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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

1997-98
(session year)

Senate
(Assembly, Senate or Joint)

Committee on Education...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (December 2012)

Senate

Record of Committee Proceedings

Committee on Education

Senate Bill 405

Relating to: dispute resolution procedures under the municipal employment relations act, requiring the exercise of rule-making authority and making an appropriation.

By the Committee on Education.

January 15, 1998 Referred to committee on Education.

February 11, 1998 **PUBLIC HEARING HELD**

Present: (8) Senators C. Potter, Jauch, Shibilski, Grobschmidt, Darling, Huelsman, Roessler and Fitzgerald.

Absent: (0) None.

Appearances for

- (See Committee Slips)

Appearances against

- (See Committee Slips)

Appearances for Information Only

- (See Committee Slips)

Registrations for

- (See Committee Slips)

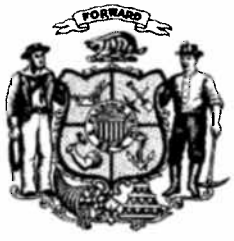
Registrations against

- (See Committee Slips)

March 26, 1998 **Failed to pass pursuant to Senate Joint Resolution 1.**

Paul Rusk
Committee Clerk

WISCONSIN STATE LEGISLATURE



James R. Meier
Chairperson
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State of Wisconsin
Wisconsin Employment Relations Commission

February 10, 1998

The Honorable Calvin Potter
Chair
Senate Committee on Education
100 North Hamilton
Suite 407, Senate
Madison, WI 53703

Re: Position of Wisconsin Employment Relations Commission Regarding SB 405

Dear Senator Potter:

Thank you for inviting Commissioner Hempe to testify tomorrow regarding the January 1, 1995 Report from the Council on Municipal Collective Bargaining. The Commission appreciates the opportunity to be of service to the Legislature. However, I wish to make it clear that the Wisconsin Employment Relations Commission takes no position on Senate Bill 405.

Our lack of a position is consistent with our historical perspective that our role is to implement whatever policy choices the Legislature wishes to make - not to advocate for any particular policy choice.

Please do not hesitate to call if we can be of any further assistance.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier
Chairperson

JRM/rb
02109803
cc: Governor Tommy Thompson
Commissioner A. Henry Hempe
Commissioner Paul A. Hahn


FORWARD

Remarks of A. Henry Hempe to
Senate Education Committee
February 11, 1998

Mr. Chairman and Committee Members:

I am pleased to respond to the invitation of the chair to testify before this Committee. Your invitation to me indicated that SB 405 is based on the Report from the Council on Municipal Collective Bargaining, dated January, 1995. You requested that I provide the Committee members with the rationale for the Council recommendations.

As you know, the Council on Municipal Collective Bargaining (CMCB) consisted of 10 persons, 5 labor representatives and five public sector employer representatives. As then chairperson of the Wisconsin Employment Relations Commission, I had the honor of serving the Council as its non-voting chair. The Council was assisted in its work by five special consultants appointed by me and confirmed by the Council: 2 labor representatives, 2 public sector employer representatives, and one neutral - a professor with the University of Wisconsin's Industrial Relations Research Institute.

The names of these persons are contained on the inside cover of the Report. They worked diligently, courageously and creatively. Each participated in two sets of four public hearing per set, or a total of eight, in diverse locations around the state. They brought to the Council extensive public sector collective bargaining experience and expertise, coupled to a strong desire to be of service. Several of them are here today and I understand may have testimony to provide.

Section 9120 (2z) of the 1993 Wisconsin Act 16, required the Council to " . . . conduct an analysis and assessment of each of the changes proposed by the governor to section 111.70(4)(cm) in Senate Bill 44." The Council was further mandated to " . . .report the results of its analysis and assessment to the governor, and to the chief clerk of each house of the legislature . . . together with any recommendations of the council for changes to section 111.70(4)(cm) or (7m) of the statutes before January 1, 1995.[1] The law further provided that any action taken by the Council, to be effective, had to receive at least 7 of the 10 votes.

The Council discharged each of its responsibilities. By unanimous vote - 10 to 0 - it completed its analysis and assessment of the Governor's proposals. Its recommendations for a successor law contained a report designated "pre-final" and dated January, 1995 were passed by a 7 to 3 margin. Ultimately, a subsequent "amended pre-final" outline report was passed 8 to 2.

[1] Subs. (4)(cm) describes lawful methods for settling public sector labor disputes; subs. (7m) provides for injunctive relief, penalties and civil liability in the event of a strike.

I understand you all have a copy of the Council's booklet entitled "Recommendations for Successor Law . . ." dated January, 1995. This is the one designated as "pre-final report," and it is on this report that SB 405 is based.

I should tell you, however, that after adopting that pre-final report, the Council conducted four additional public hearings in Milwaukee, Green Bay, Eau Claire and Madison to obtain public reaction to its efforts.

As a result of those hearings, by a vote of 8 to 2, the Council amended its original pre-final report. It summarized its modifications in a document entitled "Amended Pre-final Outline Summary of Recommendations of Council on Municipal Collective Bargaining Adopted by 8 to 2 vote on 6/13/95." Although the recommendations in this subsequent amended document are very similar to those in the earlier, pre-final report, there is one relatively significant difference. With your permission, Mr. Chairman, I will explain that difference to the Committee (along with a couple of minor ones) when we reach the relevant portions of SB 405.

I have brought copies of this later amended summary of the Council's recommendations for Committee members. These were all submitted to each 1995 member of the Legislature, along with a cover letter, a synopsis of the changes or amendments which were made, and a copy of the minutes of the Council's last deliberative meeting on June 13, 1995.

One further preliminary point: as I indicated, the Council was statutorily charged with the responsibility of making recommendations for a successor law. That term was used because under the law at that time, interest arbitration for represented municipal employes other than police and fire fighters, was due to sunset on July 1, 1996. Thus, the Council was being requested to submit its recommendations for a "successor law" to the one that was slated to sunset on the July 1, 1996 date.

I know this can be confusing. Are there any questions so far as to the composition of the Council, its statutory mandate and duties, the process it followed, and the state of the law at that point in time when the Council was operating?

If there are none, I will proceed. It is worth mentioning prior to considering any of the changes proposed by the Governor and prior to considering any possible recommendations for a successor law, the Council adopted what it called "Guiding Principles." These were adopted unanimously by the Council using consensus methods to achieve agreement. I have included copies of these eight guiding principles in your packet, and they are worth referring to at least briefly.

As reflected by these Principles, Council members believed that any proposal for change to the interest arbitration law should:

- Allow for local problem solving;
- Foster open, honest and direct communications between the parties;
- Be clear and administratively feasible;
- Promote labor-management peace;
- Promote voluntary settlements;
- Encourage the uninterrupted delivery of high-quality public services at a reasonable cost;
- Be fair to all those with a stake in the collective bargaining process;
- Encourage creativity in the labor/management relationship.

I note from the bill analysis by the Legislative Reference Bureau that the concept of the Qualified Economic Offer is eliminated by the bill. This is not a reflection of any Council recommendations. The Council did, however, consider whether or not to recommend eliminating the QEO. On p. 26 of the Pre-final report is the Council's conclusion which is probably worth repeating here. The Council said:

> "These recommendations contain neither endorsement nor criticism of the concept of Qualified Economic Offer or any similar cost containment measure. In a recent analysis, Council members commented on the concept of a qualified economic offer and unanimously concluded:
>
> > 'Inasmuch as collective bargaining usually is defined as negotiations on wages, hours, and conditions of employment, limited only by the rules governing mandatory, permissive, and prohibited subjects of bargaining, Council members do not perceive the concept of a Qualified Economic Offer as representing a bargaining device. Council members instead see it as a cost containment device superimposed on the collective bargaining process. The Governor and the Legislature must determine whether there is sufficient economic necessity to justify the utilization of cost control measures such as the QEO.'

This continues to be the view of the entire Council. It is the reason why those Council members supporting the aforesaid recommendations for a successor interest arbitration law applicable to municipal employes make no recommendations with respect to the continuation or discontinuation of the QEO concept. It is important to recognize, however, that the successor law being recommended will work with or without the superimposition of cost containment devices such as qualified economic offers."

What this passage tried to say was that Council members recognized that imposition of a QEO is essentially a political judgment to be made by the Governor and the Legislature. Council members were not about to enter that controversial arena.

Instead, based on its Guiding Principals, the Counsel attempted to construct a model law. Although SB 405 would abolish the QEO which was not part of the Council

recommendations, it does reflect Counsel attempts to create a model which, in the judgment of the super-majority of the Council, best and most fairly maintained labor peace.

