Approved _____
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:00 a.m./~~p.m.~~ on January 29, 1985 in room 526-S of the Capitol.

All members were present except:

Committee staff present:

All present.

Conferees appearing before the committee:

Mr. Steve Goodman, Dept. of Human Resources
Mr. Hernandez
Mr. Rob Hodges, KCCI
Mr. Wayne Maichel, KS AFL-CIO

Chairman Douville called Ben Barrett to the speakers stand. Mr. Barrett said that it had been requested by the Chairman that he assemble information for the committee in reference to the Public Employer Employee Relations Act. See attachments six through 12.

Chairman Douville then called Mr. Steve Goodman to the speakers stand. Mr. Goodman spoke about the Job Training Partnership Act. He then called Mr. Hernandez to the speakers stand to explain handouts. See attachments one through five. A question and answer period followed.

The next speaker was Mr. Rob Hodges speaking on behalf of the Employment Security Advisory Council. He said the council came to an agreement they recommended to this committee and asked that the committee direct the staff to draft their recommendations into bill form without determining whether or not you could totally support what they recommended and with the understanding that there would be hearings. He said the council did basically four things. They changed the penalty for voluntarily quitting; they changed the test which is applied to determine whether or not a quit is a voluntary quit or whether or not there is a disqualification tied to it; they changed the re-qualification period, that once you have been disqualified what tests you must meet to become requalified; and they are making a recommendation that the maximum weekly benefit amount be increased for the last year of the two year freeze that was put into effect a year ago by the legislature.

Representative Friedeman made a motion that the committee introduce a committee bill that incompasses the outline that Mr. Hodges gave for consideration. The motion was seconded by Representative Nichols. The Chairman asked if there was any objection to this. A vote was taken and the motion was passed.

The meeting was adjourned at 9:55 a.m.

Labor & Industry

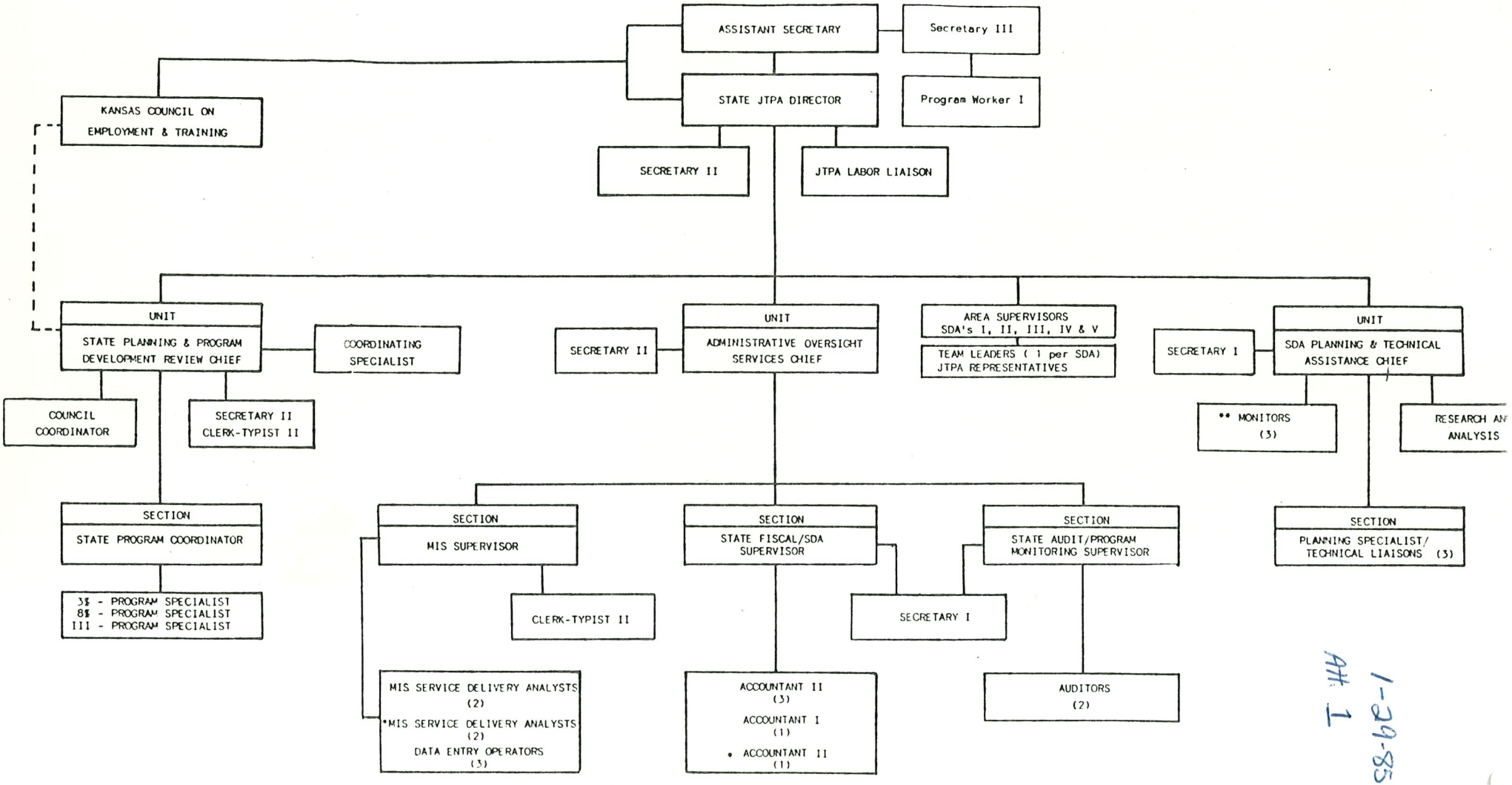
1-29-85

Bob Harper	KCCI	Topeka
Harry D. Nelson	Ks AFL-CIO	"
Ralph McGee	"	"
Wayne Maichel	"	"
PAT SCHAFER	BUDGET	Topeka
Martha Gabehart	Ks Advisory Cmte on Employment of the Handicapped	Topeka
Jeremy Linscheid		Top
Charles J Hernandez	SDA II PIC/MGR	TOPEKA
Armand Carpentenyo	Dept of Human Resources-JTPA	Topeka
Eduardo Ramirez	SJDA II PIC Chairman	Topeka
Richard Frank	KANSB	Topeka
Roger Myers	Capital Journal	

Kansas Department of Human Resources

JTPA ORGANIZATIONAL STRUCTURE

(Program Year 1984 - July 1, 1984 through June 30, 1985)



AH 1 1-29-85

* Temporary

** Outstationed

August 2, 1984

Handout #2

1-29-85
A##2

01-24-85

JTPA Program Year 1984 Funding Levels

Funding Source		Allocation
IIA Total		11,914,392
5% Administrative STAFF		595,720
6% Technical Assistance		714,864
8% Education		953,151
3% For Serving older workers		357,432
*SDAs- 78% Service Delivery Areas		9,293,225
IIB Summer Youth		5,604,470
III-A (Dislocated Worker)		924,805
	Total	18,443,667

Bound by economically disadvantage criteria

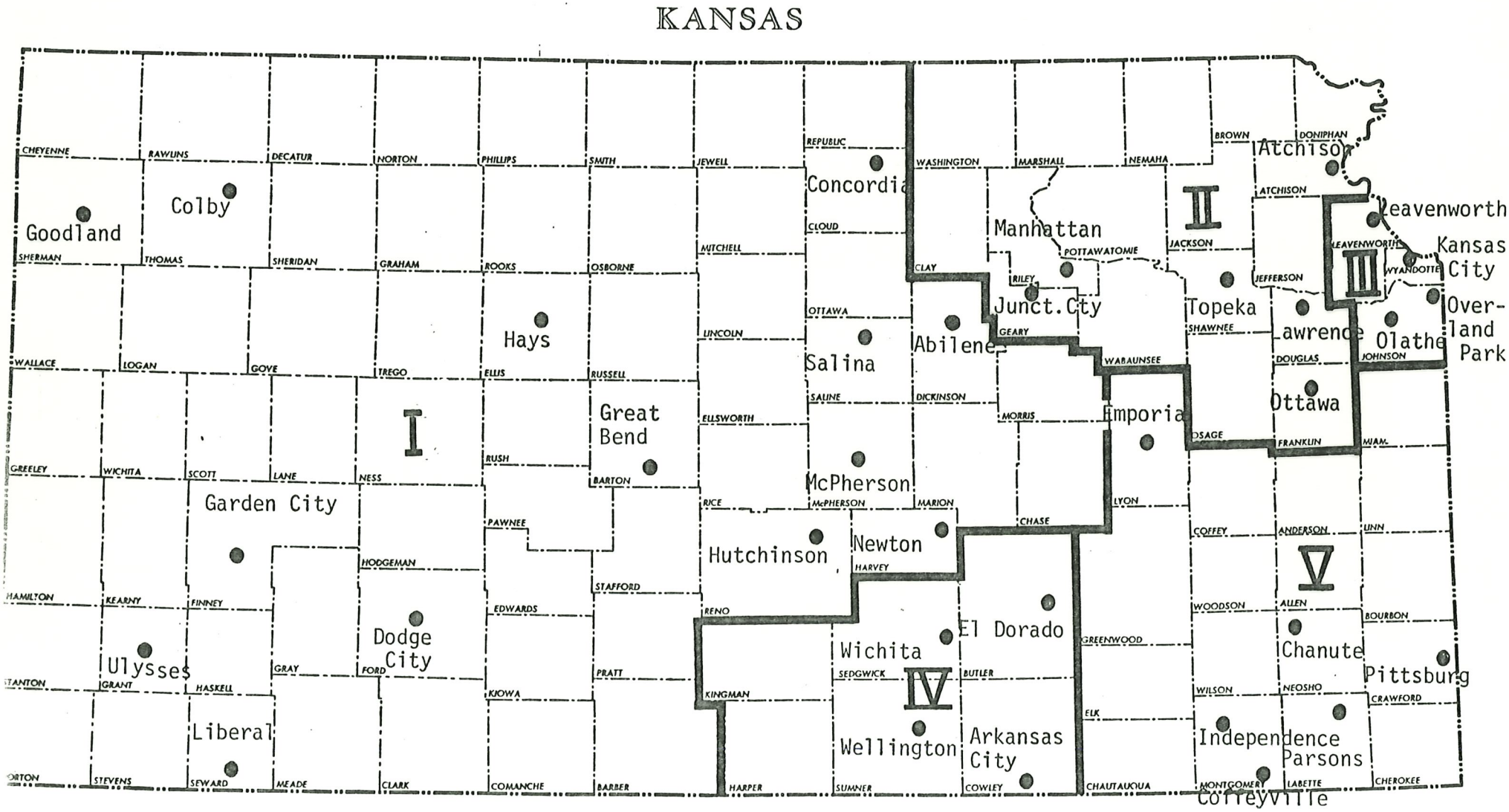
1. Plant closing
2. Development of joint projects
3. Receipt of applications from non-PIC agencies

*SDA Allocations - Title IIA

SDA I		1,750,379
SDA II		1,859,853
SDA III		1,465,728
SDA IV		2,608,608
SDA V		1,608,657
	SubTotal	9,293,225

Atch. 2, 1/29/85

JTPA SERVICE DELIVERY AREAS



The cities identified on the map are current locations of Job Service offices

1-29-85
AH #3

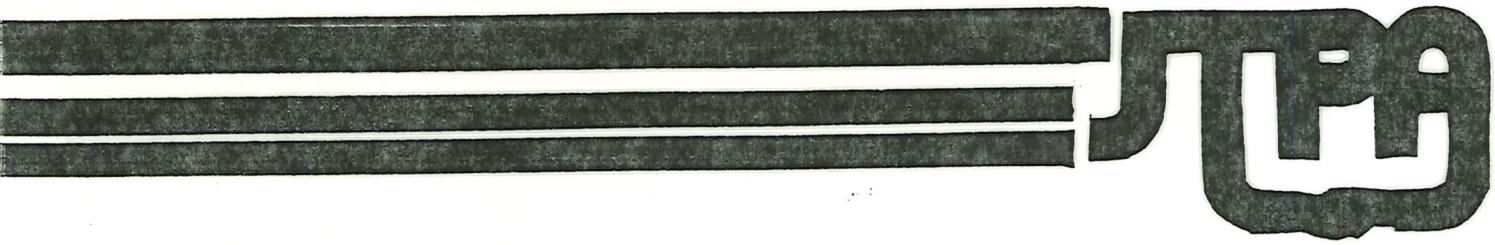
Handout #5

KANSAS COUNCIL ON EMPLOYMENT & TRAINING

ANNUAL REPORT TO THE GOVERNOR

1-29-85
ATT #4

DRAFT



TRANSITION YEAR

OCTOBER 1, 1983-JUNE 30, 1984

Atch. 4, 1/29/85

KANSAS COUNCIL ON EMPLOYMENT & TRAINING

ANNUAL REPORT TO THE GOVERNOR

1983

Job Training Partnership Act
Transition Year
October 1, 1983 - June 30, 1984

KANSAS COUNCIL ON EMPLOYMENT AND TRAINING
Annual Report to Governor John Carlin

TABLE OF CONTENTS

Prepared by the Staff of the Kansas Department of Human Resources
Division of Employment & Training - JTPA

Telephone: (913) 296-3031

Larry E. Wolgast, Secretary of Human Resources
Richard F. Hernandez, State JTPA Director
Teresa Biery, Editor & KCET Coordinator

What is JTPA?

The most striking feature of the Job Training Partnership Act is its dependence upon the private sector for determining the type of training to be offered, in setting goals for who and how many will be trained and deciding how the money will be spent to meet these goals. The word "Partnership" in JTPA refers to this close involvement.

The JTPA Act of 1982 was implemented on October 1, 1983. The purpose of the Act is to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment. Assistance is also available to aid dislocated workers who have been laid off, terminated due to plant closure or whose skills have become obsolete.

As its name implies, a primary feature of JTPA is the forging of a public/private partnership. This concept was a recognition of the need to use private sector expertise, resources and support in order to tailor publicly-financed training programs to the local economy. JTPA enlists representatives of business, labor, education, government, rehabilitation and community groups to develop the programs.

Governor John Carlin appointed the Kansas Council on Employment and Training in January 1983 as an advisory group to him regarding administration of JTPA and other employment and training concerns. With the advice of the KCET, using JTPA guidelines, the state was divided into five Service Delivery Areas (SDAs). The governor appointed a board of Local Elected Officials (LEOs) for each SDA. The LEOs named members for the Private Industry Council (PIC) for their respective SDAs.

The local units - the PICs and LEOs - decide who delivers the services, who and how many are served and in what manner. This was laid out in a job training plan drawn up by the PIC. The SDA plan was signed by the LEO, certified by KCET and approved by the Governor. The state, through the Kansas Department of Human Resources oversees the programs and measures "success". The Act also mandates a system of checks and balances to ensure the program goals are met.

Through PICs at the local level, business and industry work with elected officials to plan, design and implement training programs for the state's five SDAs. At the state level the partnership relationship is found in the roles and responsibilities of the Governor, the KCET, and the Kansas Department of Human Resources. The division of responsibilities assigned to these actors creates an accountable, balanced and responsive JTPA system.

The State of Kansas was prepared for the advent of the JTPA. Much of the cooperative effort and coordination encouraged by the new Act was already taking place where sparse resources demand their most efficient uses. Kansas has attempted to retain and improve upon successes of past employment and training programs, and yet to take advantage of flexibility in the Act to try some new and innovative approaches to address labor market problems and meet both social and economic needs. The coordination of the system to enhance the services provided to Kansas citizens is the most important aspect of JTPA.

Who Gives Advice?

The Kansas Council on Employment & Training has a top executive from the private sector as chairperson. Membership is mixed, with representation from business and industry, state interests, local units of government and other relevant interests such as labor, education, and community-based organizations. The KCET plans, coordinates, and monitors state employment and training programs and services. The KCET does not operate programs or provide direct services.

A critical function of the KCET is development of the Governor's Coordination and Special Services Plan which outlines goals and objectives, coordination criteria, and describes how JTPA resources will be utilized in Kansas. The State Plan also establishes the performance standards and system of incentive awards for SDAs meeting those goals.

The KCET also monitors and oversees the local programs. Given the importance assigned in JTPA for meeting performance standards, the Council's oversight activities are a critical mechanism driving the whole employment and training system within the State of Kansas.

Representing Business and Industry:

Chair - Howard M. Chase, Topeka - Stormont-Vail Regional Medical Center
Robert Clark, Wichita - Fourth National Bank of Wichita
Gary Hanssen, Wichita, Beech Aircraft Corporation, PIC Chair Area IV
T. Michael Fegan, Junction City - Fegan Enterprises, Inc., PIC Chair Area II
Robert Garcia, Salina - General Battery Corp., PIC Rep. Area I
Rob Hodges, Topeka - Kansas Chamber of Commerce & Industry
Eugene H. Horton, Pittsburg - Atkinson Industries, Inc., PIC Chair Area V
Marion Houk, Moran - Houk Insurance Co.
Janis Lee, Kensington - Ferguson Bros., Inc.
Charles Navarro, Hutchinson - Hutchinson Tent & Awning
Doris Weber, Overland Park - Inland Industries, Inc., PIC Chair Area III
*Edward Whitacre, Topeka - Southwestern Bell (Chair 1/83-2/84)
*Jerry Wolf, Topeka - Goodyear (1/83-3/84)

Representing State Interests:

Sen. Paul Burke, Leawood - Kansas Senate
Marjorie Byington, Topeka - Work Incentive Program, Social & Rehabilitation Services
Steve Goodman, Topeka - Kansas Department of Human Resources
Kay Groneman, Kansas City - State Board of Education
Rep. Anthony Hensley, Topeka - Kansas House of Representatives
Carole Muchmore, Topeka - Kansas Dept. of Economic Development
Gwen Nelson, Arkansas City - Cowley County Community College and AVTS
Harry Wiles, Topeka - Governor's Veterans' Advisory Committee
Sharilyn Young, Wichita - State Advisory Council on Vocational Education

Representing Local Units of Government:

Bill Beamgard, Atwood, Unified School District #318
*Kenneth R. Carter, Hays City Manager (1/83-10/84)
Morris Dozier, Junction City, Geary County Commissioner
Beryl Lowery, Dodge City Commissioner
Darold Main, Topeka/Shawnee Co. Intergovernmental Coordinator
Dennis Tinberg, Parsons City Manager
Clyde Townsend, Wyandotte County Commissioner
Margalee Wright, Wichita Commissioner

*Served During Transition Year

Representing Labor, Local Education, Community-based Organizations, Public:

Edward Beasley, Kansas City - Black Motivation Training Center
Morris Eastland, Olathe - Brotherhood of Carpenters & Joiners, AFL-CIO
Pat Lehman, Wichita - Int'l. Assn. of Machinists & Aerospace Workers
Prentice Lewis, Wichita - Urban League
Mark Marcano, Kansas City - Harvest America Corporation
Hubert Reid, Pittsburg - Pittsburg State University
Allen Smith, Topeka - United Rubber Workers
Marge Zakoura-Vaughan, Wichita - Colvin Senior Center

The KCET is organized with various ad hoc and standing committees. The standing committees of the KCET during the Transition Year were as follows: (an Executive Committee was formed after transition.)

Dislocated Worker Committee - Pat Lehman, Chair

Evaluation Committee - Janis Lee, Chair

State Plan Committee - Margalee Wright, Chair

Plans Review Committee - Bob Clark, Chair

Why Be Involved?

There are economic benefits with the JTPA programs as well as the obvious social benefits. Participation in JTPA is as American as private enterprise.

The benefits to the business leader may be as hard-hitting as the profit/loss sheet or as subtle as tapping into the volunteer spirit.

Business participation can be a response to surveys to help assess the future job market and the direction of economic development. Employers also become involved by training people on the job or by allowing the flexibility for workers to upgrade their skills in a classroom.

The benefits include better trained workers whose skills are in demand as well as the indirect benefits from having fewer people on the welfare rolls. New jobs can be created through JTPA, helping the economy of the state through such economic development in growth areas. The return on investment in human capital is realized as the job training addresses the labor supply and demand in the Kansas market.

Is JTPA Better?

With improved coordination of services through JTPA, a more efficient employment and training system is constantly evolving. Co-location of most JTPA local offices with existing Job Service Centers helps make the system more accessible and linkages with Unemployment Insurance payments allow services to be more comprehensive for both the employer and the unemployed. Such coordination mechanisms due to JTPA also consolidate public outreach to private employers through joint JTPA/Job Service planning and joint state and SDA level administration of the two programs.

Other benefits of collaborating resources were experienced in the McNally-Pittsburg Dislocated Worker Project where JTPA worked with labor, the company, and a local educational institution to retrain thirty dislocated workers. Unemployment compensation received by participants made classroom training possible; and funds available through the company through on-the-job training wages also attributed to the success of the project.

One hundred and thirty-eight (138) unemployed workers were able to be employed through on-the-job training and the assistance of the Montgomery County Re-employment Center which was a state model for other dislocated worker programs. The Center was funded with a one-time JTPA Emergency Jobs Bill allotment received during the summer prior to the Transition Year at which time Montgomery County had the state's highest unemployment rate at 13%.

The KSWAT Dislocated Worker Project, funded with federal discretionary monies during the transition year, served over two hundred workers in a twenty-county area of Southwest Kansas. The project consists of a consortium of three Area Vocational Technical Schools (Pratt, Liberal, Southwest Kansas) and three Area Community Colleges (Pratt, Seward County, Dodge City) to assist in the depressed agricultural employment area in Kansas.

Coordination with the Kansas Department on Aging for the Older Worker (3%) Program, and joint administration of the Education Coordination & Grants (8%) Program with the Kansas Department of Education is building a more comprehensive network of services for special target groups and addresses unique training and education needs of the Kansas labor force.

The KCET views coordination development as an ongoing process which will continue to grow in order to reduce duplication of effort and provide comprehensive services to employers and participants.

How is JTPA Funded?

Under JTPA, the U.S. Department of Labor allocates funds to the Governor in the form of a block grant.

Most of the JTPA funds allocated to Kansas are under Title IIA, adult and youth programs, or under Title IIB, summer youth programs.

The State distributes these funds to the Service Delivery Areas by formula. Under Title IIB, all funds are passed on to the SDAs. Under Title IIA, seventy-eight percent (78%) of the allocation goes to the SDAs.

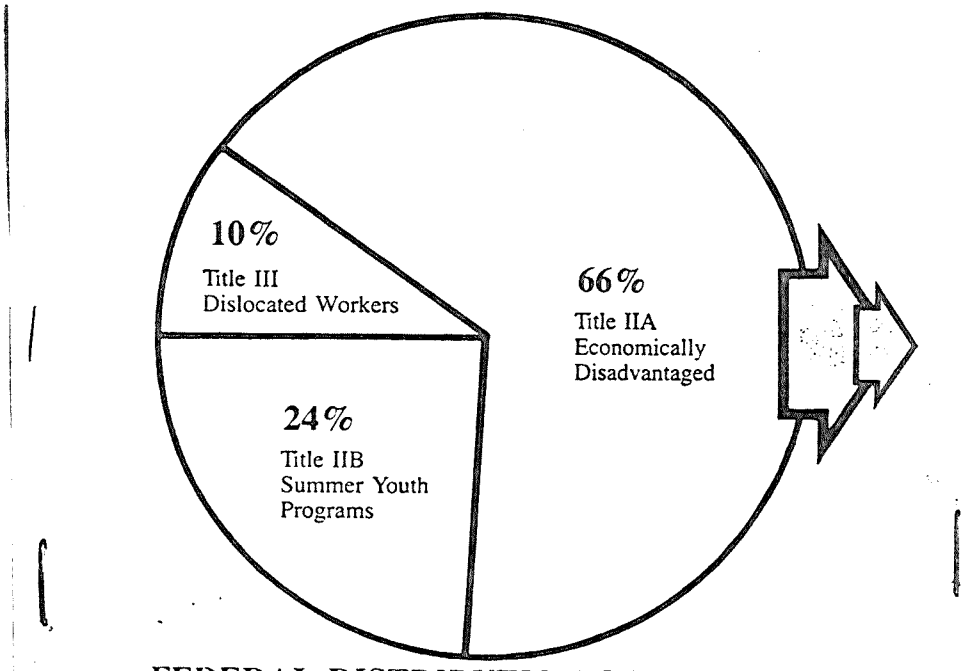
Of the remaining twenty-two percent (22%) of the JTPA funds designated for state programs under direction of the KCET, the majority of the funds were sub-allocated to the SDAs during the Transition Year. Three percent (3%) of the state's Title IIA allocation is reserved for programs for older workers and was allocated to SDAs during transition. Eight percent (8%) is for special educational programs, most of which was made available to the SDAs as education grants. Six percent (6%) was during the transition year, used for training and technical assistance to the SDAs. Five percent (5%) of the money was for state administrative services such as audits, staffing the KCET, systems design and maintenance, and staff for the monitoring function.

Of that seventy-eight percent (78%) going to the SDAs, the PICs assure that seventy percent (70%) is spent on training. The other thirty percent (30%) is used for administrative costs and support services to the clients, with no more than 15% for administration. Actual expenditures are in the financial summary presented later in this report.

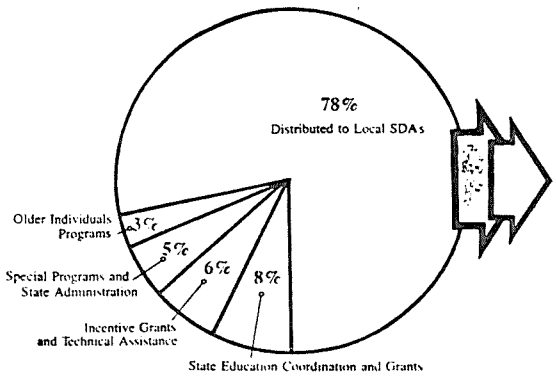
Specific amounts, such as how much money was spent to train and place a person, was determined by the PIC.

The state also received funds under JTPA Title III for Dislocated Worker Programs. Most of those funds (75%) were sub-allocated to the SDAs, and a portion (25%) was reserved by the state during the transition period to respond to special needs such as mass lay-offs or plant closure.

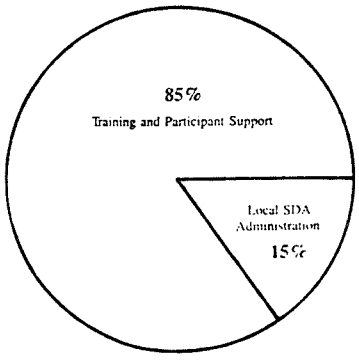
At least forty percent (40%) of the training funds under Title IIA must be used to train or place eligible youth such as AFDC recipients or school dropouts. With three major universities in SDA II (Northeast Kansas), their required percent was much higher and the state applied an adjustment methodology to lower the SDA II required level in order to equalize services to adults and youth in that SDA. The KCET expressed concern over the required forty percent (40%) level of service to youth in the Act through letters to appropriate U.S. Congressional delegates.



FEDERAL DISTRIBUTION OF JTPA FUNDS



STATE DISTRIBUTION OF TITLE IIA DOLLARS



LOCAL SDA DISTRIBUTION OF FUNDS

What Training is Available?

Job training programs in Kansas are of four major types: on-the-job training, classroom training, customized training and work experience. The employer may want a combination of classroom and on-the-job (OJT) training which would be customized to meet the employers needs for hiring the individual.

The client earns while he or she learns during OJT. OJT training can be used to support industrial or economic development, to upgrade and retrain a person who needs to advance above a dead-end job or it can be used in combination with institutional or internship assignments for career development.

Classroom training may be occupational or educational. Education training may include remedial or continued education for youth.

Other classroom training may provide supplemental skills many take for granted. Individuals may be taught the importance of being on time, how to prepare for the job hunt, how to dress or act on the job.

Work experience is used mostly for youth and is seen as one way to enhance employability through the development of good work habits and basic work skills.

Who is Eligible?

JTPA primarily serves the economically disadvantaged.

Disadvantaged may be defined as a person or family meeting the poverty income levels. Often these persons receive welfare support or food stamps; however, up to ten percent (10%) of the clients served by JTPA need not qualify as economically disadvantaged but must face serious barriers to employment. This group includes persons with limited English language proficiency or displaced homemakers, school drop-outs, teenage parents, handicapped persons, older workers, veterans or offenders.

Kansas also received funds under Title III, which aids dislocated workers. These persons need not be economically disadvantaged. They qualify as a dislocated worker by having been laid off, terminated due to plant closure or unemployed long-term. Kansas expanded the definition of dislocated worker to include self-employed and underemployed dislocated workers.

What are Performance Standards?

Performance standards were not required during the JTPA transition year, but the Kansas Council on Employment & Training and the five Private Industry Councils decided to administer the programs in Kansas with the same integrity as if standards were mandated. They adopted seven goals for each of the Title IIA Adult and Youth programs in accordance with Section 105 of the Act. This made the transition year a real test period. These seven goals and actual accomplishments for Title IIA programs by SDA and statewide are illustrated with the table on the following page. The table also summarizes the number of Transition Year Performance Standards met or exceeded by each SDA.

JTPA
Title II-A Actual Performance
Transition Year (October 1, 1983 - June 30, 1984)

	GOAL	ACTUAL					
	Performance Standard	Kansas Statewide	SDA I	SDA II	SDA III	SDA IV	SDA V
Adult							
Entered Employment Rate	58%	83.9%	91.8%	89.7%	58.8%	81.4%	90.3%
Cost per Entered Employment	$5,900	$3,617	$5,491	$3,174	$7,900	$3,010	$3,135
Average Wage at Placement	$4.90	$5.02	$4.31	$5.28	$5.55	$5.06	$4.92
Welfare Entered Employment Rate	41%	73.7%	100%	83.8%	45%	72%	81.4%
Youth							
Entered Employment Rate	41%	72.8%	84.7%	81.8%	59.4%	59.8%	73.5%
Positive Termination Rate	82%	81.3%	91.6%	84%	83.7%	68.1%	84.7%
Cost per Positive Termination	$4,900	$2,677	$2,903	$1,841	$3,088	$4,338	$2,049

SDA	No. of Standards met or exceeded	No. of Standards	Total Score*
I	6	7	151%
II	7	7	154%
III	6	7	111%
IV	6	7	130%
V	7	7	149%
Statewide	6	7	

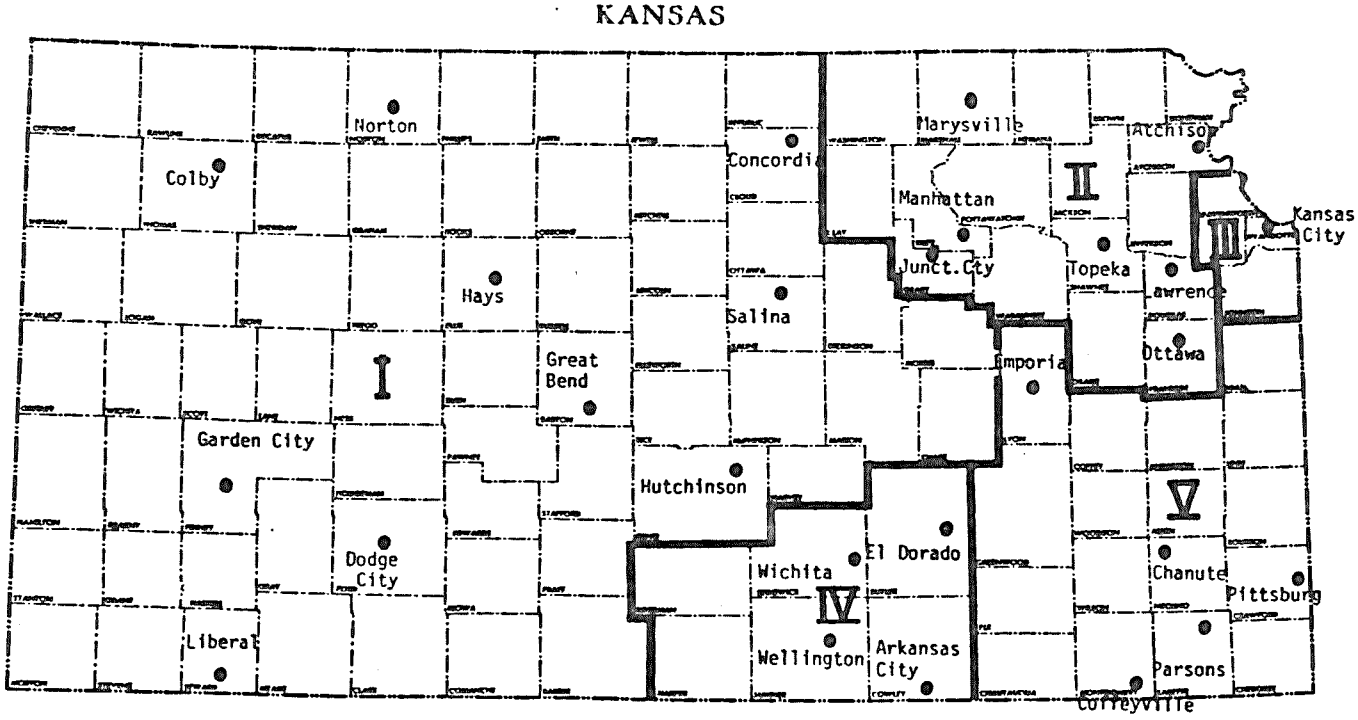
*Percent Achieved Standards on Average

The only goal not met on the average statewide during the transition year was the positive termination rate for youth. The state has developed a model Youth Competency System for employment which will assist SDAs in becoming fully operational next year. This should increase the positive termination rate for youth in the future. Two SDAs (II and V) exceeded all seven standards. Western and Central Kansas, SDA I, was below standard on average wage at placement for adults which may be due to the lower average wage for the large rural area. The Kansas City area, SDA III, had a delay in fully implementing JTPA due to unique organizational changes with the state's only incorporated PIC. The extremely high cost per entered employment for adult was caused by the later start in entering participants into the system; therefore fewer would have entered employment by the end of the transition period.

How is JTPA Organized?

With the advice of the KCET, the Governor divided Kansas into five Service Delivery Areas for JTPA program delivery and administration. A map of the SDAs is included in this annual report. Each SDA is directed by its respective Private Industry Council. The following SDA Profiles briefly describe the organizational structure for JTPA program and service delivery established during the Transition Year.

JTPA SERVICE DELIVERY AREAS



Service Delivery Area I Profile

Area:	Western and Central Kansas 63 Counties
Grant Recipient/Administrative Entity:	Kansas Department of Human Resources
SDA Administrator:	Glenn Fondoble Area Employment Supervisor 332 East 8th Street Hays, Kansas 67601 (913) 628-1014
PIC Chair:	Eddie Estes, Executive Director Western Kansas Manufacturing Association 1700 E. Wyatt Earp Blvd. Dodge City, Kansas 67801 (316) 227-8082
LEO Board Chair:	Charles M. Benjamin Harvey County Commissioner Harvey County Courthouse N. Newton, Kansas 67117 (316) 283-6900
Local Offices:	Hays, Colby, Concordia, Dodge City, Garden City, Great Bend, Hutchinson, Liberal, Norton, Salina

Service Delivery Area II Profile

Area:	Northeast Kansas 16 Counties
Grant Recipient/Administrative Entity:	Kansas Department of Human Resources
SDA Administrator:	Mike O'Hara Area Employment Supervisor 207 Humboldt Manhattan, Kansas 66502 (913) 539-0591
PIC Manager:	Charles Hernandez 207 Humboldt Manhattan, Kansas 66502 (913) 539-0591
PIC Chair:	T. Michael Fegan Vice President & General Manager Fegan Enterprises, Inc. Junction City, Kansas 66441 (913) 238-8101
LEO Board Chair:	Jack Alexander City of Topeka Commissioner 215 E. 7th Street Topeka, Kansas 66603 (913) 295-4000
Local Offices:	Atchison, Junction City, Lawrence, Manhattan, Marysville, Ottawa, Topeka

Service Delivery Area III Profile

Area:	Kansas City Area Johnson, Leavenworth and Wyandotte Counties
Grant Recipient:	SDA III Private Industry Council, Inc.
Administrative Entity:	SDA III PIC, Inc./Ks. Dept. of Human Resources
PIC Manager/SDA Administrator:	Michael Edwards (Acting) Suite 827, Gateway Centre Tower II, 4th & State Avenue Kansas City, Kansas 66101 (913) 371-1607
PIC Chair:	Doris Weber Special Project Director Inland Industries, Inc. Post Office Box 15999 Lenexa, Kansas 66215 (913) 492-9100
LEO Board Chair:	Robert C. Bacon Johnson County Commissioner Santa Fe and Kansas Olathe, Kansas 66061 (913) 782-5000
Local Offices:	Kansas City, Olathe, Leavenworth, Overland Park

Service Delivery Area IV Profile

Area:	Wichita 6 Counties
Grant Recipient/Administrative Entity:	City of Wichita
Subcontractor:	Kansas Department of Human Resources Six County Area outside City of Wichita
SDA Administrator:	Lorraine Griffin Johnson, Director Department of Human Resources City of Wichita 455 N. Main Wichita, Kansas 67203 (316) 268-4691
PIC Manager:	Carol Burch 402 E. Second Post Office Box 877 Wichita, Kansas 67202 (316) 264-3646

PIC Chair:	Gary Hanssen, Vice President Industrial Relations Beech Aircraft Corporation Post Office Box 85 Wichita, Kansas 67201 (316) 681-7111
LEO Board Chair:	Margalee Wright, Commissioner City of Wichita 455 N. Main Wichita, Kansas 67203 (316) 268-4331
Local Offices:	Wichita (4), Arkansas City, El Dorado, Sedgwick County, Wellington, Winfield

Service Delivery Area V Profile

Area:	Southeast Kansas 17 Counties
Grant Recipient/Administrative Entity:	Kansas Department of Human Resources
SDA Administrator:	John Gobetz Area Employment Supervisor Department of Human Resources 105 West 11th Pittsburg, Kansas 66762 (316) 232-2620
PIC Chair:	Eugene H. Horton, Vice President Atkinson Industries, Inc. Pittsburg, Kansas 66762 (316) 231-6900
LEO Board Chair:	Perl Bass Labette County Commissioner Labette County Courthouse Oswego, Kansas 67356 (316) 795-4522
Local Offices:	Chanute, Coffeyville, Emporia, Independence, Parsons, Pittsburg

Kansas Profile

Area:	Statewide
Administrative Offices:	Kansas Department of Human Resources 401 Topeka Topeka, Kansas (913) 296-3031
JTPA Liaison:	Larry E. Wolgast, Ed.D. Secretary of Human Resources
State Administrator:	Richard F. Hernandez State JTPA Director
KCET Coordinator:	Teresa Biery
State Planning & Program Chief:	Katie Krider
Administrative Services Chief:	Armand Corpolongo
Technical Assistance Chief:	Terry Moore

What are State Programs?

Program Highlights of State Programs for Transition Year

1. Dislocated Worker (Title III)

A. Montgomery County Reemployment Center

Expenditures:	$100,179
Participants Placed:	138
Project Period:	June 1, 1983 - September 30, 1983
Services:	OJT, Job Development & Placement, Job Search Assistance, Relocation, Counseling

B. McNally-Pittsburg Dislocated Worker Project

Expenditures:	$ 22,216
Grant Amount:	$ 33,761
Participants Placed:	29
Project Period:	May 1, 1983 - June 30, 1984 (Extended through December 31, 1984)
Services:	Classroom Training, GED, Assessment

C. Hutchinson Community College Reemployment Center

JTPA Allocation:	$ 60,500
Participants Placed:	Projected 40
Project Period:	Started in late June, 1983 (Extended through December 31, 1984)
Services:	Job Search Assistance, Job Club, Job Development and Placement, Classroom Training, Counseling and Assessment

D. SRS Job Club - Topeka

Grant Amount:	$ 13,000
Participants Placed:	Projected 125
Project Period:	Started late June 1983 (Extended through December 31, 1984)
Services:	Assessment, Counseling, Job Club, Job Search Assistance for Welfare Recipients.

E. KSWAT Dislocated Worker Projects - Southwest Kansas, 20 counties

Grant Amount:	$455,996 (Federal Discretionary Grant)
Participants Placed:	227
Expenditures:	$262,535
Project Period:	March 1, 1983 - June 30, 1984 (Extended through December 31, 1984)
Services:	OJT, Classroom Training, Customized Training, Direct Placement, Counseling, Assessment.

F. SDA Activities (75% Allocation)

(1) Served through Title IIA service delivery system with On-the-Job Training

Grant Amount:	$ 87,733
Expenditures:	$ 2,378
Participants Placed:	1

(2) Dislocated workers primarily served through subcontract with Allis Chalmers to upgrade laid-off worker skills.

Grant Amount:	$ 91,338
Expenditures:	$ 14,245
Participants Placed:	26

(3) Subcontracted with the Tri-County Labor Council to operate program for dislocated workers providing job search assistance primarily.

Grant Amount:	$ 88,935
Expenditures:	$ 35,843
Participants Placed:	120

(4) Three dislocated worker projects operated in the Wichita area. Control Data Center and American Business Center were both private industries that provided classroom training. American Business Center also completed a jobs need survey for the area. The third project was with Arkansas City Development Council which provided basic education remedial skills with computers.

Grant Amount:	$237,960
Expenditures:	$ 2,277
Participants Placed:	53

(5) Dislocated workers were served through the Title IIA mechanism on an individual basis primarily with OJT and one Classroom Training activity.

Grant Amount:	$ 94,944
Expenditures:	$ 17,740
Participants Placed:	17

All existing Dislocated Worker Programs, both State and SDA, were extended through December 31, 1984 in order to serve more participants. For Program Year 1984, the State is retaining 100% Title III funds with access for plant closings, SDA needs, and special projects.

2. Older Worker Program (3%)

The SDAs were allocated 85% of the total $239,181 Older Worker (3%) Program during the Transition Year. These funds were allocated to the SDAs based on a formula relative to the percent of older individuals age 55 and over, the percentage of economically disadvantaged individuals, and percentage of the relative number of unemployed workers within each SDA.

The remaining 15% was retained at the state level to provide a small pool of resources for special needs of the older worker programs and state administrative oversight.

The Older Worker Programs were extended through September 30, 1984 as most programs in the SDAs had a slow start. Direction for the future allocation has been to fund Request for Proposals at the State level for Program Year 1984 to improve efficiency and cost effectiveness.

SDA I - Services throught OJT.

Grant Amount:	$ 43,667
Expenditures:	$ 360
Participants:	1
Grant Period:	January 1, 1984 - September 30, 1984

SDA II - Educational classroom training and occupational classroom training.

Grant Amount:	$ 39,560
Expenditures:	$ 26,899
Participants:	19
Grant Period:	January 1, 1984 - September 30, 1984

SDA III - Services to older workers were classroom training, job club, job search assistance, OJT with the Title IIA program, and counseling.

Grant Amount:	$ 34,329
Expenditures:	$ 18,255
Participants:	49
Grant Period:	January 1, 1984 - September 30, 1984

SDA IV - Services to older workers included direct placement and job search assistance and various training.

