have assumed from the title that the sole function of the factfinder is to develop objective data or facts bearing on the dispute and to make recommendations based on such facts. Aside from factfinding as such, however, the factfinder usually becomes involved in further mediation. A substantial proportion of cases assigned to factfinders are resolved by mediation, making it unnecessary for the factfinder to submit a final report or recommendations.

If the dispute is not resolved at least 80 days prior to the end of the fiscal year, or by such other date determined by the board to be appropriate, the factfinder or the factfinding board is required to transmit a report and recommendations for resolution of the dispute to the chief executive officer of the government involved and to the employee organization involved. The factfinder may continue to seek a voluntary resolution of the dispute but shall within five days of such transmission make public such findings and recommendations.

In the event that the dispute reaches the stage where the factfinder's report is made public and the impasse continues, PERB has the power to take whatever steps it deems appropriate to resolve the dispute prior to referral to the legislative body. PERB has actually become involved at this stage in a limited number of disputes through what is sometimes informally referred to as super mediation.

If the public employer or the employee organization does not accept the recommendations of the

factfinder, the chief executive of the government is required within ten days after receiving the factfinder's report to submit it to the legislative body of the government involved. The chief executive also submits his recommendations to the legislative body, and the employee organization is entitled to submit its recommendations.

The legislative body is then obliged to conduct a public hearing at which the parties have an opportunity to explain their positions. It was not until the 1971 session of the Legislature, however, that it was required that the hearing should be a public hearing. It is clear from the law and from the reports of the Taylor Committee that it was visualized that referral to the legislative body (assuming no last minute agreement is reached) would be followed by prompt unilateral action by the Legislature. This action was expected to take place before the beginning of the new fiscal year so that the financial consequences would be reflected in the new budget, in the new appropriation schedules, and if necessary in the tax program.

In a number of instances things have not worked out this way. Unresolved disputes are not always referred to the legislative body in accord with the schedule suggested in the law. In some instances the parties may have agreed on procedures under Section 209.2 which depart from time schedules which others have understood were mandated. In several cases the legislative body has preferred to try to reach agreement, or for various reasons has not been inclined to promptly resolve the dispute on a unilateral basis. In some instances disputes have remained open for a considerable period of time, sometimes with the understanding that settlements when reached would be retroactive.

Although the number of disputes which linger on unresolved for any substantial period of time is not large in relation to the total number of agreements, it is difficult to obtain a reliable count because of the absence of any recording of such cases in accord with a fixed schedule and because of minutia which sometimes delay the final steps in reaching and confirming an agreement. PERB is familiar with many such cases but is not necessarily familiar with those which attract no public attention. As is to be expected, employee groups vigorously criticize such delays and attribute them to refusal of the employer to bargain and to the employer's reliance on the strike prohibition.

The law states that in the event the impasse continues after the public hearing "thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved." (Section 209-3-(d)). Although employees protest such unilateral action,

and insist it is inconsistent with negotiations, it was considered by the Taylor Committee as necessary to provide "finality" so that the completion of fiscal procedures necessary for the operation of government would not be delayed. In the absence of measures to assure finality, long delayed agreements with the potential of retroactivity could create fiscal chaos.

Fiscal procedures, however, vary among school districts, counties, cities and villages and the State. Although the schedule contemplated under the Taylor Law can be, and is followed generally, variations do at times occur when there is an impasse. One of the reasons for variation is that many governments have procedures which provide flexibility through transfer of funds, delays in making planned expenditures, curtailment of planned programs, temporary borrowing, etc. Such flexibilities may make it possible to live with a new agreement, even though its precise financial impact is not known when the appropriation and tax program for the year are adopted.

Note should be taken of some major features of fiscal procedures in New York City. Under Section 212 of the Taylor Law, New York City, unlike other jurisdictions, is not required to relate its local procedures to the end of the fiscal year. Some funds, however, are included in a lump sum in the annual budget to provide for anticipated wage increases. Presumably, as in any large unit of government, additional flexibility can be provided in New York City through transfer of funds and other fiscal measures. Furthermore in the absence, until very recently, of any step to insure "finality," contract disputes have on occasion lingered on for substantial periods with potential financial problems in the probable event of retroactivity.

Until recently the procedures adopted by New York City did not provide for steps beyond the submission of recommendations by impasse panels. It was recognized that something to provide "finality" was required to achieve substantial equivalence with the Taylor Law. The City has now provided through local law for compulsory arbitration of unresolved disputes through the Board of Collective Bargaining.

As will be noted elsewhere, however, it is provided that "any provision of a determination of the Board of Collective Bargaining the implementation of which requires the enactment of law shall not become binding until the appropriate legislative body enacts such law."²⁹ This has been explained as recognizing the need for action by the legislative body in the appropriation of funds, if such funds are not already available, and, if necessary, the enactment of

29. *New York City Administrative Code*, Sect. 1173-7.0-C-(4) (e).

taxes or of any other legislative steps required by law before an agreement can be implemented.

Penalties for Strikes

Section 210.1 provides "No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike."

Penalties for an illegal strike may be invoked against striking employees by administrative action (subject to appeal and review procedures) and in certain instances by Board action against employee organizations. In addition, penalties may be assessed against an employee organization and the officials of the employee organization for contempt of court, arising in connection with the violation of an injunction against a strike or against the continuation of a strike.

The Taylor Law provides in Section 210.2-(a) that any public employee who violates the strike prohibition may be subject to removal or other disciplinary action provided by law for misconduct. This provision makes clear that violation of the strike prohibition is misconduct and that such employees are subject to the provisions of the Civil Service Law concerning misconduct. Action against employees in this connection has occurred in some instances but seems to be comparatively rare. Lack of general enforcement of penalties for misconduct in this connection is understandable in the light of the pressures and psychology that are likely to prevail when a strike is settled and everyone is back at work long before hearings concerning misconduct can be completed.

The Taylor Law also provides in Section 210.2-(f) that any public employee who has been found to have violated the prohibition of the strike shall be on probation for a term of one year during which he shall serve without tenure. Enforcement is by the employer. Although it is generally considered that the penalty is applied, it has not commonly been regarded as among the more severe penalties. At the moment, however, differences of opinion have not been fully resolved concerning one point. Under the statute it has been recognized that an employee who strikes would be deprived of his protection under Section 75 of the Civil Service Law, (removal and other disciplinary action). The question arises, however, as to whether the probationary status of such an employee also disrupts his seniority and means that, under Section 80 of the Civil Service Law, he would have to be laid off before other employees of lower seniority. If so, the penalty could be a severe one in the event of curtailment of the number of employees.

The Taylor Law also provides in Section 210.2-employees who strike shall have deducted from their

compensation two days pay for each day on strike (loss of a day's pay because of not working plus an additional penalty of one day's pay) with appropriate adjustments for any compensation already withheld as a result of absence from work during the strike. This penalty is also administered by the employer. Its impact is very substantial. It is protested by employees as unfair and as giving the employer a benefit from a strike.

In the event that it appears that a violation of Subdivision 1 of Section 210 prohibiting a strike has occurred, the chief executive officer of the public employer involved is to so notify the Board (PERB or a mini-PERB if one is involved) and the chief legal officer of the government involved, or the Board on its own motion, shall institute proceedings before the Board to determine whether such employee organization has violated the provisions of Subdivision 1 prohibiting the strike. Other provisions of Section 210 spell out procedures. In determining whether an employee organization has violated the no strike provision, the Board shall consider whether the employee organization called the strike, or tried to prevent it, and whether the employee organization made good faith efforts to terminate the strike.

If the Board determines that an employee organization has violated the no strike clause, the Board shall order forfeiture of the checkoff of membership dues for a period of time. In fixing the duration of the forfeiture for the dues checkoff, the Board is to consider a number of elements including whether the public employer engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In some fifty cases before it to date, the Board found extreme provocation in two cases and therefore refrained from imposing the forfeiture but because of provocation in a number of other cases reduced the period of forfeiture substantially below what it would otherwise have been.

It is to be noted, however, that where local government procedures have been adopted pursuant to Section 212, PERB does not have jurisdiction over this penalty. Although local board jurisdiction can be provided through the local procedures, the courts are empowered to apply the penalty of forfeiture of dues checkoff as punishment for contempt. Some strikes in the jurisdictions of mini-PERBS and of OCB never get to court, or if they do they may be settled before any court order is found to be violated. Consequently, the application of this penalty is not uniform throughout the State.*

Application for injunctive relief is provided

* See Issue no. 3 of this report, entitled, "Exclusive Jurisdiction for PERB concerning Forfeiture of the Dues Checkoff as a Result of a Strike."

under Section 211 if it appears that public employees or an employee organization have struck or are about to strike in violation of Section 210.1. In such cases, the chief executive officer of the government involved shall notify the chief legal officer. The chief legal officer is to apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such legal officer shall forthwith apply to the supreme court to punish such violation under Section 750 and 751 of the Judiciary Law.**

Where an injunction is issued against a strike or the continuation of a strike, Section 751 of the Judiciary Law provides that punishment against individuals (usually against union officials or leaders) for contempt in violation of the injunction is a fine not

** See Issue no. 5 of this report, entitled, "Should Individuals be Imprisoned for Striking?"

The Development of Public Employee Relations in New York City³⁰

Public employee relations for employees of state and local government in New York City are subject to the Taylor Law. The provisions of the Taylor Law permit a local system in New York City with provisions and procedures substantially equivalent to those in the Taylor Law but the local system in New York City is not applicable to state employees. The provisions in the Taylor Law permitting a local system in New York City reflected legislative recognition that public employee relations for New York City employees had developed more rapidly and in a somewhat different pattern than elsewhere in the state. It apparently was concluded that some degree of flexibility was appropriate in New York City rather than the imposition of a structure which might have disrupted

30. Alice H. Cook, "Public Employee Bargaining in New York City," *Industrial Relations*, vol. 9, no. 3, May 1970; Alice H. Cook, *Adaptations of Union Structure for Municipal Collective Bargaining* (Ithaca, New York State School of Industrial and Labor Relations, Cornell University) Reprint No. 198, p. 81; New York City Office of Collective Bargaining, *Annual Report 1970-71*.

to exceed \$250 or by imprisonment not to exceed 30 days. The punishment for an employee organization willfully disobeying a lawful mandate of the court in a case growing out of a strike in violation of Section 210 may be a fine fixed in the discretion of the court for each day that such contempt persists. The impression prevails that penalties for contempt are highly variable and unpredictable, but this may be in part a result of the differences in the conditions under which strikes occur. There is some inclination to ignore penalties once a settlement of the strike has been reached.

Under Section 213.e, failure by the various officials to perform the duties required under 210.2, 210.3 and 211 may be reviewable under article seventy-eight of the civil practice law and rules by any taxpayer. It is reported that no such taxpayer action has been brought.

the organizations and relationships developed over a substantial period of time.

The Period 1954-1967

Although there were interesting and relevant earlier developments in public employee organization and bargaining in New York City, particularly in specialized services, one of the landmarks for organization of public employees generally was Mayor Wagner's "Interim Order" in 1954. Regulations promulgated in Executive Order 49, adopted in 1958, provided for a grievance procedure within each department, the establishment of department labor-management committees, the dues checkoff and released time for organization representatives to process grievances. The City Commissioner of Labor was given broad, but not completely defined powers, to deal with the problems of unit determination and of identifying majority representation.

Under the New York City public employee relations policies of the 1950's almost any group of employees in a given title could obtain certification even though it represented only a few employees.

As stated by the Office of Collective Bargaining in its combined annual reports of 1970-71, "This bargaining structure originally designed to encourage and promote the growth of employee organizations, nevertheless led to an unwieldy array of fragmented units. It pointed up that a bargaining framework consisting of a multiplicity of small units was self defeat-

ing since it served only to impede the conduct of bargaining. Moreover, the fragmented structure interfered with the efficient administration of the city's labor relations program."³¹ For this, and other reasons, it was 1960 before the city moved to engage in bargaining on a broad basis. At this stage the Directors of Budget and Personnel were the City's designated bargaining representatives.

The Civil Service classification of jobs was accepted as the basis for grouping employees who were in the Career and Salary Plan for purposes of representation on wages. This meant that the title or class of position became the basis of unit determination for employees in the Career and Salary Plan, and only an organization which represented a majority of the employees within a title or group of titles in the Career and Salary Plan could bargain with the city in behalf of such employees.

Special problems were encountered in organizing to represent a majority of employees in titles which crossed departmental and agency lines and included employees in a number of such units. For example, employees organized in a specific title in various agencies sometimes had to wait as long as ten years to achieve bargaining rights on wages, until after their union or council of unions achieved representation of a majority of the employees in the *title on a citywide basis*.

In addition, the city did not permit bargaining on a citywide *title basis* on issues which it considered should be uniform on a departmental basis, or for all employees in the Career and Salary Plan. This necessitated a several tiered bargaining arrangement to accommodate the requirement for uniformity, with all the attendant confusion as to how to put together groups (even if they represented a majority in a given title) to constitute majority representation on a departmental basis, on a Career and Salary Plan basis or for the members of the general pension system.

