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Chapter 6: Labor Law: Municipal Bargaining

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C H A P T E R 6

Labor Law: Municipal Bargaining

ROBERT M. SEGAL

§6.1. Introduction. Twenty-five years ago a distinguished labor relations expert prophesied that the labor relations developments in private industry would someday be felt in the field of public employment.¹ That day has now arrived. The 1960s have witnessed a tremendous growth in employment, unionism, and labor strife in the public sector. From 1957 to 1967, public employers added 3.5 million persons to their payrolls, and public employment rose faster than employment in the private sector.² It is anticipated that by 1975 another 3.3 million persons will swell the number of government employees to a total of almost 15 million.³ In the ten years between 1960 and 1970, public employee union membership rose from slightly more than one million to more than three million, and in 1970 union members constituted almost 25 percent of the public sector work force.⁴ Although generally

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§6.1. ¹ Beyer, *Employee Relations in the Public Sector*, 7 *Pub. Personnel Rev.* 20 (1946). For a general discussion of developments in the public sector, see Bok and Dunlop, *Labor and the American Community* 312-341 (1970) [hereinafter cited as Bok and Dunlop]; Twentieth Century Fund, *Pickets at City Hall* (1970) [hereinafter cited as Twentieth Century]; Industrial Relations Research Assn., *Collective Bargaining in the Public Service* (1966); Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations*, 30 *Md. L. Rev.* 179 (1970); Lev, *Strikes by Government Employees: Problems and Solutions*, 57 *A.B.A.J.* 771 (1971); Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service*, 22 *Sw. L.J.* 585 (1969); Comment, *Collective Bargaining for Public Employees: An Analysis of Statutory Provisions*, 8 *B.C. Ind. & Com. L. Rev.* 273 (1967). For an analysis of state laws covering teachers, see Wollett and Chanin, *The Law and Practice of Teacher Negotiations* (1970); Summary of State Collective Bargaining Statutes Affecting Teachers, Compact, spec. supp. Feb. 1971, table at 17-24. For discussions of labor relations in the public sector in Massachusetts, see Teele, *Analysis of Massachusetts Municipal Law v. State Law and the NLRA* (1970); Moran, *Collective Bargaining in the Public Sector—Massachusetts Style*, 52 *Mass. L.Q.* 153 (1967); Mass. House Bill 5235 (1971) (Second Interim Report of the Special Legislative Study Commn. on Collective Bargaining) [hereinafter cited as House Bill 5235]. The collective bargaining statutes of Massachusetts and regulations pertaining thereto are published in pamphlet form as Mass. Labor Relations Commn., *Collective Bargaining Under the General Laws of the Commonwealth of Massachusetts* (1970).

² Bok and Dunlop 314.

³ *Ibid.*

⁴ Twentieth Century 1.

speaking it is illegal for public employees to engage in work stoppages,⁵ the growth in public employee labor strife, as measured by the increase in the number of work stoppages over the past ten years, has been exponential. In 1968 there were 254 walkouts involving over 200,000 public employees, with over 2.5 million man-days idle. Ten years earlier there had been a nationwide total of only 15 strikes by 1720 state and local government employees, with 7510 man-days idle.⁶ Municipal workers now go on strike somewhere in the United States every three days.⁷

The causes of federal, state, and municipal employee unrest are several. First of all, increasingly younger and more militant employees have joined the public work force. Secondly, antiquated personnel practices and delays in handling grievances and negotiations have created employee frustration. Job hazards have increased, particularly for policemen, firemen, and teachers, and municipal employees have sought to exert their influence over conditions of employment to an extent never before attempted. In addition, the spirit of unrest, protest, and student activism reflected in the civil rights and antiwar movements and the greater tolerance for protest and direct action against constituted authority have provided a hospitable climate for unionization and strikes by public employees.

Economics has also had an important role in the labor strife of the public sector. The wages of many state and local employees have lagged

⁵ On the federal level, government employees are specifically excluded from coverage under the National Labor Relations Act, 29 U.S.C. §§151 et seq., which recognizes the right of employees in the private sector to strike. Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970), permits federal employees to organize unions and establish procedures which facilitate union recognition and negotiation between employees and the government over "personnel policy" and working conditions to the extent such subjects are not covered by laws and regulations. For a discussion of Exec. Order No. 11,491, see Loewenberg, *Developments of the Federal Labor-Management Relations Program: Executive Order 10988 and Executive Order 11491*, 21 Lab. L.J. 73-79 (1970). In *Postal Clerks v. Blount*, 404 U.S. 802 (1971), the Court affirmed without opinion a decision upholding the constitutionality of 5 U.S.C. §7311(3) and 18 U.S.C. §1918, which, in effect, ban strikes by federal employees.

For a discussion of state labor relations, see McKelvey, *The Role of State Agencies in Public Employee Labor Relations*, 20 Ind. & Lab. Rel. Rev. 179 (1967). For a detailed summary of state labor laws, see Rubin, *A Summary of State Collective Bargaining Law in Public Employment* (Pub. Employee Relations Rep. No. 3, 1968); see also Executive Bd. of AFL-CIO Maritime Trades Dept., *Collective Bargaining in the Public Sector* (1969). In *Jefferson County Teachers Assn. v. Board of Educ.*, 463 S.W.2d 627 (Ky. 1970), *cert. denied*, 404 U.S. 865 (1971), the Kentucky Supreme Court held that Kentucky's denial of the right to strike of public school teachers did not violate the state or federal constitution. In *Rogoff v. Anderson*, 28 N.Y.2d 880, 271 N.E.2d 553, 322 N.Y.S.2d 718 (1971), *dismissed for want of substantial federal question*, 404 U.S. 805 (1971), the New York court upheld a statute requiring an organization of public employees seeking recognition as a bargaining agent to file an affirmation that it did not assert the right to strike.

Some states do accord to public employees the right to strike. In both Hawaii (Laws 1970, Act 171, §12 (4 BNA Lab. Rel. Rep. 21:232 to 21:233)) and Pennsylvania (Pa. Stat. Ann. tit. 43, §§1101.1001 to 1101.1010 (Supp. 1971)) public employees have a limited right to strike after they have exhausted certain prescribed procedures.

⁶ Twentieth Century 32.

⁷ Christian Science Monitor, Jan. 19, 1971, at 1.

far behind wages in private employment, and the inflationary pressures of the sixties have stimulated large wage and benefit demands which have fostered more than 50 percent of all public sector labor disputes in recent years.⁸ Public employee demands for wage parity with the private employee must compete with the need for larger public outlays for construction, welfare, and expanded and new services, and these wage demands come at a time of manifest taxpayer dissatisfaction with rising taxes and inadequate government services.⁹ As a consequence, resistance to the wage demands runs high on the part of both governmental employers and taxpayers. It has not helped that many states have only begrudgingly accepted the existence of public employee unions.¹⁰ Although the right of employees to organize is recognized in the great majority of states, there is much less acceptance on the part of public authorities of the need to negotiate with public employee unions. Indeed, several states have enacted legislation prohibiting collective bargaining with public employees.¹¹ Only a few states have established procedures to determine an appropriate bargaining unit, to test the strength of employee support for a given union, to ascertain the proper subjects of collective bargaining, or to resolve disputes over the rules and procedures of collective bargaining.¹²

⁸ Twentieth Century 33.

⁹ Since wages and salaries make up almost half of state and local government expenditures and 15 percent of federal expenditures, a 5 percent wage and salary increase to all government employees would cost taxpayers \$4 to \$5 billion, exclusive of related fringe benefits. Bok and Dunlop 314.

¹⁰ The failure of public employers to recognize or negotiate with public employee unions was the major cause of approximately one-quarter of the public sector strikes between 1962 and 1968. Twentieth Century 33.

¹¹ Texas has enacted legislation declaring collective bargaining with public employees to be against public policy (Tex. Rev. Civ. Stat. art. 5154c (1971)); North Carolina has prohibited organization on the part of public employees (N.C. Gen. Stat. §§5-97 (1965)), although the statute has been declared unconstitutional on its face (*Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969)); and Alabama prohibits state employees from joining unions (Ala. Code tit. 55, §§317(1)-317(4) (1960)). However, in *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969), it was held that public employees have a right under the First and Fourteenth Amendments to belong to unions.

¹² Connecticut (Conn. Gen. Stat. Ann. §§7-467 to 7-477 (Supp. 1972)), Hawaii (Laws 1970, Act 171 (4 BNA Lab. Rel. Rep.21:224 to 21:234)), Massachusetts (G.L., c. 149, §§178D-178N (Supp. 1970)), Michigan (Mich. Stat. Ann. §§17.455(1) to 17.455(16) (1968)), New York (N.Y. Civ. Serv. Law §§200-208 (McKinney Supp. 1971)), Pennsylvania (Pa. Stat. Ann. tit. 43, §§217.1 to 217.10 (Supp. 1971) (policemen and firemen only)), Rhode Island (R.I. Gen. Laws §§28-9.4-1 to 28-9.4-19 (1969)), and Wisconsin (Wis. Stat. Ann.