Grant Amount:	$ 54,140
Expenditures:	$ 52,712
Participants:	115
Grant Period:	January 1, 1984 - September 30, 1984

SDA V - Services to older workers included OJT, occupational classroom training and direct placement.

Grant Amount:	$ 31,607
Expenditures:	$ 16,541
Participants:	11
Grant Period:	January 1, 1984 - September 30, 1984

3. Education Coordination & Grants (8%)

The SDAs were allocated 80% of the Education Grant to provide services to Title IIA participants through cooperative agreements with local educational institutions which could help leverage other resources to bring to bear for the JTPA program participants. The method of allocations was in accordance with the formula set out in Section 202(1) of the Act.

The remaining 20% was used at the State level to facilitate training/education coordination through technical assistance, counseling, professional enhancement and curriculum development.

The total allocation to Kansas for 8% activities during the Transition Year was $766,378. Funds unobligated were returned to the Governor to be utilized under Section 121 of the Act which is for special State General Administrative activities.

SDA 80% Activities

SDA I - No 8% monies sought during Transition Year.

Grant Amount:	$ 77,456	Local Match:	0
Expenditures:	0	Unobligated:	$77,456

SDA II - Career Assistance Network designed to assist 250 economically disadvantaged women throught the YWCA in Topeka.

Grant Amount:	$102,642	Local Match:	$118,978
Expenditures:	$ 51,714	Unobligated:	$ 50,928

SDA III - SDA III and Kansas City AVTS developed a Vocational Exploration Workshop for Title IIB Summer Youths.

Grant Amount:	$ 94,958	Local Match:	$ 15,000
Expenditures:	$ 15,000	Unobligated:	$ 79,958

SDA IV - Developed an in-depth assessment system in cooperation with the City of Wichita Human Resources Department, Kansas Department of Human Resources/6-county area, and Wichita Public Schools. The additional assessment system enhances the SDA's ability to identify participant strengths and weaknesses.

Grant Amount:	$158,077	Local Match:	$ 51,665
Expenditures:	$ 45,685	Unobligated:	$112,392

SDA V - Developed two projects with the Education Grants.

Grant Amount:	$ 77,120	Unobligated:	$ 4,484

A. Youth and Business in Partnership Program operated by the USDs serving Independence and Coffeyville. Consisted of school-to-work transition program for economically disadvantaged high school youth.

Expenditures:	$ 37,000	Local Match:	$ 60,960

B. Columbus AVTS provided GED services to adults. Expanded SDA's effort to provide job employability skills to participants.

Expenditures:	$ 16,000	Local Match:	$ 36,975

What are the Results?

The State Programs are supplementary and complementary to the basic grant program of the SDAs under Title IIA of JTPA. This section will summarize the results of the Transition Year activities of the SDAs in the Title IIA Adult and Youth Program.

The State has assisted the SDAs through special technical assistance, in-service training through various meetings, conferences and workshops. The State in conjunction with the Women's Bureau of the U.S. Department of Labor, conducted a statewide conference entitled "JTPA: It's Implementation & Impact on Women" at Washburn University in Topeka on February 21, 1984. The intent of the conference was to help community leaders, service providers and other key people to become more aware of the job-related needs of women and how they could best be served under the training system. Various national, state and local leaders participated in the presentations and panel discussions, including Governor John Carlin.

On January 25-26, 1984, the State conducted jointly with the National Governor's Association, the "State JTPA Youth Programming Conference" in Topeka to assist SDAs with services and programs for youth of Kansas.

Overall, the State of Kansas has received recognition for an outstanding job in implementing during the Transition Year. The Secretary of Labor, along with staff of the National Governor's Association has commended the State for a job well done. Kansas was considered in the top one-third early in its implementation phase. Kansas is unique in that most SDAs contracted back to the State for service delivery.

National visibility of Kansas' employment and training system is evidenced as state staff involved with JTPA are actively involved in various national roundtables, commissions, legislative subcommittees dealing with employment and training policy at the national level. Kansas was a member of the NGA team studying European Employment and Training Programs in Sweden, West Germany and Great Britain during October of 1984. For Program Year 1984, Kansas is one of the first states to set a goal of job creation through economic development as one of the performance standards for SDAs.

The following tables best summarize the performance of the SDAs in delivering employment and training programs to Kansas citizens. The tables indicate characteristics of the participants served, program activity, along with the financial summary of expenditures by administrative, training, and participant support cost categories. Being the first year of JTPA, the results are extremely encouraging especially when noted with the actual performance report presented in a prior section of this Annual Report.

TABLE 1

Title II-A Transition Year

Percentage of Participants by Program Activity

		OJT	Classroom Training	Work Experience	Youth Tryout	Direct Placement	
SDA I	Adult	60%	36%	4%	0%	0%	100%
	Youth	42%	37%	8%	12%	1%	100%
SDA II	Adult	50%	48%	0%	0%	2%	100%
	Youth	34%	40%	10%	12%	4%	100%
SDA III	Adult	10%	84%	0%	0%	6%	100%
	Youth	17%	77%	0%	0%	6%	100%
SDA IV	Adult	42%	44%	0%	0%	14%	100%
	Youth	41%	27%	24%	0%	8%	100%
SDA V	Adult	54%	36%	2%	0%	8%	100%
	Youth	37%	28%	6%	20%	9%	100%
STATE	Adult	43%	48%	1%	0%	8%	100%
	Youth	36%	38%	10%	10%	6%	100%

TABLE 2

KANSAS JTPA ENROLLMENTS
10/1/83 - 6/30/84

FUNDING SOURCE	PARTICIPANTS ENROLLED	TERMINATED	PLACED	PERCENTAGE PLACED
Title II-A Adult	2105	967	811	84%
Title II-A Youth	944	530	386	73%
State Dislocated Workers Program	698	376	336	89%
Older Workers	151	62	56	90%
Summer Youth Employment Program (II-B)	4045*			
GRAND TOTAL	7943	1935	1589	82%

* Total 1984 Summer Youth Enrollments

Table 3

Characteristics of Participants Served
Transition Year

Service Delivery Area		I	II	III	IV	V	Statewide	%
Total Participants		415	645	465	843	681	3,049	100
Sex	Male	225	386	239	384	405	1,639	54
	Female	190	259	226	459	276	1,410	46
Age	14-15	0	0	0	0	0	-	-
	16-19	81	141	61	132	152	567	19
	20-21	62	88	52	72	103	377	12
	22-44	248	390	334	572	387	1,931	63
	45-54	21	19	14	53	32	139	5
	55 and Over	3	7	4	14	7	35	1
Education	School Dropout	64	92	106	200	119	581	19
	Student HS or Less	25	42	25	52	54	198	7
	H.S. Graduate	130	355	263	384	313	1,445	47
	Post-H.S. Attendee	196	156	71	207	195	825	27
Race	White	354	503	198	518	595	2,168	71
	Black	26	108	226	222	67	649	22
	Hispanic	24	12	16	63	15	130	4
	American Indian/Alaskan	3	18	1	11	3	36	1
	Asian/Pacific Islander	8	4	24	29	1	66	2
Public Assistance Status	Aid for Dependent Children	38	105	126	217	80	566	19
	Social Security Insurance	3	4	13	13	7	40	1
	Total Public Assistance	104	198	212	394	201	1,109	36
Economic Status	OMB Poverty Level	393	628	438	821	655	2,935	96
	70% of LLSIL	4	6	0	11	15	36	1
	Above LLSIL	18	11	27	11	11	78	3
Economically Disadvantaged		397	634	438	832	670	2,971	97
Family Status	Single Parent, Dep. Under 6	64	98	74	134	58	428	14
	Single Parent, Dep. Over 6	29	49	56	104	32	270	9
	Parent in 2-Parent Family	101	164	119	176	206	766	25
	Other Family Member	59	89	95	117	168	528	17
	Non-Dependent Individual	162	245	121	312	217	1,057	35
Limited English Speaking Ability		9	21	31	36	1	98	3
Migrant or Seasonal Farm Worker		7	4	1	6	2	20	1
Veteran Status	Veteran	60	76	81	89	95	401	13
	Vietnam Veteran	22	26	29	34	49	160	5
	Disabled	1	3	1	4	1	10	3
	Recent Veteran	7	15	4	8	10	44	1
Handicapped		37	54	41	52	47	231	8
Offender		35	46	41	49	33	204	7
Displaced Homemaker		27	70	63	53	9	222	7
Labor Force Status	Employed Full Time	8	34	16	27	50	135	4
	Employed Part Time	65	67	36	70	67	305	10
	Unemployed	233	382	301	296	421	1,633	54
	Not in Labor Force	109	162	112	450	143	976	32
Unemployment Insurance Claimant		149	253	193	408	258	1,261	41
Targeted Job Tax Credit		0	3	0	12	34	49	2

Source: Quarterly Summary of Participant Characteristics Report #20, Title II-A Adult and Youth (October 1, 1983 - June 30, 1984)
LLSIL - Lower Living Standard Income Level

FINANCIAL SUMMARY
Title II-A Adult & Youth Program
Transition Year
(10/1/83 - 6/30/84)

	TOTAL EXPENSES	TRAINING	%	ADMINISTRATION	%	SERVICES	%	% YOUTH
SDA I	$ 625,496	$ 424,584	68%	$ 117,759	19%	$ 83,153	13%	31%
SDA II	$ 769,209	$ 579,367	75%	$ 141,755	18%	$ 48,087	6%	28%
SDA III	$ 490,769	$ 368,256	75%	$ 66,863	14%	$ 55,650	11%	20%
SDA IV	$1,380,878	$1,014,113	74%	$ 239,168	17%	$ 127,597	9%	28%
SDA V	$ 820,350	$ 605,719	74%	$ 115,816	14%	$ 98,815	12%	32%

TABLE 5

JTPA GOALS REPORT

Title II-A Adult

October 1, 1983 - June 30, 1984

GOALS	SDA I	SDA II	SDA III	SDA IV	SDA V	KANSAS
1. INCREASED EMPLOYMENT						
Total Participants	272	416	352	639	426	2105
Terminated	86	195	85	404	197	967
Entered Unsubsidized Employment	79	175	50	329	178	811
Percentage Placed	92%	90%	59%	81%	90%	84%
2. INCREASED EARNINGS						
Average Wage at Entry	$2.47	$4.03	$5.05	$2.48	$4.49	$3.70
Average Wage at Termination	$4.31	$5.28	$5.55	$5.06	$4.92	$5.02
3. REDUCED WELFARE DEPENDENCY						
Number of Participants on Welfare	84	155	159	315	153	866
Number of Welfare Recipients Terminated	25	61	31	190	68	375
Number of Welfare Recipients Placed	25	47	14	141	58	285

TABLE 6

Summer Youth Employment & Training Program

Title II-B Enrollments
1984*

SDA	ACTUAL	MALE/ FEMALE	H.S. DROPOUT	H.S. OR LESS	H.S. GRAD	POST H.S.	AGE 14/15	AGE 16/19	AGE 20/21
I	628	343/285	10	523	37	58	196	401	31
II	971	535/436	70	733	120	48	212	649	110
III	723	398/325	28	540	96	59	216	433	74
IV	997	543/454	56	741	150	50	306	607	84
V	726	425/301	53	539	90	44	194	475	57
KANSAS TOTAL	4,045	2,244/1,801	217	3,076	493	259	1,124	2,565	356

* Computer Printout Generated 9-11-84

Handout #6

1-29-85
Att. #5

JTPA STATUS REPORT

KCET
February 1, 1985

Atch. 5
1/29/85

JTPA PARTICIPANT

CHARACTERISTICS

PERIOD: 07-01-84 TO: 12-31-84

TITLE II - ADULT AND YOUTH

PERFORMANCE INDICATOR NO. 18

SERVICE DELIVERY AREA		I	II	III	IV	V	STATE WIDE	% OF TOTAL PARTICIPANT
TOTAL PARTICIPANTS		513	767	809	936	795	3820	100.0%
SEX	Male	253	372	379	433	474	1911	50.0%
	Female	260	395	430	503	321	1909	50.0%
AGE	14 - 15	0	1	2	0	0	3	0.1%
	16 - 19	90	194	125	103	0	512	13.4%
	20 - 21	63	82	93	107	102	447	11.7%
	22 - 44	324	447	542	667	444	2424	63.5%
	45 - 54	29	29	33	45	27	163	4.3%
	55 and Over	7	14	14	14	7	56	1.5%
EDUCATION	School Dropout	74	110	209	239	152	784	20.5%
	Student HS or Less	20	90	44	10	67	231	6.0%
	H.S. Graduate	199	422	433	494	362	1910	50.0%
	Post - H.S. Attendee	220	145	123	193	214	895	23.4%
Race	White	452	584	410	597	693	2736	71.6%
	Black	21	131	336	237	81	806	21.1%
	Hispanic	25	19	24	46	13	127	3.3%
	American Indian/Alaskan	3	29	2	13	4	51	1.3%
	AsianPacific Islander	12	4	37	43	4	100	2.6%
Public Assistance Status	Aid for Dependent Children	49	149	227	240	96	761	19.9%
	Social Security Insurance	3	16	21	16	11	67	1.8%
	Total Public Assistance	128	264	348	397	229	1366	35.8%
ECONOMIC STATUS	OMB Poverty Level	480	747	739	906	773	3645	95.4%
	70 % of LLSIL	8	10	2	15	13	48	1.3%
	*Above LLSIL	25	10	68	15	9	127	3.3%
ECONOMICALLY DISADVANTAGED		492	758	745	925	787	3707	97.0%
FAMILY STATUS	Single Parent, Dep. Under 6	80	115	140	184	60	579	15.2%
	Single Parent, Dep. Over 6	62	72	107	108	41	390	10.2%
	Parent in 2 - Parent Family	119	161	181	204	214	879	23.0%
	Other Family Member	58	144	133	91	180	606	15.9%
	Non-Dependent Individual	194	275	248	349	300	1366	35.8%
LIMITED ENGLISH SPEAKING ABILITY		14	12	44	57	2	129	3.4%
MIGRANT OF SEASONAL FARM WORKER		5	10	3	11	3	32	0.8%
VETERAN STATUS	Veteran	66	76	130	87	122	481	12.6%
	Vietnam Veteran	27	19	38	26	51	161	4.2%
	Disabled	1	3	2	1	1	8	0.2%
	Recent Veteran	6	17	15	11	17	66	1.7%
HANDICAPPED		58	58	78	61	57	312	8.2%
OFFENDER		39	58	58	108	49	312	8.2%
DISPLACED HOMEMAKER		44	97	77	52	11	281	7.4%
LABOR FORCE STATUS	Employed Full Time	11	31	12	35	7	96	2.5%
	Employed Part Time	87	89	80	92	86	434	11.4%
	Unemployed	290	424	445	362	515	2036	53.3%
	Not in Labor Force	125	223	272	447	187	1254	32.8%
UNEMPLOYMENT INSURANCE CLAIMANT		197	258	315	426	297	1493	39.1%
TARGETED JOB TAX CREDIT		0	0	0	0	0	0	0.0%

* LLSIL - Lower Living Standard Income Level

COMPUTER GENERATED REPORT *********

JTPA ANNUAL STATUS REPORT

PERIOD COVERED - FROM 10/01/83 TO 12/31/84 BALANCE-TOTALS REPORT #

	I. PARTICIPATION AND TERMINATION SUMMARY	TOTAL ADULTS	ADULTS (WELFARE)	YOUTH	DISLOCATED WORKERS
	A. TOTAL PARTICIPANTS	3,922	1,109	5,767	1,076
	B. TOTAL TERMINATIONS	2,436	637	5,128	782
	1. ENTERED UNSUBSIDIZED EMPLOYMENT	1,873	389	969	638
	A. ENTERED REGISTERED APPRENT. PGM.	0	0	1	2
	B. ENTERED ARMED FORCES	6	0	19	0
	2. YOUTH EMPLOYABILITY ENHANCEMENT	0	7	3,797	1
	A. ENTERED NON-TITLE II TRAINING	0	0	7	0
	B. RETURNED TO FULL-TIME SCHOOL	0	3	1,129	0
	C. AGE 14 - 15 COMPLETED PGM OBJECTIVES	0	0	384	0
	D. COMPLETED MAJOR LEVEL OF EDUCATION	0	2	12	0
	C. OTHER TERMINATIONS	563	241	362	143

II. TERMINEES PERFORMANCE MEASURES INFORMATION

LINE NO.	A. CHARACTERISTICS OF TERMINEES		TOTAL ADULTS	ADULTS (WELFARE)	YOUTH	DISLOCATED WORKERS
1	SEX *	MALE	1,307	220	2,865	512
2		FEMALE	1,129	417	2,263	270
3		14 - 15	0	0	1,117	0
4		16 - 17	0	0	3,237	33
5	AGE *	18 - 21	0	0	774	46
6		22 - 44	2,046	558	0	574
7		45 - 54	159	41	0	84
8		55 AND OVER	232	38	0	45
9		SCHOOL DROPOUT	512	171	458	145
10	EDUC	STUDENT (HIGH SCHOOL OR LESS)	3	2	3,291	4
11	STATUS *	HIGH SCHOOL GRADUATE	1,234	325	924	443
12		POST HIGH SCHOOL ATTENDEE	687	139	455	190
13	FAMILY	SINGLE PARENT WITH DEPENDENTS	314	177	209	50
14	STATUS *	SINGLE PARENT WITH DEPENDENTS	290	135	3	57
15		WHITE (NOT HISPANIC)	1,711	353	2,934	599
16	RACE/	BLACK (NOT HISPANIC)	530	221	1,693	137
17	ETHNIC *	HISPANIC	96	23	199	33
18	GROUP	AMERICAN INDIAN OR ALASKAN	39	13	74	7
19		ASIAN OR PACIFIC ISLANDER	60	27	228	6
20	OTHER	LIMITED ENGLISH LANGUAGE	87	41	216	28
21	BARRIERS	HANDICAPPED (ADULT/YOUTH)	216	50	312	38
22	TO EMPL *	OFFENDER	167	39	295	20
23	U.I.	UNEMPLOYMENT COMP. CLAIMANT	201	13	48	164
24	STATUS *	UNEMPLOYMENT COMP. EXHAUSTEE	1,046	271	264	361
25	LABOR	UNEMPLOYED: 1 - 14 WEEKS	650	104	446	308
26	FORCE	UNEMPLOYED: LONG-TERM	840	217	403	365
27	STATUS *	NOT IN LABOR FORCE	720	292	4,130	75
28		AVERAGE WEEKS PARTICIPATED	14	14	9	11
29		YOUTH WELFARE RECIPIENT	0	0	193	0

LINE NO.	B. WAGE AND WELFARE DATA	TOTAL ADULTS	ADULTS (WELFARE)	YOUTH	DISLOCATED WORKERS
30	NO. TERINEES ENTERED UNSUBEDIZED EMPLOY. (WITH PREPROGRAM HOURLY WAGE)	1,377	221	557	580
31	AVERAGE HOURLY WAGE, IN LAST JOB (13 WEEKS PREPROGRAM)	4.89	4.35	3.75	6.35
32	AVERAGE HOURLY WAGE AT TERMINATION (TERMINEES WITH PREPROGRAM HR/WAGE)	4.99	4.48	4.27	5.78
33	AVERAGE HOURLY WAGE AT TERMINATION (TERMINEES WITHOUT PREPRGRM HR/WAGE)	5.01	5.03	4.00	5.58
34	AVERAGE MONTHLY WELFARE GRANT AT TIME OF ELIGIBLE DETERMINATION	119.52	744.73	636.61	26.94
	III. PROGRAM COSTS				
35	TOTAL PROGRAM COST	.00	.00	.00	.00
	IV. FOLLOWUP INFORMATION				
36	POTENTIAL TOTAL CONTACTS	1,697	449	4,609	595
37	POTENTIAL SAMPLE CONTACTS	0	0	0	0
38	RESPONES	1,332	322	0	477
39	TOTAL EMPLOYED (AT TIME OF CONTACT)	932	194	0	362
40	TOTAL EMPLOYED (SOMETIME DURING FIRST WEEKS AFTER TERMINATION)	1,007	200	0	379
41	AVERAGE HOURLY WAGE (13 WEEKS PREPROGRAM)	1.63	1.09	.00	3.02
42	AVERAGE HOURLY WAGE (13 WEEKS AFTER TERMINATION)	5.18	5.02	.00	5.84
43	AVERAGE WEEKS WORKED (13 WEEKS PREPROGRAM)	2	1	0	4
44	AVERAGE WEEKS WORKED (13 WEEKS AFTER TERMINATION)	0	0	0	0
45	AVERAGE HOURS WORKED IN LAST JOB (13 WEEKS PREPROGRAM)	32	27	0	46
46	AVERAGE HOURS WORKED IN LAST JOB (13 WEEKS AFTER TERMINATION)	38	38	0	39
47	INDIVIDUALS OFF WELFARE (13 WEEKS AFTER TERMINATION)	296	296	0	40
48	INDIVIDUALS WITH REDUCED WELFARE (13 WEEKS AFTER TERMINATION)	294	294	0	35
49	AVERAGE WELFARE GRANT REDUCTION (13 WEEKS AFTER TERMINATION)	258.21	258.21	.00	262.89

OLDER WORKER PROGRAM

On October 1, 1984, the Older Worker Program was transferred to the Kansas Department on Aging for program administration. The Department of Human Resources retained a small portion of the funds to ensure oversight responsibilities and maintain program integrity.

The Department of Human Resources and the Kansas Department on Aging issued a coordinated Request for Proposal to seek new or existing programs which increase the employment earnings of qualified older people, age 55 and over. The primary goal was stated to reduce welfare dependency, assist re-entry into the work force and develop a wider range of service delivery opportunities.

Ten proposals were received. The top three rated proposals were recommended for funding, with the fourth top rated proposal from Social Rehabilitation Services of the State of Kansas being asked to fill in services in two SDAs not represented in the previously awarded projects. The following proposals were funded:

North Central - Flint Hills Area Agency on Aging
Manhattan, Kansas — Amount Awarded: $37,023

The goal of this project is to assist 50 low-income job seekers through a coordinated process that includes individual assessment and counseling, job search assistance, job training, and job development and placement.
To date this project has enrolled 24 participants, five of whom were welfare recipients, and placed one in unsubsidized employment.

Senior Services, Inc.
Wichita, Kansas — Amount Awarded: $182,736

This project is jointly sponsered by Senior Services, Inc, and the Kansas Elks Training Center for the Handicapped/Projects-with-Industry. The goal is to expand and enhance employment opportunities for low-income older workers through job seeking skills training, linkage and cooperation with other training programs and job development activities with the business sector.
To date this project has enrolled 49 participants, 6 of whom were welfare recipients, and placed 16 in employment, nine full-time and 4 part-time, three were placed directly into jobs.

Southeast Kansas Area Agency on Aging
Chanute, Kansas — Amount Awarded: $56,025

This project seeks to enroll 125 participants in the first nine months of the program in Job preparedness training. The projects seeks to develop an employer education program to alter the myths employers and the general public hold about older workers through an organized publicity campaign. To date, the program has enrolled 30 participants, 4 of whom were welfare recipients, and placed 2 in employment.

Social and Rehabilitation Services
Topeka, Kansas — Amount Awarded $29,631

This project will provide Job Search assistance to older workers in Shawnee and Wyandotte counties. This project has just been finally negotiated and has no enrollement figures at this time.

EDUCATION COORDINATION & GRANTS (8%)

Program Year '85 - February 1, 1985

Of the total 8% funds available for FY '84 ($953,151), 80% of the funds were allocated to the administrative entities to provide services to Title IIA participants through cooperative agreements with local educational institutions. The method of allocation was in accordance with the JTPA Title IIa formula set forth in Section 202(a) of the Act.

The following funding levels have been established from July 1, 1984:

SDA	Title IIA 8% allocation
I	143,621
II	152,603
III	120,265
IV	214,040
V	131,992
Total	762,521

The SDA's were allowed to obligate funds from the above allocations from July 1-September 30. The remaining 20% ($190,630) was appropriate for use at the State level to facilitate training/education coordination through technical assistance, counseling, professional enhancement and curriculum development.

The Service Delivery Areas in conjunction with the Kansas State Department of Education/Vocational Education Section have finalized contracts for most projects. The following is a brief summary of the approved projects and SDA activity under the Education and Coordination Grants.

JTPA Section 123(a)(1) - 80%

SDA I

On December 5, 1984 the Private Industry Council approved three proposals for FY 85. Each educational institution was provided an orientation to the Education Coordination project by the Kansas State Department of Education, the Department of Human Resources and the Service Delivery Area staff on December 18 and 19, 1984. The following projects were approved.

Service Provider	Services	Federal Contributions/ No. of Participants
Chase USD	School-to-Work Transition Program To provide youth competencies remedial math & English, personal survival skills, Kansas Careers and placement in postsecondary training or unsubsidized employment for high school youth	$ 5,883.00 5-10 participants
Dodge City Community College	"55" Plus Program To provide educational training and services to adults between 55-65 in Clark, Comanche, Edwards, Ford, Gray, Hodgement, Kiowa, Meade and Ness counties	32,559.00 42 participants
Barton County Community College	Assessment Center/Classroom To provide basic remedial education and vocational training for unemployed persons, specifically those receiving cash payments or food stamps.	28,310.00 240 participants

SDA II

Service Delivery Area II has four projects which are operational and one project pending:

Service Provider	Services	Federal Contributions No. of Participants
Lawrence USD	GED/Pre-employment Skills To provide assistance to JTPA participants in attaining basic skills and employability skills	$ 11,892.50 30 participants
Washburn University	Classroom Training To provide assessment and open entry/open exit training for JTPA eligible clients in the general office and clerical fields	62,638.10 100 participants
Lyndon USD	School-to-Work Transition Program To provide remedial math and English, personal survival skills, youth competencies and Kansas Careers for high school students	6,991.00 5-10 participants
YWCA (1984 funding)	Women in Transition Programs	85,233.26 150 participants
Shawnee County Mental Health Center (pending)	Pre-Vocational/Skill Training To provide pre-employment training and sill training for the chronically mentally ill	27,979

The Lawrence USD was provided project orientation by the Kansas State Department of Education, the Department of Human Resources and the Service Delivery Area staff on November 30, 1984. On December 21, 1984, Washburn University participated in project orientation. Lyndon USD was involved in the project orientation on January 4, 1985.

SDA III

Service Delivery Area III has four approved projects. Three of the projects are operating with FY 85 funds. On January 14, 1985, the Kansas State Department of Education and the Private Industry Council staff met with the Olathe Vocational School staff to provide project orientation.

Service Provider	Services	Federal Contributions/ No. of Participants
St. Mary College	GED/Basic Remedial To provide pre-employment skills, life skills, job search skills and GED preparation for 18-21 year olds	$ 45,408.84 60 participants
Kansas City AVTS (85)	Summer Career Exploratory Program in the AVTS To provide assessment, career planning, hands on experience in three vocational areas for youth in the summer	17,027.40 40 participants
Olathe Vocational School	School-to-Work Transition Program To provide vocational evaluation and tryout work experience for in school youth	10,949.00 10 participants
Kansas City AVTS (84)	Summer Career Exploratory Program in the AVTS	15,000.00 40 participants

SDA IV

Service Delivery Area IV has four projects approved with two projects in the negotiation process.

Service Provider	Services	Federal Contributions/ No. of Participants
Wichita USD 259 (85)	Assessment Center To provide comprehensive assessment of all IIA participants	$ 117,723.00 967 participants
Wichita USD 259 (84)	Assessment Center	50,000.00
City of Wichita	Youth Coordination To coordinate youth services under IIA, IIB	23,200.00
Wichita State University	Classroom Training-Basic Skills To strengthen the academic experience of minority students entering health professions in a summer enrichment program	31,645.00 25 participants
Butler County Community College	Pre-Vocational To provide a vocational exploration program for handicapped youth including job shadowing	10,391.00 20 participants
Patricia Stevens School	Skill Training To provide training for youth to obtain entry level positions in the restaurant industry	I. 17,289.00 12 participants II. 14,385.00 12 participants
Cowley County Community College	GED/Basic Skills To provide job preparation, specific vocational skills training, remedial education and survival skills training	24,240.00 60 participants

Project orientation was provided to the Wichita USD 259 on November 7, 1984. On January 3, 1985, the Kansas State Department of Education, the Department of Human Resources and the Service Delivery Area staff met with the Patricia Stevens School staff for project orientation.

SDA V

Service Delivery Area V has approved three projects for FY 85.

Service Provider	Services	Federal Contributions/ No. of Participants
Flint Hills AVTS	Assessment Center/Classroom Training To provide individual assesment including interests, aptitudes, strengths, weaknesses, career objectives and basic skills; to provide job preparation skills; referral to classroom training, OJT or unsubsidized employment	$ 32,437.00 90 participants
Fort Scott Community College	Assessment Center/Educational Training To provide vocational assesment, adult basic education/ GED, survival skills, job attainment skills, job retention skills, and job placement	59,240.00 50 participants
Coffeyville Community College	Women in Transition Programs To provide unemployment/ underemployed women with basic education, employment and job seeking skills training with counseling and placement	42,309.40 50 participants
Coffeyville USD (84)	School-to-Work Transition	18,500.00 30 participants
Independence USD (84)	School-to-Work Transition Program	18,500.00
Southeast KS AVTS (84) Columbus	GED/Basic Education Employability Skills	16,000.00

JTPA Section 123(a)(2) - 20%

20% Coordination Services

An appropriate portion of funds were used to cover costs of salary, fringes, travel and non-personal services for State staff and to facilitate training/ education coordination through technical assistance, professional enhancement and curriculum development.

Funds were also utilized by the Kansas State Department of Education to present a JTPA workshop at the Kansas National Education Association (KNEA) Conference on November 8, 1984 at Century II in Wichita. The Kansas State Department of Education is in the process of developing a program plan for 20% expenditures for the Department of Human Resources.

11/13/85

WU initiates training program for unemployed, disadvantaged

Washburn University's School of Applied and Continuing Education beginning this month will start an office skills training program for the unemployed and economically disadvantaged.

Dr. Reid A. Holland, the school's dean, said the university in its grant application for funding under the U.S. Labor Department's Job Training Partnership Act will take up to 100 individuals into the program. He said students referred to the program by the JTPA and the state's Employment Security Division will be assessed for potential office skills; be trained in a variety of modern office methods, including basic word processing and use of computers; and, hopefully, at least 70 percent of those completing the training will be placed either through the university's placement office or by the state's employment services.

Dr. Reid A. Holland

"We're excited about Washburn's involvement with the JTPA," Holland said. "Although the scope of JTPA encompasses far more areas than we could participate in, we are confident we can make a significant contribution in training unemployed and economic disadvantaged persons to assist them in finding career positions."

Total amount of the grant is $125,535, of which JTPA will provide $62,600 and that amount will be matched by the School of Applied and Continuing Education in in-kind services and instruction. Ed Minnock, director of continuing education at Washburn, will be project director.

> "The neat thing about our program is that ... a student can come in any time and proceed at his or her own pace."
>
> Reid A. Holland

"The neat thing about our program is that it will be 'open entry.' That means a student can come in any time and proceed at his or her own pace," Holland explained. "This gives the student a considerable amount of flexibility, particularly when a student has other obligations."

Holland said the importance of Washburn's office training program is emphasized because no single occupational group is predicted to need more workers in this decade than the clerical/office employees.

"Jobs are available in traditional roles of secretary and receptionists, as well as new roles in word processor operators and records managers," Holland said. He added that many colleges and universities offer degrees and certificates in office administration. "But underprivileged men and women are finding it difficult to enter this market because they lack the skills necessary to do so and often times the financial means to obtain those skills in the usual manner," he said.

Holland said the goals of the project are:

— To identify employment opportunities for JTPA eligible clients who have office skills training.

— To establish a central referral source where JTPA eligible clients can learn about educational, training and employment opportunities.

— To assess the potential of JTPA clients for office employment.

— To identify training and development needs of qualified applicants.

— To provide open-entry, open-exit skills training for clients in the office and clerical field, and provide such training on an individualized basis.

Holland said a classroom will be established on campus with all necessary equipment to carry out the JTPA project. Curriculum for students will range from basic typing and shorthand through word processing, office and record management and even include instruction on dress and telephone etiquette.

"When a student completes the program," Holland concluded, "there's every reason to believe that he or she will be fully capable of stepping into the office environment and handle a full share of the workload."

Persons interested in learning more about the JTPA program may call Washburn's School of Applied and Continuing Education at 295-6619 or by writing the school in care of Washburn University, Topeka, 66621.

PROGRAM ISSUANCE

STATE OF KANSAS
Department of Human Resources

NUMBER: 624-07-84

DATE: 01-16-85

DIRECTIVE: JTPA Program Issuance No. 624-07-84

TO: All Components of DHR

FROM: Larry E. Wolgast, Ed.D.
Secretary of Human Resources

SUBJECT: JTPA Dislocated Worker Program/Emphasis on Pre-layoff Assistance

1. Purpose. This is to serve as notification to all components of the Department of Human Resources that the Division of Employment/JTPA has recently developed a new direction in the Kansas Dislocated Worker Program, which involves close coordination and cooperation with many of the divisions within DHR, as well as with other state and local agencies.

2. References. Job Training Partnership Act, Sections 301-308. Division of Employment Program Issuance DE 254-01-85 dated October 23, 1984.

3. Background. Title III of the Job Training Partnership Act provides for employment and training assistance for dislocated workers. During the current program year, Kansas has been allotted $924,805 for this purpose. In addition to the JTPA funds for dislocated workers, the Governor has designated the 7(b) funds available under Wagner-Peyser be used for dislocated workers as an important facet of the new program plan.

4. Content. Attached to this issuance is the recently adopted plan for the State of Kansas which introduces KPACT, the Kansas Pre-layoff Assistance Coordination Team. KPACT is a coalition of service providers, with representation from JTPA, Job Service, Unemployment Insurance, education, economic development agencies and Social and Rehabilitation Services.

5. Action Required. Please review the attached and be prepared to cooperate with this new program.

6. Inquiries. Inquiries should be addressed to Richard F. Hernandez, State JTPA Director, (913) 296-3031.

RFH:PSM:pc

cc: Jamie Schwartz, Secretary of Economic Development
Harold Blackburn, Commissioner of Education
Robert Harder, Secretary of Social & Rehabilitation Services

RESCISSIONS	EXPIRATION DATE
NONE	Continuous

KESD 122
(5-83)

DISTRIBUTION Total

State of Kansas

Dislocated Worker Proram

JTPA Program Years 1984 & 1985

I. Dislocated Worker Program Operations During Current Program Year

   A. Kansas Pre-layoff Assistance Coordination Team (K-PACT)

   B. State/SDA Joint Project Development

   C. Outside Proposals

II. Dislocated Worker Program Operations To Be Developed for Upcoming Program Year (to commence by July 1, 1985)

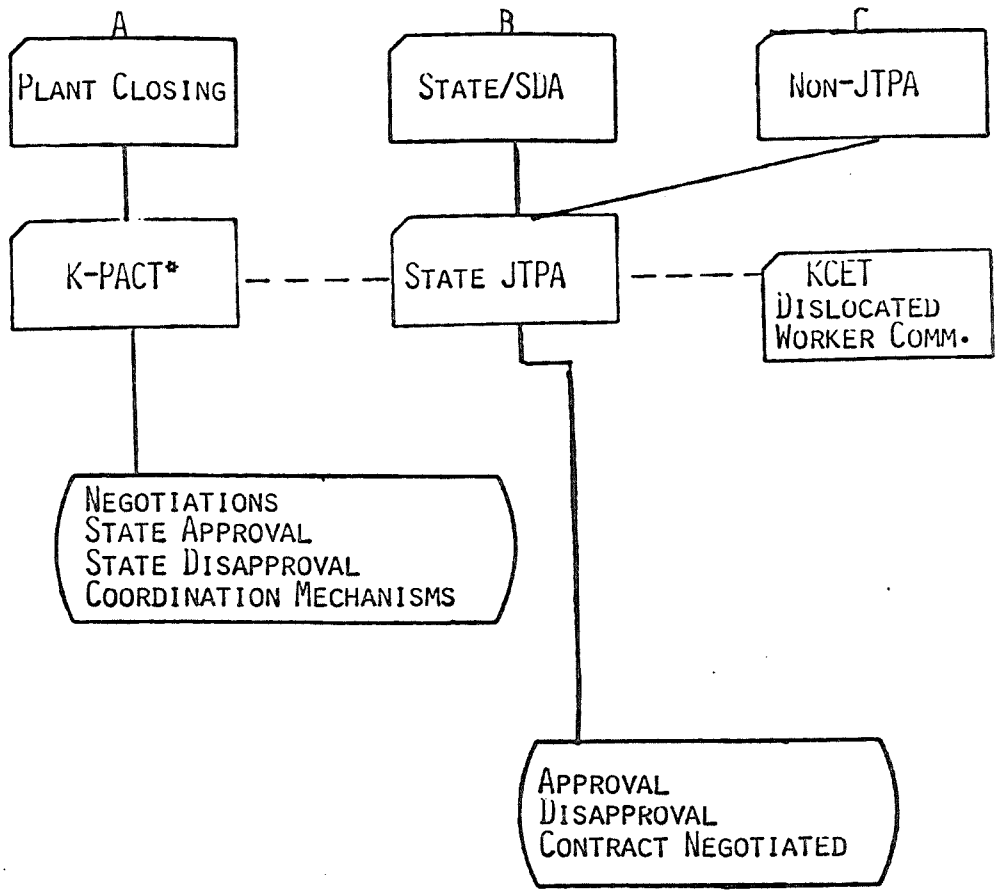
III. Coordination Mechanisms

IV. Policy

Formulated and Adopted by the
Dislocated Worker Committee
Kansas Council on Employment & Traini
November 1984

Dislocated Worker Program Operations

Current Year, July 1, 1984 - June 30, 1985

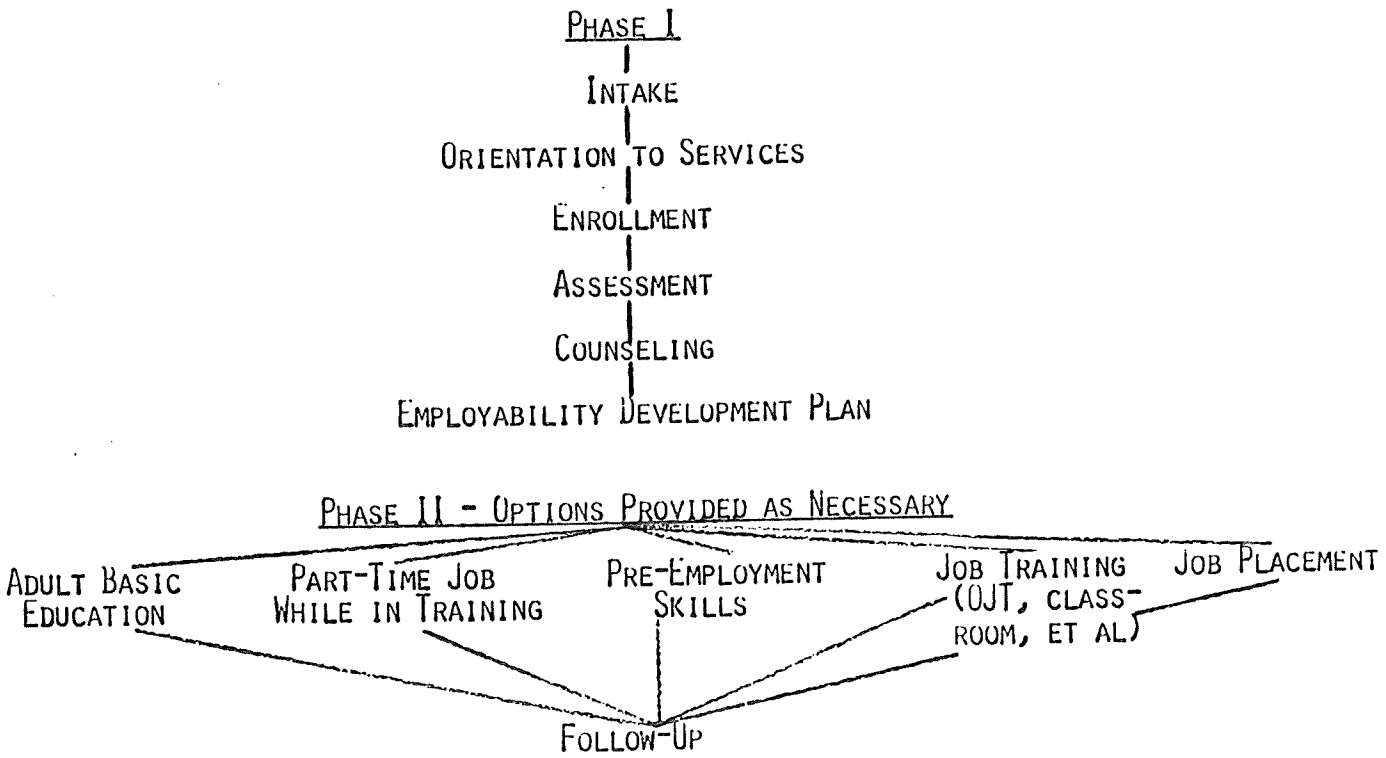


*K-PACT Composition:

1. JTPA
2. Job Service
3. Unemployment Insurance
4. Ks. Dept. of Economic Development
5. Ks. Dept. of Education
6. Ks. Dept. Social & Rehab Services

Others as appropriate

RE-EMPLOYMENT CENTER SERVICES



STATE OF KANSAS

DISLOCATED WORKER PROGRAM

I. DISLOCATED WORKER PROGRAM OPERATIONS DURING CURRENT PROGRAM YEAR

During the current program year, three basic modes of project development will be used for the State of Kansas Dislocated Worker Program.

Mode A. For plant closings and major layoffs - Kansas Pre-layoff Assistance Coordination Team (K-PACT)

Mode B. State/SDA Joint Project Development (post-layoff, to serve workers who have been dislocated for up to two-years)

Mode C. Outside Proposals (also post-layoff)

A. Kansas Pre-Layoff Assistance Coordination Team (K-PACT)

The Kansas Pre-layoff Assistance Coordination Team (K-PACT), a coalition of service providers, includes State and local representatives as appropriat from JTPA, Job Service, Unemployment Insurance, education, economic development agencies, and Social and Rehabilitation Services.

K-PACT COMPOSITION

1. Job Service Administration:

Contact: Jane Burbridge
Alternate: Charles Geist

2. JTPA Administration:

Contact: Katie Krider
Alternate: Polly Schubert-Morey/Bob Rios

3. UI Administration:

Contact: Don Bruner
Alternate:

The following agencies will be asked to designate representatives:

4. Kansas Department of Economic Development:

Contact:
Alternate:

5. Kansas State Department of Education:

Contact:
Alternate:

6. Kansas Department of Social & Rehabilitation Services:

Contact: Marjorie Byington (not yet officially designated)
Alternate:

And other appropriate officals as deemed necessary.

K-PACT MODE OF OPERATION.

1. Identification of impending layoff - may be from a variety of sources, either at the state or local level. Basic information sheet completed with as much information as is immediately available.

2. Two or three K-PACT representatives (with one lead person) convene a preliminary informational meeting with company officials(s) and labor representative(s) if appropriate. Encourage development of local task force.