During the period 1954-1967, several hundred employee organizations were recognized, some of which had only a handful of members. Many groups were organized on a title basis, but frequently with membership only in a single agency or department. Some were organized on an industrial union basis representing different titles and types of employment in an agency. Therefore, whatever the merits of representation for "meet and confer" purposes, many of the organizations of employees during their early years of life had no significant bargaining rights in connection with wages, hours and working conditions, as these rights were reserved for organizations representing a majority of the employees on a title or on a broader

31. New York City Office of Collective Bargaining, *Annual Report 1970-71*, p. 7.

basis. Even where there was bargaining the result was rarely a written contract and the tendency was to depend on informal memoranda for the reflection of agreements.

Bargaining for the uniformed services (police-fire-sanitation-correction) has not been subject to all of the same complications outlined for the other services. The uniformed services were not part of the Career and Salary Plan. Separate pension plans exist for the police and fire departments. Employees in each of the uniformed services were found in a corresponding department, and there was a substantial history of organization and negotiation within such services which had its impact on the bargaining arrangements. The police, however, had been excluded from the provisions of the Executive Order 49 until 1963.

It is beyond the scope of this report to describe in detail the employee relations system during this period or to analyze fully its strengths and weaknesses. In general, however, it was recognized that the system was cumbersome and complex. There was some criticism of dependence on the city Department of Labor (an agency of the employer) for handling representation issues; there was confusion concerning the matters appropriate for bargaining and concerning the bargaining structure; and there was felt to be a need for procedures established in advance for dealing with deadlocks in bargaining.

During 1965, the last year of his administration, Mayor Wagner took action leading to the establishment of a tripartite panel under the auspices of the American Arbitration Association's Labor-Management Institute to study the City's public employee relations system and to make recommendations.³² During 1966, adoption of the recommendations of the tripartite panel was delayed, while the recommendations of the Taylor Committee were being considered by the Legislature in Albany. After the adoption of the Taylor Law in 1967, the recommendations of the tripartite panel were adopted by the city through a combination of local legislation implemented by Executive Order No. 52.

Under the new City administration the Office of Labor Relations was established to represent the City as employer in negotiations with its employees. Under the new local legislation and executive order many of the employee relations functions, previously performed by the New York City Commissioner of Labor, were modified and placed under the jurisdiction of the Office of Collective Bargaining.

One further aspect concerning the Career and Salary Plan requires clarification. This plan estab-

32. *Tripartite Memorandum of Agreement on Municipal Collective Bargaining*, Labor Management Institute of the American Arbitration Association, March 31, 1966.

lished in 1954 for city employees in the competitive, non-competitive and labor classes but excluding prevailing rate employees, the uniformed services and numerous other specified positions, provided pay rates in thirty-two grades of compensation with fixed minima, maxima and increments.

Because a rigid schedule applicable to all positions and titles was considered to inhibit and to be incompatible with collective bargaining, an Alternate Career and Salary Plan was instituted. Therefore collective bargaining takes place concerning compensation levels in the Alternate Career and Salary Plan rather than in the older Career and Salary Plan. The alternate approach was authorized by Personnel Order 21 issued by Mayor Lindsay on March 15, 1967. This alternate approach did not negate the need for logical relationships among the compensation levels for various titles and grades, but made clear that it was not intended that the structure provided by the Career and Salary Plan should preclude bargaining.³³

The Period 1968-1971

Local legislation supplemented by Executive Order No. 52 adopted in 1967 in New York City, for the most part became effective early in 1968. The Office of Collective Bargaining (OCB) has been the major influence on the reshaping of public employee relations in the city in accord with the local legislation and the Taylor Law. The new Office of Labor Relations has also had a major role in representing the City as employer.

The legislation provided for a seven member tripartite board of collective bargaining (BCB) in the Office of Collective Bargaining. Two members are appointed by the Mayor to represent the City as employer and two members are designated by the Municipal Labor Committee, an organization of the various unions which bargain with the City in behalf of its public employees. The Chairman and two other impartial or public members are elected by unanimous vote of the members representing the City and Labor. The three impartial members constitute the Board of Certification.

The Chairman, who also serves as Director of the Office of Collective Bargaining, is paid an annual salary. The other two public members are paid on a per diem basis. The City members and the Labor members serve without special compensation. All members are entitled to receive reimbursement for necessary expenses. Half of the salary, fees and expenses for members of the Board are paid by the

33. Decision and Order, Office of Collective Bargaining, Board of Collective Bargaining, In the Matter of Petition of Association of Building Inspectors and Housing and Development Administrators, Decision No. B-4-71, Docket No. BCB-68-70.

Municipal Labor Committee representing the public employees thus leaving half of such costs to be borne by the City.

In considering the bargaining structure under OCB in New York City, employees in the uniformed services (policemen, firemen, sanitationmen and correction workers) are each represented by a separate union and can be thought of as in a separate category. Insofar as the structure of bargaining is concerned, each is basically separate because they are outside the Career and Salary Plan, the organizations are solely within given departments, and each has a separate history of organization and bargaining.

Bargaining for employees other than those in the uniformed services can be thought of on levels as follows: bargaining on wages and some other conditions which must be uniform for all employees in the citywide title in question; matters which must be uniform for all employees in the Career and Salary Plan; matters which must be uniform for all employees in the general pension system, the membership of which is approximately the same as for the Career and Salary Plan, and; matters which must be uniform on a departmental or agency basis, a level of bargaining which is being phased out.

Substantial numbers of employees, not part of District Council 37, have their own organizations for representation on wages and certain working conditions for many of the multitude of titles within the Career and Salary Plan. On those matters which must be uniform for the Career and Salary Plan, and for members of the general pension system, bargaining is with District Council 37 which has bargaining rights for titles which provide a majority. The results of the bargaining are also made applicable to employees not represented by District Council 37. From a practical standpoint, this calls for various unofficial relationships and types of communication. Without minimizing the complications of such arrangements, it is a tribute to the ingenuity of those concerned that the system has been made to work.

Some idea of the bargaining structure in New York City is indicated by the following paragraph from the report of OCB for 1970-71 pertaining to bargaining on a "citywide" basis on issues which must be uniform:

"Another significant and complex negotiation during the year 1970 concerned the bargaining between the City and District Council 37, AFSCME, representing upwards of 120,000 employees in bargaining on "citywide" items, including pensions, which must be uniform for all career and salary plan employees. Bargaining by the designated representative on such items crosses departmental and agency lines and is not confined to any single, citywide title or series of job titles. In the bargaining, six general areas

were covered; health and security benefits, time and leave regulations, civil service and career development, personnel and pay practices, matters dealing with workweek, overtime and shift differentials, and pensions.³⁴

Under the bargaining structure in New York City, established substantially earlier than 1968, District Council 37, AFSC&ME, AFL-CIO achieved the status of bargaining representative on "citywide" items which must be uniform for the Career and Salary Plan only after the years of work required to achieve representation of a majority of such employees. This involved organizing local groups primarily on a title or group of titles basis, bargaining on wages and some working conditions where a local or a group of locals represented a majority of those in the job title, and waiting for the opportunity to bargain on "citywide" issues until a majority of those in the Career and Salary Plan were represented by the one parent organization.

Without going into too much complex detail the major features of the structure of bargaining may be summarized as follows: the "citywide" bargaining status of District Council 37 does not apply to special groups outside the Career and Salary Plan such as the uniformed services and other identifiable categories; the issues which have to be uniform for the Career and Salary Plan employees are bargained for by District Council 37; District Council 37 and its locals bargain on wages and on certain issues arising under hours and working conditions, on a title by title basis, or on a relevant group of titles basis, for many of the titles in the Career and Salary Plan; under the "levels of bargaining" or "tiered" approach other unions represent employees in many of the titles for bargaining on wages and certain conditions even though they are not officially involved in bargaining for the issues which must be uniform for the Career and Salary Plan. The applicable local legislation helps identify the issues under hours and working conditions which are required to be uniform for the Career and Salary Plan, but the line of distinction is not always clear.

During the four years 1968-71, in accord with the legislation and Executive Order of 1967, possibly the most important responsibility of the OCB was introducing and gaining a substantial degree of acceptance for systematic procedures to resolve disputes in bargaining through the use of mediation and impasse panels. Also, at a very high level of policy, the OCB participated during 1970 and 1971, in cooperation with the Office of Labor Relations and the Municipal Labor Committee in the development of the new local legislation adopted by the City Council in

34. New York City Office of Collective Bargaining, *Annual Report 1970-71*, p. 19.

December 1971. This included compulsory arbitration to fill the gap in the earlier impasse procedures which did not include any step to assure "finality" in the event of a continuing impasse.

Early in its operation the Office of Collective Bargaining developed a policy to rationalize the structure of bargaining by reducing the number of units. Progress has been made in this direction but the resistances are obvious. Some progress has been made through the discouragement of departmental units which did not seem essential in the overall scheme. Efforts to carve out titles from existing citywide units were discouraged. Merger and consolidation of units was encouraged. The overall number of some 400 units of representation has been reduced by possibly one-fourth but many of those which remain have little impact on bargaining patterns.

The tripartite Board of Collective Bargaining also had the responsibility of determining policy on a number of types of issues. These included the scope of bargaining in contract negotiations, the arbitrability of grievances and the interpretation of the applicability of the New York City Collective Bargaining Law (NYCCBL). The Board also handled disputes concerning full faith compliance with the NYCCBL, but in the future this type of issue will be encompassed in the responsibility of the Board for the determination of complaints concerning improper practices, as now provided by the local legislation and in accord with the Taylor Law.

The Board of Certification, made up of the three impartial or public members of the BCB, was responsible for cases concerning unit determination, designation of bargaining representatives under the complicated multi-tiered bargaining structure, decisions concerning exclusion of managerial and confidential employees from bargaining units, and the handling of elections. Both the Board of Collective Bargaining and the Board of Certification were aided by an experienced, competent, professionally staffed office.

Thus the public employee relations system in New York City for the four year period 1968-1971, while continuing the complex unit and bargaining structure initiated earlier, reflected a modernized approach under the Office and Board of Collective Bargaining. This was accomplished as a result of the legislation and executive order of 1967 and the development of an adequate staff of competent professionals under the auspices of the tripartite Board. Mediation and impasse panel services were developed to aid in resolving disputes. During this period, however, the City did not have a provision for "finality" when the recommendations of an impasse panel were rejected.

Under the local legislation adopted by the City Council in December of 1971, the recommendations

of an impasse panel, if not accepted by the parties, can be reviewed by the BCB which may affirm or modify the panel's recommendations by majority vote. The recommendations of the impasse panel are deemed to have been adopted by the Board if it fails to issue a final determination within a specified period. Thus, in effect, compulsory arbitration is provided.

Because of various legal considerations, as well perhaps as on policy grounds, a significant limitation is included. The legislation provides that a final determination of the Board shall be binding on the parties except that "any provision of a determination

of the Board of Collective Bargaining the implementation of which requires the enactment of a law shall not become binding until the appropriate legislative body enacts such law."³⁵ This has been explained as recognizing the necessity for appropriation of necessary funds by the legislative body, if such funds have not already been provided, and as recognizing that on an issue, such as pensions, changes cannot be achieved without State legislation.

35. New York City Administrative Code, Sect. 1173-7.0-c-(4)-(e).

Public Employee Relations — The State and City Picture³⁶

Although substantial numbers of state and local employees in New York State had joined employee organizations, with some exercising negotiating or bargaining rights, prior to the enactment of the Taylor Law, a substantial part of the organization of employees, and the initiation of negotiations or bargaining occurred following the passage of the Taylor Law. It is interesting to note that the organization of public employees and the effectuation of negotiation and bargaining rights under the Taylor Law was accomplished without anything comparable to the degree of conflict over such issues as occurred in the private sector in the 1930's.

Labor Relations Dimensions

Of the approximately one million state and local public employees in New York State, some 900,000 are now represented under the Taylor Law. It is estimated that some 600,000 of the represented employees belong to recognized employee organizations. Of the possibly 100,000 not represented, many have been excluded from units of representation because they are managerial or confidential employees. Others are employees of very small units of government, or are in specialized employment of a type which is not readily organized. The local procedures adopted in New York City

36. *PERB News* constituting Annual Report for 1971, March 1972; New York City Office of Collective Bargaining, *Annual Report, 1970-71*.

apply to something more than 200,000 employees in more than 1200 titles but not to transit employees nor to employees of the Board of Education.

On a statewide basis some 1100 public employee organizations negotiate in some 2500 negotiating units. Approximately 800 of the public employers are school districts, including Boards of Cooperative Educational Services, with some 1900 negotiating units. Most professional and non-professional employees of school boards are organized.

In four years of activity PERB has received some 766 representation petitions, conducted some 190 elections, and in a period of two years has closed some 326 improper practice charges cases. During the last five months of 1971, PERB received 150 applications from public employers in connection with proposed exclusion of managerial and confidential employees from negotiating units.