SB 405, for instance, accurately reflects the Council determination that no one dispute resolution mechanism fits all situations. Thus, in Section 11 of SB 405 (p. 8 beginning at line 11) the bill grants the parties the authority to pick whatever dispute resolution method is believed most suitable to resolve their dispute. Now parties already have the right under existing law to agree to an alternative dispute resolution method not necessarily specified in the statutes. What the Council did was to actually list some alternative method such as fact-finding, strikes and lockouts, interest arbitration, and (as listed in the SB 405) something called the "dispute resolution judicial process." Council members believed that the authorities most qualified to determine which method of dispute resolution best suits their needs are the actual parties involved in the dispute.

I will spend a little more time on the dispute resolution process or DRJ in a moment because that is an area where the Council significantly modified its position following its second set of public hearings.

I might also add parenthetically that an additional dispute resolution mechanism also considered at some length by the Council was one which would have enabled municipalities to bypass interest arbitration on the condition that employes would then have the correlative the right to strike. Although that alternative received a 6 to 4 majority, it failed because it lacked 7 votes. A fuller explanation of that alternative is contained in the minutes of the Council's June 13, 1995 meeting, for those of you who are interested.

SB 405 also reflects the desire of the Council to promote and recommend consensus bargaining as a preferred means of labor dispute resolution. The Council's original Pre-final Report put its Consensus Bargaining section under Roman Numeral III. The only change in the amended Pre-final Report in that area was to move it under Roman Numeral II as a means of emphasizing it more greatly.

As some of you may know, consensus bargaining has been taught and facilitated by the Commission since 1990. We have trained more than 200 state and municipal bargaining unit negotiators and their employer counterparts in this problem solving method of bargaining that focuses on identifying and satisfying the respective interests of the parties, many of which are found to be mutual. We have witnessed dramatic success stories as we have successfully trained parties in using this method. These success stories, include, of course, examples close to home and probably well-known to you - examples like the State of Wisconsin and the Wisconsin State Employees Union which represents some 25,000 state employees, or United Professionals for Quality Health Care which represents state-employed nurses. In both cases, belligerent, militant relationships were transformed into productive partnerships. That example has been replicated in many Wisconsin municipalities since then, following training by our agency in the consensus method.

Consistent with the Council's recommendation, SB 405 proposes to provide an incentive and reward for those parties who use consensus bargaining and are successful in reaching a voluntary agreement by refunding training fees they may have paid to the WERC. Council members all see consensus bargaining as offering each side significantly greater prospects of bargaining success. SB 405 also reflects Council recognition that competent training is an absolute prerequisite of parties success in consensus bargaining.

The DRJ alternative contained in SB 405 does accurately reflect the Council recommendation contained in its original Pre-final Report. Parties opting for that alternative would first pick a Dispute Resolution Judge (DRJ) from a list of appointments made by the Governor. Each side would then pick its own advocate to join the DRJ, thus creating a tripartite panel. The rationale behind this was the belief that in the relative privacy of a deliberative environment, each advocate would be able to communicate more candidly with the DRJ as to the real issues of the dispute than is sometimes possible in a traditional arbitration setting. The Council went on to suggest that the tripartite panel fashion a non-binding recommendation for settlement; if the parties are unable to settle within 30 days, the tripartite panel would reconvene and adopt by majority vote the final offer of one side or the other as the arbitration result. That provision was deemed to provide the parties with an incentive to settle their own dispute, if possible.

The Council initially thought highly enough of this process to provide that if the parties were unable to agree on which dispute resolution method they wished to employ they would be automatically put in the DRJ module.

All this is reflected in various parts of SB 405, which also includes a provision in accordance with the original Council recommendation as to how the DRJs would be selected , that they would be state officers, that there would be only twelve at a time, and that no DRJ could serve more than 2 consecutive terms.

If this sounds complicated to you, your reaction is similar to that expressed by a number of witnesses on our second tour of public hearings. Moreover, it seemed too time-consuming and costly to the parties. So when the Council finished its second set of public hearings and reconvened as a deliberative body, it concluded that the DRJ section should be dropped, and in its place inserted something it called the "Expedited Dispute Resolution System."

This is described on the bottom of p. 1 of the "Amended Pre-final Outline Summary" included in your packet. The Council super-majority favoring this change believed it retained the inherent advantage of greater candor among arbitrator and the parties that a tripartite panel can inspire without the disadvantages of the tripartite panel.

In summary, the Expedited Dispute Resolution System ultimately favored by the Council was believed to have the advantage of timelines consistent with those imposed in other alternative dispute resolution methods or models listed by the Council, cost less, and still retain a form of fact-finding (with the consent of the parties).

The Council recommended that in the event the parties were unable to agree to a dispute resolution method, they would be placed in the Expedited Dispute Resolution System.

Throughout SB 405 you will find time-lines. These reflect a perception of the Council in its Recommendations that interest arbitration cases were simply taking too long. Some time-saving devices are also inserted similar to devices now commonly used in our judicial system, such as pre-hearing briefs and pre-hearing exchange of exhibits and objections to exhibits. There seemed to be general agreement among the advocates both on the Council and those who appeared as witness that these proposed time-lines were reasonable. You will also find in SB 405 a provision that extensions to time limits may be granted only for exceptional need, and that a stipulation between the parties to extend the time limits shall not, by itself, constitute that need. This was done to eliminate a common cause of delay - some of the advocates, themselves.

You will find in SB 405 a provision that reflects the Council view that there be only three basic arbitral areas of standards by which a case be judged. The arbitrator would be required to give greatest, greater or normal weight to these specified areas. Greatest weight was to be given to state legislation or administrative directives which placed limits on local spending; greater weight was to be given to local and/or state economic conditions; normal weight was to be given to such other factors normally or traditionally considered in determining wages, hours, and conditions of employment in public and private employment. Factors given normal weight were deemed generally to be in non-economic categories, as set forth on the top of p. 23 of the Council's original Pre-final Report.

The approach of differing weights was first taken by the Council in commenting on the Governor's proposals. The Council credited the Governor with coming with the proposal that accorded different weights to different categories of standards. But, based on their own experiences, Council members and special consultants believed that the more arbitral standards that are legislatively created, the greater opportunity there will be for standards that are inconsistent with each other. This, in effect, gives the arbitrator greater discretion, because the arbitrator can then legitimately ignore whichever conflict standard he or she may choose. Utilization of external and internal employe comparables is an example of this. When this happens, the predictability of the result is reduced, an event which Council members did not believe enhanced the prospects of voluntary settlements.

SB 405 also reflects the Council recommendation that parties be required to discuss innovative proposals to increase efficiency or effectiveness. This doesn't mean these are a mandatory subjects of bargaining that may go to interest arbitration. The Council recommendation is that it be called a "mandatory subject of discussion." Moreover, if the topic is a permissive, as opposed to mandatory subject of bargaining, under this recommendation the employer would still not be prevented from unilateral implementation, even though required to initially discuss it. Thus, it's a door that swings both ways,

however, because although an employer cannot be forced to interest arbitration of such a proposal, it is required to discuss it.

This is a recommendation that was debated long and hard by Council members. This is the second area where the Council modified its original recommendation, but only for greater clarity. Its purpose is explained at some length in the Council's original Pre-final Report on p. 24. Advocates of this recommendation explained that in some instances a meritorious proposal to increase operating efficiency and effectiveness (whether made by employer or employee) if a mandatory subject of bargaining may be defeated by the inability of its proponent to justify it by the use of "comparables." Obviously, if a proposal is truly innovative, few, if any, comparables can be invoked to support it. More often, in a "final total package" interest arbitration case which is governed by comparables , the party advocating the change to achieve greater efficiency and effectiveness will usually abandon that proposal because of an understandable unwillingness to risk losing the entire case due to that one element.

The Council sought to remedy this problem by enabling a party making an innovative proposal (the primary purpose of which is to increase operating efficiency and effectiveness) to safely include it in the final offer, because it will be judged on its own merits, apart from the totality of the remainder of the case.

In the words of Council members supporting this recommendation, they " . . . see in it an effective opportunity for municipalities and their employes to become well-equipped to enter the 21st century."

Finally, I call your attention to the Declaration of Policy recommended by the Council which does not appear in SB 405. This declaration was one of the first items agreed to by Council members and was intended to be inserted at the beginning of subchapter 4. Council members who supported this new declaration recognize the danger of lengthy declarations of policy. At the same time they believe it is important to advise the public that a new day has dawned which requires an expanded declaration of policy. The recommended policy would establish additional priorities, including efficient service to the public, development of innovative methods to improve operating efficiency and effectiveness, harmonious cooperative employment relations, efficient administration of municipal government establishment of cooperative and mutually satisfactory employe-management relations and the concept that neither party has the right to engage in actual practices that present a clear and present danger to the health; safety and welfare of the public.

The last paragraph of the proposed policy declaration is identical with the existing statutory statement of policy contained in s. 111.70(6). Inspiration was also gained from other statutory sources. The entire text of the proposed Declaration of Policy is found on p. 10 of the original Pre-final Report and p. 4 of the Amended Pre-final Outline Summary.

