Citizens League
530 Syndicate Building
Minneapolis, MN 55402

APPROVED BY:
Citizens League Board
of Directors
April 19, 1979

MEMORANDUM

TO: Members, Citizens League Board of Directors

FROM: Community Information Committee, Greer E. Lockhart, Chairman

SUBJECT: Collective bargaining for public employees

Summary

Too much effort in public sector collective bargaining in Minnesota is directed at trying to resolve disputes after both sides have reached an impasse. Currently, the parties at interest -- management and the employee groups -- are trying to manipulate the impasse procedures of strike or arbitration to their own interests. We began our review of this issue essentially after being asked to take sides. After we began our work, however, we decided that from the public's standpoint, the key problem is how to keep disputes from reaching impasse in the first place.

The recommendations heighten the degree of risk for both sides post-impasse, and provide a mechanism for a more reasonable proposal to surface at or before the point of impasse.

Findings

1. The Minnesota public employees collective bargaining law divides employees into two categories, essential and non-essential.

There are approximately 264,000 state and local goverment public employees in Minnesota, of which about one-half currently are members of recognized collective bargaining units, according to the Bureau of Mediation Services. These employees are organized in 1,809 collective bargaining units, according to the Bureau. About 45 per cent of the units are school district employees; 27.5 percent, city employees; 15.5 per cent, county employees; 6 per cent, state employees; and 6 per cent special boards and commissions.

The collective bargaining law divides employees broadly into two categories, essential and non-essential, with different bargaining procedures prescribed for each. The law defines essential employees as persons in jobs which are "essential to the health or safety of the public and the withholding of such services would create a clear and present danger to the health or safety of the public." The Bureau of Mediation Services is responsible for determining, upon petition, whether employees fall in either category. In the absence of a petition, the units automatically are placed in the non-essential category. A decision by the Bureau is subject to appeal to the state Public Employees Relations Board. The Legislature or the courts also may specify that certain employees are to be placed in the essential category.

To date the following types of public employees have been classified or treated as essential:

-- All law enforcement, fire or corrections personnel.

-- Hospital workers in University of Minnesota Hospitals and in state hospitals.

-- Transit drivers.

-- Assistant prosecutors in Dakota County.

-- Supervisory and confidential employees, including school principals and vice principals.

-- Court related employees in Hennepin County.

Transit drivers have been declared essential under a separate state law. Assistant prosecutors in Dakota County were granted the essential category by a decision of Dakota County District Court; court-related employees in Hennepin County received their designation from Hennepin County District Court, with the Minnesota Supreme Court upholding this designation.

A provision of state law requires that supervisory and confidential employees, including school principals and vice principals, are to be treated, for collective bargaining purposes, as if they are essential, even though they have not received that formal designation by the Bureau of Mediation Services.

Of the 1809 collective bargaining units in the state, 378 of them, or 20.9 per cent, currently are classified as "essential."

The 378 essential units are divided as follows: 39.4 per cent, law enforcement; 3.4 per cent, fire fighters; 4.5 per cent, hospital workers; 20.4 per cent, supervisory employees; 7.4 per cent, confidential employees; and 31.7 per cent, school principals.

2. Options for settling an impasse differ for the two categories. With "essential" employees, the strike option does not exist. Management has the option of going to arbitration, or accepting a strike, if an impasse occurs with "non-essential" employees.

In the event of an impasse in collective bargaining negotiations, essential employees have the right to demand that the disagreement be settled by submission of the dispute to arbitration. The arbitrator's award is binding on both the employees and the public board or agency. Essential employees are not given a strike option.

Non-essential employees are treated differently. In the event of an impasse, the disagreement can be submitted to arbitration, provided both sides agree. If the employees ask for arbitration, and the employer refuses, then the law allows the employees to strike. A strike would not be legal unless the employer had first refused to go along with arbitration. Approximately 3 per cent of non-essential units went on strike in the year ending June 30, 1978, according to the Bureau of Mediation Services.

Prior to an impasse, the Bureau of Mediation Services provides mediation upon request of either party in the dispute. The mediator tries to assist both parties in reaching an agreement.

