TESTIMONY OF JOSEPH E. MCNEIL TO GENERAL, HOUSING & MILITARY AFFAIRS COMMITTEE

Re H. 81 and H.63

January 21, 2021

Good afternoon Chair Stevens and members of the Committee. My name is Joe McNeil. I am a Burlington lawyer at McNeil Leddy and Sheahan P.C. and I served as chief negotiator for the Employer Commissioners on the Educational Employees Health Care Commission. I was the Employer Commissioners' Suzanne Dirmaier in the first round of bargaining, and have been engaged to represent the Employer Commissioners in the upcoming round as well.

But for the temperature difference being about 80° less, it seems like just yesterday I was before this Committee on the labor organizing bill. Of course, since that time, the pandemic has increased, our U.S. Capitol has faced an insurrection, we have a new President and our Vermont State House was on high alert this past weekend. Otherwise, though, barely anything has changed! I observed on Tuesday the same level of graciousness from the Chair and the Committee members that characterized you all this past session. Congratulations on your re-election (I think!) and thanks very much for your service to our state.

Like Suzanne, I also have extensive collective bargaining and labor relations experience ranging over several decades in the state. I've been responsible for negotiating hundreds of collective bargaining agreements for school districts, municipalities, not for profit entities, private corporations, UVM, the State of Vermont and the Vermont Judiciary. I've also accumulated significant experience as a labor relations mediator and arbitrator both within and outside of Vermont. I have been chief spokesperson in labor and employment fact findings, grievance arbitrations and last best offer proceedings which set the terms and conditions of an agreement that could not be successfully negotiated directly by the parties. I have also been an advocate and a mediator with regard to the number of Vermont strikes.

First, if I may, a few basics. I know how difficult it is for committees such as yours to suddenly need to understand the minutiae of what can sound almost like a foreign language, especially when practitioners begin to use some of the "inside baseball" jargon. So, in order to be helpful, Act 11 established a ten-member commission consisting of five Employer Commissioners and five Employee Commissioners, and charged it with negotiating the division of responsibility for paying health care plan premiums and out of pocket obligations for educational employees, assisted by mechanisms such as health reimbursement arrangements (HRA's) and health savings accounts (HSA's). The process involves the gathering of necessary information, direct negotiations between the two interests, and utilizing what is called the statutory impasse procedures if agreement cannot be reached despite good faith bargaining by both sides. The impasse procedures under Act 11 involve the option of mediation followed in turn by mandated fact-finding and ultimately by last best offer or LBO arbitration.[1] Both fact finding and LBO

[1] The Employer Commissioners strongly believe that the important step of mediation should be required, not simply an option, and that the mediator should be a different person from the fact-finder unless both parties agree to a "mediated fact-finding." Additionally, LBO arbitration means that one of the parties' submissions must be adopted

involve quasi-judicial evidentiary hearings, following which a nonbinding recommendation is made for settlement in fact finding, and a binding determination of the terms and conditions of the agreement is made in LBO. This mandated state-wide process took the place of localized district by district bargaining with respect to health care issues. Hopefully this is helpful. However, please interrupt me if I digress into jargon that you don't understand during my testimony.

On behalf of the Employer Commissioners, I have been asked to testify concerning what they believe to be the greatest areas of need in H. 81 and H.63 as a foundation for their upcoming and future bargaining. Unquestionably, their major objective is to ensure that the legislation recites the need for a proper balancing between access to excellent health care benefits by educational employees at a cost that is reasonably affordable for Vermont school districts and their supporting taxpayers, this being a cost that does not inordinately deprive school districts of revenues that are needed for educational programs.

I would like first to repeat the basis for our primary request that was articulated Tuesday by Employer Commissioners' Chair, Elizabeth Fitzgerald. In our first round of bargaining, despite an incredible amount advance preparation, direct bargaining and impasse procedures work by both sides, that included significant expert analysis and testimony, the impasse procedures under Act 11 that became applicable when agreement eluded us permitted a single "fact finder" from Massachusetts to inform the Employer and Employee Commissioners that their respective recommendations with regard to the allocation of out-of-pocket expenses were too complicated and complex for him to understand, so he would make no absolutely no recommendation as to this critically important aspect of the parties' disagreement.

Similarly, in the penultimate decision resulting from the last best offer (LBO) hearing, the single arbitrator from New Hampshire limited his analysis of literally three long days of hearing to a declaration that he had considered both parties' positions, and that "the Employees' position more closely adhered to the statutory criteria", so he ordered it to be implemented without any further analysis.[2]

As a result of these proceedings, the cost of providing health care to educational employees across Vermont increased by $25,000,000 in the view of the Employer Commissioners.

While it is true that both the employee side and the employer side agree that this abject punting of responsibility and total lack of analysis must not be repeated, and that H. 81 adds 2 changes towards this end by requiring (1) an explanation of the rationale for the choosing the position that is ordered, and (2) a cost estimate of the selected proposal with a breakdown of the portion to be borne by employers and employees, for both of which we are grateful, we respectfully submit that the more extensive list of Employer Commissioners' recommendations as set out in H. 63

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in its entirety, with the adjudicator having no ability to select portions from both submissions, which the first round arbitrator indicated he would have done were it legally permissible for him to do so.