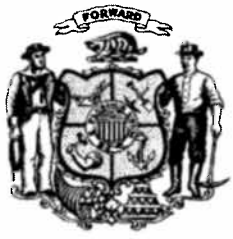
In closing, I want to express my appreciation to each Council member and special consultant whose service on the Council was in the best tradition of Wisconsin citizen government. The bulk of their work was done at a time when they were faced with the pressure of knowing that a labor relations law that had at least created labor peace was about to expire and the practical knowledge that each legislative house was then controlled by a different political party. But labor relations professionals always seem to react well under deadline pressure and are all pragmatists - at least the successful ones. Under the foregoing circumstances, the professionals serving as Counsel members and special consultants knew they had to come up with a balanced, fair work product or it would be of no value.

They did just that, and, in the end, consistent with the consensus training they had all received at the beginning of their Council service, could each say to the other:

I think I understand your viewpoint;
I think you understand mine;
I may not prefer the result we have reached,
But I can live with it,
And I will support it.

I appreciate the invitation and courtesy extended to me by you and your committee members, Mr. Chairman. I regret having been this lengthy, even though I've really only covered the high points. Hopefully you all have a better idea of Council rationales for their recommendations. If there are any questions I'd be pleased to address them.

WISCONSIN STATE LEGISLATURE



Wisconsin Council 40
AFSCME, AFL-CIO

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Michael Murphy
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Robert W. Lyons
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SENATE EDUCATION COMMITTEE

TESTIMONY OF ROBERT W. LYONS, EXECUTIVE DIRECTOR, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

FEBRUARY 11, 1998

Thank you for the opportunity to appear before your committee today to present our views regarding SB-405.

AFSCME Council 40 represents local government employees in the 71 counties outside of Milwaukee. At the present time Council 40 has about 30,000 members, the overwhelming majority of whom are covered by the Municipal Employment Relations Act (Section 111.70, Wis., Stats.), and who would therefore be impacted by SB-405.

I was privileged to serve as one (1) of the five (5) public employee representatives on the Council on Municipal Collective Bargaining (CMCB). I attended all of the meetings and public hearings scheduled by the Council, and I voted to support the Pre-Final Report that it issued in January, 1995.

It is important to remember the public sector labor relations environment in which the CMCB began its deliberations back in 1993. Pursuant to the provisions of 1993 Wisconsin Act 16, interest arbitration as the dispute resolution mechanism for municipal employers and most of their employees was scheduled to sunset on July 1, 1996. The CMCB was charged with the responsibility of recommending successor legislation. In that context, the recommendations contained in the Pre Final Report of the Council, which form the basis for SB-405, made sense. I'm not so sure that they do now.

Recall, too, that when the CMCB issued its report some three years ago, the Legislature took no action on it. No hearings were held. No bill was drafted. Instead, during the process of adopting the 1995-97 State Budget, the Legislature changed the statutory factors that arbitrators have to consider when rendering their decisions and repealed the sunset date. Since adoption of the 1995-97 Budget Bill, arbitrators have been required to give "greatest weight" to "any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer." Additionally, arbitrators were required to give "greater weight" to local economic conditions. The rest of the statutory criteria that arbitrators had been required to weigh when issuing their decisions were relegated to the category of "other factors considered".

It is instructive to look at what has happened since these latest amendments to the interest arbitration process. Calendar year 1997 was the first year in which all of the interest arbitration awards issued were subject to the new criteria. An analysis of the thirty-seven (37) decisions issued during that time frame, none of which involved teacher bargaining units, shows that:

- Unions prevailed in a bare majority of cases (19 to 18);
- In eleven (11) of the thirty-seven cases, the general wage increase was not an issue;
- In five (5) of the twenty-six (26) cases which involved a general wage increase, the Union's wage proposal was actually lower than that of the employer;
- Of the twenty-one (21) cases in which the dispute involved a Union wage proposal greater than that proposed by the employer, the employer prevailed nine (9) times.

This leaves a grand total of twelve (12) cases in 1997 in which Unions went to arbitration and won a wage increase greater than that contained in the employer's final offer.

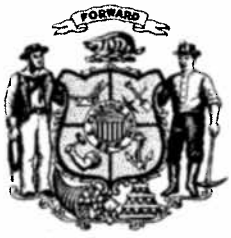
That is hardly compelling evidence of a need to make sweeping changes in the impasse resolution procedures that govern approximately 1,300 non-teaching bargaining units.

I recognize that the focus of the Education Committee is on the tensions that exist in teacher-school board collective bargaining relationships. That is a perfectly proper focus for this committee. And let me hasten to add that AFSCME Council 40 would fully support any action by this committee to eliminate the Qualified Economic Offer (QEO) concept which continues to flat out eliminate meaningful collective bargaining for teachers. There is no reason to believe that the factor changes included in the 1995-97 Budget Bill would not worked every bit as well in teacher units as they have in other units if only they had been allowed to go into effect.

But I urge the committee to remember that well-intentioned attempts to "fix" problems that may exist in teacher/school board collective bargaining relationships can have unintended -- and entirely unwelcomed -- consequences in hundreds of other collective bargaining relationships involving tens of thousands of employees who work for other units of local government. Right now, those collective bargaining relationships don't need the radical "fix" contemplated by SB-405.

In closing, I urge you to eliminate the QEO. But don't throw the baby out with the bathwater. Thank you, but the rest of us simply don't need SB-405.

WISCONSIN STATE LEGISLATURE



RECOMMENDATIONS FOR

SUCCESSOR LAW TO

SEC. 111.70(4)(cm) AND (7m)

OF THE STATUTES

January, 1995

Submitted by:
COUNCIL ON MUNICIPAL COLLECTIVE BARGAINING

PRE-FINAL REPORT
NOT FOR SUBMISSION TO LEGISLATURE
(see Introduction, p.4)

Drafted by:
A. Henry Hempe, Chairperson

COUNCIL ON MUNICIPAL COLLECTIVE BARGAINING

MEMBERS

Mary Ann Braithwaite	term ending July 1, 1997
Kenneth Cole	term ending July 1, 1997
Chuck Grapentine	term ending July 1, 1999
Christel Jorgensen	term ending July 1, 1997
Robert Lyons	term ending July 1, 1999
Charles Mulcahy	term ending July 1, 1999
Rodney G. Pasch	term ending July 1, 1997
Mark Rogacki	term ending July 1, 1995
Robert K. Weber	term ending July 1, 1995
Robert West	term ending July 1, 1999

Non-Voting Chairperson
A. Henry Hempe
Chairperson
Wisconsin Employment Relations Commission

SPECIAL CONSULTANTS

Donald Ernest
Michael Julka
Keith Krinke
James Stern
Mary Theisen

terms

ACKNOWLEDGEMENTS

The diligence, dedication and expertise of all Council members cannot be overstated.

Gratitude must also be expressed to the five special consultants. Although they did not participate in any Council votes, they fully participated in Council discussions, and offered significant contributions to the potpourri of ideas being produced.

Appreciation should be extended to Wisconsin Employment Relations Commission staff attorney Lionel Crowley whose careful notes of Council meetings and other tasks of legal research, proofreading and editing were all performed with distinction.

My secretary, Diana Arpke, also deserves recognition for the high degree of professionalism which she demonstrated.

A. Henry Hempe, Chairperson
COUNCIL ON MUNICIPAL COLLECTIVE BARGAINING

January, 1995

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INTRODUCTION

Pursuant to the provisions of 1993 Wisconsin Act 16, interest arbitration as set forth in Sec. 111.70(4)(cm)6. of the Municipal Employment Relations Act will sunset as a labor dispute resolution mechanism for municipal employers and most of their represented employes on July 1, 1996.

But Act 16 also invites the Council on Municipal Collective Bargaining to make recommendations to the Legislature for improvements to the dispute resolution processes contained in Ch. 111.70(4)(cm) and (7m).

This Report is the response of the Council. It contains recommendations for successor legislation to the interest arbitration provisions being sunsetted. These recommendations are currently supported by 7 of the 10 Council members. 1/ They are in a pre-final form, i.e., further than preliminary, but not necessarily ready to be submitted to the Legislature.

While the recommendations herein have been carefully studied and, in the opinion of their 7 endorsors, represent the best options considered by the Council, they are still subject to possible revision or modification by the Council following additional public hearings to be conducted by the Council for the purpose of obtaining reactions to the recommendations.

Pursuant to a unanimous vote of the Council, these hearings will be held in the following cities according to the following schedule:

CITY	DATE	TIME	SITE
Milwaukee	2/28/95	7:00 pm	War Memorial
Green Bay	3/13/95	7:00 pm	to be determined
Eau Claire	3/20/95	7:00 pm	to be determined
Madison	5/17/95	7:00 pm	to be determined

Following completion of these public hearings the Council will consider ideas or suggestions produced by these hearings for possible incorporation into its recommendations.