§111.70 (Supp. 1972)) have adopted comprehensive statutory schemes regulating public employee labor relations. Other states have adopted specific statutes to regulate particular employees, primarily teachers. See Summary of State Collective Bargaining Statutes Affecting Teachers, Compact, spec. supp. Feb. 1971, table at 17-24.

Absent specific statutory authorization to bargain collectively with their employees, governmental units have been forced to seek authorization to do so under common law. Courts have divided on the question. In Florida (*Dade County v. Amalgamated Assn. of Street, Elec. Ry. & Water Work Employees*, 157 So. 2d 176 (Fla. App. 1963), *cert. denied*, 379 U.S. 971 (1965)), and in California (*Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 168 P.2d 741 (1946)), the courts have not granted governmental units the authority to bargain collectively without specific authorization, on the theory that collective bar-

Public employment in Massachusetts has reflected the nationwide trends. The number of public employees rose sharply in the past decade: state employment increased from 40,352 in 1959 to the present 55,000; city, county, and town employment soared from 138,000 to the present estimated 220,000.¹³ One-fifth of the total work force in Massachusetts now earns its living by public employment.¹⁴ Public employee unionism has also greatly increased: in the three-year period from 1969 through 1971 the number of local unions representing public employees rose by 50 percent (from 376 to 560), and total membership increased by nearly 40 percent (from 78,694 to 108,349).¹⁵ As of 1971, the number of unionized employees in municipal and state service constituted 18 percent of the total organized labor force in Massachusetts,¹⁶ an increase of 360 percent in seven years. Prior to the effective date of the Massachusetts collective bargaining law in 1966, there were no written labor contracts for school teachers, and the Massachusetts Teachers Association (MTA) had only 30,000 members. Today, in nearly every one of the state's 351 cities and towns, education personnel are represented by locals of the Massachusetts Federation of Teachers, AFL-CIO, or by the MTA, which itself claimed 43,000 members as of 1969.¹⁷ As of February 1971, 42,000 of the state's 55,000 employees were members of bargaining units.¹⁸

Concerted activities on the part of Massachusetts public employees have increased as well, both in number and variety. There have been strikes by teachers in Boston, New Bedford, and Fall River; mass refusals to work overtime by municipal employees in Worcester; "blue days" by patrolmen; demonstrations by firemen and policemen; and mass resignations of nurses and threats of resignation by doctors at the Boston City Hospital. In Massachusetts, as in other urban states, the time of the public employee has come.

As state and national statistics indicate, public employment is becoming an increasingly important segment of the labor market. More stress is being placed on the laws by which labor conflicts in the public sector must be resolved. The growing significance of public employee labor

gaining illegally narrows the sovereignty of the governmental units involved. In other states, however, the authority has been granted, e.g., *Norwalk Teachers' Assn. v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951) (school board could bargain with teachers' union over wages and working conditions, provided that the resulting contract covered only union members and did not limit the statutory power of the Board of Estimates to fix the maximum aggregate amount of teacher salaries).

¹³ House Bill 5235, at 15.

¹⁴ *Ibid.*

¹⁵ Mass. Dept. of Labor and Industries, *Directory of Labor Unions 189-190* (1971). It is interesting to note that the greatest increase in union membership occurred in the ranks of female employees in the public sector, whose number increased from 28,333 to 45,150 during the years 1969-1971. The number of male employees rose from 50,361 to 63,199 during the same period.

¹⁶ *Ibid.*

¹⁷ *Boston Globe*, Dec. 2, 1969, at 10, col. 1.

¹⁸ House Bill 5235, at 15.

relations presents a new challenge to the law of collective bargaining, one which must be met if mature and harmonious labor relations in the public sector are to be achieved.

§6.2. Introduction to Massachusetts municipal labor relations legislation. Prior to 1943, public employees in Massachusetts had only a limited right to organize.¹ In 1943, the commissioner of administration and finance issued a directive declaring that state employees could organize and be represented by their own chosen representatives,² but the status of employees of political subdivisions was unaffected by the directive. Not until 1958 did the legislature grant to all public employees—except police officers—the right to join unions and to present proposals with respect to salaries and other conditions of employment through their own representatives.³ During the years 1958 to 1965, public employees formed unions, met with various governmental officials, and filed legislation concerning public employment, but they remained dependent on legislation for increases in wages and benefits.⁴ It was not until 1965 that a comprehensive labor relations law was enacted for public employees.⁵ By Chapter 763 of the Acts of 1965, the legislature provided a comprehensive mandatory collective bargaining law for municipal employees throughout the Commonwealth.⁶ Although the municipal bargaining statutes have been amended several times, their basic provisions remain intact.

Chapter 763 of the Acts of 1965 inserted Sections 178G to 178N in Chapter 149 of the General Laws. In Section 178G, the terms *municipal*

§6.2. ¹ G.L., c. 149, §20 was the only source of any right to organize: “No person shall, himself or by his agent, coerce or compel a person into a written or oral agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person.”

² Doyle, *Labor Perspectives on the Civil Service: The Roles of Unionism*, Tufts Assembly on Mass. Government 1 (1966).

³ Acts of 1958, c. 460, added G.L., c. 149, §178D, which grants public employees the right to join unions and also prohibits discrimination against, or the discharge of, those employees because of their union activities. The intimidation or coercion of public employees in carrying out their union activities is also prohibited. By Chapter 156 of the Acts of 1966, police officers were given the rights granted to other municipal employees by the municipal bargaining statutes.

⁴ E.g., Acts of 1957, c. 447 (raising the minimum wage for teachers to \$3300); Acts of 1963, c. 412 (permitting a town to grant any of its employees a leave of absence with pay to attend a veterans' convention); Acts of 1964, c. 637 (recognizing the right of employees of the Commonwealth to organize).

⁵ Prior to 1965, the activities of municipal employees and their unions were controlled by common law, which prohibited strikes, offered no machinery for union recognition or collective bargaining, and did not recognize any substantive right on the part of municipal employees to join a union and to be free from interference and coercion in their activities. The state anti-injunction law (G.L., c. 214, §9A) and the state labor relations laws (G.L., c. 150A) did not apply to public employees, and, as a result, injunctions against employee activities could more easily be obtained in the public sector. E.g., *Hansen v. Commonwealth*, 344 Mass. 214, 181 N.E.2d 843 (1962) (transit authority held to be body politic incorporate and political subdivision of the Commonwealth; therefore, authority employees were public employees and were not covered by anti-injunction labor statute).

⁶ State employees are covered by G.L., c. 149, §178F.

employer, employees, employee organization, and *professional employee* are defined. Section 178H sets forth the rights of employees and the duty of the bargaining representative, the procedure for determining which employee organization is to be the bargaining representative, guidelines for determining the appropriate bargaining unit, and authority for the use of consent elections. Section 178I imposes the duty to bargain collectively and details the requirements as to who may represent the employer in bargaining sessions. In Section 178J the procedure for the resolution of an impasse in negotiations is set out, and under Section 178K certain services of the Massachusetts Board of Conciliation and Arbitration are made available to employers and employee organizations. Section 178L prohibits specified activities of employee organizations and municipal employers and creates a procedure whereby complaints with respect to prohibited activities are evaluated and appropriate remedies dispensed. Section 178M outlaws strikes by public employees. The final provision in the 1965 enactment, Section 178N, notes certain jurisdictional limitations and declares that no provision of the act shall in any way imply a right to strike.

The administration of the municipal bargaining statute is entrusted primarily to the Massachusetts Labor Relations Commission, which is composed of three members, each appointed by the governor for a five-year term.⁷ The commission is granted the authority to make, amend, and rescind such rules and regulations as may be necessary to implement the mandate of its own enabling act,⁸ the provisions of G.L., c. 149, §§178H and 178L, and the provisions of G.L., c. 150A, which deal with labor relations in the private sector.⁹ On June 1, 1970, five years after the passage of Chapter 763 of the Acts of 1965, and pursuant to the authority granted therein, the commission issued rules and regulations with respect to Chapter 149.¹⁰

The Massachusetts Board of Conciliation and Arbitration also plays an important role in the settlement of labor disputes. The board is administered in accordance with Chapter 150 of the General Laws and provides its services to both public and private employers. It is empowered to conciliate, arbitrate, and appoint fact finders in its efforts to resolve labor disputes.¹¹ The current fact-finding rules of the board with respect to public employers were issued in 1971 pursuant to the board's authority under Chapter 149, Section 178J(c);¹² the board

⁷ G.L., c. 23, §9O.

⁸ The commission's enabling act is G.L., c. 23, §§9O-9R.

⁹ *Id.* §9R.

¹⁰ Mass. Labor Relations Commn., Rules and Regulations Relating to the Administration of an Act Providing for the Election of Representative Bargaining Agents with Political Subdivisions of the Commonwealth (effective June 1, 1970), as published in Commonwealth of Massachusetts, Collective Bargaining under the General Laws of the Commonwealth of Massachusetts 36-45 (1970) [hereinafter cited as Rules and Regulations].

¹¹ G.L., c. 149, §§178J, 178K.