Although the figures vary somewhat from year to year, PERB reports that more than 70 per cent of the total agreements are negotiated by the parties without third party assistance. Approximately 75 per cent of the agreements on which PERB renders assistance involve school districts and school employees. In that portion of the cases in which PERB renders assistance, about half have been settled through mediation while approximately half have gone to factfinding. Of those which go to factfinding, approximately 25 per cent were settled by mediation without the necessity of the actual issuance of a factfinder's report. The factfinder's reports when submitted are for the most part accepted or with some modifications provide the basis for settlement. In possibly 10 per cent of the impasses per year (about 80 cases) are truly difficult situations encountered which call for extensive third party assistance after factfinding.

The Office of Collective Bargaining in New York City reports that 178 cases were before its Board of Certification in 1970 and 120 in 1971. In the two year period 207 were closed and 183 decisions rendered. Thirty-three elections were held during the two year period. OCB received 124 bargaining notices in 1970 and 100 in 1971 for a total of 224 notices covering 883 job titles over the two year period.³⁷

More than 80 per cent of the contract negotiations are completed without intervention by OCB. Mediation was helpful in resolving some key cases. Sixteen impasse panel requests were received in 1970 and 15 in 1971.

Although settlements were reached in 1971 covering some 70,000 employees, there was a backlog of 141 unresolved contract negotiations at the end of the year affecting some 87,000 employees. The delay was due in substantial degree to prolonged negotiations with the uniformed services, and the inclination to await clarification on settlements with the uniformed services as well as on Federal Pay Board guidelines.

"In 1970, all reports and recommendations of impasse panels were accepted by both parties, as they had been in the preceding two years. In 1971, all except four of the reports and recommendations received from panels were accepted by the parties in that year. The four recommendations not yet accepted by the end of 1971 involved police, fire, a park department unit and a unit of pharmacist titles. . . . The recommendations in the park department and pharmacist disputes were accepted in January 1972. Those in the fire impasse served as the basis for contract terms ratified by the membership in the same month."³⁸

Understandably the attention given by the mass media to public employee labor relations tends to emphasize conflict and confrontations out of proportion to the settlements without controversies. In the slightly more than four years (up to December 31, 1971) during which PERB has been in existence, there have been some 108 work stoppages both large and small in scale. During the same period of time some 8000 agreements were reached without a work stoppage. The total man days lost through strikes during this same period was almost three million but approximately two-thirds of this total was attributable to strikes in New York City in 1968 alone.

Although one or two large prolonged strikes can disrupt statistical trends, it is significant to note the position of New York State based on data from the

37. New York City Office of Collective Bargaining, *Annual Report, 1970-71*.

38. New York City Office of Collective Bargaining, *Annual Report, 1970-71*, p. 18.

U.S. Department of Labor, Bureau of Labor Statistics³⁹ as follows for twelve primarily industrial states. In 1970, New York had fewer strikes than Michigan, Ohio and Illinois, and more than Pennsylvania, California, New Jersey and the five other states in the comparison. In per cent of workers involved, however, New York had less than 1 per cent compared with more than 1 per cent in each of the eleven other states. In man days idle New York had 28,870 compared with 338,420 in California and intermediate numbers in the ten other states in the comparison. In per cent of working time, New York lost .013 per cent compared with substantially larger percentages in the other eleven states.

Strike statistics, however, vary widely from year to year. Man days idle by public employee strikes in New York State in 1968 totaled 1,992,563 compared with 5,485 days in 1969; 37,832 in 1970; and 227,903 in 1971. The large total in 1968 was due almost entirely to strikes in New York City while the smaller total in 1969 was due predominantly to strikes Upstate. Twenty per cent of the total in 1970 was in New York City and 93 per cent in 1971. Thus, too much dependence should not be placed on the significance of strike statistics for any one year alone.

Comparisons and Relationships

Public employee labor relations in New York City are subject to most of the specific provisions of the Taylor Law, and also to Section 212 of the Taylor Law which permits New York City a degree of local autonomy within the "substantially equivalent" proviso of the law. Elsewhere in the state such mini-PERBS as have existed have not had the effect of actually developing separate local systems of public employee relations. Consequently, outside New York City, the Taylor Law itself, supplemented by the regulations of PERB, is responsible for determining the public employee provisions and procedures. Although some alternatives are available, it is basically true that a single system prevails.

PERB and OCB follow many of the same concepts and procedures in discharging their responsibilities for determining representation status of employees and "improper practices" cases, and in handling impasses. As indicated, however, New York City's system is spelled out by local legislation. In enacting local legislation, the representatives of the City must always keep in mind that PERB can bring court action in an attempt to obtain a declaratory judgment if it feels that the New York City provisions and procedures are not substantially equivalent to those in the Taylor Law. Nevertheless, the effect of Section 212

39. *PERB News*, vol. 4, no. 12, December 1971.

of the Taylor Law is to give New York City significant flexibility. Differences between the system under the Taylor Law generally and the New York City system exist in the following areas:

1. The New York City system retains some hundreds of organizations of employees, many of which have little impact on bargaining patterns because of the necessity for some degree of uniformity or consistent relationship in wages, hours and working conditions. The number of units is gradually being curtailed, but the resistances to abolition and merger are substantial. For the State as employer, however, most state employees are encompassed in eight units. Neither system is without problems. Other municipalities have limited numbers of units, but none approach New York City in size and complexity.

2. Because of the large number of units coupled with the recognized need for uniformity in many areas, the bargaining structure in New York City is very complex, particularly for employees other than in the uniformed services. The result has been different levels of bargaining with different employee organizations or groups of organizations involved.* At the level of the State as employer, with comparatively few organizations, the structure of negotiations is much simpler, but a potential problem on level of negotiations arises here if there is to be negotiation on pensions, which for the most part have to be uniform for state employees, and where action by legislation is required in order to modify employee benefits.

The multiplicity of negotiating units, and the structure of bargaining in New York City, made necessary the authorization of an Alternate Career and Salary Plan if bargaining was to be meaningful. Such authorization does not, however, eliminate the importance of consistency in wage relationships. With the limited number of negotiating units in the State, however, negotiations have thus far been on a broader basis with nothing approaching the title by title basis prevailing in New York City. No survey has been made of practices in other jurisdictions under the Taylor Law, but it is generally considered that with a less complex personnel structure than in New York City, and usually with a very limited number of bargaining units, the problems of interrelationship among wages have not been insurmountable.

3. Another major difference has been the absence of finality procedures in the New York City system, compared with the Taylor Law provisions for referral of an unresolved impasse to the legislative body for final determination. In a move to remedy this gap, New York City adopted local legislation providing for compulsory arbitration of impasses through the

* See Section of this Report, entitled, "The Development of Public Employee Relations in New York City."

Board of Collective Bargaining, but with the limitation that "any provision of a determination of the Board of Collective Bargaining the implementation of which requires the enactment of a law shall not become binding until the appropriate legislative body enacts such law." Thus New York City now has procedures designed to achieve finality. Although these are of a somewhat different type than those prevailing for the State government and its employees, and for other jurisdictions subject to the Taylor Law, there is great public interest in seeing how the new procedures work. In small communities with only a few bargaining units, substantially the same result might be obtained by utilizing the authorization in the Taylor Law for voluntary arbitration.

Among other comparisons and relationships the Chairman of the Board of Collective Bargaining in New York City is the Director of the Office of Collective Bargaining. Although the titles and the legal terminology vary, the Chairman performs functions which parallel in many ways those performed by the Chairman of the New York State Public Employment Relations Board (PERB). In considering any comparison with the state, however, it is to be noted that the BCB is tripartite and that PERB is made up entirely of public members. Some observers criticize any public employment relations board made up of public members and insist that it cannot be impartial if appointed by the chief executive. Others insist that from a practical, political standpoint, any tripartite board is bound to be dominated by labor. Although the OCB and PERB both take their share of criticism, both have established a reputation for responsible action and both have a well deserved reputation for highly qualified members and staff.

Both organizations, OCB and PERB, have important responsibilities in unit determinations and in resolving disputes concerning the selection of the appropriate organization to represent employees. Both have important responsibilities in determinations concerning improper employee or employer practices. Such determinations are important in safeguarding both public employees and public employers from illegal practices by their negotiating or bargaining counterparts.

At the state level, where there is no detailed language in the statute concerning the scope of negotiations and no management rights clause, improper practice charges concerning refusal to bargain on certain issues constitute a significant procedure for gradually defining the scope of negotiations. The Board of Collective Bargaining in New York City has similar responsibilities but with more guidelines, including a management rights clause, in the local legislation. The OCB is in position to safeguard the scope of

bargaining provision of local legislation in part through its power to limit the issues which are permitted to go to impasse panels and to arbitration concerning the interpretation of agreements.

A major responsibility of both PERB and OCB is to facilitate impasse procedures. Both may supply mediation services at the request of the parties or on their own motion. In a continuing impasse, PERB may appoint a factfinding board and OCB may appoint an impasse panel. Under the Taylor Law, generally, if the parties do not accept the recommendations of the factfinder and a resolution is not reached, the dispute is referred to the legislative body with the expectation, not always achieved, of prompt unilateral action by the legislative body unless last minute agreement is reached. Under the OCB, the recommendations of the impasse panel have generally been accepted by the parties, but until very recently the local legislation provided no final step in the event the recommendations of the impasse panel were not accepted.

The local legislation providing for the New York City system utilizes the term, "collective bargaining" rather than the term, "collective negotiation" used in the Taylor Law. The local legislation in New York City uses the phrase, "wages, hours and working conditions" in connection with scope of bargaining rather than the "terms and conditions of employment" used in the Taylor Law. The New York City legislation provides for a management rights clause, a subject which is not covered in the Taylor Law except to the degree that it can be considered to exist by implication. The New York City legislation provides for an "impasse panel" whereas the Taylor Law provides for a "factfinding board."

The local legislation in New York City provides that under certain circumstances supervisory or pro-

fessional employees, who do not come in the managerial category, shall not be included in a bargaining unit which includes non-supervisory or non-professional employees unless a majority so desires.

Under local law in New York City, there is no duty to bargain with employees whose wages are determined under Section 220 of the New York State Labor Law (relating to prevailing wages and benefits). The State, however, has utilized the Civil Service approach almost to the exclusion of the approach represented by Section 220, and the Taylor Law makes no provision for exclusion of prevailing wage employees from bargaining on benefits provided through Section 220. Such other public employers as have employees subject to Section 220 may be faced with problems involving the reconciliation of the two statutes.

As indicated elsewhere, the Taylor Law itself exempts New York City from the statutory requirement for relating impasse procedures to the expiration of the fiscal year; provides the one exception to jurisdiction over improper practices by PERB; and provides, as with controversies under mini-PERBS, primarily for jurisdiction of the courts for administration of the penalty of revocation of the dues checkoff in the event of a strike.

These differences are cited, not for the purposes of criticisms nor of suggesting that two different public employee labor relations systems exist in New York State under the Taylor Law, but for the purpose of emphasizing that differences in terminology, and in some instances in procedures, do exist and must be kept in mind with respect to the impact of the Taylor Law elsewhere in the State, compared with its effect in New York City. The basic similarities, however, far overshadow the differences.

Selected Issues

Introduction

This listing of issues is based on the earlier preliminary report of the Committee in January, 1972 with some elaboration and modification. The first three issues listed, on which bills have been introduced, were included in the earlier report. They correspond with the major issues included in the Governor's program bill (Senate Introductory 9372). More were enacted.

Consideration has been given to the many criticisms and suggestions which have come to the attention of the Committee. In selecting issues which merit special analysis for purposes of changes in the Taylor Law, the Committee has had no illusion that there are simple solutions which can assure the objectives which it seeks. An attempt has been made, however, to consider the more significant specific problems which have arisen and to begin the process of analysis to determine changes which would assist public employees and employee organizations in resolving their differences.

Although the position of the Committee will not satisfy those who insist there should be no distinction between employee relations in the public and private sectors, or who advocate that public employees should have the right to strike, it is believed that the issues presented here when analyzed and carried to an appropriate conclusion mark the way for significant improvement in the Taylor Law.

In the limited time available to analyze a large and complex subject, the Committee has not had the opportunity to reach conclusions and recommendations on all issues. It is believed that the issues listed are all relevant although in some instances more experience may be required before a sound conclusion can be reached.

In addition, attention needs to be given to the combined effect of a number of the proposals rather than to merely consider them individually as spot changes. In most instances the Committee will benefit from further discussions with public employers and representatives of organizations of employees concerning the pros and cons of the various issues, and a logical overall program of improvement.

1. *The Role of the Office of Collective Bargaining in Improper Practices Jurisdiction*

The one exception to the handling of charges of improper practices by PERB has been the exercise of such functions by the OCB in New York City. This

has been a result of the proviso in Section 205.4-(d) of the Taylor Law which has permitted the OCB in New York City to exercise such jurisdiction on a year to year basis. Because this exception for New York City would have expired on March 1, 1972, the Legislature prior to such date extended it for one year to avoid a lapse and to provide an opportunity for consideration of a more permanent solution.