3. K-PACT representatives who attended preliminary meeting determine the scope of subsequent K-PACT involvement, and set up second meeting with company management and labor, along with the appropriate state and local K-PACT members.

4. Second meeting held with appropriate K-PACT members and management and labor to establish the project parameters and to plan necessary services.

Meeting Agenda

a. Describe more fully what services can be made available through K-PACT (JTPA, Job Service, UI, etc.)

b. Explain what the company is expected to provide:

* list of affected employees, names, addresses, phone numbers, social security numbers;
* job descriptions for all affected workers;
* on-site facilities for initial services, equipment, supplies, niceties;
* assignment of a contact person from management and labor;
* employees given time off with pay for taking advantage of initial services (from 4 hours to 3 days)
* all communication and coordination with workers; and
* employees' required attendance

c. Facilitate establishment of local task force.

5. Workers assessed to determine their needs. (A $20,000 pool of Title III funds will be set aside for each SDA, to allow JTPA staff engaged in these pre-contract non-administrative activities to charge their time to Title III. Job Service 7(b) funds will be used for Job Service staff time devoted to the project.)

6. Public announcement of project, locally-initiated, to emphasize local ownership of program.

7. Project becomes operational; contract developed with the appropriate agency or organization - may be the JTPA administrative entity or another organization or agency which has taken a lead role in project development.

B. State/SDA Joint Project Development

1. State convenes meeting in each SDA to include State and local JTPA administrative entity staff, PIC & LEO representation, labor and management if appropriate, and community leaders if appropriate.

   (Note: Meetings have thus far been held in SDAs I and IV.)

2. State/local group works through the following agenda:

   a. Review of D.W. checklist and authorized activities. Explain that $20,000 has been set aside from Title III funds for each SDA, so that JTPA staff engaged in non-administrative pre-contract activities in Title III program development and initial intake and assessment may charge their time to Title III.

   b. Discussion of SDA's dislocated worker situation:

      * Who are they - how many?
      * What services do they need?
      * What would be the best approach to serve them? Re-employment center(s)? Supportive services?
      * What resources can be brought to bear to provide services?
      * Who should be involved in designing services? Should a local task force be established? Who will the local contact person be?
      * When could a proposal be ready for the PIC to submit to the Dislocated Worker Committee of the State Council?
      * Is there interest in establishing a forum to discuss ways to avoid layoffs?
      * What are the next steps after this meeting?

   c. Distribution of Title III application guidelines and review criteria.

3. PIC applies to State for a portion of the available state pool of Title III funds, using Title III application guidelines (if the PIC's administrative entity won't be the Title III program operator, the PIC will request proposals as necessary if there is more than one obvious service provider in the area.)

4. KCET Dislocated Worker Committee reviews the funding request (materials sent to Committee 5-7 days prior to meeting) and develops a recommendation.

5. Public announcement of funding, if proposal is approved.

6. State develops contract with SDA for program implementation.

C. Outside Proposals

1. State publishes announcement of Title III funds for dislocated worker program, outlining three methods of project development. The public notice indicates the State JTPA contact person, if non-JTPA agencies wish to apply for funds.

   (Note: This press release went out to major Kansas newspapers on November 2, 1984)

2. State issues proposal instructions and procedures to interested applicants.

   a. General instructions and information

   b. Application guidelines

   c. Proposal rating criteria

3. Proposals submitted concurrently to State JTPA Administration (and appropriate PIC and LEO, for information. State assures that PIC and LEO have received proposal.)

4. State team reviews and rates proposal. Recommendations presented to KCET Dislocated Worker Committee to consider, with materials sent to Committee 5-7 days prior to meeting. Committee develops its recommendation.

5. If proposal is approved, public announcement is made of grant award.

6. State develops contract with proposer.

II. DISLOCATED WORKER PROGRAM OPERATIONS TO BE DEVELOPED FOR UPCOMING PROGRAM YEAR (to commence by by July 1, 1985)

The Kansas Pre-layoff Assistance Coordination Team will continue as the central mode of the Kansas Dislocated Worker Program for the upcoming program year. In addition, it is proposed that a network of re-employment centers be established across the State to begin operation by July 1, 1985.

Based on the Arizona model, there would be three to five centers across the State (the Conference work group on services suggested one each in Wichita, Topeka, Kansas City, Pittsburg and Colby - a cost analysis and feasibility study will show what the Kansas budget will allow). Each re-employment center would be staffed by several technicians who would be on call for plant closings and would coordinate dislocated worker services for their area. The re-employment center staff would not necessarily directly provide all services, but would sub-contract as appropriate.

The network of re-employment centers could be staffed by individuals funded under JTPA Title III and Wagner-Peyser 7(b), with UI staffing to be explored as well. The feasibility study will also explore the possibility of satellite centers to serve outlying areas, with partial or part-time staffing.

The re-employment centers would be publicized through the K-PACT marketing efforts which are described elsewhere in this proposal.

A request for proposal would be distributed during January, with a pre-bid conference held in February to describe specific requirements. As in the Arizona model, it is possible that each of the centers would be operated by a different type of agency, which might be a community college, a JTPA administrative entity, a Job Service Center, the continuing education division of an educational insitution, a labor organization, a community-based organization, or other agency.

Services provided through the re-employment centers would be as follows:

Phase 1: (to be provided in the plant whenever possible)

1. intake (eligibility determination and documentation)
2. orientation to available services
   a. program objectives
   b. participant expectations
   c. resource directory
3. enrollment
4. assessment
   a. interest and aptitude inventory
   b. identification of transferable skills
   c. determination of occupational preferences
   d. skill/job matching in available job market
   e. coping and adjustment
5. counseling
   a. career/employment
   b. economic (monthly income requirements)
   c. labor market demands vs. expectations and qualifications
6. employability development plan

Phase 2: After the above services have been provided, the following program options will be provided as needed:

1. Adult Basic Education
2. part-time job placement to provide income while receiving training or other services
3. pre-employment skills
   a. job club
   b. job-seeking skills
   c. job retention skills
   d. resume preparation
   e. interviewing skills
4. job training - OJT, classroom, et al.
5. job placement (might be immediately after Phase I services, or after necessary Phase 2 services)
6. follow-up

III. COORDINATION MECHANISMS

Key to the success of the Title III Dislocated Worker Program is the coordination of entities to provide services to adversely affected workers.

Formal agreements are to be developed between:

* State Job Service Administration and State JTPA Administration and other JTPA Service providers with the State.

* Education, labor organizations, PICs, or other appropriate groups serving the affected community(ies).

Layoff and/or plant closing information will be coordinated with the Kansas Council on Employment & Training Dislocated Worker Committee, which will receive monthly briefings. Each PIC will be formally requested to establish a Dislocated Worker subcommittee, which will be briefed whenever activity occurs within their SDA. The PIC subcommittee members could also be called upon for assistance by the K-PACT in a crisis situation.

In addition, every effort should be made to cooperate/coordinate with interested ad hoc groups in the adversely affected area(s). These groups may include:

Job Service Employer Committees

Local Elected Officials

Labor Unions

Chambers of Commerce

To further develop the Department of Human Resources' intention to avoid duplication of sevices, efforts should be continued to establish co-located services whenever feasible. Development of a common intake form for DHR employment and training units should be encouraged.

Coordination of Pre-layoff/Plant Closing Information

Regardless of who receives the layoff or plant closing information, the Job Service/JTPA supervisor or designate (in Wichita the administrative contact person) should be informed of the proposed layoff and/or closing. The Job Service/JTPA Supervisor or the SDA IV administrative contact person from the City of Wichita (or a designate if the City waives participation) is to serve as the lead person.

The supervisor notifies State Job Service/JTPA Administration officials, who are responsible for notifying local office staff. The supervisor also notifies the PIC chairperson, who should inform the subcommittee members. Discretion should be used by the supervisor in notifying other interested groups. Requests for confidentiality will be adhered to in notifying appropriate personnel.

Upon being notified of a layoff, K-PACT representatives will attempt to schedule a meeting with the employers and labor representatives (where appropriate) within three (3) working days.

K-PACT representatives will contact or meet with the PIC subcommittee in the adversely affected community to advise them of the anticipated proposal of services to be offered.

Richard Hernandez will be the designated spokesperson for the Department's Dislocated Worker Program, with Armand Corpolongo as the alternate.

Information to the designated agency spokesperson will be from the K-PACT spokesperson who has been designated by the group.

Concurrently, Job Service/JTPA staff must be developing appropriate educational material - flyers, brochures, pamphlets.

The K-PACT should use the available resources to alert employers/unions to K-PACT services. (The Resource, Kansas Business Week, Chamber of Commerce mailings, mailings sent to employers from UI, etc.)

IV. POLICY

A. Labor-Management Cooperation

Labor-management cooperation will be emphasized in project development, with labor representation being required in K-PACT meetings in which services are being planned for laid-off workers, and union consultation being required in the other two modes of proposed development.

Total commitment will be sought from both labor and management, each of whom will be asked to designate a lead contact person. The following will be required:

* list of affected employees, names, addresses, phone numbers, social security numbers;
* job descriptions for all affected workers;
* on-site facilities for initial services, equipment, supplies, niceties;
* assignment of a contact person from management and labor;
* employees given time off with pay for taking advantage of initial services (from 4 hours to 3 days);
* all communication and coordination with workers; and
* employees' required attendance

If there is an unwillingness of either labor or management to cooperate, the State will work with whatever parties are willing to help develop services for the affected workers.

If neither labor or management will cooperate, a community-based model (such as Montgomery Co.) can be developed.

B. Impacts Required to Trigger Intervention

No specific size of layoff will be required for State intervention - determinations will be made on a case by case basis, since the impact of a layoff is relative to many factors.

The State will never intervene in a situation in which there is a labor-management dispute.

C. Developing an Intelligence System

In the absence of advance notice, the State will strive to develop information resources that will permit the State or local program operators to learn about troubled industries or firms before closings or layoffs occur.

To develop this intelligence system, K-PACT member agencies will be asked to communicate information to the appropriate contact persons, who will coordinate inter-agency cooperative efforts. State field staff will receive necessary training to engage this communication network.

The press will be monitored, and public relations efforts will be directed toward local elected officials, labor organizations and the business community to inform them of services available through K-PACT, using informational materials which will be developed with all due haste.

The assurance of confidentiality when necessary is essential, to develop trust.

DHR's Industrial Roundtable should be involved in this effort, to establish and direct policy along with the Kansas Council on Employment & Training, and to assist in marketing K-PACT services.

D. Coordination with Other State Policies

Through K-PACT, the Dislocated Worker Program funded under JTPA Title III will be compatible and coordinate with funds available under Wagner-Peyser 7(b) for Job Service activities, with Vocational Education funds, with KDED's Kansas Industrial Training (KIT) funds and Community Development Block Grant (CDBG) funds, and others as appropriate.

E. Regulatory

State regulations will be kept minimal and flexible. The State will provide necessary guidelines and provide a definition of dislocated worker participant eligibility which will enable maximum participation in the program.

F. Developing a Favorable Climate For Early Intervention

The State will strive through public relations and other means to create a favorable climate for concerted responses and early interventions.

Through K-PACT, a public relations campaign will be mounted to develop heightened awareness of available services. Seminars will be conducted for business through Chambers of Commerce and other business groups which demonstrate the advantages of early notification. The Kansas Council on Employment & Training, Kansas Industrial Roundtable, Job Service Employer Committees, local elected officials, Private Industry Councils and labor organizations will also be involved in this effort.

1-29-85
AH. #6

Statement by Secretary Marvin Harder to
the Interim Committee on Labor and Industry
September 6, 1984

The PERB Law

The meaning I attach to the words "meet and confer" is essentially what the First Amendment of the Constitution of the United States guarantees to every American citizen and that is to peaceably assemble and to petition the government for a redress of grievances. If a "meet and confer" law is intended to protect those rights, I find it difficult to imagine anyone objecting to such a law. Individually or collectively, employees have a right to express their concerns and interests. In effect, and by court interpretation, employees, like all citizens, have the right to organize.

But it is not clear that the Legislature intended "meet and confer" to legitimate collective bargaining in State Government. The collective bargaining model expresses or implies more than what the words "meet and confer" means to me. In the private sector collective bargaining means negotiations intended to culminate in decisions which will be honored and implemented. This

Atch. 6
1/29/85

procedure assumes that managers or their agents have the authority and resources to decide and to carry out what they have decided to agree to. Concepts like "impasse," "fact finding," "good faith," "prohibited practices," and "arbitration" are all related to the collective bargaining model which is widely though not universally accepted in the private sector. To the extent that the present PERB law can be or is interpreted as legitimating collective bargaining in Kansas State Government, it ought to be modified if, on review, the Legislature wishes to preclude such interpretation.

Before I identify the difficulties of applying the collective bargaining model in State Government, this committee needs to know that I came to understand why collective bargaining became the principal objective of organized labor in the private sector. This happened when I taught labor law at the University of Wichita during the early Fifties. And it should be known that I was one of a half a dozen academics who publicly opposed the right to work law. I would consider it highly inaccurate and unfair if my testimony this morning led to my being labeled anti-labor union.

Nonetheless, I have concluded that I must tell this committee that the institutionalized processes of decisionmaking in State Government make collective bargaining an ineffective model for the resolution of grievances in this arena.

My reasons for adopting this position are as follows:

1. On many if not most major issues, such as wages, no state administrator, including myself and the Governor, has the authority or power to make commitments. It should be obvious that the Legislature controls the purse strings. What negotiable items are controllable by an agency administrator are few in number.

2. Though some union officials have accepted this fact and now ask only that management agree to advocate what they want, I, as the legal state negotiator, am unwilling to compromise my role as a policy advisor in that way. Allocation of resources necessarily involves the seeking of a balance which approximates the public interest. If I know or anticipate a tight fiscal

condition, and therefore cannot in good faith advocate a substantial pay hike, I will be viewed as an intransigent manager.

3. But the most fundamental reason is that union employees are not served well unless their representatives proceed on the assumption that in our political system success depends on their ability to lobby all of the principal actors in the decisionmaking process. It is through lobbying, not collective bargaining, that unions and associations may hope to get their grievances remedied. The exception to this condition may be local school boards and city commissions who do possess the authority to levy the taxes that may be needed to meet a union's demands. That kind of authority no state government administrator possesses, nor indeed, any legislative committee possesses.

4. Still another reason is that the present law invites litigation and the involvement of the courts in policy areas that properly belong to the Legislature.

5. Finally, I must say that I don't like charades. The collective bargaining which occurs presently is a charade which can only damage everyone's credibility.

The PERB law was enacted more than a decade ago. The time has come for the Legislature to review that law and learn how the law has been interpreted and applied. All of us know that policymaking doesn't stop with a legislative enactment. Policy is made by implementation as well as by enactment. It is appropriate, therefore, to ask whether present policy is consistent with legislative intent. If it is perceived as having evolved beyond the original intent, then the law should be amended to make it what the lawmakers want it to be.

In conclusion, it is necessary and important that I tell you that I am speaking my own mind today as Secretary of Administration.

LABOR LAW—MANDATORY SUBJECTS OF BARGAINING UNDER THE KANSAS PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT—*Kansas Board of Regents v. Pittsburg State University Chapter of Kansas-National Education Association* *

1-29-85
AH. #7

I. INTRODUCTION

In 1971, after a bumpy legislative history,[1] the Kansas legislature passed the Public Employer-Employee Relations Act (PEER Act).[2] The Act's stated purpose is to "obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment."[3] The PEER Act requires a public employer to meet and confer in good faith on conditions of employment with the elected representatives[4] of an approved employee bargaining unit[5] and to prepare a memorandum of agreement memorializing any agreement for consideration and action by the appropriate governing body.[6] The PEER Act prohibits lockouts[7] and strikes[8] and creates a public employment relations board (PERB)[9] with authority to mediate in the event of an impasse[10] and to make prohibited employment practice findings.[11] The Kansas Supreme Court characterized the PEER Act as a " 'hybrid' " combining some characteristics typical of pure "meet and confer" acts with other characteristics found in "collective bargaining" acts.[12]

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* Diana Dietrich.

[1] *See* S. 383, 63d Legis., Reg. Sess. (1969); S. 383, H. 1573, 63d Legis., Reg. Sess. (1969); S. Sub. for H. 1573, 63d Legis., Reg. Sess. (1970). For a general discussion of the Act's history, see also Goetz, *The Kansas Public Employer-Employee Relations Law*, 28 KAN. L. REV. 243, 245 (1980).

[2] KAN. STAT. ANN. §§ 75-4321 to -4337 (1977 & Supp. 1982).

[3] *Id.* § 75-4321(b). Section 75-4321(a) states in part:

> (1) The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees. . . .
>
> (2) [T]he denial by some public employers of the right of public employees to organize and the refusal by some to accept the principle and produce of full communication between public employers and public employee organizations can lead to various forms of strife and unrest. . . .
>
> (3) [T]he state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. . . .
>
> (4) [T]here neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions. . . .
>
> (5) [T]he difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion and in the fact that constitutional provisions as to contract, property, and due process do not apply to the public employer and employee relationship.

The PEER Act applies to all public employees other than public school teachers (who are provided for under the Professional Negotiations Act. *Id.* §§ 72-5413 to -5432 (1980)) and supervisory, elected, management, or confidential employees. *See id.* § 75-4322(a).

[4] *See id.* § 75-4324.

[5] *See id.* § 75-4327 (Supp. 1982).

[6] *See id.* § 75-4331 (1977).

[7] *See id.* § 75-4333(b)(8).

[8] *See id.* § 75-4333(c)(5).

[9] *See id.* § 75-4323 (Supp. 1982).

[10] *See id.* § 75-4332 (1977).

[11] *See id.* § 75-4333.

[12] Kansas Bd. of Regents v. Pittsburg State Univ. Chapter of Kansas-Nat'l Educ. Ass'n, 233 Kan. 801,

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Despite inclusion of the PEER Act of what appears to be a closed-ended, definitional listing of "conditions of employment,"[13] *Kansas Board of Regents v. Pittsburg State University Chapter of Kansas National Educational Association (PSU-KNEA)*[14] raised for the first time the issue of what subjects come within the scope of mandatory negotiability under the Act. Kansas joined a number of other states which have recently decided the same issue under a variety of public bargaining statutes.[15]

This note will review and analyze the Kansas Supreme Court's decision in *PSU-KNEA* against the backdrop of decisions from other states which have grappled with the issue.

II. THE SCOPE OF BARGAINING ISSUE—AN OVERVIEW

A. The NLRA Prototype

The National Labor Relations Act (NLRA),[16] enacted by the United States Congress in 1935, governs collective bargaining in the private sector. Section 8(d) of the NLRA requires the employer and employee to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."[17] Despite the Supreme Court's determination that these are "words of limitation,"[18] courts have found a broad spectrum of subjects to constitute "wages, hours and other terms and conditions of employment."[19] With relative ease, courts have held generally that "hours" includes "subjects relating to the time when and how often employees work" and that " 'wages' means something more than a salary and includes any form of remuneration for services rendered, including bonuses, pensions and welfare plans, profit sharing plans and company provided housing and meals."[20] "Other terms and conditions of employment"

804, 667 P.2d 306, 309-10 (1983) (citing Goetz, *supra* note 1, at 283) [hereinafter cited as PSU-KNEA]. The court distinguishes "meet and confer" acts from "collective bargaining" acts by reasoning that in the former employees unilaterally prepare proposals which the employer ultimately accepts or rejects. The court interprets the PEER Act's statutory definition of "meet and confer in good faith" in conjunction with other statutory sections, e.g., section 75-4321(b), *supra* text accompanying note 3, as circumscribing the employer's power of ultimate authority. *See infra* note 78.

[13] " 'Conditions of employment' means salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures . . . ." KAN. STAT. ANN. § 75-4322(t) (1977).

[14] 233 Kan. 801, 667 P.2d 306 (1983).

[15] *See, e.g.*, San Mateo City School Dist. v. PERB, 33 Cal. 3d 850, 191 Cal. Rptr. 800, 663 P.2d 523 (1983) (affirmed the administrative board's three-pronged balancing analysis to determine proposal negotiability); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972) (teacher load and class size, compensation for extra-curricular activities, and binding arbitration of grievances mandatorily negotiable; length of school day, school calendar, or scheduling of extracurricular activities not negotiable); Charles City Educ. Ass'n v. PERB, 291 N.W.2d 663 (Iowa 1980) (post graduate education hours not negotiable); National Educ. Ass'n v. Board of Educ. 212 Kan. 741, 512 P.2d 426 (1973) (identifies mandatorily negotiable subjects); City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973) (scheduling of school vacations not negotiable); Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978) (transfer policy not negotiable).

[16] 29 U.S.C. §§ 151-69 (1976).

[17] *Id.* § 158(d).

[18] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 220 (1964) (Stewart, J., concurring).

[19] *See generally* C.J. MORRIS, THE DEVELOPING LABOR LAW 772-844 (1983); R. GORMAN, LABOR LAW 498-506 (1976).

[20] Alleyne, *Statutory Restraints on the Bargaining Obligations in Public Employment*, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 100 (A. Knapp. ed. 1977).

has been more difficult to define.[21] Normally, for a topic to fall within this catch-all category, it must relate to some aspect of the employer-employee relationship as well as "have a significant impact on the job rights and security of an employee."[22]

Many state public employment bargaining statutes have emulated the NLRA section 8(d) prototype.[23] Where a state public employment negotiation statute differs from the NLRA language, courts consider the deviation important, and sometimes controlling on scope of bargaining questions.[24]

A few state enactments, the Kansas PEER Act among them, stand outside the mainstream by providing statutorily a closed-ended, laundry-list definition of mandatorily negotiable conditions of employment.[25] Through these statutes, legislatures may attempt "mechanically and effectively [to] limit the scope of bargaining."[26] Although *PSU-KNEA* indicates that a laundry-list format does not alleviate scope of bargaining litigation, "listing the terms and conditions of employment" supposedly provides the advantage of making it "less difficult for agencies and courts to decide scope of bargaining cases" as well as making "the law of the subject more predictable."[27] Conversely, laundry list statutes may undermine the essence of the bargaining process to the extent that they preclude "compromise and accommodation" by "freezing in" a specific number of required subjects and "freezing out" all others.[28]

Despite the incorporation into state enactments of NLRA section 8(d) language, a "critical difference" exists between the NLRA and the many state enactments which also contain retained employers' rights provisions.[29] Section 75-

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[21] *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); *See also* Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look via a Balancing Formula*, 40 MONT. L. REV. 231, 239 (1979).

[22] Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 909 n.107 (1973); Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 62 (1965).

Summers identifies a two-part test to determine mandatory negotiability: is the subject of such vital concern to both labor and management that it is likely to lead to controversy and conflict and is collective bargaining appropriate for resolving such issues.

[23] *See, e.g.*, CONN. GEN. STAT. § 5-272(c) (1977); HAWAII REV. STAT. § 89-9 (1976 & Supp. 1982); MICH. COMP. LAWS § 423.215 (1978); MONT. CODE ANN. § 39-31-305 (1983); NEB. REV. STAT. § 48-816 (Supp. 1982); N.Y. CIV. SERV. § 204.2 (1983); PA. CONS. STAT. ANN. tit. 43, § 1101.301 (Purdon 1980).

[24] Clark, *Scope of the Duty to Bargain in Public Employment*, LABOR RELATIONS IN THE PUBLIC SECTOR 87 (A. Knapp ed. 1977). *See, e.g.*, West Hartford Education Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972) (length of school day and school calendar not negotiable because the omission of "hours" from the Teachers Negotiations Act indicates legislative intent to reserve all decisions concerning hours as ones of policy for management.)

[25] CAL. GOV'T CODE § 3543.2(a) (West 1974); IOWA CODE § 20.9 (1979); KAN. STAT. ANN. § 75-4322(t) (1977); NEV. REV. STAT. § 288.150 (1976).

[26] Alleyne, *supra* note 20, at 111.

[27] *Id.* at 113.

[28] *Id.*

[29] *Id.* at 105; *see also* Edwards, *supra* note 22, at 914-15.

4326 of the PEER Act illustrates one such provision.[30] Although the private sector case law has developed to exclude from mandatory negotiability "managerial decisions which lie at the core of entrepeneurial control . . . and [those] not themselves primarily about conditions of employment,"[31] employers' rights provisions (sometimes called management rights or management prerogative provisions) theoretically give legislatures a tool to define the line between nonnegotiable policy and negotiable conditions of employment. In Kansas the employers' rights provision[32] reflects a legislative adherence to the belief that the "status between public employees and private employees, in fact or law" is nonanalogous.[33] Sections 75-4321(a)(4) and (a)(5) of the PEER Act set forth several of the reasons underlying this belief.[34]

In addition to management rights provisions, legislatures may also include preemptive provisions which circumscribe the scope of bargainable issues by declaring other laws not superseded by the public bargaining statute.[35] The PEER Act contains a statutory preemption clause prescribing that "nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state."[36]

B. The Overlap Problem

In statutes combining broad NLRA section 8(d)[37] language with a management rights clause, the problem of subject overlap arises. As numerous courts have recognized, some bargaining subjects commonly touch both a mandatorily negotiable condition of employment and a policy concern reserved to management.[38] The basic problem is to what extent a statement of management rights

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[30] Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:

(a) Direct the work of its employees;

(b) Hire, promote, demote, transfer, assign, and retain employees in positions within the public agency;

(c) Suspend or discharge employees for proper cause;

(d) Maintain the efficiency of governmental operation;

(e) Relieve employees from duties because of lack of work or for other legitimate reasons;

(f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and

(g) Determine the methods, means and personnel by which operations are to be carried on.

KAN. STAT. ANN. § 75-4326 (1977).

[31] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

[32] KAN. STAT. ANN. § 75-4326 (1977); *see supra* note 30.

[33] KAN. STAT. ANN. § 75-4321(a)(4) (1977 & Supp. 1982); *see supra* note 3.

[34] KAN. STAT. ANN. §§ 75-4321(a)(4), (5); *see supra* note 3. Scholars have commented extensively on the unique constraints which distinguish public sector employment from private. *See* Edwards, *supra* note 22, at 887 n.9; for a general discussion of these constraints, see Note, *The Scope of Negotiations Under the Iowa Public Employment Relations Act*, 63 IOWA L. REV. 649, 653-67 (1978).

[35] Alleyne, *supra* note 20, at 109. *E.g.*, Philadelphia Bd. of Educ. v. Philadelphia Fed'n of Teachers, 464 Pa. 92, 346 A.2d 35 (1975) (public school code did not preempt grievance arbitration clause in collective bargaining agreement); Parsons Nat'l Educ. Ass'n v. Unified School Dist., 225 Kan. 581, 593 P.2d 414 (1979) (subject of personnel reduction not negotiable because teachers' job security already protected by Continuing Contract Law and Due Process Procedure on Contract Termination Law).

[36] KAN. STAT. ANN. § 75-4322(t) (1977).

[37] 29 U.S.C. § 158(d) (1976).

[38] *See, e.g.*, National Educ. Ass'n v. Board of Educ., 212 Kan. 741, 512 P.2d 426 (1973); Parsons Nat'l Educ. Ass'n v. Unified School Dist., 225 Kan. 581, 593 P.2d 414 (1979); Clark County School Dist. v. Local Gov't Employee Management Relations Bd., 90 Nev. 442, 530 P.2d 114 (1974); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973); West Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46, 358 N.Y.S.2d 720, 315 N.E.2d 775 (1974); Sutherlin Educ. Ass'n v. Sutherlin School Dist., 25

removes subjects, which would otherwise be included, from mandatory negotiability.[39] Courts and administrative boards have taken the position that a legislature does not intend to "enact a nullity"[40] and generally strive to resolve scope of bargaining questions by one of two methods.[41] The first method employs a significant relation test, the second method uses a balancing test.

The significant relations test used in Clark County School District v. Local Government Employee-Management Relations Board,[42] formerly the rule in Nevada,[43] requires mandatory negotiability "if a particular item is found to *significantly* relate to wages, hours and working conditions even though the term is also related to management prerogative."[44] The test has come under criticism for its "distinct bias towards negotiability."[45] The noted authority Theodore Clark argues that the test "gives undue weight to conditions of employment,"[46] while ignoring other competing interests.[47] Until Kansas adopted what it labeled a "significantly related" test in *PSU-KNEA*,[48] the test had received little or no attention by courts in recent years.[49]

The balancing test, considered the superior test since it "openly acknowledges the overlap conflict problem," weighs equally the competing employer and employee interests at stake.[50] Courts and administrative boards, identifying this method by various names, have utilized it with increased frequency.[51] The Kan-

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Or. App. 85, 548 P.2d 204 (1976); PLRB v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975); Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 88 S.D. 127, 215 N.W.2d 837 (1974); City of Beloit v. WERC, 73 Wis. 2d 43, 242 N.W.2d 231 (1976).

[39] H. EDWARDS, R. CLARK, JR. & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR, 316 n.5 (1979) [hereinafter cited as H. EDWARDS].

[40] Washoe County School Dist., Nevada Local Government Employee-Management Relations Board, item 3 (1971) *reprinted in* H. EDWARDS, *supra* note 39, at 316, *aff'd sub nom* Clark County School Dist. v. Local Government Employee-Management Relations Board, 90 Nev. 442, 530 P.2d 114 (1974) [hereinafter cited as Washoe County School Dist]. On appeal, the Nevada Supreme Court stated:

> It is not conceivable that the legislature would give its extensive time and attention to study, draft, meet, hear, discuss and pass this important piece of legislation were it not to serve a useful purpose. For this court to hold that any item even though remotely relevant to management policy is beyond the pale of negotiation defeats the purpose of the legislation. Many matters involved in a teacher's work day bear somewhat on management policy and at the same time are inextricably linked to wages, hours and conditions of employment. What the legislature gave us was not intended to immediately be taken away.

Clark County School Dist. v. Local Gov't Employee-Management Relations Bd., 90 Nev. 442, 445, 530 P.2d 114, 117 (1974).

[41] *See* Clark, *supra* note 24, at 91-92.

[42] 90 Nev. 442, 530 P.2d 114 (1974).

[43] *See* Washoe County School Dist., *supra* note 40. In 1976, Nevada amended its statute to limit specifically the scope of bargaining to twenty enumerated subjects, identifying all other topics as within management's prerogative and not negotiable. *See supra* note 25.

[44] *Clark County School Dist.*, 90 Nev. 446, 530 P.2d at 117 (emphasis in original).

[45] Clark, *supra* note 24, at 92; *see also* Ridgefield Park Bd. of Educ., 3 NJPER 303 (N.J. 1977), *aff'd*, 78 N.J. 144, 393 A.2d 278 (1978) (" 'Significant relation' " standard inadequate for failing to recognize employer's competing interests where conditions of employment overlap management prerogative).

[46] Clark, *supra* note 24, at 92.

[47] *Id.*

[48] 233 Kan. at 814-21, 667 P.2d at 315-20 (1983).

[49] At least two cases have used the test. Los Angeles County Employees Ass'n v. County of Los Angeles, 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 (1973); Barrington School Comm. v. Rhode Island, 388 A.2d 1369 (R.I. 1978).

[50] Clark, *supra* note 24, at 92.

[51] *See, e.g.*, National Educ. Ass'n v. Board of Ed., 212 Kan. 741, 512 P.2d 426 (1973) ("impact" test); City of Biddeford: Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Sutherlin Educ. Ass'n v. Sutherlin School Dist., 25 Or. App. 85, 548 P.2d 204 (1976); PLRB v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975); City of Beloit v. WERC, 73 Wis. 2d 43, 242 N.W.2d 231 (1976) ("primary related" test).

sas Supreme Court was one of the first courts to articulate the test, known in Kansas as the impact test, in *National Education Association of Shawnee Mission, Inc. v. Board of Education (Shawnee Mission)*.[52] The court described the test as balancing the "direct impact of an issue . . . on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole."[53]

C. Laundry-list Statutes

A few state legislatures, apparently attempting to relieve the courts of the need to develop and apply negotiability tests, have enacted statutes which contain both laundry-list definitions of mandatorily negotiable conditions of employment *and* employer reservation provisions. These laundry-list statutes have not alleviated the overlap problem. Rather, the issue has become whether the specified laundry-list items must be read narrowly, and literally, or whether proposals related to the specific item are mandatorily negotiable as well. Two cases, one in Iowa[54] and one in California,[55] have considered this issue and arrived at divergent results.

Section nine of the Iowa Public Employment Relations Act[56] requires that public employers and employees meet to "negotiate in good faith with respect to" a list of specific subjects.[57] Additionally, section seven grants public employers "exclusive power, duty, and the right to" unilaterally decide questions falling within nine comprehensive areas,[58] one of which is the area of "hire, retain, and demote."[59] In *Charles City Education Association v. PERB, (Charles City)*[60] the Iowa Supreme Court considered a proposal concerning the nature of post-graduate education hours necessary to advance a teacher along a salary schedule. The court concluded that the mandatorily negotiable wage term did not include the proposal. The court adopted the argument that the co-existence of the management rights provision and the laundry-list of negotiable subjects within the statute evidence a legislative intent that the subject list be an exclusive list and that it "narrow, by specific enumeration, the scope of negotiable subjects."[61] Having ruled against the teacher association's argument that subjects "primarily relating" to the enumerated subjects which do not significantly infringe upon employers' rights were mandatorily negotiable,[62] the court proceeded to define wages in

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[52] 212 Kan. 741, 512 P.2d 426 (1973). *See also infra* text accompanying notes 127-28.

[53] *National Educ. Ass'n*, 212 Kan. at 753, 512 P.2d at 435.

[54] Charles City Educ. Ass'n v. PERB, 291 N.W.2d 663 (Iowa 1980).

[55] San Mateo City School Dist. v. PERB, 33 Cal. 3d 850, 191 Cal. Rptr. 800, 663 P.2d 523 (1983).

[56] IOWA CODE §§ 20.1-29 (1979).

[57] *Id.* § 20.9.

[58] These areas are: (1) direct the work of its public employees; (2) hire, promote, demote, transfer, assign, and retain public employees within the public agency; (3) suspend or discharge public employees for proper cause; (4) maintain the efficiency of governmental operations; (5) relieve public employees from duties because of lack of work or for other legitimate reasons; (6) determine and implement methods, means, assignments and personnel by which the public employer's operations are to be conducted; (7) take such actions as may be necessary to carry out the mission of the public employer; (8) initiate, prepare, certify, and administer its budget; (9) exercise all powers and duties granted to the public employer by law. *Id.* § 20.7.

[59] *Id.* § 20.7(2). The inclusiveness of this management rights clause led Professor Pope to conclude that since section seven covers "[n]early all legitimate functions of the public employer," the listed negotiable subjects constitute exceptions to the employer's rights. Pope, *Analysis of the Iowa Public Employment Relations Act*, 24 DRAKE L. REV. 1, 34 (1974).

[60] 291 N.W.2d at 663 (Iowa 1980).

[61] *Id.* at 668 (quoting Pope, *supra* note 59, at 11).

[62] *Id.* at 667.

the most narrow, literal sense. Relying on the Webster's dictionary definition, the court found that " 'wages' involves a specific sum or price paid by an employer in return for services rendered by an employee" and held the litigated proposal outside this definition.[63] Conspicuously absent from the court's rationale is consideration of whether this constrictive approach operates in derogation of the act's stated public policy to "promote harmonious and cooperative relationships between government and its employees by permitting public employees to organize and bargain collectively."[64]

In contrast, the California Supreme Court in *San Mateo City School District v. PERB (San Mateo)*[65] took a much less restrictive tack. The California Educational Employment Relations Act (EER Act)[66] provides that "the scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment."[67] The same section goes on to state that "terms and conditions of employment means" a specifically enumerated list of subjects.[68] Although the EER Act does not list areas of reserved management prerogative as do the Kansas and Iowa statutes, it provides that "all matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating."[69] The California Supreme Court affirmed the public employment relations board's three-pronged balancing analysis to determine the negotiability of a non-specified subject.[70] This analysis balances not only the employer and employee's significant interests, but also considers the need and propriety of collective negotiations to resolve conflict.[71]

The *San Mateo* holding rejected on three grounds the appellant's contention that the EER Act asserts a legislative intent to establish a strictly limited scope of negotiation.[72] First, the court acknowledged that the EER Act defines the scope of negotiation to subjects "relating to" the enumerated items.[73] Second, since the enumerated list includes subjects which "touch both fundamental educational policy decisions and traditionally recognized conditions of employment,"[74] the court found "that no rigidly limited scope was intended."[75] Third, by comparing the EER Act with its statutory predecessor,[76] the court determined that although the EER Act prescribes a more limited scope of negotiable subjects, it gives " 'employees' rights to *bargain* . . . significantly stronger than the right to meet and confer" under the previous act.[77] In the court's eye, this stronger right, cou-

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[63] *Id.* at 668. Arguably, the court gave the narrowest possible construction to the scope of negotiability under the act.

[64] IOWA CODE § 20.1 (1979).

[65] 33 Cal. 3d 850, 191 Cal. Rptr. 800, 663 P.2d 523.

[66] CAL. GOV'T CODE §§ 3540-3549.3 (West 1975).

[67] *Id.* § 3543.2(a).

[68] *Id.*

[69] *Id.*

[70] *San Mateo, 33 Cal. 3d at __, 191 Cal. Rptr. at 811, 663 P.2d at 534.*

[71] *Id.* at __, 191 Cal. Rptr. at 805, 663 P.2d at 528.

[72] *Id.* at __, 191 Cal. Rptr. at 806-08, 663 P.2d at 529-30.

[73] *Id.* at __, 191 Cal. Rptr. at 804, 808, 663 P.2d at 527, 531.

[74] *Id.* at __, 191 Cal. Rptr. at 806, 663 P.2d at 529.

[75] *Id.*

[76] Winton Act, Stats. 1965, Ch. 2041, § 2, 4660, *repealed by* Stats. 1975, Ch. 961, § 1, 2247.

[77] *San Mateo* 33 Cal. 3d at __, 191 Cal. Rptr. at 808, 663 P.2d at 531. The EER Act does not expressly grant employees a bargaining right. The Act grants employees the right to "form, join, and participate . . . for the purpose of representation." CAL. GOV'T CODE § 3543 (West 1975). Nor does the Act circumscribe the employer's right of final decision. *San Mateo*, 33 Cal. 3d at __, 191 Cal. Rptr. at 806, 663 P.2d at

pled with what the court perceived as the legislature's determination that collective negotiations furthered the public interest,[78] justified the board's analysis and decision.[79] In contrast to the Iowa Supreme Court, the California Supreme Court appears to have given the most expansive reading possible to the EER Act's scope of bargaining.

III. *KANSAS BOARD OF REGENTS V. PITTSBURG STATE UNIVERSITY CHAPTER OF KANSAS-NATIONAL EDUCATION ASSOCIATION*

A. Factual Background

PSU-KNEA[80] came to the Kansas Supreme Court as a consolidated appeal from three PERB decisions referred to as case 20,[81] case 21, and the 1982 case. Case 21 centered on the mandatory negotiability of "retrenchment."[82] The Pittsburg State University president devised a procedure to elect a faculty committee to the exclusion of the Pittsburg State University Chapter of the Kansas National Education Association (KNEA), the faculty negotiating committee, for the purpose of preparing a retrenchment plan.[83] The KNEA responded by filing a prohibited practice charge[84] against the University of the Kansas Board of Regents.[85] The PERB hearing examiner's recommended order determined that retrenchment, to the extent that it involved procedures for carrying out layoff and recall, was mandatorily negotiable.[86] The order acknowledged the impact on employees' wages and hours of work, notwithstanding the employer's statutory right to relieve employees from duties.[87] The recommended order went on to find bad faith in the University's refusal to negotiate and held it in violation of the act.[88] The Regents and the University filed exceptions with PERB to the

529. To the extent that the court considers the EER Act stronger than meet and confer legislation, it may be characterized as a "hybrid" equivalent to the PEER Act. *See supra* note 12.

Arguably, the Kansas Act leans more in the direction of a collective bargaining statute than does the EER Act. The PEER Act contains a broad policy section, subsections of which may be construed as a legislative intent to grant Kansas employees stronger negotiating powers than those accruing from the less committed policy provision of the EER Act. *See* KAN. STAT. ANN. § 75-4321(a), *supra* note 3.

[78] *San Mateo*, 33 Cal. 3d at __, 191 Cal. Rptr. at 808, 663 P.2d at 531. The court liberally construed the EER Act's policy provision to derive this legislative determination. That section expresses the Act's purpose "to promote the improvement of personnel management and employer-employee relations . . . by providing . . . the right of public school employees to join organizations . . . to be represented by such organizations in their professional and employment relationships with public school employers . . . and to afford . . . a voice in the formulation of educational policy." CAL. GOV'T CODE § 3540 (West 1975).

[79] *San Mateo*, 33 Cal. 3d at __, 191 Cal. Rptr. at 808, 663 P.2d at 531.

[80] 233 Kan. 801, 667 P.2d 306 (1983).

[81] Case 20 centered on the parties' dispute over the interpretation of a clause in the parties' 1979-80 written agreement which specified the agreement's duration and provided the procedure for modification. *PSU-KNEA*, 233 Kan. at 806-07, 667 P.2d at 310-11.

[82] The parties stipulated to the following definition of retrenchment: "Retrenchment means reduction in force and includes the methods and procedures used for reduction of personnel, how personnel are to be laid off and establishment of procedures for recall of personnel." *Id.* at 807, 667 P.2d at 311. Case 21 arose during the spring 1980 negotiating session between the Pittsburg State University Chapter of the Kansas-National Education Association, the faculty negotiating representative, and Pittsburg State University. *Id.*

[83] *Id.*

[84] "Refuse to meet and confer in good faith with representatives of recognized employee organizations. . . ." KAN. STAT. ANN. § 75-4333(b)(5) (1977).

[85] *PSU-KNEA*, 233 Kan. at 807, 667 P.2d at 311-12.

[86] Brief of Appellant at 4-5, *PSU-KNEA*, 233 Kan. 801, 667 P.2d 306 (1983) [hereinafter cited as Brief of Appellant].

[87] *Id.* The right derives from KAN. STAT. ANN. § 75-4326 (1977).