¹² Mass. Bd. of Conciliation and Arbitration, Fact Finding Rules (April 16, 1971) (available from the board) [hereinafter cited as Fact Finding Rules].

also has issued regulations governing the arbitration procedure.¹³

§6.3. Representation of municipal employees. All employees¹ of municipal employers are granted the right of self-organization, the right to form, join, or assist any employee organization, and the right to bargain collectively through representatives of their own choosing, free from *actual* interference, restraint, or coercion.² This right, however, is subject to two provisos, namely: that the employee organization recognized by a municipal employer or designated as the representative of the majority of the employees represent an “appropriate unit,”³ and that the employee organization, as exclusive bargaining agent for all employees in that unit, represent the interests of all such employees without discrimination and without regard to membership in the organization.⁴

An employee organization can be certified by the commission as the bargaining representative⁵ of an appropriate unit of employees by going through the statutory procedures of petition, hearing, election.⁶ There are several ways in which the commission may be petitioned relative to certification of an employee organization: (1) by a municipal employer alleging that one or more employee organizations have presented a claim to be recognized as the representative of a majority of employees in a specified unit;⁷ or (2) by an employee, group of employees, or an employee organization alleging that a substantial number of employees wish to be represented for collective bargaining by

¹³ Mass. Bd. of Conciliation and Arbitration, Rules and Regulations (undated) (available from the board).

§6.3. ¹ As defined in G.L., c. 149, §178G, *employee* does not include an elected official, a board or commission member, or an executive officer of any municipal employer. *Municipal employer* is defined as “any county, city, town, or district, and any person designated by the municipal employer to act in its interest in dealing with municipal employees.” *Ibid.*

² G.L., c. 149, §178H(1). The statute apparently draws a distinction between freedom from interference, restraint, or coercion, which is protected by Section 178L, and freedom from *actual* interference, restraint, or coercion, which is protected by Section 178H. The distinction has not yet been litigated, nor has the commission issued explanatory regulations.

Section 178G defines *employee organization* as “any lawful association, organization, federation or council having as a primary purpose the improvement of wages, hours and other conditions of employment.”

³ G.L., c. 149, §178H(1). The determination of appropriateness is within the discretion of the Massachusetts Labor Relations Commission. *Id.* §178H(4).

⁴ *Id.* §178H(1).

⁵ An employer always has the option, if so requested by an employee organization, of recognizing the organization as the employees’ bargaining representative without any formal procedural steps being taken. See *id.* §§178H, 178I. Having been recognized by the employer, the employee organization is bound by G.L., c. 149, §§178H, 178I, and 178L to represent the employees in the unit and to bargain collectively just as though the organization had been certified by the commission. *Ibid.* The advantage gained by certification is security: only if the organization is certified after an election can it be secure for one year from decertification by another election. *Id.* §178H(3).

⁶ G.L., c. 149, §§178H(2), 178H(3).

⁷ G.L., c. 149, §178H(2). The other necessary contents of petitions brought by employers are prescribed in Rules and Regulations art. II, §2A.

an employee organization as exclusive representative;⁸ or (3) by an employer, employee or group of employees, or an employee organization alleging that the employee organization currently certified or recognized by the municipal employer as the bargaining representative does not currently represent a majority of the employees in the unit.⁹ Absent uncommon or extenuating circumstances, the petitions of an employee, group of employees, or an employee organization must be signed by at least 30 percent of the employees in the unit that the organization seeks to represent.¹⁰ The commission must verify the signatures supporting these petitions if, within ten days of the filing of the petition, 5 percent of the employees in the unit request such verification.¹¹

If, after investigating the petition, the commission finds reasonable cause to believe that a question of representation exists, it must hold a hearing.¹² At this time the employer and the employees or the employee organization may waive the hearing and agree to the commission's conducting a consent election.¹³ Absent such a consent election agreement, a formal, public hearing is held following notice to all interested parties,¹⁴ at which hearing all interested parties may be represented by counsel.¹⁵ After the hearing, the commission may either certify the bargaining representative¹⁶ or, if a question of representation remains, direct an election by secret ballot or other suitable means to resolve the issue.¹⁷ The statute specifically rules out elections in two instances: (1) within the 12 months following a valid election in the same unit; and (2) during the term of a collective bargaining agreement to which the unit is subject (except for good cause).¹⁸ The commission has the discretion to control the terms and manner of conducting the election, and must specify them when it directs the holding of an election.¹⁹ The employee organization that receives the majority of the votes cast in an election will be designated by the commission as the exclusive bargaining representative of the employees in the unit.²⁰ In

⁸ G.L., c. 149, §178H(2). The other necessary contents of petitions filed by these parties are prescribed in Rules and Regulations art. II, §2.

⁹ G.L., c. 149, §178H(2). The necessary contents of decertification petitions are prescribed in Rules and Regulations art. II, §2B.

¹⁰ Rules and Regulations art. II, §1. The phrase *uncommon and extenuating circumstances* is not defined or further described in Rules and Regulations.

¹¹ G.L., c. 149, §178H(2).

¹² *Ibid.*

¹³ G.L., c. 149, §178H(5). Rules and Regulations art. II, §10, sets forth the consent election agreement.

¹⁴ G.L., c. 149, §178H(2); Rules and Regulations art. II, §§3, 5.

¹⁵ Rules and Regulations art. II, §6; the hearing procedure is set forth in Rules and Regulations art. II, §§4-7.

¹⁶ Rules and Regulations art. II, §8.

¹⁷ G.L., c. 149, §178H(3). There is no elaboration of the meaning of *other suitable method* in the statute or in Rules and Regulations.

¹⁸ *Ibid.* *Good cause* is not defined or described in the statute or in Rules and Regulations.

¹⁹ Rules and Regulations art. II, §9.

²⁰ G.L., c. 149, §178H(3).

an election where none of the choices on the ballot receives a majority, a runoff election between the top two choices is held,²¹ the winner being certified. Elections may be set aside by the commission based on objections made to and filed with the commission within five days of the election.²²

The determination of the appropriate bargaining unit is left to the discretion of the commission,²³ with two caveats: (1) uniformed employees of the fire department are to be in separate units;²⁴ and (2) no unit shall include both professional and nonprofessional employees unless a majority of the professional employees vote for inclusion in the larger unit.²⁵ The regulations issued by the commission do not shed light upon any other standards that the commission may utilize. General Laws, c. 149, §178H(4), which deals with the determination of appropriate bargaining units, should be compared with the similar statutory provision applicable to private employment²⁶ and with the statute that regulates collective bargaining for state employees.²⁷

The extent of the commission's discretion in determining the appropriate bargaining unit, the general standards to be considered in making such a determination, and the method of reviewing the commission's determination were discussed by the Supreme Judicial Court in *City Manager of Medford v. State Labor Relations Commission*.²⁸ The commission had determined that the appropriate bargaining unit was to consist of all uniformed firefighters other than the chief. An order was then issued that an election be held for the employees in the unit to ascertain whether the firefighters in fact desired to be represented by the union. The city manager argued that the commission's unit was inappropriate because all uniformed supervisory employees with the exception of the chief were put in the same unit with uniformed non-supervisory employees. The Court replied:

[Section 178H(4)] does not indicate to us that all uniformed firefighters must be in the same unit. We think that the section re-

²¹ Ibid.

²² Rules and Regulations art. II, §9.

²³ G.L., c. 149, §178H(4).

²⁴ Ibid.

²⁵ Ibid. G.L., c. 149, §178G, defines a *professional employee* as "any employee engaged in work which is predominantly intellectual and varied in character . . . which involves the consistent exercise of discretion and judgment in its performance . . . and which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. . . ."

²⁶ The statute applicable to private employment is G.L., c. 150A, §5(b).

²⁷ The statute applicable to state employees is G.L., c. 149, §178F(3), which provides in part: "Employee organizations and the appropriate department may establish appropriate collective bargaining units based upon community of interest, which may include similar working conditions, common supervision and physical location. Employees may, in appropriate cases, be given the opportunity to determine for themselves whether they desire to establish themselves as an appropriate collective bargaining unit."