This will be the second set of public hearings sponsored by the CMCB. In addition to its regularly monthly meetings beginning in December, 1993, in calendar year 1994 it conducted 4 public hearings in an effort to elicit general viewpoints from the public as to possible directions and shapes a successor law might take. Hearing locations were Pewaukee (June), Rhinelander (July), LaCrosse (August) and Milwaukee (September).

The Council now seeks reaction to the product those earlier viewpoints helped craft.

1/ Pursuant to the provisions of Sec. 111.71(3)(b) as revised by Act 16, "(t)he vote of 7 of the voting members of the Council ... is required for the Council to act on any manner before it."

GUIDING PRINCIPLES

Prior to any consideration of either the changes proposed by the Governor to Sec. 111.70(4)(cm), Stats., or its own recommendations for changes, Council members considered the standards by which they wished to measure not only the gubernatorial proposals, but any further independent proposals they chose to make. Following training from WERC staff persons in consensus-reaching techniques the Council successfully reached consensus as to what these standards should be. Ensuing Council discussions were frequently interspersed with references to what Council members called "Guiding Principles."

According to these 8 Principles any proposal for change to Sec. 111.70(4)(cm) should:

Allow for local problem solving;

Foster open, honest and direct communications between the parties;

Be clear and administratively feasible;

Promote labor-management peace;

Promote voluntary settlements;

Encourage the uninterrupted delivery of high quality public services at a reasonable cost;

Be fair to all those with a stake in collective bargaining process;

Encourage creativity in the labor/management relationship.

EXISTING LAW

At present, either party to a municipal labor dispute may petition the Wisconsin Employment Relations Commission (WERC) for interest arbitration to resolve the dispute. The petition always contains the allegation that the parties are deadlocked. Upon receipt of the petition, the WERC sends an "investigator" to "investigate" the particulars of the situation and advise the Commission as to whether a bargaining impasse exists. The "investigator" is actually a skilled mediator whose "investigation" consists of intensive mediation. In the event the mediator is unable to influence the parties to reach a voluntary settlement, the Commission certifies the existence of an impasse which enables the parties to proceed to interest arbitration.

Under Chapter 111.70 procedures, the WERC provides the parties to the dispute with a panel containing the names of seven arbitrators. The parties strike names alternately until only one name remains. That person is the arbitrator for the dispute.

Only if both sides agree to the inclusion of the names of arbitrators who reside outside the State of Wisconsin can non-resident arbitrators be listed on a panel.

The arbitrator is required to establish a date and place for the conduct of the arbitration hearing within 10 days of his/her appointment. Upon petition of at least 5 citizens of the jurisdiction served by the municipal employer filed within 10 days of the day on which the arbitrator is appointed, the arbitrator is required to hold a public hearing in the jurisdiction for the purposes of providing the opportunity to both parties to explain or present supporting arguments for their respective positions and for members of the public to offer their comments and suggestions.

As a part of the certification procedure, the WERC, through its mediator, will have received the last total package final offer of each party. These final offers are transmitted to the arbitrator. The arbitrator is then required to make an arbitration award by approving the final offer of one side or the other in its entirety. The approval is based on the arbitrator's perception of which offer is most reasonable in light of the statutory factors the arbitrator must consider.

These factors are enumerated under Sec. 111.70(4)(cm)7. as follows:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.

e. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.

f. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost-of-living.

h. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties in the public service or in private employment.

According to a recent study by the Legislative Reference Bureau, the total time which elapses between petition for commencement for interest arbitration and the issuance of awards is as follows for the following years:

	1988-89	1989-90	1990-91
Average number of days	319	339	381
Maximum	615	1203	738
Minimum	350	127	183

Since passage of interest arbitration procedures in 1978, there has been only one strike of municipal employes subject to those procedures (Milwaukee Sewage District employes, 1979).

In August, 1993, the Legislature passed 1993 Wisconsin Act 16. Except for its "sunset" provision, 2/ this Act applied only to professionals employed by a school district and enabled the school district to avoid interest arbitration on economic issues if it offered a "qualified economic offer" (QEO).

While the particulars of a QEO can be complex, generally speaking it consists of combined salary and fringe benefit increases totalling at least 3.8% of the previous year's figure. While this cost containment device has effectively reduced the size of teacher settlement packages, it has, predictably, also caused some resentment on the part of some teachers. Teacher unhappiness with the law resulted in a brief work stoppage by the Madison teachers in December, 1993. In other areas, teachers have used job actions such as "working to contract" (doing only those tasks specifically set forth in the labor agreement) to demonstrate their unhappiness. At present, these instances appear to be declining, but the potential for these kind of local brush fires remains, depending on the quality of the labor relationship between school district professionals and their employers.

In the event the interest arbitration currently provided in Sec. 111.70(4)(cm) were to sunset (see footnote #2), absent enactment of successor legislation, fact-finding would become the sole dispute resolution device. 3/

2/ Under the Act, Sec. 111.70(4)(cm) and (7m) will sunset effective July 1, 1996, thus eliminating interest arbitration for most municipal employment labor disputes. However, the sunset provision would not affect members of a police department in cities of the first class and law enforcement supervisors employed by counties having a population of 500,000 or more (Milwaukee), as well as fire departments and city and county law enforcement agencies. Labor disputes involving these employes would remain controlled by the provisions of Secs. 111.70(4)(jm), 111.70(8)(a) and 111.77, Stats., respectively.

3/ Fact-finding, of course,is merely advisory conventional arbitration. While the fact-finder has an almost unfettered discretion to craft a recommended compromise for the parties to use as a basis for a voluntary settlement, such recommendation is advisory only and has no binding effect on the parties. For definitions of various arbitration models including conventional arbitration, see footnotes 13, 14 and 15 on pp. 9-10, *Analysis and Assessment of Each of the Changes Proposed by the Governor to Sec. 111.70(4)(cm) of the Statutes in 1993 Senate Bill 44.*

OUTLINE SUMMARY OF RECOMMENDATIONS

COUNCIL ON MUNICIPAL COLLECTIVE BARGAINING

I. Parties to determine whether they want to utilize consensus or traditional collective bargaining model within thirty (30) days of first meeting.

II. If parties opt for traditional model, in the event they reach a WERC certified bargaining impasse, they must mutually determine within thirty (30) days of such certification which of the following dispute resolution models they will use.

A. Dispute resolution models.

1. Legal right of employes to strike; legal right of employers to lockout.

2. Mediation as set forth in Sec. 111.87, Stats.; fact-finding as set forth in Sec. 111.88, Stats.; and prohibition of employe strike as set forth in Sec. 111.89, Stats. (All of above statutory references are to sections of the State Employment Labor Relations Act - SELRA.)

3. Final package interest arbitration as set forth in Sec. 111.70(4)(cm)6., provided that neither party shall be permitted to include more than five (5) issues in its final offer except in those cases where the parties are attempting to obtain an initial agreement.

4. Other mutually agreed upon impasse procedures filed with the Commission.

5. Dispute Resolution Judge (DRJ) and tripartite process. 4/

a. Final offer submitted to DRJ appointed by WERC from DRJ panel by random selection.

4/ The concept of tripartite panels has been endorsed by the current law under which the WERC is required to adopt rules for all arbitration proceedings including "the appointment of tripartite arbitration panels when requested by the parties." Sec. 111.70(4)(cm)8.a.

b. Each side appoints an advocate creating a tripartite panel. Said appointments to be made and noticed to each party and DRJ within three (3) days of DRJ appointment.

c. DRJ shall schedule hearing to be conducted within sixty (60) days of appointment of DRJ.

d. Tripartite panel fashions a non-binding conventional arbitration award.

e. Within thirty (30) days of this award, the parties meet and attempt to reach a voluntary agreement.

f. If parties are unsuccessful in reaching a voluntary settlement, the tripartite panel shall reconvene within ten (10) days following elapse of aforesaid 30-day period and select the final offer in its totality of one side or the other, as the binding decision.

B. In the event the parties are unable to reach agreement as to their preferred dispute settlement model within thirty (30) days of their impasse being certified, they shall be automatically placed in the DRJ-tripartite model (II, A, 5 above).

III. Consensus Bargaining

A. If parties opt for this approach, they should receive training from the WERC.

B. State to reimburse parties for training fees and expenses incurred following parties reaching voluntary settlements.

C. If parties fail to reach voluntary settlement, no reimbursement for training fees and expenses, but parties retain option of selecting a dispute resolution model. (See II, A, 1-5.)