During the year ending June 30, 1978, the Bureau of Mediation Services was involved in mediation with 609 bargaining units. In that same fiscal year, 156 petitions were received for arbitration. Of the 156 petitions, a total of 86 of them ultimately were settled by an arbitration award.. Of the 86 settled by arbitration, 38 involved essential employees.

3. The present law differs somewhat from the procedure recommended by the Citizens League in March, 1971.

In March 1971 the Citizens League issued a report on collective bargaining between teachers and school boards. While the recommendations were directly specifically at one type of public employee bargaining, the report said the recommendations might be applicable to other types of employees, too.

The League recommended that, in event of an impasse, both parties could request arbitration. But the decision of the arbitrator would be more in the form of a proposal than an award. That is, the governing body would have the option to accept or reject the arbitrator's proposal. If the governing body accepted, it would be binding on employees, too. If the governing body rejected the proposal, then the employees would be given the right to strike.

4. Minnesota is one of 17 states with some form of binding arbitration for public sector bargaining disputes.

By the end of 1977, according to the Monthly Labor Review, 19 states had enacted some form of binding arbitration for public-sector bargaining disputes, with two states' laws declared unconstitutional (leaving 17 in effect). In nine states, the courts have ruled the laws are constitutional and, as of the end of 1977, three still were in litigation.

Eight of the 17 states, including Minnesota, provide some form of strike provision for public employees.

Eight of the 17, including Minnesota, provide for compulsory arbitration for certain essential service employees.

Nine of the states, including Minnesota, do not restrict the decision-making authority of the arbitrator. The other eight states provide for varying forms of final-offer arbitration. In final-offer arbitration, the arbitrator is limited to selected options for ordering a settlement. One form requires the arbitrator to pick either the final package offered by the employee group or the final package offered by the employer group, with no alteration whatsoever in the package selected. Another form gives more discretion to the arbitrator, in that each side submits its final offer on each issue in dispute. The arbitrator then can make a choice, issue-by-issue. Massachusetts, Nevada and Wisconsin provide for final offer by package. New Jersey provides final-offer package on economic items and final-offer issue-by-issue on non-economic items. Connecticut, Iowa and Michigan provide for final offer issue-by-issue on all items, economic and non-economic.

5. Some dissatisfaction is evident in Minnesota over current arbitration provisions.

The city of Richfield recently failed in an effort to have the courts declare binding arbitration for essential employees unconstitutional because the final

decision on a matter involving the expenditure of public funds is taken from the City Council and given to an outside party, the arbitrator.

Some suburban city officials are dissatisfied because of a 15 per cent wage settlement for police ordered by an arbitrator in the summer of 1978. They claim the police demanded arbitration on the theory they would get a better settlement thanin good-faith bargaining.

Representatives of the Amalgamated Transit Union, Local 1005, were dissatisfied with an arbitrator's decision in November 1978 to restructure its wage system with the Metropolitan Transit Commission, including the provision of part-time drivers.

The League of Minnesota Cities and the Association of Minnesota Counties are asking the Minnesota Legislature to do away with the categories of essential and non-essential employees and place all of them under provisions of the law which now apply to the non-essential employees.

6. Several major issues with the current law governing public employee labor relations have come to our attention:

(a) Whether the present system gives enough assurance that credible proposals will surface before use of impasse procedures -- The vast majority of public sector agreements are reached without either strikes or arbitration.

Nevertheless, in those instances where impasse procedures are used, there is controversy over whether both sides had enough incentive to discuss -- before impasse -- reasonable proposals that could form the basis for agreement. If, for example, an employer feels the employee group will insist on arbitration, will the employer bother to make an early proposal that could form the basis for settlement? Or, if the employee group senses the employer won't compromise short of a strike, will the employees bother to make a reasonable proposal prior to the strike occurring.

(b) Whether the strike should be contemplated as part of public sector bargaining -- Organized labor, particularly in the private sector, has fought hard to gain and to protect the strike option, because it has given employees a valuable economic weapon in collective bargaining. Legal strikes, however, do not have a long history in the public sector. Only about eight states, including Minnesota, permit strikes by any public employees now. Some persons believe that a strike by public employees brings about a political decision, rather than an economic decision, because of the public pressure brought to bear on elected officials when a strike occurs. They also say that a strike by some kinds of public employees is unthinkable, because of the potential of holding "hostage" services essential to the public safety. A feeling seems to be growing among some public employees against the prospect of strikes. These employees are seeking to be relieved of the duty, or obligation, to strike rather than keep the "right" to strike. In Minnesota this feeling is evident in those employees who are seeking to be declared "essential" so they can be guaranteed arbitration as a procedure for resolving impasse, thereby foregoing the strike option.