The system of local procedures for collective bargaining in New York City is unique from the standpoint both of the size of the operation and as an integrated system of public employee relations substantially equivalent to the provisions of the Taylor Law, but somewhat different from those which exist elsewhere in the state. Issues which arise under improper practices are frequently interrelated with representation issues, with scope of bargaining, or with various other features of the local procedures under which the OCB operates. It is logical, therefore, that the OCB should have continuing jurisdiction over "improper practices". To provide otherwise might impair the exercise of OCB's responsibilities. No convincing reasons have come to the attention of the Committee as to why such jurisdiction should not be on a continuing basis.

Improper practices determinations, however, can have a major impact on the practical application of the basic concepts of the Taylor Law. Consistent with the need for continuing substantial equivalence between the local procedures in New York City and the Taylor Law, it would be appropriate to permit review of OCB improper practices determinations at the option of PERB.

2. *Authorization for the Administrative Board of the Judicial Conference to Come Under the Office of Collective Bargaining with Respect to Employees Paid from Funds Appropriated by New York City*

Some change is appropriate concerning the coverage of non-judicial employees of the Administrative Board of the Judicial Conference who are paid by New York City. It is understood that employees of the Administrative Board of the Judicial Conference by recent court decision are clearly under the jurisdiction of PERB. Earlier the Administrative Board of the Judicial Conference elected to bring its non-judicial employees who are paid by New York City under the jurisdiction of OCB for economic issues only. Although this action has not been formally challenged, there is no authorization under the Taylor Law for any branch of the State to come under OCB nor for dividing jurisdiction between economic and non-economic issues.

As discussions have proceeded, the Administrative Board of the Judicial Conference has indicated a desire to bring its employees who are paid from funds appropriated by the City of New York under OCB, both for economic and non-economic issues. The organizations representing employees are understood to also favor this proposal. Many of these employees perform work similar to that performed by other employees paid by the City of New York. In addition, there is logic in recognizing the interests of the City in applying the same procedures in bargaining on terms and conditions of employment to all who are paid by it. This proposal seems well justified.

It is not proposed to bring under OCB jurisdiction the employees paid by the State for work for the Administrative Board, the Appellate Divisions, etc., in New York City nor those working in the court system outside New York City. The proposal is limited to non-Judicial employees.

3. *Exclusive Jurisdiction for PERB Concerning Forfeiture of the Dues Checkoff as a Result of a Strike*

PERB has the responsibility for administration of the penalty of withdrawal of the dues checkoff in connection with illegal strikes except in New York City and in the jurisdiction of upstate mini-PERBS where local procedures have been adopted pursuant to Section 212 of the Taylor Law. In these jurisdictions Section 210.3 and 210.4 of the Taylor Law do not apply and as a result PERB is without jurisdiction in the enforcement of this penalty.

Insofar as the mini-PERBS are concerned, PERB requires that they assert jurisdiction to enforce this penalty. The mini-PERBS, however, are not as well prepared as PERB to enforce this penalty and consequently are not able to do so on a uniform basis. PERB is not in a position under the law to require OCB in New York City to assert such jurisdiction and such jurisdiction is not provided by the local legislation in New York City under which OCB operates.

Under Section 751 of the Judiciary Law the courts are given the power to withdraw the dues checkoff as part of the penalty for contempt of court arising in connection with an illegal strike in New York City and in the jurisdiction of upstate mini-PERBS. The court is in a position to enforce this penalty only in those cases which come before it and in which an injunction has been issued and has been violated. The court tends to use the penalty as a discretionary tool in settling strikes and/or as punishment. Consequently, in the local governments which have taken advantage of the opportunity to establish local procedures under Section 212 of the Taylor Law, this penalty is not administered in the same fashion as in the remainder of the state.

As a matter of principle something can be said in behalf of uniform enforcement. In addition, the prospect of withdrawal of the dues checkoff where a strike occurs provides a very significant deterrent to strikes. Consequently, it is felt that PERB should be given exclusive jurisdiction to determine whether an organization which has engaged in a strike should forfeit its right to the dues checkoff, and if it is determined that forfeiture is in order, the length of time the checkoff privilege shall be withheld. As is the case currently with Subdivision 1 and 2 of Section 210 of the Taylor Law, Subdivision 3 and 4 would be made applicable where local procedures have been adopted. Subdivision 3 relates to the steps followed in applying forfeiture of the checkoff. Subdivision 4 relates to mandating a public report concerning a strike, those involved, and the sanctions imposed, or proceedings pending.

4. *Disposition of Funds Deducted From the Wages of Public Employees Who Strike*

Employees protest that the penalty of loss of two days pay (loss of regular wages plus an additional penalty) for each day on strike results in the employer benefiting from a strike. Certainly under most circumstances the disadvantages of the strike to the employer overshadow any such benefits. Reportedly, however, there have been cases where employer representatives have taken positions such as "let them strike—we will save on payroll—and we will benefit from the additional penalty."

Where a strike occurs, the employee should not receive wages for the period of the strike. It is questionable, however, whether the additional penalty beyond the loss of the regular pay for the period of the strike should be retained by the employer. The present procedure provides the employer with a benefit, even though its significance may not be large in relationship to the disadvantages of a strike. It might well be required that the penalty beyond the loss of the day's pay be paid over to the State. In a case with the State as employer, it might be provided that the additional penalty be turned over for the support of some appropriate public purpose.

A somewhat different situation is faced if the employer is guilty of extreme provocation in connection with a strike. Under these circumstances one of the possibilities is that the penalty in excess of the loss of the day's pay should not be collected or (if it has already been collected) should be returned to the employee.

Under these two possible changes in the law, the employee would lose his pay for the days not worked as a result of the strike but in the absence of a finding of extreme provocation, the additional penalty paid by the employee would go to the State or some ap-

appropriate public purpose. In the event of extreme provocation, however, the employee would not be subject to the additional penalty or if it has already been collected, it would be returned to him rather than paid to the State. If one stops here, however, the result is that the employer would save the wages, which would have been paid in the absence of the strike, and suffers no penalty, as such, even if guilty of extreme provocation.

Therefore a third modification merits consideration. In the event of extreme provocation, it might be further provided that the employer pay over to the State an amount equal to the wages saved as a result of the strike. Such an arrangement, when coupled with the two changes mentioned earlier, would go far to offset criticisms that under the present law the penalties benefit the employer, and that they are onesided and are applied only against employees.

For the purpose of achieving the above changes, it would be necessary for certain jurisdiction to be extended to PERB. The grant of such powers to PERB would be consistent with PERB's present authority to take extreme provocation into account under Section 210.3-(f) relating to the penalty of forfeiture of the dues checkoff for striking. In this connection, to the end of 1971, PERB found extreme provocation by the employer in two instances out of more than fifty cases but also found sufficient provocation in a number of other cases to reduce the penalty below what it would otherwise have been.

5. *Should Individuals be Imprisoned for Striking?*

It is questionable whether individuals should be imprisoned for contempt of court where the contempt consists only of individual disobedience of a court order not to strike.

Section 211 of the Taylor Law subjects public employees and public employee organizations which strike, or threaten to strike, to supreme court injunction against violation of the law. If such injunction is violated, they may be punished under Section 750 and 751 of the Judiciary Law, notwithstanding the provisions of Section 807 of the Labor Law (Little Norris LaGuardia Act). Under the Judiciary Law, individuals may be punished for a contempt by a fine not exceeding \$250 or by imprisonment not exceeding 30 days in the discretion of the court. This fine or imprisonment has not been applied on a wholesale basis in connection with strikes, but in some instances has been applied to the leaders of the employee organization involved in the strike.

When utilized, however, the jail sentence tends to make a martyr of the imprisoned official, takes away from the bargaining table a key spokesman for the

union, engenders bitterness and is likely to delay settlement. Although some union leaders point out that they benefit from the existence of this penalty because it intensifies support from the membership and makes a martyr of the leader by giving him the opportunity to go to jail or proclaim his willingness to do so, most of them resent this penalty and insist there is no counterpart for a public employer who may force the employee organization to strike. Some have insisted that the existence of the jail sentence as a penalty has forced union leaders to support a strike to prove that they are not intimidated by the possibility of a term in jail.

Clearly it is not appropriate to interfere with the necessary powers of the Judiciary to punish contempt. Experience with the jail sentence, however, suggests that such punishment solely because of disobedience of a court order not to strike does not constructively contribute to the objectives of the Taylor Law. The changes suggested would not interfere with the power of the court to punish for other behavior constituting contempt. This proposal would not change the other penalties under Section 751 of the Judiciary Law against employees or employee organizations which strike.

6. *Should Costs of Factfinding Proceedings be Shared by the Parties?*

The possibility of requiring the parties to share in the costs of factfinding is currently subject to substantial differences of opinion. The number of cases which go to factfinding is substantial but possibly not excessive. Trends in the percentage of cases going to factfinding may be significant and should be watched.

It appears that mediation services should continue to be supplied at the expense of the State. Mediation services in the private sector have traditionally been supplied by the federal and state governments, without charge to the parties, and it has proved to be constructive public policy to so do. In the public sector the same conclusion seems justified. To charge for mediation might discourage the use of services which have been highly beneficial in facilitating agreements between the parties.

When mediation processes have failed to achieve agreement, however, the next step in the impasse procedure is factfinding. Factfinding frequently achieves a settlement through mediation, rather than through factfinding as such, and this may be an argument why the factfinding services should be financed in the same way as mediation services. On the other hand, there is reason to believe that in some instances one or the other of the two parties incline toward factfinding as a too readily available substitute for collective negotia-

tion, available without charge. A charge for factfinding services might or might not significantly discourage any tendency to turn too promptly in this direction.

In any event PERB should continue to play an important role in the factfinding process. It is important that factfinders be well qualified and that they pursue a consistent line with respect to scope of negotiations. The factfinder should continue to come from a list established by PERB although the parties could, if desired, be given various degrees of participation in the selection process. Participation of the parties in the selection process might increase the chances that the recommendations would be accepted.

If public employers and employee organizations are to be charged for part of the costs of factfinding, the question arises whether some are so small or so poorly financed that they cannot afford to pay such costs. PERB might well pay the costs in the first instance and then bill the employer side and the employee organization side each with one-third of the costs, thus leaving one-third to be borne by the State. As a safeguard against undue hardship, it could be provided that the shares to be paid by each side would be limited, possibly to some such amount as \$3.00 per person in the negotiating unit. Under such a proviso the parties would each pay one-third of the costs in most instances, but would be protected against high costs which might arise under special circumstances.

7. Should the Taylor Law Require Arbitration of the Terms of an Agreement When an Impasse Continues?

Reference has already been made to the adoption of local legislation in New York City to mandate compulsory arbitration through the Office of Collective Bargaining. In addition policemen and firemen throughout the State are interested in arbitration and some other employee groups are also advocating it. During recent years a number of other states have provided compulsory arbitration, particularly for employees whose services are considered critically important.

There is little question that legislation which requires arbitration, or that an agreement by a public employer to arbitrate contract terms, places substantial pressure on the public employer to implement an arbitration award even if it should be a distasteful one. Some assume that an arbitration award should be final and binding in all respects. At the present time legal issues as well as the issue of public policy raise questions as to whether this is feasible. There would be many who would insist that any State legislation providing for compulsory arbitration should include a limitation such as that included in local legislation in New York City which makes any determination, the

implementation of which requires the enactment of a law, binding only when such law is enacted.*

Experience in binding arbitration of new contract disputes, which is now accumulating in various states, should be examined to determine successes and limitations inherent in different approaches. It would be well to determine the degree to which the process of implementation of arbitration awards has been reserved to the legislature through statute or through court interpretation. State constitutional provisions impinging on arbitration should be examined.

Arbitration is not a panacea. It does not always result in the avoidance of a strike. It may discourage negotiations. The results of arbitration may be well intentioned but less equitable than anticipated. In an imperfect world, and where a strike is illegal, however, it is one of the methods of attempting to insure fairness for employees and for the public if agreement cannot be reached through other means. It is not an adequate substitute for voluntary agreement between the parties, but under some circumstances may be the best available alternative.

8. Improvement of Impasse Procedures

In a large proportion of cases, collective negotiation results in agreements without the utilization of impasse procedures. A substantial additional proportion is settled by the use of mediation. Most of the remainder get settled at some stage in the factfinding process. A number, however, get referred to the legislative body where some are settled at various stages of discussion or negotiation. Relatively few remain for resolution by unilateral action of the legislative body, and such action when taken is not always taken promptly.

As indicated elsewhere, arbitration is not to be ignored as a procedure for meeting an impasse and assuring finality. It is essential, however, to further improve impasse procedures as much as possible prior to the final step, whether this is arbitration or referral to the legislative body.

Even where a settlement is reached, the employees may be dissatisfied and feel that in the absence of the right to strike they have little negotiating power and no alternative but to settle. The public employer may be dissatisfied with the settlement, feeling that pressures of one kind or another, including the threat or possibility of a strike, leave no alternative but to settle. Thus the test of impasse procedures is in part the acceptability of agreements reached and not solely the reaching of agreements.

