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Maine Labor Relations Board Annual Report, Fiscal Year 1989

Maine Labor Relations Board

ANNUAL REPORT

MAINE LABOR RELATIONS BOARD

Fiscal Year 1989

This report is submitted pursuant to section 968, paragraph 7, and section 979-J of Title 26, Maine Revised Statutes.

Introduction

During the past year, the Maine Labor Relations Board had requests for services from most segments of the public sector that have statutorily conferred rights of collective bargaining. As will be noted later in this report, there were substantial fluctuations in the Board's activities compared to the previous year. While there was a moderate increase (in percentage terms) in mediation requests, there were more marked increases in decertification election requests, fact-finding requests and prohibited practice complaints. There were also substantial increases in voluntary bargaining unit agreements (Form 1's) and voluntary bargaining agent recognitions (Form 3's), with a concomitant though smaller decrease in the number of unit determination/clarification requests and bargaining agent election requests. Overall the work load of the Board increased substantially over last fiscal year.

Sunset review was the most important legislative matter affecting the Board this year. Although no other legislative initiatives seriously impacted the jurisdiction or functions of the Board, a few matters were deserving of comment by the Executive Director or staff through written submissions and/or appearances at committee hearings and work sessions; these are discussed later. As this report goes to press, the Appropriations Committee of the Legislature has before it three public sector contracts -- two related to the Maine Maritime Academy (L.D. 995 and L.D. 1039) and one for two bargaining units in the Maine Vocational-Technical Institute System (L.D. 1694).

The State's Bureau of Employee Relations and MSEA filed a joint request for mediation in early June for contract negotiations covering five bargaining units totaling approximately 10,000 State employees, as did the Bureau and AFSCME for a contract covering some 1500 institutional services employees. Negotiators for the State and MSEA reached tentative agreement in mediation for

new, three-year contracts on June 28, while State-AFSCME negotiators reached a tentative three-year agreement in mediation on June 29. This was the first time in recent years for both sets of contracts that tentative agreements were reached prior to the common expiration date of June 30. The Judicial Department and MSEA, as well as the Maine Vocational-Technical Institute and MSEA, also filed joint mediation requests with the MLRB and reached tentative agreements in mediation in late June. All of the above contracts require funding by the Legislature.

As in past years, the staff of the Board handled a great many inquiries from public employers and employees or their representatives, the media, and members of the public. The staff continues to be a primary source of information for persons interested in the operations and procedures of Maine's public sector labor laws. In those instances that did not involve matters over which the Board has jurisdiction, the staff continued its policy of providing some orientation for the inquirer and suggesting other agencies or organizations that might be of help.

Board staff made only one court appearance in FY 89. Counsel Wayne Jacobs represented the Board before the Maine Supreme Judicial Court in the Lee Academy matter.

In an effort that will be valuable to members of the labor relations community, staff completed a topical index and accompanying abstracts of the Board's prohibited practice decisions issued through FY 88. The index includes Superior and Supreme Judicial Court opinions reviewing Board decisions. An index of the Board's representation decisions is being prepared and should be available by September, 1989. For a modest fee, copies of both indexes will be available upon request.

Board members and staff participated in a variety of meetings, conferences and educational programs this fiscal year. In July of 1988, Alternate Board Chairman Peter T. Dawson, Alternate Employee Representative Vendean V. Vafiades, Acting Executive Director Marc Ayotte and Board Counsel Wayne Jacobs attended the week-long annual meeting of the Association of Labor Relations Agencies (ALRA) held in Seattle, Washington. Preceding the annual meeting, Mr. Dawson and Ms. Vafiades also attended a three-day, ALRA-funded training (ALRAcademy) for new board members.

In September of 1988, Acting Executive Director Marc Ayotte spoke to a group of bargaining team representatives of the Maine Teachers Association. In March of 1989 he moderated a panel on representation issues at the annual conference of the New England Consortium of State Labor Relations Agencies (NECSLRA) in Hartford, Connecticut; Executive Director Nancy Connolly Fibish also attended, representing the Board.

