STRUCTURE AND DUTIES OF MINNESOTA PUBLIC SECTOR LABOR RELATIONS AGENCIES: A REPORT TO THE LEGISLATIVE COMMISSION ON EMPLOYEE RELATIONS

By

Mark Shepard
House Research

and

Bob Lacy
Senate Research

July, 1980

I. INTRODUCTION

Labor relations, in both the public and the private sector, is essentially a "private" matter: in theory the employer and employee representative are supposed to negotiate, come to an agreement, and administer the contract without outside intervention. In fact, both public and private labor relations are extensively facilitated and regulated by various governmental bodies and by outsiders such as mediators and arbitrators. In Minnesota, two impartial executive branch state agencies as well as the district courts have responsibilities relating to public sector labor relations.

Laws 1979, Chapter 332 ordered the Legislative Commission on Employee Relations to study "the feasibility of an unfair labor practices board." Since that topic overlaps with other issues concerning the function of governmental bodies in public sector labor relations, the scope of this report is broader than what the 1979 law requires. The purpose of this paper is to discuss the manner in which Minnesota public sector labor relations responsibilities are divided among the impartial governmental bodies: the Bureau of Mediation Services (BMS), the Public Employment Relations Board (PERB) and the district courts. The report also suggests and discusses alternatives to the present structure. Of course, most other governmental bodies in Minnesota are also involved in labor relations--but as public employers and not as neutrals--and this report does not discuss their role in public sector labor relations.

II. PRESENT DUTIES OF BMS, PERB AND DISTRICT COURT

A. Bureau of Mediation Services

The BMS is an executive branch agency of state government headed by a director. The director is appointed by and serves at the pleasure of the Governor. The Bureau was created in 1939, and has responsibilities in private sector labor relations as well as public. This paper does not discuss the Bureau's private sector responsibilities, which include unit determination and conducting elections for private sector groups not covered by federal law. The Bureau's public sector duties can be broken down into the following categories:

1) Representation Issues: BMS determines "appropriate units" for all public sector collective bargaining, except to the extent that bargaining units are established in

statute for state and University of Minnesota employees. In identifying which individual employees will be assigned to particular bargaining units, BMS must decide issues such as which employees are "supervisory," "confidential," "essential," and "professional." Once units are established, BMS conducts any elections needed to determine if employees wish to be represented by a labor organization. BMS also has authority to void any election if the director finds that an unfair labor practice affected the result.

1980 legislation gave BMS the duty to assign state and University of Minnesota employee classifications to the statutorily estabished units if:

-- there are classifications which were not assigned by statute, or

-- the classifications assigned by statute were later significantly modified in occupational content.

BMS also is presiding over the transition to the new statutory bargaining units for state and University employees.

2) "Fair Share" Fees: Exclusive representatives have the right to charge employees who are represented by the organization, but who are not dues-paying members, a "fair share" fee. Employees have the right to contest the amount of this fee and BMS hears and decides all such challenges.

3) Mediation and Arbitration: When contract negotiations deadlock either or both sides may request the services of a mediator to help the parties in reaching a voluntary settlement. BMS provides mediators who can suggest settlements. Mediators do not have authority to force a decision on either side.

When there is an impasse in negotiations and arbitration is agreed to by the parties or required by law, BMS certifies those matters which have not been agreed upon to PERB. BMS also maintains a list of arbitrators that parties may choose from to settle grievance arbitration cases.

4) Contract Administration: BMS promulgates a grievance procedure for parties to use if they are not able to negotiate one.

B. Public Employment Relations Board

PERB was created by the Public Employment Labor Relations Act of 1971. The Board is composed of five members appointed by the Governor to four year terms. Two members are representative of public employees, two of

public employers, and one of the public at large. PERB's duties can be summarized as follows:

1) Representation Issues: PERB hears appeals from BMS appropriate unit determination decisions, insofar as the units are not specifically set forth in statute. PERB also hears appeals from the determinations made by BMS in the course of setting up a unit as to the meaning of "supervisory," "confidential," "essential" or "professional" employee.

2) "Fair Share" Fee: PERB hears appeals from BMS "fair share fee" decisions.