IV. Dispute Resolution Judges and DRJ Procedures

A. From a list of resident and ad hoc arbitrators maintained by the Wisconsin Employment Relations Commission, the Council shall recommend to the Governor those persons it deems qualified to act as dispute resolution judges (DRJs). From the names recommended by the Council, the Governor shall appoint twelve (12) dispute resolution judges for a term of four years each (except that initial appointment terms shall have staggered dates of expiration). No person shall be eligible for appointment of more than two consecutive terms. Each appointment shall be subject to confirmation by the Senate.

B. The DRJ may establish dates and places of hearing, and shall conduct the hearings with the other panel members under rules established by the Commission. Upon request, the Commission shall issue subpoenas for hearings being conducted by DRJ. The DRJ may administer oaths. Upon completion of the hearing, the DRJ shall make written recommendations for solution of the dispute to which at least one other panel member agrees, and shall cause the same to be served on the parties and the Commission. In making such recommendations, tripartite panel shall take into consideration, among other pertinent factors, the principles vital to the public interest in efficient and economical governmental administration. The cost of DRJ proceedings shall be divided equally between the parties.

C. In the event the DRJ is not notified by the parties that they have voluntarily settled the dispute within 30 days following issuance of the DRJ's recommendation, the DRJ shall reconvene the tripartite panel and upon the agreement of at least one other panel member shall adopt without further modification the final offer of one of the parties of all disputed issues submitted, except those items that the Commission determines not to be mandatory subjects of bargaining and those items which have not been treated as mandatory subjects by the parties.

D. Extensions to the aforesaid time limits shall be granted only upon showing of exceptional need and in such case only by concurrence of all tripartite panel members. A stipulation between the parties to extend the time limits shall not, by itself, constitute a legal basis for the extension of any time limits.

E. In the event either party fails to comply with the pre-hearing time requirements, the brief or evidence of said party shall not be considered.

V. DRJ/Tripartite and Arbitration Proceedings

A. In all cases requiring the appointment of an arbitrator or DRJ, such arbitrator or judge be appointed through random selection by the WERC unless the parties mutually agree to the contrary. If either side objects in writing filed with the Commission within five (5) days of said appointment, a replacement shall be appointed by the Commission through random selection. In the event the other party files a written objection with the Commission within five (5) days of the appointment of said replacement, a third arbitrator or judge shall be appointed.

B. All arbitration, fact-finding or DRJ tripartite hearings shall be scheduled to be conducted within sixty (60) days of the initial appointment of the arbitrator or the DRJ.

C. In all arbitration, fact-finding or DRJ/Tripartite proceedings, the parties shall exchange exhibits twenty (20) days before hearing. In the event either party objects to an exhibit offered by the other, it shall file an objection in writing with the arbitrator or DRJ at least five (5) days prior to hearing.

D. In all arbitration, fact-finding or DRJ/Tripartite proceedings, the parties shall exchange hearing briefs and file respective hearing briefs with the arbitrator at least five (5) days before hearing. In the event there is a tripartite panel, the parties shall file three (3) copies of their respective hearing briefs with the DRJ at least five (5) days before hearing. No post-hearing briefs shall be considered.

E. All arbitration and fact-finding awards shall be issued within forty (40) days following hearing.

VI. In making any decision under arbitration procedures authorized in this section, the arbitrator shall make the award based upon the following factors in descending order of importance as follows:

A. GREATEST WEIGHT: State legislation and administrative directives which place limits on local spending or revenue.

B. GREATER WEIGHT: Local and/or state economic conditions.

C. WEIGHT:

1. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes of the employer and of other public and private sector employes performing similar services in the same community and in comparable communities.

2. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through collective bargaining in the public service or in private employment.

VII. Innovation to Increase Efficiency and Effectiveness

A. Proposals by either party to promote innovation where the primary purpose is to increase operating efficiency and effectiveness shall be deemed mandatory subjects of discussion.

B. Only those innovation proposals primarily related to wages, hours and conditions of employment shall be eligible for interest arbitration. In the event the parties proceed to arbitration under any of the models, an innovation proposal or

proposals of one or both of the parties (which are mandatory subjects of bargaining), shall be decided solely based upon the reasonableness of each such proposal(s).

VIII. Declaration of Policy (To Be Inserted at Beginning of Sub-Chapter 4)

A. It is the intent of the legislature that the municipal governmental bodies of the State provide efficient service to the public and that municipal employers and employes should be encouraged to develop and introduce new and innovative methods to improve the operating efficiency and effectiveness of local government.

B. Harmonious, cooperative employment relations and the efficient administration of municipal government promote this public interest. These ends are best served by the establishment of cooperative and mutually satisfactory employe-management relations, and the availability of suitable procedures for adjustment of controversies. It is recognized that whatever may be the rights of parties with respect to each other in any controversy regarding municipal employment relations, neither party has any right to engage in acts or practices which present a clear and present danger to the health, safety and welfare of the public.

C. It is in the public interest to encourage voluntary settlement through procedures of collective bargaining. Municipal employes shall be given the opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and peaceful procedure for settlement as provided in this subchapter.

OVERVIEW OF RECOMMENDATIONS

The Council members supporting the Recommendation for a Successor Law believe it makes significant, compelling and multiple changes to the existing law. It has added utility in that it can operate efficiently with or without the superimposition of a QEO type of cost containment device. Specifically, those Council members supporting the Recommendations believe that if enacted into law the Recommendations would offer:

1. Strong encouragement of consensus bargaining;

2. Encouragement of innovation where the primary purpose is to increase operating efficiency and a realistic, equitable means to obtain it;

3. Significantly expanded opportunities for the parties to meet with each other for the purpose of discussing options;

4. Significantly expanded options from which to choose;

5. Substantial reformation and simplification of the "Factors to be Considered by the Arbitrator" which will give the parties greater control over the arbitration results, enhance advocate creativity and reduce reliance on comparables so the parties are less likely to have the terms of some other parties' labor agreement imposed on them;

6. Drastic reduction of time spent in the interest arbitration process once the parties reach impasse;

7. Creation of a default process to be utilized only in the event the parties mutually agree to do so or the parties are unable to reach agreement to use any other dispute resolution device.

The Council members who endorse the multi-option approach contained in their Recommendations believe that it is virtually impossible to design one model which will suit all situations. They believe that the parties best able to define which model best suits a particular situation are the parties actually involved in that situation. They also believe that expanding opportunities for the parties to meet enhances mutual understanding and may more readily lead to a voluntary settlement.

COMMENTARY

I. *Parties to determine whether they want to utilize traditional or consensus collective bargaining model within thirty (30) days of first meeting.*

COMMENT: It is fair to say that all Council members share a common belief in the effectiveness of consensus bargaining. They view it as a process of problem-solving, not posturing, collaboration, not capitulation, and an enhancer, instead of a threat to the short-term and long-term relations of the parties. This provision would necessarily require the parties to consider whether consensus bargaining would be the most appropriate bargaining vehicle for them to use. Under this provision, neither party could unilaterally determine that consensus bargaining would be utilized. Any decision to use consensus bargaining would have to be mutual. Promoted and taught to the State of Wisconsin negotiators and negotiators from two separate union organizations which represent almost 30,000 state employes by the Wisconsin Employment Relations Commission, consensus bargaining has also made its way to a number of municipalities and their bargaining units. To date, in no case in which instruction in the method was provided by the WERC have the parties failed to reach a responsible, voluntary agreement. Using the consensus bargaining method, ratification votes on both sides typically have a high margin of victory. This bargaining model is known by many names. Consistent with the nomenclature mutually adopted by the Department of Employee Relations and Wisconsin State Employes Union, Council members choose to call it "consensus bargaining." It may be defined as a collaborative, problem-solving system of collective bargaining which emphasizes the mutual interests of the parties.

II. *If parties opt for traditional model, in the event they reach a WERC certified bargaining impasse, they must mutually determine within thirty (30) days of such certification which of the following dispute resolution models they will use.*

COMMENT: Council members supporting this recommendation believe that there is no one dispute resolution mechanism which fits all situations. They further believe that the best qualified source of determining which dispute resolution device best fits a given situation are the parties involved in the particular dispute.

This recommendation gives the parties a range of options to utilize to resolve their labor dispute. It is intentionally open-ended, even allowing the parties to invent their own dispute resolution mechanism.

The parties must mutually agree to a dispute resolution procedure before any can be employed. However, in the event the parties cannot reach an agreement to a dispute resolution model within thirty (30) days following a WERC certified bargaining impasse, they would be automatically placed in the DRJ/Tripartite model. The 30-day time limit, of course, is intended to accelerate the process.

This process represents a significant change from the existing procedures specified in Sec. 111.70(4)(cm). Currently, parties must petition the WERC for interest arbitration and then be certified as being at impasse in order to proceed to the only dispute resolution model which exists -- final package interest arbitration. Under this recommendation, however, the parties would necessarily be required to petition the WERC to certify a bargaining impasse which may or may not result in interest arbitration occurring depending on the dispute resolution model the parties ultimately select.

