2009 HOUSE EDUCATION

HB 1519

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1519

House Education Committee

☐ Check here for Conference Committee

Hearing Date: February 9, 2009

Recorder Job Number: 8997

Committee Clerk Signature Carmen Hoerl

Minutes:

Rep. Lee Myxter introduced the bill. HB 1519 would provide for binding arbitration of grievances between school districts and employees. He was a negotiator for the Fargo district and other small districts for over twenty years. He is a lifetime member of NEA and NDEA but he was not there as their representative. He has spent hundreds of hours working at negotiations and working with people who have been going through grievances. When people see the word binding arbitration, they think the teachers want to take over. This is binding arbitration only of grievances. It doesn't control salaries. It doesn't control insurance. A grievance is that an employee feels contractually he or she has been wronged. The normal grievance procedure in most contracts is like this: the employee files the grievance, it goes to the school principal, and if the school principal doesn't agree, it goes up the chain finally ending up with the school board, and the school board has the final decision. Unless it is a real grievous contractual error, usually the employee is not going to win. This bill would allow for a fairer process for the employee. If the normal procedure didn't come to any kind of conclusion, then it would go to a binding arbitration in which the teacher or the employee would select one person for the committee, the school board would select another person, and a third person would be selected by those two, a somewhat supposedly impartial person. According to the NDEA attorney in North Dakota each year there are from seven to ten lawsuits because

if a teacher goes through the normal process and the school board doesn't agree, the only recourse is to go to court. It costs each side from $10,000 to $15,000 per court case. Binding arbitration would cost significantly less. Binding arbitration is faster, more economical, appears more fair to the employee, and there is a neutral party. It provides an orderly means of resolving workplace disputes. It could reduce tension. It compels both parties to write better contract language. It could push both sides to be more reasonable in their discussions. This bill requires all teacher contracts to contain a section for binding arbitration of grievances. He sees this bill could work for both sides. He finds it a little disheartening and a little bit ironic that districts and parents turn their kids over to us from ages 5 to 18 and fully trust and expect that we are going to the best for them. Yet, what do the teachers in North Dakota get for this—the second lowest wages in the nation? The teachers do not want power. The point of this bill is to allow for easier and better relationships between the board and the teachers. He mentioned a statistic from an administrator's publication that a lot of the problems with the fact that students are scoring well is that the teachers aren't doing well. Teachers are looking for respect. He thinks that this bill would go a little way in providing that.

Rep. Phillip Mueller: When it comes time for these contract negotiations, might a bill like this passed make those negotiations a tougher road?

Rep. Lee Myxter: From my point of view, it makes it easier. As a negotiator, I don't have to sit around and try to change the contract. He gave an example of having to work a lunch period without pay. Another period of your day is taken away, and that is not in the contract. That could be grieved. If that could be taken care of outside of negotiations, that would eliminate one problem so that negotiations of salary, insurance, and benefits could take place.

Rep. David Rust: I think you are talking about the master contract. You want to require all master negotiated agreements between board and representative agency to contain a section on arbitration for items that are in that negotiated agreement only?

Rep. Lee Myxter: Yes. It has to be in the contract to be a grievance.

Rep. Brenda Heller: In Beulah Middle School one of the classrooms has a smart board and the other one doesn't. Could that teacher without the smart board have a grievance?

Rep. Lee Myxter: No, unless your contract in Beulah says that all teachers must have a smart board. It only has to do with things in the contract.

Rep. Bob Hunskor: If I hear you right if a teacher has, in the teacher's mind, a serious justifiable grievance, the school board does not have to honor them. They can listen to it and they can say no which could create a hassle between the teacher and the board. It makes working conditions more strained. In this case that could be turned over to an arbitration board which would take care of the problem and you wouldn't have those strained relations between faculty and administrators. Is that right?

Rep. Lee Myxter: That is the point of the bill.

Chairman Kelsch: I would imagine that this would cause some interesting conversations between you and your wife.

Rep. Jerry Kelsh: Would this arbitration board be paid and who would pay them?

Rep. Lee Myxter: There is a cost. It could be about one third of what it costs to go to court which is $10,000 to $15,000. Both sides pay. It would be split between them.

Vice Chair Lisa Meier: If these cases go to court, how long do they usually take then?

Rep. Lee Myxter: I honestly don't know. They can drag out for a long period of time.