3) Impasse Arbitration: PERB maintains a list of qualified arbitrators. When an impasse in contract negotiations has been reached, and arbitration is requested or required, BMS certifies the parties' final positions to PERB. PERB then issues a list of seven arbitrators to the parties. The parties alternately strike names until a single arbitrator, or in some cases a three-arbitrator panel, remains.

4) Grievance Arbitration: When a grievance under a contract has been processed up to the arbitration stage, and the parties are unable to agree on an arbitrator, the parties may petition PERB for a list of five arbitrators. This list is then used by the parties in selecting the final arbitrator to decide the grievance.

C. District Courts

Minnesota district courts have jurisdiction to review decisions made by PERB, such as definitions of the various types of employees, the appropriateness of a unit, and fair share challenges, and to review BMS decisions concerning elections. The district courts have original jurisdiction over alleged unfair labor practices committed by public employers, employees or employee organizations.

The following chart summarizes the functions performed by BMS, PERB, and the District Courts:

FUNCTION	ORIGINAL JURISDICTION	APPEALS
Unit determination issues	BMS (to extent not mandated in statute)	PERB, then District Court, then Supreme Court
Conducting Elections	BMS	District Court, then Supreme Court
Fair Share Fee challenges	BMS	PERB, then District Court, then Supreme Court
Hear and decide unfair labor practice allegations	District Court	Supreme Court
Mediation	BMS	
Certification of issues to arbitration	BMS	
Maintain list of arbitrators for interest arbitration	PERB	
Maintain list of arbitrators for grievance arbitration	PERB, BMS	

For those decisions which require hearings (such as some unit determination issues and fair share fee challenges) the procedure starts with a BMS hearing at which a hearing officer takes testimony. The hearing officer then discusses the case with the director and the final decision is then issued by the director.

If a party decides to appeal the BMS decision to PERB, BMS prepares a transcript of the hearing and sends it and the record to PERB. The parties file briefs with PERB and then argue the case orally in front of the Board. PERB has the power to take additional evidence, but this authority is rarely used. PERB then deliberates, and sometimes decides the case immediately. Following PERB's decisions, parties have the right to appeal to district court, and then to the state supreme court.

Peter Obermeyer, director of BMS, supplied the following information about BMS' case load, and the number of appeals to PERB:

	FY1979	FY1980
Representation Issue (unit appeal) Cases decided by BMS	348	374
Fair Share Cases Decided by BMS	201	367
Representation (unit appeal) and Fair Share cases decided by PERB on Appeal from BMS	28	28

Claudia Hennen, Executive Secretary of PERB, estimates that unit appeals and fair share determinations, on the average, take the following amount of time:

Time of initial filing to BMS decision - 6 months
(This statistic is only for BMS decisions which are later appealed to PERB. These decisions would tend to be harder and to take longer than the average BMS decision.)

Time from filing of appeal with PERB to PERB decision - 8 more months
(Ms. Hennen estimated that it

often takes 2-4 months for PERB to receive a transcript of the BMS hearing.)

Time from PERB decision to District Court decision - 13 more months

Time from District Court decision to Supreme Court - 11 more months
(Recent changes in Supreme Court procedures may have changed this figure. The time for a decision varies greatly from case to case.)

Ms. Hennen estimates that about 20 percent of PERB decisions are appealed to district court.

III. PERCEIVED PROBLEMS WITH THE PRESENT SYSTEM

This paper does not attempt to draw conclusions as to the effectiveness of the present structure for dealing with public sector labor relations. Rather, we have talked to a number of people who are involved on a daily basis with BMS, PERB, or the district courts, and from their comments have tried to get some sense of how the present system is regarded, and what changes might be considered.

Although most people we talked to had suggestions for improving the current distribution of duties to BMS, PERB and district court, no one suggested that the present system was in a state of crisis or that any structure must be changed to prevent a crisis. Some people felt that no major changes are needed in the present structure.

Most people felt that the problems that do arise are a result of the way the system is structured and not of failure of any individuals in an agency. Those interviewed emphasized two general categories where problems arise: (1) the handling of unfair labor practices and (2) problems caused by the structure of the relationship between BMS, PERB, and the court appeal system.