The Executive Director also attended the annual meetings of the National Acacemy of Arbitrators in Chicago this spring and participated in labor-management cooperative meetings to resolve contract disputes and grievances at the quarterly meeting of the Council of Industrial Relations in Washington. In March, Ms. Fibish spoke on dispute resolution to a public sector labor relations class at the University of Maine in Orono, and in May she participated in a panel at the collective bargaining seminar hosted by the Maine Municipal Association.

Three staff members participated in educational programs during the fiscal year. Board Counsel Wayne Jacobs attended a three-day workshop sponsored by the University of Maine at Augusta; the workshop focused on improvement of negotiation, conflict management and dispute resolution skills. Clerical staff Lorna DeAmaral and Roberta Hutchinson participated in Maine's Fourth Annual Secretarial Symposium. Topics covered in the symposium included leadership development, improving communications, resolving conflict in the workplace, and handling workplace stress.

Two new Board members were appointed by the Governor and confirmed by the Legislature in August, 1988: Judge Jessie Briggs Gunther, of Milo, Maine, as an Alternate Chairman, and James A. McGregor of Cooper Mills, Maine, as an Alternate Employer Representative. Judge Gunther had been a Justice in the Superior Court from 1980 to 1986 and currently serves on the Board of Directors of the Maine Bar Assocation. Mr. McGregor has been Director of Public Relations for the Bath Iron Works for a number of years.

William M. Houston resigned as Chairman of the Board on April 1, 1989, following his change of legal residence from Maine to Florida. Mr. Houston had been Chairman since September of 1987, and had served as Alternate Chairman for several years before that; prior to serving on the Board, he had been the first Neutral Chairman appointed to the Board's roster of fact-finders. Mr. Houston

was also General Counsel and Vice President of the Bangor and Aroostook Railroad before his retirement in 1987. His service with the Board marked a period of sound advancement in public sector labor relations in the State of Maine, and his leadership and dedication will be missed.

There have been several staff changes among the full-time staff of the MLRB. In August of 1988, the Board appointed Nancy Connolly Fibish as Executive Director, and she assumed the duties of that position on October 3, 1988. A native of Maryland, Ms. Fibish served as a foreign service officer with the U.S. State Department from 1983 to 1988 and as a mediator, National Representative and Assistant Regional Director with the Federal Mediation Service in Chicago, Washington, D.C., and Cleveland from 1968 to 1983. She was also on the staff of the National Labor Relations Board in Chicago and Washington in 1967 and 1968.

On May 15, 1989, Marc Ayotte was promoted to the position of Labor Attorney-Mediator (formerly called "Dispute Resolution Specialist" and occupied by Robert Goldman until his retirement in August, 1988.) Also in May, 1989, Judith A. Dorsey joined the staff as Attorney Examiner. Ms. Dorsey comes to the MLRB from the Maine Audubon Society, where she served as staff attorney and lobbyist. She also gained considerable legal and negotiating experience while working at the U.S. Environmental Protection Agency and at the Public Interest Law Center of Philadelphia, where she handled some OSHA-related matters. Ms. Dorsey has also worked for the Federal Trade Commission in Washington.

Robert I. Goldman, who had done the research and writing of the MLRB's annual reports prior to his retirement last August, returned under contract to help draft the 1989 annual reports for the Board, the BAC, and the Panel of Mediators. Mr. Goldman's assistance and input have been invaluable; we sincerely appreciate his assistance with the reports, as well as his availability to the MLRB's staff during the past year.

Legislative Matters

The most important legislative matter facing the Board in FY 89 was review under the Maine Sunset Act. The Legislature's Committee on Audit and Program Review, after examining the Board's justification report and evaluating the Board's activities, found that the services of the Board "are an essential component of harmonious labor-management relations in the State." The committee

recommended continuation of the Board, and the Legislature concurred.

In Public Law 236 the 114th Legislature amended section 966 of the Municipal Employees Labor Relations Law to allow either the recognized bargaining representative of multiple bargaining units of the same employer, or the employer of those units, to petition the Board for unit merger. If the expanded unit would otherwise conform with the requirements of section 966, affected employees of each unit vote whether to be included in the merger through Board-conducted elections; a bargaining unit can be included in the expanded unit only if a majority of its voting members approve the merger. Teacher/nonprofessional employee mergers are prohibited.