Rep. Karen Karls: You are saying contracts from this point on will have to specify?

Rep. Lee Myxter: No. That was just an example I used because I know that is a grievance that has come up. What is in the contract would be decided by the representatives of the teachers and the board. One thing that is often in a contract is that statement at the end that says any other duties that the board may require. The board usually relies on this statement.

Rep. John Wall: If we pass 1519, do you think we could inadvertently spawn more frivolous grievances?

Rep. Lee Myxter: I would hope not. This goes to the argument that kind of bothers me is that North Dakota teachers are out there looking for frivolous things to hassle. Remember if you are a member of an association which the majority of those teachers are, half of that fee comes out of that association. Let's use $1,000 for an example. If they are going to kick out that $1,000 for every binding arbitration, pretty soon they are going to say we are not going to binding arbitration for this.

Rep. Lyle Hanson: How about if the losing side pays for the whole thing?

Rep. Lee Myxter: They wouldn't bring frivolous ones at that point. The ones that I have been a part of is that both sides have to split the fees.

Greg Burns, Executive Director, North Dakota Education Association, appeared in support of HB 1519. **(See Attachment 1.)** He answered some questions posed earlier and gave some extra facts. Court cases can drag up to 9 months, 12 months, or even 2 years. It is up to the parties to decide on the number of arbitrators. There can be 1 arbitrator, 3 arbitrators, or whatever the parties decide. The cost for each arbitrator is about $300 per day.

Vice Chair Lisa Meier: What would be a more common situation that occurs that goes into arbitration?

Greg Burns: Let me build on what Rep. Myxter was using. A good collective bargaining agreement will set down the hours people are required to work, what they get paid for, and

what they get paid for other assignments. Those are probably the most typical types of disagreements whether the pay is correct. An arbitrator will look at the language and they will decide whether the language is clear and unambiguous. If the language is not clear and unambiguous, they will go to the intent of the parties at the time it was negotiated. They will see how the parties had applied this language. In the past when similar situations have arisen, how did the parties act the last time this happened or did they do the same thing over a series of events like this. They have these standards that they will apply. Only those things that are found in the collective bargaining agreement are subject to arbitration.

Rep. John Wall: Right now I believe things can be grieved that are not in the master contract. Correct me if I am wrong.

Greg Burns: It might be true in some cases. This is what happens when the grievance procedure which should be in the contract moves to board policy. It opens the field for complaints. It does not open the field for adequate resolution of the complaint. What this does is it causes both parties to be sharper and more precise in what they are doing.

Rep. John Wall: I also served on a grievance committee for many years. Many of the things that we were called upon to grieve were not in the master contract but we could grieve them and actually make progress some of the time. I am wondering if this would not exclude that possibility. For instance, open record laws, things like that are not normally found in a master contract. Would this language exclude that more wide open ability to set up a dialog between teachers and school board in a friendly manner hopefully to resolve some things?

Greg Burns: Actually, no. In the long term, it enhances that ability to discuss things. Grievance procedure increases people's ability to talk openly and try to reach resolution about issues before entering further into the grievance procedure and ultimately into arbitration.

Rep. Phillip Mueller: If the bill passes, it would seem to me if I was a school board member I would put in as little in that contract as I possibly could. If I was a teacher, I would put everything in there that I could think of in there. What is your reaction to what I would see this thing doing in terms of setting up that kind of conflict in terms of the negotiated agreement itself?

Greg Burns: Actually that is happening now without this. It doesn't make any difference with regards to that. What it does mean is that as people do propose these things and as the grievances are reached, that the parties must reach a better understanding of exactly what it is they are agreeing to. It causes more precise, well honed language.

Rep. Karen Karls: Could you list specific things that you would want to see in that contract?

Greg Burns: I could get a list of things that I would like to see in the collective bargaining agreement but what we are talking about here today and trying to focus on is regardless of what is in the collective bargaining agreement, a lot or a little, who gets to decide what it means when there is a dispute over what it means. He gave an example of personal leave. Every employee of the bargaining unit shall be entitled to two days personal leave. We get into a dispute about what people can use it for. Can people use personal leave to go hunting? If it doesn't say in the collective bargaining agreement, normally people would assume that they don't have the right to do it. But if over the course of the years, the employer has allowed certain people to go hunting using personal leave and somebody else wants to claim that right, an arbitrator would probably say based on the past how you applied this language, this exists.