The following problems were mentioned in regard to handling unfair labor practice cases under the current system. It should be noted that there was disagreement on whether or not some of the things listed below are problems.

-- District court judges, who have initial jurisdiction to hear unfair labor practice allegations, are not specialists in labor

law, and their decision often reflects a lack of understanding of PELRA. Some practitioners also felt that since judges must run for re-election, unfair labor practice decisions are sometimes political when they should not be.

-- District courts take too long to decide unfair labor practice cases. Especially during the course of negotiations, decisions must be made quickly if there is to be an effective remedy for the alleged unfair labor practice, and courts have been unable to make timely decisions.

-- Since unfair labor practice charges are filed in district courts throughout the state, there are inconsistent decisions. Because there is no consistent body of law, more litigation is encouraged.

-- It is too costly to bring unfair labor practice charges in district court, especially for small employers and small employee organizations. On the other hand, some practitioners feel that the relatively high costs deter the filing of frivolous charges.

-- Because district courts across the state decide unfair labor practice cases, and because their decisions are not centrally published, it is not practicable to gather information on the results of unfair labor practice cases.

The following matters were identified as problems with the present relationship between BMS, PERB, and the court appeal process. Again, there was disagreement on whether or not some things are problems.

-- The process of unit determination and fair share appeals takes too long because BMS decisions can be appealed to PERB, and in turn to the district courts and the supreme court. Among suggestions as to contributing factors in these delays are: (1) BMS is slow in processing transcripts of hearings, perhaps because of clerical understaffing; (2) Since PERB is a part-time board and only meets approximately once a month, the appeal process is slowed; (3) Crowded district court calendars.

-- The lengthy appeal process is very costly. For example, the appealing party must pay for a transcript of the BMS hearing when it appeals to PERB, and there are further costs

if there is an appeal to court.

-- Because PERB members serve only part-time, they sometimes have conflicts of interest when cases involving parties who the members are affiliated with come before the Board.

-- BMS performs two distinct types of functions: (1) it mediates disputes when parties are bargaining a contract; and (2) it has adjudicatory functions such as deciding the composition of a unit, and making decisions in fair share challenges. Some people feel that even though BMS has separated these two types of decisions internally, there is still a possibility that BMS's mediation abilities are weakened by the fact that the Bureau must decide cases which involve the same parties for whom it also attempts to mediate disputes.

-- BMS hearing officers are generally experts in labor relations, but often are not specialized in conducting hearings. Some people felt that the conduct of hearings and the quality of the records and opinions could be improved.

-- Both BMS and PERB maintain lists of arbitrators that parties may choose from in selecting a grievance arbitrator. Some felt that there was no need for two lists, and that choice may allow parties to manipulate the system by trying to use the list that they feel is most favorable to them.

IV. ALTERNATIVES TO THE PRESENT SYSTEM: PRO AND CON

A. Minor Changes in Present System

There are several relatively minor changes which could be made in the present system without making any structural revisions. For example, if it is felt that BMS hearing officers need to do a better job of conducting hearings, special effort could be made to provide training in conducting hearings, or to provide more officers or officers with different qualifications. Similarly, there are points at which the appeals process could probably be speeded up by adding more staff, or changing the method for appeal, without making any major structural changes. Also, to the extent that the two lists of arbitrators maintained by BMS and PERB are thought to be a problem, it would be easy to mandate that only one of these agencies maintain a list. Apart from this "fine tuning" there are a variety of

alternatives for major structural changes to address the perceived problems under the current system.

B. NLRA Model

The National Labor Relations Act and the laws of some states provide for one administrative agency to handle all adjudicatory matters and another agency to do mediation, or other methods of dispute resolution. One division of the National Labor Relations Board regulates determination of bargaining units and holds elections. Another division under the NLRB decides unfair labor practice cases. A separate agency, the Federal Mediation and Conciliation Service provides mediation services when bargaining reaches an impasse.