[88] *Id.*

examiner's recommended order.[89]

The 1982 case evolved from salary and grievance proposals advanced by the KNEA during negotiations in the spring of 1981 for the upcoming academic year.[90] The salary proposal contained subproposals labeled salary generation, salary allocation, out of state travel, promotions, and summer employment; the grievance proposal also had subproposals labeled tenure, retrenchment, personnel files, and academic freedom.[91] The University contended these subjects were outside the mandatory conditions of employment and refused to negotiate over them.[92] When the KNEA sought to include these topics in PERB factfinding proceedings held in September, 1981,[93] the University filed prohibited practice charges.[94] The hearing examiner in this case found all items mandatorily negotiable except salary allocation and summer employment and academic freedom.[95]

The PERB order in case 21 differed from the hearing examiner's recommendations. The order recognized a good faith dispute over negotiability of retrenchment and on that basis found no prohibited practice. By fashioning its ruling on the threshold question of good faith, the Board sidestepped the question of retrenchment's mandatory negotiability.[96]

Rendering a decision in the 1982 case, however, required the PERB to address directly the issue of scope of mandatory negotiability under the PEER Act. Focusing on sections stating purpose,[97] defining conditions of employment,[98] and reserving employer rights,[99] the PERB concluded that the "clear" message of the legislature was that "public employers and public employees are required to enter into *full communication* on all subjects which *relate* to conditions of employment to the extent that those proposals do not infringe upon the existing rights of public employers."[100] The PERB considered its reading of the PEER Act to be the only reasonable choice among three alternatives, the other two representing opposite polarized extremes.[101] The PERB dismissed as unreasonable the view that all subjects infringed upon management's rights and were therefore not negotiable.[102] At the same time, the PERB recognized that "a subject does not become mandatorily negotiable by flimsily tying it to an enumerated subject term and condition."[103]

Contrary to the Kansas Supreme Court's depiction of the PERB's method for

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[89] *Id.*
[90] *PSU-KNEA*, 233 Kan. at 807-08, 667 P.2d at 312.
[91] Brief of Appellant, *supra* note 86, at 13.
[92] *Id.*
[93] *Id.*
[94] *PSU-KNEA*, 233 Kan. at 807-08, 667 P.2d at 312.
[95] Brief of Appellant, *supra* note 86, at 6.
[96] *See* PERB, 75-CAE-21-1980 at 15.
[97] KAN. STAT. ANN. §§ 75-4321(a)(2) & (b) (1977); *see supra* note 3.
[98] *Id.* § 75-4322(t), *supra* note 13.
[99] *Id.* § 75-4326, *supra* note 30.
[100] PERB, 75-CAE-1-1982 at 2.
[101] The first [polarized] interpretation could find that every subject proposed for negotiations carries with it an economic cost and therefore has a direct effect on the individual's salary or wages and as such is a mandatorily negotiable subject within the purview of the statute. The second [polarized] interpretation could find that all subjects proposed for negotiations infringe upon one or more of management's rights as outlined at K.S.A. 75-4326 and as such do not constitute subjects over which the public employer is obligated to bargain.

Id.
[102] *See id.*
[103] *Id.*

determining mandatory negotiability,[104] hypotheticals given in the board's opinion and its treatment of the proposals at issue before it indicate that PERB did not engage in a weighing process to balance a proposal's significant effect upon employees' conditions of employment against its degree of infringement upon management's retained rights.[105] Rather, PERB employed an analytical formula which looked beyond the proposal's label to its purpose and ramifications. If the purpose and ramifications significantly related to an enumerated condition of employment, the PERB next asked whether repercussions would touch reserved employers' rights as well. If employers' rights remained unaffected, the proposal was mandatorily negotiable. Conversely, if a proposal affected both areas, the board dissected the proposal and required negotiations of only that portion which significantly related to conditions of employment. The PERB never suggested that if a subject touches upon a reserved management right it may be mandatorily negotiable so long as it touches to a greater degree upon an employment condition. The PERB appeared to defer to the literal meaning of section 75-4326, which bars negotiation of any subject affecting a retained employer's right.[106] When the PERB did divide a proposal, it consistently found implementation procedures, versus the decision to implement itself, mandatorily negotiable. The PERB, however, never openly considered whether negotiation of implementation procedures infringes upon a retained employer right.

The PERB determined that all subjects, except academic freedom, were negotiable.[107] The Regents and the University appealed the PERB decisions. The Kansas District Court of Shawnee County, viewing its role in administrative ap-

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[104] *See infra* text accompanying notes 114-15.

[105] *See infra* note 107 and accompanying text.

[106] For example, in discussing a hypothetical proposal to negotiate a university's decision to add a class section and change the times a class is offered, the PERB states that "[a]lthough these decisions would have a significant relation on conditions of employment such as hours of work . . . the decisions are management's to make and would be other than mandatory subjects." PERB, 75-CAEO-1-1982 at 5.

[107] The PERB's opinion on each mandatorily negotiable proposal was as follows:

> *Salary Generation*: Mandatory. This proposal sought to give "employees input into the salary portions of the budget process." KAN. STAT. ANN. § 75-4322(t) (1977) specifically identifies salary as a condition of employment and KAN. STAT. ANN. § 75-4327(g) (Supp. 1982) reflects the intent that negotiations affecting finances be conducted in time to allow implementation of an agreement into the budget process.
>
> *Salary Allocation*: Mandatory. This proposal sought "input" into the distribution of salary monies and is linked to the salary generation process. KAN. STAT. ANN. § 75-4322(t) justifies.
>
> *Out-of-State Travel*: Mandatory. In higher education travel is often necessary to improve academic credentials which in turn significantly affects salaries.
>
> *Promotions*: In part mandatory. The employer has a right to promote under KAN. STAT. ANN. § 75-4326(b) (1977). At the same time, the promotion decision significantly relates to conditions of employment. Therefore, "criteria, procedures, or methods by which the candidates for promotion are identified" are mandatorily negotiable; all other topics relating to promotion not negotiable.
>
> *Summer Employment*: In part mandatory. The employer has the sole right to determine curriculum. The decisions to offer summer school and to choose offered courses are reserved to the employer. Proposals going to the selection of summer faculty are mandatorily negotiable.
>
> *Tenure*: Mandatory to the extent that the proposal goes to establishing a procedure for determining how an untenured faculty member moved from probationary status to permanent tenured status.
>
> *Retrenchment*: In part mandatory. The employer's retained right to relieve due to lack of work, KAN. STAT. ANN. § 75-4326(e), makes the decision to retrench not mandatory. Pro-

peals as limited, affirmed.[108]

B. The Kansas Supreme Court Decision

After deciding two threshhold questions concerning scope of review[109] and the Regents' public employer capacity,[110] Justice Miller's majority opinion affirmed the PERB and the district court decisions that the contested proposals were mandatorily negotiable.[111] The majority rejected the Regents' and the University's argument that the PEER Act's laundry-list definition of conditions of employment limits the scope of negotiations literally to those subjects listed.[112] The court instead affirmed what it termed a "significantly related" test to determine negotiability.[113] The court considered the "significantly related" test to be that which the PERB originally used to decide the case.[114] In the majority's view, the significantly related test was a balancing test which required mandatory negotiation "if an item is *significantly related* to an express condition of employment and if negotiating the item will not unduly interfere with management rights reserved to the employer by law."[115] The court considered the test a "middle course" and "a commonsense approach to the problem of sorting out matters which cannot be easily defined or neatly categorized."[116] To support adoption of this test, the court chiefly relied[117] on *Clark County School District*,[118] which looked only to a proposal's significant relationship with conditions of employment and did not engage in the balancing of employers' interests.[119]

In addition to sanctioning what it considered to be the PERB's test, the court also ratified the PERB's determination that a subject need not duplicate exactly one of the specifically enumerated subjects to be mandatorily negotiable, but

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posals pertaining to the procedures to implement retrenchment are mandatory since reduction in work force affects conditions of employment.

Personnel Files: Mandatory. These files contain materials which guide the employer's decisions affecting conditions of employment.

[108] PERB, 75-CAEO-1-1982 at 6-17. Apparently relying on Kansas State Bd. of Healing Arts v. Foote, 200 Kan. 447, 436 P.2d 828 (1968), the district court refused to substitute its judgment for that of PERB absent a determination that the Board's findings were arbitrary, capricious, or unlawful. *See PSU-KNEA*, 233 Kan. at 830, 667 P.2d at 327 (Schroeder, C.J., dissenting).

> A district court may not, on appeal substitute its judgment for that of an administrative tribunal, but is restricted to consider whether as a matter of law, (1) the tribunal acted fraudulently, arbitrarily or capriciously, (2) the administrative order is substantially supported by the evidence, and (3) the tribunal's action was within the scope of its authority.

Kansas State Bd. of Healing Arts, 200 Kan. at 447, 436 P.2d 828.

[109] The court affirmed the district court's reliance on the *Kansas State Board of Healing Arts* standard of review. It determined that it could not substitute findings of fact for those of the Board and that it should treat the Board's legal conclusions with deference. *PSU-KNEA*, 233 Kan. at 808-10, 667 P.2d at 312-13.

[110] The Regents claimed as an affirmative defense that they were not the "public employer" under the Act. *See* KAN. STAT. ANN. § 75-4322(a) (1977) (defining public employer). The court looked to Art. 6, § 32 of the Kansas Constitution and a number of statutory provisions and determined that "it is clear beyond a doubt that the Board of Regents is the ultimate authority." *PSU-KNEA*, 233 Kan. at 810-11, 667 P.2d at 314.

[111] *See id.* at 825-28, 667 P.2d at 324-26.

[112] *See id.* at 814, 667 P.2d at 316.

[113] *See id.* at 816, 667 P.2d at 317.

[114] *See id.*

[115] *Id.*

[116] *Id.* at 819, 667 P.2d at 319.

[117] *Id.* at 819-20, 667 P.2d at 319-20.

[118] 90 Nev. 442, 530 P.2d 114 (1974).

[119] *See supra* text accompanying notes 42-44.

may simply relate to one of those subjects.[120] The court concluded that the Act's language warranted "disagreement over its 'true' meaning."[121] Yet, in the end the majority singled out the language of section 75-4330(a)[122] as a "clear" directive supporting PERB's conclusion "that the parties may reach a memorandum of agreement on all matters *relating* to conditions of employment, as long as those matters do not infringe upon employer or employee rights."[123]

The Regents, the University, and the two dissenting opinions argued strongly that the legislative history of the PEER Act, read in tandem with its sister statute, the Professional Negotiations Act (PN Act),[124] preclude an expansive reading of negotiability under the PEER Act.[125] The original version of the PN Act, enacted in 1970, required parties to negotiate "on terms and conditions of professional service" without defining specifically what those terms and conditions were.[126] In 1973, the Kansas Supreme Court in *National Education Association of Shawnee Mission, Inc. v. Board of Education (Shawnee Mission)*,[127] engaged in impact analysis[128] to define "terms and conditions of professional service." In 1977 the legislature responded to *Shawnee Mission* by amending the PN Act to include a definition of terms and conditions which specified individual subjects and also incorporated the impact test.[129] A surge of litigation focusing on the scope of negotiation under the amended statute occurred in the wake of this amendment.[130] In 1980, the legislature again amended the PN Act, this time deleting

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[120] *PSU-KNEA*, 233 Kan. at 816, 667 P.2d at 317.

[121] *PSU-KNEA*, 233 Kan. at 815, 667 P.2d at 316.

The court focused on five sections: KAN. STAT. ANN. § 75-4322, *see supra* note 13; KAN. STAT. ANN. § 75-4323 (Supp. 1982) ("The primary purpose of the Public Employee Relations Board is to effectuate the purposes and provisions of the Act"); KAN. STAT. ANN. § 75-4324 (1977) ("Public employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment"); KAN. STAT. ANN. § 75-4326, *see supra* note 30; KAN. STAT. ANN. § 75-4330(a) ("The scope of a memorandum of agreement may extend to all matters relating to conditions of employment, except proposals relating to [a statutorily or constitutionally preempted subject of section 75-4330(a)]").

[122] *Id.* at 820, 667 P.2d at 320; *see supra* note 122.

[123] *Id.*

[124] KAN. STAT. ANN. §§ 72-5413 to -5432 (1977).

[125] Brief of Appellant, *supra* note 87, at 29-32; *PSU-KNEA*, 233 Kan. at 831-32, 667 P.2d at 327-28 (Schroeder, C.J., dissenting); *id.* at 840-41, 667 P.2d at 333-34 (McFarland, J., dissenting).

[126] Professional Negotiations Act, Ch. 248, § 1 (1970) (current version at KAN. STAT. ANN. §§ 72-5413 to -5432 (1980)).

[127] 212 Kan. 741, 512 P.2d 426 (1973).

[128] *See supra* text accompanying note 53.

[129] Professional Negotiations Act, ch. 248, § 1 (1977) (current version at KAN. STAT. ANN. § 72-5413 to -5432 (1980)).

[130] In National Educ. Ass'n-Topeka v. Topeka Bd. of Educ., 225 Kan. 445, 592 P.2d 93 (1979), the court approved the impact test to determine the negotiability of nine proposed subjects. The bulk of these proposals concerned Association rights which the court found mandatory because of their significant impact on teachers versus the insignificant impact on the operation of the school district. Class size was among those subjects found nonmandatory; the court considered its impact on a teacher's work load not to outweigh its impact on the school district.

Parsons Nat'l Educ. Ass'n v. Unified School Dist., 225 Kan. 581, 593 P.2d 414 (1979), determined that proposals for the reduction and recall of teachers did not come within the definition of mandatorily negotiable terms and conditions of professional service. Although the court recognized the significant impact of the subject upon teachers, the court's holding turned on the fact that two other statutes, the Continuing Contract Law and the Due Process Procedure on Contract Termination, controlled the issue. *See* KAN. STAT. ANN. §§ 72-5410 to -5412 (1977); *id.* §§ 72-5436 to -5446. In dicta, the court stated that:

> [T]o further limit the discretion of the school board by requiring collective negotiations with the teacher's association o the question of reduction and recall of personnel or the manner by which the same is achieved would have serious implications upon the board's responsibil-

the impact test but extending and adding specificity to the list of enumerated subjects.[131] The Regents, the University, and the dissenting justices in *PSU-KNEA* contended that if the legislature had intended the PEER Act's conditions of employment to be open to more than literal interpretation, it would have engrafted the balancing test onto that statute in 1977 along with its amendment to the PN Act.[132] Instead, when the legislature added the impact test to the PN Act, the PEER Act's definition of employment conditions was amended simply to add a single term.[133] Finally, the Regents, University, and dissenting justices considered the legislature's 1980 amending out of the impact test from the PN Act as a strong indication that no legislative intent existed to have conditions of employment under the PEER Act determined by balancing.[134]

The majority opinion distinguished the two acts on three grounds. First, the PEER Act applies to the "entire spectrum of state employees" which runs from white collar professionals to blue collar tradesmen and laborers.[135] In contrast, "the PN Act applies only to public school teachers and community college instructors."[136] Second, the PEER Act "contains an expansive statement of policy not found in the PN Act."[137] Third, the legislature enacted the two acts at different times to serve different purposes.[138] Combined, these differences led the majority to conclude that cross-interpretation of the acts was unjustified.[139]

The majority further asserted that its interpretation of the PEER Act and adoption of a "significantly related" test to determine negotiability does not run counter to legislative intent because the PERB had "doubtless" used the significantly related test previously.[140] If the legislature had intended strictly to limit mandatorily negotiable subjects to those precisely enumerated, it would have clarified the law in response to the PERB's ruling to reflect this intent.

The majority refused to recognize any precedential value in scope-of-negotiation cases decided under the 1977 amended version of the PN Act containing the

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ity to determine curriculum, basis educational policies, and the particular qualifications and general level of quality personnel to carry out those curriculum policy decisions.

Parsons Nat'l Educ. Ass'n, 225 Kan. at 586, 593 P.2d at 419.

In Chee-Craw Teachers Ass'n v. Unified School Dist., 225 Kan. 561, 593 P.2d 406 (1979) the court again faced the question of the negotiability of a list of teachers' proposals. The court's decisions on these proposals reflect its concern with "expeditious judicial determination" and adherence to its directive that "whenever possible, determine the matter on the 'topic' basis rather than on the nuances of the actual individual proposal." *Id.* at 567, 593 P.2d at 412. The court determined negotiability on the basis of the proposal's label, *e.g.*, non-discrimination: not a statutory item, non-negotiable; sabbatical leave: not within the statutory item of "sick and other leave" therefore not negotiable; reducation in personnel: not negotiable as determined in *Parsons Nat'l Educ. Ass'n*. Finally, in deciding issues of mandatory negotiability in Tri-County Educators' Ass'n v. Tri-County Special Educ. Coop., 225 Kan. 781, 594 P.2d 207, the court adhered to its reasoning in *Chee Craw Teachers Ass'n* and determined negotiability on the basis of topic headings.

131 KAN. STAT. ANN. §§ 72-5413 to -5432 (1980).

132 *PSU-KNEA*, 233 Kan. at 818, 667 P.2d at 318.

133 *See id.*

134 *See id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* Aside from PERB Case No. 75-CAE-21-1980 and PERB Case No. 75-CAEO-1-1982, the two Board decisions appealed from in this case, the issue of mandatory bargaining under the PEER Act has not reached the hearing stage. Telephone conversation with Jerry Powell, Executive Director of PERB, Topeka (Sept. 1983).

impact test.[141] The court justified this refusal by the fact that the PN Act litigation had been filed directly in district court, while the present case arose as an administrative appeal.[142] Apparently, the majority felt that its limited review powers in administrative appeals inhibited it from measuring the PERB's negotiability findings against the precedent of the teacher's cases.

C. Dissenting Opinions

Chief Justice Schroeder's dissent leveled several criticisms at the majority. First, he considered both the district court and the supreme court to have "abdicated" their "responsibility to construe" the PEER Act.[143] He accepted that the court could not reconsider factual findings in an administrative board review, but found PERB's legal analysis of the PEER Act "so far afield . . . that a real need exists for a correct and sensible interpretation and application" of the Act,[144] and faulted the majority's refusal to consider previous cases decided under the PN Act.[145]

Chief Justice Schroeder also argued that the coinciding histories of the PEER and PN Acts as well as the language of the PEER Act itself undermine the majority's holding that a significant relation with an enumerated condition of em-

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[141] *See supra* note 131.

[142] The majority distinguished this case from the teachers' negotiation cases, *e.g.*, *Chee-Craw Teachers Ass'n*, which, arising under the PN Act, were filed directly in district court. In contrast, the court emphasized, this case involved an administrative appeal from the PERB, an agency unique to the PEER Act, which had heard evidence, reviewed the parties' contentions and "made a determination of each issue." In light of this treatment, the majority summarized its appellate function as asking "whether the district court observed the requirements and restrictions placed upon it" and then making "the same review of the administrative agency's action as does the district court." The court considered itself barred from substituting its judgment for the agency's and further observed that the "legal interpretation of an administrative board . . . is entitled to a great deal of judicial deference." *PSU-KNEA*, 233 Kan. at 822, 667 P.2d at 321; *see also infra* note 145.

[143] *Id.* at 830, 667 P.2d at 327 (Schroeder, C.J., dissenting).

[144] *Id.*

[145] *Id.* The PEER Act provides that "findings of the board as to the facts shall be conclusive unless it is made to appear to the court's satisfaction that the findings of fact were not supported by substantial evidence and the record considered as a whole." KAN. STAT. ANN. § 75-4334(b) (1977). Interpreting this section to determine the scope of judicial review for PERB decisions, the Kansas Supreme Court determined that it prescribed the "customary standard for review for the acts of an administrative agency" as set forth in Kansas State Bd. of Healing Arts v. Foote, 200 Kan. 447, 436 P.2d 828 (1968). *See supra* note 108. Kansas Ass'n of Pub. Employees v. Public Serv. Employees Union, 218 Kan. 509, 511, 544 P.2d 1389, 1392. The court held that on appeal of a PERB order, the "district court had a duty to consider the 'record as a whole' in its search for 'substantial evidence' " but could not "weigh conflicts in the evidence" or "substitute its judgment for that of the Board." *Id.* at 512, 544 P.2d at 1392-93; *accord* Coggins v. PERB, 2 Kan. App. 2d 416, 581 P.2d 817, *rev. denied*, 224 Kan. clxxxvii (1978).

In Berhmann v. Public Employees Relations Bd., 225 Kan. 435, 591 P.2d 173 (1979), the court upheld the constitutionality of section 75-4334(b) in the face of a charge that it vested PERB, an administrative agency, with quasi-judicial powers in violation of the Kansas Constitution which "exclusively" vests judicial power in the courts of justice. KAN. CONST. art III, § 1. The court interpreted the word "exclusively" as intended to "establish one court system"—and not "to prevent the legislature from conferring quasi-judicial powers on administrative agencies." *Berhmann*, 225 Kan. at 442, 591 P.2d at 179. The *Berhmann* holding affirms the scope of review for PERB orders as established in *Kansas Ass'n of Pub. Employees*. *Id.* at 438, 591 P.2d at 176.

In this case the majority and the dissenting Chief Justice appear to agree that the courts have a very limited review function with respect to PERB factual findings. The views split on the degree of deference due PERB's legal analysis, the category into which a reading of the PEER Act on the scope of negotiation question falls. Case law offers little guidance to determine whether a court should act with deference or not.

For a general discussion of Kansas law of appellate review for agency decisions, *see* Ainsworth & Shapiro, *Rethinking Kansas Administrative Procedure*, 28 KAN. L. REV. 419, 434-44 (1980).

ployment can render a subject mandatorily negotiable.[146] The Chief Justice contended that because both the PEER Act and the PN Act address the subject of employer/employee negotiations and because both "use strikingly similar terminology," they may be construed together to discern legislative intent.[147] A dual construction of the acts, reasoned the Chief Justice, indicates that the legislature only could have intended that the listed conditions of employment be interpreted within their narrow, literal meanings.[148] Neither did he accept the majority's conclusion that the phrase "relating to" in several PEER Act sections warrants the "significantly related" test.[149] Chief Justice Schroeder noted the absence of "relating to" in sections 75-4327(b)[150] and 75-4322(m)[151] and determined that the omissions indicate a legislative intent for a three-tiered approach to negotiability under the PEER Act. According to this reasoning, the specific subjects enumerated in 75-4322(t) are mandatorily negotiable, the subjects reserved to the employers discretion in 75-4326 are non-negotiable, while all other subjects are permissibly negotiable and may be included within a memorandum of agreement under section 75-4326.[152] The Chief Justice concluded that this negotiability scheme foreclosed any notion that the legislature intended that a "significantly related" test determine negotiability.[153]

The Chief Justice also raised Theodore Clark's contention that the "significant relationship" test contains an inherent bias towards mandatory negotiability.[154] Chief Justice Schroeder pointed to the different decisions reached on the mandatory negotiability of retrenchment in *Parsons National Education Association v. Unified School District (Parsons)*[155] and the instant case as definitive proof of this bias.[156]

Chief Justice Schroeder posed an additional argument centered on the PEER Act's statutory preemption clause.[157] He argued that the Kansas Constitution explicitly mandates that the Regents have "control and supervision of public institutions of higher learning."[158] The Chief Justice determined that the constitutional provision, read conjunctively with its statutory compliment,[159] gives the Regents absolute authority to direct university operations. He concluded his

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[146] *PSU-KNEA*, 233 Kan. at 831-32, 667 P.2d at 327-29 (Schroeder, C.J., dissenting).

[147] *Id.*

[148] *Id.* at 831-32, 667 P.2d at 327-28 (Schroeder, C.J., dissenting). In addition, the Chief Justice contended that if the legislature had intended mandatorily negotiable subjects to be determined on a case-by-case basis it would have left conditions of employment undefined as did the original version of the PN Act enacted the year before.

[149] *Id.* at 833, 667 P.2d at 328-29 (Schroeder, C.J. dissenting).

[150] "The appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act, and may enter into a memorandum of agreement with such recognized employee organization." KAN. STAT. ANN. § 75-4327(b) (Supp. 1982).

[151] " 'Meet and confer in good faith' is the process whereby [party representatives] have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment." KAN. STAT. ANN. § 75-4322(m) (1977).

[152] KAN. STAT. ANN. § 75-4326. *See supra* note 30.

[153] *PSU-KNEA*, 233 Kan. at 833-34, 667 P.2d at 329 (Schroeder, C.J., dissenting).

[154] *See supra* text accompanying notes 45-47.

[155] 225 Kan. 581, 593 P.2d 414 (1979). *See supra* note 130.

[156] *PSU-KNEA*, 233 Kan. at 835, 667 P.2d at 330 (Schroeder, C.J., dissenting).

[157] *See supra* text accompanying note 36.

[158] KAN. CONST. art VI, § 2.

[159] The state educational institutions are state agencies and state institutions and shall be controlled by, and operated and managed under the supervision of the board of regents. For such control, operation, management or supervision, the board of regents may make con-

argument noting that the PEER Act's explicit provision[160] prohibits the court from requiring the Regents to bargain away this constitutional and statutory grant of authority.[161]

Justice McFarland also dissented from the majority. She saw a potential for "endless, crippling litigation" in the majority's adoption of a test similar to that previously incorporated in the PN Act.[162] Justice McFarland placed importance on legislative hearing testimony given prior to the 1980 amending out of the impact test from the PN Act. This testimony reflects a consensus among teachers' associations and school boards that the impact test engendered ambiguity and, in turn, litigation.[163] McFarland found it "indeed ironic that after the balancing test concept had been tried and repudiated by the legislature in public school teacher negotiations, it has, like the legendary phoenix, arisen from its ashes and been engrafted onto the [PEER] Act by PERB with the blessing of the majority of this court."[164]

McFarland's second argument derives from the legislative history of the PEER Act.[165] She emphasized that the PEER Act as adopted contained two major deviations from the bills which served as its models.[166] Rather than adopting an open-ended definition of conditions of employment,[167] the legislature precisely defined the term by way of a laundry list. Further, the PEER Act's inclusion of a management rights provision distinguishes it from its aborted predecessors.[168] From these deviations and from hearing testimony given prior to the PEER Act's adoption, Justice McFarland inferred that the PEER Act reflected the legislature's intended balancing of competing interests.[169] She considered a judicial redetermintion of that balance as error.[170]

IV. ANALYSIS OF THE DECISION

A. Statutory Construction

The majority read the PEER Act to mean that mandatorily negotiable subjects included those precisely specified as well as those which related to listed items.[171] Like PERB, the majority supports this conclusion by pointing out sections which include the phrase "relating to,"[172] particularly the Act's policy statement which speaks of "full communication" and entering "into discussions with affirmative willingness to solve disputes relating to conditions of employment."[173] Through this reasoning, the court implied that those occasions when

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tracts and adopt orders, policies, or rules and regulations and do or perform such other acts as are authorized by law or are appropriate for such purposes.

KAN. STAT. ANN. § 76-712 (1977).

160 *Id.* § 75-4322(t).

161 *PSU-KNEA*, 233 Kan. at 836-37, 667 P.2d at 330-31 (Schroeder, C.J., dissenting).

162 *Id.* at 842, 667 P.2d at 334 (McFarland, J., dissenting).

163 *Id.* at 839-42, 667 P.2d at 333-34 (McFarland, J. dissenting).

164 *Id.* at 842, 667 P.2d at 334 (McFarland, J., dissenting).

165 *See supra* note 1.

166 *PSU-KNEA*, 233 Kan. at 838-39, 667 P.2d at 331-32 (McFarland, J., dissenting).

167 *See supra* text accompanying note 17.

168 *See supra* note 1.

169 *PSU-KNEA*, 233 Kan. at 839, 667 P.2d at 332 (McFarland, J., dissenting).

170 *Id.*

171 *See supra* text accompanying notes 120-23.

172 KAN. STAT. ANN. §§ 75-4321(b), 75-4330(a) (1977).

173 *Id.* § 75-4321(a)(2), (b).

the statute fails to qualify "conditions of employment" with "relating to" constitute oversight by the drafters.[174] The omission of "relating to" from such central provisions, however, provides a basis to doubt the majority's implication, and also lends credibility to Chief Justice Schroeder's interpretation of the Act. He reads the PEER Act to require negotiation of the specific listed subjects; to allow, but not to require, negotiation of subjects related to those enumerated; and to make non-negotiable subjects which touch upon the employer's retained rights.[175] This interpretation harmonizes those sections that use "relating to" with those that do not.

Yet, neither the Chief Justice's nor the majority's opinion addressed an inherent contradiction central to this statute which raises the question of whether the sections of the Act, as literally read, are capable of being harmonized. That contradiction exists between the express phrase of section 75-4326 "nothing in this act is intended to circumscribe or modify the existing right of the public employer to"[176] and every other provision which attempts to give employees a voice in the decisions which affect them. Prior to the PEER Act the public employer's right to decide issues affecting employees' conditions of employment was exclusive.[177]

The PEER Act provision in section 75-4326 closely resembles the employer rights provision of the Iowa public negotiations statute[178] which the Iowa Supreme Court considered so all-inclusive as to preclude any determination other than that the listed negotiable subjects constituted exceptions to the employer's rights.[179] The two provisions are virtually identical in scope.[180] Thus, there is some basis to conclude, as did the Iowa court, that the Kansas management rights provisions cover "nearly all legitimate functions of a public employer."[181] Differences exist, however, which would make inappropriate an application of the Iowa court's extremely constrictive analysis of the scope of bargaining issue to *PSU-KNEA*. Although both management rights provisions grant nearly the same rights, the Iowa provision states that "[p]ublic employers shall have . . ."[182] while the Kansas provision states that "[n]othing in this act is intended to circumscribe or modify . . . ."[183] The Kansas language cannot support a theory that the PEER Act's prescription to bargain enumerated subjects delineates an exception in employers' otherwise absolute rights. Conversely, the PEER Act's comparatively generous pro-negotiation policy provisions[184] sharply

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[174] *See id.* § 75-4322(m), 75-4327(b) (Supp. 1982).

[175] KAN. STAT. ANN. § 75-4326 (1977); *see supra* note 30.

[176] *Id.*

[177] "The entire matter of qualifications, tenure, compensation and working conditions for any public employee involves the exercise of governmental powers which are exercised by or through legislative fiat. Under our form of government public office or public employment cannot become a matter of collective bargaining and contract." Wichita Public School Employees Union, Local 513 v. Smith, 194 Kan. 2, 5, 397 P.2d 357, 360 (1964).

[178] IOWA CODE § 20.7 (1979).

[179] *See supra* note 59.

[180] In addition to the rights provided in the PEER Act, under the Iowa statute the employer retains express authority over the budget process and may "[e]xercise all powers and duties granted to the public employer by law." IOWA CODE § 20.7 (1979). *Compare supra* note 30 *with supra* note 58.

[181] 291 N.W. 2d at 667-68 (quoting Pope, *supra* note 59, at 34).

[182] IOWA CODE § 20.7 (1979).

[183] KAN. STAT. ANN. § 75-4326 (1977).

[184] *Id.* §§ 75-4321(a)(1), (2) & (b); *see supra* note 3 and accompanying text.

contrast with the constrained policy expression of the Iowa statute.[185] This difference in policy language means that while the Iowa court could narrowly interpret scope of bargaining without colliding with an express policy, the Kansas court should not do the same.

Alternatively, similarities exist between the PEER Act and California's EER Act which might warrant application of the *San Mateo* reasoning to determine scope of bargaining. Under that reasoning, both the inclusion of "relating to" to qualify conditions of employment and the fact that the enumerated subjects touch on areas of retained employer rights imply lack of legislative intent to limit bargaining scope rigidly.[186] Additionally, the *San Mateo* majority not only placed great weight on what it interpreted to be the California act's pro-collective negotiations policy, it took constructive liberties with the statute's statement of purpose to find that policy justification.[187] Arguably, since the PEER Act's policy provision[188] is more express and comprehensive than that of the California statute, it should be considered a strong compelling factor to resolve the scope of bargaining question in the way most consistent with advancing the goal of "discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment."[189] The less restrictively scope of bargaining is interpreted, the more favorable the effect on this policy goal. Again, however, a critical difference in the two acts exists. In the California EER Act, employer rights do not directly clash with the rest of the act; they are carved out as everything that is not specifically negotiable.[190]

The PEER Act evades a definitive, harmonizing reading. This condition makes it difficult to determine whether the scope of mandatorily negotiable subjects is narrowly limited to those items literally enumerated.[191] Under Kansas law, where literal interpretation of a statute would "defeat the manifest purpose of the legislature in its enactment, it should be construed according to its spirit and reason . . . ."[192] Since literal interpretation of section 75-4326 precludes negotiation altogether, the spirit of and the reason for the Act should control in this case.[193] To the extent that the PEER Act's purpose and intent are expressed explicitly in the statute,[194] the majority's interpretation is in accord with the spirit of the Act. Further, the policy provision does not appear adverse to the use of a balancing test to determine bargaining scope. The care which is reflected in the policy statement toward a balanced presentation of the considerations both compelling[195] and constraining[196] public employment negotiations suggests that a balancing approach is entirely harmonious with the Act's intent.

The argument posed against the majority opinion on the basis of the concur-

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185 IOWA CODE § 20.1 (1979). *See supra* text accompanying note 64.
186 *See supra* text accompanying notes 72-79.
187 *See supra* notes 77-78.
188 KAN. STAT. ANN. § 75-4321 (1977).
189 *Id.* § 75-4321(b).
190 *See supra* text accompanying note 69.
191 *See supra* note 13.
192 Gnadt v. Durr, 208 Kan. 783, 785, 494 P.2d 1219, 1222 (1972).
193 *Cf. supra* note 40.
194 *See* KAN. STAT. ANN. § 75-4321 (1977).
195 *Id.* §§ 75-4321(a)(1), (2) & (b).
196 *Id.* §§ 75-4321(a)(3), (4) & (5).

rent histories of the PEER and the PN Acts[197] does not require finding a legislative intent different than that indicated through section 75-4321.[198] Although the majority rather perfunctorily states, without expounding upon its rationale, that the differences in the two acts' purposes and target groups preclude analogy of legislative intent,[199] support for this conclusion exists. As the majority points out, the PEER and the PN Acts differ markedly in scope; the PEER Act applies to all public employees except teachers, the PN Act to teachers only.[200] On its face, this difference implies that if the legislature had intended the two acts to be construed in the same manner, it would not have enacted dual legislation, but would have lumped teachers in with other public employees covered by the PEER Act. A comparison of the PEER Act's definition of "conditions of employment"[201] with the PN Act's definition of "terms and conditions of professional service"[202] illuminates the importance of the target scope difference. The dissents focus on the fact that both definitions have laundry-list construction. However, the items listed in the PN Act's definition have much greater specificity and are tailored to address issues of exclusive concern to teachers.[203] In comparison, it is unreasonable to expect the legislature to identify specifically all conditions of employment unique to all public employment sectors and include them in the statute. The more reasonable expectation is that the legislature would identify broad categories, as it did in the PEER Act, such as salaries, wages, and hours of work and intend particular employment conditions which are unique, job-centered extensions of these categories to fall within them and be negotiable. For example, in some sectors of public employment merit pay may be an important component of wages. If, however, the PEER Act is construed to circumscribe mandatory negotiation to those items literally enumerated, merit pay, because it is not listed would not be negotiable. Alternatively, if the PEER Act is given the logical interpretation of requiring negotiation of all subjects falling within the categories, one way to determine whether a subject "falls within" is to ask if it "significantly relates."

Additional important differences in the two acts support the conclusion that mandatory negotiation under the PEER Act should not be construed to be equivalent to that under the PN Act. The PN Act contains no retained employers' rights provision or express policy constraints as does the PEER Act. In the absence of these limits on negotiation, it is reasonable that negotiation under the PN Act be limited constrictively to the enumerated laundry-list subjects, particularly since the act targets only teachers, which makes it capable of job-specific enumeration. Further, the PEER Act sanctions an administrative board to "hold such hearings and make such inquiries as it considers necessary to carry out properly its functions and powers"[204] while the PN Act creates no parallel authority. This difference supports the idea that the PEER Act is broad legislation which

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[197] *See supra* notes 124-34 and accompanying text.
[198] *See supra* note 3 and accompanying text.
[199] *See PSU-KNEA*, 233 Kan. at 818, 667 P.2d at 318.
[200] *Id.*
[201] KAN. STAT. ANN. § 75-4322(t) (1977); *see supra* note 13.
[202] *Id.* § 72-5413(l) (1977).
[203] *E.g.*, salaries and wages, including pay for duties under supplemental contracts; vacation allowances; holiday, sick, extended, sabbatical, and other leave; employment of professional employees; professional employee appraisal procedures. *See id.*
[204] *Id.* § 75-4324(d)(2) (1977).

requires expertise in labor issues to fit it to the particular circumstances of different public employment sectors. Consistent with this view of the PEER Act is the view which considers section 75-4322(t) to define broadly and categorically the conditions of employment into which job-specific conditions may fall.

The dissents in *PSU-KNEA* also consider it important that the PN Act has gone through extensive amendments, culminating in its present status as a public negotiation statute with the scope of negotiation limited to the literal meanings of specific subjects,[205] while the PEER Act's negotiable subject definition has remained relatively static. From these comparative histories, the dissents infer that the legislature all along intended the PEER Act's scope of mandatory negotiations to be limited to the literal meanings of enumerated subjects and that it has now affirmed the wisdom of that legislative approach by making mandatory negotiations closed-ended under the PN Act. This reasoning fails to recognize a crucial point: the legislature has tailored amendments to the PN Act in response to litigation.[206] Contrary to the majority's assumption, scope of bargaining under the PEER Act has never before reached even the threshold stage of litigation, the PERB hearing.[207] The argument that the legislature's amendments to the PN Act reflect broad policy beliefs about scope of public employment negotiations which must be ascribed to the PEER Act weakens upon acknowledging that the legislature amended the PN Act to reflect court decisions. One may argue that the legislature never amended the PEER Act because the Act worked as it stood. It did not create litigation.

The knowledge that the issue of scope of negotiation under the PEER Act never arose before casts new light on Justice McFarland's fear that scope of negotiation litigation will abound in the wake of the majority's decision.[208] To assume from the history of teachers' litigation that a flexible interpretation of the PEER Act's scope of negotiation will encourage litigation fails to recognize an important difference between the nature of the teachers' litigation and public employees' litigation generally. In Kansas, teachers' disputes under the PN Act have spawned, on a whole, significantly more formal litigation than disputes involving all other categories of public employees covered by the PEER Act.[209] This disparity can be explained, at least in part, by the fact that under the PEER Act an administrative agency, the PERB, acts at the first level in a quasi-judicial capacity to resolve disputes. In comparison, under the PN Act, district court litigation is the first dispute-resolving recourse. Justice McFarland's argument lays no groundwork to show that as a result of the majority's decision the PERB

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[205] *See Chee-Craw Teachers Ass'n*, discussed *supra* note 130.

[206] *Compare Shawnee Mission* impact test, *supra* text accompanying note 53, *with* Professional Negotiations Act, ch. 248, § 1 (1977) (current version at KAN. STAT. ANN. § 72-5413 to -5432 (1980)); *compare Chee Craw Teachers Ass'n*, *supra* note 130, *with* KAN. STAT. ANN. § 72-5413(1) (1980).

[207] *See supra* note 141.

[208] *See supra* text accompanying notes 164-66.

[209] Prior to *PSU-KNEA*, three cases arising under the PEER Act were appealed beyond the district court level. Berhmann v. Public Employees Relations Bd., *see infra* note 146; Kansas Ass'n of Public Employees v. Public Service Employees Union, *see infra* note 146; Coggins v. PERB, *see infra* note 146.

In contrast, nineteen cases have advanced beyond the district court stage under the Professional Negotiation Act. *See, e.g.*, Tri-County Educators Ass'n v. Tri-County Special Educ. Coop., 225 Kan. 781, 594 P.2d 207 (1979); NEA-Wichita v. Unified School Dist., 225 Kan. 395, 592 P.2d 80 (1979); Boatright v. Board of Trustees, 225 Kan. 327, 590 P.2d 1032 (1979); Garden City Educators' Ass'n v. Vance, 224 Kan. 732, 585 P.2d 1057 (1978); Seaman Dist. Teachers' Ass'n v. Board of Educ., 217 Kan. 223, 535 P.2d 889 (1975); Liberal-NEA v. Board of Educ., 211 Kan. 219, 505 P.2d 651 (1973).

will lose its ability to defuse public employment disputes and make formal litigation unnecessary.

B. The Test

Uncertainty surrounds the question of what test is used to determine scope of bargaining in the wake of this decision. The court identifies the "significantly related" test and claims it to be the test used by PERB.[210] The court describes a balancing test; PERB's analysis, however, did not balance competing interests, but rather tried to separate competing interests so that the portion related to conditions of employment was negotiable and the portion related to employers' rights was not.[211] PERB's analysis consistently resulted in implementation procedures being mandatorily negotiable and decisions to implement not negotiable.[212] The question which the PERB analysis did not ask was whether negotiation of implementation procedures also may infringe employers' rights.

The majority adds to the confusion surrounding its test by describing it as a balancing test but labeling it a "significantly related" test. The court then quotes extensively from *Clark County School District v. Local Government Employee Management Relations Board*[213] which did *not* balance employers' rights to determine negotiability. The "significantly related" label and the reliance on the Nevada case fuel Chief Justice Schroeder's criticism of the test's inherent pro-negotiation bias. A closer look at the test, however, suggests this criticism is unwarranted. Despite the test's label and the chief case cited for its support, what the court actually describes is a balancing test which does weigh employer rights and therefore contains no inherent bias. The decision in this case that retrenchment procedures are mandatorily negotiable, despite the finding in *Parsons* that they are not,[214] does not prove bias in the balancing test described by the court; rather, it indicates the bias in PERB's method for finding *procedures* negotiable.

The confusion which this decision creates concerning what test determines negotiability may lead to two problems. First, it becomes difficult to predict the PERB's response. PERB may interpret the decision as an affirmance of its method, although wrongly labeled and described, and continue to follow the method of dividing proposals into negotiable and non-negotiable parts (implementation procedures negotiable, decisions to implement not negotiable). Alternatively, PERB could interpret the court's ruling as a mandate to employ the balancing test described by the court. The second problem may arise from the fact that the rulings made by the PERB and adopted by the court on the individual proposals will be precedent for future decisions. If these rulings, which were not arrived at by balancing, become precedential under a balancing approach, the rationale in future decisions is likely to become tenuous.

C. Statutory Preemption

The majority never addressed Chief Justice Schroeder's argument that the

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[210] *See supra* text accompanying notes 113-15.
[211] *See supra* text accompanying notes 104-06.
[212] *Id.*
[213] 90 Nev. 442, 530 P.2d 114 (1974).
[214] *See supra* note 130.

Kansas Constitution[215] and section 76-712[216] of the Kansas statutes have preemptive authority and must govern the holding in this case. These constitutional and statutory provisions explicitly vest the Regents with controlling, supervisory, and management authority over state universities. It appears that if that preemption were recognized, the Regents would have authority to decide all subjects pertinent to university operations unilaterally. University faculty organizations could claim no right to mandatory negotiation on any issue. By ignoring this issue, the majority creates uncertainty over the meaning and future interpretation of that portion of section 75-4322(t) which provides that "nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state."[217]

One might draw the implication from this decision that the court will view the constitution and statutes narrowly to avoid triggering the PEER Act's preemptive provision.[218] Because no constitutional or statutory provision explicitly grants the Regents *sole* authority,[219] the operation of the PEER Act neither adjusts nor changes a fixed legal relationship. This argument pivots on the debatable assumption that the Regents' duty to bargain in good faith under the PEER Act[220] does not drain the Regents of power to fulfill their prior-defined duty to supervise, manage and, particularly, to control university operations. The obvious risk associated with this "narrow" interpretive approach is that it will lead to "strained interpretation in order to avoid repeal of the bargaining obligation."[221]

However, to imply favor for narrow construction from the majority's total silence on the briefed[222] issue of preemption, probably presumes too much. The majority's reticence more likely signals its unwillingness at this time either to engage in analysis which may border on "strained" or to recognize preemption where it would serve to close off completely negotiations in an entire sector of public employment. Unfortunately, the court's decision affords little, if any, guidance to predict its treatment of this issue in the future.