Finally, a bill that would have required the Board to issue its decisions and orders in prohibited practices cases within 30 days after hearing and argument failed to receive support from the Joint Standing Committee on Labor. The bill was withdrawn by its sponsors after the committee was informed of the Board's intention to include the issue of time limits in upcoming public hearings to amend the Board's Rules and Procedures.

Bargaining Unit and Election Matters

During fiscal year 1988, the Board received 31 voluntary or joint filings (most of them Form 1's) for the establishment of or change in collective bargaining units under its jurisdiction. There were 24 in FY 88, 19 in 1987, and 9 in 1986. Of the 31 1989 filings, 19 were for units within educational institutions, and another 8 were for public safety units, confirming the recent trend toward organization among these two groups of public employees.

Twenty-one (21) unit determination or clarification petitions (filed when there is no agreement on the composition of the bargaining unit) were filed in FY 89; 16 were for determinations, and 6 were for clarifications. Seven (7) of the unit filings actually went to hearing, 6 voluntary unit agreements were signed, 5 petitions were withdrawn, 2 were dismissed, and 1 remains to be scheduled for hearing. There were 30 unit filings in 1988, 14 in 1987, and 24 in 1986.

The Lee Academy case, which began as a unit determination petition in FY 87, reached the Supreme Judicial Court in FY 89. Lee Academy Educ. Assoc. v. Lee Academy, 556 A.2d 218 (Me. 1989). The Board's 1987 reversal of a preliminary

decision by one of its hearing examiners finding Lee Academy to be a public employer under the Municipal Employees Labor Relations Act (MPELRL) had been upheld on appeal to Superior Court. The Supreme Judicial Court, sitting as the Law Court, in turn affirmed the Superior Court ruling. In doing so, it rejected the contention that the Board has no authority to reverse its hearing examiners, and reaffirmed the separate review standards contained in the MPELRL that accord more finality to the Board's findings of fact in unit determination proceedings than in prohibited practices cases.

After the scope and composition of the bargaining unit is established, either by agreement or by hearing and determination, a secret ballot bargaining agent election is conducted by the Board to determine the desires of the employees, unless a bargaining agent is voluntarily recognized by the public employer. During FY 89 there were 13 voluntary recognitions (Form 3's) filed, more than in any year since 1981. Eighteen (18) election requests were filed in FY 89; 11 elections were actually held or are scheduled. Two (2) requests were withdrawn, 1 was dismissed, 3 are pending unit determination hearings and 1 is pending a Form 1 voluntary agreement.

In addition to representation election requests, the Board received 5 requests for decertification/certification, which involves a challenge by the petitioning organization to unseat an incumbent as bargaining agent for bargaining unit members. Three (3) requests resulted in elections, 1 is scheduled for election, and 1 was withdrawn.

One decertification/certification election matter was appealed to the Board. In Merrymeeting Employees Assoc. and Local 2010, Council 74, AFSCME, No. 88-EA-01 (Me.L.R.B. Sept. 19, 1988), the Board affirmed its longstanding practice that in situations where a petition for decertification/certification is filed during the statutory "window period" of an expiring collective bargaining agreement, the representation election will be conducted as soon as practicable consistent with its election rules, and not postponed until the agreement has expired.

The Board received 9 straight decertification petitions in FY 89. No new union is involved in these petitions; rather the petitioner is simply attempting to remove the encumbent agent. Elections were conducted in 6 of these matters, 2 were dismissed, and 1 was withdrawn.

There were 3 election matters carried over from FY 88, 2 certifications and 1 decertification/certification. Consequently, there were 35 such matters requiring attention during the fiscal year; this compares with 32 in FY 88, 36 in FY 87, and 31 in FY 86.

Dispute Resolution

The Panel of Mediators is the statutory cornerstone of the dispute resolution process for public sector employees. Its importance continues to be reflected in its volume of activity and in its credibility with the client community. The activities of the Panel are summarized in this report and are more fully reviewed in the Annual Report of the Panel of Mediators.