If this model were applied in Minnesota, a multi-member board would take over BMS's current responsibilities for unit determination, fair share challenges, and conduct of elections, and would replace district courts as the initial body to hear unfair labor practice charges. Presumably the Board would make decisions by assigning a hearing officer to conduct hearings and to make a recommended decision in each case. The Board would then make a final decision after considering the recommendation of the hearing officer. Alternatively, the decision of the hearing officer could be considered as the final decision of the Board, unless one of the parties appealed to the Board. Under either option, the only responsibility of BMS in the public sector would be to conduct mediation sessions, and possibly to provide other services at bargaining impasse.

Among the perceived advantages of this model are that the Board would develop considerable expertise in administering public sector labor law. It is argued that unfair labor practice decisions would be of a higher quality than the present decisions, and that these decisions would be made more quickly (assuming that Board would be full-time). Furthermore, placing all adjudicatory responsibilities in a single agency would eliminate the duplicative administrative appeal from BMS to PERB that now exists, and would streamline the decision-making process.

Those who favor this model also contend that it would allow BMS to do a better job as a mediation agency, because the Bureau would be free of the conflicts it now faces as both a mediation and adjudication agency. Another possible advantage is that a multi-member Board whose members are appointed for fixed terms might be perceived as a better decision maker than a director who serves at the pleasure of the Governor.

Perhaps the strongest argument against such a major change in the assignment of responsibilities is the belief held by some that the present system seems to be working

fairly well. Although numerous people have pointed out problems with the current structure, it is argued that these problems can be mitigated without major structural changes. Furthermore, recent legislation has made substantial changes in public sector labor law, and it may be best to see how these changes work before making more major revisions.

Another disadvantage of moving to a full-time board would be cost. Currently PERB operates on a budget of approximately $43,000 per year, which includes per diem for its members, and the salary of the one full-time staff person. Although much of the staff for a full-time board would undoubtedly come from current employees of BMS and PERB, there would be higher costs just from paying the salaries of the full-time board members. If the board had to make unit determination decisions, hold elections, hear fair share challenges, and decide unfair labor practices, it would probably have to be full time to make decisions in a timely manner. There would be further costs in hiring staff to hear unfair labor practice cases. If the Board were given responsibility to investigate and enforce unfair labor practice cases (as the NLRB does) there could be further costs.

Another argument against creating a full-time board is that creating an agency to hear unfair labor practice charges might stimulate the filing of frivolous charges. Some practitioners contend that the present system for hearing unfair labor practices works, and that the reason that more are not filed is that there simply aren't many unfair labor practices committed which merit the filing of charges. On the other hand, it would be possible to discourage frivolous charges by giving the Board authority to assess costs or attorney fees against a party who files a charge which the Board finds frivolous.

Finally, the present system of two administrative agencies making decisions on the same case is thought by some to reduce appeals to court. Some people feel that parties appeal BMS decisions to PERB to get a "second opinion," and that if PERB upholds BMS, the party will not appeal to court. Under the single agency system, parties would have to file court appeals to get a "second opinion."

The National Labor Relations Act provides that appeals from NLRB decisions shall be filed in the Circuit Courts of Appeals, instead of in the U.S. District Courts where most federal cases begin. If this model were followed in Minnesota, appeals from the Board's decisions would be filed directly with the Supreme Court, in the manner in which appeals from unemployment compensation and workers' compensation cases are currently heard. It is important to note that this alternative of cutting the district courts out of the appeal process could be done under the <u>current</u> system, as well as under the alternative discussed above.

That is, without modifying any of the present responsibilities of PERB or BMS, it would be possible to expedite the appeal process significantly by providing for appeal from PERB directly to the Minnesota Supreme Court.

C. Single Agency Model

In some states, such as Wisconsin, one board has jurisdiction not only over all adjudicatory decisions (unit determination, conduct of elections, and unfair labor practices) but also is responsible for handling mediation.

Applying this model to Minnesota, all BMS and PERB public sector responsibilities would become subject to one board. This system would be very similar to, and have most of the same advantages and disadvantages of, the NLRA model. The major difference would be that the Board would also be responsible for mediation. While this would centralize all responsibility in one agency, it would also leave room for the argument that an agency cannot have maximum effectiveness as a mediation agency if it also has to decide cases which may involve the same parties as those involved in mediation. To the extent that the mediation and adjudication functions are clearly separated within the agency this argument would be weakened, but one board would still maintain ultimate responsibility for both types of functions.