Opposition

Gary Thune, Legal Counsel, ND School Boards Association, appeared in opposition of HB 1519. **(See Attachment 2.)**

Rep. Lyle Hanson: You wrong on that one statement. In the 1980s legislature passed binding arbitration. It went to the public and was voted down.

Gary Thune: I stand corrected.

Rep. Lee Myxter: Would you agree that the law favors the board much more than the teachers?

Gary Thune: If the process goes all the way to and through impasse, then for the first time at that point, the board is authorized by supreme court decisions to issue contracts unilaterally to teachers and if that is done in good faith, then the courts uphold it. At that stage the advantage goes to the school board. Last year for example, there was one impasse. For all the rest it has been a very level table up to that point. At some point the legislature determined that schools have to open and run and so at some point there has to be a final determinant. When they issue contracts unilaterally, they are often subject to litigation.

Rep. Lee Myxter: In reference to the line about the slippery slope, to me that means you are implying that teachers are out to get the district and they are looking for ways to erode your _ . Is that true?

Gary Thune: Teachers are consistently seeking more and more into the negotiated agreement which takes it out of the control of school boards. In terms of the slippery slope that I am talking about is if the legislature decides to impose binding arbitration grievances on school boards which hasn't been in the law for 40 years, that is next. Teachers have not been overwhelmingly successful getting this into negotiated agreements. If you were, you probably wouldn't have litigation going here. There is a good reason for our boards to keep some of those things out of negotiated agreements. If legislature decides this is a good place, will this be the only bill? I doubt it. School boards aren't here in terms of in order to negotiate this at

the table. The proposal from the NDEA is seeking to impose statewide these provisions that school boards have rejected for 40 years, and the law is still working.

Rep. Lee Myxter: We are to be working together for the benefit of the children not taking sides.

Rep. Phillip Mueller: I think you might be correct on opening this thing up to all grievances. I don't think that isn't necessarily the intent of the bill. If it says within the negotiated agreement, would that put you and your organization in a different position on how you feel about the bill?

Gary Thune: The short answer is no. It would require massive overhauling of current negotiated agreements by school districts.

Rep. John Wall: To your knowledge the ten schools that have adopted similar language, have you been talking to? Are there problems there?

Gary Thune: I am relying on the accuracy of Mr. Burns and the ten. I couldn't name any of the ten. In West Fargo in 1977-79 the question was raised whether or not they have agreed to binding arbitration that is enforceable.

Rep. Bob Hunskor: You alluded to the fact that if this bill were to pass it may open the door for more demands in the future. What would you think about a sunset for this or the fact that in years before here this particular body could review the passage of this bill and how it is working? (not very audible)

Gary Thune: I don't know how that could get majored down the road. What I meant by my statement about seeking more and more, if you are under binding arbitration—in other words the board has relinquished its control—I would see that teachers certainly wanting to get more provision into the negotiated agreement that they then go to binding arbitration with. How school districts would attempt to try to take things out of the negotiated agreement that are not the subject of binding arbitration. It still is in the law that the teachers would not be required to

agree to make a position in any proposal to remove language from the contract. By adopting this bill the broad range in contract that we have out there in many districts who don't have lawyers, who just come in from working in the fields and sit down, language that they think they understand with the teachers, that language trying to get it out of context would either be next to impossible or incredibly expensive.

Rep. David Rust: He read a portion of the bill. How do you interpret compulsory binding arbitration of any grievance?

Gary Thune: The end grievance language would come down to how it is defined either in the negotiated agreement and many of those are defined process or in board policy, because there is definition of grievance there that is broadly defined. All of those would be subject to compulsory binding arbitration under this bill. It has nothing to do with what is just in the negotiated agreement. Even if it is what's in the negotiated agreement, many of those negotiated agreements have broad definitions of grievance so the very nature of the contract in which you place this language would be to have a broad definition if that is what is in there now and then the parties would have to negotiate it out. I strongly suspect the teachers with binding arbitration as a part of it would be very reluctant to give away any of the language that is __. Our experience has been that when we attempt to remove language that we found to be troublesome, it is routine to report to progressive bargaining and if it happens at all, it is at significant cost.

Dr. Doug Johnson, NDCEL, appeared in opposition to HB 1519. He didn't have much more to add to what Gary Thune just presented for the rationale. Often principals are carrying out the policies of the board and that does put them in a position that can be compromised.