This recommendation specifically identifies 4 different dispute resolution models and, as previously noted, gives the parties the option of creating their own model. These models were selected for the following reasons:

Legal right of employes to strike; legal right of employer to lockout

This option is inserted for those parties who prefer to resolve their dispute by testing their respective strengths in the traditional manner of strike and lockout. It is not envisioned that any employer would agree to this option if a strike or lockout would adversely affect the public safety or health of the community. (It should be noted that this option would not affect any law enforcement or firefighter personnel since their labor relations rights are covered under different statutory sections.)

Mediation as set forth in Sec. 111.87, Stats.; fact-finding as set forth in Sec. 111.88, Stats.; and prohibition of employe strike as set forth in Sec. 111.89, Stats.

This option is for those parties who can agree they do not need the safety net of interest arbitration to resolve their dispute, but neither do they wish to resolve it by the traditional weapons of strike and/lockout. It is the model presently in place for all represented state employes. Under this model, in the event the parties find the recommendation of the fact-finder to be unacceptable as a settlement basis, negotiations will continue.

Final package interest arbitration as set forth in Sec. 111.70(4)(cm)6. provided that neither party shall be permitted to include more than 5 issues in its final offer except in those cases where the parties are attempting to obtain an initial agreement.

This is the present dispute resolution model except that under the current law there is no limitation on the number of issues which can be included in the package to be arbitrated. Limiting the parties to 5 arbitration issues is a means of insuring that more than minimal communications between the parties take place. However, where the parties are negotiating a "first contract" their lack of familiarity with each others' needs and/or the mechanics of collective bargaining

coupled to the wide range of issues they need to cover seems to suggest an exception be made to the 5-issue limitation rule.

Other mutually agreed upon impasse procedures filed with the Commission.

Under this option, the parties can select a dispute resolution model not listed if they mutually decide it better fits their needs. If, for instance, the parties were to determine issue-by-issue interest arbitration to be most appropriate for their needs, they would be free to select it and use it following their filing a description of their model with the WERC.

Dispute Resolution Judge (DRJ) and tripartite process

Under this option, a dispute resolution judge would be appointed by the WERC from a DRJ panel (explanation of panel creation to follow). As is presently the case at the WERC with respect to appointment of interest arbitrators, the DRJs would be selected by a random, computer-generated system.

Following the appointment of a DRJ, each side would appoint an advocate to assist the DRJ, thus creating a tripartite panel. To accelerate the process, these appointments would be required to be made and noticed to each party and the DRJ within 3 days of the DRJ's appointment. The rationale for a tripartite panel is that the advocate for each side can explain to the DRJ what is really behind the dispute and the political factors affecting it from the standpoint of both parties. This is the kind of information which would be helpful to a DRJ in fashioning a recommended solution to the impasse, but which the DRJ would not normally become aware of in the course of a formal arbitration hearing. Thus, this recommendation is premised on the belief that a tripartite panel is better able to fashion a more realistic and politically acceptable remedy to resolve the issues between the parties than would be one arbitrator acting singly.

Under this recommendation, the DRJ would be required to schedule the arbitration hearing to be conducted within sixty (60) days following the DRJ's appointment. This recommendation dovetails with one made in the Governor's Proposals (with respect to arbitration hearings). As with the Governor's Proposals, this recommendation is intended to accelerate completion of the process.

Under this recommendation, the tripartite panel is expected to fashion a non-binding conventional arbitration award, i.e., a fact-finder's recommendation. The award would not be binding on the parties, but after they received it the parties would be required to meet and attempt to reach a voluntary agreement. Whether or not they use the non-binding conventional arbitration award as a basis for settlement is immaterial. However, in the event the parties are unable to reach a voluntary settlement on all issues, the tripartite panel is required to reconvene

within ten (10) days following the elapse of the thirty (30) day period (during which 30 day period the parties were presumably attempting to reach a voluntary settlement) and select the total package final offer of one party or the other as originally submitted to the tripartite panel. Even if the parties have managed to settle one or more of the issues between them during their thirty (30) day period following the issuance of the tripartite panel's advisory conventional arbitration award, this recommendation would not permit the parties to amend their respective final offers at this point. This, again, is intended to promote complete voluntary settlements and motivate the parties to take their final offer responsibilities seriously at the beginning of this process when the offers are submitted.

III. *Consensus Bargaining*

A. Training from the WERC

COMMENT: All Council members believe that parties attempting to engage in consensus bargaining should receive competent training from qualified trainers. Council members endorse the consensus bargaining training provided by the WERC as excellent, effective and economical. While sources exist in the private sector which also provide consensus bargaining training, normally their fees are substantially higher than those charged by the WERC with no assurance that the quality of training is equal or superior to that provided by the WERC.

B. State to reimburse parties for training fees.

COMMENT: Under this recommendation, parties opting for the consensus bargaining model who are able to reach a voluntary settlement would be reimbursed for the training fees. The condition which must be met for reimbursement, of course, is that the parties actually reach a voluntary settlement. This was inserted as an incentive to the parties to do so.

C. If parties fail to reach voluntary settlement

COMMENT: Notwithstanding the high probability of success for parties which have committed themselves to use the consensus bargaining model, the possibility, however small, does exist that the parties will be unable to achieve a voluntary agreement. Under these circumstances, upon certification of an impasse by the WERC, this recommendation would allow the parties to select another dispute resolution model without penalty. In the event a filing fee is established for parties filing a petition for certification of impasse it is the intent of this recommendation that those parties who attempted consensus bargaining, but failed, may be excused from payment of such filing fee.

IV. *Dispute Resolution Judges and DRJ Procedures*

A. Establishment of panel of 12 dispute resolution judges (DRJs); term limitation; appointment by Governor with Senate confirmation

COMMENT: The WERC currently maintains two lists of qualified interest arbitrators. One contains the names of all interest arbitrators who reside in the State of Wisconsin; the other contains the names of those interest arbitrators who do not reside in the State of Wisconsin. Under this recommendation, the WERC would provide the Council on Municipal Collective Bargaining with its list of in-state arbitrators for Council review. Following Council review (which by vote of at least 7 members could result in the deletion of one or more names from said list) the list would be delivered to the Governor. From this list the Governor would appoint 12 dispute resolution judges, all of whom would be subject to confirmation by the Senate. Initial terms would be staggered to expire on different years but initial terms of one or two years would not count toward the consecutive term limitation contained within the recommendation.

The term limitation was established in an effort to increase public confidence in arbitration results. The accusation has been often made that some arbitrators deliberately manipulate their case results to reflect an even balance between the union and the employer. While most if not all Council members place no credence in this notion, term limitations could be helpful in ridding the public of this notion.

Appointment by the Governor with subsequent confirmation by the Senate represents a deliberate attempt to politicize the arbitration process to the extent of giving the political leaders of the State a significant role in the selection of those deemed qualified to be DRJs.

Concern has been expressed by some that 12 DRJs are an insufficient number to handle the disputes to which this provision would be applicable. Council members supporting it do not claim to have access to an unusually pellucid crystal ball. They do note, however, that if all the 78 municipal labor disputes which were resolved by interest arbitration in fiscal 1993-4 (including those involving police and firefighters) had been subject to the DRJ model, each DRJ would have had only 6 to 7 cases during that one-year span.

B. DRJ to establish dates and places of hearing, etc.

COMMENT: This recommendation simply mirrors existing statutory language with respect to the duties, powers and authority of interest arbitrators. It would give the same duties, powers and authority to the DRJs. It provides that the cost of the DRJ proceedings be divided equally between the parties. It is further intended that the WERC be permitted to approve the fees of the DRJs. Because their role as leader

of the tripartite panel require considerably greater efforts that those required of a sole arbitrator, as well as the fact that DRJs would have had to initially endure the rigors of appointment and confirmation, Council members supporting the DRJ/Tripartite model believe the DRJ fees should reflect those additional responsibilities and inconveniences.

Council members supporting this recommendation recognize that should it be enacted into law, a new set of state officers would be established -- a unique arrangement because these new officers would not be paid by the State but by the parties. The uniqueness of this arrangement, however, appears to be no legal barrier to implementation.

C. If parties do not voluntarily settle their dispute within thirty (30) days following issuance of the DRJs recommendation, tripartite panel would reconvene and issue award adopting the total package final offer of one party or the other.

COMMENT: Commentary has already been provided on this recommendation. It may deserve to be emphasized that only mandatory subjects of bargaining would be subject to the DRJ/Tripartite model consistent with the existing arbitration law of this State.

D. Extensions to time limits

COMMENT: The interest arbitration process can be a very time-consuming one. The latest figures available from the WERC indicate a minimum time of 179 days to enter and finish the process and an average time of 381 days.