²⁸ 353 Mass. 519, 233 N.E.2d 310 (1968) (appeal from the commission's determination and order of election dismissed as premature).

quires no more than that uniformed employees be kept in one or more units separate from the department's non-uniformed employees, thus enabling the commission to deal flexibly in the public interest with the great variety of situations that may confront it. These may require determining whether in any particular community or department it is wise to include supervisory employees in a unit with the employees whom they supervise.²⁹

Noting that Section 178H contained no provision excluding from the definition of *employee* an "individual employed as a supervisor," the Court stated that the commission was not bound by federal precedents to the effect that supervisors could not be included in the unit.³⁰

The Court declared that the commission, in determining the appropriateness of a bargaining unit, must consider the public interest objectives of the statute. "Because the statute deals with public employees, public interest considerations are of greater importance in determining appropriate units than in cases dealing with private employment."³¹ The Court pointed out that in addition the commission may take into account considerations such as those discussed in *Jordan Marsh Co. v. Labor Relations Commission*.³² Although *Jordan Marsh* involved the private sector, the Court indicated that the considerations discussed in that case could be relevant to questions involving the public sector. In *Jordan Marsh* the Supreme Judicial Court stated the bargaining units should be adapted, as far as possible, to the manner in which the particular industry is "habitually" run; that the bargaining units should include the largest possible number of employees with "common interests in the more important matters which are likely to become the subjects of collective bargaining"; and that the commission must avoid "Balkanization" and at the same time insure that the bargaining units are small enough to provide adequate representation for the individual employees.³³

The Court in *Medford* also discussed whether the commission's determination and order of election constituted a final order that was subject to judicial review. The Court concluded that, absent extraordinary circumstances making certification questions of vital significance or absent questions relating to the commission's jurisdiction,

judicial review of certification questions [ought to be postponed] until, upon complaint, the commission has issued or denied an order (see c. 149, §178L) to the municipal employer or to employees to desist from a practice prohibited by the statute. When such an order is issued, the propriety of the commission's decision

²⁹ Id. at 525, 233 N.E.2d at 315. Accord: *Worcester Indus. Tech. Inst. Instructors Assn. v. Labor Relations Commn.*, 357 Mass. 118, 256 N.E.2d 287 (1970) (petition for review of commission's order for an election held premature).

³⁰ 353 Mass. 519, 526 n.7, 233 N.E.2d 310, 315 n.7 (1968).

³¹ Id. at 525, 233 N.E.2d at 314-315.

³² 316 Mass. 748, 56 N.E.2d 915 (1944).

³³ Id. at 751, 56 N.E.2d at 917.

on certification issues will be open for appropriate judicial scrutiny.³⁴

§6.4. Prohibited practices. Certain activities of municipal employers, their representatives, or agents are prohibited:

(1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section [178H]; (2) dominating or interfering with the formation, existence or administration of any employee organization; (3) discharging or otherwise discriminating against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this section; (4) refusing to bargain collectively in good faith with an employee organization which has been recognized or designated as the exclusive representative of employees in an appropriate unit; [and] (5) refusing to discuss grievances with the representatives of an employee organization recognized or designated as the exclusive representative in an appropriate unit. . . .¹

Also prohibited are certain acts of employee organizations or their agents, namely,

(1) restraining or coercing a municipal employer in the selection of its representative for purposes of collective bargaining or the adjustment of grievances; and (2) if recognized or designated as the exclusive representative of employees in an appropriate unit, refusing to bargain collectively in good faith with a municipal employer.²

Complaints of past or present prohibited practices may be made to the commission by any municipal employer or employee organization.³ The complaint must be embodied in a written and signed charge.⁴ As well as identifying the parties concerned with the complaint, the charge must enumerate the provisions of G.L., c. 149, §178L which have been or are being violated, and must contain a concise statement of facts supporting the claim of a violation.⁵ After a charge has been filed, the commission must conduct an investigation to determine whether further proceedings are necessary.⁶ If the investigation indicates that no further proceedings are necessary, the commission may enter an order dismissing the complaint; if further actions appear to be called for, the commission may order additional investigation or a hearing.⁷ If a

³⁴ 353 Mass. 519, 523, 233 N.E.2d 310, 314 (1968).

§6.4. ¹ G.L., c. 149, §178L.

² Ibid.

³ Rules and Regulations art. III, §1.

⁴ Id. §2.

⁵ Id. §3. This requirement, if narrowly enforced, might be quite a stumbling block for an employee who is trying to file a charge on his own.

⁶ Id. §4.

⁷ G.L., c. 149, §178L.

proceeding is to be instituted, the commission is required to issue and cause to be served upon the party charged with the prohibited practice a formal complaint stating the charges and giving notice of a hearing to be held before the commission. A similar notice and a copy of the complaint are to be delivered to the complainant.⁸ Any complaint may be amended at the discretion of the commission,⁹ and any complaint may be in whole or in part withdrawn by the commission on its own motion after notice has been given to the parties, or upon the motion of the commission's attorney.¹⁰

The party served with the commission's complaint has the right to file an answer to the original or amended complaint within five days of such service or within such time as the commission in its discretion may allow.¹¹ The answer must either deny separately, clearly, and precisely those asserted facts that are alleged in each paragraph of the complaint and that the charged party intends to deny, or must express the lack of knowledge of the charged party with respect to the alleged facts.¹² Should the charged party answer and refrain from contesting the proceeding, or consent to the entry of a cease and desist order, or admit the allegations in the complaint, he will be deemed to have waived a hearing. He will also be deemed to have authorized the commission to enter an order that the charged party cease and desist the admitted violations or to take any other proper action, including the ordering of a fact-finding.¹³

The charged party has the right to appear before the commission, personally or otherwise, to defend himself.¹⁴ Any other person, at the discretion of the commission, may intervene in the proceeding.¹⁵ If the commission determines after a hearing that a prohibited practice has not been or is not being committed, it will state its finding of fact and order the dismissal of the complaint.¹⁶ If the commission determines that a prohibited practice has been committed, the commission will state its findings of fact and enter an order that the charged party cease and desist from the prohibited practice.¹⁷ The commission has been directed to take further affirmative action as follows: (1) if an employee organization has either been established or been assisted in its es-

⁸ Rules and Regulations art. III, §4.

⁹ G.L., c. 149, §178L.

¹⁰ Rules and Regulations art. III, §7, states in part: "Any such complaint . . . may be withdrawn by the Commission on its own motion, upon notice to all parties or on motion of the Commission's attorney. . . ." The regulation apparently does not require that notice be given to the parties when a complaint is withdrawn upon the motion of the commission's attorney.

¹¹ G.L., c. 149, §178L.

¹² Rules and Regulations art. III, §9, states in part: "The answer shall deny in clear and precise terms every alleged substantive fact intended to be denied in each paragraph of the complaint separately. . . ."

¹³ *Id.* §12.

¹⁴ G.L., c. 149, §178L.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

establishment by the prohibited practice, the commission is to withdraw its certification of the organization; and (2) if an employee was discharged or discriminated against in violation of the first paragraph of Section 178L (the employer prohibited practices paragraph), the commission is to order his reinstatement, with or without back pay.¹⁸ If it is even alleged to the commission, either in conjunction with another charge or independently, that either the employee organization or the employer has refused to bargain collectively, the commission is to order fact-finding and direct the party at fault to bear the full cost thereof.¹⁹

Although it is the duty of the employee organization under Section 178H to represent all employees without discrimination and without regard to employee organization membership, there is no provision in the statute or in the commission's regulations providing a remedy for the employee who has been discriminated against by his own employee organization.

§6.5. Concerted activities of municipal employees. Municipal employees have the right to engage in concerted activities, either in aid of collective bargaining or for other mutual aid or protection, free from actual interference, restraint, or coercion.¹ These employees are explicitly and implicitly prohibited, however, from inducing, encouraging, or engaging in any strike, work stoppage, slowdown, or withholding of services by municipal employees.² No penalty is prescribed for violation of the no-strike statute; the normal procedure for enforcing the law is through the use of an injunction. Once an injunction against the concerted activity has been obtained, violation of the injunction is punishable under the contempt powers of the court sitting in equity.³ Thus, apart from the right to strike, municipal employees have the right to engage in the full range of concerted activities permitted to their brethren in the private sector, including, for example, advertising, lobbying for legislative action, leafleting, and peaceful picketing.

§6.6. Collective bargaining. Both the municipal employer and the duly designated representative of an appropriate bargaining unit

¹⁸ Ibid.

¹⁹ Ibid. It appears from Section 178L that the order for a fact-finding is mandatory, and that the hearing procedure required for other prohibited practices is not required where the charge alleges a refusal to bargain. In practice, however, a hearing is held on all charges.

§6.5. ¹ G.L., c. 149, §178H(1).

² Id. §§178M, 178N. The latter section declares that nothing in the municipal bargaining statute (G.L., c. 149, §§178F-178M) shall constitute a grant of the right to strike to employees of any municipal employer.