Impasse procedures may include a number of

* See Section of this Report, entitled, "The Development of Public Employee Relations in New York City."

steps—mediation, factfinding and arbitration—all with numerous variations. This is not necessarily undesirable, since disputes vary widely in their nature and there is a need for practical methods to help the parties to reach a mutually satisfactory agreement. Steps which are acceptable at one time or place will not necessarily be acceptable at another. Consequently, it is important to have available a variety of procedures and to encourage some responsible experimentation.

It is fair to conclude that the Taylor Committee hoped that there would be more development of unique local impasse procedures than has developed to date. New York City has gone further in this direction than any other jurisdiction but there is not yet the opportunity to appraise the result.

Outside New York City, public employee relations impasse procedures predominantly follow the pattern of the provisions of the Taylor Law as administered by PERB. This may be advantageous. Most local governments are not in as good position as PERB to establish and administer impasse procedures since they lack the necessary expertise and sophistication. Consequently, it may be desirable to give PERB somewhat greater powers and to permit more varied procedures relating to impasses.

One of the interesting possibilities, not yet fully developed on a mature basis, is to expand the fact-finding procedures to include a public hearing prior to referral of any continuing impasse to the legislative body for unilateral determination. Such public hearings might be conducted by an "impartial hearing master" or hearing officer, possibly serving alone or as chairman of a public hearing committee. At such hearings the factfinder's recommendations would be fully explored and the positions of the parties made clear. Such a hearing would encourage public awareness of the dispute and of the position of the factfinder and of the parties. It would not curtail the ultimate power of the legislative body but would bring the issues to public attention in a hearing conducted under neutral auspices rather than by an agency which may already have been involved in negotiations or impasse procedures and which must make the final decision.

It would be up to the legislative body, however, to determine its own procedures for handling the impasse after it receives the factfinder's report, the position of the parties and the recommendations of the impartial panel. The procedure suggested here might not be appropriate, or might not have the same degree of advantage, in jurisdictions with distinct separation of the legislative and executive branches compared with those where these branches are not clearly separated.

As outlined here, the proposal might be subject to criticism as an additional layer of factfinding. Such a criticism might be mitigated if it should be feasible

to turn to the factfinder to conduct the public hearing. It might be difficult and cumbersome, however, for the factfinder to make a report, hold a public hearing and then modify his recommendations for settlement. An alternate approach, not yet developed on a mature basis, might be for the factfinder to hold a public hearing on the positions of the parties before reaching his own recommendations. Although the search for improved impasse procedures will have to continue, it seems possible that some type of public hearing under impartial auspices before the impasse goes to the legislative body might provide helpful "input" from the public. Such a hearing might also discourage extreme positions by the parties and thus encourage settlement.

In a somewhat different area there has been discussion in recent years of increased powers for PERB to intervene in an impasse, possibly with a public hearing, recommendations, etc. PERB now has such powers at the stage prior to referral of an impasse to the legislative body but not after such referral. It is not yet completely clear whether additional powers may be needed on an occasional basis, and if so how to preclude the possibility of overuse or undesirable prolongation of a dispute. This potential needs critical exploration. The instances of PERB intervention late in an impasse and prior to referral to the legislative body should be analyzed to see if the experience suggests productive procedures for more extensive use. Such an analysis might well clarify the need, if any, for modification of the law to permit further procedures designed to facilitate reaching an agreement in some of the cases which now go to the final step.

9. *Scope of Negotiations and Management Rights Clause*⁴⁰

Definition of scope of negotiations and the setting forth of management rights or responsibilities relate to substantially the same basic issue but not from the same point of view. Theoretically, the scope of negotiation could be defined by affirmatively listing the issues which are negotiable with all other issues considered as not negotiable. But in the absence of uniformity in terminology and in definition, and with the infinite interrelationships involving legislation other than the Taylor Law, it is impossible to provide a detailed listing of all issues which are negotiable.

It is theoretically possible to approach the problem by listing in detail all the issues which are not bargainable but this is not practical for the same reasons.

40. Kurt Hanslowe and Walter Oberer, "Determining the Scope of Negotiations Under Public Employment Relations Statutes," *Industrial and Labor Relations Review*, vol. 24, no. 3, (April 1971); Irving H. Sabghir, "The Scope of Bargaining in Public Sector Collective Bargaining," *New York State Public Employment Relations Board*, October 1970.

Furthermore such approaches run the danger of being too inflexible and restrictive as changes occur over a period of time which may make it desirable to change the dividing line between issues which are mandatory subjects of negotiation, those which are permissible for negotiation and those which are non-negotiable. Consequently, legislation relating to what is, or what is not, negotiable tends to be cast in relatively broad terms which still requires considerable interpretation.

Obviously neither party wants a definition of scope of negotiations which gives the opposite party undue advantage. The representatives of the parties are not always equally well informed on what is negotiable. A reasonable definition of scope of negotiation or of management rights can facilitate negotiations for both parties. Although scope of negotiations and management rights clauses are not necessarily easy to apply, they provide guidelines without which negotiations sometimes get far afield.

A management rights clause in an *agreement* tends to be a managerial declaration that other parts of the agreement are not to be interpreted in such a fashion as to encroach on the specified management rights. Presumably the agreement will not include clauses in conflict with the management rights clause, but this becomes a matter of opinion. A management rights clause in an agreement, of course, does not preclude the employee organization from attempting to negotiate on the issues in question the next time an agreement is under negotiation.

A management rights clause in *legislation* usually sets forth rights, prerogatives or responsibilities of the employer which are not subject to mandatory negotiation and which thus protect the employer in some degree against allegedly inappropriate encroachments by employee organizations in the negotiating process. In addition the enunciation of such rights provides some guidelines for mediators, factfinders and arbitrators in the interpretation of the various provisions of the contract without encroachment on rights reserved to the employer. Likewise a management rights clause in legislation provides some guidelines for public agencies and for the courts in the resolution of charges that one of the parties is refusing to negotiate on a negotiable issue.

Employers frequently recognize that even on non-negotiable issues, consultation may be helpful and appropriate. It is easy for some aspects of such discussions to find their way into the agreement. Employers may also willingly negotiate from time to time on issues which are not subject to mandatory negotiation but once in an agreement they are likely to not be subject to easy removal. In addition, issues which are not subject to mandatory negotiation frequently have impacts which are subjects for negotiations. For

example, notice and other features of layoff or of bumping procedures may be negotiable, even though the level of appropriations, or of the number of employees, is not normally considered subject to mandatory negotiation. Consequently, the difficulties inherent in attempts to define scope of negotiations or of management rights in great detail are apparent. Likewise, it is clear that in the absence of some guidelines as to what is and what is not negotiable, there is a danger that negotiations get far afield from what may have been the intent of the law.

For present purposes, the scope of negotiations concerning "terms and conditions of employment" is relatively undefined in the Taylor Law. The law does not include a management rights clause. It is to be noted, however, that a management rights clause of some significance is included under contracts negotiated by the State of New York with employee groups and that a management rights clause has existed for some time in the local procedures providing for the public employee relations system in New York City. This management rights clause is continued by the recent local legislation adopted in New York City.*

There was some indication that neither the employer nor the employee organizations are completely satisfied with the language of the management rights clause in the local procedures in New York City but that both have learned to live with it. It does seem to provide reasonable guidelines. If a management rights clause is to receive serious consideration at the State level, experience with the clause in New York City should be critically examined.

It is difficult to know to what degree the very strong labor opposition to the scope of negotiations proposal during the 1971 Legislative session was based on the subject matter of the proposal or on the absence of advance knowledge and consultation or on both. Although public employee representatives naturally prefer a broad rather than a narrow scope of bargaining and a limited rather than a broad management rights clause, it is not clear that they would be unwilling to accept reasonable definitions. A number of public employers would like guidelines in this area. They feel they would thus have protection from some of the demands they receive from employee groups. They may overestimate the protection thus afforded, particularly since the impact of issues not subject to mandatory negotiation may well be negotiable. The New York State Boards Association, however, does not favor a move in this direction at this time and it is not clear that other public employers have reached a united position.

* See Appendix I for management rights clauses in the Omnibus Bill in 1971, in local legislation in New York City, and in certain State contracts.

In the absence of a substantial definition of "terms and conditions of employment" in the Taylor Law, PERB is gradually providing a definition through determination of "improper practices" charges in instances where refusal to negotiate on issues alleged to be subject to negotiation is alleged. Some feel this approach is adequate. Others feel there should be more guidelines in the statute. In New York City, likewise, the OCB, in acting on improper practices charges concerning alleged refusal to bargain, is gradually helping define the scope of collective bargaining, but does so in the light of the management rights clause which is part of the statute.

One of the complexities in determining what is included in terms and conditions of employment under the Taylor Law is often due to the impact of other statutes such as those relating to Civil Service, Education and Finance. The Taylor Law was enacted without repeal or specific amendment of these other laws. Consequently, without the guidance which would have been provided by a somewhat more specific definition of scope of negotiations, it has been necessary to make assumptions as to how far the Legislature intended to go in superseding other provisions of law with the provisions of the Taylor Law relating to "terms and conditions of employment." Disputes over such assumptions have in some instances been carried to court. Decisions in such cases are gradually having an impact on the definition of scope. Needless to say such court decisions are not necessarily the same as they would have been if the Taylor Law had included more specific provisions concerning scope of negotiations.

A recent, as yet unpublished, decision of the New York State Court of Appeals in a case involving the Board of Education of Union Free School District No. 3 of the Town of Huntington vs. Associated Teachers of Huntington, Inc., provides significant guidance through substantiating the negotiability of a number of items which the Board of Education insisted were not negotiable. The court stated, "Under the Taylor Law the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment." This defines the scope of negotiations under the Taylor Law somewhat more broadly than some have heretofore assumed. The application of this concept in the negotiating process, however, will still leave a number of issues on which there will be differences of opinion. Such differences

will continue until there are further court decisions or clarifying legislation.

10. *Should There be Increased Penalties on Employers for Refusal to Bargain?*

Representatives of employee organizations insist bitterly that employees and their organizations are subject to various penalties for violations of the Taylor Law but that employers can refuse to negotiate in good faith and escape with a slap on the wrist, even though their refusal to negotiate may have precipitated a strike.

It is probably inevitable that employees in some tough negotiating situations will feel that the employer successfully refuses to bargain and suffers no penalty. Inevitably part, but not all, of the complaints by employee organizations, however, are for the purpose of bringing negotiating pressure on the employer, who may negotiate in good faith without necessarily granting the benefits requested by the employee organization. Nevertheless, the general acceptance of the obligation of the employer to negotiate has been strengthened by the Taylor Law, with the result that most employers negotiate willingly in good faith. Most of those who are not willing to do so in the first instance are in fact subsequently required to do so. The employer who has been found to have refused to negotiate in the first instance, however, is not penalized unless there is continued refusal to negotiate.

There are, of course, significant procedures under the law whereby an employer who refuses to negotiate is required to do so, and, if he persists is subject to penalties. The dividing line between negotiating and refusal to negotiate, however, is a nebulous one. It is not uncommon, if an employer is found to have refused to negotiate, for the employer to then negotiate or profess to do so but possibly successfully defending a position which to the employee seems the same as the refusal to negotiate.

The question logically arises, however, as to whether, aside from present penalties, there should be penalties administered by PERB against public employers who are found guilty of improper practices in refusing to bargain on appropriate issues. If such change were to be made, it is not clear as to the most appropriate penalty. Who, representing the employer, should, as an individual, be subject to a penalty? Would a fine be borne by the individual or by the employer? With the power of the employer to utilize tax funds, it is not clear that a fine against the employer would be effective. It would be difficult to identify the individual, working at the direction of the employer, who should be fined for refusal to negotiate.

The exploration of the ways to achieve, as nearly as possible, equality of treatment for employers and

employees in connection with refusal to bargain will have to proceed further. In a discussion of a collateral issue of disposal of the penalty of two days wages for each day on strike, mention is made under Issue No. 4 in this report of some steps which would move toward more balanced treatment of employees and employers where the employer is responsible for extreme provocation.

11. *Should the Parties be Permitted to Negotiate for an Agency Shop?*

Some form of union security prevails in much of the private sector, including the agency shop in some situations in which stronger forms such as the union shop have not been accepted. Under the agency shop, employees in the negotiating unit who are not members of the recognized or certified organization may nevertheless be required to contribute to the financial support of such organization. Sometimes the financial payments under the agency shop are equivalent to the dues paid by the members. Under other circumstances the payments are meant to be limited to the specific costs of providing such services as wage negotiations and grievance administration which are presumed to be of direct benefit to non-members as well as to members. Under exclusive representation, which is not mandated but is the accepted pattern under the Taylor Law, an organization is obligated to represent non-members as well as members.

Some public employers are more or less willing to go along with the agency shop. Others oppose it or express the conviction that it would be premature. The agency shop is desired by most unions. Some representatives of employee organizations, however, insist that agency shop fees mandated by an agreement would remove the pressure on an organization to press for goals with universal appeal to the employees in the unit. Therefore, they feel that compulsory support is bad in concept and in result. As pointed out above, however, most representatives of employee organizations do not take such a view, and even those who do so usually indicate that they would accept the financial benefits from an agency shop when, and if, they become available.