D. Other Alternatives

The following alternative structures are less comprehensive than those discussed above. All of the following options are lesser parts of the comprehensive alternatives discussed above.

1) Administrative Agency to Hear Unfair Labor Practices: Under this alternative, an administrative agency, instead of the district courts, would have initial jurisdiction over unfair labor practices. The perceived advantages of assigning the responsibility to an administrative agency are that the agency might make decisions more quickly than the courts, and that the agency could have more expertise, and thus make better decisions. Furthermore, an agency would build up a more consistent body of decisions than the district courts are able to, and would also be able to maintain data on the filing and results of unfair labor practice charges.

A slightly different alternative would be the creation of an unfair labor practices court, instead of giving the responsibility to an administrative agency. The advantages which were mentioned in regard to an agency to hear unfair labor practices would also apply to a court. Further, a court might be able to produce a better record, and to the extent that a court's decisions would carry more weight than the decision of an agency, appeals could be reduced.

However, court proceedings might be more expensive than proceedings before an agency.

The disadvantages of either an agency or court alternative could be that more charges, including possibly frivolous charges, might be filed. An unfair labor practice charge might be easier and cheaper to file than it is now. While this is perceived by some as an advantage over the present system, others fear that unfair labor practice charges might be used to harass the other side during negotiations rather than to resolve legitimate complaints. Some people also argue that deciding unfair labor practices requires some legal expertise, and that there is no guarantee that members of an administrative board would have this expertise.

If the duty to decide unfair labor practice charges were given to BMS, a single director, appointed by and serving at the pleasure of the Governor, would have responsibility for the decision. Some argue that this would make unfair labor practice decisions subject to too much political pressure. If the BMS decision could be appealed to PERB, the process would take too long. If PERB or a new board were given the responsibility to hear unfair labor practices, the board might have to be full-time to make decisions in a timely fashion. However, if a full-time board had only PERB's present duties plus the duty to decide unfair labor practices, the Board might not be able to keep busy.

2. Abolish PERB: Another alternative to the present system would be to abolish PERB, so that BMS decisions on matters such as unit determination and fair share fees would be final unless appealed to court. Presumably BMS would take over PERB's present responsibilities for supervising selection of arbitrators.

The perceived advantage of this alternative is that the process would work more quickly. There would be only one administrative decision, yet due process rights would be preserved by allowing an appeal to court. By eliminating an appeal step, the process would also become less costly.

Disadvantages of this alternative are that PERB decisions are made by a board consisting of representatives of management, labor and a neutral, and thus may offer more protection to parties, and a different type of review, than the decision made by the director of BMS. Eliminating PERB's place in the appellate process might also lead to more court appeals than under the present system. These court appeals might take longer to decide and would be more costly than PERB decisions are.

3. Eliminate District Court from Appeal Process: Under this alternative, already mentioned above, BMS and

PERB structure would remain the same. However, appeals from PERB decisions would skip the district court step, and would proceed to the Supreme Court on a writ of certiorari. The Supreme Court would have the option of hearing the case or of simply affirming PERB's decision. This option has the advantage of speeding the present appeal process, while not adding any significant expenses either to the state or the parties. A possible disadvantage could be that an already crowded Supreme Court docket could become more so, and that PERB decisions might be less likely to receive thorough judicial scrutiny.

4. The final alternative would be to leave jurisdiction over unfair labor practices in district court, but to give PERB initial jurisdiction over the adjudicatory matters (unit determination, fair share challenges, elections) that BMS currently handles. This would have the advantage previously mentioned of (1) speeding the process by eliminating one level of administrative decision-making, and (2) eliminating any possible conflicts that arise because BMS is currently both a mediation agency and an adjudicatory agency. However, this alternative might require the use of either more full time PERB staff or a full-time board in order to make timely decisions.

E. Subsidiary Issues

If any of the major changes outlined above are instituted a number of subsidiary issues must also be considered. Among these issues are:

-- Composition of the Board: Should a board which will hear unfair labor practices and/or representation issues be composed entirely of "neutral" members, or should the present tri-partite composition be maintained? How many members should be on the board, who should appoint the members, and for what term? Should the members serve full-time or part-time?