Rep. Karen Karls: Give us an example.

Dr. Doug Johnson: A most recent one I had was just on a contractual basis where a contract was written with individual, had supervisions within that contract as far as time being spent between two different districts. The way the contract was written the way the two school districts thought it should have been written didn't work out. We were able to come to an agreement and put the contract back in place.

Rep. Jerry Kelsh: On page 2 of the new language, wouldn't you think the last sentence eliminate any grievance to the contract __?

Dr. Doug Johnson: Yes. Many of those situations we have within those contracts were written by people who weren't experienced folks at writing contracts. That can be a problem in some of those situations because of writing we have. We have a lot of opportunity for the school districts to get into situations where they are going to have challenges to those terribly straight forward contracts that they have negotiated __ and need the school board association to help straighten that out.

Rep. Lee Myxter: Would you agree that if a grievant went through the process and didn't go to court, the school board has the power to do what it did?

Dr. Doug Johnson: Yes. ...

Chairman Kelsch: Rep. Hanson said that in the 80s the legislature passed binding arbitration and it was referred by the people.

Rep. Lee Myxter: That was binding arbitration only for negotiations?

Chairman Kelsch: Right.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1519

House Education Committee

☐ Check here for Conference Committee

Hearing Date: February 11, 2009

Recorder Job Number: 9221

Committee Clerk Signature	Carmen Hart

Minutes:

Rep. Lee Myxter: This is only for binding arbitration of grievances. It is for things that are in the contract or in school board policy. It is not salaries—only grievances. I am sure you are aware that the odds are stacked against teachers when it comes to negotiations. The law is basically behind school boards, right or wrong. This is for fairness of contracts.

Rep. Corey Mock: Knowing that the better half of Rep. Myxter is a school administrator, I would urge us all to make the household environment more difficult right now and urge this with a Do Pass.

Rep. Brenda Heller moved a **Do Not Pass** on HB 1519. **Rep. Karen Karls** seconded the motion.

DO NOT PASS, 8 YEAS, 6 NAYS. Rep. David Rust is the carrier of the bill.

Date: 2-11-09
Roll Call Vote #: ____

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1519

House Education Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number ____

Action Taken ☐ Do Pass ☑ Do Not Pass ☐ Amended

Motion Made By Rep Heller Seconded By Rep Karls

Representatives	Yes	No	Representatives	Yes	No
Chairman RaeAnn Kelsch	✓		Rep. Lyle Hanson		✓
Vice Chairman Lisa Meier	✓		Rep. Bob Hunskor		✓
Rep. Brenda Heller	✓		Rep. Jerry Kelsh		✓
Rep. Dennis Johnson	✓		Rep. Corey Mock		✓
Rep. Karen Karls	✓		Rep. Phillip Mueller		✓
Rep. Mike Schatz	✓		Rep. Lee Myxter		✓
Rep. John D. Wall	✓				
Rep. David Rust	✓				

Total (Yes) 8 No 6

Absent 0

Floor Assignment Rep Rust

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1519: Education Committee (Rep. R. Kelsch, Chairman) recommends **DO NOT PASS** (8 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1519 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

HB 1519

Attachment 1

Testimony HB 1519 House Education Committee 2/9/09

Greg Burns, Executive Director, North Dakota Education Association

Madame Chair, members of the Committee, I stand before you today on behalf of all members of the NDEA, to urge passage of this important piece of legislation. We urge you to pass this legislation because it will provide for workplace dispute resolution which is more efficient, economical and fair than the current practice in North Dakota school districts.

Disputes about the meaning or application of the terms of a collective bargaining agreement occur despite the best attempts by both parties to a contract to avoid them. Increasingly in our society, manufacturers use binding arbitration to resolve disputes between customers and the companies. Binding arbitration is used so that expenses and time are saved as opposed to going through the judicial system and the decisions are made by arbitrators who are trained in resolving contract disputes. For decades, employers and unions have used this means of dispute resolution as a way of maintaining peaceful labor relations at the work site.

In North Dakota, the Century Code, Chapter 15.1-16-13, subpart c, has provided that employers and bargaining units in school districts can negotiate the "Formation of a contract, which **may** contain a provision for binding arbitration." (Emphasis added) Statewide, there are fewer than ten school districts where such a provision exists in collective bargaining agreements. Most agreements leave the final decision regarding employee grievances to the school board and still others are found in school district policy. If a local association disagrees with the school district they are forced to take the matter to court.