V. CONCLUSION

Because the PEER Act includes an extremely broad management rights provision which facially would foreclose negotiation of virtually all subjects, including those specified for negotiation, its sections, literally read, cannot be harmonized. The Kansas Supreme Court's determination that mandatorily negotiable subjects are those which significantly relate to listed conditions of employment but which do not infringe unduly upon employers' rights resolves the question to harmonize with the Act's express purpose and policy. Since the legislature's past amendments to the PN Act have been in response to court decisions, the PN Act's history does not imply a legislative intent antagonistic to the majority's construction of the PEER Act. An onslaught of scope of bargaining litigation in response

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[215] KAN. CONST. art VI, § 2; *see supra* text accompanying note 158.
[216] *See supra* note 159.
[217] KAN. STAT. ANN. § 75-4322(t) (1977).
[218] *See supra* text accompanying note 215.
[219] *See supra* note 159 and text accompanying note 158.
[220] KAN. STAT. ANN. § 75-4327(b) (1977).
[221] Alleyne, *supra* note 20, at 111.
[222] *See* Brief of Appellant, *supra* note 86, at 25-29.

to this decision should not be expected considering the PERB's apparent previous ability to resolve public labor disputes.

The decision suffers for two reasons. The court purports to adopt the PERB's test for negotiability while it describes a balancing analysis (which the PERB did not employ) and labels the analysis a "significantly related" test. Under these confused conditions, the PERB's future treatment of scope of bargaining cases becomes uncertain and a likelihood for illogical precedent emerges. By ignoring the statutory preemption issue, the court provides no gauge to discern the future viability of this important issue.

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Att. #8

THE KANSAS PUBLIC EMPLOYER-EMPLOYEE RELATIONS LAW

*Raymond Goetz**

I. INTRODUCTION

The need for a statute governing public employee labor relations in Kansas was highlighted in 1964 by the decision of the Kansas Supreme Court in *Wichita Public School Employees Union, Local 513 v. Smith*.[1] The court in that case[2] held that the Wichita Board of Education was not an "employer" within the meaning of the Kansas Employer and Employee Relations Act.[3] Accordingly, the State Labor Com-

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[1] 194 Kan. 2, 397 P.2d 357 (1964).

[2] *Id.* at 5-6, 397 P.2d at 360.

[3] KAN. STAT. ANN. §§ 44-801 to -817 (1973). The federal Labor Management Relations Act defines the term "employer" to exclude any state or political subdivision. 29 U.S.C. § 152(2) (1976) [unless otherwise indicated, all sections hereinafter referred to are from Kansas Statutes Annotated].

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missioner had properly dismissed a petition by the Wichita Public School Employees Union for a determination of the proper bargaining unit for custodial and maintenance employees of the Board of Education. The court pointed out that, as a political subdivision of the state, the Board of Education had only the power and authority granted by the legislature either expressly or by necessary implication. The court could find nothing to indicate that the legislature had intended to make political subdivisions and governmental agencies subject to the labor laws of the state and to collective bargaining. In reaching this conclusion, the court expressed the following negative philosophy concerning the role of collective bargaining in the public sector:

> The entire matter of qualifications, tenure, compensation and working conditions for any public employee involves the exercise of governmental powers which are exercised by or through legislative fiat. Under our form of government public office or public employment cannot become a matter of collective bargaining and contract.
>
> The objects of a political subdivision are governmental—not commercial. It is created for public purposes and has none of the peculiar characteristics of enterprises maintained for private gain. It has no authority to enter into negotiations with labor unions concerning wages and make such negotiations the basis for final appropriations. Strikes against a political subdivision to enforce collective bargaining would in effect amount to strikes against the government.
>
> The statutes pertaining to employer and employee relations must be construed to apply only to private industry, at least until such time as the legislature shows a definite intent to include political subdivisions.[4]

This judicial rebuff to collective bargaining in the public sector was somewhat at odds with the state's so-called "right to work" law, enacted in 1958 as an amendment to the Kansas Constitution.[5] That law expressly recognizes the right of public employees in this state to join labor organizations.[6] Indeed, by 1968 the federal courts had clearly stated that freedom of association under the first amendment of the United States Constitution confers on public employees the right to form and join labor unions.[7] Thus, while Kansas public employees in the 1960s were free to organize for the purpose of collective bargaining, their public employer had no legal authority to bargain with them. Meanwhile, during these years membership in public employee organizations was experiencing phenomenal growth in all states across the country including Kansas.[8]

Concerned lest this situation might lead to a sense of frustration and possibly even

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[4] 194 Kan. at 5, 397 P.2d at 360.

[5] KAN. CONST. art. 15, § 12.

[6] *Id.*

No person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, *nor shall the state or any subdivision thereof . . . enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or nonmembership in any labor organization* (emphasis added).

[7] American Fed'n of State, County, and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969); Local 1858, Int'l Ass'n of Fire Fighters v. Willis, 406 F. Supp. 1097 (N.D. Ill. 1975), *aff'd*, 536 F.2d 714 (7th Cir. 1976) (dispute arose over the right of a state to protect its citizens); Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971) (right and the right of a state to protect its citizens).

[8] *See* report of Advisory Commission on Intergovernmental Relation, *Labor Management Policies for State and Local Government* (1969), *reprinted in* H. EDWARDS, R. CLARK, & G. CRATER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 10-14 (1979) [hereinafter cited as LABOR RELATIONS LAW].

of local governments in Kansas, the League of Kansas ernook sponsorship of a "public employer relations bill."[9] e League as background for the bill indicated that it was gue policy favoring a limited collective negotiation pro- ace by the state, at the local level at the option of the were to be expressly prohibited. The League statement existing law strike action could be enjoined in view of law.[11] In order to eliminate this doubt, the bill would tions and provide that the anti-injunction law did not out of public employer-employee relations.[12]

after the League proposal was introduced in the 1969 neither that bill nor two other public employee-employer that session were enacted.[14] The League bill was not e Senate Committee on State and Local Affairs reported to a model state public employee relations bill drafted in Commission on Intergovernmental Relations (ACIR).[15] " model act recommended by the ACIR, rather than the odel suggested as a possible alternative.[17] This bill also

legislature finally did adopt a Collective Negotiations Law the "Professional Negotiations Act") that gave public al employees") the right to join professional employees' icipate in professional negotiations."[18] From the stand- red, this new law was woefully inadequate primarily

LITIES, BACKGROUND FOR LEAGUE SPONSORSHIP OF EMPLOYER RELATIONS cited as LEAGUE OF KANSAS MUNICIPALITIES].

(1976). A number of federal and state courts have held that similar lication to injunctions against strikes by public employees. *E.g.*, United 30 U.S. 258 (1947); School Dist. No. 351 v. Oneida Educ. Ass'n, 98 ; City of Pana v. Crowe, 57 Ill. 2d 547, 316 N.E.2d 513 (1974); 519 v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969); ternational Organization of Masters, 45 N.J. 138, 211 A.2d 789 (1965); nerican Fed'n of State, County & Mun. Employees Local 1511, 83 N.J. Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 662 2d 480, 7 N.Y.S.2d 718 (1941); City of Minot v. Drivers Local 74, 142 of Pawtucket v. Pawtucket Teachers Local 930, 87 R.I. 364, 141 A.2d ternational Longshoremen's Union, 52 Wash. 2d 317, 324 P.2d 1099

CIPALITIES, *supra* note 9, at 7.
(1969).
Reg. Sess. (1969).
is., Reg. Sess. (1970).
NFER" ACT (1970), *reprinted in* GOV'T EMPL. REL. REP. (BNA) 51:211 R MODEL ACT]. At the time of the ACIR Report 29 states had not ployer-employee relations in the public service. *Id.* at 51:109. That 11 and includes Arizona, Arkansas, Colorado, Louisiana, Mississippi, ina, Utah, Virginia, and West Virginia. *Id.* at 51:501-23. Another eight verage for teachers, firefighters, police, or some combination thereof. s), Idaho (teachers and firefighters), Indiana (teachers) (declared un- (police and firefighters), Maryland (public school employees), Okla- d firefighters), Tennessee (teachers), and Wyoming (firefighters). *Id.*

84, §§ 1-14, 1970 Kan. Sess. Laws 366 (codified at KAN. STAT. ANN.

because it established no impasse resolution procedures[19] and set forth no prohibited practices.[20]

Despite its inadequacy, the Professional Negotiations Act, which was extensively amended in 1977,[21] apparently paved the way for the more comprehensive Public Employer-Employee Relations Act[22] (the Act). That Act, which excluded public school teachers, was enacted in 1971 and made effective on March 1, 1972.[23] It was patterned after the ACIR "meet and confer" model, but included several important changes from the ill-fated 1970 bill. This Article will analyse the Act and experience under it during the eight years that have elapsed since it went into effect.

II. COVERAGE OF THE ACT

One of the more questionable features of the Act is its limited coverage. Since at the time of its enactment public school teachers were already covered by the Professional Negotiations Act, their exclusion from the new law probably was not surprising.[24] Nevertheless, the extent of statutory protection then accorded teachers' collective negotiations fell so far short of that enjoyed by other public employees under the Public Employer-Employee Relations Act, that it would be difficult to justify the disparity in treatment on the basis of any fundamental difference in the nature of employment or operations of the respective categories of employers.[25] Until the 1980 amendments to the Professional Negotiations Act there were important discrepancies. For example, impasse resolution procedures could not have been implemented under the Professional Negotiations Act until after a declaration by a state district court that an impasse existed;[26] teachers seeking redress for commission of prohibited practices would have been required to resort to legal proceedings in state court that lacked the convenience and informality recourse to an administrative agency offers.[27] Yet, after a decade of such separate treatment, it would be impractical

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[19] *See* text at notes 248-84 *infra*.

[20] *See* text at notes 152-61 *infra*.

[21] KAN. STAT. ANN. §§ 72-5413 to -5431 (Supp. 1979).

[22] *Id.* §§ 75-4321 to -4337 (1977).

[23] *Id.*

[24] The definition of "public employee" in § 75-4332(a) excludes "professional employees" of school districts. "Professional employee" is defined in § 75-4322(d) as follows:

> "Professional employee" includes any employee: (1) Whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning; or (2) who has completed courses of prolonged study as described in paragraph (1) of this subsection, and is performing related work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or (3) attorneys-at-law or any other person who is registered as a qualified professional by a board of registration or other public body established for such purposes under the laws of this state.

[25] H. 1573, 63d Legis., Reg. Sess. § 2 (1969). One of the unsuccessful 1969 bills would have applied equally to teachers and other public employees.

[26] KAN. STAT. ANN. § 72-5426 (Supp. 1979). For analysis of the numerous problems involved in obtaining such a determination, see Babcock & Kaufmann, *Impasse in Wonderland: Some Ramifications of the 1977 Amendments to the Kansas Collective Negotiations Act*, 16 WASHBURN L.J. 11 (1978). An amendment passed by the 1980 Kansas Legislature authorizes the Secretary of Human Resources, rather than the district court, to investigate and determine whether an impasse exists and to institute impasse resolution procedures pursuant to §§ 72-5427, -5428. Act of April 24, 1980, S.B. 539, 68th Legis. (1980).

[27] KAN. STAT. ANN. § 72-5430(d) (Supp. 1979).

to suggest at this late date that coverage of the Act be expanded to include teachers.[28] Any further efforts to put teacher unionization and negotiations on a par with those of other public employees probably will come in the form of amendments to the Professional Negotiations Act.

More difficult to justify is the unavailability of the protection of the Act for most municipal employees in the state, especially since it was a concern for these employees that prompted the League of Kansas Municipalities to sponsor such legislation in the first place. The 1971 bill preserved one important principle emphasized by the League from the beginning: coverage at the local level was to be strictly optional for the governing body.[29] Accordingly, section 75-4321(c) provides that any public employer other than the state *may elect* to bring itself under the provisions of the Act.[30]

The ostensible justification for optional rather than mandatory coverage is the desirability of preserving "home rule" recognized in the Kansas Constitution, which empowers cities "to determine their local affairs and government" by ordinance without the necessity for enabling legislation.[31] This justification is not entirely valid. While the constitutional provision goes a long way toward recognizing local autonomy, it does not automatically make matters of general statewide concern, such as public employee labor relations,[32] the sole province of the municipalities. The Constitution expressly makes the home rule power of cities "subject only to enactments of the legislature of statewide concern applicable uniformly to all cities."[33] Thus, the

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[28] The possibility of extending the Public Employer-Employee Relations Act to teachers was one of the issues posed in Memorandum to the Kansas House Education Committee from the Legislative Staff (February 21, 1977) and earlier in SPECIAL COMM. ON EDUC. MASTER PLANNING AND RELATED MATTERS PROFESSIONAL NEGOTIATIONS, REP. No. 55, Kan. Legis. 55-1 (1973).

[29] S. 333, 64th Legis., § 1(c) (1971).

[30] KAN. STAT. ANN. § 75-4321(c) provides,

> The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election. Once an election has been made to bring the public employer under the provisions of this act it continues in effect unless rescinded by a majority vote of all members of the governing body. No vote to rescind shall take effect until the termination of the next complete budget year following such vote.

This provision was inserted without fully integrating it with other provisions of the model bill dealing with public employers other than the state, such as § 75-4329, which provides,

> Every public agency, other than the state, acting through its governing body, may establish procedures, not inconsistent with the provisions of K.S.A. 75-4327 and 75-4328 and, after consultation with interested employee organizations and employer representatives, may resolve disputes concerning the recognition status of employee organizations composed of employees of such agency. *In the absence of such procedures, such disputes shall be submitted to the public employee relations board in accordance with K.S.A. 75-4327* (emphasis added).

In the case of *Kansas City Bd. of Pub. Utils.*, P.E.R.B. Case No. UDC 9-1977 (June 28, 1977) the International Association of Machinists petitioned for a unit determination and certification even though the Board of Public Utilities (a municipal corporation) had not elected to bring itself under the Act in accordance with § 75-4321(c). The union contended that the last sentence of § 75-4329, by its terms, allowed the dispute as to recognition to be submitted to PERB, regardless of the lack of an election under § 75-4321(d), since the Board of Public Utilities had not established any alternate procedure for resolving disputes concerning recognition as permitted by the first sentence of § 75-4329. Attorney General Ruling 77-21 dated June 24, 1977, however, ruled that § 75-4329 does not apply to political subdivisions that have not made an election under § 75-4321(c) and that the legislature by this provision had manifested an intention that political subdivisions should not be covered by any provisions of the Act unless and until they elected to come under it. Accordingly, PERB dismissed the petition for lack of jurisdiction.

[31] KAN. CONST. art. 12, § 5(b).

[32] *See* Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

[33] KAN. CONST. art. 12, § 5(b). *See* Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 KAN. L. REV. 631, 654-63 (1972).

underlying policy question is whether the Act addresses a matter of statewide concern, in which event uniform treatment ought to be accorded municipal as well as state employees.

On this point, the Act is contradictory. It sets forth a legislative finding that the state has a fundamental interest in the development of harmonious relationships "between government and its employee," and that denial by some public employers of the right of public employees to organize and the refusal by some to accept the principle and procedure of full communication with employees "can lead to various forms of strife and unrest."[34] Surely this is equally true of all types of public employees and public employers in the state. Yet, municipalities are left free to determine for themselves whether to be governed by the legislative solution to this problem.

The predictable result has been that most municipalities have chosen to retain control over employee relations at the local level, without allowing for possible interference by the state. It would be naive indeed to assume that their preference is dictated solely by philosophical devotion to principles of local autonomy or home rule. The real reason is more likely a practical one—a desire to avoid the obligations and restrictions in the Act that would compel the municipality to recognize and deal with labor organizations representing a majority of its employees. This attitude exists despite the public policy of the state favoring such recognition for public employees generally. By remaining outside the Act, a city can legally and with impunity turn a deaf ear on union requests for meeting and conferring, refuse to discuss employee grievances, take unilateral action on matters of mutual concern such as wages, promotions, transfers, layoffs, discipline, and working conditions, and perhaps even engage in discriminatory discharge or the discipline of union leaders. This result is contrary to the 1970 ACIR recommendations for uniform treatment of state and local government employees and for a single statute giving the same rights and privileges to all.[35]

Only twelve Kansas cities,[36] plus seven other political subdivisions,[37] have exercised the option for coverage under the Act. The important incentive for their doing so may be the impasse resolution procedures and strike prohibition[38] that can force bargaining efforts and pressure tactics of militant employee groups into peaceful channels. An example is Kansas City, which elected to come under the Act after its police force went on strike.

Municipalities in some cases may have elected not to be covered by the Act because they sense no substantial interest among their employees for unionization, but clearly that has not always been the case. The experience in Lawrence is illustrative. The City Commission has adamantly refused to come under the Act despite repeated requests from organized police and fire employees to do so. Instead,

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[34] KAN. STAT. ANN. § 75-4321(a)(2) (Supp. 1979).

[35] ACIR MODEL ACT, *supra* note 16, at 51:113. The Report underscored "the need for achieving generally uniform treatment of state and local employees by according them, to the greatest extent possible, the same rights and privileges and assigning them the same types of responsibilities."

[36] Chanute, Ellis, Hays, Hutchinson, Kansas City, Manhattan, McPherson, Phillips, Reno, Russell, Topeka, and Wichita.

[37] Ellis, Saline, and Shawnee Counties, Sedgwick County Fire District, and Wichita, Hays, and Salina School Districts.

[38] KAN. STAT. ANN. § 44-809 (Supp. 1979).

the City Commission has adopted a resolution[39] expressing its intention not to recognize formally any employee organization as a bargaining agent. It provides instead that an individual employee may become the elected representative of a group of city employees for purposes of "group discussions" with the City's representative concerning wages, fringe benefits, and working conditions.[40] Any impasse resulting from such discussions is to be resolved first by mediation efforts by the Federal Mediation and Conciliation Service and ultimately by the City Commission itself. The Commission is to select whichever party's "package" it deems fair and equitable. Strikes and "job actions" are prohibited. While a resolution of this type may provide improved communication between the city and its employees, it seems more likely to generate frustration than to relieve it since it merely obligates the city to listen and then leaves it free, in effect, to ignore the discussion and do as it pleases.

If the objection of cities like Lawrence to coverage under the Act were based on some technicality in the impasse resolution procedures that did not fit local conditions, it would not be necessary for them to remain outside the Act altogether. Section 75-4335 allows any public employer other than the state and its agencies, subject to approval by the Public Employee Relations Board, to adopt its own procedures governing memoranda of understanding and impasse resolution.[41] If the objection were to procedures for resolving disputes concerning recognition status of employee organizations, public employers other than the state are also free under section 75-4329 to establish their own procedures, so long as they are not inconsistent with the statutory procedures.[42] That no municipalities or other political subdivisions have exercised these options suggests that the objection to coverage is not due to a concern for special local conditions, but rather to a desire to avoid dealing with employee organizations.

A less troublesome exclusion is made for "supervisory employees."[43] Such em-

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[39] LAWRENCE, KANSAS, CITY COMMISSION RES. No. 4302 (1979).

[40] KAN. STAT. ANN. § 75-4335 (1977) provides,

> *Act inapplicable to public employers, other than state or its agencies, adopting provisions and procedures determined by board to be reasonably equivalent.* This act, except for K.S.A. 75-4322, 75-4323, 75-4324, 75-4325, 75-4326, 75-4327, 75-4328, 75-4333 and 75-4334, shall be inapplicable to any public employer other than the state and its agencies which, acting through its governing body, had adopted by ordinance or resolution its own provisions and procedures which have been submitted to the board by such public employer and as to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are reasonably equivalent to the provisions and procedures set forth in this act with respect to the state.

[41] *Id.*

[42] S. Sub. for H. 1573, 63d Legis., Reg. Sess. (1970), ACIR MODEL ACT, *supra* note 16, at 51:113. The addition of § 75-4321(c) really defeated the purpose of §§ 75-4329 to -4335, which was stated as follows in the ACIR Report:

> A variation of the single act approach is statutory coverage of both State and local levels and all occupational categories, but inclusion of sufficiently flexible provisions to permit a sensible and relevant application to a variety of local situations. This option is another feasible way of implementing the Commission's goal of providing generally equal treatment of State and local employees while recognizing varying needs and home rule traditions.

ACIR MODEL ACT, *supra* note 16, at 51:113. Both of the substitute local procedure provisions, which would have required only that local autonomy be consistent with uniform state policy, were included in the 1970 bill and the ACIR model after which the Act was patterned, but the bill and the model did not include the optional coverage provision of § 75-4321(c).

[43] KAN. STAT. ANN. § 75-4322(a) (1977). The term "supervisory employee" is defined as follows in § 75-4322(b):

> "Supervisory employee" means any individual who normally performs different work from his or her subordinates, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such

ployees have responsibility for direction of work and maintenance of discipline. The theory behind the exclusion is that the supervisory employees cannot serve two masters. If they were themselves represented by the same union as rank and file employees, in all probability their loyalties would be divided between the union and the public employer when it came to handling grievances, administering agreements, or dealing with an open labor dispute. This consideration is also reflected in the Labor Management Relations Act (LMRA),[44] which since the Taft-Hartley amendments of 1947[45] has excluded supervisors from the definition of "employee."[46] Like the federal law,[47] however, the Act recognizes the right of supervisory employees to become or remain members of employee organizations.[48] This concession may not be enough to satisfy the desires of supervisory employees themselves, particularly among firefighters and police. Persons in what generally would be considered supervisory positions have made efforts to be included in the same units with rank and file employees.[49] In some cases the statutory roadblock to attainment of this objective may result in a preference by the public *employees* themselves to have a municipality remain outside coverage of the Act in order to be represented in a unit more to their liking. But despite this ambivalence on the part of some public sector supervisors, their exclusion from coverage under the Act should have the added benefits of forcing management to more clearly identify its members and of promoting a greater community of interest among them.

III. THE PUBLIC EMPLOYEE RELATIONS BOARD

The Act is administered by a Public Employee Relations Board (PERB) consisting of five members appointed by the Governor for four-year terms.[50] The primary functions of the Board are to make determinations as to the appropriate unit,[51] conduct representation elections,[52] and adjudicate charges of prohibited

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actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. A memorandum of agreement may provide for a definition of "supervisory employees" as an alternative to the definition herein.

[44] Labor Management Relations Act, 1935, ch. 372, Pub. L. No. 74-198, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 152 (1976)). The LMRA definition of "employee" provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

[45] Labor Management Relations Act, 1947, (Taft-Hartley), ch. 120 § 101, 29 U.S.C. § 152 (1976).

[46] 29 U.S.C. § 152(3) (1976).

[47] 29 U.S.C. § 164 (a) (1976).

[48] KAN. STAT. ANN. § 75-4325 (1977). Supervisor employees excluded from the appropriate unit may nevertheless be members of the employee organization representing the unit. In the case of *Ambler v. Fraternal Order of Police Lodge No. 4*, P.E.R.B. Case No. 75-CAEO-1 (Dec. 17, 1979), a group of employees claimed that the F.O.P., which was the certified representative, had violated § 75-4333(c)(1) by allowing members in supervisory positions to participate in the organization with the same privileges as members of the unit. The complaint was dismissed after the F.O.P. adopted a resolution prohibiting non-unit members from voting on ratification of any memorandum of agreement with the city.

[49] AFGR MODEL ACT, *supra* note 16, at 51-105.

[50] KAN. STAT. ANN. § 75-4325 (a) (1977). Not more than three members can be members of the same political party.

[51] *Id.* § 75-4327(c), (e).

[52] *Id.* § 75-4327(d).

practices.[53] Since 1976, PERB has been part of the Department of Human Resources, which provides PERB with office space, an Executive Director, Hearing Examiners appointed on an ad hoc basis, staff attorney, and clerical assistance.[54] In addition, the Secretary of Human Resources, through the Executive Director of PERB, retains panels of qualified persons to serve as mediators, arbitrators, or members of fact-finding boards for purposes of the impasse procedures provided under the Act.[55]

Although PERB exercises a quasi-judicial function in representation and prohibited practice cases, there is no requirement that PERB members be lawyers, and only two of them have been. In most cases, their background and experience prior to appointment to PERB do not indicate any special expertise in labor relations, either in the public or private sector.[56] Since PERB normally meets only once a month and does not conduct hearings, members are forced to rely heavily on the Executive Director and the Hearing Examiners for guidance in their decision-making process.[57]

Unlike the National Labor Relations Board (NLRB),[58] which administers the LMRA, PERB has a tripartite composition, with one member designated as "representative of" public employers, one as representative of public employees, and three as representatives of the public at large.[59] This, of course, gives an appearance of fairness by assuring that the competing interests of employees, employers, and the public are all given a voice in PERB deliberations. As a practical matter, however, the arrangement is little more than window dressing. The three representatives of the public, obviously, can control the decisions, and if representatives of public employees or employers were to advocate the positions of their respective constituencies, cases would simply be reargued within PERB itself. This situation has not, in fact, occurred. PERB action in almost every case to date has been unanimous, which raises the question whether true "representation" in the sense used in labor relations has been provided on PERB. Under the circumstances, it is difficult to find any reason why PERB could not function just as equitably, if not more efficiently, with just the three public members.

IV. REPRESENTATION QUESTIONS

The first confrontation between organized public employees and their employer frequently begins with a demand by the employee organization for recognition that

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[53] *Id.* § 75-4334. The Board also has the power under § 75-4323(d)(3) to issue regulations, which are set forth in KANSAS ADMINISTRATIVE REGULATIONS article 84 (1978). They relate almost entirely to procedural matters.

[54] Act of March 9, 1976, ch. 354, 1976 Kan. Sess. Laws 1258 (codified at KAN. STAT. ANN. §§ 75-5701 to -5732 (1977)).

[55] KAN. STAT. ANN. § 75-4323(c) (1977).

[56] The first Board, appointed by Governor Docking, consisted of Eldon B. Dananhauer, Alan Neely, Merle W. Staats, Nathan W. Thatcher, and Arthur J. Veach. Subsequent appointments have been: Phyllis Burgess, Carroll Been, and Richard Rock. On the current Board are James Mangan, Lee Ruggles, Orbano Perez, Louisa Fletcher, and Arthur J. Veach. Veach is a Union Business Agent, and Rock is an attorney representing management in labor matters. Mangan is the only other attorney.

[57] Until recently, the Board had a practice of meeting informally during the morning of its monthly meeting for "off the record" discussions of pending cases with the Hearing Examiner, but in *Coggins v. PERB*, 2 Kan. App. 2d 416 (1978), the court held that such private meetings violated § 75-4318(a).

[58] The National Labor Relations Board was altered to consist of five rather than three members, appointed by the President with the advice and consent of the Senate. Labor Management Relations Act, 1947, ch. 120, § 101 (1947) (Taft-Hartley), 29 U.S.C. § 153 (1976).

[59] KAN. STAT. ANN. § 75-4323(a) (1977).

the employer for one reason or another has denied. Experience has shown that employees who are thwarted in their quest for representation are likely to resort to some form of concerted action in support of their demand.[60] One of the most significant ways in which the Act accomplishes its purpose to promote harmonious relationships and to eliminate "various forms of strife and unrest"[61] is by establishing an election machinery for determining whether a particular public employee organization is the representative of a majority of the employees.[62] If the organization represents a majority, the Act requires the public employer to recognize the organization for purposes of representing its members with respect to grievances and conditions of employment.[63]

A. Unit Determinations

Under any orderly procedure for resolving disputes over representative status and recognition of an employee organization, a threshold question is whether the group of employees the organization seeks to represent constitutes "an appropriate unit." This is made explicit in the Act, which provides that *following* a determination of the appropriate unit of employees among whom the election will be conducted, PERB shall conduct a secret ballot election to ascertain the employees' representation.[64] Moreover, the duty is imposed on the public employer to meet and confer in good faith with an employee organization only if it has been certified by PERB as representing a majority of the employees in an appropriate unit.[65] This determination of the appropriate *unit* must be distinguished from the determination of whether a particular group of employees desires to be represented by a *union*. The unit consists of a designated group of employees described by classes of jobs or positions rather than by the names of individuals, whose status is subject to change.

While the unit question may become rather technical at times, its determination is a matter of the utmost practical importance for both the public employer and the public employee organization.[66] First, the boundaries of the unit may be a determining factor in the outcome of any representation election: the larger the unit, the more difficult it will be for the employee organization to win over a majority of the employees. Second, the more units of employees with which a public employer must deal, the more time and effort will have to be devoted to employee relations problems, the greater the number of disputes and likelihood of impasse, and the more rivalries between different employee organizations. Last, the degree of cohesiveness among employees within the unit will affect the scope of bargaining and the solidarity of the employees behind their representative's position. In general, therefore, public employers tend to seek the most all-inclusive unit, while employee representatives seek the smallest possible unit consistent with their organizational success. Since the primary interest of the public at large is usually in avoiding any interruption of or interference with governmental services, the larger unit will normally be preferable

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[60] In 1968, for example, nearly one-quarter of all work stoppages by public employees concerned union recognition. *Pickets at City Hall*, *in* TWENTIETH CENTURY FUND 35 (1970).

[61] KAN. STAT. ANN. § 75-4321(a)(2) (1977).

[62] *Id.* § 75-4327(d).

[63] *Id.* § 75-4327(a), (c).

[64] *Id.* § 75-4327(d).

[65] *Id.*

[66] *See generally* Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems* 51 OR. L. REV. 152 (1971).

to the public because it minimizes the likelihood of disruptive concerted action by employees. Yet, the public interest in "harmonious and cooperative relationships" between the government and its employees expressly set forth in the Act[67] may at times militate in favor of a less expansive unit.

Unlike the federal law,[68] the Kansas statute permits a petition for a unit determination to be filed prior to, and completely separate from, a petition for a representation election.[69] It may be filed by a public employer, a public employee organization, or by any group of five or more employees.[70] It is difficult to see any real necessity for making such unit determinations in the absence of any pending question concerning representative status of an employee organization, but this procedure may offer one advantage for public employers. If there is reason for concern about the possibility of having to deal with a multiplicity of units at some point, an alert public employer might want to petition for a unit determination in advance of any organizing effort, proposing the employer's preferred unit at a time when there is not opposition. The unopposed unit petitioned for is likely to be accepted by PERB without the necessity for a formal hearing as long as the unit does not include supervisors or mixed groups prohibited by statute from being in the same service organization and does not otherwise conflict with some express statutory mandate. Although in actual practice the petition for a unit determination usually has been filed by an employee organization in connection with a pending or contemplated claim for representation, on at least one occasion, a petition was filed by five employees without any claim for representation pending or even on the horizon, presumably to avoid time-consuming delays on the unit question should a question concerning representative status arise later.[71]

If the petitioned-for unit is opposed, PERB may conduct a hearing on the question.[72] It is current practice for PERB to appoint a Hearing Examiner to conduct the hearing on its behalf. The Examiner may be a member of PERB itself, a member of its staff, a lawyer from the office of the Attorney General, or some other individual designated by PERB.[73] PERB has the usual powers to administer oaths, examine witnesses, and compel attendance of witnesses and to require the production of documents by the issuance of subpoenas.[74] Compliance with the technical rules of evidence is not required.[75] Following the hearing, the Hearing Examiner issues findings of fact, conclusions of law, and a recommended description of the unit, which are usually adopted by PERB.[76]

In making any unit determination, PERB is required to take into consideration the following statutory criteria, along with "other relevant factors":

(1) The principle of efficient administration of government.
(2) The existence of a community of interest among employees.
(3) The history and extent of employee organization.

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[67] KAN. STAT. ANN. § 75-4321(a)(1) (1977).
[68] 29 U.S.C. § 159(b) (1976); National Labor Relations Board Rules and Regulations, 29 C.F.R. § 102.60 to -.63 (1979).
[69] KAN. STAT. ANN. § 75-4327(c) (1977).
[70] *Id.*
[71] Certain Employees of the Univ. of Kan. (Faculty), P.E.R.B. Case No. UD 1-1975 (Dec. 29, 1975).
[72] KAN. ADMIN. REG. art. 84-2-9(d) (1978).
[73] *Id.* art. 84-2-2(a)(1).
[74] KAN. STAT. ANN. § 75-4323(d)(2) (1977).
[75] KAN. ADMIN. REG. art. 84-2-2(a), (5)(a) (1978).
[76] *Id.* art. 84-2-2(c)(7).

(4) Geographical location.
(5) The effects of overfragmentation and splintering of a work organization.
(6) The provisions of K.S.A. 75-4325 [excluding supervisors from the definition of public employees].
(7) The recommendations of the parties involved.[77]

PERB regulations supplement these statutory factors with a provision making it clear that a unit *may* consist of "all of the employees of the public employer, or any department, division, section or area, or party or combination thereof, if found to be appropriate."[78] The regulations go on to provide that in addition to the statutory factors, PERB shall consider whether the proposed unit is "a distinct and homogeneous group with significant problems that can be adjusted without regard to the other public employees of the public employer," and may also consider "the relationship of the proposed unit to the total organization of the public employer."[79] On the other hand, neither the extent to which public employees have been organized nor the desires of a particular group of public employees to be represented separately is to be "controlling."[80]

Most fundamental of these guidelines is the requirement of a community of interest among employees in the unit. This factor is expressly set forth in all state public employee relations laws that attempt to provide statutory standards for unit determinations.[81] Even under those laws that do not specify factors, it is the basic standard used in making such determinations, as it is under federal labor law.[82] The reasons for its preeminence are quite practical. First, by requiring a cohesiveness within the unit and a degree of isolation from other employees of the same employer, it tends to assure effectivenesss of any bargaining or meeting and conferring that may occur. Representatives of both the employer and the employees are then able to concentrate on issues of real concern to a majority of the employees in the unit, without being distracted by demands of minority factions that might be militant enough to block settlement. Second, it protects the interests of an identifiable and unified group whose numbers might be too small to provide an effective voice if they had to be combined with a larger number of other employees intent on promoting their own interests.

While most observers agree that a community of interest is essential to an appropriate unit, its determinants are so vague that application to specific cases leaves considerable room for discretion. In a sense, everyone who works for the State of Kansas has certain interests in common simply by virtue of their having the same employer. Yet, that group is so large that it contains a wide variety of compensation and benefit structures, hierarchies of supervision, geographic locations, types of work, and extent of interchange with each other, that few would seriously contend that a single statewide unit would be appropriate for all of them. Consequently, a smaller group would constitute what the regulations refer to as a group "with significant

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[77] KAN. STAT. ANN. § 75-4327(c) (1977).
[78] KAN. ADMIN. REG. art. 84-2-6(a)(1) (1978).
[79] *Id.* art. 84-2-6(a)(2).
[80] *Id.*
[81] *See* SUMMARY OF STATE LABOR LAWS, GOV'T EMPL. REL. REP. (BNA) 51:501-23 (1979).
[82] 14 NLRB ANN. REP. 32-33 (1949).

ed without regard to the other public employees"—one unity of interest.[83]

nity of interest as a factor in unit determinations, the the additional factor of geographical location, which is ommunity of interest. It is self-evident that employees locations are likely to have fewer interests in common no regularly work together and have daily personal con- lition, separate physical locations would usually require ult in somewhat different working conditions. The ation does have the effect of weakening arguments for ade by state officials. If the legislature had intended iate for all employees of the state, it would not have as a unit determination criterion. Since state employees nployed at different geographical locations, this factor parate units of state employees for each location or area. d extent of organization"[84] also appear to be redundant s of community of interest. Moreover, because organiza- in its infancy at the time the statute was enacted, it is organizations would have any *history*. The *extent* of petitioning for a unit determination would be better n's history that the employees themselves—perhaps the munity of interest—feel a strong common bond within ce them into a broader unit would frustrate their ex- heir future welfare together with those who share the ovision in the regulations that neither the extent of of the employees to be represented separately shall be an effort to downgrade the importance accorded this

factors of "efficient administration of government"[85] the splintering of the work organization"[86] further ation. Presumably, the reference to efficient administra- interest of the public in having a particular agency or nat is capable of carrying out its designated functions of time, effort, and money. A crazy quilt of small units r and out of kilter with the organizational lines of the esult in needless inefficiency. It might even be argued ould be one coextensive with the unit of government ad intended that result, however, it could have simply d omitted the factor of geographical location. Because t simplistic approach, it has left PERB with the delicate terest in efficiency of administration with the legitimate s to be represented in a unit that can work effectively

(2) (1978).
1977).

The problem is illustrated by five petitions for five separate departmental unit determinations for Shawnee County.[87] In previous cases, the county and Teamsters Local 696 had voluntarily agreed to departmental units for five other groups of employees, and the union had ultimately been certified as representative for 268 employees in those units. The county, however, opposed the five additional units and was upheld by PERB, which refused to find any of the proposed units appropriate on the ground that they would hinder the principle of efficient administration of government and tend to overfragmentation of the work force. Since the five additional units would have included only fifty of the approximately five hundred county employees, PERB stated, "The approval of units of this type can only lead to the creation of mass confusion due to the hodgepodge composition of the resulting units."[88]

The reference to "overfragmentation" would seem to have the same objective as the reference to "efficient administration," and therefore be superfluous as evidenced by its failure to be included in the ACIR model from which the Act was drawn.[89] It appears in the public employee relations law of only a few other states.[90] In any event, it presents PERB with the same difficult question of judgment—at what point does something smaller than an employer-wide unit result in inefficiency or overfragmentation? Although terms like "overfragmentation" and "splintering" do not admit of precise definition, they bring to mind the picture of a group haphazardly broken up into extremely small particles.

The difficulty of trying to balance all these factors was illustrated in 1974 by a unit determination for a major portion of the employees of the state.[91] After twenty-eight days of hearings extending over four months, the Hearing Examiner recommended nine separate statewide units for administrative services employees, fiscal and staff professional employees, inspection and regulatory employees, professional-legal employees, operational service employees, patient care-professional employees, non-guards at penal institutions, physical and natural science professional employees, professional special services employees, and technical employees, plus seven separate units of nonprofessional employees of the Highway Department, four units of security services employees in four designated areas, seven units of nonprofessional social services field employees in designated areas, and nine units of nonprofessional employees at state institutions. These recommended units were then adopted by PERB.[92]

Another example of the close questions of judgment involved in unit determinations is a 1975 case involving the Kansas Turnpike Authority (KTA).[93] Employees in the classification of toll-taker were petitioning for a separate statewide unit, while the KTA was seeking a unit that would include all employees within the statutory definition of "public employee" other than clerical employees. Hearing Examiner Donald R. Hoffman's recommendation of a separate toll-taker unit was adopted by

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[87] Certain Employees of Shawnee County, P.E.R.B. Case No. UDC 5 through 7-1979 (Sept. 17, 1979).
[88] *Id.* at 6.
[89] ACIR MODEL ACT, *supra* note 16, at 51:213.
[90] Alaska, California, Connecticut, Indiana, Maine, Nebraska, New Mexico, Pennsylvania, and Vermont.
[91] Appropriate Units for Pub. Employees, P.E.R.B. Case No. UD 1-1974 (Sept. 4, 1974).
[92] *Id.*
[93] Certain Pub. Employees of the Kan. Turnpike Auth., P.E.R.B. Case No. UDC 13-1974 (Mar. 31, 1975).

PERB.[94] The factors relied on by the Hearing Examiner included the following: the toll-takers had separate supervision, transfers to other classifications outside the unit were uncommon, the toll-takers had limited contact with other employees, the toll-takers worked different schedules from other employees and did not receive time off for lunch, no other KTA employees had shown an interest in establishing an appropriate unit, and the nature of the toll-takers' work was completely different from that of other KTA employees.[95] In essence, the Hearing Examiner seemed to base his determination on the existence of a community of interest among the toll-takers apart from that of other KTA employees. Ironically, the organizational effort failed and no election was ever held.[96]

The statewide units, found to be appropriate in the 1974 determination, excluded state colleges and universities because PERB in its first unit determination had held that it "would allow public employees at each unit of higher education to organize on individual institutional units."[97] PERB found that each institution was a separate and distinct operating entity with a complex relationship already existing between its employees and the administration. It concluded that principles of efficient administration would be maintained because the evidence indicated that "most problems concerning conditions of employment with university employees have been handled on a local basis."[98] PERB made it clear that it did not view the factor of overfragmentation and splintering of the work force as automatically requiring a statewide unit in every case, but that each case must be reviewed on its own merit. For example, buildings and grounds employees at the University of Kansas Lawrence campus and the faculty at Kansas State College at Pittsburg are organized in separate units at their respective campuses.[99]

The faculty unit[100] was subdivided still further at the Lawrence campus of the University of Kansas.[101] When five faculty members petitioned for a unit covering all faculty members at that campus, the faculties of the School of Law and the School of Engineering each petitioned for separate units. After two days of hearings, the Hearing Examiner recommended the inclusion of the Engineering School faculty in a campus-wide unit, and the creation of a separate unit for the Law School.[102] His findings of fact set forth numerous factors that indicated the existence of a separate community of interest for the Law School unit. Those factors include enrollment, registrar services, class and examination scheduling, graduation ceremony, continuing legal education program, building and autonomous library, fund-raising and alumni relations programs, separate support formula, tuition rates, and fund raising, hiring levels, standards for promotion and tenure, teaching, accreditation by agencies outside the university, operation during certain periods while the rest of

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] P.E.R.B. Case No. UDC 1-1974.
[98] *Id.*
[99] Certain Professional Faculty Members of Kan. State College of Pittsburg, P.E.R.B. Case No. UE 2-1974 (Mar. 29, 1974).
[100] The United States Supreme Court recently held that faculty members at private universities are "managerial" employees whose efforts to unionize are not protected by the LMRA. NLRB v. Yeshiva, 100 S. Ct. 856 (1980). While this ruling does not directly affect state university faculty, the Court's reasoning would seem equally applicable to public as well as private universities.
[101] Certain Employees of the Univ. of Kan. (Faculty), P.E.R.B. Case No. UD 1-1975 (Dec. 29, 1975).
[102] *Id.*

the university is shut down, and its status as the only school other than the Medical School that offers solely post-baccalaureate instruction without being part of the Graduate School.[103] The Hearing Examiner's recommendation was supported by decisions of the NLRB and public employee relations boards in other states.[104]

PERB refused to accept the Hearing Examiner's recommendation and instructed him to rewrite his findings and recommendation to include the Law School in the campus-wide unit, after which his recommendation was adopted by PERB.[105] On review by the district court, the portion of PERB's order that included the Law School in the campus-wide unit was set aside on the ground that it was arbitrary and capricious.[106] The Court of Appeals reversed that decision, but vacated PERB's order on several procedural grounds.[107] The case was ultimately settled on the basis of an agreed order excluding the Law School from the campus-wide unit after the university administration withdrew its objections to this exclusion.[108]

Since supervisory employees are excluded from the definition of "public employee" and the Act provides that no public employer shall be compelled to deem them as such,[109] consideration of their status in unit determinations always results in their exclusion from any appropriate unit. Difficulty arises, however, in determining which employees actually are supervisors, an issue that was hotly debated in a 1974 case involving City of Wichita fire fighters.[110] The petition filed by the International Association of Fire Fighters claimed a unit including all uniformed employees below the rank of deputy chief. The city claimed that all those with a rank of fire lieutenant or higher should be excluded as supervisors—a unit determination that would result in a ratio of one supervisor for every two nonsupervisors. The union claimed that lieutenants and captains were, in effect, "working foremen" and that to set them apart from the others would drive a wedge into the team effort necessary in fighting fires. After a hearing, PERB decided that the fire lieutenants should be included in the unit and fire captains excluded, based primarily on the greater number of persons supervised by the captains. In a case involving Hutchinson fire fighters, on the other hand, PERB approved a unit to which the parties agreed that included lieutenants, captains, and fire inspectors, along with the fire fighters, drivers, and switchboard operators.[111]

"Confidential employees" are similarly excluded from the definition of "public employee,"[112] and consequently are also excluded from any appropriate unit. The

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[103] *Id.*

[104] Fordham Univ., 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971); *In re* University of Pittsburg, PLRB (Case No. R-5237-W); AAUP v. University of Neb., 198 Neb. 243, 255 N.W.2d 1 (1977).