Some insist that the nature of public employment is such that public employees who do not wish to do so should not be required to support an employee organization. Others insist that because of special circumstances in the public sector, any provision for the agency shop should be contingent on legislation which would assure that none of the agency shop fees would be spent for political purposes. Possibly this issue could be met by limitations in the level of the agency shop fee, but employee organizations are likely to be very much opposed to any limitation which they feel may

provide undue restriction or interference with political activities. It is not completely clear that an effective dividing line can be drawn between the support of political activities on the one hand and representation activities on the other. A law designed to do this might pose difficult problems of administration.

In New York City, multi-tiered bargaining poses interesting questions as to whether under an agency shop arrangement employees might and should be subject to more than one agency shop fee or, if not, how the determination should be made as to the level of bargaining for which the agency shop fee would be applicable. The problem is not insoluble, but the question arises as to whether provisions which would be acceptable under other conditions would necessarily be appropriate under the multi-tiered arrangement.

The major argument in favor of the agency shop is that it is only fair that those who benefit from the activities of the organization representing employees should contribute to its support. Others insist, however, that not all groups within the unit benefit equally, or at all, and feel some option should be left to the individual in deciding whether to support the organization. Opinions differ as to whether those presently non-members would, under an agency shop, join the organization in order to get the maximum benefit for their payments or whether they would continue as non-members.

In any event there is wide support for the conclusion that an agency shop strengthens the majority organization and makes it more stable. It may, or may not, make it a more mature and responsible representative of employees. As already indicated, however, a minority view from among employee representatives is that in the long run it is not a good thing for the organization or for the employees. Some of these feel that the organization may be temporarily strengthened by the increased financial support but that in the long run the support of the organization by the membership may decline or be less dependable and that such decline in support is likely to mean that the employer has a less responsible organization with which to negotiate.

The proposal that an agency shop may be a subject for negotiations between the parties can be expected to be one of the issues to be discussed as a part of any major revision of the Taylor Law. The impression prevails that, if made subject to negotiation, the agency shop would be rather generally and promptly adopted.

12. *Should the Taylor Law Require Ratification of Agreements?*

The Taylor Law does not require ratification of agreements. A number of questions arise from time to

time as to what, if any, standards should be required by law. Many employee organizations do require ratification by the membership before an agreement which has been negotiated becomes effective. In other instances an organization may give a bargaining committee, or an executive committee, or some other group power to accept an agreement. Even if membership vote is not required, the leadership normally is not inclined to negotiate a binding agreement which, if it had been submitted to the membership, would fail to get approval.

Employers sometimes suggest that there should be procedures whereby an offer from the employer can be required to be submitted to the membership. Such a procedure which would permit going over the heads of the leaders of the employee organization, is of course opposed by employee organizations. Under most circumstances, it would probably fail to achieve what the employer hopes. In connection with ratification, it may seem simple, for example to require a membership vote after the membership has been supplied with written copies of the agreement. Many negotiations, however, are reflected in long complex documents some parts of which may not be completed, checked against source material, proofread, printed, etc., for a period of months after negotiations have been completed. Consequently, in many situations it is more feasible for the membership to base its approval or disapproval on a summary of the agreement. Although abuses are possible, a summary may provide members with more effective information than would a copy of a complicated technical agreement itself.

Ratification is related to the leadership function in complex ways and may, at times, either strengthen or destroy it. It is related to democratic representation and may either strengthen or weaken it. It is complicated by intra-union politics and by growing militancy particularly among younger members. Consequently, it is easy to see the potential shortcomings of almost any effort to mandate ratification or safeguards to surround it and difficult to come up with a proposal which might not be self defeating. The purpose here is not to argue for or against any specific treatment in the Taylor Law, of the issue of ratification of agreements, but to note the complexities of the subject and to suggest that there should be careful, sophisticated, consideration of any proposals in this area before changes are made.

13. *Should the Law Make Provision for Multi-Employer Negotiations?*

The Taylor Law does not specifically prohibit multi-employer negotiations or its counterpart, negotiations by a group of employee organizations. The law is written, however, primarily from the standpoint

of negotiations by an employer with a single organization of employees. The basic problem results from the large amount of time and effort required to negotiate a large number of settlements in different units with somewhat similar problems. Solutions might be provided by multi-employer negotiating, or in some instances negotiating responsibility might be given to a larger unit.

Schools are cited as a major illustration of fragmented negotiations in a large number of relatively small units requiring a major investment of negotiating time and effort by employers and employee organizations. The problem of fragmentation into small units is not limited to school districts, but applies in some degree to other local units such as villages and towns. Negotiations on a multi-employer basis or by a large negotiating unit do not necessarily preclude different levels of benefits under different conditions, but there is a strong thrust in this direction. The reluctance of local units to give up, or water down, their present right to negotiate concerning benefits which constitute important costs with an impact on taxes is understandable.

Some opinions have been expressed that the recommendations of the Fleischmann Commission on the Quality, Costs and Finances of Elementary and Secondary Education would result either in much larger administrative units or in the taking over of most school costs by the State, or both. Either such development might be controlling in requiring a larger unit for negotiations, but nothing to date suggests that such changes are to be expected in the immediate future.

The experience of New York City in dealing with a fragmented bargaining structure, which results from factors other than multiplicity of employers, does not present a pattern for use upstate where fragmentation exists because of geographic dispersion of employers and consequently of units for negotiation. The imagination and flexibility used in New York City, however, in meeting, in part, the problems for employees, created by fragmented units, through use of councils of employee organizations and informal arrangements, may suggest approaches to a different problem upstate.

The Committee did not encounter any urgent support for legislation to facilitate multi-employer negotiations at this time. Sooner or later, however, it is to be expected that groups of local employers and of units representing employees will want to try negotiations on a group basis in an effort to reduce administrative burdens and costs and to obtain more effective negotiations.

Such a step would of course pose problems concerning what units should group together, how their negotiating representative would receive guidance,

how far the individual units would be willing to go in delegating the power to make a binding agreement, etc. These are difficult problems, but the potential for improving the negotiating process is such as to suggest that it would be desirable to have some legislative authorization and guidelines to encourage voluntary efforts in this direction.

14. *Exclusion of Managerial and Confidential Employees From the Negotiating Unit and From Any Organization Representing Employees for Purposes of Negotiation*

Amendments to the Taylor Law in 1971 provided that an employer may make application to PERB for exclusion of managerial and confidential employees pursuant to the provision of Section 201.7 of the Taylor Law defining the term, "Public Employee." Such exclusion from the definition of "Public Employee" has the effect of exclusion from the negotiating unit. Section 214 provides that managerial or confidential employees, determined pursuant to Section 201.7, shall not hold office or be a member of any employee organization, "which is or seeks to become the certified or recognized representative of the public employees employed by the public employer of such managerial or confidential employee."

Although in varying degree managerial and confidential employees were excluded from many negotiating units prior to the above amendments, there was no uniformity in the policies followed. In some instances, managerial and confidential employees continued as members of the employee organization for various benefits even though not in the negotiating unit. In some instances, separate organizations of administrative employees were recognized even though including managerial personnel. In some instances negotiating units were created to represent managerial personnel.

In retrospect, it is to be regretted that guidelines concerning exclusion of managerial and confidential employees were not included in the original Taylor Law. It is now painful to many managerial employees to lose what they have come to look on as necessary protection. The whole issue is complicated by the general failure to distinguish between "managerial" employees as rather rigidly defined in the statute, and other administrative or supervisory employees at a lower level of administrative responsibility, but who are not subject to exclusion. Many public employers feel that the definition of managerial employees is too restricted.

From the standpoint of the employer, it is essential that employer representatives at the negotiating table and at a policy level not be subject to the conflict of interest that is involved in representing the

employer and at the same time being a member of the negotiating unit. More experience under the present law will probably be required before it is possible to determine whether further amendments are required for the protection of the employer. Interesting questions also arise as to whether it would be feasible to permit managerial employees to have non-voting membership in employee organizations for purposes of carrying insurance and obtaining other benefits not involving representation in negotiations or whether such association would represent a significant conflict of interest.

In the absence of guidelines in the Taylor Law at an earlier date, organizations representing managerial personnel or including managerial personnel have been recognized by some employers. If managerial personnel are excluded from the negotiating unit, some such organizations may function without power to negotiate, but presumably with the opportunity to meet and confer. Although such organizations are not likely to be pleased with elimination of the right to negotiate, it may be that they will play a significant role for their members without the conflict of interest implications inherent in a negotiating role.

One of the serious difficulties facing public enterprise has been the failure of management to actually manage. Some had anticipated that with the advent of collective negotiations the managerial role would become more effectively defined and developed but it is not clear that this has happened. It is however a key issue in the exclusion from the negotiating unit of those for whom such a role would be in conflict with their management responsibilities.

15. *Are Changes Required in the Definition of Employer or in the Provision for Joint Public Employers?*

In many cases no problem arises as to the definition of the employer for purposes of the Taylor Law. The problem arises where more than one official, agency or unit contributes funds or otherwise exercises some of the functions commonly associated with the term, employer. Some aspects of the problem appear where there is no clear distinction between the executive and the legislative branches. Others arise where there is such a distinction.

The problem arises in connection with the office of sheriff, where the sheriff appoints and is responsible for his deputies who are paid by the County. Terms and conditions of employment for the deputies are legally of concern to the sheriff, as well as to the County, but it is necessary to avoid interference with the sheriff's legal responsibilities. Problems have arisen in some instances in Community Colleges where the

board of trustees is frequently treated as the employer but the governmental unit, or units, which supplies the funds has an interest in negotiations which cannot always be handled by delegation. Another illustration is provided by the fiscally dependent school districts in which the school board, which is thought of as the employer, nevertheless does not control the funds which are to be made available. The city therefore may become involved in negotiations or, through limiting the available funds, may limit what the school board may negotiate. Under these circumstances the concept of "joint employers" may be helpful.

The amendment of Section 201.6 of the Taylor Law in 1971, permitting the designation of joint public employers by the Board upon application by the employer, may not solve the problem, but is probably a step in the right direction. It will be necessary to examine the problem in a number of different negotiating situations in an effort to determine whether the present provisions of law meet the problem.

16. *Do the Recommendations of the Fleischmann Commission Carry any Major Implications for the Taylor Law?*

As the work of the Joint Legislative Committee on the Taylor Law developed, it was recognized that the recommendations of the Fleischmann Commission on the Quality, Costs and Finances of Elementary and Secondary Education might have implications for the Taylor Law. The Fleischmann Commission has now made important recommendations concerning administration and financing of education. The financial stringency, however, adds to other uncertainties concerning the adoption of the recommendations. Consequently, at this time there is no way to know whether, or when, significant recommendations of the Commission will be adopted. There would be major implications for the Taylor Law if school districts were to be greatly enlarged or if the State were to take over the financing of elementary and secondary education.

A staff report by Myron Liberman entitled, "The Impact of the Taylor Law Upon the Governance and Administration of Elementary and Secondary Education," has had some distribution and includes forty-five recommendations, some forty of which relate more or less specifically to issues under the Taylor Law. It is not yet clear as to the degree these recommendations will be adopted or supported by the Commission.

The Fleischmann Commission report and recommendations together with supporting documents may provide helpful suggestions and input in efforts to improve the Taylor Law. It does not seem probable, however, that the Commission's recommendations

concerning the educational system will, in and of themselves, result in changes in the educational system in the immediate future which in turn will require changes in the Taylor Law.

17. *Seasonal Employees*

The Taylor Committee recognized that subsequent consideration should be given to assuring appropriate rights for seasonal employees, some of whom do not at present have representation. Some of the problems are quite different than for year round employees. The situations where seasonal employees are not represented vary so widely that such instances should be examined carefully before reaching generalizations concerning legislation.

18. *Productivity*

Productivity is a major continuing issue in the economic life and standard of living of the nation, private employment. It is difficult to exaggerate the and is important in the public sphere as well as in importance of bringing to bear on this issue the best of existing knowledge and experience. The issues related to productivity permeate our social and economic system and are not limited to the area of collective bargaining. To some degree, however, they are bound to arise in negotiations and bargaining.

Productivity has important theoretical as well as practical aspects. It is hard to measure or define. It does not depend alone on the output of effort by employees but also on facilities, organization, leadership and possibly as much as anything on morale and other intangibles. Joint labor-management interests and efforts are required but with emphasis on productivity planning and not exclusively within the traditional framework for negotiations or bargaining.

In jockeying for position to protect their own interests, employers sometimes minimize the productivity of the work force and employees insist that it is already high. Employees, or employers, or sometimes both, however, sometimes reach specious conclusions concerning productivity in an effort to justify wage increases to the public or to public agencies.

The public appeal of "productivity" sometimes tempts employers to use allegations of low productivity to oppose demands for legitimate and appropriate employee benefits. Even where reasonable proposals concerning "productivity" are made, it is easy for employees to use scare tactics and to insist that the purpose is to deprive them of legitimate and hard won gains.