New mediation requests received during fiscal year 1989 rose to 107 from the 91 filings of FY 1988. The FY 1989 figure represents the second highest number of filings recorded over the past ten years, exceeded only by the record 120 filings in FY 1987. In addition to the new mediation requests received during the fiscal year just ended, there were 33 matters carried over from FY 1988 that required some form of mediation activity during the year. Thus the total number of mediation matters requiring the Panel's attention in this fiscal year totaled 140, compared to 141 in the previous fiscal year. The activity in both years is continuing evidence of the sustained level of interest in the mediation process shown by the public sector labor relations community. As recorded in the Annual Reports for the past few years, it is also a continuing measure of that community's confidence not only in the process of mediation, but in the competence and expertise represented by the membership of the Panel as a whole.

That competence and expertise is reflected in the 78% settlement rate achieved for matters resolved through mediation efforts during this fiscal year, including carryovers from FY 1988. In past reports the settlement rate was based only upon settlements achieved in matters that were actually filed during the fiscal year. However, since both groups of filings contribute to the actual work load of the Panel in the course of a 12-month period, it was determined to henceforth use settlement figures representing all matters in which mediation activity has been completed. Had prior practice been followed for FY 1989, the settlement rate would have reached a level of 82%.

Among the mediation filings were two under the Maine Agricultural Bargaining Act, which was amended in 1987 to insert the Panel of Mediators in the contract dispute mechanism between processors and producers who are subject to that statute. Several problems have become apparent regarding use of the statute as it is currently drafted. First, its unrealistic deadlines indicate that the statute was drafted with little or no input from the dispute resolution community. In addition, the Panel of Mediators was not contacted prior to being inserted into the dispute resolution process for agriculture; only one Panel member, because of his background in agriculture, is technically qualified to handle agricultural disputes. Finally, parties are billed by the state for mediation services, at the State rate rather than at the higher rate labor mediators receive for non-agricultural mediations. Being assessed the higher rate could well prod participants in agricultural mediations to utilize the process more efficiently.

Several of the other mediations this year were illustrative of the complexities mediators face at the bargaining table. For example, one mediator was able to bring to a successful conclusion a unique mediation that involved a single employer in negotiations with four bargaining units represented by three separate unions. It was up to another Panel member to get parties on both sides of a dispute to move from their unusually hard-line bargaining stances, while allowing them both to save face.

In a dispute concerning a police unit, the mediator was forced to suspend negotations temporarily, since one of the parties had sent its negotiator to the bargaining table without any real authority to bargain. In his mediation of a dispute between a teachers' association and a school committee, a Panel member faced a situation where one party was not interested in a settlement, even though that party had requested the mediation.

One PUM member mediated a dispute between a municipal housing authority and a maintenance unit that presented problems inherent in negotiations with any public authority -- a large number of behind-the-scenes groups and individuals had to be satisfied. In addition, the representative for one party at the bargaining table was replaced midstream. Another mediator faced a unique situation in which management desired to continue its policy of what it called "win-win" problem-solving negotiations, while the newly certified union insisted on more traditional collective bargaining. A contract was eventually negotiated

through the more traditional means.

Another Panel member was called upon to help negotiate a successor contract between a teachers' association and the school committee representing several towns. Such mediations can be particularly trying, due to the fact that the contract must reflect the financial realities of each town -- they each have independent and sometimes very different budget constraints.

This particular mediation also had something in common with nearly two-thirds of the mediations conducted by this mediator in FY 89 -- a dominant issue in the negotiations was health insurance benefits. It was this issue, in the mediator's experience, that most often derailed or threatened to derail settlements. Several other mediators have made the same observation. Given the recent dramatic rise in health insurance premiums, these observations should not be surprising; public sector labor relations are simply reflecting a dilemma that is facing the nation as whole.

Fact-finding is the second step in the three-step process of statutory dispute resolution. In fiscal year 1989 there were 29 fact-finding requests filed.[1] (One involved four separate school bargaining units; the union filed a single fact-finding request, while the employer filed four separate petitions. For the purpose of statistics-gathering, the matter was counted as one filing.) The 29 requests represent nearly a two-fold increase over the last year, and the highest number since FY 82. Ten (10) petitions were withdrawn or otherwise settled, 13 requests went to hearing (2 of those were "mediated" to a settlement with the aid of the fact-finding panel), 4 petitions are pending hearing, and 2 are currently in mediation.