³ E.g., *School Comm. of New Bedford v. Dlouhy*, 1971 Mass. Adv. Sh. 1257, 271 N.E. 2d 655 (defendant teachers fined \$50,000 for civil contempt after violating no-strike injunction). Criminal contempt procedures have also been used by courts to enforce no-strike injunctions. E.g., *School Comm. of Boston v. Reilly*, Eq. No. 91352 (Suffolk Super. Ct., May 6, 1970) (teachers' union leader sentenced to 30 days in jail for violation of no-strike injunction).

of employees have a duty to bargain collectively, that is, the duty to meet at reasonable times (including meetings appropriately related to the budget-making process) and to confer in good faith with respect to wages, hours, and other conditions of employment, or with respect to the negotiation of an agreement or any question arising thereunder.¹ Refusing to bargain collectively in good faith is a practice prohibited by G.L., c. 149, §178L, whether engaged in by an employer or an employee organization. The parties are under a duty to execute a written contract that incorporates any agreements they may reach,² but neither party is required to agree to any proposal of the other or to make any concession to the other.³

In bargaining with organizations representing other than school employees, the chief executive officer of the municipality or his designee will represent the municipal employer.⁴ In bargaining with school employees, the school committee or its designee will represent the municipal employer. Where the school committees of various jurisdictions have joined together in a superintendency union formed in accordance with general or special law,⁵ the committees involved may be represented by common representatives designated by the committees, and the employee organizations may be similarly represented.⁶

In the public sector, the subjects of collective bargaining, i.e., wages, hours, and conditions of employment, may in some ways be restricted or defined by statute. The use of checkoffs⁷ and agency fees⁸ is so defined. The statute provides that the checkoff of union dues by a public employer may be authorized by the particular state, county, city, or town employer concerned,⁹ or by the local or regional school commit-

§6.6. ¹ G.L., c. 149, §178L. The terms *good faith* and *conditions of employment* are not defined with reference to collective bargaining by municipal employees. *Conditions of employment* is defined with respect to collective bargaining by state employees as "any conditions of employment not in conflict with statutes of the Commonwealth or rules and regulations made pursuant thereto." Mass. Labor Relations Commn., Rules and Regulations on Collective Bargaining Under 178 D & E, Rule 1.7. The definition would appear to be less than adequate, since no regulations have been issued on the subject.

² G.L., c. 149, §178L.

³ *Ibid.*

⁴ *Ibid.*

⁵ A superintendency union is an association of two or more towns for the purpose of employing a common superintendent of their collective school systems. G.L., c. 71, §61 prescribes the conditions regarding the number of schools and the limitations as to the particular towns in which a union may be formed.

⁶ G.L., c. 149, §178L.

⁷ A checkoff is a deduction from the pay of a union employee of certain sums which may constitute union dues. The employer makes the deduction and pays the money to the employee organization.

⁸ An agency fee is a deduction from the pay of a nonunion employee of certain sums that represent the employee's fair share of the cost of the union's representation of his interests. The employer makes the deduction and pays the money directly to the union.

⁹ G.L., c. 180, §17A. This statute was enacted in 1950 and has been amended several times. The provision is ambiguous insofar as it refers to "union dues to an association of state, county or municipal employees."

The statute does not require that the collective bargaining agreement—if there is

tee where a teachers' union is involved.¹⁰ The state, county, or municipal treasurer may withhold the union dues of any employee who submits written authorization for such withholding, but the employee may withdraw such authorization by giving 60 days' written notice to the employer and the union involved.¹¹ A bond is required of the treasurer of the union or association for which dues are being withheld.¹² A teacher may authorize the withholding from his or her salary of an amount specified in writing for payment of dues to an association of teachers, and may withdraw the authorization after giving 60 days' notice.¹³ A bond is also required from the treasurer of the teachers' association.¹⁴ General Laws, c. 180, §17G governs agency fees from county and municipal employees, which must be proportionately commensurate with the cost of collective bargaining and contract administration. The fees can be deducted from an employee's pay check and transmitted to the union which has been designated the exclusive bargaining representative under municipal bargaining law, and that union's treasurer must post a bond. These deductions must be based on written authorizations from the employee and can be withdrawn on 60 days' written notice to the municipal employer and the union. Presumably, although the statute does not so specify, the requirement for agency fees would have to be included in the collective bargaining agreement between the parties, and the amount would have to be agreed upon by the parties.

In 1969, the city of Boston and Suffolk County were authorized to make payroll deductions for agency fees payable to exclusive bargaining representatives under the following conditions:

- (1) if the collective bargaining agreement contains an agency fee clause; and (2) the sum proportionately commensurate with the cost of collective bargaining and contract administration is stated in the agreement; and (3) the agreement with the agency fee clause is formally executed pursuant to a vote of a majority of the employees in the bargaining unit.¹⁵

The range of subjects open to municipal collective bargaining may possibly be restricted by implication under Section 178N, which provides that the municipal bargaining statutes may not diminish the power or authority of the Civil Service Commission or any lawfully constituted retirement or personnel board. It can be argued that Sec-

one—provide for the checkoff. Acts of 1969, c. 472, provides that where a union is recognized or certified, the dues can only be checked off for the union which is the exclusive bargaining agent; if no union is certified or recognized, the statute seems to place no limit on the number of unions for which checkoffs can be authorized.

¹⁰ G.L., c. 180, §17C.

¹¹ *Id.* §17A.

¹² *Ibid.*

¹³ G.L., c. 180, §17C. Section 17E allows a checkoff for dues paid to a teachers' association by a school nurse.

¹⁴ *Ibid.*

¹⁵ Acts of 1969, c. 335 (a special act).

tion 178N prevents a municipal employer from bargaining about tenure or from laying off employees in a manner other than as directed by the Civil Service Commission. Section 178N may also prevent the municipal employer from discharging an employee, even if the discharge is pursuant to a collective bargaining agreement or is otherwise called for to resolve a grievance.

§6.7. Aids to collective bargaining: Fact-finding; Conciliation; Mediation. Collective bargaining in the public sector is most often employed to hammer out a new collective bargaining agreement (employment contract) between the municipal employer and the employee organization. Often the employee organization, lacking any real power at the bargaining table because it cannot legally call its members out on strike, is not able to achieve what it considers acceptable terms for the new contract and will thus refuse to agree to the terms proposed. If both parties are adamant in their positions and a solution cannot be reached over the bargaining table (before or after the employees have engaged in concerted activities), certain statutory aids to collective bargaining are available.¹

If after a reasonable period of negotiation a dispute exists between an employee organization and a municipal employer over the terms of a collective bargaining agreement, or if no agreement has been reached by the parties 60 days prior to the final date for setting the municipal budget, either party or both parties acting jointly may petition the state board of conciliation and arbitration to initiate a fact-finding.² An employee organization may initiate a fact-finding petition only if that organization is designated or recognized in accordance with G.L., c. 149, §178H(d) as the exclusive representative of the municipal employees involved.³ Upon receipt of a petition for fact-finding, the board will investigate the situation.⁴ If it appears that there is either an unresolved dispute or a failure on the part of the parties to agree, the board will initiate fact-finding.⁵

The selection of the person to serve as fact finder is initiated and overseen by the board. The board submits to the parties a list of three "qualified, disinterested persons" from which the parties may choose one to serve as fact finder.⁶ If, having been in receipt of the board's list for five days, the parties cannot reach a mutual choice, the board will appoint a fact finder.⁷ The person chosen or appointed as fact finder

§6.7. ¹The administrative caseload resulting from the failure of across-the-table bargaining to handle municipal employee disputes is detailed in §6.9 *infra*.

²G.L., c. 149, §178J(a). The information to be included in the petition is set forth in Fact Finding Rules no. 2.

³This provision is set forth separately in the laws and could be construed to prevent employers from initiating fact-finding petitions. The board has understandably not so construed it.

⁴G.L., c. 149, §178J(b).

⁵*Ibid.*

⁶*Ibid.*

⁷*Ibid.* The person appointed by the board need not be one of the three persons suggested to the parties by the board.

is authorized to hold hearings, which are to be conducted in accordance with the regulations of the board, and which are to be held within the municipality involved if such is feasible.⁸ In furtherance of such hearings the board may, upon request, issue subpoenas, and the fact finder is empowered to take testimony under oath.⁹ Within 60 days after his appointment (unless the period is extended by the board for good cause) and after completion of hearings, the fact finder is required to make written findings of fact and recommendations for the resolution of the dispute and to have them served on both parties.¹⁰ The recommendations are in no way binding upon the parties.¹¹ The cost of the fact-finding is to be divided equally between the two parties to the dispute.¹²

When municipal employers and employee organizations are involved in contract disputes, i.e., disputes over the terms of a new contract, the services of the state board of conciliation and arbitration are available for the purpose of conciliation.¹³ The conciliation procedure as set out in G.L., c. 150, §3¹⁴ provides that the board, having received notice of a dispute, shall endeavor to settle it by mediating between the parties or shall try to persuade them to submit the dispute to arbitration. If both of these attempts fail, the board is to investigate the cause of the controversy to ascertain which of the parties is mainly responsible or blameworthy for the creation or continuance of the dispute. Unless settlement is reached, the board is to publish a report finding the cause of the controversy and assigning responsibility for its continuance.¹⁵ Thus conciliation is a nonbinding procedure whereby one party is singled out as being in the wrong in hopes of putting sufficient pressure on that party to cause it to settle the dispute.

While either a fact-finding or conciliation is being attempted, the fact finder or the conciliator will often resort to meditation, a process which is occasionally referred to in the statutes but not explained in any detail. Section 178 of Chapter 149 provides: "Nothing in this section shall be construed to prohibit the fact finder from endeavoring to

⁸ G.L., c. 149, §178J(c). The hearing procedure is prescribed in Fact Finding Rules nos. 11-24.

⁹ G.L., c. 149, §178J(c).

¹⁰ *Ibid.*

¹¹ There is nothing in the statute which makes them binding.

¹² G.L., c. 149, §178J(e).

¹³ *Id.* §178K.

