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TO: **Senate Committee on Economic Development, Housing and General Affairs**
House Committee on General, Housing and Military Affairs

FROM: **Act 154 - Grievance Arbitration Study Committee**

DATE: **January 15, 2015**

SUBJECT: **Grievance Arbitration Study Committee Report**

Overview

During the 2013-2014 Legislative session, a Bill (S. 241) was introduced which would have amended the State Employees Labor Relations Act ("SELRA") to allow, among other modifications, the parties to a collective bargaining agreement to agree to utilize binding arbitration as a final step of the grievance procedure as an alternative to the Vermont Labor Relations Board ("VLRB"). After hearing testimony on the issue, the Legislature finalized Act 154. Section 1 of Act 154 established a Grievance Arbitration Study Committee ("Committee"), to (1) study the issue of grievance arbitration for State employees; and (2) assess the relative merits of various grievance protocols, including arbitration and use of the Vermont Labor Relations Board, addressing the ability of these protocols to provide resolution of grievances in a manner that is economical, timely, just, and provides for appropriate privacy protections for the parties. Additionally, the Act requires the Committee to, on or before January 15, 2015; submit a written report to the Legislative Committees identified above. Accordingly, this report is submitted for your consideration.

Committee

As established by Act 154, the Committee consisted of the following members:

John J. Berard, Director of Labor Relations, as designee for the Commissioner of Human Resources;
Robert Paolini, Esquire, Executive Director of the Vermont Bar Association;
Michael O'Neil, President, Vermont Troopers' Association, Inc.;

Jonathan Goddard, Vermont State Employees' Association, Inc.; and
Michael Duane, Esquire, GCAL Director, as designee for the Attorney General

The Committee met seven (7) times between September 1, 2014 and January 14, 2015, taking testimony from the following individuals:

Timothy Belcher, Esquire, Counsel Vermont State Employee Association, Inc.;
Richard Cassidy, Esquire, Hoff Curtis, PC;
James Dunn, Esquire, Mickenberg, Dunn, Lachs & Smith, PLC;
Steven Collier, Esquire, General Counsel, Department of Human Resources;
Joseph E. McNeil, Esquire, McNeil, Leddy & Sheehan, PC; and
Timothy Noonan, Esquire, Executive Director, Vermont Labor Relations Board

Analysis

During the testimony of the individuals identified above, it became clear to the Committee that a number of grievance resolution protocol variations exist and such protocols are typically, in the case of a unionized workforce, mutually agreed upon by the parties to a collective bargaining agreement ("CBA") to suit their particular needs.

SELRA provides the VLRB as the final step of the existing grievance procedure and for final adjudication of contested dismissals. In its current configuration, the VLRB has adopted the Rules of Civil Procedure which provides for processes such as discovery, interrogatories, and depositions. While the VLRB has adopted general principles that govern proof, principles of contract interpretation, progressive discipline, and/or just cause, such principles may be modified by the precedential nature of its decisions. Additionally, VLRB decisions may be appealed to the Vermont Supreme Court. VLRB hearings are generally open to the public and its decisions a matter of public record readily available on-line at the VLRB website. Each day of a VLRB grievance hearing results in an approximate cost of $1,500 in VLRB staff salaries and member's per diems. During calendar years 2011 through 2013, the average time between a filing of a grievance with the VLRB and the issuance of a decision was 278 days.

In the majority of unionized environments, absent an agreement to the contrary, binding arbitration generally provides for an exclusive remedy for grievances arising under a CBA. The process is usually administered by a neutral agency such as the American Arbitration Association or the Federal Mediation and Conciliation Service ("FMCS"). Costs are split between the parties and the process is final and binding with very limited exceptions. Prehearing processes such as discovery, interrogatory, and depositions are generally limited in nature. Labor arbitration is guided by general principles that govern proof, principles of contract interpretation, progressive discipline, and just cause. While an arbitrator's decision is not necessarily precedential on a fellow arbitrator, arbitrators normally follow basic principles that provide consistency and predictability to the process. Arbitration is generally a private process not open to the public. The Office of Arbitration Services of the FMCS determined in Fiscal Year 2013 that the average per diem rate charged by an arbitrator on the FMCS roster was $1,023 and the

average cost for each case including hearing, travel, and study time was $4,516. In Fiscal Year 2013, the average time between the parties requesting that FMCS appoint an arbitrator and an arbitration award being issued was 333 days. Additionally, it is worth noting that the Judiciary Employees Labor Relations Act (3 V.S.A. § 1017) provides the ability to bargain binding arbitration as the final step of the grievance procedure to employees in the Judiciary. However, the parties to the CBA have yet to bargain such a procedure.

Testimony received from individuals experienced in the arbitration process indicated that, historically, arbitration was seen as a low-cost, simple process designed to resolve a limited contractual dispute between two business entities. The parties to the arbitration process desired a quick resolution of a dispute, and expected that their close business relationship would continue to exist after the immediate contractual issue was resolved. Over time, however, the arbitration process has generally now become a more litigious process involving multiple fact witnesses, with discovery, and the submission of proposed findings of fact and conclusions of law. Accordingly, it appears that the distinction between the perceived simpler, low cost arbitration process and the contested hearing process for the resolution of contractual disputes has become less clear.

Conclusion

The Committee found that excepting the significant difference in pre-hearing administrative processes (e.g. discovery, interrogatories, depositions, etc.) and the public nature of VLRB hearings and decisions, both the VLRB and labor arbitration provide substantially similar methodologies for providing economical, timely, and just resolution of grievances. As a result, the Committee concluded that should the Legislature modify SELRA to allow for binding arbitration, other conflicting provisions in SELRA must be appropriately modified and the parties should be allowed to collectively bargain all aspects of the process including, but not limited to, confidentiality, and precedential value of decisions. Additionally, the Legislature should consider adopting the Revised Uniform Arbitration Act, which has been adopted by eighteen (18) other States.

The Committee noted that the VLRB could adopt streamlined procedural rules for the administration of grievance disputes or, alternatively, the parties could bargain such streamlined rules in an effort to reduce the perceived cumbersome nature of the VLRB process. Finally, the Legislature should be aware that due to the fact that the current VLRB process is effectively an internal state process, the adoption of an external labor arbitration process may result in financial obligations to the State which may require an appropriation of funds, in addition to those required to maintain the VLRB, which will continue to be the final adjudicator of alleged violations of SELRA.