The reason for the jump in fact-finding requests is not clear. One factor may be the large increases in health insurance premiums already mentioned. To some extent, these increases are outside the control of parties at the bargaining table, and may represent a substantial economic burden for whichever party

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[1]Twenty-seven (27) were filed with the Board for appointment of private fact-finding panels by the Executive Director. Two (2) were filed with the Board of Arbitration and Conciliation, which requires joint submission by the parties. When the services of the State Board of Arbitration and Conciliation are utilized, the statutory per diem and expenses of the Board members are defrayed by the State.

must absorb them. A second reason for the increase in fact-finding requests may be that the relatively strong economy of the last few years has permitted employees to concern themselves less with job security and more with the level of wages and other benefits.

Some of the fact-findings conducted this fiscal year were particularly interesting or instructive. First, the observation by mediators that health care benefits were a major sticking point was echoed by fact-finders. One fact-finder suggested that this problem may begin to affect the ability of public sector employers to recruit and/or retain a workforce sufficient for their needs. It has traditionally been the ability of the public sector to provide a good benefits package, including health insurance, that has made it competitive with private sector employers.

Two members chaired fact-finding panels that conducted what they described as "mediated fact-finding." In one of those cases, because many issues were brought to the panel that did not require fact-finding for resolution, the hearing turned into a process consisting of suggestions from the panel for settlement, interspersed with caucuses between each of the parties and their respective panel representatives. Eventually, each of the issues was settled without the need for formal fact-finding.

In another fact-finding hearing, parties indicated to the fact-finding panel upon return from a lunch break that they had caucused, met together, and reached a settlement. Since no vehicle was in place to memorialize the terms of the settlement, the panel refused to adjourn the hearing. It had been their experience that reducing oral settlements to writing could create difficulties, and in some cases, derail the settlement. The decision of the panel to recess the hearing rather than adjourn it turned out to be a wise one; one and one-half months later, there was still no written contract. Upon receipt of a letter suggesting that the panel intended to reconvene the hearing shortly, the parties finally reached an accord -- neither the weakness in one of the party's positions nor the expense of fact-finding made a full hearing attractive.

Finally, one fact-finding involving a teachers' association and a Maine School Administration District (MSAD) board of directors resulted in part from the fact that a referendum pending for the merger of the district and a school union overshadowed the negotiations. Thus it was unclear to the parties whether

any contract they might negotiate would be implemented.

Interest arbitration is the third and final step in the statutory dispute resolution process. Under the provisions of the various public employee statutes administered by the Board, an interest arbitration award is binding on the parties only as to non-monetary issues. Issues involving salaries, pensions and insurance are subject to interest arbitration, but an award on these issues is advisory only. In recent years the Board has received few interest arbitration requests, and in FY 89 it received none. Nor were any requests received by the Board of Arbitration and Conciliation (BAC). On occasion, there are informal requests for the Board's list of arbitrators, for use outside the auspices of either the Board or the BAC. Although the public statutes require that such arbitration awards be filed with the Board, no awards were filed this year. While it is assumed that no interest arbitration awards were issued in the public sector during the year, it may be that parties have simply failed to provide proper notification to the Board.

Prohibited Practices

One of the Board's responsibilities is to hear and rule on prohibited practice complaints. These matters are heard in formal hearings by the full, three-person Board. Twenty-four (24) complaints were filed in FY 89; though this represents a 41% increase over FY 88, it is not out of line with the number of filings in the past six years. During that time, complaints filed have fluctuated from a low of 17 to a high of 31, with the average being 24 -- the number filed this year.

In addition to the 24 complaints filed in FY 89, there were 4 carryovers from FY 88. The Board conducted 7 hearings during the year, and Board members sitting as a single prehearing officer held prehearing conferences in an additional 8 cases for which no hearings were necessary or for which hearings have not yet occurred. In 4 matters the Board issued formal Decisions and Orders; an additional 3 are being drafted. Four (4) complaints were dismissed for procedural deficiencies; 1 matter has been deferred pending the resolution of four grievances; and 2 complaints await hearing. Twelve (12) complaints were dismissed or withdrawn at the request of the parties; such requests generally occur when the complaint is related to contract bargaining and after the parties reach agreement on and ratify the contract.