[105] Certain Employees of the Univ. of Kan. (Faculty), P.E.R.B. Case No. UD 1-1975.

[106] Coggins v. PERB, 2 Kan. App. 2d 416, 417 (1978).

[107] *Id.*

[108] Coggins v. PERB, No. 30245 (Dist. Ct., Douglas County, Kan., Mar. 1, 1978) (cross appeal *aff'd in part, rev'd in part*).

[109] KAN. STAT. ANN. §§ 75-4322(a), 75-4325 (1977).

[110] International Ass'n of Fire Fighters Local 666, P.E.R.B. Case No. UE 4-1974 (Oct. 22, 1974).

[111] Hutchinson Fire Fighters Local 179, P.E.R.B. Case No. UE 33-1973 (Nov. 2, 1973). According to Jerry Powell, all employees may be included in a unit if all the parties agree. Interview with Jerry Powell, PERB Executive Director (Spring 1980).

[112] KAN. STAT. ANN. § 75-4322(a) (1977). Section 75-4322(c) defines "confidential employee" as follows:

> [A]ny employee whose unrestricted access to confidential personnel files or other information concerning the administrative operations of a public agency, or whose functional responsibilities or knowledge in connection with the issues involved in the meet and confer process would make his or her membership in the same employee organization as other employees incompatible with his official duties.

exclusion is based primarily on their access to confidential information bearing on personnel matters or the meet and confer process. "[E]lected and management officials" are also excluded from the definition of public employee,[113] an arrangement that is consistent with NLRB practices under federal law.[114]

The Act also provides that "a recognized employee organization" shall not include: (1) both professional and other employees unless a majority of the professional employees vote for inclusion; (2) uniformed police employees and public property security guards with any other public employees; or (3) uniformed firemen with other public employees.[115] A unit composed of employees of a city public safety department that has both police and fire protection duties, however, would be appropriate.[116] A similar restriction on professional employees is found in the federal LMRA.[117] The provisions on police and fire presumably recognized the traditional separate organization of such groups that existed long before the days of public employee bargaining, or meeting and conferring, and reflected a desire to isolate any possible concerted activity involving such employees.[118]

B. Election Procedures

The Act provides that a secret ballot election to determine the employee representative is to be conducted "at the request of the public employer or on petition of employees,"[119] but makes no express provision for petition by an employee organization. It has been PERB's practice, nevertheless, to accept such petitions from employee organizations as well. A petition by an employee organization becomes, in effect, a petition by employees because it must "show the names" of not less than thirty percent of the employees in the unit.[120] This "showing of interest" as a condition precedent to the processing of an election petition is patterned after the procedure under the LMRA,[121] and is designed to avoid wasting the time and resources of PERB on cases in which the degree of apparent interest by employees in representation is so low that there is no real likelihood of any representative being designated. This showing of interest, however, is not a precondition to the processing of a petition for unit determination.[122]

Ballots furnished by PERB for the elections it conducts show the name of each organization claiming representation, along with a choice of "no representative."[123] To be certified, an organization must receive a majority of the valid *ballots cast*.[124] This raises the possibility of a representative being certified without actually being the choice of a majority of the employees in the unit, a feature that is common to

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[113] *Id.* § 75-4322(a).

[114] *See, e.g.*, Continental Can Co., 74 N.L.R.B. 351, 20 L.R.R.M. 1156 (1947); Ford Motor Co., 66 N.L.R.B. 1317, 17 L.R.R.M. 394 (1946).

[115] KAN. STAT. ANN. § 75-4327(f) (1977).

[116] *Id.*

[117] 29 U.S.C. § 159(b) (1976).

[118] *See* KAN. STAT. ANN. § 75-4327(d) (1977).

[119] *Id.* The Board is also authorized to conduct elections to determine whether a recognized employee organization should be certified. *Id.*

[120] *Id.*

[121] NLRB Statements of Procedure, 29 C.F.R. § 101.18(a) (1979).

[122] KAN. ADMIN. REG. art. 84-2-5(a) (1978). The regulations make no provision for an election petition (as distinguished from a request for unit determination) by a public employer since the Board takes the position there would be no necessity for such an employer petition.

[123] KAN. STAT. ANN. § 75-4327(d) (1977).

[124] *Id.*

state public employee relations laws[125] and consistent with the LMRA.[126] The Act also provides that when the ballot provides for three or more choices, and no representative receives a majority of the votes cast, a runoff election will be conducted between the two choices receiving the largest number of votes. The runoff election may result in elimination of "no representative" as a possible choice.[127]

The frequency of representation elections is limited somewhat by the provision in section 75-4327(d) that once PERB has certified a formally recognized representative, it is not required to consider the matter again for one year, unless PERB determines that sufficient reason exists. This suggests that in the event that an employee organization *loses* an election—with the result that no organization is certified—it could petition for another election within a period of less than one year, or as often as it might see fit.

This provision is less restrictive than the LMRA, which prohibits the direction of an election in any unit in which a valid election has been held within the preceding twelve months, regardless of whether any labor organization was certified.[128] The theory behind this provision of the LMRA, of course, is that once employees have expressed their wishes, one way or the other, neither they nor their employer should have to undergo the disruption of another election campaign for at least a year since it would be unlikely that there would be any drastic change in sentiment within a shorter period. The Kansas Act, by contrast, gives public employees greater opportunity for freedom of choice and makes it easier for a persistent labor organization to gain representative status at the earliest opportunity. Whether this liberality is worth the trouble and administrative expense is questionable.

Another way in which PERB procedures differ from the election procedures under the federal law for the private sector is that PERB has not established any rule governing the effect of an existing memorandum of understanding on a petition filed by a rival labor organization. In this regard, the NLRB has adopted the so-called "contract bar" rule, under which a collective bargaining agreement will bar the processing of a petition filed by a rival union while the agreement is in effect, up to a maximum of three years.[129] This rule balances the desirability of employee freedom of choice against the need for stability in the employer-employee relationship once a representative has been properly designated and the terms and conditions of employment have been agreed upon. Since the Kansas Act authorizes a memorandum of agreement up to three years in duration,[130] this lack of a contract bar in Kansas raises a possibility that an agreement might have to be renegotiated if a rival employee representative successfully petitioned for an election more than one year after the original certification.[131] Such an unsettling result might be justified by the statutory construction argument that if the legislature had intended any restriction

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[125] An exception is the Indiana statute covering teachers. IND. CODE ANN. § 20-7.5-1-10(c)(4) (Burns 1975).

[126] 29 U.S.C. § 159 (1976).

[127] KAN. STAT. ANN. § 75-4327(d) (1977).

[128] 29 U.S.C. § 159(c)(3) (1976).

[129] 37 N.L.R.B. ANN. REP. 50-52 (1972). A petition is timely when filed not more than 90 nor less than 60 days before the termination date of the agreement. The 60 days prior to expiration is "insulated" to provide an opportunity to negotiate a successor agreement.

[130] KAN. STAT. ANN. § 75-4333(a) (1977).

[131] The NLRB has held that a union certified during the term of a valid existing agreement between an employer and another union is not bound by the terms of its predecessor's agreement, but is free to negotiate a new one. American Seating Co., 106 N.L.R.B. 250, 32 L.R.R.M. 1439 (1953).

on the frequency of elections beyond the one-year-from-certification provision of section 75-4327(d), it would have said so.

The Act does not permit the processing of an election petition to be delayed pending the disposition of a prohibited practice charge, even though there might be some question whether it would be possible to conduct a fair election in an atmosphere tainted by unlawful conduct.[132] This apparently is to avoid the possibility that where two rival unions are competing for representation rights, one union that needed additional time for campaigning might be able to gain the time by filing a "blocking charge" against the employer or the rival.

If there is any alleged irregularity in the conduct of a representation election, PERB may set aside the election and conduct a new one.[133] The regulations provide that objections to the conduct of one of the parties or a third party shall be filed with PERB "by a charge of unfair practice" within five days after the election.[134] This appears to involve something different from the procedure for a charge of prohibited practice,[135] which may be filed at any time within six months of the date of the alleged practice.[136] This process for objecting to the conduct of an election seems comparable to that of the NLRB, which through a vast body of decisions over the years has established a complex set of rules governing permissible employer and union conduct during representation campaigns.[137] The NLRB goal is to maintain "laboratory conditions" in order to enable employees to register "a free and untrammeled choice" or "reasoned choice."[138] Similarly, PERB "views its function in the conduct of elections as assuring to the employees involved an opportunity to cast their ballots in an atmosphere free of elements which prevent or impede a reasoned choice."[139] Thus, in *Kansas Association of Public Employees v. Public Service Employees Union Local 1132*[140] it was recognized that the NLRB rule requiring the setting aside of an election when there has been a material misrepresentation of fact[141] "is a rule of fundamental fair play, and should be universally applicable"[142] even though the facts of that case were not sufficient to bring the rule into play. It is reasonably safe to assume that PERB will follow other NLRB guidelines for setting aside elections, for example, in situations in which there has been an appeal to racial prejudice[143] or in which an employer has threatened dire consequences if unionization is achieved.[144]

It does not follow, however, that public employers are obligated to remain strictly neutral. Since an employer's noncoercive expression of views concerning unionization

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[132] KAN. STAT. ANN. § 75-4323(d)*(1)* (1977). This was done by agreement of the parties in *Public Service Employees Local 1132 v. University of Kan.*, P.E.R.B. Case No. CAE 2-1973 (Mar. 2, 1973).

[133] Kansas Ass'n of Pub. Employees v. Public Serv. Employees Local 1132, 218 Kan. 509, 544 P.2d 1389 (1976).

[134] KAN. ADMIN. REG. art. 84-2-12(a)(10) (1978).

[135] *See* notes 152-61 and accompanying text *infra.*

[136] KAN. STAT. ANN. § 75-4334(a) (1977). It would seem that if a charging party could prove pre-election conduct that did constitute a prohibited practice under § 75-4333, one of the remedies might well be setting aside the election and ordering a new one.

[137] R. WILLIAMS, P. JANUS & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT (1974).

[138] General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948).

[139] 218 Kan. at 517-18, 544 P.2d at 1396.

[140] *Id.*

[141] This rule was originally promulgated in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962) and revived in *General Knit, Inc.*, 239 N.L.R.B. 101, 99 L.R.R.M. 1687 (1978).

[142] 218 Kan. at 517, 544 P.2d at 1396.

[143] Sewell Mfg. Co., 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962).

[144] Oak Mfg. Co., 141 N.L.R.B. 1323, 52 L.R.R.M. 1502 (1963).

is within the protection of the first amendment of the United States Constitution,[145] public employers should be free to call employee's attention to the possible disadvantages of unionization and to express a preference that there be no organization. Where PERB's regulation of campaign propaganda is conducted under the "charge of unfair practice" procedure, which merely results in an election set aside, there is less likelihood of an "abridgement" of speech of the type covered by the first amendment than there would be if the regulation were conducted under the prohibited practice procedure, which results in a cease and desist order. Yet there is a danger that in its well-intentioned efforts to assure reasoned choice, PERB might take on the role of censor if it were to go beyond imposing limits on communications between employer and employee involving express or implied threats of reprisal or promises of benefits.

If experience under the LMRA is any guide, the opportunity to object to the conduct of an election on grounds of misrepresentation of fact can be expected to operate as an invitation to the losing party in a close election to comb through the opposition's oral and written propaganda for questionable statements in the hope of obtaining a second election with a more favorable result.[146] This, in itself, might not be undesireable if PERB had a reliable basis for determining what types of communications do unfairly influence employee voting in a representation election. The difficulty is that PERB has only intuition as a guide to evaluating the way in which employees actually react to specific communications—a question that is more psychological than legal. A recent empirical study suggests that the NLRB's regulatory effort in this area has been an exercise in futility based on invalid psychological assumptions about how employees respond in representation election campaigns and recommends that this type of regulatory effort be abandoned.[147] Accordingly, PERB might be well advised to proceed with caution in this area.

PERB regulations have codified the NLRB's *Excelsior Underwear* rule.[148] That rule requires the employer to furnish the Board with a list of names and addresses of all eligible voters, which is then turned over to all employee organizations involved prior to the election.[149] The purpose is to give employee organizations access to employees comparable to the employer's, which should improve the likelihood of a reasoned choice. Without the lists of names and addresses, employee organizations would be severely handicapped in putting their message across to more than a few employees. Although some employees might prefer not to be exposed to union communications, it cannot be assumed that a union will engage in harassment. If a union were to do so, employees have an adequate remedy under other provisions of

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[145] Thomas v. Collins, 323 U.S. 516, 547 (1945); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941).

[146] During the fiscal year ended September 30, 1978, objections were filed in 1057 of the 8464 elections conducted by the NLRB. 43 N.L.R.B. ANN. REP. 262, 263 (1978).

[147] J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 159 (1976).

[148] KAN. ADMIN. REG. art. 84-2-5(b), -2-11(a)(4) (1978).

[149] Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966).

the Act.[150] Should an employer refuse to provide this information, PERB presumably could obtain it through the exercise of its subpoena powers.[151]

V. EMPLOYEE AND EMPLOYER RIGHTS AND PROHIBITED PRACTICES

A. In General

Section 75-4324 grants to public employees "the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers,"[152] as well as the right to refuse to join or participate. This statutory recognition of the right of public employees in Kansas to such representation obviously eliminated the judicial roadblock to effective representation that had been thrown up by the *Wichita Public School Employees* decision.[153] Drastic as this change might seem to some Kansans, it merely established for public employees a right roughly comparable to what their counterparts in the private sector have enjoyed for years under section 7 of the LMRA.[154] One difference, however, is that under the Kansas Act, representation is only for the purpose of "meeting and conferring," while the federal statute gives the employee the more potent right "to bargain collectively."[155] More important, federal law includes among protected activities the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"[156]—in plain English, the right to strike. The Kansas Act, like most employee relations laws, provides no such right, and indeed expressly prohibits strikes.[157]

These new employee rights would in effect be meaningless without some provision for their enforcement. For this purpose, section 75-4333(b)(1) through (8) sets forth eight "prohibited practices" for employers, the first five of which are patterned after the employer unfair labor practices in section 8(a)(1) through (5) of the LRMA.[158] The Kansas Act differs from the LMRA in that the conduct specified constitutes a prohibited practice only if engaged in "willfully."[159] The import of this qualification is far from clear. The term "willful" is more commonly found in criminal statutes under which criminal intent is an essential element of particular crimes. Under section 21-3201 proof of willful conduct is required to establish criminal intent and "willful conduct" is defined as "conduct that is purposeful and intentional and not accidental."[160] This may have been what the legislature had in mind when it used this term in section 75-4333(b), but if so, it still is not apparent how it should apply in this context. It may mean that conduct that would otherwise constitute a prohibited practice is excused if done through negligence or due to some mistake of fact or law. Or it may mean that proof of anti-union animus

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[150] KAN. STAT. ANN. § 75-4333(c)*(1)* (1977) (making it a prohibited practice for an employee organization to interfere with, restrain, or coerce public employees in the exercise of their statutory rights, including the right to refrain from activities of employee organizations).

[151] *Id.* § 75-4323(d)(2). Such action by the NLRB was upheld in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

[152] KAN. STAT. ANN. § 75-4324 (1977).

[153] *See* note 1 and accompanying text *supra.*

[154] 29 U.S.C. § 157 (1976).

[155] *See* notes 285-301 and accompanying text *infra.*

[156] 29 U.S.C. § 157 (1976).

[157] KAN. STAT. ANN. § 75-4333(c)(5) (1977).

[158] 29 U.S.C. § 158(a)(1)-(5) (1976).

[159] KAN. STAT. ANN. § 75-4333(b) (1977).

[160] KAN. STAT. ANN. § 21-3201(2) (1974).

or specific intent to violate an employee's or union's statutory rights is essential. In any event, it would seem that proof of a prohibited practice is more difficult under Kansas law than under federal law,[161] and that the protection afforded by the statutory rights is diluted accordingly by the imposition of this nebulous requirement of some sort of blameworthiness.

B. Interference

The most basic limitation on employer conduct is set forth in section 75-4333(b)(1), which makes it a prohibited practice for a public employer willfully to "[i]nterfere [with], restrain or coerce public employees" in the exercise of the rights granted under section 75-4324.[162] This provision parallels section 8(a)(1) of the LMRA, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."[163] Commonly referred to simply as "interference," this category of prohibited practice—or unfair labor practice—really is a "catchall" because of its broad general language. By its terms, it includes almost anything an employer might do that would tend to interfere with the statutory right to represenation. The remaining seven employer prohibited practices enumerated in section 75-4333(b)(2) through (8) constitute specific applications of the sweeping prohibition against interference in section 75-4333(b)(1). Any conduct which would violate (2) through (8) would also violate (1). Consequently, a section 75-4333(b)(1) violation has been involved in almost every employer prohibited practice case alleging violation of one of the other subsections.

Typical examples of blatant interference with statutory rights of public employees would be employer surveillance of or spying on union activities, interrogating employees about their union activities or sympathies, promises of benefits or threats of reprisals, and similar forms of harassment. A complaint of such surveillance and harassment in violation of subsection (1) was upheld by PERB in *National Association of Government Employees v. Topeka State Hospital*.[164] In that case PERB relied heavily on a representative of management having asked the employee, "What do you think the most of, the Union or your job?" In the case of *Public Service Employees Local 1132 v. University of Kansas Medical Center*,[165] the employer was found guilty of violating subsection (1) for reprimanding an employee for speaking to a supervisor during working time about the discharge of another employee. The warning notice had stated that the employee was speaking on behalf of the union, which was not true, and failed to cite any specific rule violated by the employee. PERB held that an employer cannot attempt to "gag" an employee in this manner. In *Service Employees International Union v. Board of Ellis County Commissioners*[166] the employer was found in violation of subsection (1) for disciplining shortly before a representation election three employees who were union adherents because they had used

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[161] For example, in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the employer was found guilty of unfair labor practices for discharging an employee who had been soliciting for the union because the employer mistakenly believed the employee had threatened to dynamite the employer's property.

[162] *See* text at notes 133-44 *supra*.

[163] 29 U.S.C. § 158(a)(1) (1976).

[164] P.E.R.B. Case No. CAE 12-1976 (April 14, 1977).

[165] P.E.R.B. Case No. CAE 6-1976 (May 27, 1976).

[166] P.E.R.B. Case No. CAE 1-1973 (May 3, 1973).

city vehicles during working hours to solicit money for an employees' Christmas party. PERB found that the employer had condoned the same conduct by a foreman and that the incident constituted an improper reprisal that had a chilling effect on the forthcoming election.

PERB has not yet had to resolve the more basic policy questions that arise when public employer interference with the right of employees to engage in union activities results from some restriction by the employer on the use of government property that would be considered entirely lawful outside the labor relations context. For example, in the private sector a common source of litigation has been employer restrictions on union organizational activity or solicitation of membership by employees at the workplace. The accommodation reached there between employees' organizational rights and employer property rights has been that the employer may not lawfully prohibit solicitation by employees on employer property during employees' nonworking time, but may promulgate a nondiscriminatory prohibition on solicitation during working time.[167] Similarly, the employer may not prohibit distribution of union literature in nonworking areas of the employer's property during nonworking time, but the employer may be somewhat more restrictive of distribution by nonemployees, provided that the union has other available channels by which to reach employees with its message.[168]

It cannot be assumed that these principles will automatically be applied to Kansas public employers since section 75-4333(e) requires that "fundamental distinctions between private and public employment shall be recognized" in the application of the prohibited practice provisions, and specifically provides that "no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent."[169] Yet in the absence of unusual circumstances, however, such as a safety hazard or potential interference with some governmental function, it is difficult to see any reason not to adopt in the public sector the kind of balance that federal law permits in the private sector between the competing interests of employees in their organizational rights and employers in their property rights. The federal rules were not designed with a view to any peculiar characteristics of the private sector, but rather in recognition of the simple propositions that while "working time is for work," property rights are not absolute, and some inconvenience or even some dislocation of property rights may be necessary to safeguard organizational rights.[170] While it is easy to find differences between public and private employers, none require Kansas to work out this sensitive accommodation of competing interest without the benefit of the accumulated experience in the private sector.

If anything, the involvement of public, rather than private, property would seem to permit more, rather than less, dislocation for organizational purposes. For example, union organizers—even though they may not be employees—probably should have a right of access to public property in order to conduct organizational activities any place open to the public so long as this does not interfere with the work of the public employees. Similarly, they probably should have the right to conduct organizational

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[167] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
[168] *Id. See also* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).
[169] KAN. STAT. ANN. § 75-4333(e) (1977).
[170] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

meetings wherever the public is allowed to congregate, such as cafeterias or meeting rooms, so long as a disturbance is not likely to result.

C. *Domination and Assistance*

Section 75-4333(b)(2) makes it a prohibited practice for a public employer willfully to "[d]ominate, interfere or assist in the formation, existence, or administration of any employee organization."[171] This provision is patterned after section 8(a)(2) of the LRMA,[172] which was designed to outlaw so-called "company unions"—unions not independent of the employer.[173] The objection to such organizations is not only that they are usually weak and ineffective but also that they deprive employees of the opportunity to be represented by a union of their own choosing and, in fact, of any true representation at all since the employer is sitting on both sides of the bargaining table by virtue of control over the union. Violations of this provision could take many forms including the actual formation of a union by the employer's appointing its officials and providing financial support.[174] Sometimes, however, it is difficult to draw the line between employer "assistance" and mere "cooperation."[175]

Comparatively few violations of this provision of the Kansas Act have been alleged, and none have been upheld. The case of *Public Service Employees Local 1132 v. University of Kansas*[176] is illustrative. The charge claimed that the University had violated section 75-4333(b)(2) by dominating, interfering with, or assisting the Kansas Association of Public Employees (K.A.P.E.), whose membership and officers included a number of managerial, professional, and supervisory personnel.[177] Surprisingly, PERB found no violation because the organization of K.A.P.E. had preceded the Act, which was not intended to eliminate existing employee organizations and did not prohibit supervisors and professional employees from belonging to the same organization as rank and file employees. Nevertheless, it seems likely that if such an organization were to be formed today with supervisory public employees in control, the employer would be found in violation of section 75-4333(b)(2) and required to cease recognizing it.

D. *Discrimination*

Perhaps the most important specific protection afforded individuals under the Act is assurance against employer reprisals for engaging in organizational activity. In this regard, section 75-4333(b)(3) makes it a prohibited practice for an employer willfully to "[e]ncourage or discourage membership in any employee organization . . . by discrimination in hiring, tenure or other conditions of employment, or by blacklisting."[178] This provision parallels section 8(a)(3) of the LMRA, which does not expressly mention blacklisting but makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

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[171] KAN. STAT. ANN. § 75-4333(b)(2) (1977).
[172] 29 U.S.C. § 158(a)(2) (1976).
[173] R. GORMAN, BASIC TEXT ON LABOR LAW 195-96 (1976).
[174] *Id.* at 197-201.
[175] *Id.* at 201-03.
[176] P.E.R.B. Case No. CAE 2-1973 (Mar. 28, 1973).
[177] *Id.* at 1-2.
[178] KAN. STAT. ANN. § 75-4333(b)(3) (1977).

organization."[179] It should be noted that neither of these statutory provisions prohibits discrimination generally. Discrimination based on race, sex, or age is not illegal under this Act. Instead, the Act confines its interdictions to discrimination that encourages or discourages membership in an employee organization. Any such discrimination in regard to employment obviously would interfere with an employee's statutory rights, but this more specific prohibition makes clear the insulation of employees' jobs from their organizational rights.[180]

The classic example of the kind of employer conduct proscribed by this provision is the discharge of a union leader. Such a crude response to organizational efforts has rarely been encountered among Kansas public employers—perhaps due to a sense of responsibility on the part of public officials or to existing civil service restrictions on peremptory discharge. Cases under this provision to date have usually involved some form of alleged harassment on the job in retribution for organizational activity, as in the *University of Kansas Medical Center*,[181] *Ellis County*,[182] and *Topeka State Hospital*,[183] cases which found discrimination in violation of section 75-4333(b)(3) as well as interference in violation of section 75-4333(b)(1). Cases of this kind often turn on a question of employer motive—was the true reason for the treatment complained of some misconduct or shortcoming on the job or a desire to discourage the employee from organizational activity? PERB is not willing to assume that simply because an individual happens to be a union adherent, a warning, reprimand, or low rating is necessarily aimed at discouraging organizational activity. When the employer has been able to show proper cause for the action taken and there is no other evidence of antiunion motive, PERB has not hesitated to dismiss charges filed under this provision.[184] When, however, the evidence establishes dual motives such as discouragement of membership and some other cause, a burden probably should be on the employer to show that the action would have been taken without regard to the organizational activity.

E. Discrimination for Giving Testimony

Section 75-4333(b)(4) makes it a prohibited practice for a public employer willfully to discriminate against an employee because he or she has filed a complaint or given any information or testimony under the Act. This prohibition is also borrowed from the LMRA,[185] under which it has been used infrequently. The Kansas Act, however, includes an additional prohibition, not found in the LMRA, on discrimination that arises because the employee "has formed, joined or chosen to be represented by an employee organization."[186] This portion of subsection (4) seems to overlap the prohibition on discrimination in subsection (3)[187] since any case of discrimination because an employee has formed, joined, or chosen to be represented by an employee

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[179] 29 U.S.C. § 158(a)(3) (1976).
[180] Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).
[181] P.E.R.B. Case No. CAE 6-1976.
[182] P.E.R.B. Case No. CAE 1-1973.
[183] P.E.R.B. Case No. CAE 12-1976.
[184] *See, e.g.*, Public Service Employees Local 1132 v. University of Kan. Medical Center, P.E.R.B. Case No. CAE 13-1977 (July 21, 1977); Service Employees Local 513 v. City of Wichita, P.E.R.B. Case No. CAE 3-1976 (June 11, 1976); Rose v. Kansas Univ. Medical Center, P.E.R.B. Case No. CAE 14-1977 (June 19, 1977).
[185] 29 U.S.C. § 158(a)(4) (1976).
[186] KAN. STAT. ANN. § 75-4333(b)(4) (1977).
[187] *See* notes 178-84 and accompanying text *supra*.

organization would necessarily constitute discrimination that would discourage membership in a labor organization. The need for such duplication is not apparent, but as long as this particular form of discrimination has been singled out for special treatment this provision probably will continue to be used as it has in the past as the basis for charges believed to come within it. To be on the safe side, a party charging violation of this portion of subsection (4) probably ought to rely on the more general prohibition in subsection (3) as well.

F. Refusal to Meet and Confer

1. In General

The legal battle lines for public employee organizations have been formed not so much over efforts to protect the rights of individuals to join and form such organizations, but rather over attempts to give substance to the employer's obligation to bargain or meet and confer once recognition has been achieved. In the public sector, it is at that point that employer resistance usually becomes most open and forceful. Under the Kansas Act, the employer's obligation is described in general terms as follows:

> Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act, and may enter into a memorandum of agreement with such recognized employee organization.[188]

This provision is buttressed by section 75-4333(b)(5), which makes it a prohibited practice for a public employer willfully to "[r]efuse to meet and confer in good faith with representatives of recognized employee organizations as required in section 75-4327." Conflicts over implementation of this statutory obligation fall into two categories: (1) disputes concerning the *subjects* about which the parties must meet and confer, namely, the *scope* of the obligation; and (2) disputes over the *manner* in which the parties must meet and confer, primarily the standard of *good faith*.

2. Scope of Employer Duty

The phrase "conditions of employment," about which employers must meet and confer, could be interpreted very broadly to include almost any element of the employee-employer relationship that affects the continuation of employment status, the physical or economic conditions under which employees work, and the nature of the work they are expected to perform. The statutory definition of "conditions of employment," however, circumscribes its meaning as follows:

> "Conditions of employment" means salaries, wages, hours or work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime,

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[188] KAN. STAT. ANN. § 75-4327(b) (1977).

shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state.[189]

This definition narrowly confines the mandatory subjects of meeting and conferring to the economic aspects of employment and grievance procedures. This restriction is supplemented by the provision in section 75-4330 that the scope of a memorandum of understanding may extend to all matters relating to conditions of employment, except proposals relating to "public employer rights," enumerated in section 75-4326 as follows:

> Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:
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> (a) Direct the work of its employees;
>
> (b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency;
>
> (c) Suspend or discharge employees for proper cause;
>
> (d) Maintain the efficiency of governmental operation;
>
> (e) Relieve employees from duties because of lack of work or for other legitimate reasons;
>
> (f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and
>
> (g) Determine the methods, means and personnel by which operations are to be carried on.[190]

Since a public employer is guilty of a prohibited practice under section 75-4333(b)(5) only if it refuses to confer about subjects that would qualify as "conditions of employment," the employer may, if it chooses, flatly refuse even to listen to requests concerning anything else. This state of the law obviously could have the effect of completely shutting off discussion of a number of traditional subjects of bargaining in the private sector such as: procedures for promotion, layoff, and recall based on seniority; discharge or discipline for cause; scheduling of vacations; distribution of overtime; mandatory or nonmandatory overtime work; hours of work; leaves of absence; safety and health; evaluation procedures; nondiscrimination in employment; contracting out of work; work by supervisors; and bulletin boards.

This result hardly seems consistent with the statutory interest in "the development of harmonious and cooperative relationships between government and its employees"[191] or the statutory objective of "improvement of employer-employee relations."[192] After all, the basic reason public employees seek representation in the first place is to gain a greater voice in decisions affecting their working conditions. Frustration of this objective so far as noneconomic matters are concerned could lead to the "various forms of strife and unrest" the statute was designed to avoid.

Examples of this kind of frustration can be found in two cases involving Kansas State University at Pittsburg,[193] in which the university refused to discuss a variety of items, including "retrenchment" and personnel files, on the ground that they fell

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[189] *Id.* § 75-4322(t).
[190] *Id.* § 75-4326.
[191] *Id.* § 75-4321(a)(1).
[192] *Id.* § 75-4321(b).
[193] Kansas Higher Educ. Ass'n v. Pittsburg State Univ., P.E.R.B. Case No. CAE 2-1978 (Jan. 25, 1978).

outside the scope of mandatory meeting and conferring. Since PERB could find no evidence of bad faith, the charges were dismissed.[194]

The ACIR model bill on which the Kansas Act was based did not contain any definition of "conditions of employment," but the counterpart to the statement of the employer's recognition obligation in section 75-4327(b) simply stated that the employer had an obligation to meet and confer with the employee organization "in the determination of the terms and conditions of employment."[195] This is comparable to the approach taken in the LMRA, which defines the duty to bargain collectively as the obligation to confer in good faith "with respect to wages, hours, and other terms and conditions of employment."[196] This general language leaves it to the administrative agency, and ultimately to the courts, to determine the precise scope of the employer's obligation on a case-by-case basis.

The ACIR bill did, however, include a statement of employer rights almost identical to section 75-4306 and a prohibition comparable to section 75-4330 against modifying those rights in a memorandum of understanding.[197] Statements of this kind are quite common in state public employee-employer relations laws and seem to be based on a belief in the necessity of preserving the integrity of certain "management prerogatives" against encroachment through the bargaining process. The trouble is that if taken literally—particularly together with the definition of "conditions of employment" in the Kansas Act—such provisions virtually obliterate the possibility for meaningful discussion of important subjects of mutual interest of a noneconomic nature. To be sure, the Kansas definition of "conditions of employment" probably would not, in itself, *prevent* discussion of items falling outside that definition if the public employer could be persuaded to engage in such discussions. To the extent that any nonmandatory item constituted a reserved management right under section 75-4326, however, it could not lawfully be included in a memorandum of understanding because of section 75-4330, and if it were, it probably would be legally unenforceable. Giving section 75-4326 a liberal interpretation might be one way to circumvent this problem in order to permit more meaningful discussions when both parties are willing. For example, an agreement provision requiring layoffs and recalls to be made in accordance with seniority could be construed simply as an agreed *method* of exercising the management right to relieve employees from duty for lack of work, rather than as an attempt to circumscribe or modify the right of the public employer to determine whether a layoff or recall should take place, or to establish the number of employees to be affected.

3. Manner of Conferring

For guidance in the *manner* by which a public employer should negotiate with an employee organization in order to meet its statutory obligation to "meet and confer in good faith," section 75-4322(m) provides the following definition: " 'Meet and confer in good faith' is the process whereby the representative of a public agency and representatives of recognized employee organizations have the mutual obligation personally

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[194] *Id.* at 6.
[195] ACIR MODEL ACT § 7(b), *supra* note 16, at 51:213.
[196] 29 U.S.C. § 158(d) (1976).
[197] ACIR MODEL ACT § 6, *supra* note 16, at 51:213.

to meet and confer in order to exchange freely information, opinions and proposals to *endeavor to reach agreement* on conditions of employment."[198]

While this standard is rather subjective, the essential element seems to be an "endeavor to reach agreement." Accordingly, the PERB decision in *Topeka Printing Pressmen Union 49 v. Kansas Department of Administration*[199] emphasized that the Act "requires a good faith effort by both labor and management through a negotiations process to reach agreement."[200] To put it another way, to establish that an employer has committed a prohibited practice under section 75-4333(b)(5), it probably would be necessary to make an affirmative showing of *bad faith*, which in turn would require evidence of a desire on the part of the employer *not to reach agreement*. The difficulty is that to make such a finding, PERB must necessarily examine the positions taken and statements made in the negotiations since a desire not to reach agreement is a state of mind that can only be inferred from a party's outward manifestations in words and deeds. One type of conduct, which by statute constitutes evidence of bad faith in meet and confer proceedings, is the commission of any prohibited practice specified in section 75-4333.[201]

In this connection, it is interesting to note that the Kansas Act does not include a provision of the type found in the LMRA and some state statutes to the effect that the duty to bargain "does not require either party to agree to a proposal or require the making of a concession."[202] In the absence of a provision of that kind, can a public employer in Kansas be found to be not endeavoring to reach agreement by virtue of its remaining adamant in its stance on a particular proposal or demand, without making any counterproposal or compromise? PERB has shown no inclination to take that approach. Indeed, PERB has yet to find evidence of lack of good faith in any prohibited practice case under section 75-4333(b)(5). PERB failed to find lack of good faith even in the case of *Kansas State College of Pittsburg*,[203] in which negotiations did not even start until nine weeks after certification and dragged on for months with practically nothing agreed upon—even with respect to what the subjects for discussion should be.

In that decision, however, PERB did recognize that if certain complained-of unilateral action by the employer had not come within the rights reserved to management in section 75-4326, this unilateral action would have been evidence of bad faith. This is in accord with the doctrine under the LMRA that unilateral action by an employer with respect to a mandatory subject of bargaining is per se an unlawful refusal to bargain even in the absence of any independent evidence of subjective bad faith—at least until an impasse has been reached in bargaining. As the Supreme Court has observed, unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the conditions of employment affected and must of necessity obstruct bargaining; it usually discloses an unwillingness to agree with the union.[204]

In *Pittsburg College* PERB also indicated that in assessing an employer's degree

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[198] KAN. STAT. ANN. § 75-4322(m) (1977) (emphasis added).
[199] P.E.R.B. Case No. CAE 1-1978.
[200] *Id.* at 9.
[201] KAN. STAT. ANN. § 75-4333(a) (1977).
[202] *Compare* 29 U.S.C. § 158(d) (1976) *with* Iowa Public Employment Relations Act § 9, IOWA CODE ANN. § 20.9 (West 1979) *and* GOV'T EMPL. REL. REP. (BNA) 51:2414 (1980).
[203] P.E.R.B. Case No. CAE 4-1975.
[204] NLRB v. Katz, 369 U.S. 736 (1962).

of good faith, it would not sit in judgment on the substance of the proposals made or the agreements reached. Nevertheless, a leading case on the duty to bargain under the LMRA suggests that if PERB is not to be blinded by empty talk and "surface motions of collective bargaining" it must take some cognizance of the reasonableness of the positions taken by the employer.[205] That decision stated,

> Thus, if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, . . . the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union . . . .[206]

This makes good sense. If it is apparent from examination of the positions taken and the statements made that an employer is merely "going through the motions," that should be sufficient to show lack of a sincere desire to reach an agreement and, therefore, bad faith—whether the employer happens to be in the public or private sector. Thus, to carry out the purposes of the Act, PERB may have to start giving closer scrutiny to the substance of discussions. As in the case of unilateral action, an outright refusal to discuss a mandatory subject should constitute a per se refusal to meet and confer without requiring independent evidence of bad faith, even though the employer may have mistakenly felt the matter was not a "condition of employment," since such conduct does show a desire not to reach agreement on that subject and actually does obstruct the whole process of meeting and conferring.

The timing of meet and confer proceedings is controlled by section 75-4327(g), which requires generally that employer-employee discussions affecting the finances of a public employer be conducted at such time as will permit any resultant memorandum of agreement to be implemented in the budget preparation and adoption process. More specifically, it provides that a public employer is not required to begin meet and confer proceedings for a period of thirty days before and thirty days after its budget submission date.

A further complication is that meet and confer sessions between a public employer and an employee organization are probably "meetings" subject to the Kansas Open Meeting Act,[207] which means that they must be open to members of the press and public. Although the statute permits executive sessions for "[p]ersonnel matters of nonelected personnel," this exception probably applies only to meetings on *individual* employee matters.[208] In addition, the reference to exchange of information in the statutory definition of "meet and confer" seems to contemplate a duty on the part of the public employer to furnish financial information in support of a claim of inability to pay.

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[205] NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953).

[206] *Id.* (emphasis in original).

[207] KAN. STAT. ANN. §§ 75-4318 to -4320 (Supp. 1979). *See* Note, *Public Sector Collective Bargaining and Sunshine Laws: Needless Conflict*, 18 WM. & MARY L. REV. 159 (1976).

[208] KAN. STAT. ANN. § 75-4319(b)(1) (1977). This is because of the need for personal privacy when the focus of discussion is on a named individual. *See* Tacha, *The Kansas Open Meeting Act: Sunshine on the Sunflower State?*, 25 KAN. L. REV. 169, 195 (1977).

G. Other Employer Prohibited Practices

The Act provides for three additional employer prohibited practices that have no counterpart under the LMRA. One is section 75-4333(b)(6), which makes it a prohibited practice for a public employer willfully to "[d]eny the rights accompanying certification or formal recognition granted in section 75-4328."[209] This prohibited practice is comparable to "interference" under section 75-4333(b)(1) except that the right being protected is the right of the employee organization to represent employees, rather than the right of individual employees to participate in organizational activity. An example of the type of employer conduct that might be challenged under this prohibited practice would be the denial of union representation to an employee at a meeting with management.[210]

The second additional prohibited practice is set forth in section 75-4333(b)(7), which makes it a prohibited practice for a public employer to "[d]eliberately and intentionally avoid mediation, fact-finding, and arbitration endeavors as provided in section 75-4332 [dealing with impasse resolution procedures]."[211] It is interesting to note that the words "deliberately and intentionally" were not included in the ACIR model bill.[212] Since the introductory clause to section 75-4333(b) includes the phrase "willfully to," which must be read together with each of the following employer prohibited practices—including of course the one under this subsection (b)(6)—it would seem that the words "deliberately and intentionally" are repetitious (not to mention ungrammatical) unless "willfully" means something different. No cases have been found that shed light on this confusing language.[213]

Finally, section 75-4333(b)(8) makes it a prohibited practice for a public employer willfully to "[i]nstitute or attempt to institute a lockout."[214] A "lockout" is defined in section 75-4322(s) as action "to provoke interruptions of or prevent the continuity of work normally and usually performed by the employees for the purpose of coercing the employees into relinquishing rights guaranteed by this act."[215] This definition is unusual in two respects. First, it refers not only to employer action to prevent the continuity of work—presumably by shutting down all or part of an operation—but also to an action to *provoke* interruption of work. Exactly what this covers is by no means clear, but it could be interpreted to include any action by an employer in negotiations or other dealings with an employee organization that "provokes" *the employees* to interrupt work—presumably to strike. Second, the definition refers only to an action that has as its purpose coercing employees into relinquishing rights guaranteed by the Act. This would seem to suggest that if a public employer were to "lock out" its employees merely to bring economic pressure on them in support of its position in meet and confer proceedings, that would not be the type of lockout prohibited by section 75-4333(b)(8) since such pressure would not seem to deprive the employees of any statutory "right." Such lockouts are lawful under the LMRA

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[209] KAN. STAT. ANN. § 75-4333(b)(6) (1977).
[210] *See, e.g.*, National Ass'n of Gov't Employees v. Topeka Youth Center, P.E.R.B. Case No. CAE 7-1976 (May 21, 1976); Kansas Pub. Employees Council 64 v. City of Topeka, P.E.R.B. Case No. CAE 7-1975 (Apr. 29, 1975).
[211] KAN. STAT. ANN. § 75-4333(b)(7) (1977).
[212] ACIR MODEL ACT § 13(c)(4), *supra* note 16, at 51:125.
[213] KAN. STAT. ANN. § 75-4333 (Supp. 1979).
[214] *Id.* § 75-4333(b)(8) (1977).
[215] *Id.* § 75-4322(s).

largely because they are deemed to be the correlative of the right to strike[216]—which is nonexistent under Kansas law. Thus, it is difficult to perceive the purpose of this peculiar provision in the Act, which was not included in the ACIR model and has been found in only four other state public employer-employee relations laws,[217] none of which defines "lockout." Since public employees are barred from striking, it is understandable that public employee unions might want a corresponding ban on employer lockouts designed to secure favorable settlement terms, but if that is what the unions were seeking, the statutory definition of lockout does not seem to have given it to them.

H. Prohibited Practices of Employees and Employee Organizations

Section 75-4333(c) contains five subsections setting forth prohibited practices of public employees and employee organizations. Of these, the most important is subsection (5), which makes it a prohibited practice for public employees or employee organizations willfully to "[e]ngage in a strike." "Strike" is defined in section 75-4322(r) to mean "an action taken for the purpose of coercing a change in the conditions, rights, privileges or obligations of employment through the failure by concerted action with others to report for duty or to work at usual capability in the performance of the normal duties of employment."[218] This definition clearly is broad enough to include not only the garden variety strike or walkout, but also various types of "job action" such as "mass sick call," "slowdown," and similar pressure tactics, even though it may be necessary to draw an inference from coincidences in timing of the commencement and cessation of the activity and the number of persons involved that the employees had engaged in a "strike" in concert. Since the prohibition applies equally to employees and to employee organizations, the employees could be found guilty of a prohibited practice, although the activity may not have been instigated or condoned by an employee organization.