This recommendation recognizes the advocates themselves are responsible for some of the delay. For instance, requests for extensions of the time to file briefs are routinely granted as a matter of professional courtesy. Under this recommendation, the advocate seeking an extension to any time limit under the DRJ/Tripartite process would be required to show the reason necessitating such request. If all members of the tripartite panel agree that such reasons constitutes an "exceptional need," it may grant the request under this recommendation. However, while a stipulation or agreement between opposing advocates that the request of one for an extension of time limits constitutes an exceptional need may be considered as evidence that an exceptional need exists, such stipulation or agreement by itself is an insufficient basis for granting the extension being requested. Only if all members of the tripartite panel are persuaded that an exceptional need exists requiring the extension of time limits as may be requested, can such extension be granted under this recommendation. Under these circumstances it is anticipated that advocates' requests for extensions to time-limits will at least not proliferate and probably decrease.

E. If either party fails to comply with pre-hearing time requirements, the brief or evidence of said party shall not be considered

COMMENT: While most advocates are reasonably diligent in attempting to comply with agreed upon time limits established by the interest arbitrator (or obtain the agreement of the opposing advocate to an extension) some advocates, doubtless for what they consider good and sufficient reason, simply ignore the time limits. The arbitrator does not have judicial powers of contempt and cannot force the advocate to submit the required brief. (Evidence is usually submitted at the time of hearing and doesn't represent the same problem) Under this circumstance, most arbitrators are reluctant to move ahead and issue an award without receiving the briefs of both parties lest they be accused of acting in a high-handed, uninformed and arrogant fashion.

This recommendation is designed to correct that problem. There is no question it will capture the undivided attention of any advocate representing a party in an interest arbitration case. Council members supporting this recommendation understand the draconian nature of the remedy they propose but believe it is necessary.

V. *DRJ/Tripartite and Arbitration Proceedings*

A. Random selection of arbitrator or DRJ; Each side may exercise one (1) request for substitution of arbitrator or DRJ

COMMENT: Under this recommendation an arbitrator or DRJ would be appointed by the WERC through random selection (as is presently the practice with respect to the creation of arbitration panels). Mirroring current provisions of the statutory rules of civil procedure with respect to judicial substitution, each side would be able to request one substitution for the arbitrator or DRJ who had been appointed.

At present, under WERC procedures, arbitrators may be replaced for "exception circumstances," usually relating to a conflict of interest. This recommendation is not intended to affect that procedure.

B. Sixty (60) day scheduling requirement

COMMENT: This provision is identical with the recommendation made in the *Governor's Proposals for Changes to Sec. 111.70(4)(cm) of the Statute in Senate Bill 44.* Here, as there, it represents and effort to reduce the time required to get through an interest arbitration process.

C. Exchange of Exhibits

COMMENT: Most of the evidence submitted in interest arbitration cases consists of statistical data such as consumer price indexes, per capita income figures, tax levy rate increases or internal and external comparables. There is no reason these exhibits cannot be exchanged well in advance of the hearing date so that neither party is

surprised, and unnecessary time is not consumed by the parties wrangling over admission of evidence questions. Under this recommendation either party is still privileged to object to any exhibit proposed to be submitted by the other, but the objection must be filed in writing with the arbitrator or DRJ at least 5 days prior to the hearing date.

D. Parties to exchange hearing briefs and file same with the arbitrator or DRJ at least 5 days before hearing; no post-hearing briefs to be considered

COMMENT: This recommendation, as with the previous one, represents an effort to save significant amounts of time in getting the parties through the interest arbitration process. Although a few interest arbitrators currently encourage advocates to exchange and file hearing briefs prior to hearing, the common practice is for both advocates to appear at the hearing, submit their evidence and then submit a post-hearing brief several weeks later. The time required to get through the interest arbitration process can be then further extended in the event the advocates decide they want to file rebuttal briefs following the receipt by each of the other's post-hearing brief.

Post-hearing briefs and rebuttal briefs are intended to assist the arbitrator in gaining a clearer picture of what the evidence is supposed to demonstrate, and why the evidence of the other side is not as reliable. Council members supporting this recommendation believe that this can be accomplished as well prior to hearing with the consequent benefit of enabling the arbitrator or DRJ to proceed immediately to his/her task. Since each advocate will have exchanged with his opponent the exhibits he/she intends to introduce, the utility of the post-hearing "rebuttal brief" can be incorporated in the hearing brief.

E. All arbitration and fact-finding awards to be issued within 40 days following hearing

COMMENT: This provision mirrors one of the suggestions made in the *Governor's Proposals for Changes to Sec. 111.70(4)(cm) of the Statutes in Senate Bill 44*. Here, as there, the intent is to reduce the time required to get through the interest arbitration process.

Currently, WERC rules provide that the interest arbitrator must issue his/her award within 60 days following submission of all briefs by the parties. If the 40 day recommendation were adopted, it appears that significant blocks of time would be saved.

VI. *In making a decision under any arbitration or DRJ proceedings, the arbitrator shall make the award based upon the following factors in descending order of importance as follows:*

A. GREATEST WEIGHT: State legislation and administrative directives which place limits on local spending or revenue.

B. GREATER WEIGHT: Local and/or state economic conditions.

C. WEIGHT:

1. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes of the employer and of other public and private sector employes performing similar services in the same community and in comparable communities.

2. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through collective bargaining in the public service or in private employment.

COMMENT: In their report entitled *Analysis and Assessment of Governor's Proposals for Changes to Section 111.70(4)(cm) of the Statutes in Senate Bill 44*, Council members unanimously concluded:

> The Council is unanimous in its support for the proposition that factors be allocated to different weight categories. This approach can be an effective device in dealing with the problem presented by apparently inconsistent or contradictory factors (e.g., internal comparable vs. external comparables). It is not infrequent for this to occur under the existing law and when it does the arbitrator is necessarily invited to give credence to one factor to the detriment of the other.
>
> To the extent that none of the factors in the category is consistent with or contradictory to any other factor in the same category the Council believes the approach taken by the Governor is sound. Council members also believe that if the objective is to more closely shape arbitration results in conformity with legislative established standards or factors, that objective is best served by reducing, not increasing, the number of factors which the arbitrator must consider.
>
> ... (T)he Council endorses the division of "Factors to be Considered by the Arbitrator" in the greater and lesser weight categories as a device to reduce arbitral discretion provided:

1. There is not a super abundance of factors in the "greater weight" category, and;

2. No factor is inconsistent with or contrary to any other factor in the same category. 5/

This recommendation represents a deliberate, thoughtful attempt by the Council to implement these observations.

Building from the Governor's Proposal, Council members supporting this recommendation plotted the factors it devised into categories of varying weights. However, the recommendation differs from the Governor's Proposal in two ways:

1. It creates one additional weight category.

2. It substantially reduces the number of factors.

Council members share the Governor's apparent desire to shape arbitration results to conform more closely with legislatively established standards or factors. Those Council members supporting this recommendation believe it would effectively accomplish that goal. As the entire Council observed in its earlier Report " ... to the extent that factors to be considered by the arbitrator are increased to that extent is the risk increased of increasing arbitral discretion -- even though that may not be the intent." 6/

A. Greatest Weight

COMMENT: Only one generic factor was placed in this category. If, for instance, the Governor and Legislature determined there existed sufficient economic necessity to justify the continuation of cost-containment measures such as the QEO or tax levy increase limits, that decision, once enacted, would constitute the factor(s) in this category which the arbitrator would have to consider. It is intended that the fiscal directives which would constitute the factors in this category would be absolute if they apply to an employer and its bargaining units.

Other factors in lesser weight categories could not be used by the arbitrator to defeat those in the greatest weight category.

5/ *Analysis and Assessment of Governor's Proposals for Changes to Sec. 111.70(4)(cm) of the Statute in Senate Bill 44*, pp. 11, 15.

6/ *Ibid*, p.13.

B. Greater Weight

COMMENT: While local and/or state economic conditions could not be used to defeat factors in the greatest weight category, Council members supporting this recommendation believe them to be of great importance. Placement of the word "local" ahead of "state" is deliberate. While analysis of both local and state economic conditions are relevant and may be useful in determining an interest arbitration outcome, Council members supporting this recommendation are determined that local economic conditions not be obscured by a more general view of state economic conditions.

The generalized description of these factors is also advisably made. Council members supporting this recommendation believe that traditional tools of economic measurement such as consumer price indexes are not always reliable indicators. They believe the public interest is better served by allowing the parties to exercise their own ingenuity and creativity in demonstrating local and state economic conditions. In many cases, traditional economic indicators will continue to be used; in others, newer, more accurate devices of measuring economic conditions will be offered into evidence. If they can be validated to the satisfaction of the arbitrators, Council members supporting this recommendation believe they should be considered.

C. Weight

COMMENT: Under the current law, interest arbitration is driven by comparables. The relegation of the "comparability factors" to the category having the least weight thus represents a radical change of direction.