With all the existing problems of financing necessary governmental services, including appropriate terms and conditions of employment within the limits

of an acceptable tax program, it is important to both employees and employers as well as to the public that reasonable and effective steps be taken to assure a high level of productivity. Good management, a responsible organization of employees and fair treatment of employees are all among the important requirements in achieving productivity but frequently some type of joint effort is required.

The Committee hopes it will be possible for the New York State School of Industrial and Labor Relations, together with other appropriate groups to sponsor a working conference on productivity in public service. This might highlight problems and possibilities in this important area and encourage employees and employers to consider constructive steps. The Committee has already discussed the possibility of such a conference with the School and is gratified at the interest which has been expressed. Out of such conferences and follow-ups, it should become clear whether any legislative changes would be helpful in facilitating constructive development of productivity in the public service.

19. *Relationship of "Other Legislation" to Collective Negotiations*

Important issues, which in the private sector come within the scope of collective bargaining, have traditionally been covered by legislation in the public sector as in the Civil Service Law and in the Education Law. The Taylor Law was enacted providing for collective negotiations concerning "terms and conditions of employment" without spelling out the degree to which the new law was meant to supersede other provisions of law and the degree to which other provisions of law were to continue in effect. Thus "scope of negotiations" under the Taylor Law cannot be defined without assumptions concerning the intent of the Legislature as related to "other legislation." An example is provided by the prevailing wage protections in Section 220 of the Labor Law.

Over a period of time court decisions provide some clarification as to what part of "terms and conditions of employment" is covered by the Taylor Law and not by "other legislation." Definition of scope of negotiations by PERB through resolution of improper practices charges of refusal to negotiate on given issues must of course take place within the framework of such court decisions as are controlling concerning the impact of the Taylor Law, and of other laws, on the definition of terms and conditions of employment.

The recent decision of the New York State Court of Appeals in the Huntington case, referred to under Issue No. 9 entitled, "Scope of Negotiations and Management Rights Clause," supports a broader definition of scope of negotiations than some have heretofore

assumed. Not all the implications of this decision are immediately obvious, but in the absence of a more precise legislative definition of scope, it may have the effect of extending negotiations into areas which some have heretofore considered as not subject to mandatory negotiations.

With the Taylor Law now established and functioning, however, there is a strong case for review of legislation and court decisions in an effort to identify the major "terms and conditions of employment" subject to other legislation and those subject to the Taylor Law, even though further court decisions may be required to resolve some of the conflicts. Sooner or later, the question must be faced as to whether some of the issues covered in other legislation, such as in the Civil Service Law and the Education Law, should be subject to collective negotiations under the Taylor Law, or conversely, whether they are or should remain outside the scope of negotiations.

20. *Other Related Issues*

A number of other issues are of importance and will continue to arise in discussions concerning the Taylor Law.

Should violation of the terms of a contract be made an improper practice and thus brought under the jurisdiction of PERB and of OCB? Some of the smaller organizations of employees would welcome such a procedure rather than to incur the costs and delays of legal action which they allege is presently the only alternative.

Would making the violation of the terms of an agreement an improper practice, however, discourage agreements to arbitrate grievances under the contract? Would a better approach be to mandate by law that grievances should be subject to arbitration? There is such a requirement in some states.

Should it be required by law that the terms of an expired agreement carry over until a new agreement is reached? Understandings to this effect are frequently reached, at least as to some elements of a contract. Some feel, however, that with changes in contract terms taking place, it might be to the advantage of one party and the disadvantage of the other to require that all conditions carry over. Some situations arise where it would be incongruous to require carryover of terms which both parties recognize would be obsolete. Would legal requirements for carryover of terms encourage delay in negotiating a new agreement?

Should it be provided by law that the terms of a new agreement be retroactive to the date of expiration of the old agreement? Would such a requirement encourage delay in negotiating a new agreement? Al-

though retroactivity is frequently agreed to, there are those who fear that such a requirement would encourage delay in negotiating a new agreement, and that if delay should be extensive, an employer might belatedly be confronted with accumulated obligations for which budgetary provisions have not been made. On the other hand, employees insist that they need protection in the event that an agreement is long delayed.

Some further attention needs to be given to the issue of the timing of procedures designed to produce "finality" before the beginning of the fiscal year of the government concerned. It would be helpful to have specific information as to experience with this issue Upstate and the implications of practical experience related to the concept expressed in the law. With respect to New York City, the issue was one of those on which the Legislature asked the Mayor to make recommendations designed to achieve substantial equivalence to the Taylor Law. The Mayor recommended against removal of the present exemption of New York City from the general requirement of relating negotiating procedures to the end of the fiscal year. He indicated, however, that efforts would be made to resolve disputes in advance of the end of the fiscal year. Currently, for a variety of reasons, there has been delay in achievement of agreements for a very substantial portion of the employees of the City. Such delays can create financial problems, particularly where retroactivity is involved.

The Port of New York Authority as a bi-state organization, and its employees, do not automatically fall within the coverage of the Taylor Law. The 1971 Legislature called on PERB to make a study and recommendations concerning this situation. PERB made such a report and outlined the various ways in which a public employee relations system might be provided. In the meantime, the Port of New York Authority established an employee relations system which is approved by some and criticized by others. Some insist that a system should be provided by joint action between New York and New Jersey, preferably in the form of law. One of the possibilities is to bring the Port of New York Authority and its employees under the Taylor Law by joint action of New York

and New Jersey. It is reported that employees of the Port of New York Authority are already members of the New York State Employees Retirement System.

Is there any appropriate way to provide more complete information on matters pertaining to collective negotiations to the general public, or even to the immediate constituencies of the parties at the negotiating table? Public opinion can be a powerful force supporting reasonable positions, and opposing unreasonable positions, of employers and employees, but only if it is informed. On the other hand, public discussion of the details of negotiations while they are underway, or before approval by the parties, may delay agreement or make it more difficult. The research and information services provided by PERB have been useful, and can be invaluable, not only to the parties but also to the public in encouraging the type of knowledge and understanding which is required if the public employee relations system is to function with maximum effectiveness. It seems likely that expansion of such services will be required.

Finally, problems arise because of the relationship between the structure of government and collective negotiations. Reference has already been made to the problems arising where, in the absence of an independent executive branch, an impasse is referred to a legislative body which has already participated in negotiations. Different complications arise where an independent executive branch negotiates an agreement, and expects implementation by the legislative branch which has had little, if anything to say concerning the proposed expenditure policy and its tax consequences. To involve the independent legislative branch in negotiations, however, would raise a new set of issues. Other problems arise where administrative agencies are, except for financial support, basically independent of the legislative branch of local government, and of such executive branch as exists (for instance as in the case of community colleges). In actual experience all these types of problems are encountered. Structures of government vary greatly and there is no simple answer. The problems are somewhat different than those which arise in the private sector and merit more mature and comprehensive consideration than they have received to date.

Epilogue

By the standards which must be applied to any legislation involving complex social and economic interests, the Taylor Law has been successful but far from perfect. Improvements have been made through amendments, particularly in 1969 and 1971. These have not changed the basic concept of the law. It has not eliminated strikes of public employees in New York, but compared with the experience of other major states, and with the conditions which were developing in New York at the time the Taylor Law was adopted, it has kept strikes and their severity below the level which otherwise would have been expected by most knowledgeable observers.

Vast changes have taken place in public sector employee relations in New York under the Taylor Law. As such changes have occurred, it has not been difficult to criticize various elements of the law, nor to recognize that it is not a perfect instrument with which to bring all of the inevitable conflicts in employee relations under control. The problem that remains is to devise effective remedies which will improve the statute, and make for better operation in the interest of all who are involved.

In the Annual Report of PERB for 1971 it is stated, "it appears on the basis of data now available, that increases negotiated for public employees since the inception of the law have generally paralleled movements in the economy as a whole." In general this is probably true with respect to wages, but exceptions are to be found. Settlements can be found which appear to be extraordinarily high and others which appear to represent minimal improvement. But the law has opened areas other than wages for discussion and negotiation. As a consequence, collective negotiations have provided for employee participation in the resolution of vital issues dealing with work and the work environment and has exposed many of these to public view. In the public sector, the resolution of such issues may rank at the same level as wages.

It is easy to understand the complaints of those who point out abuses by employers and by employees in specific situations, and it is important to continue to improve the law and its administration. It is, however, difficult to project, either from the standpoint of the merits or the politics, substantial elimination of the opportunities which state and local employees in New York now enjoy for participation in the determination of the terms and conditions of their employment. Furthermore, whatever the disagreements over a few features of the Taylor Law, it seems inevitable that any system of public employee rela-

tions in the future will necessarily include most of the provisions of the Taylor Law, or basically equivalent provisions. Many of these are not in serious dispute.

In broad terms, therefore, what are the basic matters in dispute, or on which clarification is needed?

First, there is the issue of the absence of the right to strike, including the related issue of penalties for striking. The arguments for and against a right to strike have been reviewed earlier in this report. By and large, those who oppose a right to strike insist that because public employment is so different from private employment, strikes by public employees cannot be tolerated. By and large, those who favor a right to strike in public employment minimize the differences compared with private employment. To date it appears that arguments in favor of a right to strike have not been convincing to a majority of the citizenry and it is to be expected that the prohibition will continue. Nevertheless, some who favor a right to strike are not without hope, and feel that the final returns are not yet in. Therefore, the issue can be expected to remain alive. In the interest of equity, and of effectiveness, however, penalties for striking do need re-examination. Such re-examination should be concerned, not with the abolition of penalties as deterrents, but with a critical study of the degree to which the application of existing penalties has proved ineffective or counter-productive. Furthermore, the possibility of devising appropriate penalties for illegal action by public employers needs to be examined.

Second, careful examination of, and experimentation with, impasse procedures is needed in an effort to determine whether a larger proportion of disputes can be resolved by the parties, and if they can be resolved with a greater degree of satisfaction to the parties. This examination needs to be broad and imaginative and should include a review of actual experiences as well as of new but untried ideas. Among the aims should be the encouragement of more sustained collective negotiations by the parties.

This examination of impasse procedures should be extended to include the consideration of both voluntary and compulsory arbitration for grievances and contract terms. Arbitration is no cure-all, and it may be subject to serious limitations, but it holds attraction for many who feel there can be no right to strike, but that something other than unilateral action by the employer is required to resolve an impasse which does not respond to other efforts.

Third, the scope of negotiations, in a broader sense than the term is frequently used, needs resolution and definition. In connection with specific problems of negotiation, a reasonable management rights clause would be helpful, quite possibly to both employees and employers. In a very real sense, however, public

employees have historically had many protections provided by laws other than the Taylor Law. It has not always been clear as to which of these other provisions of law are superseded by the Taylor Law. This has caused confusion. "Other legislation" has been criticized, by those favoring increased benefits, as precluding negotiations on issues which should be negotiable. At the same time, "other legislation" is criticized for providing benefits which, it is alleged, become excessive when combined with those obtained through negotiations. Both results are possible.

Further confusion can result when, as on pensions, negotiations are permitted, but changes in benefits negotiated are not effective until approved through legislation. There may be good reasons for not removing such requirements for legislative approval, but the conflict in procedures can produce frustration. Possibly some issues now subject to negotiations and to legislative approval should be subject to one, but not to the other.

The processes of collective negotiation in the public sector are complicated by the structure of government, particularly where there is separation of legislative and executive power, which is largely foreign to the private sector. Where the executive branch negotiates an agreement and transmits it to the legislative branch, the Legislature may be faced with a dilemma. Should it provide proforma approval of those aspects subject to legislation, and thus abandon its fiscal and policy making responsibilities, or should it follow its own judgment concerning implementation of the agreement with the possible result of scuttling the negotiating process? The result is that in the public sector the different roles of the executive and legislative branches of government, in relation to collective negotiation, have not always been clearly defined and accepted. To try to meet the problem by delegation of powers from the legislative branch to the executive branch would raise issues of policy and form of government going beyond what were contemplated when a system of collective negotiations was adopted. Hence the dilemma.

Closely related to the issue of scope of negotiations, is the protection which public employees have through the political process. The nature of public employment, and of our political system, is such that very significant employee benefits were provided prior to the Taylor Law and would be provided in the absence of a Taylor Law. One aspect of the issue is not whether we should abandon the Taylor Law and depend on other legislation, but rather on the degree to which dependence is to be placed on negotiations under the Taylor Law vs. the political processes as reflected in "other legislation."

Another unresolved aspect under the Taylor Law is whether political pressures will permit collective

negotiations to work. This is not to suggest that any aspect of government can be, or should be, removed from political pressures in the broad sense. In addition to other efforts, however, representatives of employees may try to obtain intervention by political figures in collective negotiations, or may benefit from voluntary intervention. On occasion, concessions are made which would not have resulted from responsible negotiations. While this is not a new phenomenon, it may be a threat to collective negotiations in the public sector because the process is vulnerable to such intervention, particularly as far as wages and wage related issues are concerned.