The question whether public employees should have the right to strike has been the subject of voluminous debate.[219] Outside Kansas, at least, the question is by no means settled—particularly where a strike would not pose a substantial threat to health or safety.

The other four subsections of section 75-4333(c) correspond to employer prohibited practices under section 75-4333(b). These subsections proscribe interference, restraint, or coercion of employees in the exercise of rights granted by section 75-4324;[220] interference, restraint, or coercion of a public employer with respect to management rights

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[216] American Ship Building Co. v. NLRB, 380 U.S. 300, 315 (1965).

[217] *See* ACIR Model Act, *supra* note 16, at 51:214, 501-23. The other states prohibiting public employer lockouts are Connecticut (*id.* at 1620-21); Iowa (*id.* at 2413); Nebraska (*id.* at 3618); New Hampshire (*id.* at 51:3813); and Oklahoma (police and firefighters, *id* at 4512).

[218] KAN. STAT. ANN. § 75-4322(r) (1977).

[219] H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES (1971); Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357 (1972); Kheel, *Resolving Deadlocks Without Banning Strikes*, 92 MONTHLY LAB. REV. July 1969, at 62; Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969); Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1968); Taylor, *Public Employment: Strikes or Procedures*, 20 INDUS. & LAB. REL. REV. 617 (1967); Wellington & Winter, *Structuring Collective Bargaining In Public Employment*, 79 YALE L. J. 805 (1970); Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260 (1969); Note, *The Strike and Its Alternative in Public Employment*, 1966 WIS. L. REV. 549.

[220] KAN. STAT. ANN. § 75-4333(c)(1) (1977).

under section 75-4326; or with the selection of its representative;[221] refusal to meet and confer in good faith;[222] deliberate and intentional avoidance of mediation, fact-finding, and arbitration efforts.[223]

Section 75-4333(d) makes it a prohibited practice for a public employee organization to "endorse candidates, spend any of its income, directly or indirectly, for partisan or political purposes or engage in any kind of activity advocating or opposing the election of candidates for any public office."[224] This prohibition—not found in the ACIR model bill—strips public employee organizations of one of their most effective alternatives to the strike as a weapon for inducing public officials to settle on favorable terms in meet and confer proceedings.

Comprehensive as the statutory definition of "strike" is, it does not seem broad enough to include *secondary* boycott activity by public employees that does not interfere with their own normal duties because engaged in during "off duty" hours. Such activity in the private sector—such as a picket line around the place of business of a customer or supplier of the primary employer with whom a union has a dispute—constitutes a separate unfair labor practice under the LMRA,[225] but does not seem to be covered by the Kansas Act or by other similar state statutes. Thus, for example, it might be possible for a public employee organization to exert economic pressure on a public employer by picketing a governmental building project, which would normally cause all unionized building tradesmen to walk off the job and refuse to report to work and cause truckers to halt deliveries to the site. So long as the employee organization involved represented only public employees, such activity probably would not be prohibited under the LMRA either.

I. Procedure, Enforcement, and Judicial Review

Prohibited practice proceedings are initiated by a "complaint" that may be filed with PERB by a public employee, a group of public employees, an employee organization, or a public employer.[226] The complaint must be filed within six months of the alleged prohibited practice.[227] The party named in the complaint has seven days after service of the complaint in which to file a written answer admitting, denying, or explaining each allegation and setting forth any affirmative defense and the facts and matters of law on which it relies.[228] The time allowed for answering may be shortened to twenty-four hours in the event of emergency, such as a strike or lockout.[229] A motion to dismiss may be filed with the answer.[230] Although the statute makes no express reference to investigation, PERB at this point through its Executive Director will investigate the complaint to determine whether a hearing should be conducted and to explore the possibility of settlement.[231]

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[221] *Id.* § 75-4333(c)(2).
[222] *Id.* § 75-4333(c)(3).
[223] *Id.* § 75-4333(c)(4).
[224] *Id.* § 75-4333(d) (1977).
[225] 29 U.S.C. § 158(b)(4)(B) (1976).
[226] KAN. ADMIN. REG. art 84-3-1 (1978).
[227] KAN. STAT. ANN. § 75-4334(a) (1977).
[228] *Id.*
[229] *Id.*
[230] KAN. ADMIN. REG. art 84-2-2(c)(3)(b) (1978).
[231] KAN. STAT. ANN. § 75-4323(d)(2) (1977) gives the Board power to hold hearings "and make such inquiries as it deems necessary." KAN. ADMIN. REG. art. 84-3-2 (1978) provides for a hearing if it appears to the Board that formal proceedings should be instituted. This obviously contemplates investigation.

One fundamental difference between prohibited practice procedures before PERB and unfair labor practice procedures before the NLRB is that the LMRA provides for an office of General Counsel, which investigates each unfair labor practice "charge" to determine whether a "complaint" should be issued.[232] Once a complaint is issued, the case is then prosecuted by the office of the General Counsel.[233] Under the Kansas Act, however, it is up to the complainant to retain an attorney to prosecute the case or to handle it alone.[234] If the respondent is a public employer, this arrangement is obviously favorable since the public employer normally will have regularly retained legal counsel available to present its defense.

If a settlement is reached, the complaint is either withdrawn or dismissed. Although PERB has no official power to enforce the settlement, the complaining party might be able to do so by bringing an action for specific performance of a contract.

If investigation indicates there is no basis for the complaint, it will be dismissed. Otherwise, a hearing will be conducted by a Hearing Examiner appointed by PERB. The Examiner may be the Executive Director, an Assistant Attorney General, or an attorney in private practice, but there is no requirement that the hearing officer be an attorney.[235] The Act provides that "[c]ompliance with technical rules of evidence shall not be required."[236]

After the conclusion of the hearing, the hearing officer prepares findings of fact, conclusions of law, and "recommendations," which are considered by PERB at its next regularly scheduled monthly meeting.[237] A final decision is then made by PERB, which will either dismiss the complaint or find that a prohibited practice has been committed and issue a remedial order.[238] The Act does not specify PERB's remedial powers in any detail, but simply grants PERB the power to "[e]stablish procedures for the prevention of improper public employer and employee organization practices." In the case of a refusal to meet and confer, PERB is limited to entering an order directing the public agency or employee organization to meet and confer in good faith.[239] The failure to mention prevention of prohibited practices *by employees* in the enumeration of PERB's powers undoubtedly was an oversight, but there is some question whether that power could properly be implied since the provisions of section 75-4334 on prohibited practice proceedings do not require PERB to issue a remedial order when it finds that a prohibited practice has been committed; it merely requires that PERB make "findings as authorized by this act."[240] Since no provision is made for penalties, PERB's powers, like those of the NLRB, can be presumed to be solely remedial.[241] PERB could be expected to order the guilty party to "cease and desist" from continuing the prohibited practice.

PERB orders are not self-enforcing. If a charged party does not voluntarily comply, PERB may file a petition for enforcement in the district court.[242] If deemed

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[232] 29 U.S.C. § 153(d) (1976).
[233] *Id.*
[234] KAN. STAT. ANN. § 75-4334(a) (1977) provides that at a hearing "the parties" shall be permitted to be represented by counsel and to summon witnesses in their behalf.
[235] KAN. ADMIN. REG. art 84-2-2(a)(1) (1978).
[236] KAN. STAT. ANN. § 75-4334(a) (1977).
[237] KAN. ADMIN. REG. art. 84-2-2(c)(7) (1978).
[238] KAN. STAT. ANN. § 75-4334(b) (1977).
[239] *Id.* § 75-4323(d)(1).
[240] *Id.* § 75-4334(b).
[241] Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940).
[242] KAN. STAT. ANN. § 75-4334(c) (1977).

appropriate, the court could issue an injunction in accordance with the code of civil procedure, except that the limitation on injunctions in labor disputes set forth in section 60-804 would be inapplicable.[243]

Any person aggrieved by a final order issued by PERB may obtain judicial review by petitioning the district court in the judicial district in which the major geographical area of the public employer is located.[244] During this review, findings of fact by PERB are conclusive unless it is made to appear to the court's satisfaction that the findings were "not supported by substantial evidence and the record considered as a whole."[245] Since this provision for judicial review is contained in a subsection of section 75-4334 dealing generally with prohibited practice proceedings, it may not be applicable to judicial review of PERB orders in representation cases—such as unit determinations or the setting aside of elections. Nevertheless, such decisions, as "final orders" by an administrative agency, are subject to review under the general administrative review provisions of section 60-2101(d), under which the standard for review would be essentially the same.[246]

In the event of an alleged strike or lockout while prohibited practice proceedings are pending before PERB, the aggrieved party may seek temporary relief in the district court in the same manner that is provided for judicial review.[247]

VI. IMPASSE RESOLUTION PROCEDURES

A. Impasse in Meet and Confer Proceedings

Since the basic purpose of the Act is to promote a harmonious relationship between public employees and employers and to avoid disruption of governmental services, one test of this statute is the effectiveness of its impasse resolution procedures. Once a public employee organization has been recognized, the process of meeting and conferring is likely to become the area of primary concern for the parties. Where strikes and lockouts are prohibited—as they are in Kansas—some substitute is needed if the parties have been unable to reach agreement. In general, the alternative under public employee relations laws has been either compulsory arbitration or a combination of mediation and fact-finding. The Kansas Act, following the ACIR model, opted for the latter.

In recognition that problems and procedures may vary considerably from governmental unit to unit, the Act provides that the parties themselves may establish in their memorandum agreement procedures to be invoked in the event of an impasse in the course of meet and confer proceedings.[248] The only statutory limitation is that the memorandum must define conditions under which an impasse exists. If the employer is governed by the budget law set forth in section 79-2925, however, the memorandum also must provide that an impasse is deemed to exist if the parties fail to reach agreement at least fourteen days prior to the budget submission date.[249] Thus, for example, a state agency might provide in its memorandum agreement only

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[243] *Id.*
[244] *Id.* § 75-4334(b).
[245] *Id.*
[246] KAN. STAT. ANN. § 60-2101(d) (Supp. 1979).
[247] *Id.* § 75-4334(d) (1977).
[248] *Id.* § 75-4332(a).
[249] *Id.*

for mediation without fact-finding, or, at the other extreme, for binding arbitration of settlement terms. Yet, mutual agreement to either of these substitutes for the statutory procedures seems unlikely since each would probably be deemed disadvantageous to one side or the other. So far as can be determined, no alternative impasse procedures have been agreed upon by a Kansas public employer and employee organization.

1. Mediation

In the absence of memorandum procedures (or in the event these procedures do not break the impasse), the starting point for statutory resolution of the dispute is either for one of the parties to request assistance from PERB, or for PERB to render assistance on its own motion.[250] Joint requests for assistance are provided for in the regulations, but mediation may be initiated without necessarily having the consent of both parties.[251] A nonconsenting party has no choice but to participate since deliberate avoidance of mediation by either party constitutes a prohibited practice under section 75-4333(b)(7) or (c)(4).[252] Upon such request, PERB must investigate to determine whether an impasse exists.[253] The Act itself does not define "impasse." In general terms, an impasse may be assumed to exist when the parties have exhausted meet and confer proceedings and are deadlocked with little or no apparent prospect for further concessions or compromise from either side.[254] A stalemate by the parties on one or two issues, therefore, would not necessarily constitute a true impasse, provided that other issues were still negotiable.

In the process of investigating the existence of an impasse, the PERB representative has an opportunity to engage in some informal mediation himself while identifying the unresolved issues and the respective positions of the parties. Such informal mediation appears to be supported by the statutory mandate that if PERB determines that an impasse exists, it "shall aid the parties in effecting a voluntary resolution of the dispute"[255] and shall appoint a mediator or mediators representative of the public from a list of qualified persons maintained by the Secretary of the Department of Human Resources. In practice, a single mediator is requested from the Federal Mediation and Conciliation Service, an independent agency of the federal government that provides its services free of charge to assist in settlement of labor disputes in both the private and public sectors.[256] "Mediation" is defined in the Act as an "effort by an impartial third party to assist in reconciling a dispute regarding conditions of employment between representatives of the public agency and recognized employee organizations through interpretation and advice."[257]

This definition makes it clear that mediation is different from arbitration. Although both involve intervention by a neutral third party, the technique of mediation is to induce the parties to reconcile their differences on their own "through interpreta-

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[250] *Id.* § 75-4332(b).
[251] KAN. ADMIN. REG. art. 84-5-1(a) (1978).
[252] KAN. STAT. ANN. § 75-4333(b)(7), (c)(4) (1977).
[253] *Id.* § 75-4332(b) (1977).
[254] *See, e.g.*, American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622, 628, n.17 (D.C. Cir. 1968) (court stated that the Board's finding "that there was no realistic possibility that continuation of discussion at that time would have been fruitful" constituted "sound standard of deadlock").
[255] KAN. STAT. ANN. § 75-4332(b) (1977).
[256] 29 U.S.C. §§ 171-175 (1976).
[257] KAN. STAT. ANN. § 75-4322(o) (1977).

tion and advice."[258] The mediator has no power to dictate a settlement or compel the parties to agree; his or her function is simply to make suggestions and persuade, in the hope that the parties themselves will ultimately arrive at mutually acceptable settlement terms.[259] One difficulty with effective mediation in the public sector is the lack of economic pressures on the parties to settle that may be generated by a strike, or threatened strike. Perhaps for this reason, the mediation effort is limited by statute to a maximum of seven days.[260]

2. Fact-Finding

If the impasse persists, PERB must appoint a fact-finding board of not more than three members to represent the public, from a list of qualified persons maintained by the Secretary of the Department of Human Resources.[261] The practice has been to appoint a single person, who has been either a college or university professor or an attorney engaged in the private practice of law. As the term implies, the fact-finder conducts a hearing to investigate the nature of the dispute, the unresolved issues, the positions of the parties on each, and the facts and arguments offered in support of their respective positions. Since neither the statute nor the regulations set forth any prescribed procedures, the determination of the procedures to be followed in obtaining this information, and the degree of formality of the hearing, seem to be within the discretion of the fact-finder. According to its statutory definition "fact-finding" simply means "investigation" of the dispute,[262] but since the Act gives the fact-finder power to administer oaths and issue subpoenas,[263] he or she presumably could require that evidence be presented in a manner comparable to a quasi-judicial proceeding, with direct and cross examination of witnesses. Certainly the fact-finder should not hesitate to ask questions, or even to call witnesses, since the objective is to provide the background needed for intelligent recommendations through a complete understanding of the dispute and the discovery of the real basis for the positions of the parties as distinguished from their posturing in negotiations.

Although it is possible that the fact-finding process itself might produce a settlement,[264] particularly if the parties are not too far apart when fact-finding starts, in keeping with the statutory definition of the process fact-finders are instructed to avoid mediation. Barring voluntary settlement by the parties, however, the fact-finder must, within twenty-one days of appointment, issue a report to the parties including "recommendations for resolution of the dispute."[265] This obviously is the heart of the fact-finding process and its successful preparation is the measure of the fact-finder's capabilities. These recommendations communicated privately to the parties (and to PERB) are intended to provide the basis for voluntary settlement. PERB is given discretion to make the fact-finding report public seven days after submission to the parties and must make it public fourteen days after submission to

[258] *Id.*

[259] Labor Management Relations Act, ch. 120, § 203(b), 61 Stat. 153 (1947) (codified at 29 U.S.C. § 173(b) (1976)), makes it the duty of the Federal Mediation and Conciliation Service to use its best efforts "by mediation and conciliation, to bring [the parties] to agreement."

[260] KAN. STAT. ANN. § 75-4332(c) (1977).

[261] *Id.*

[262] *Id.* § 75-4322(p).

[263] *Id.* § 75-4332(c).

[264] *See, e.g.*, City of Hays v. Police Officers Local 806, P.E.R.B. Case No. I 10-1976 (Sept. 5, 1976) (parties reached settlement after fact-finding hearings but before issuance of report).

[265] KAN. STAT. ANN. § 75-4332(c) (1977).

the parties.[266] The economic burden of both mediation and fact-finding is borne by the Department of Human Resources.[267]

3. Legislative Determination

If the parties have not resolved the impasse within forty days after appointment of the fact-finder, or fourteen days prior to budget submission date (whichever is earlier), the dispute must be referred to the "governing body" of the public employer[268]—*i.e.*, "the legislative body, policy board, or other authority" possessing legislative or policymaking responsibilities.[269] The governing body, in effect, legislates a settlement under a four-part procedure that includes: (1) submission by a representative of the public employer of a copy of findings and facts and recommendations of the fact-finder, together with the representative's recommendations for settlement; (2) submission by the employee organization, if it desires, of its recommendations for settlement; (3) a hearing conducted "forthwith" by the governing body or a duly authorized committee thereof at which the parties are required to explain their positions; and (4) such action as the governing body deems to be in the public interest, including the interest of the public employees involved.[270] Though not without its drawbacks, this legislative determination is the least objectionable last-step impasse resolution procedure, and perhaps for this reason has gained fairly wide acceptance in other states.[271]

Strangely enough, section 75-4332(d), which provides for this ultimate settlement mechanism by the governing body, states that "this subsection shall not be applicable to the state and its agencies and employees."[272] Because public employers other than the state and its agencies are not governed by the Act at all unless they voluntarily elect to be covered,[273] this leaves the statutory legislative determination procedures applicable only to those few municipalities and political subdivisions that have made this election. The only discernible reason for this exclusion of the state from the final legislative determination provision must be that the state legislature does not want any state governing body to be inhibited by a fact-finding report or to be required to conduct hearings before dictating its settlement, even though the report would previously have been made public. Indeed, the Act does not spell out what steps are to be taken by state agencies in the event of failure of fact-finding to produce a settlement. Apparently, "anything goes."

Another peculiarity of this legislative determination provision is that it may be triggered by the mere fact that a settlement has not been reached fourteen days prior to the budget submission date, if that date occurs before the end of the forty-day period commencing with appointment of the fact-finder.[274] This date fourteen days prior to budget submission date, however, is the same date on which an impasse must be "deemed to exist" in an impasse procedure provided in a memorandum of agree-

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[266] *Id.*
[267] *Id.* § 75-4332(e).
[268] *Id.* § 75-4332(d).
[269] *Id.* § 75-4322(g).
[270] *Id.* § 75-4332(d).
[271] *See, e.g.*, N.Y. CIV. SERV. LAW § 209.4 (McKinney 1979).
[272] KAN. STAT. ANN. § 75-4332(d) (1977).
[273] *Id.* § 75-4321(c).
[274] *Id.* § 75-4332(d).

ment.[275] Even if there is no memorandum of agreement procedure, this triggering date could apparently propel the dispute into legislative settlement before fact-finding or even mediation had been completed.[276]

One advantage of the provision for legislative determination as the final step in an impasse resolution procedure is that it preserves for the legislative process a decision that is basically political in nature. Even the best of fact-finders is not infallible, and the task of balancing the competing interests of the public employees, the public employer, and the public at large in the allocation of scarce governmental resources might best be left to the legislature as the final authority. The disadvantage is that the public employer is, in effect, deciding unilaterally what the settlement of its own dispute will be and is free to ignore the recommendations of an impartial third person concerning an equitable settlement.

Many union representatives undoubtedly would argue either that fact-finding recommendations should be binding on the public employer, or that if nonbinding recommendations are not adopted, the public employee organization should be free either to strike[277] or demand binding arbitration. Of course, if fact-finding recommendations were to be made binding, the result would be tantamount to compulsory binding arbitration. Although this could have the advantage of encouraging voluntary settlement to avoid an unpredictable settlement that might be recommended by the fact-finder, this alternative has the politically unpalatable flavor of improper delegation of governmental authority to a nonelected person.[278] It might also give rise to the practical problem of how to enforce the "binding" recommendation if the governing body chose to ignore it. The strike alternative, by contrast, would still encounter all the objections to strikes in public employment that have been so well documented elsewhere, and does not seem realistic to consider in this state.

B. Impasse over Application and Interpretation of an Existing Agreement

In addition to an impasse in meet and confer proceedings over the terms of a *new* memorandum of agreement, the parties may also become deadlocked on a dispute concerning the application or interpretation of an *existing* agreement. In the private sector, such disputes are commonly resolved through compulsory binding arbitration as the final step in a grievance procedure.[279] Section 75-4330(b) makes such procedures optional for public employers and employee organizations by providing that a memorandum of agreement may contain a grievance procedure providing for either "advisory or final and binding arbitration" of any disputes that arise with respect to interpretation of the agreement. This section also provides that the agreement may provide for the use of a *fact-finding board*. The decision of the fact-finding

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[275] *Id.* § 75-4332(a).

[276] Such potential shortcutting of those desirable steps seems unnecessary and was not provided for in the ACIR model.

[277] The Hawaii statute grants a right to strike 60 days after the fact-finding report is made public, but the Hawaii PERB may limit the strike in the event of a threat to public safety. HAWAII REV. STAT. § 89-12(b) (1976). A proposed amendment to the Kansas statute would in the case of firefighters or law enforcement officers permit a request for binding arbitration five days after the fact-finding report is made public or not later than 40 days prior to budget submission date, whichever occurs first. H. 2511 Kan. Legis. § 4 (1980). Iowa is one of several states providing that either party may request binding arbitration if an impasse persists after the fact-finding report is made public. IOWA CODE ANN. § 20.22 (West 1978).

[278] H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES 177-84 (1971) (discusses disadvantages of binding arbitration, including possible "chilling" effect on bargaining process).

[279] *See generally* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (1973).

board is to be final, unless "arbitrary and capricious," and appeals may be taken in accordance with section 60-2101.[280]

This provision for fact-finding on a grievance dispute seems completely out of place. It was not included in the ACIR model and probably will not be included in many memorandum agreements, if any. The only apparent reason for its extension to disputes of this nature is to make available a procedure for disposition of grievances by an impartial third party that would still allow some type of limited judicial review not available in grievance arbitration.[281] If that is its purpose, the provision still appears to be both unnecessary and undesirable since arbitration alone should be adequate to dispose of these questions, and the statutory definition of "fact-finding" provides only for "recommendations for settlement,"[282] which seem no different from "advisory arbitration." Moreover, this provision for fact-finding in section 75-4330(b) raises questions whether the "fact-finding board" provided for in a memorandum agreement is to be one appointed by PERB, and whether the provision in section 75-4332(e) that the funds for fact-finding services be provided "upon the request of the board" by the Department of Human Resources applies to this type of fact-finding.

C. *Success of Impasse Resolution Procedures*

Assessment of the practical value of the statutory impasse resolution procedures is extremely difficult at this stage because of the small number of cases in which PERB has been asked to render assistance in an impasse, and the even smaller number that have reached the fact-finding stage.[283] This may indicate that, with a few notable exceptions, the imminence of outside intervention through mediation and fact-finding is inducing public employers and employee organizations to reach agreement through their own meet and confer proceedings. The system is working sufficiently well, at least, that there has been only one occasion on which a public employer has charged any employee organization with a strike or concerted action in violation of section 75-4333(c)(5).[284]

VII. "MEET AND CONFER" VS. "COLLECTIVE NEGOTIATIONS"

The Act uses the euphemisms "meet and confer" and "meet and confer proceedings" to describe the process that takes place when an employee organization attempts

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[280] KAN. STAT. ANN. § 75-4330(b) (1977).

[281] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[282] KAN. STAT. ANN. § 75-4322(p) (1977). Moreover, one purpose of fact-finding is to bring the force of public opinion to bear on the parties to reach agreement on recommended settlement terms by making the recommendations public, but there should be little need to activate public opinion behind what amounts to a quasi-judicial decision on the application of an existing memorandum of agreement.

[283] Roughly 15% of all cases reach the fact finding stage. Telephone conversation with Jerry Powell, Executive Director of PERB, in Topeka (July 1980). *See, e.g.*, Pittsburg State Univ. v. Kansas Higher Educ. Ass'n, P.E.R.B. Case No. I-2-1978 (Aug. 12, 1978); City of Topeka v. Topeka Water Dep't, P.E.R.B. Case No. I 11-1976 (Dec. 2, 1976); Service Employees Local 513, P.E.R.B. Case No. I 5-1976 (June 22, 1976).

[284] Public Service Employees Local 1132 v. University of Kan. Medical Center, P.E.R.B. Case No. CAE 6-1976 (May 27, 1976). On September 11, 1978, some of the City of Wichita's fire fighters walked off the job to protest a lack of progress in contract negotiations. On September 12 a restraining order was granted on behalf of the City of Wichita. The contract dispute was subsequently resolved, with fire fighters returning to work on September 22, 1978. No prohibited practice charge was filed against the union. *See* City of Wichita v. International Ass'n of Fire Fighters Local 666, No. 78-C-2201 (Dist. Ct., Sedgwick County, Kan., Sept. 12, 1978).

to represent employees in dealing with a public employer.[285] Terms like "bargain collectively," "negotiate," and "collective bargaining," customary in the private sector, have been studiously avoided. The distinction between the meet and confer procedure in the public sector and the collective bargaining that takes place in the private sector has been described as follows in the ACIR report that accompanied the model bill on which the Kansas Act was based:

> To a greater degree than collective negotiations, the meet and confer approach is protective of public management's discretion. To a greater extent, it seeks a reconciliation with the merit system since agreements reached through the discussional process and actions taken as an implementary follow-up can not contravene any existing civil service statute. To a far greater degree than collective negotiations, it is candid and squarely confronts the reality that a governmental representative cannot commit his jurisdiction to a binding agreement or contract, and that only through ratifying and implementing legislation and executive orders can such an agreement be effected. To a greater extent, it avoids detailed, statutorily prescribed procedures applicable to all situations, and this lack of specificity in some degree and in some areas permits greater flexibility and adaptability in actual implementation. To a much greater degree, it recognizes—indeed, is rooted in—the vital differences existing between private and public employment, and does not make the mistake of relying heavily on the National Labor Relations Act as a blueprint for action in the public service.[286]

In their more unadulterated version, "meet and confer negotiations" have been defined even more narrowly as follows: "[a] particular labor-management relationship set up under some state public sector labor laws which gives public employees the right to organize and make recommendations to management but gives management the right to make the ultimate decision on terms and conditions of employment."[287]

Thus, the distinguishing feature of this pristine brand of meet and confer discussions is not just its failure to culminate in a binding contract, but more important, the reservation to the public employer of unilateral decision-making after the formality of some communication process in which the union functions essentially as an information gatherer and supplicant. If this is what the Kansas Legislature contemplated when it adopted the Public Employer-Employee Relations Act, it missed the mark. Despite its consistent use of "meet and confer" nomenclature, the Act in substance provides a "hybrid" combining some characteristics of pure meet and confer with other characteristics of collective bargaining.

By 1976, some members of the legislature had apparently come to this same conclusion. A Special Committee on Public Employer-Employee Relations in that year reported out a bill "to make it clear that this is a 'meet and confer' and not a "collective bargaining' act,"[288] as well as to make a number of technical revisions. Among the extensive amendments proposed was a restatement of the purpose of the Act to provide that nothing therein should be construed "to authorize the substitution of negotiations or collective bargaining for meeting and conferring."[289] In addition, the definition of "meet and confer" would have eliminated the crucial obligation "to

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[285] *See* notes 188-208 and accompanying text *supra*.
[286] [Reference File] GOV'T EMPL. REL. REP. (BNA) 51:111 (1970).
[287] [Reference File] GOV'T EMPL. REL. REP. (BNA) 91:17 (1977) (Glossary).
[288] SENATE COMM. ON WAYS AND MEANS, SUPPLEMENTAL INFORMATION ON S. 629, Kan. Legis. 1 (1976).
[289] S. 629, Kan. Legis. § 1(b) (1976).

endeavor to reach agreement,"[290] and the definition of "conditions of employment" about which the parties must meet and confer in good faith would have expressly excluded each of the management rights specified in section 75-4326.[291] No memorandum of agreement was to include any subject fixed by state law;[292] every proposed memorandum of agreement pertaining to employees of the state would have to be approved by the Secretary of Administration (or by the Board of Regents in certain cases) and returned to the parties for further discussion if disapproved.[293]

Probably because it was too drastic a regression, this legislation was not adopted. Its sponsors consequently may have been "hoist by their own petard." Having argued that the Act needed to be amended to make clear that it does not provide for anything resembling collective bargaining and having failed, they cannot avoid the inference that without such "clarification" the Act does not so provide. In other words, the legislature has tacitly said that the Act as it existed should *not* necessarily be construed along the lines the amendment would have required. Consequently, it would now be difficult to maintain that the Act confines public employee representation to a "cap in hand" receipt of information and a plaintive expression of views of the type sometimes envisioned by devotees of traditional "meet and confer." In addition to this inference drawn from legislative history, express provisions of the Act defining "meet and confer in good faith," "conditions of employment," and "memorandum of agreement"—along with provisions delineating the scope of a memorandum of agreement and prescribing the obligations of a public employer with respect to a certified employee organization—preclude any such restrictive view of public employee representation under the Act.

Much of the confusion on this point, understandably, stems from an apparent conflict between the statutory obligation of the public employer to meet and confer in good faith on conditions of employment and the existing statutes and administrative regulations governing many of these same subjects. This ostensible incompatibility is particularly noticeable at the state level. Final authority for basic regulation and financing of government resides with the state legislature, and the public employer representative with responsibility for meeting and conferring with the employee representative usually has only limited discretion for one segment of the state's overall operations. Consequently, the representative of the public employer may be inclined to take the position that subjects covered by statutes or administrative regulations on a statewide basis cannot be included in a memorandum of agreement and that with respect to such subjects it is pointless to go beyond a mere exchange of views. That, of course, is essentially what the amendments proposed in 1976 would have provided.

A serious blow to such a debilitative concept of the scope of "meet and confer" proceedings, and the agreements that may result, has been dealt by the recent opinion by Hearing Examiner (and Executive Director) Jerry Powell in *Local 1357, AFSCME v. Emporia State University*.[294] In that case, the University took the posi-

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[290] *Id.* § 2(o).
[291] *Id.* § 2(v).
[292] *Id.* § 9(a).
[293] *Id.* § 10(a).
[294] P.E.R.B. Case No. CAE 6-1979 (Feb. 15, 1980) (adopting Hearing Examiner's opinion without modification). The case is now on appeal to the Lyons County District Court. Emporia State Univ. v. Local 1357, 80-C-193 (filed April 29, 1980).

tion that it was not obligated to "meet and confer" with the certified representative of its service and maintenance unit concerning grievance procedure, pay differentials or overtime proposals to the extent of including such items in a memorandum of agreement or of making recommendations for change to the Secretary of Human Resources. Furthermore, the University was willing to negotiate with respect to the fifteen mandatory subjects listed in the definition of conditions of employment in section 75-4322(t) only in those areas in which existing statutes or administrative rules or regulations leave the university discretion to determine the way in which they apply to the particular agency. The Hearing Examiner rejected this contention and recommended that the university be found guilty of refusal to meet and confer in good faith in violation of section 75-4333(b)(5) and be ordered to meet and confer in good faith with respect to all subjects listed in section 75-4322(t).

The Hearing Examiner's recommendation, which was approved by the Board, is supported by careful analysis of several interrelated statutory provisions, and if affirmed by the courts, will establish once and for all that under this Act the parties "meet and confer" as equals for something more than an exchange of views followed by unilateral action, even though the topic of discussion may at the moment be governed by a statute or statewide regulation. Whichever way it finally is decided, this could well become the leading case in establishing the true character of the Act, either as a pure meet and confer statute, or as a hybrid.

In his recommendation, the Hearing Examiner began by calling attention to the distinction between the "representative of the public agency," defined in section 75-4322(h), and the "governing body," as defined in section 75-4322 (g). Under the definition of "meet and confer in good faith" in section 75-4322(m) (and by implication under the obligation set forth in section 75-4327(b)), it is the representative of the public agency who incurs the statutory obligation to meet and confer in good faith. The Hearing Examiner pointed out that the subjects listed in the definition of "conditions of employment" in section 75-4322(t) are "mandatory" subjects about which employers and employees are *required* to meet and confer in good faith on request. A majority of these, however, are governed by statute or administrative rule or regulation, and thus raise the question whether the legislature erred in listing such subjects or intended to recognize the potential problems with regard to such items and to provide a means for resolving them. Thus, the case goes directly to the inherent conflict between the statutory obligation of the public employer and the existing statutes and administrative regulations.[295]

The Hearing Officer concluded that "the legislature was very much aware that many of the subjects enumerated in section 75-4322(t) would require passage of legislation or changes in existing administrative rules and regulations for implementation," and had provided an orderly procedure for doing so.[296] He reasoned that under section 75-4327(b), the representative of the public agency may, but is not required to, enter into a "memorandum of agreement" with the recognized employee organization after meeting and conferring in good faith on the terms and conditions of employment. He noted that "memorandum of agreement" is defined in section 75-4322(n) as a "memorandum of understanding . . . which may be presented to the governing body of the public employer." In his opinion, the *memoran-*

[295] *See* text at notes 189-97 *supra*.
[296] P.E.R.B. Case No. CAE 6-1979, at 8.

dum of understanding does not become a *binding memorandum of agreement* until approved by the governing body in accordance with section 75-4330(c). If approved, its implementation is to be accomplished by amending the rules and regulations of the Secretary of Administration or by enacting legislation at the next session of the legislature. This conclusion is buttressed by the provision that

> [i]f *agreement* is reached by *the representative of the public agency* and the recognized employee organization, they jointly shall prepare a memorandum of understanding and, within fourteen (14) days, present it to the appropriate governing body or authority for determination. . . . If a *settlement* is reached with an employee organization and the *governing body or authority*, the governing body or authority shall implement the settlement in the form of a law, ordinance, resolution, executive order, rule or regulation. If the governing body or authority rejects a proposed memorandum, the matter shall be returned to the parties for further deliberation.[297]

The conclusion is also consistent with section 75-4330(c), which provides that when a memorandum of agreement applies to the state or to a state agency, it shall not become effective for any matter requiring passage of legislation or State Finance Council approval until approved as provided in that subsection. Provisions such as this would be superfluous unless the legislature had intended to obligate state agencies to meet and confer over subjects requiring legislation or changes in administrative rules and regulations or statutes.

Furthermore, the Hearing Examiner pointed out that the provisions of section 75-4330(a) defining the scope of a memorandum of agreement state that it "may extend to all matters relating to conditions of employment," subject only to four stated exceptions, one of which is "any subject preempted by federal or state law." As he observed, "There is a conspicuous absence of any mention of matters set by administrative rule and regulation."[298] With unassailable logic, he concluded that any matter relating to a condition of employment may be included within a memorandum of agreement unless it is specifically preempted by state or federal law. He noted that the subject of wages and salaries, included in section 75-4322(t) as a mandatory subject of "meet and confer" procedures, is not preempted by state law so far as the provisions of a pay plan are concerned, although section 75-2935(4) preempts any negotiations over *who* establishes the pay plan. Therefore, a memorandum of agreement may legally contain amendments to the pay plan agreed upon between the representative of the public agency and the employee organization. These amendments then would be presented to the Director of Personnel Services for adoption, modification, or rejection after consultation with the Secretary of Administration and the Director of the Budget. If adopted, the amendments would be subject to final approval by the Governor. Similarly, a grievance procedure (another mandatory subject of meet and confer proceedings) in a memorandum of agreement providing for arbitration of dismissals could be approved by the appointing authority and the Director of Personnel Services as a supplement to the civil service procedures established in section 75-2949.

The Hearing Examiner's opinion is supported by the language of the statute, by recent legislative history, and by the basic purpose of the Act. If the courts affirm

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[297] KAN. STAT. ANN. § 75-4331 (1977) (emphasis added).
[298] P.E.R.B. Case No. C4E 6-1979, at 5.

the Board's approval of the Hearing Examiner's opinion this decision will establish the principle that the fundamental difference between "meet and confer" under this Act and "collective bargaining" in the private sector or "collective negotiations" under the public employee relations laws of some states is that any understanding or agreement reached between the representative of the public agency and the representative of employees with respect to subjects covered by statute or regulation may be only conditional, subject to final approval by the governing body. The required scope of negotiations may also be somewhat narrower under the Act because of the enumeration of subjects that constitute "conditions of employment," and of the list of reserved rights of management. The representative of the public employer may not, however, refuse to confer in good faith—in an endeavor to reach agreement—on a proposed subject simply because it happens to be governed by regulation or statute.

If the Board's decision in this case is not upheld, "meeting and conferring" by public employees in Kansas will revert to the form of "collective begging" that preceded enactment of this legislation since virtually all the subjects listed in the definition of "conditions of employment" are or could be covered by regulation or statute. A reversal probably would focus on the proviso to the definition of conditions of employment stating that "nothing in this act shall authorize *the adjustment or change* of such matters which have been fixed by statute or by the constitution of this state."[299] If, however, this qualification were interpreted to remove these matters from *discussion and conditional agreement,* all of the statutory procedures for governing body approval of agreement provisions requiring regulatory or statutory change would become a nullity, a result the legislature hardly could have intended. More in keeping with the legislative purpose would be to interpret this qualification on the definition of conditions of employment as preventing agreed change *in itself* from authorizing a deviation from conflicting statutory provisions.

In all probability, hard line advocates of the pure "meet and confer" philosophy of public employee relations in Kansas will ultimately find that the difference between "meet and confer proceedings" called for under the Kansas Act and the "collective negotiations" provided in the alternative ACIR model is primarily one of terminology. A leading commentator on labor relations in the public sector has observed that the definition of "meet and confer" in the Kansas statute "clearly is at variance with the pure 'meet and confer' model" because of the requirement in Kansas of an "endeavor to reach agreement."[300] He also commented,

> To the extent that "meet and confer" suggests that the parties do not meet as "equals" at the bargaining table, it is a bad term; and to the extent that it suggests that there is a meaningful distinction between "meet and confer" and "collective negotiations," it is a misleading term.[301]

VIII. REGULATION OF INTERNAL UNION AFFAIRS

The Act regulates the internal affairs of public employee organizations in two ways that parallel the regulation of the internal affairs of labor organizations under

[299] KAN. STAT. ANN. § 75-4322(t) (1977) (emphasis added).
[300] Edwards, *An Overview of the "Meet and Confer" States—Where are We Going?*, 16 MICH. L. QUANDRANGLE NOTES 10-15 (1972), *reprinted in* LABOR RELATIONS LAW, *supra* note 8.
[301] LABOR RELATIONS LAW, *supra* note 8, at 267.

the Kansas Employer-Employee Relations Act. First, the Act requires annual registration of business agents;[302] and second, it requires annual reports of financial condition.[303] To obtain a registration certificate as a business agent for an employee organization, an individual must pay a registration fee of one dollar and show that he or she is a citizen of the United States and a resident of Kansas and is authorized to act as agent for the employee organization.[304] A certificate obtained under section 44-804 will satisfy this requirement.[305]

The annual report of an employee organization "operating" in the state and having one hundred or more members must include an audited statement of income, expenditures, assets, and liabilities; information about the location and mailing address of its office; and name and title of each of its officers and registered business agents together with their salaries, wages, bonuses, other remuneration paid, and mailing addresses; the date of the regular election of officers; and the rate of initiation fees, dues, assessments, and other periodic payments required of members.[306] In lieu of this annual report, the organization may file copies of reports that have already been filed with the United States Department of Labor under the federal Labor Management Reporting and Disclosure Act.[307] An annual report filed under section 44-806 will also be deemed to satisfy this requirement.[308]

By avoiding duplication of other state or federal registration and reporting, the Act probably provides desireable accountability while it enhances the acceptance by the public of public employee representation. Surprisingly, however, the Act fails to include provisions suggested in the ACIR model designed to assure internal union democracy through a "bill of rights" and certain required provisions in the constitution or by-laws of the organization[309] similar to the provisions of the federal Labor Management Reporting and Disclosure Act.[310] This is probably not a serious defect because most of the public employee organizations are covered by the LMRA, which affords ample protection in this area.

IX. SUMMARY AND CONCLUSION

The Kansas Legislature has had the wisdom to recognize that public employer-employee relations present a significant state problem worthy of statutory regulation. As in many other states, the difficulty has been in arriving at a consensus that balanced the vigorously competing interests of government, public employees, and the public at large in a manner reasonably satisfactory to all parties concerned. The modified version of the ACIR model "meet and confer" bill finally adopted in 1971—after two years of groping—inevitably became something of a patchwork, with overlapping and seemingly inconsistent provisions whose practical applications still have not been clearly delineated. The Act in its original form has, nonetheless, stood up remarkably well against an onslaught of amendments and extreme interpretations,

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[302] KAN. STAT. ANN. § 75-4336 (1977).
[303] *Id.* § 75-4337.
[304] *Id.* § 75-4336(a).
[305] *Id.* § 75-4336(c).
[306] *Id.* § 75-4337(a), (b).
[307] 29 U.S.C. §§ 431-531 (1976); KAN. STAT. ANN. § 75-4337(c) (1977).
[308] KAN. STAT. ANN. § 75-4337(d) (1977).
[309] ACIR MODEL ACT, § 15(c)-(f), *supra* note 16, at 51:215-16.
[310] 29 U.S.C. §§ 431-531 (1976).

and still remains substantially intact. Future attacks probably will concentrate on the failure to require inclusion of the state's political subdivisions.

Though still rather limited, experience over the past eight years has demonstrated no serious problems with administrative procedure. While the necessity for a five-member tri-partite PERB is debatable, PERB—with assistance of its small full-time staff—has managed to function with refreshing informality and a minimum of bureaucratic complications.

PERB has managed to steer a middle course through the uncharted sea of unit determinations in state and local government, giving effect to the wishes of the parties when there is mutual agreement, while at the same time guiding both employer and employee organizations away from extreme positions when there has been a contest. (The inclusion of the University of Kansas Law School faculty with a campus-wide unit, contrary to practically all state and federal precedent, has been its most obvious aberration.) Elections for designation of employee representatives have been conducted with surprisingly few questions or objections.

The rights of public employees and employers have been well protected by the statutorily prohibited practices. The small number of complaints filed have in most cases been settled without necessitating formal proceedings, and there has been little evidence of the vicious labor-management combat found all too often in the private sector.

That is not to say that all has been sweetness and light. As might be expected between adversaries unaccustomed to dealing with each other with mutual respect in matters of vital concern, serious conflicts still remain to be resolved at the bargaining table—or as some would insist, in "meet and confer discussions." The law is necessarily vague as to the manner in which the parties must conduct their negotiations, and the required scope of their negotiations is still in the process of being defined. The underlying problem seems to be a basic philosophical difference as to the true nature of the "meet and confer" proceedings contemplated by the legislature, but it should not be long before the statutory ambiguity is clarified.

Perhaps the most heartening aspect of this controversial piece of legislation is that in eight years of experience there has been only one serious interruption of essential governmental services.[311] Although impasse, animosity, and tension have occurred, as yet, there has been practically none of the open warfare experienced in other jurisdictions. The most probable explanation is that the statute is working. It remains to be seen how long and how well the Act's impasse resolution procedures will withstand the pressure of militant public employee demands against strenuous employer resistance.

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[311] *See* note 284 *supra*.