¹⁴ Section 3 does not by its terms include municipal employers. Presumably the later statute (G.L., c. 149, §178K) will be construed as overruling Section 3 by implication, so as to permit the conciliation of municipal employer disputes.

¹⁵ G.L., c. 150, §3. In substance, the "place blame" procedure is no different from the commission's prohibited practice procedure. Although the prohibited practice remedy (a cease and desist order, plus assessment of the costs of the procedure to the violating party) would seem to be more efficacious than merely placing blame, in reality that remedy carries no requirement for the violating party to make any concessions, and the commission almost never assesses costs to a party found responsible for a failure to bargain in good faith.

mediate the dispute in which he has been selected or appointed as a fact finder.”¹⁶ Mediation is also described as a preliminary step to conciliation.¹⁷ Mediation is an informal procedure conducted before and during the statutory procedures in an attempt to resolve the controversy by persuading the parties to settle their dispute.

If no collective bargaining agreement is reached, either with or without the aid of fact-finding, mediation, or conciliation, there are no provisions in the statute for arriving at an effective contract between the parties. The municipal employer and the employee organization are left to their own devices to reach an agreement. Because there is no right to strike, the parties are urged toward settlement only by their own needs for stable labor relations. In at least one case where the municipal employer and the employee organization were unable to agree to a contract, they voluntarily agreed to submit their contract dispute to the arbitration board. The board made an award in the case,¹⁸ and the parties agreed to adopt the award as the contract.¹⁹

§6.8. Collective bargaining agreements between municipal employers and employee organizations. Collective bargaining agreements between municipal employers and employee organizations have a status that is not comparable to the status of a collective bargaining agreement in the private sector. The municipal employer, being a political subdivision of the state, does not have the legislative power to appropriate funds and may not make a private contract that conflicts with legislative enactments.¹ In most respects a collective bargaining agreement between a municipal employer and an employee organization is enforceable by both parties.² The special character of municipal employee contracts has given rise to explicit qualifications with respect to the relationship between municipal collective bargaining agreements and public law: (1) if the terms of the contract conflict with any law, ordinance, or bylaw, the conflicting portion of the employee contract cannot prevail;³ (2) if the terms of the contract conflict with

¹⁶ G.L., c. 149, §178J(f).

¹⁷ G.L., c. 150, §3.

¹⁸ Award of Arbitrators in the Matter of the Arbitration Between Boston Teachers Union, Local 66, American Federation of Teachers, AFL-CIO and Boston School Committee, Aug. 4, 1970.

¹⁹ Settlement Agreement, School Committee of the City of Boston and the Boston Teachers Union, Local 66, American Federation of Teachers, AFL-CIO, Aug. 11, 1970.

§6.8. ¹ Indeed the common law theories of sovereignty (that governmental power resides ultimately in the populace and cannot be infringed upon) and delegation of powers (the legislature cannot delegate its power over the purse and the laws of the state) may continue to prevent municipal collective bargaining entirely where they are observed. Hart, *Collective Bargaining in the Federal Civil Service* 38-54 (1961).

² G.L., c. 149, §178I (by implication). If a municipal employer agrees to a clause in a collective bargaining agreement that calls for arbitration of contract terms, and if a dispute arises over a contract term that involves the expenditure of funds not appropriated, and arbitration award that would cause the employer to spend funds not appropriated, would raise at least some question as to whether the award would be binding on the employer. Hart, *id.* at 38-54.

³ G.L., c. 149, §178I.

any regulation made by a chief of police pursuant to his authority to administer the police department⁴ or by a head of a fire department pursuant to similar authority,⁵ the contract controls rather than the regulations;⁶ and (3) if money is required for the implementation of any provision of the contract and the legislative body concerned fails to approve the appropriation necessary to provide the funds, the contract must be returned to the parties for further bargaining.⁷

The relationship between a municipal collective bargaining agreement and a state law was at issue in *Chief of Police v. Town of Dracut*.⁸ The collective bargaining agreement had been made by the town selectmen with the bargaining representative of the police officers and by its terms, inter alia, set standards for certain assignments of police officers and for the granting of leaves. The police chief contended that the selectmen, in agreeing to the provisions of the contract which dealt with leaves and the assignment of officers, had exceeded their bargaining authority and had infringed upon the powers granted to the police chief under G.L., c. 41, §97A. Section 97A provides that the police chief shall be in immediate control of his officers, whom he is to assign to their duties. The Supreme Judicial Court held that Section 97A gave the authority to the chief to assign his men, and that the legislature, in enacting provisions for collective bargaining by municipal employees, had meant neither to take that authority away from the chief nor to permit the selectmen to bargain it away under the guise of negotiations on “wages, hours and other conditions of employment.” Since the collective bargaining agreement conflicted with Section 97A, the agreement failed in that respect because Section 178I of Chapter 149 made the existing statute controlling.

After the lower court decision in the *Dracut* case, the legislature had amended Section 178I to provide that the terms of a collective bargaining agreement would prevail over the regulations made by a police chief under Section 97A. The Supreme Judicial Court found that the passage of the amendment did not require a different result in *Dracut* because there had been no regulations made by the chief of police that were still extant and in conflict with the collective bargaining agreement. The Court indicated that the assignments made by the police chief were not “regulations” that could conflict with Section 178I.⁹

⁴ G.L., c. 41, §97A, provides the authority of the police chief to regulate his department.

⁵ G.L., c. 48, §42, provides the authority for the head of a fire department to regulate his department.

⁶ G.L., c. 149, §178I; the particular provision was added to Section 178I by Acts of 1969, c. 341, to clarify a previous conflict between that section and Section 97A of Chapter 41.

⁷ *Ibid.* The procedure outlined in the text is not followed in the case of school negotiations in municipalities or towns that have adopted Section 34 of Chapter 71. Under Section 34, the right of the school committee to fix the salaries of teachers is absolute. *Watt v. Town of Chelmsford*, 323 Mass. 697, 84 N.E.2d 28 (1949), and cases cited therein.

⁸ 1970 Mass. Adv. Sh. 769, 258 N.E.2d 531, discussed in 1970 Ann. Surv. Mass. Law, §§11.5, 24.6, 24.8, 24.12, 24.20.

⁹ *Id.* at 774 n.3, 258 N.E.2d at 535 n.3 (by implication).

The relationship between a municipal collective bargaining agreement and a city ordinance was explored in *Fitchburg Teachers Assn. v. School Committee*.¹⁰ The school committee and the teachers' association had signed a collective bargaining agreement which provided for a salary adjustment for the benefit of retiring teachers, the adjustment to consist of an additional payment in the final year of service. The amount of the payment was computed on the basis of the number of days of the teacher's attendance in excess of 170 each year, the excess days being those designated as unused sick leave or personal leave days. When requested by the school committee to make payments pursuant to the provision, the auditor of Fitchburg refused. The auditor argued that the contract provision conflicted with a city ordinance that forbade the payment to any person, either as compensation or as a gift, of "any more money than such person has actually earned in such employment," and that under Section 178I the ordinance was to prevail. The Supreme Judicial Court's response focused on the auditor's invalid premise, to wit, that the salary adjustment was a gratuity. The Court had no trouble finding the contract provision to be a valid exercise of the committee's power to set wages and conditions of employment through collective bargaining. In finding that the money to be paid pursuant to the contract would actually have been earned, the Court held that the contract provision did not conflict with the ordinance and hence that the agreement could stand.

It should be mentioned that the status of municipal employee contracts may be affected by Section 178N, which provides: "Nothing in sections [178F-178M, which set forth the entire municipal bargaining law] shall diminish the authority and power of the civil service commission, or any retirement board or personnel board established by law. . . ." ¹¹ In addition, it should be remembered that municipal employee contracts are limited to terms of three years' duration.¹²

When under an existing collective bargaining agreement the parties are in conflict over a grievance, the services of the Massachusetts Board of Conciliation and Arbitration are available for the conciliation of the grievance.¹³ If municipal employers and employee organizations are involved in disputes over the interpretation or application of the terms of a written agreement, the services of the board are available for the purpose of arbitration (other arbitration tribunals may be used as well for the same purpose as long as the costs thereof are equally divided).¹⁴ The arbitration procedure is governed by G.L., c. 150, §§5, 6. Section 6 provides that the application to the board must be signed by the employer, by a majority of employees concerned with the controversy or their duly authorized agent, or by both parties. If the application is signed by an agent claiming to represent the employees,

¹⁰ 1971 Mass. Adv. Sh. 1253, 271 N.E.2d 646.

¹¹ G.L., c. 149, §178N.

¹² Id. §178I.

¹³ The conciliation procedure is set forth in §6.7 *supra*.

¹⁴ G.L., c. 149, §178K.

the board must satisfy itself that the agent is so authorized but may not reveal the names of the authorizing employees. The application must contain a concise statement of the controversy, and the parties to the application must promise to continue at work without any lockout or strike until the decision of the board has been rendered or until three weeks have passed after the filing of the application, whichever occurs first. After the application has been filed, the board must promptly publish notice of a hearing on the application. If both parties have joined in the application and have presented a written request that no public notice be given, the board, in its discretion, need not give public notice but shall notify the parties. If the party presenting the application does not fulfill its promise to continue work, the board may not proceed further without the written consent of the adverse party.