(c) Whether public employees should be divided in two categories, essential and non-essential -- Some persons say the distinction is necessary if the strike option is to be retained in any form, but with assurance that public safety and health will not be endangered. Others claim the distinction is artificial. How, they ask, can a firefighter be more essential than the operator of a snowplow who keeps the streets open so the fire trucks can get through?

A particularly difficult and growing issue is whether current law provides a reasonable method for determining who is essential. The present system has resulted in some apparent inconsistencies. For example, school principals are treated as "essential", while school teachers are "non-essential". Certain court-related employees are "essential" in one county and "non-essential" in a neighboring county.

(d) Whether the arbitrator has too much freedom in arranging a settlement -- Currently, the arbitrator is free to write whatever settlement he wishes, so long as the settlement is not inconsistent with other laws in effect. Some persons say that the parties in the dispute should be encouraged to narrow their differences as much as possible, with the arbitrator then making the final choice. These persons believe that some form of final-offer arbitration might help. Others say that in actuality the arbitrator does not go too far. In fact, one criticism is that arbitrators, wanting to be asked to serve again, do their best to select a middle ground.

(e) Whether the tentative, informal nature of meditation and the final, formalized nature of arbitration should be the only options available -- The current process permits a mediator to make private, informal proposals. Frequently, these become the basis for a final settlement. If a mediator were required to make his proposals public, his effectiveness might well be impaired because he would be identified personally with a point of view.

At the other end of the scale, the arbitrator's effectiveness is possible only to the extent that his decision is final. If the arbitrator were to float tentative proposals, that would compromise his ability to adopt a final settlement, because he would be seen as having modified his original proposal to suit either the employer or the employee.

Nevertheless, the present system provides little else between mediation and arbitration. For example, no specific provision is made for the development of a credible public proposal by a third party which, though not binding on either side, might be accepted because of public support. Sometimes a prominent outside party like a Governor or Mayor may suggest a basis for settlement.

(f) Whether the public interest necessarily coincides with the interests of either the employer or employee group in determining issues for negotiation -- Currently, it is common for an employee group to submit its list of "demands." The employer generally reacts to those demands, but may not necessarily respond with any of its own. Some concern has been expressed that the system would be improved if another way were available to assemble a list of issues that should be debated.

(g) Whether further constraints should be imposed by law or regulation as to the issues which can be made subject to arbitration -- Present state law does not require the employer to negotiate "on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel." Some employer representatives apparently are fearful of arbitration because of uncertainty as to whether the arbitrator will make decisions on matters which the employer deems to be management prerogatives.

(h) Whether any changes are needed in the rights given to supervisory employees to organize for collective bargaining -- In apparent contrast with private sector labor relations, an increasing number of supervisory and managerial personnel in the public sector are becoming organized themselves for collective bargaining. Consequently, the lines between "management" and "labor" seem to be becoming more blurred in a public body than in a private business. In some cases the supervisory employees are members of the same union as the rank-and-file.

(i) Whether any changes are needed in the role of public employers in seeking to influence the outcome of a representation election -- Public employers in Minnesota are prohibited by law from making any recommendations to their employees on how they should vote in a representation election for collective bargaining. Private employers are not so prohibited.

(j) Whether state employees should be treated differently, because of their relationship to the State Legislature -- A conflict between the Legislature and the courts has developed over the handling of arbitration cases involving state employees. The Minnesota Supreme Court currently is considering whether the Legislature legally could over-rule an arbitrator's wage settlement for junior college employees. The Legislature itself determines the legal framework within which settlements are reached.

Conclusions and Recommendations

In the time available to us, it isn't possible to reach conclusions and recommendations on all of the above-listed issues. It was necessary for us to set priorities. Our failure to address all of them doesn't mean the ones we left out are not important.