Comparing a group of municipal employes involved in the arbitration with other groups of employes employed by the same employer, or other employes performing similar services in the same or comparable communities can be of assistance in trying to establish a sort of rough equity. At the same time, over-reliance on comparables also constitutes a source of frustration to both employers and employes because each ultimately ends up with a labor contract reflecting solutions developed by other employers and their employes which may not really fit the needs of the parties involved in the immediate dispute being arbitrated.

In the absence of evidence demonstrating factors in higher wage categories, those "comparables" would continue to play a decisive interest arbitration role under this recommendation. It should be noted that comparability with private sector employes is placed on the same level as comparability with public sector employes. As a practical matter, however, accurate private sector wage and fringe benefit data in sufficient volume to offer a representative sample of the local community is extremely difficult to obtain on a timely basis.

Besides the "comparability factors" included in this category, an additional set of factors was added by Council members supporting this recommendation. This set of factors is intended to offer guides to arbitrators in determining non-economic issues. It is intended to essentially parallel a provision in the existing arbitration law. 7/

VII. *Innovation to Increase Efficiency and Effectiveness*

A. Mandatory subjects of discussion

COMMENT: Council members supporting this recommendation believe that in this era of global economic competition it is as essential to encourage employes to make suggestions for increasing efficiency and effectiveness of operations in the public sector as it has become in the private sector. This provision is intended to encourage that kind of participation even though the parties may choose not to participate in consensus bargaining. However, it is important to understand that under this provision a mandatory subject of discussion is not the same as a mandatory subject of bargaining. A "mandatory subject of discussion" is intended to connote the concept that if employes make an innovative proposal designed to increase operating efficiency and effectiveness that proposal is required to be discussed even though it may be a permissive subject of bargaining. (i.e., primarily related to the management and direction of the operation). Under the current practice it is not unusual for employers to resist any discussion of a permissive subject of bargaining offered by the employes even though it may represent a good faith attempt to improve operating efficiency and effectiveness. This provision would require the employer to at least discuss the proposal. It also deserves to be emphasized that this provision does not preclude the employer from unilaterally instituting any innovative proposals of its own to increase operating efficiency and effectiveness if such proposal is primarily related to the management and direction of the operation (i.e., permissive subject of bargaining), regardless of whether or not an agreement to such proposal was obtained from the employes. While delaying implementation of such a proposal until a bargaining impasse has been declared might normally represent a better practice, this recommendation does not preclude the employer from implementing any measures primarily related to the management and direction of the operation at any time.

7/ Sec. 111.70(4)(cm)7.j.

B. Only mandatory subjects of bargaining go to interest arbitration; "reasonableness" sole test for arbitrator; innovative proposals decided on issue-by-issue basis.

COMMENT: Consistent with current law, under this recommendation only innovative proposals which constitute a mandatory subject of bargaining would be required to go to interest arbitration. As previously noted, under this recommendation the employer would not be required to go to interest arbitration on any proposal, innovative or not, if that proposal constitutes a permissive subject of bargaining. As a corollary, neither would the employer be precluded from unilaterally implementing any measure primarily related to the management and direction of the operation.

Thus, to repeat, this recommendation requires any innovative proposal for increasing operating efficiency and effectiveness to go to interest arbitration only if it is primarily related to the wages, hours and conditions of employment.

It is the observation of those Council members supporting this recommendation that in some instances, a meritorious proposal to increase operating efficiency and effectiveness (whether made by the employer or employes), if a mandatory subject of bargaining, may be defeated by an inability of its proponent to justify it by use of "comparables." It seems fairly obvious that if a proposal is truly innovative, very likely few, if any, comparables can be invoked to support it. More often, though, in situations governed by comparables and subject to a "final package" arbitration process, the party advocating an innovative change to increase operating efficiency and effectiveness will usually abandon that proposal when formulating its final offer for interest arbitration. This is due to an understandable unwillingness to risk losing the interest arbitration case and the "bread and butter" economic issues it contains by inserting a proposal which cannot be justified by comparables and may tip the balance of the entire case against the would-be innovator. What might have been a good idea is thus aborted.

This recommendation seeks to remedy this problem. Under it, each innovative proposal, (the primary of purpose of which is to increase operating efficiency and effectiveness and which is a mandatory subject of bargaining) may be safely included in the final offer of either party because it will be judged apart from the remainder of the final offer. Multiple innovative proposals will be treated on an issue-by-issue basis. The sole reason for adoption will be the reasonableness of the proposal in the eyes of the arbitrator. While comparables could be cited in support of such a proposal, failure to do so would not be to the proposal's detriment.

Council supporters of this recommendation see in it an effective opportunity for municipalities and their employes to become well-equipped to enter the 21st century.

VIII. *Declaration of Policy*

COMMENT: Council members supporting this recommendation recognize the inherent danger of lengthy declarations of policy for they may offer opportunities to defeat the more substantive provisions. At the same time Council members who support this recommendation believe it is important to advise the public that a new day has dawned which requires an expanded declaration of policy. Inasmuch as they perceive the proposed Declaration as consistent with their substantive recommendations, they do not believe it represents a significant threat to those recommendations.

The current Declaration of Policy reads as follows:

> The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with a municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and above all, peaceful procedure for settlement as provided in this subchapter. 8/

It is fairly obvious that the recommended declaration of policy establishes additional priorities which include efficient service to the public, development of new innovative methods to improve operating efficiency and effectiveness, harmonious cooperative employment relations, efficient administration of municipal government, establishment of cooperative and mutually satisfactory employe-management relations, and the concept that neither party has the right to engage in actual practices which present a clear and present danger to the health, safety and welfare of the public.

It should be noted the last paragraph of the Declaration of Policy is virtually identical to the existing Statement of Policy contained in Sec. 111.70(6). Some inspiration was also gained from existing Declaration of Policies contained in Sec. 111.01 (Wisconsin Employment Peace Act) and 111.80 (State Employment Labor Relations Act).

8/ Sec. 111.70(6).

IX. *Qualified Economic Offer*

COMMENT: These recommendations contain neither endorsement nor criticism of the concept of Qualified Economic Offer or any similar cost containment measure. In a recent analysis, Council members commented on the concept of a qualified economic offer and unanimously concluded:

> Inasmuch as collective bargaining usually is defined as negotiations on wages, hours and conditions of employment, limited only by the rules governing mandatory, permissive, and prohibited subjects of bargaining, Council members do not perceive the concept of a Qualified Economic Offer as representing a bargaining device. Council members instead see it primarily as a cost containment device superimposed on the collective bargaining process. The Governor and the Legislature, independent of this Council, must determine whether there is sufficient economic necessity to justify the utilization of cost control measures such as the QEO. 9/

This continues to be the view of the entire Council. It is the reason why those Council members supporting the aforesaid recommendations for a successor interest arbitration law applicable to municipal employes make no recommendations with respect to the continuation or discontinuation of the QEO concept.

It is important to recognize, however, that the successor law being recommended will work with or without the superimposition of cost containment devices such as qualified economic offers.

9/ *Analysis and Assessment of Each of the Changes Proposed by the Governor to Section 111.70(4)(cm) of the statutes in 1993 Senate Bill 44*, January 3, 1995, at page 14.

CONCLUSION

All members of the Council faithfully participated in the process of developing this Report. The seven members of the Council who approved this Report for discussion at the final public hearings modified their individual positions on certain issues to agree upon this Report. The remaining three members did not support or vote for this Report.

Based on the record of the 70's, failure to provide a dispute resolution process which is perceived as being equitable by both sides will inevitably lead to job actions, strikes and potential worker replacement. 10/ This kind of activity is perceived as contrary to the public interest: it represents a fundamental threat to the health, safety, welfare and convenience of the public as occurred in the 70's; it stands as a barrier to collaborative improvements in operating efficiency, effectiveness and working conditions without which Wisconsin municipalities will be unable to keep apace of the legitimate needs of the taxpayers they serve.

"Those who cannot remember the past are condemned to repeat it." 11/

10/ WERC records list a total of 110 municipal employe strikes occurring in the 8 years preceding passage in 1978 of the original MED/ARB law for an average of almost 14 municipal employe strikes per year. Included in this number is the 1975 Hortonville teacher strike as a result of which 85 out of 105 teachers permanently lost their jobs.

The work time lost by these strikes was high. WERC records show that in total they consumed an estimated 589,358.65 work days, although strike time by teachers was generally made up following settlement. But excluding teacher strikes still leaves a deficit of 295,193.15 municipal work days (or 2.3 million work hours) which do not appear to have been made up. Put another way, a mere 8 years of municipal employe strikes (again, excluding teacher job actions) resulted in a total loss of close to 800 work years.

11/ Santayana, George, The Life of Reason, Vol. I, Reason and Common Sense