Section 5 provides that if an application has been made to the board in accordance with Section 6 and if a controversy exists between an employer and his employees, the board must visit the site of the controversy as soon as possible and inquire into the cause of the dispute. The board must hear all interested persons who appear before it, advise the respective parties to the controversy what they ought to do or submit to in order to resolve the controversy, and make a written decision thereof. That decision is binding for six months upon the parties who join in the application, unless both parties stipulate in the application that the contract is to run for a longer period of time; in the latter case the board's decision is binding for the length of time agreed upon by the parties in their application. Once entered, the decision of the board is to be made public immediately and is to be open to public inspection. After the decision is recorded by the board, a summary thereof is filed with the clerk of the municipality involved.¹⁵ The purpose of arbitration is to provide a binding procedure whereby the facts of a labor controversy are discovered and a fair and impartial solution is imposed upon the parties who have petitioned the board.

The construction of the arbitration statutes and of a collective bargaining agreement between a school committee and a teachers' union was involved in *Sheahan v. School Committee of Worcester*.¹⁶ The pertinent section of the collective bargaining agreement read as follows:

In the event that the employee alleging a grievance is not satisfied with the decision of the School Committee, the Association may file at the request of the employee an application with the State Board of Conciliation and Arbitration for further review under the provisions of Sections 5 and 6 of the General Laws, Chapter 150. The School Committee reserves the right to insist upon a court determination of the jurisdiction of the arbitrator.¹⁷

An application was initiated by the association, and an award was made

¹⁵ A summary may also be published in the Annual Report of the Massachusetts Board of Conciliation and Arbitration. G.L., c. 150, §5.

¹⁶ 1971 Mass. Adv. Sh. 1073, 270 N.E.2d 912.

¹⁷ Id. at 1074, 270 N.E.2d at 913.

in favor of the association by the board. The school committee moved to vacate and dismiss the board's award, arguing in part that the board lacked jurisdiction because the committee had never agreed to arbitrate the controversy.

The Supreme Judicial Court indicated initially that an agreement between a municipal employer and an employee organization to submit an existing or future controversy to arbitration was "valid, enforceable and irrevocable," and subject to interpretation and enforcement under the provisions of Chapter 150C of the General Laws.¹⁸ The Court then turned its attention to Sections 5 and 6 of Chapter 150, which were specified in the collective bargaining agreement as controlling the "review." Concentrating on the first two sentences of Section 5 ("If a controversy exists . . . the board shall . . . visit the place . . . [and] shall hear all persons interested . . . , advise the respective parties what ought to be done . . . , and make a written decision thereof. . . ."), the Court stated:

That language when read alone contemplates and permits action by the board in the form of recommendations or advice to the parties, and does not limit the board's action to a binding decision. This conclusion seems compelled when the quoted language is read with (a) the provision of §6 permitting an application to be filed with the board on the signature of either or both parties to a controversy, and (b) the provision of §5 that the board's "decision shall for six months be binding upon the parties who join in said application," or longer if the parties agree. Neither §5 nor §6 contains the word "arbitration."¹⁹

In construing the language of the grievance clause of the collective bargaining agreement, the Court said:

The language of the collective bargaining agreement was selected by the parties. They said that the Association could ask the board to "review" a controversy under §§5 and 6, rather than to "arbitrate" the controversy. The language of the agreement is not ambiguous.²⁰

¹⁸ *Id.* at 1076, 270 N.E.2d at 914 (by implication). An examination of G.L., c. 150C, §1, suggests that if the Court were to consider the question directly, it would hold that Chapter 150C applies to collective bargaining agreements between municipal employers and employee organizations. Section 1 of that chapter provides in part: "[A] provision in a written agreement between a labor organization or organizations, as defined in [G.L., c. 150A, §2(5)] and an employer . . . to submit to arbitration any existing controversy or any controversy thereafter arising . . . shall be valid, enforceable and irrevocable. . . ." *Employee* as defined in Chapter 150A includes any employee, but *employer* as defined in the same chapter does not include a political subdivision. G.L., c. 150A, §2(2), (3). However, the use of *employer* in Chapter 150C does not seem to require any reference to the definition of *employer* in Chapter 150A. It is therefore submitted that Chapter 150C does apply to collective bargaining agreements involving a municipal employer.

¹⁹ 1971 Mass. Adv. Sh. 1073, 1077, 270 N.E.2d 912, 915.

²⁰ *Ibid.*

The Court held that the language in the grievance clause of the collective bargaining agreement did not constitute a prior agreement by the committee that it would submit any controversy to the board for arbitration.

The Court's decision in *Sheahan* is in part the result of its unjustifiably restrictive approach to the arbitration provisions of Chapter 150. The problem is that the Court chose to construe the first two sentences of Section 5 alone. Section 5 does not contemplate by its terms a non-binding decision. The board is required by the statute to issue a written decision, and the statute clearly states: "*Said decision shall for six months be binding upon the parties who join in said application.*" (Emphasis added.)²¹ If only one person has petitioned the board, that person is bound by the board's decision in accordance with the statute. The fact that the nonjoining party to the controversy is not bound by the award may make the decision effectively nonbinding on the petitioner if the latter's obligation is conditioned upon performance by the nonjoining party pursuant to the award. In that case, however, the nonbinding effect would not depend on the language of the arbitration statute. The Court's reading of Section 5 in *Sheahan* seems incorrect precisely because it reads into that section a nonbinding procedure that is without basis in the statutory language.

The *Sheahan* decision also reflected in part an unjustifiably restrictive approach to the construction of the collective bargaining agreement. The Court clearly hinged its decision upon the use of the word *review* in the agreement and indicated that the parties ought to have used *arbitrate* instead. Yet, as the Court itself pointed out, the word *arbitrate* is not used in the statute—not in Section 5, 6, or any other section of Chapter 150 that refers to the proceeding under Section 5. The word occurs only in the titles of Sections 5 ("Arbitration") and 6 ("Application for Arbitration"). Since the statute itself does not use the word *arbitration* to describe the binding procedure set forth in Section 5, it seems particularly inappropriate to fault the parties for using the word *review*, provided they made it clear that the procedure of Section 5 was to be followed.

As a practical matter, there are strong indications that the parties intended to agree upon the use of the binding procedure described in Section 5. The Board of Conciliation and Arbitration does not accept one-party applications for the Section 5 procedure, even if the other party is committed to arbitration by the collective bargaining agreement.²² Therefore, the nonbinding Section 5 procedure described by the Court is not even permitted by the board. Other nonbinding procedures, such as conciliation, are available to the parties if they desire, and are measurably superior to the claimed nonbinding Section 5 procedure since, in the case of conciliation, blame for the dispute is affixed and publicly proclaimed. Finally, it seems that if a nonbinding,

²¹ G.L., c. 150, §5.

²² Interview with Conciliator Robert A. Browning, Massachusetts Board of Conciliation and Arbitration, Jan. 5, 1972.

one-party procedure can be initiated, there would be no need for the parties to bargain over the inclusion in their agreement of a clause permitting employees to initiate the procedure. Such a bargaining exercise would be meaningless if the procedure could be initiated as a matter of statutory right. The Court's interpretation of the agreement seems to run contrary to common sense. After *Sheahan*, any party wishing to provide for arbitration in a collective bargaining agreement must do so in unmistakably clear terms and by specific reference to *arbitration*; mere reference to Section 5 of Chapter 150 is insufficient.

§6.9. Administrative caseload with respect to municipal employees. A review of the records of the Massachusetts Labor Relations Commission shows that in recent years the cases involving municipal employees have far outnumbered the cases involving other employees.¹ In the fiscal year ending June 30, 1970, there were 129 representation cases filed by unions representing municipal workers, 114 formal hearings, and 88 elections, involving 6573 employees.² There were also 18 representation petitions filed by employees of state agencies, 17 formal hearings, and three elections, involving 692 employees. In the private sector during the same period, only 34 representation petitions were filed, 27 formal hearings held, and 18 elections conducted, involving 2055 employees. In the 88 municipal elections ordered and held by the commission (including eight consent elections), 84 unions were certified: AFL-CIO unions in 51 cases and independent unions in 33 cases. In the same period, municipal employers filed 6 representation petitions upon which formal hearings were held; in the 6 resulting elections, the unions won 5 and lost 1. Out of a total of 22 petitions for amendments for clarification of bargaining units, public employees of cities or towns were involved in 19 instances.

In the fiscal year 1970, unions representing 13,000 municipal employees filed 80 unfair labor practice complaints against municipal employers. The commission held 45 informal conferences, issued 7 complaints, held 16 formal hearings, sustained 1 complaint, and dismissed the 6 others. Although 36 complaints had been withdrawn and/or dismissed, 35 complaints were still being processed at the end of the year. Fire fighters, police, and teachers or other school employees were involved in 52 of the 80 complaints filed. During the same period, 8 complaints were filed against labor unions by individuals or municipal employers; 8 informal conferences were held, 4 cases were

§6.9. ¹The figures summarized in the first two paragraphs of the text were taken from Mass. Labor Relations Commn., Report of the Activities of the Labor Relations Commission of the Commonwealth of Massachusetts for the Fiscal Year July 1, 1969-June 30, 1970.