1. More efforts need to be made to try to avoid impasse procedures in the first place -- that is, to create a better environment wherein employers and employee groups can negotiate to agreement without either strike or arbitration. One reason parties move to the procedures of impasse resolution is that a reasonable proposal for settlement has not surfaced early enough. This is perfectly understandable under the present system. Both sides fear that premature revelation of a reasonable offer would jeopardize their bargaining position in either a strike or arbitration situation.

2. The distinction between "essential" and "non-essential" employees should be eliminated. All employees should be treated alike. The public interest will not be served by a two-class system of public employees, one of which seems to enjoy an inherent benefit of being more important than the other -- strictly by the designation "essential". As noted earlier, a working definition of essentiality is extremely hard to devise. Moreover, more and more employees are seeking to be placed under the "essential" umbrella. Interestingly, the determination as to whether an employee is essential or not is made by someone other than the employer, who probably should know better than anyone else who on the staff is essential. In fact, if an employee isn't essential, why should taxpayers dollars be used to pay the salary?

3. The role of the arbitrator should be diminished. Currently, when a dispute is submitted to arbitration, the arbitrator has the authority to mandate, unilaterally, a comprehensive agreement, which then is binding on

both sides. Such a decision can have far-reaching impact on governmental budgets. A third party, if necessary to settle a dispute, should not have so much leeway. Nor should the arbitrator be able to simply "split the difference" between the positions of the parties in the dispute.

4. We recommend the following changes in public employee bargaining to implement the above three conclusions.

(a) When arbitration is used to settle an impasse, the arbitrator would be limited to selecting either the employer's final offer or the employees' final offer. The arbitrator would not be allowed to prescribe a decision of his own. This approach would have two beneficial effects. First it would stimulate both sides to negotiate on the basis of credible proposals advanced by each of them. This would reduce, rather than increase, the likelihood of the dispute being settled by arbitration. The parties would both submit their final offers to the arbitrator, knowing if they can't then agree on some middle ground between the two final offers, the arbitrator will make the decision. In effect, both sides would be so fearful of what the arbitrator would decide -- knowing, as they do, the final offer of each other -- that they would have a greater incentive to reach agreement together. Second, if the arbitrator must make the final decision, the freedom of the arbitrator is much more restricted than it is today, thereby diminishing the importance of the third party in the settlement.

(b) In making the selection the arbitrator would have to pick from the final package submitted by both sides -- The arbitrator should be limited to picking one package or the other. The arbitrator should not have the right to select some issues from one package and some issues from the other package. That is known as issue-by-issue final offer, which we oppose. The package approach is realistic because the employer or employer's package is almost surely to be tied together with parts balancing each other. We recommend, however, that the arbitrator be permitted to strike from either package issues which the arbitrator determines are not properly the subject of arbitration. The arbitrator's decision could be appealed to the courts. Such a provision is needed, we believe, because of the possibility that either side might throw in a " ringer " with what otherwise seems to be a very reasonable proposal.

An arbitrator's decision should be final. The public employer -- even if that employer is the State of Minnesota -- should not have an option to adjust the decision. But the decision does not by itself determine the level of the appropriation. The public employer should have full authority to reduce the number of employees, for example, if that is necessary to stay within allowable appropriation limits.

(c) All public employees would be treated under the bargaining law as if they are "essential" -- This means that all employee-employer disputes would have one procedure for impasse resolution: final-offer arbitration as described in (a) and (b) above. The strike option now in effect for non-essential employees would be removed. Collective bargaining and mediation would continue as at present. Either party could certify an impasse to the Bureau of Mediation Services, which would activate the final-offer procedure. The final-offer procedure would provide explicitly that after the submission of the final offers, both sides would have a reasonable time in which to work out an agreement before the arbitrator were asked to pick either position.

We are extremely reluctant to recommend the removal of the strike option. However, the situation today is altered considerably from the past. There continue to be major questions about whether strikes in the public sector are

legitimate because the issues become more political than economic. But equally significant, it seems to us, is the growing interest of public employees themselves to be exempt from striking.

Our proposal is tied together, with its parts not separable. To make this clear, we would oppose the elimination of the strike option unless it were accompanied by the arbitration change.

In summary, then, our proposal treats all employees alike, substitutes arbitration for strike, requires that arbitration be so designed that employers and employees are given every incentive to settle short of arbitration, but provides if arbitration is chosen that it be final-offer only.