One prohibited practice case in FY 89 was of particular interest. In Auburn Firefighters Assoc. Local 797 v. City of Auburn, No. 89-01 (Me.L.R.B. Mar. 31, 1989), the Board, in addition to finding a contract violation in the city's unilateral wage increase and deferring some other contractual issues, took the opportunity to review its precedent regarding employer implementation of last-best offer at impasse. The labor relations community is now on notice that the use of the theory of implementation of last-best offer at impasse as a defense to charges of unlawful unilateral change is not appropriate during the pendency of impasse resolution procedures requested by the employer bargaining agent, absent extraordinary circumstances.

Appeals

The appeal to the Board of the Merrymeeting decertification election and the appeal to the Law Court of the Lee Academy case are discussed elsewhere in this report. A second appeal to the Law Court involved the Windham Teachers Association case, discussed in last year's report. The appeal was dismissed in March of 1989 on the stipulation of the parties. Windham School Comm. v. Windham Educators' Assoc., Nos. 87-14 and -15 (Me.L.R.B. Apr. 17, 1987), aff'd, No. CV-87-153 (Me. Super. Ct., Ken. Cty., Sept. 30, 1987), appeal dismissed, No. KEN-87-449 (Me. Mar. 27, 1989). The Superior Court had previously affirmed an order of the Board finding that the Windham Teachers Association had engaged in illegal "job actions."

One unit determination by a Board hearing examiner was appealed to the Board; it was subsequently dismissed at the request of the appellant. Finally, in Teamsters Local Union 48 v. Washington Cty. Commrs., No. 89-07 (Me.L.R.B. Apr. 4, 1989), a prohibited practice case, the Board found that the employer had made a unilateral change in a mandatory subject of bargaining, in violation of the statutory duty to bargain. The Board's Decision and Order has been appealed to Superior Court.

Summary

The following chart summarizes the filings for this fiscal year, along with the previous five years:

	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988	FY 1989
Unit Determination/ Clarification Requests		+13%	-50%	-53%	+114%	-30%
Number filed---	32	36	24	14	30	21
Agreements on Bargaining Unit (MLRB Form #1)		+190%	-69%	+111%	+21%	+29%
Number filed---	10	29	9	19	24	31
Voluntary Recognitions (MLRB Form #3)		-	-43%	-	+125%	+44%
Number filed---	7	7	4	4	9	13
Bargaining Agent Election Requests		+81%	-58%	-42%	+43%	-10%
Number filed---	21	38	24	14	20	18
Decertification Election Requests		-28%	+46%	-26%	-40%	+56%
Number filed---	18	13	19	15	9	14
Mediation Requests		+18%	+15%	+22%	-24%	+19%
Number filed---	72	85	98	120	91[2]	107
Fact-Finding Requests		-31%	+73%	-5.3%	-17%	+93%
Number filed---	16	11	19	18	15	29
Prohibited Practice Complaints		-33%	+25%	-12%	-23%	+41%
Number filed---	31	20	25	22	17	24

[2]Beginning in FY 88, this number includes disputes referred to the Panel of Mediators under the Maine Agricultural Bargaining Act.

As the summary table indicates, the demand for the Board's services increased significantly over the last fiscal year. Whether the increase is a preview of things to come, or is merely an aberration in the recent trend toward leveling off of the demand for services, cannot be determined at this time.

Public sector labor relations in Maine has been maturing -- as evidenced by: a) the parties' increased use of the Board's dispute resolution machinery to resolve their differences; b) the substantial increase in voluntary agreements and recognitions on representation matters; and c) the boost in requests for withdrawal or dismissal of prohibited practice complaints once agreements are reached in other forums. If this trend continues, it may lead to an increased demand for the dispute resolution services of both the MLRB and the BAC and a concomitant decrease in the need for the Board's legal services, except in those instances where issues are precedent-setting and require a definitive decision by the Board. However, it is not clear whether the parties' increased reliance on dispute resolution machinery indicates that Maine's public sector labor-relations community is ready to move toward a new plateau of labor-management cooperation in collective bargaining.

Dated at Augusta, Maine, this 30th day of June, 1989.

Respectfully submitted,

Nancy Connolly Fibish
Executive Director
Maine Labor Relations Board