²In the fiscal year ending June 30, 1971, the commission received 125 certification petitions in the municipal field from employee organizations. (Policemen, firemen, public works employees, school custodians, school clericals and schoolteachers accounted for most of the 125 cases.) The commission held 77 formal hearings and 92 elections, including 37 by consent; 83 elections resulted in certification by unions (47 AFL-CIO and 36 independents); Mass. Labor Relations Commn., Preliminary Report of the Activities of the Labor Relations Commission for the Fiscal Year Ending June 30, 1971.

withdrawn and/or dismissed, and 4 were still being processed at the end of the year.

In the fiscal year ending June 30, 1971, the Massachusetts Board of Conciliation and Arbitration also handled more municipal conciliation cases than private sector cases.³ It received 240 cases involving municipal conciliation (compared with 217 in other fields), closed 109 by conciliation, transferred 5 to labor relations, and transferred 93 to fact finders. At the end of the year, 46 cases were pending, compared with 13 cases pending at the end of the previous year. These figures are nearly double the number of cases involving municipal employees in fiscal 1970.⁴

Of the 93 cases referred to fact finders after the failure of conciliation efforts by the board during 1971, 21 cases were settled by the fact finder and 38 cases were reported upon by the fact finder.⁵ One case was withdrawn after the appointment of the fact finder and one was transferred to arbitration. At the end of the year, 43 cases were still pending, compared with only 11 at the end of the previous fiscal year.

§6.10. Conclusion. Massachusetts municipal bargaining laws, in the six years since their enactment, have not been able to provide the needed foundation for stable municipal employee relations. The statute itself is incomplete, subject to conflicting interpretations, and not integrated at all with the arbitration and conciliation statutes (which themselves are substantially unchanged since they were enacted in 1886).¹ The regulations issued by the Massachusetts Labor Relations Commission are likewise incomplete and subject to conflicting interpretations. The commission is flooded with cases involving municipal employment, and its work is being greatly delayed as a result. The municipal conciliation load at the Board of Conciliation and Arbitration is likewise soaring, and the number of fact-finding cases annually is exceeding 100.² Under the present collective bargaining law, those procedures which relate to the solution of disputes involving new contracts are being subjected to severe tests, in part because of the tendency of municipal employers to ignore any fact-findings which involve expenditure of tax monies.

The commission is under attack from critics who question both its policies and procedures.³ Employee organizations are becoming more

³ The figures summarized in the final two paragraphs of the text were taken from Commonwealth of Massachusetts, Annual Report of the Board of Conciliation and Arbitration for Fiscal Year of July 1, 1970-June 30, 1971.

⁴ See Commonwealth of Massachusetts, Annual Report of the Board of Conciliation and Arbitration for Fiscal Year of July 1, 1969-June 30, 1970.

⁵ No records were available on the results of the fact finders' reports in these 38 cases. Casual observation seems to indicate a growing tendency on the part of the municipal employer to reject the fact finder's recommendations in whole or in part.

§6.10. ¹ The arbitration statute was enacted as Acts of 1886, c. 263, §§3-6. The conciliation statute was enacted as Acts of 1887, c. 269, §§4, 5.

² Commonwealth of Massachusetts, Annual Report of the Board of Conciliation and Arbitration for Fiscal Year of July 1, 1970-June 30, 1971.

³ E.g., Boston Globe, Dec. 5, 1969, at 24.

dissatisfied with the present law and its administration. For example, at the recent convention of the Massachusetts State Labor Council, AFL-CIO, the following resolutions were adopted: (1) support legislation giving public employees the right to strike;⁴ (2) support legislation providing for compulsory arbitration for fire fighters (who have been unable to convince municipal employers to accept the recommendations of fact finders in Springfield, Boston, and Fall River);⁵ (3) support legislation to make the three-judge, anti-injunction law applicable to public employment;⁶ (4) call for additional personnel at the commission and the establishment of an office in the western part of the state;⁷ and (5) repeal the 1875 statute⁸ that sets a school budget date of September 1 and thereby limits the period available for collective bargaining.⁹ Another resolution called for the creation of a new labor relations commission to handle only municipal employee cases because "delays have occurred before the State Labor Relations Commission due to the laxity of keeping up with the change of times and labor disputes."¹⁰

Other proposals for change have not been lacking. In its second interim report, the Special Legislative Study Commission on Collective Bargaining called for the creation of a new Public Employee Relations Commission which, although intended principally for state employees, might later be adapted to meet the needs of the counties and municipalities.¹¹ Another proposal would nationalize public sector bargaining and eliminate state bargaining schemes.¹² The proposal would establish a Federal Public Employee Mediation Board to have jurisdiction over all government employees, and would provide for appointment of public mediators who would have power to require acceptance of the proposal of either of the disputing parties on a particular issue. To assist the local legislatures in meeting the monetary awards of the mediators, the federal government would contribute up to 20 percent of cost increases of any resulting contracts. Public em-

⁴ Massachusetts State Labor Council, AFL-CIO, Resolutions Before the Fourteenth Convention, Oct. 5, 1971 (Resolution No. 36). [hereinafter cited as Labor Council Resolutions].

⁵ Id. (No. 58). The pattern of compulsory arbitration is inconsistent. At the present time, compulsory arbitration applies to nurses in privately owned health care facilities (G.L., c. 150A, §9A) but does not apply to nurses employed in municipally owned health care facilities as the latter are subject only to nonbinding fact-finding G.L., c. 149, §§178G-178N).

⁶ Labor Council Resolutions (No. 34).

⁷ Id. (No. 27).

⁸ Acts of 1875, §241, as most recently amended by Acts of 1963, §786 (a special act).

⁹ Labor Council Resolutions (No. 32).

¹⁰ Id. (No. 27).

¹¹ House Bill 5235, Appendix B. It is interesting to note that this report also recommends for state employees many of the provisions now covering municipal employees. Included among the recommended provisions are some which have been under attack in the municipal field, such as the provision for nonbinding fact-finding.

¹² Lev, *Strikes by Government Employees: Problems and Solutions*, 57 A.B.A.J. 771 (1971).

ployees would still not have the right to strike, however, even where the locality refused to accept the mediator's award.

The proposals noted above, however, would not solve all the problems of bargaining in the public sector. One of the most difficult problems involved in municipal collective bargaining is the quality of the bargaining on both sides. Instances of inexperience and lack of mature leadership on the part of employer and employee alike will continue to produce unnecessary tensions and labor unrest in Massachusetts. To implement the present law, there is a need for trained and experienced personnel administrators. More extensive use of qualified persons in handling grievances and negotiations will help to avoid a backlog of unresolved grievances and promote industrial peace in the public sector. The development within public agencies of skilled management that is concerned with maintaining healthy relationships with its employees and with implementing aggressive ideas to reduce labor costs will contribute to the reduction of public employee disputes. A willingness on the part of management and labor alike to entrust their qualified negotiators with authority commensurate with their function will also produce better labor relations.

In addition, the general public will have to be educated to understand fully the economics of the public sector. Adequate funds will have to be raised if public services are to be continually expanded and if the legitimate needs of the public employee are to be satisfied. Public services must be delivered more effectively and efficiently, and consumer support must be generated. As part of a philosophy of constructive collective bargaining, there must be developed an identity of interests between management and labor in the public sector similar to the identity of interests developed in many parts of the private sector.

There are other areas of uncertainty under the Massachusetts law that will have to be clarified: (1) the relation of the collective bargaining contract (especially the union security and agency fee provisions) to employee rights under civil service, tenure, retirement, and personnel laws and regulations; (2) the relation of the collective bargaining process to the budget-making process and to the school laws; (3) the role of supervisors and their proper place in the appropriate bargaining unit; (4) the scope of bargaining and the meaning of "wages, hours and other conditions of employment" in the public field; and (5) the means of enforcement of the collective bargaining contract. More comprehensive regulations on the part of the commission could go a long way toward eliminating some of these areas of uncertainty.

To date, the public has been concerned with symptoms and crises rather than with the improvement of methods necessary to achieve equitable and peaceful settlements in the public sector. In the private sector, our labor law system encourages collective bargaining as an instrument of industrial peace. Although collective bargaining is not a perfect instrument for resolving conflicts over wages and working conditions, it has helped to resolve problems, has fostered a climate

conducive to negotiations between labor and management, and has narrowed the range of differences between employers and employees so as to permit temporary accommodations or long-term solutions. The philosophy and practice of bilateralism with respect to issues arising from the employment relationship in the private sector must be adapted to the public sector to provide greater participatory rights, including collective bargaining, for state and local government employees. Unless satisfactory solutions are developed for some of the above major problems, municipal bargaining will soon face further serious challenges in Massachusetts.