Even though negotiations on wages and wage related issues are sometimes vulnerable to political pressures, it is doubtful if there is a better alternative. Furthermore, collective negotiations provide a mechanism for handling a multitude of other issues which arise under terms and conditions of employment, most of which do not reach the headlines but the resolution of which is essential if public employees are to experience job satisfactions that are necessary for government to work efficiently. Collective negotiations also provide the potential, as yet largely unrealized, for effectively defining, sharpening and developing the role of management which is required if efficiency and productivity are to be achieved. Unless this potential can be achieved in substantial degree, it is likely that public impatience with collective negotiations will increase. Even in the face of such problems and limitations, it is to be expected that something like the present system of collective negotiations will have to continue. The public, therefore, has a major stake in anything that can be done to further improve the fairness and effectiveness of the Taylor Law.

Strains on public employee relations have been created by the economic inflation of recent years, and currently added stress is resulting from efforts to finance the desired level of governmental services and at the same time provide employees with appropriate terms and conditions of employment. In some instances governments are proceeding to negotiate improved terms and conditions with their employees without assurance that they will be able to obtain the necessary funds to implement them. In other instances, governments are taking a strong line in refusing to make concessions on wages and working conditions until the necessary funds are in sight. The financial problems are such that in many instances the only way in which governments can provide an appropriate level of terms and conditions of employment is through the restrictions of governmental services, sometimes with the necessity for cutbacks in personnel. In the face of these difficult alternatives, present provisions of the Taylor Law may be subject to increasing challenge from both public employers and employees.

Appendix I

Clause on scope or management rights included in the original Omnibus Bill in 1971 but withdrawn.

Section 201.4

The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment, *provided however, such term shall not include, and the public employer shall have the sole right to determine, its mission, purposes, objectives and policies, including but not limited to the standards of admission to its facilities and the nature and content of curriculum or programs offered; the facilities, methods, means and number of personnel required for conduct of its programs, including but not limited to the ratios and standards of staffing of its facilities; the standards of examination, selection, recruitment, hiring, appraisal, training, retention, discipline, promotion, assignment and transfer of its employees; the direction, deployment and utilization of its work force; the establishment of specifications for each class of position, and the classification and reclassification and allocation and reallocation of new or existing positions.* (Italicized material proposed as an amendment but withdrawn)

Paragraph from Section 1173-4.3 b., New York City Collective Bargaining Law, relating to "management rights."

It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies;

determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

Management Rights Clause in Contracts between New York State and CSEA for certain units.

5. Except as expressly limited by other provisions of this Agreement, all of the authority, rights and responsibilities possessed by the State are retained by it, including, but not limited to, the right to determine the mission, purposes, objectives and policies of the State; to determine the facilities, methods, means and number of personnel required for conduct of State programs; to administer the Merit System, including the examination, selection, recruitment, hiring, appraisal, training, retention, promotion, assignment, or transfer of employees pursuant to law; to direct, deploy and utilize the work force; to establish specifications for each class of positions and to classify or reclassify and to allocate or reallocate new or existing positions in accordance with law and the provisions of this Agreement.

Appendix II

MEMORANDUM IN SUPPORT OF SENATE 9886,
March 15, 1972 (Relates to Issue No. 1)

An Act to amend the civil service law, in relation to procedures adopted by the city of New York to resolve disputes over improper practices between public employees and public employers

Purpose of bill

To make permanent the authority of New York City's OCB to adjudicate improper practice cases subject to the possibility of review by New York State's PERB.

Summary of provisions of bill

CSL §205.5(d) would be amended to delete the clause which provides that the power of New York City's OCB to adjudicate improper practice cases will expire on March 1, 1973. In place of that clause, this bill would introduce language that makes improper practice determinations of OCB subject to review by PERB. It is left to the discretion of PERB whether or not to review a determination of OCB and PERB would have to exercise such discretion within thirty days after receiving notice of the OCB decision. PERB's authority to review OCB determinations would not delay the judicial review or enforcement of an OCB determination, but the exercise of that authority would stay court proceedings for review and enforcement.

Statement in support of bill

Unlike other mini-PERBs, New York City's OCB is adequately staffed and is competent to adjudicate improper practice cases. To deprive OCB of this jurisdiction would impair its effectiveness in the resolution of negotiations deadlocks, because in connection with that responsibility it is often necessary to resolve questions of negotiability which arise in the form of improper practice charges that a party has refused to negotiate in good faith. This bill also preserves the legislative intent that there be statewide uniformity in application of the statutory improper practice provisions by giving to PERB a watch-dog role over OCB determinations.

AN ACT

to amend the civil service law, in relation to procedures adopted by the city of New York to resolve disputes over improper practices between public employees and public employers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (d) of subdivision five of section two hundred five of the civil service law, as last amended by chapter twenty-six of the laws of nineteen hundred seventy-two, is hereby amended to read as follows:

(d) To establish procedures for the prevention of improper employer and employee organization practices as provided in section two hundred nine-a of this article, provided, however, that in case of a claimed violation of paragraph (d) of subdivision one or paragraph (b) of subdivision two of such section, such procedures shall provide only for the entry of an order directing the public employer or employee organization to negotiate in good faith. The pendency of proceedings under this paragraph shall not be used as the basis to delay or interfere with determination of representation status pursuant to section two hundred seven of this article or with collective negotiations. The board shall exercise exclusive nondelegable jurisdiction of the powers granted to it by this paragraph; provided, however, that this sentence shall not apply to the city of New York [prior to March first, nineteen hundred seventy-three], *but the board may, in its discretion, review any such determination of an agency exercising such jurisdiction on behalf of the city of New York within thirty days after a copy of such determination is filed with it. Upon such review the board may affirm or reverse in whole or in part, or modify the determination, or remand the matter for further proceedings, or make such order as it may deem appropriate. A decision of the board not to review such a determination shall not be reviewable. The exercise of jurisdiction by the board to review such a determination shall stay any proceedings for review or enforcement of that determination until issuance of a final order by the board.*

§ 2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.

**MEMORANDUM IN SUPPORT OF SENATE
9885, March 15, 1972 (Relates to Issue No. 2)**

An Act to amend the civil service law, in relation to the administrative board of the judicial conference.

Purpose of bill

To authorize the Administrative Board of the Judicial Conference to elect to come under OCB with respect to their employees who are paid from funds appropriated by the City of New York.

Summary of provisions of bill

CSL §212 is amended to specifically authorize the change indicated above.

Statement in support of bill

As an agency of the State, the Administrative Board of the Judicial Conference may not now choose procedures alternative to those set forth in the Taylor Law. With respect to non-judicial employees of the Administrative Board who are paid from funds appropriated by the City of New York, this is undesirable. Some of these employees perform similar work to that performed by other employees paid by the City of New York. The morale of the employees could be adversely affected and whipsawing could result if different negotiations procedures apply to both groups. Even for those employees performing unique duties for the courts, which are not duplicated elsewhere in the City, the interests of the City in the terms and conditions of employment of these persons who are paid by it support this proposal.

AN ACT

to amend the civil service law, in relation to the administrative board of the judicial conference

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two hundred twelve of the civil service law is hereby amended by adding thereto a new subdivision, to be subdivision three, to read as follows:

3. Notwithstanding the restrictions contained in subdivision one of this section regarding the state adopting procedures different from those provided by this article, the administrative board of the judicial conference may, by resolution with respect to non-judicial employees of the unified court system who are paid from funds appropriated by the city of New York, become subject to the provisions and procedures of a local law enacted by the city of New York pursuant to

subdivisions one and two of this section and administered by a board established by such local law.

§ 2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.

**MEMORANDUM IN SUPPORT OF SENATE
9884, March 15, 1972 (Relates to Issue No. 3)**

An Act to amend the civil service law and the judiciary law, in relation to the responsibilities of the public employment relations board regarding employee organizations which engage in strikes.

Purpose of bill

To give PERB exclusive jurisdiction over organizations of public employees for the purpose of determining whether an organization which is or has engaged in a strike should forfeit its right to dues check-off.

Summary of provisions of bill

Section 210.3 of the Civil Service Law would be amended by adding thereto a new paragraph granting PERB exclusive jurisdiction over the dues check-off penalty provisions of the law; Section 212 would be amended by deleting the exemption from such authority of public employee organizations in localities which have established mini-PERBs; and Section 751 of the Judiciary Law would be amended to delete the authority of courts to impose such penalty in connection with contempt proceedings.

Statement in support of bill

Under present law, where a local government enacts a "Little Taylor Law", the responsibility for imposing a dues check-off penalty on an employee organization charged with striking falls on the local mini-PERB or the courts (where an injunction has issued and has been violated). Recent history has shown, however, that local mini-PERBs and courts are ill-equipped and often reluctant to impose the penalty. On the other hand, PERB is equipped to handle the issues involved in imposing the dues check-off penalty and has done so on several occasions. Vesting PERB with exclusive jurisdiction over the imposition of this penalty would help to insure prompt and equal enforcement of the Taylor Law throughout the State.

There appears to be no reason why the chief executive officer of a local government that has enacted a "Little Taylor Law" should not be required to issue the report mandated by Section 210.4 of the Civil Service Law in other jurisdictions regarding his

actions in the event that the employees of such government strike. Therefore, this requirement would be extended to such an officer.

AN ACT

to amend the civil service law and the judiciary law, in relation to the responsibilities of the public employment relations board regarding employee organizations which engage in strikes

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (h) of subdivision three of section two hundred ten of the civil service law, as added by chapter twenty-four of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

[(h)] (i) No compensation shall be paid by a public employer to a public employee with respect to any day or part thereof when such employee is engaged in a strike against such employer. The chief fiscal officer of the government involved shall withhold such compensation upon receipt of the notice provided by paragraph (e) of *this* subdivision [two of section two hundred ten]; notwithstanding the failure to have received such notice, no public employee or officer having knowledge that such employee has so engaged in such a strike shall deliver or [caused] *cause* to be delivered to such employee any cash, check or payment which, in whole or in part, represents such compensation.

§ 2. Subdivision three of section two hundred ten of such law is hereby amended by adding thereto a new paragraph, to be paragraph (h), to read as follows:

(h) *The board shall exercise exclusive, nondelegable jurisdiction of the powers granted to it by this subdivision.*

§ 3. Section two hundred twelve of such law, as last amended by chapter five hundred three of the laws of nineteen hundred seventy-one, is hereby amended to read as follows:

§ 212. Local government procedures. 1. This article, except sections two hundred one, two hundred two, two hundred three, two hundred four, paragraph (b) of subdivision four and paragraph (d) of subdivision five of section two hundred five, paragraph (b) of subdivision three of section two hundred seven, section two hundred eight, section two hundred nine-a, [subdivisions one and two of] section two hundred ten, section two hundred eleven, two hundred thirteen and two hundred fourteen, shall be inapplicable to any government (other than the state or a state public authority) which, acting through its legislative body,

has adopted by local law, ordinance or resolution, its own provisions and procedures which have been submitted to the board by such government and as to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent to the provisions and procedures set forth in this article with respect to the state.

2. With respect to the city of New York, such provisions and procedures need not be related to the end of its fiscal year; and with respect to provisions and procedures adopted by local law by the city of New York no such submission to or determination by the board shall be required, but such provisions and procedures shall be of full force and effect unless and until such provisions and procedures, or the continuing implementation thereof, are found by a court of competent jurisdiction, in an action brought by the board in the county of New York for a declaratory judgment, not to be substantially equivalent to the provisions and procedures set forth in this article.

§ 4. Paragraph (a) of subdivision two of section seven hundred fifty-one of the judiciary law, as last amended by chapter five hundred three of the laws of nineteen hundred seventy-one, is hereby amended to read as follows:

(a) Where an employee organization, as defined in section two hundred one of the civil service law, wilfully disobeys a lawful mandate of a court of record; or wilfully offers resistance to such lawful mandate, in a case involving or growing out of a strike in violation of subdivision one of section two hundred ten of the civil service law, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court. [In the case of a government exempt from certain provisions of article fourteen of the civil service law, pursuant to section two hundred twelve of such law, the court may, as an additional punishment for such contempt, order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of such law, for such specified period of time, as the court shall determine or, in the discretion of the court, for an indefinite period of time subject to restoration upon application, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed pursuant to this subdivision remains wholly or partly unpaid, after the exhaustion

of the cash and securities of the employee organization, such forfeiture shall be suspended to the extent necessary for the unpaid portion of such fine to be accumulated by the public employer and transmitted to the court.] In fixing the amount of the fine [and/or duration of the forfeiture], the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (i) the extent of the wilful defiance of or a resistance to the court's mandate (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the ability of the employee organization to pay the fine imposed; and the court may consider (i) the refusal of the employee organization or the appropriate public employer, as defined in section two hun-

dred one of the civil service law, or the representatives thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine of the civil service law and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the ability of the employee organization to pay the fine imposed, the court shall consider both the income and assets of such employee organization.

§ 5. This act shall take effect on the sixtieth day after it shall have become a law.

EXPLANATION—Matter in *italics* is new; matter in brackets [] is old law to be omitted.