-- Unfair Labor Practice Duties: If an administrative agency is to be given the duty to hear unfair labor practices, should it be a board, or an agency with a single director? Should this agency have authority to investigate alleged unfair labor practices and to seek court enforcement of its orders, or should these duties remain with the parties to the action? If an agency other than BMS were selected to hear unfair labor practices, should BMS's current power to void elections based on election-related unfair labor practices be transferred to the new agency?

-- Private Sector: If major structural changes are made, should BMS continue to have its present adjudicatory authority over private sector employers and employees who are not covered under the federal act?

-- Appeals: If only one agency has responsibility for public sector labor relations, should appeals from the decision of an administrative agency start in district court, or proceed directly to the Supreme Court? What is the proper scope of review for decisions of the agency?

V. OTHER STATES

We have surveyed other states which have public sector collective bargaining on a scale comparable to Minnesota. The list below is intended to provide some examples of the practices of other states. Due to time limitations, the list is not comprehensive.

Of the states surveyed, the biggest differences from the Minnesota system are that:

-- all states surveyed so far assign the initial jurisdiction over unfair labor practices to an administrative agency.

-- no state surveyed so far provides the potential for two separate agencies to decide issues such as unit appeals.

California (Similar to NLRA)

The Public Employment Relations Board consists of three public members, appointed by the Governor to serve on a full-time basis for five years. The Board handles representation issues (unit determination, elections, etc.) and also hears unfair labor practice allegations. Mediation services are provided by a separate agency, the state conciliation service.

Florida (Similar to NLRA)

The Public Employment Relations Commission is made up of three full-time public members appointed by the Governor to four year terms. PERC handles representation issues and unfair labor practices, but most mediation services are provided by a separate agency.

Iowa (Single Agency)

The Public Employment Relations Board is made up of three full-time members appointed by the Governor to serve four year terms. No more than 2 members may have the same political affiliation. PERB not only has responsibility for representation issues and unfair labor practices, but also provides mediation services.

Massachusetts (Similar to NLRA)

The Labor Relations Commission, composed of three full-time commissioners appointed by the Governor to five year terms, has jurisdiction over representation issues and unfair labor practices. A separate Board of Conciliation and Arbitration, a three member board within the Department of Labor and Industry, provides mediation services.

Michigan

Michigan has two separate administrative systems: one for state employees and one for local. Both systems provide for appointed boards to handle representation issues and to decide unfair labor practice cases.

For local government employees, the responsible agency is the Employment Relations Commission, consisting of three members, appointed by the Governor to serve three year terms on a part-time basis. The Commission also has mediation responsibilities.

Representation issues for state employees are decided by the Civil Service Commission, which consists of four part-time members (two from each political party) appointed by the Governor to eight year terms. Unfair labor practice charges are decided by a three member Employment Relations Board, which is a unit within the Civil Service Commission.

New Jersey (Single Agency)

The Public Employment Relations Commission has jurisdiction over representation issues, unfair labor practices, and mediation. The Commission is made up of seven members. Two represent labor, two management, and three the public. The members are appointed to three year terms, and serve part-time. The chairman, who is selected from among the public members, serves full-time.

New York (Single Agency)

The Public Employment Relations Board has jurisdiction over representation issues, unfair labor practices and mediation. The Board has three "public" members, no more than two of whom may be from one political party. Terms are six years.

Oregon (Single Agency)

The Employment Relations Board has responsibility for representation issues, unfair labor practices, and mediation. The Board consists of three public members appointed by the Governor to serve full-time for four years.

Pennsylvania (NLRA Model)

The Labor Relations Board has jurisdiction over representation issues and unfair labor practices. A separate Bureau of Mediation performs mediation services. The Labor Relations Board is composed of three members appointed by the Governor to serve part-time for six year terms.

Wisconsin (Single Agency)

The Employment Relations Commission handles representation issues, unfair labor practices and mediation. The Commission consists of three members appointed by the Governor to serve on a full-time basis for six years.