[2] It is true that the Employer Commissioners agreed with the Employee Commissioners to use a single arbitrator in the first round rather a panel because the required AAA selection process was too cumbersome and expensive. The Employer Commissioners agreed to use the particular arbitrator because of his background as an economist. However, it was shocked by the lack of analysis in his binding award.

should be amended into the law. The most salient of these additional employer recommendations set forth in H. 63 are the following:

- Alter the requirement in H. 81 with respect to the panel of arbitrators. H. 81 provides that if the parties are unable to agree on a single arbitrator, a three-member arbitration panel will be selected using the criteria of the American Arbitration Association. The Employer Commissioners believe this methodology is both excessively cumbersome and expensive, as well as almost inevitably resulting in a panel too remote from the Vermont scene. We believe it makes more sense to allow each party to appoint a panel representative, saving the time and expense of an appointment through AAA. Furthermore, we believe it would represent an excellent approach to specify that the Chair of the LBO panel be one of the neutral members of the Vermont Labor Relations Board designated by its chair. This alternative panel composition would have a better understanding of the Vermont milieu, allow both parties to appoint LBO panel members with healthcare or economic expertise, and be less expensive than what H. 81 mandates.[3]

- Mandate an additional degree of analysis by the LBO arbitrator or arbitration panel beyond that specified in Section 6 of H. 81 (set forth on page 10 and 11 of the side-by-side analysis) to also require:
  1. A specific determination as to which of the two submissions more appropriately balances the two primary goals of the legislation, namely appropriate access and reasonable/sustainable cost containment.
  2. Add Vermont's not for profit sector to the comparative analysis which must be made of the proposals submitted against the health care benefits/costs applicable in other public and private sector plans available to Vermont employees.
  3. Require a "full explication" of the basis for the LBO decision which is made.
  4. Specify that the decision must include an estimate of the actuarial value of the health care benefits being made available as contrasted to those available through Vermont Health Connect.
  5. Specify the increase in educational spending that is likely to occur from the implementation of both parties' LBO submissions across the life of the ordered result.

- Mandate mediation as a separate step in the impasse process and separate the mediator from the fact finder unless the parties themselves agree to utilize the same individual in both roles, again for the reasons outlined by a Chair Fitzgerald.

- Eliminate the ability of a single member of either the employer or employee commissioners to appeal an arbitration or arbitration panel award to the courts as it is now permitted by H.

[3] The Committee needs to understand that a critical guardrail against unsustainable cost increases that is present in the LBO procedures for State employees is missing here. Any LBO arbitration award for State employees is specifically subject to legislative appropriation. If the appropriate is not fully made, the parties re-bargain within the $ made available. No such safeguards are present here.

81 (page 11 of the side by side), instead requiring that there be a majority of either the employer or employee commissioners authorizing such appeal.

While not specifically related to the analysis required as a part of any fact-finding or LBO proceeding, the employer commissioners further believe that these additional changes to H. 81 as set forth in H.63 should be incorporated, as follows:

- Provide a mandate for a statewide grievance procedure to the full commission. While H. 81 would authorize this to be bargained, it would permit the employee commissioners to continue to object to its implementation as they did in the first round. It makes absolutely no sense to have the meeting and application of this statewide law become subject to different and conflicting localized grievance procedures, as this could thoroughly frustrate the basic legislative intent.

- Provide that the VLRB rather than the arbitrator or the arbitration panel will have jurisdiction to determine any charges that unfair labor practices have been committed. (Placing this jurisdiction with the VLRB will be consistent with the mandate of every other labor statute passed by the Vermont Legislature.)

- Add individuals employed as the chief business officer for school districts to superintendents of schools as being exempt from the coverage of this act because chief business officers acted as the primary financial resource for school boards and, consequently, should be regarded as exempt as executive leadership to the same extent as superintendents.

- Accelerate the schedule so that the process can be completed by early December in order to be accounted for in budget submissions.

The Employer Commissioners have recommended a number of additional amendments in H. 63, many of which have been pointed out in prior testimony. These include the process for appointment and removal of commissioners, the consideration of alternates, the issue of paid released time for the five employee commissioners (we are hoping the legislation makes clear that paid release time is not required for the alternates as well, which would remove seven teachers from classroom instruction at a time when for Vermont students are stressed for time with their teacher). While the Employer Commissioners would like to see their preferences incorporated, they are willing to try to work these out "off-line" with the Employee Commissioners if the Committee would prefer this, concentrating instead upon the essential amendments believed necessary to prevent health care costs for educational employees from becoming the next "pension crisis" for K-12 education financing.

In this regard, we also understand that the issue of the ability to bargain about an income sensitized approach to premium payments and out-of-pocket costs is of tremendous importance to the union side of this conversation. Please know that it is to us as well. We have been informed that Act 11 involved a compromise with respect to the prior standards of what was

known as Act 85. This compromise was that while the Act 11 would allow the parties to negotiate to increase access to all tiers of plan coverage for all classes of employees, this would be in exchange for a commitment that all employees on the same tier of coverage would make the same payments, in order to preclude unsustainable increases in cost. This is the more typical approach across Vermont, including the approach applicable in the collective bargaining agreements for State of Vermont employees. It seems somewhat anomalous that having gained access to all tiers, the Employee Commissioners now want to "simply have a conversation" about income sensitivity as to payments. While this Committee clearly needs to understand that simply having a conversation ultimately means the right submit this desire to binding arbitration, which makes the need for a workable arbitration panel, rather than one person, even more essential to include. The Employer Commissioners will of course bargain in good faith on all subjects mandated or authorized by the statute.

This concludes my testimony and I am happy to answer any questions you may have. Thank you very much for your time and attention.