We all know that court decisions are very time consuming and costly. Our attorney estimates that we are forced to take to court seven to ten cases a year that could be resolved through binding arbitration. Court cases typically cost each party ten to fifteen thousand dollars. Arbitration normally costs each party two to five thousand dollars.

This legislation would make grievance procedures culminating in binding arbitration mandatory in all collective bargaining agreements between school districts and teacher bargaining units. This process is more efficient, avoiding the delays that court cases and trials often entail. Arbitrations are decided in sixty to ninety days. This process is also far more economic than using the court system. Arbitrations typically cost one-third of the cost of a court action.

But it is really fairness that drives the need for this bill. Employers should not be able to block the inclusion of this method of dispute resolution from being in the collective bargaining

agreement. This is such a fundamental part of sound labor relations and dispute resolution that we believe that even fact finding panels should not be allowed to block the inclusion of a grievance procedure that culminates in binding arbitration. School boards and school administrations change, as do bargaining teams representing the teachers. Having a neutral arbitrator decide what a collective bargaining agreement really means is only fair. You will note that the bill also states that the arbitrator shall not have the power to modify the contract. Neither the school board nor the association should have the final say on what a contract means if agreement cannot be reached. School boards should not be the judge and the jury.

Knowing that disputes regarding the interpretation of the collective bargaining agreement will ultimately be judged by a neutral arbitrator, will force both parties to be more precise in the contract language which they propose and upon which they reach agreement.

Madame Chair, members of the House Education Committee, we urge you to pass this bill as a more economic, efficient and fair method of dispute resolution in our school districts.

Attachment 2

HOUSE EDUCATION COMMITTEE
Monday, February 9, 2009 - 10:30 a.m.

HOUSE BILL NO. 1519

Testimony of:
Gary R. Thune
NDSBA Legal Council

Madame Chairman Kelsch, Members of the Committee, for the record my name is Gary Thune, legal counsel to the North Dakota School Boards Association. I appear in opposition to HB 1519 for the following reasons:

1. The NDEA is negotiating out-of-season: This NDEA bill seeks to obtain from this Legislative Assembly that which it has been unable to obtain at the negotiations table: binding arbitration of grievances. Since 1969, North Dakota's Legislators have refused to choose sides by mandating substantive provisions into negotiated agreements between teachers and school boards statewide. To do so would be wholly inconsistent with the current statutory language of section 15.1-16-13(4) which states:

   "4. Nothing in this section compels either the board of a school district or a representative organization to agree to a proposal or to make a concession"

   Once started, where would this slippery slope end?

2. Binding Arbitration of Grievances Is Not in Current Negotiated Agreements for Good Reasons.

   a. Under this Bill, the erosion of the authority of publicly elected school boards would be enormous, given the wide ranging scope of current grievance procedures, which include policies, administrative decisions and day-to-day administrative practices. To require binding arbitration would turn such grievance procedures into a massive delegation of the Board's authority to an outside arbiter.

b. The cost of imposing binding arbitration would be substantially more than just the cost of the arbiter. All policy and administrative decisions would need to be thoroughly reviewed by legal counsel. The number of grievances could be expected to increase markedly, as would the involvement of legal counsel in the arbitration process and the drafting of contract language.

3. The Current Grievance Procedure Works. In the first ten years of our law, two Supreme Court decisions, one in West Fargo (1977) and one in Grand Forks (1979), addressed grievance procedures. Both cases upheld the use of existing grievance procedures, including one of which involved agreed upon binding arbitration. In the past 30 years, only three Supreme Court decisions have mentioned grievance issues. Even though school board decisions are appealable to the courts, they simply aren't being appealed. The current grievance system is more time and cost effective than a system of binding arbitration which would require third party involvement. And it provides an avenue for teacher's concerns to be heard, without eroding the school board's authority by delegating it to arbiters who are not responsible to either tax payers or parents of the school district.

This year marks the 40th anniversary of North Dakota's teacher negotiations law. It has provided a workable process that has held up remarkably well. The success of this law is due, in large part, to the refusal of the legislative branch to grant the NDEA's requests to mandate the inclusion of substantive provisions, such as binding arbitration of grievances, into the contract language negotiated by the teachers and their school board.

For all of the above reasons, the North Dakota School Boards Association urges a Do Not Pass on HB 1519.