MEMORANDUM

July 13, 1984

1-29-85
AH#9

TO: Special Committee on Labor and Industry

FROM: Kansas Legislative Research Department

RE: Proposal No. 30 — Public Employer-Employee Relations Act

This memorandum includes a copy of the Public Employer-Employee Relations Act, together with summary comments about selected provisions.

Public Employer-Employee Relations Act

75-4321. Declaration of policy and objectives; election by public employer to be bound by act; termination. (a) The legislature hereby finds and declares that:

(1) The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees;

(2) the denial by some public employers of the right of public employees to organize and the refusal by some to accept the principle and procedure of full communication between public employers and public employee organizations can lead to various forms of strife and unrest;

(3) the state has a basic obligation to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government;

(4) there neither is, nor can be, an analogy of statuses between public employees and private employees, in fact or law, because of inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions; and

(5) the difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion and in the fact that constitutional provisions as to contract, property, and due process do not apply to the public employer and employee relationship.

(b) Subject to the provisions of subsection (c), it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law. It is also the purpose of this act to promote the improvement of employer-employee relations within the various public agencies of the state and its political subdivisions by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, or to refrain from joining, and be represented by such organizations in their employment relations and dealings with public agencies.

Comment

This section contains a statement of the purpose of the law. As a rationale for such a law, there is a recognition of the need to develop harmonious relationships between the government and its employees. It is noted that denial of the right of public employees to organize and refusal to recognize the principle of full communication between public employers and public employee organizations can lead to strife and unrest.

There is a strong declaration of the differences between public and private employment and the consequences of those differences.

A stated purpose of the law is to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of the law.

(Note: The Kansas Supreme Court in 1983 in the case Kansas Board of Regents v. Pittsburg State University Chapter of K-NEA (233 K. 801), concluded that this law is not a "meet and confer" act as the Regents had contended, but a hybrid which contains some elements of "meet and confer" and some of collective bargaining. Thus, the Court concluded that the law imposes on both parties the obligation to meet, confer, and negotiate in good faith with affirmative willingness to resolve grievances and disputes, and to endeavor to reach agreement on conditions of employment.) (See also, definition of the term "meet and confer in good faith" in K.S.A. 75-4322(m).)

The law applies to the state. It also applies to public employers other than the state when a majority of the governing body opts for coverage under the law.

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Public Employer-Employee Relations Act

75-4321 (continued)

(c) The governing body of any public employer, other than the state and its agencies, by a majority vote of all the members may elect to bring such public employer under the provisions of this act, and upon such election the public employer and its employees shall be bound by its provisions from the date of such election. Once an election has been made to bring the public employer under the provisions of this act it continues in effect unless rescinded by a majority vote of all members of the governing body. No vote to rescind shall take effect until the termination of the next complete budget year following such vote.

Comment

75-4322. Definitions. As used in this act:

(a) "Public employee" means any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees.

(b) "Supervisory employee" means any individual who normally performs different work from his or her subordinates, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend a preponderance of such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. A memorandum of agreement may provide for a definition of "supervisory employees" as an alternative to the definition herein.

(c) "Confidential employee" means any employee whose unrestricted access to confidential personnel files or other information concerning the administrative operations of a public agency, or whose functional responsibilities or knowledge in connection with the issues involved in the meet and confer process would make his or her membership in the same employee organization as other employees incompatible with his official duties.

(d) "Professional employee" includes any employee: (1) Whose work is predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; involves the consistent exercise of discretion and judgment; requires knowledge of an advanced type in a field of science or learning customarily acquired by prolonged study in an institution of higher learning; or (2) who has completed courses of prolonged study as described in paragraph (1) of this subsection, and is performing related work under the supervision of a professional person in order to qualify as a professional employee as defined in paragraph (1) of this subsection; or (3) attorneys-at-law or any other person who is registered as a qualified professional by a board of registration or other public body established for such purposes under the laws of this state.

The section defines the terms that are used throughout the law. Selected definitions are highlighted below.

The term "public employee" includes any person employed by a public agency; it excludes supervisory employees, professional employees of school districts (those persons covered by the Professional Negotiations Act) and elected and management officials and confidential employees.

The term "public agency" or "public employer" means every governmental subdivision, including any county, township, city, school district, special district, board, commission, or instrumentality or other similar unit whose governing body exercises similar governmental powers, and the state of Kansas and its state agencies.

(Note: In Kansas Board of Regents v. Pittsburg State University Chapter of K-NEA (233 K. 801), the Kansas Supreme Court determined that the Board of Regents is the public employer under the law of teaching faculty of the institutions of higher learning under the Regents' jurisdiction.)

In the case of the state, the "representative of the public agency" means a team of persons, the head of which shall be a person designated by the Secretary of Administration and heads of the state agency or state agencies involved or one person designated by each such state agency head.

The term "meet and confer in good faith" is the process whereby the representatives of the public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment.

The law defines "conditions of employment" to mean salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in the act authorizes the adjustment or change of such matters which have been fixed by statute or by the state constitution

(Note: With regard to the meaning of the term "conditions of employment," the Kansas Supreme Court in Kansas Board of Regents v. Pittsburg State University Chapter of K-NEA (233 K. 801) noted that in making a determination of matters that are mandatorily negotiable, the Public Employee Relations Board (PERB) has utilized a balancing test. PERB's interpretation of the law was regarded by the Court to be reasonable; the test was deemed necessary to carry out the law and was grounded in the statute; and PERB's actions were reasonable and within the scope of its authority.

Public Employer-Employee Relations Act

75-4322 (continued)

(e) "Elected and management officials" means any elective official and any appointed officer charged by law with major administrative and management responsibilities.

(f) "Public agency" or "public employer" means every governmental subdivision, including any county, township, city, school district, special district, board, commission, or instrumentality or other similar unit whose governing body exercises similar governmental powers, and the state of Kansas and its state agencies.

(g) "Governing body" means the legislative body, policy board or other authority of the public employer possessing legislative or policymaking responsibilities pursuant to the constitution or laws of this state.

(h) "Representative of the public agency" means the chief executive officer of the public employer or his or her designee, except when the governing body provides otherwise, and except in the case of the state of Kansas and its state agencies. Such chief executive shall be for counties, the chairman of the board of county commissioners; for cities, the mayor, city manager or city superintendent; for school districts, the president of the board of education; and for other local units, such similar elected or appointed officer. In the case of the state of Kansas and its state agencies, "representative of the public employer" means a team of persons, the head of which shall be a person designated by the secretary of administration and the heads of the state agency or state agencies involved or one person designed by each such state agency head.

(i) "Employee organization" means any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in dealings with that public agency over conditions of employment and grievances.

(j) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency or certified as representing a majority of the employees of an appropriate unit.

(k) "Business agent" means any authorized person who is a full-time official of an employee organization and whose principal duties are to act or to attempt to act for an employee organization (1) in proceedings to meet and confer and other proceedings involving a memorandum of agreement, (2) in servicing existing memorandums of agreement, or (3) in organizing employees into employee organizations.

(l) "Board" means the public employee relations board established pursuant to this act.

(m) "Meet and confer in good faith" is the process whereby the representative of a public agency and representatives of recognized employee organizations have the mutual obligation personally to meet and confer in order to exchange freely information, opinions and proposals to endeavor to reach agreement on conditions of employment.

(n) "Memorandum of agreement" means a written memorandum of understanding arrived at by the representatives of the public agency and a recognized employees organization which may be presented to the

Comment

Specifically, PERB had ruled these items to be mandatorily negotiable: salary generation and salary allocation, out-of-state travel, promotions (not the right to grant promotions but the evaluative criteria to be used), summer employment, tenure (the period of time served before a tenure consideration is made), retrenchment (methods and procedures to be used), and access to personnel files. (PERB also held that academic freedom was not mandatorily negotiable, but that item was not included in the appeal to the Court from the PERB finding.)

K-NEA had proposed to meet and confer on various subjects. Because the above items were not listed by name on the statutory laundry list of conditions of employment, the Regents refused to discuss them; additionally, the Regents believed that to discuss these matters would infringe upon their management rights and violate the limitations in K.S.A. 75-4330(a)(3) regarding what can be contained in a memorandum of agreement.

PERB employed a balancing test to determine if a particular item was mandatorily negotiable. If an item was significantly related to an express condition of employment, and if negotiating the item would not unduly interfere with management rights reserved by law to the employer, the item was considered to be mandatorily negotiable. In this regard PERB relied on the language in K.S.A. 75-4321(b). PERB had concluded that the laundry list in this section was not literal or exclusive, and that items which related to the enumerated subjects, upon request, had to be negotiated. The Court, in putting its stamp of approval on PERB's "significantly related" test, noted that the test was designed to steer a middle course between minimal negotiability, with nearly absolute management prerogative, and complete negotiability, with few management prerogatives.)

The term "budget submission date" for the state means September 15.

Public Employer-Employee Relations Act

75-4322 (continued)

governing body of a public employer or its statutory representative and to the membership of such organization for appropriate action.

(o) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding conditions of employment between representatives of the public agency and recognized employee organizations through interpretation and advice.

(p) "Fact-finding" means investigation of such a dispute by an individual, panel, or board with the fact-finder submitting a report to the parties describing the issues involved; the report shall contain recommendations for settlement and may be made public.

(q) "Arbitration" means interpretation of the terms of an existing or a new memorandum of agreement or investigation of disputes by an impartial third party whose decision may or may not be final and binding. Arbitration is advisory when the results are not binding upon the parties; it is final and binding when both parties, of their own volition, agree to submit a dispute to, and to abide by the decision of, the impartial third party.

(r) "Strike" means an action taken for the purpose of coercing a change in the conditions, rights, privileges or obligations of employment through the failure by concerted action with others to report for duty or to work at usual capability in the performance of the normal duties of employment.

(s) "Lockout" means action taken by the public employer to provoke interruptions of or prevent the continuity of work normally and usually performed by the employees for the purpose of coercing the employees into relinquishing rights guaranteed by this act.

(t) "Conditions of employment" means salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, prepaid legal service benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the constitution of this state.

(u) "Grievance" means a statement of dissatisfaction by a public employee, supervisory employee, employee organization or public employer concerning interpretation of a memorandum of agreement or traditional work practice.

(v) "Budget submission date" means (1) for any public employers subject to the budget law in K.S.A. 79-2925 *et seq.* the date of July 1, and (2) for any other public employer the date fixed by law. "Budget submission date" means, in the case of the state and its state agencies, the date of September 15.

(w) "Legislature" means the legislature of the state of Kansas.

(x) "State agency" means the same as is ascribed thereto in K.S.A. 75-3701.

Comment

Public Employer-Employee Relations Act

75-4323. Public employee relations board; creation, membership; terms; compensation and expenses; powers and duties; appointment of personnel or contracts for performance of functions; rules and regulations. (a) There is hereby created the public employee relations board, which shall consist of five members appointed by the governor, subject to confirmation by the senate as provided in K.S.A. 1982 Supp. 75-4315b. One member shall be representative of public employers; one member shall be representative of public employees; and three members shall be representative of the public at large and hold no other public office or public employment. Of the three members representing the public, one shall be selected by the board as chairperson thereof. Not more than three members of the board shall be members of the same political party. Each member shall be appointed for a term of four years. The governor shall appoint qualified successors to fill vacancies occurring by reason of the expiration of the terms. In case of any other vacancy on the board, the governor shall appoint a qualified successor for the unexpired term.

(b) Members of the public employee relations board attending meetings of the board, or attending a subcommittee meeting thereof authorized by the board, shall be paid compensation, subsistence allowances, mileage and other expenses as provided in K.S.A. 75-3223 and amendments thereto. The secretary of human resources shall provide office space and such clerical and other staff assistance as necessary to assist the board in carrying out the provisions of this act.

(c) The secretary of human resources may establish, after consulting with representatives of employee organizations and of public agencies, panels of qualified persons, broadly representative of the public, to be available to serve as mediators, arbitrators or members of fact-finding boards and may appoint or may contract with such persons as necessary for the performance of the board's functions, including but not limited to mediators, members of fact-finding boards and representatives of employee organizations and public employers to serve as technical advisors to fact-finding boards. Such persons shall perform the duties and exercise the powers prescribed by the secretary, by the board or by law. The secretary shall fix the compensation of such persons and shall provide for reimbursement of their expenses within the amounts made available therefor by the legislature.

(d) In addition to the authority provided in other sections, the board may:

(1) Establish procedures for the prevention of improper public employer and employee organization practices as provided in K.S.A. 75-4333, except that the board shall provide only for the entering of an order directing the public agency or employee organization to meet and confer in good faith in the case of a claimed violation of subsection (b)(5) or (c)(3) of that section. The pendency of proceedings under this paragraph shall not be used as the basis to delay or interfere with determination of representation status pursuant to K.S.A. 1982 Supp. 75-4327 or with meeting and conferring.

Comment

This section creates the Public Employee Relations Board (PERB). It is composed of five members who are appointed by the Governor and confirmed by the Senate. One member is representative of public employers; one is representative of public employees, and three are representative of the public at large. One of the three public at large members is selected as chairperson. No more than three members can be of the same political party. Board member terms are for four years.

The Secretary of Human Resources provides space and staff assistance to PERB. The Secretary also maintains a roster of persons available to serve as mediators, arbitrators or members of fact-finding boards and contracts with such persons for the performance of the Board's functions.

PERB is authorized to hold hearings and make inquiries to carry out its responsibilities.

Public Employer-Employee Relations Act

75-4323 (continued)

(2) Hold such hearings and make such inquiries as it considers necessary to carry out properly its functions and powers. For the purpose of such hearings and inquiries, the board may administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence and compel attendance of witnesses and the production of documents by the issuance of subpoenas. Any of these powers may be delegated to any member of the board or to any person appointed by the secretary of human resources to perform the functions of the board. The subpoenas shall be regulated and enforced in the same manner as provided for the secretary of human resources under the provisions of K.S.A. 44-611 and amendments thereto.

(3) Make, amend and rescind such rules and regulations, and exercise such other powers, as appropriate to effectuate the purposes and provisions of this act.

(e) The board shall intervene in the public employer-public employee relations of political subdivisions to the minimum extent possible to secure the objectives expressed in K.S.A. 75-4321.

Comment

75-4324. Employees' right to form, join and participate in employee organizations. Public employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing, for the purpose of meeting and conferring with public employers or their designated representatives with respect to grievances and conditions of employment. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations.

The section gives public employees the right to form and participate in employee organizations of their own choice for the purpose of meeting and conferring with public employers or their representatives with respect to grievances and conditions of employment. Such employees also have the right to refuse to join or participate in employee organizations.

75-4325. Supervisory employee not prohibited from membership in employee organization. Nothing herein shall prohibit any individual employed as a supervisory employee from becoming or remaining a member of an employee organization, but no public employer subject to this act shall be compelled to deem individuals defined herein as supervisory employees as public employees for the purposes of this act.

Supervisory employees may be members of employee organizations, but the employer is not compelled to meet and confer with such employees under this law.

75-4326. Existing rights of public employer not affected. Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:

(a) Direct the work of its employees;

(b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency;

(c) Suspend or discharge employees for proper cause;

(d) Maintain the efficiency of governmental operation;

(e) Relieve employees from duties because of lack of work or for other legitimate reasons;

(f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and

(g) Determine the methods, means and personnel by which operations are to be carried on.

The section seeks specifically to preserve certain listed public employer management rights.

Public Employer-Employee Relations Act

75-4327. Public employee organizations; recognition and certification; membership; meet and confer; determination and certification of appropriate unit; rules and regulations. (a) Public employers shall recognize employee organizations for the purpose of representing their members in relations with public agencies as to grievances and conditions of employment. Employee organizations may establish reasonable provisions for an individual's admission to or dismissal from membership.

(b) Where an employee organization has been certified by the board as representing a majority of the employees in an appropriate unit, or recognized formally by the public employer pursuant to the provisions of this act, the appropriate employer shall meet and confer in good faith with such employee organization in the determination of conditions of employment of the public employees as provided in this act, and may enter into a memorandum of agreement with such recognized employee organization.

(c) A recognized employee organization shall represent not less than a majority of the employees of an appropriate unit. When a question concerning the designation of an appropriate unit is raised by a public agency, employee organization or by five or more employees, the public employee relations board, at the request of any of the parties, shall investigate such question and, after a hearing, rule on the definition of the appropriate unit in accordance with subsection (e) of this section.

(d) Following determination of the appropriate unit of employees, the public employee relations board, at the request of the public employer or on petition of employees, shall investigate questions and certify to the parties in writing, the names of the representatives that have been designated for an appropriate unit. The filing of a petition for the investigation or certification of a representative of employees shall show the names of not less than 30% of the employees within an appropriate unit. In any such investigation, the board may provide for an appropriate hearing, shall determine voting eligibility and shall take a secret ballot of employees in the appropriate unit involved to ascertain such representatives for the purpose of formal recognition. Recognition shall be granted only to an employee organization that has been selected as a representative of an appropriate unit, in a secret ballot election, by a majority of the employees in an appropriate unit who voted at such election. Each employee eligible to vote shall be provided the opportunity to choose the employee organization such employee wishes to represent such employee, from among those on the ballot, or to choose "no representation." When an election in which the ballot provided for three or more choices between representatives and no representation resulted in no choice receiving a majority of the valid votes cast, the board shall conduct a run-off election by secret ballot. The ballot in a run-off election shall only provide for a selection between the two choices receiving the largest and second largest number of votes in the original election. The board is authorized to hold elections to determine whether: (1) An employee organization should be recognized as the formal representative of employees in a unit; (2) an employee organization should replace another employee organization as the formal representative of employees in a unit; (3) a recognized employee organization should be decertified.

Comment

The section provides the mechanics for certifying the appropriate units of employees for purposes of the law and for granting recognition of employee organizations. The purpose of recognizing such organizations is to establish an orderly procedure for representation of the organization's members in relations with agencies as to grievances and conditions of employment.

The law requires the employer to meet and confer in good faith with the recognized employee organization in the determination of conditions of employment as provided in the law. The employer may enter into a memorandum of agreement with the organization.

An employee organization must represent a majority of the employees of the unit. If a question is raised by a public agency, employee organization or by five or more employees about the designation of an appropriate unit, PERB will investigate and, after a hearing, resolve the issue.

Once unit determination has been resolved, PERB, at the request of the employer or on petition of 30 percent or more of the employees of the unit, investigates and certifies to the parties the names of the representatives that have been designated for an appropriate unit. PERB resolves questions regarding formal recognition of employee representatives by a secret ballot election.

When such an election is held, the employee must have the opportunity to choose from among the employee organizations listed on the ballot or to choose "no representation."

If there are three of more choices on the ballot and no choice receives a majority of the votes cast, PERB must conduct a secret ballot run-off election on the two choices that received the most votes in the original election. PERB may hold elections to determine whether:

1. an employee organization should be recognized;
2. one employee organization should replace another as the formal representative of the employees of the unit; or
3. a recognized organization should be decertified.

A certification issue cannot be considered by PERB if a petition is filed more than 150 days or less than 90 days prior to the expiration of an existing memorandum of agreement

Generally, PERB is not required to consider a representation question for a period of one year after an organization has been certified.

The law states that a recognized employee organization shall not include both professional and other employees, unless a majority of professional employees vote for inclusion in the organization, uniform police and public property security guards with other public employees, or uniformed firemen with other public employees.

The law states an intent to conduct employer-employee relations affecting the finances of the employer at such times as to permit a memorandum of agreement to be duly implemented in the budget preparation process. Thus, an employer is not required to recognize an employee organization not previously recognized during the 60 days prior to the budget submission date nor is the employer obligated to initiate any meet and confer proceedings with any recognized employee organization within 30 days before and after its budget submission date — which date is September 15 for the state and its agencies.

Public Employer-Employee Relations Act

75-4327 (continued)

Any petition calling for an election in accordance with this section shall be dismissed by the board without determining the questions raised therein if such petition is filed more than 150 days or less than 90 days prior to the expiration date of an existing memorandum of agreement which governs the terms and conditions of employment of the employees within the appropriate unit.

If the board has certified a formally recognized representative in an appropriate unit, it shall not be required to consider the matter again for a period of one year, unless the board determines that sufficient reason exists. The board may promulgate such rules and regulations as may be appropriate to carry out the provisions of subsections (c) and (d) of this section.

(e) Any group of public employees considering the formation of an employee organization for formal recognition, any public employer considering the recognition of an employee organization on its own volition and the board, in investigating questions at the request of the parties as specified in this section, shall take into consideration, along with other relevant factors: (1) The principle of efficient administration of government; (2) the existence of a community of interest among employees; (3) the history and extent of employee organization; (4) geographical location; (5) the effects of overfragmentation and the splintering of a work organization; (6) the provisions of K.S.A. 75-4325; and (7) the recommendations of the parties involved.

(f) A recognized employee organization shall not include: (1) Both professional and other employees, unless a majority of the professional employees vote for inclusion in the organization; (2) uniform police employees and public property security guards with any other public employees, but such employees may form their own separate homogeneous units; or (3) uniformed firemen with any other public employees, but such employees may form their own separate homogeneous units. The employees of a public safety department of cities which has both police and fire protection duties shall be an appropriate unit.

(g) It is the intent of this act that employer-employee relations affecting the finances of a public employer shall be conducted at such times as will permit any resultant memorandum of agreement to be duly implemented in the budget preparation and adoption process. A public employer, during the 60 days immediately prior to its budget submission date, shall not be required to recognize an employee organization not previously recognized, nor shall it be obligated to initiate or begin meet and confer proceedings with any recognized employee organization for a period of 30 days before and 30 days after its budget submission date.

(h) No employee organization shall be recognized unless it establishes and maintains standards of conduct providing for: (1) The maintenance of democratic procedures and practices, including periodic elections by secret ballot and the fair and equal treatment of all members; and (2) the maintenance of fiscal integrity, including accurate accounting and periodic financial reports open to all members and the prohibition of business or financial interests by officers which conflict with their fiduciary responsibilities.

Comment

Public Employer-Employee Relations Act	Comment
75-4328. Recognition of right of employee organization to represent employees. (a) A public employer shall extend to a certified or formally recognized employee organization the right to represent the employees of the appropriate unit involved in meet and confer proceedings and in the settlement of grievances, and also shall extend the right to unchallenged representation status, consistent with subsection (d) of K.S.A 75-4327, during the twelve (12) months following the date of certification or formal recognition.	The section indicates that the employer extends the right to the employee organization to represent the employees of an appropriate unit in meet and confer proceedings and in the settlement of grievances. Consistent with K.S.A. 75-4327(d), as amended, exclusive recognition status extends for 12 months following the date of certification or formal recognition.
75-4329. Disputes concerning recognition of employee organization; procedure for resolving. Every public agency, other than the state, acting through its governing body, may establish procedures; not inconsistent with the provisions of K.S.A. 75-4327 and 75-4328 and, after consultation with interested employee organizations and employer representatives, may resolve disputes concerning the recognition status of employee organizations composed of employees of such agency. In the absence of such procedures, such disputes shall be submitted to the public employee relations board in accordance with K.S.A. 75-4327.	The section allows public agencies other than the state to establish their own procedures (not inconsistent with K.S.A. 75-4327 and 75-4328, as amended) to resolve recognition disputes. In the absence of such procedures, PERB resolves the matter in accord with K.S.A. 75-4327, as amended.
75-4330. Memorandum agreements; scope and other limitations thereon; grievance procedures; arbitration; appeals. (a) The scope of a memorandum of agreement may extend to all matters relating to conditions of employment, except proposals relating to (1) any subject preempted by federal or state law or by a municipal ordinance passed under the provisions of section 5 of article 12 of the Kansas constitution, (2) public employee rights defined in K.S.A.75-4324, (3) public employer rights defined in K.S.A. 75-4326, or (4) the authority and power of any civil service commission, personnel board, personnel agency or its agents established by statute, ordinance or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence, from which appointments or promotions may be made to positions in the competitive division of the classified service of the public employer served by such civil service commission or personnel board. Any memorandum of agreement relating to conditions of employment entered into may be executed for a maximum period of three (3) years, notwithstanding the provisions of the cash basis law as contained in K.S.A. 10-1102 *et seq.* and the budget law as contained in K.S.A. 79-2925 *et seq.* (b) Such memorandum agreement may contain a grievance procedure and may provide for the impartial arbitration of any disputes that arise on the interpretation of the memorandum agreement. Such arbitration shall be advisory or final and binding, as determined by the agreement, and may provide for the use of a fact-finding board. The public employee relations board is authorized to establish rules for procedure of arbitration in the event the agreement has not established such rules. In the absence of arbitrary and capricious rulings by the fact-finding board during arbitration, the decision of that board shall be final. Appeals shall be taken in accordance with the provision of K.S.A. 60-2101.	The section indicates that a memorandum of agreement may cover all matters relating to conditions of employment, except items relating to: 1. any subject preempted by federal or state law or by municipal ordinance; 2. public employee rights defined in K.S.A. 75-4324 (shown above); 3. public employer rights defined in K.S.A. 75-4326 (shown above); or 4. the authority of any civil service commission, personnel board, personnel agency or its agents established by statute, ordinance or special act to conduct and grade merit examinations and to rate candidates for appointments or promotions in the classified service. The duration of a memorandum of agreement relating to conditions of employment may not exceed three years. A memorandum of agreement may contain a grievance procedure which may provide for arbitration (advisory or binding) regarding interpretation of the memorandum of agreement. With respect to the state, a memorandum of agreement is not effective as to any matter that requires passage of legislation or State Finance Council approval until such action is taken. Each memorandum of agreement involving a state agency must be submitted to the Finance Council. Any part of the memorandum of agreement which relates to a matter that can be implemented by amendment of Department of Administration rules and regulations or by amendments to the state pay plan and state pay schedules may be approved or rejected by the Finance Council. Any part of a memorandum of agreement that requires passage of legislation must be submitted to the Legislature at its next regular session. If approved by the Legislature, that part of the agreement becomes effective on the date specified by the Legislature.

Public Employer-Employee Relations Act

75-4330 (continued)

(c) Notwithstanding the other provisions of this section and the act of which this section is a part, when a memorandum of agreement applies to the state or to any state agency, the same shall not be effective as to any matter requiring passage of legislation or state finance council approval, until approved as provided in this subsection (c). When executed, each memorandum of agreement shall be submitted to the state finance council. Any part or parts of a memorandum of agreement which relate to a matter which can be implemented by amendment of rules and regulations of the secretary of administration or by amendment of the pay plan and pay schedules of the state may be approved or rejected by the state finance council, and if approved, shall thereupon be implemented by it to become effective at such time or times as it specifies. Any part or parts of a memorandum of agreement which require passage of legislation for the implementation thereof shall be submitted to the legislature at its next regular session, and if approved by the legislature shall become effective on a date specified by the legislature.

Comment

(Note: The responsibilities assigned by statute to the Finance Council are now exercised by the Governor as a result of the Supreme Court opinion in State ex rel., v. Bennett 219 K. 285 and subsequent amendments to the State Finance Council law.)

75-4331. Memorandum of understanding; financial report; consideration and action; rejection. If agreement is reached by the representatives of the public agency and the recognized employee organization, they jointly shall prepare a memorandum of understanding and, within fourteen (14) days, present it to the appropriate governing body or authority for determination. The governing body or authority, as soon as practicable after receiving a report from the chief financial officer for the agency of the fiscal effect the terms of such memorandum will have upon the agency, shall consider the memorandum and take appropriate action. If the public employer is a taxing subdivision subject to the provisions of K.S.A. 1970 Supp. 79-4401, *et seq.*[*], such financial report shall also include information as to the impact of such memorandum on the subdivision's aggregate tax levy and operating expense limitations. If a settlement is reached with an employee organization and the governing body or authority, the governing body or authority shall implement the settlement in the form of a law, ordinance, resolution, executive order, rule or regulation. If the governing body or authority rejects a proposed memorandum, the matter shall be returned to the parties for further deliberation.

Once an agreement is reached, the employee organization and the representatives of the public agency prepare a memorandum of understanding and, within 14 days, present it to the governing body or authority for determination. As soon as practicable, the governing body considers the memorandum and takes appropriate action thereon. Prior to taking this action, the governing body is to receive a report from its chief financial officer regarding the fiscal effects of the memorandum.

If the governing body rejects the proposed memorandum, the matter is returned to the parties for further deliberation.

Public Employer-Employee Relations Act

75-4332. Memoranda of agreement; procedure in case of impasse; fact-finding board; hearing; costs. (a) Public employers may include in memoranda of agreement concluded with recognized employee organizations a provision setting forth the procedures to be invoked in the event of disputes which reach an impasse in the course of meet and confer proceedings. Such memorandum shall define conditions under which an impasse exists, and if the employer is bound by the budget law set forth in K.S.A. 79-2925 *et. seq.*, and amendments thereto, the memorandum shall provide that an impasse is deemed to exist if the parties fail to achieve agreement at least fourteen (14) days prior to budget submission date.

(b) In the absence of such memorandum of procedures, or upon the failure of such procedures resulting in an impasse, either party may request the assistance of the public employee relations board, or the board may render such assistance on its own motion. In either event, if the board determines an impasse exists in meet and confer proceedings between a public employer and a recognized employee organization, the board shall aid the parties in effecting a voluntary resolution of the dispute, and request the appointment of a mediator or mediators, representative of the public, from a list of qualified persons maintained by the secretary of human resources, and such appointment of a mediator or mediators shall be made forthwith by the secretary.

(c) If the impasse persists seven (7) days after the mediators have been appointed, the board shall request the appointment of a fact-finding board of not more than three (3) members, each representative of the public, from a list of qualified persons maintained by the secretary of human resources. The fact-finding board shall conduct a hearing, may administer oaths, and may request the board to issue subpoenas. It shall make written findings of facts and recommendations for resolution of the dispute and, not later than twenty-one (21) days from the day of appointment, shall serve such findings on the public employer and the recognized employee organization. The board may make this report public seven (7) days after it is submitted to the parties. If the dispute continues fourteen (14) days after the report is submitted to the parties, the report shall be made public.

(d) If the parties have not resolved the impasse by the end of a forty-day period, commencing with the appointment of the fact-finding board, or by a date not later than fourteen (14) days prior to the budget submission date, whichever date occurs first: (1) The representative of the public employer involved shall submit to the governing body of the public employer involved a copy of the findings of fact and recommendations of the fact-finding board, together with his or her recommendations for settling the dispute; (2) the employee organization may submit to such governing body its recommendations for settling the dispute; (3) the governing body or a duly authorized committee thereof shall forthwith conduct a hearing at which the parties shall be required to explain their positions; and (4) thereafter, the governing body shall take

Comment

This section contains the impasse procedures which include the steps of mediation and fact-finding.

The law recognizes impasse procedures that are included in a memorandum of agreement. In the absence of such mutually agreed upon procedures, the statute outlines those procedures that are to be followed.

Under the law, either party may request PERB's assistance, or PERB may provide assistance on its own motion.

The first formal step is mediation. PERB appoints a mediator from a list maintained by the Secretary of Human Resources. If the impasse has not been resolved within seven days after the appointment of a mediator, the second step is taken. PERB appoints a fact-finding board composed of not more than three persons. The fact-finders are selected from a listing maintained by the Secretary of Human Resources. The fact-finding board makes written findings of facts and recommendations for resolution of this dispute. Within 21 days from its appointment, the fact-finding board submits its findings to the employer and the employee organization. The board may make this report public seven days after it is submitted to the parties. The report must be made public 14 days after submitted to the parties if the dispute has not been resolved.

With regard to agencies other than the state, if the parties have not resolved the impasse within 40 days of the appointment of the fact-finding board or by not later than 14 days prior to the budget submission date, whichever occurs first, the following steps are to be taken:

1. The public employer representative submits to the governing body a copy of the fact-finding board's report and recommendations and the representative's recommendations for settling the dispute.

2. The employee organizations may submit to the governing body its recommendations for settling the dispute.

3. The governing body must conduct a hearing at which the parties explain their positions.

4. Thereafter, the governing body takes such action as it deems to be in the public interest, including the interest of the employees.

Mediation and fact-finding costs requested by PERB are borne by the Secretary of Human Resources. Other costs are borne equally by the parties.

Public Employer-Employee Relations Act

75-4332 (continued)

such action as it deems to be in the public interest, including the interest of the public employees involved. The provisions of this subsection shall not be applicable to the state and its agencies and employees.

(e) The cost for the mediation and fact-finding services provided by the secretary of human resources upon request of the board shall be borne by the secretary of human resources. All other costs, including that of a neutral arbitrator, shall be borne equally by the parties to a dispute.

Comment

75-4333. Prohibited practices; evidence of bad faith. (a) The commission of any prohibited practice, as defined in this section, among other actions, shall constitute evidence of bad faith in meet and confer proceedings.

(b) It shall be a prohibited practice for a public employer or its designated representative willfully to:

(1) Interfere, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;

(2) Dominate, interfere or assist in the formation, existence, or administration of any employee organization;

(3) Encourage or discourage membership in any employee organization, committee, association or representation plan by discrimination in hiring, tenure or other conditions of employment, or by blacklisting;

(4) Discharge or discriminate against an employee because he or she has filed any affidavit, petition or complaint or given any information or testimony under this act, or because he or she has formed, joined or chosen to be represented by any employee organization;

(5) Refuse to meet and confer in good faith with representatives of recognized employee organizations as required in K.S.A. 75-4327;

(6) Deny the rights accompanying certification or formal recognition granted in K.S.A. 75-4328;

(7) Deliberately and intentionally avoid mediation, fact-finding, and arbitration endeavors as provided in K.S.A. 75-4332; or

(8) Institute or attempt to institute a lockout.

(c) It shall be a prohibited practice for public employees or employee organizations willfully to:

(1) Interfere with, restrain or coerce public employees in the exercise of rights granted in K.S.A. 75-4324;

(2) Interfere with, restrain or coerce a public employer with respect to management rights granted in K.S.A. 75-4326, or with respect to selecting a representative for the purposes of meeting and conferring or the adjustment of grievances;

(3) Refuse to meet and confer in good faith with a public employer as required in K.S.A. 75-4327;

(4) Deliberately and intentionally avoid mediation, fact-finding and arbitration efforts as provided in K.S.A 75-4332; or

The section contains the listing of prohibited practices of both the public employer and the public employees.

Public Employer-Employee Relations Act

75-4333 (continued)

(5) Engage in a strike.

(d) It shall be a prohibited practice for a public employee organization to endorse candidates, spend any of its income, directly or indirectly, for partisan or political purposes or engage in any kind of activity advocating or opposing the election of candidates for any public office.

(e) In the application and construction of this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent.

75-4334. Same; proceedings for determination; findings of fact; judicial review; enforcement of final orders; action in district court in proceeding involving alleged strike or lockout. (a) Any controversy concerning prohibited practices may be submitted to the board. Proceedings against the party alleged to have committed a prohibited practice shall be commenced within six (6) months of the date of such alleged practice by service upon it by the board of a written notice, together with a copy of the charges. The accused party shall have seven (7) days within which to serve a written answer to such charges, unless the board determines an emergency exists and requires the accused party to serve a written answer to such charges within twenty-four (24) hours of their receipt. A strike or lockout shall be construed to be an emergency. The board's hearing will be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required. The board may use its rule-making power, as provided in K.S.A. 75-4323, to make any other procedural rules it deems necessary to carry on this function.

(b) The board shall state its findings of facts upon all the testimony and shall either dismiss the complaint or determine that a prohibited practice has been or is being committed. If the board finds that the party accused has committed or is committing a prohibited practice, the board shall make findings as authorized by this act and shall file the same in the proceedings. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the district court, in the judicial district where all of the major geographical area of the public employer is located, by filing in such court a petition praying that the order of the board be modified or set aside, with copy of the complaint filed with the board, and thereupon the aggrieved party shall file in the court the record in the proceeding certified by the board. Findings of the board as to the facts shall be conclusive unless it is made to appear to the court's satisfaction that the findings of fact were not supported by substantial evidence and the record considered as a whole.

Comment

The section contains the procedures to be followed in instances where the commission of a prohibited practice is alleged. Generally, the procedure involves a determination by PERB, which determination is subject to appeal to the district court.

In instances involving a lockout or a strike, the parties may seek relief in the district court while proceedings on a prohibited practices matter are pending before PERB.

Public Employer-Employee Relations Act

75-4334 (continued)

(c) The board is hereby authorized to file a petition in the district court to enforce its final orders until such time as they are modified or set aside by the court. The procedures for obtaining injunction and allied remedies shall be as set forth in the code of civil procedure, except that the provisions of K.S.A. 60-904 shall not control injunction actions arising out of public employer-employee relations under this act.

(d) In the event there is an alleged violation of either subsections (b) (8) or (c) (5) of K.S.A. 75-4333, the aggrieved party is authorized to seek relief in district court in the manner provided for the board in subsection (c) of this section while proceedings on such prohibited practices are pending before the board. Any ruling of the district court shall remain in effect until set aside by the court on motion of the parties or of the board or upon review of the board's order as provided by subsection (b).

Comment

75-4335. Act inapplicable to public employers, other than state or its agencies, adopting provisions and procedures determined by board to be reasonably equivalent. This act, except for K.S.A. 75-4322, 75-4323, 75-4324, 75-4325, 75-4326, 75-4327, 75-4328, 75-4333 and 75-4334, shall be inapplicable to any public employer, other than the state and its agencies which, acting through its governing body, has adopted by ordinance or resolution its own provisions and procedures which have been submitted to the board by such public employer and as to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are reasonably equivalent to the provisions and procedures set forth in this act with respect to the state.

Except for provisions in this law included in the definition section, the section which establishes PERB, the section which gives employees the right to form and participate in employee organizations, the section regarding the treatment of supervisory employees, the section which enumerates employer rights, the section which outlines unit determination and recognition of employee organizations, the section which extends the right to an employee organization to be recognized for meet and confer proceedings and for grievance settlement, the section which contains the listing of prohibited practices and the section that establishes procedures to be followed when prohibited practices are alleged, the provisions of the law are inapplicable to a public employer other than the state which has its own PERB-approved provisions and procedures.

75-4336. Registration of business agents for employee organizations; application; certificate; fee; exemption. (a) Every person desiring to act as a business agent for an employee organization shall first obtain a registration certificate from the secretary of state by filing an application therefor and paying a registration fee of $12.50. No person shall be issued a registration certificate unless: (1) The applicant is a citizen of the United States; (2) the applicant's name, address and length of residence in Kansas are stated in the application; and (3) the application is accompanied by a statement, signed by the president and secretary of the employee organization, which authorizes the applicant to act as agent for such employee organization.

(b) Unless it has been surrendered, suspended or revoked at an earlier date, the registration certificate shall be valid for the calendar year in which it was obtained and shall expire on December 31 or, for registration certificates obtained after December 31, 1982, each such registration certificate may be valid for the fiscal year of the employee organization represented by the business agent in which the certificate was obtained and shall expire on the last day of such fiscal year.

The section contains the requirements for registration with the Secretary of State of a person who acts as the business agent for an employee organization.

Public Employer-Employee Relations Act

75-4336 (continued)

(c). If a person has obtained a registration certificate as a business agent under the provisions of K.S.A. 44-804 and amendments thereto to act in such capacity for a labor organization thereunder and such labor organization is an employee organization, such registration shall fully satisfy the requirements of this section and no further registration or registration fee shall be required of such person desiring to act as a business agent for such employee organization.

Comment

75-4337. Annual report of employee organizations; contents; fee; alternative filing of federal reports; exemption. (a) Every employee organization operating in the state of Kansas and having 100 or more members shall file an annual report with the secretary of state on or before April 15, showing the financial condition of the employee organization on the December 31 next preceding the date of filing or at the close of business on the last day of the organization's fiscal year next preceding the date of filing. Each annual report filed under this section shall be accompanied by a filing fee of $5. The secretary of state may upon showing of reasonable cause grant an extension of time for filing of annual report.

(b) The annual report shall be in such form as the board shall prescribe and shall include:

(1) The name of the employee organization;

(2) the location and mailing address of its office;

(3) the name and title of each of its officers and registered business agents, together with the salaries, wages, bonuses and other remuneration paid each, and mailing address of each;

(4) the date of the regular election of officers of such employee organization;

(5) the rate of its initiation fees, dues, assessments and any other periodic payments required of its members; and

(6) an audited statement of the income, expenditures, assets and liabilities of the employee organization.

(c) In lieu of filing an annual report in the form prescribed by the board under subsection (b) of this section, the employee organization may file copies of the reports required to be filed with the United States department of labor by the federal labor management reporting and disclosure act of 1959, 29 U.S.C.A. § 431, *et seq.*, as follows:

(1) By having on file with the secretary of state a copy of the labor organization information report form LM-1 which is currently on file with the United States department of labor; and

(2) by filing annually as required in subsection (a) of this section, a copy of the labor organization annual report form LM-2 or form LM-3 which is filed with the United States department of labor and covers a reporting period specified in subsection (a).

(d) Every employee organization which has filed an annual report as a labor organization under the provisions of K.S.A. 44-806 and amendments thereto shall be deemed to have fully satisfied the requirements of this section and shall not be required to file an annual report under this section.

The section contains requirements for annual financial reports for employee organizations that have 100 or more members.

1-29-85
Att. #10

SUMMARY OF STATE LABOR LAWS

The following Summary of Public Sector Labor Relations Policies was issued in March 1981 by the U.S. Department of Labor, Labor-Management Services Administration. The summary was compiled of statutes, executive orders, personnel policies, court decisions, and attorney general opinions. The information is current as of January 1981, and "it is intended to provide a resource guide for researchers, practitioners, and others conducting more specific and detailed research," LMSA says. At the time the study was completed, LMSA notes that 39 states, the District of Columbia, and the Virgin Islands had statutes or executive orders providing legal frameworks for collective bargaining covering some or all of their employees. Of these, 23 states, the District of Columbia, and the Virgin Islands had comprehensive statutes covering all public employees; 11 states had comprehensive legislation limited to specific groups of employees; and 4 states provided limited collective bargaining rights to some or all of their employees.

ALABAMA

COVERAGE: Fire fighters.

AUTHORITY: Ala. Code Title 37, Sec. 450 (3) (1967).

BARGAINING RIGHTS: Present proposals.

SCOPE OF BARGAINING: Salaries and other conditions of employment.

EMPLOYEE RIGHTS: To join labor organizations; refrain from doing so.

STRIKE POLICY: Prohibited; labor organization may not assert the right to strike.

PERTINENT CASE LAW:
- Although cities cannot make binding contracts or be forced into negotiations, fire fighter's proposals must be considered in good faith and parties may enter into a written, nonbinding memorandum. (*Nichols* v. *Bolding*, (Ala. S. Ct. 1973) 277 So.2d 868).

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COVERAGE: Teachers.

AUTHORITY: Ala. School Code Title 52, Sec. 73, 166 and 653 (1973).

BARGAINING RIGHTS: Consultation.

SCOPE OF BARGAINING: Rules and regulations about the conduct and management of the schools.

UNION SECURITY: Dues deduction mandatory.

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NOTE:
- Alabama has a right to work law. (Title 26, Sec. 375(5)).

PERTINENT CASE LAW:
- Public employers cannot bargain with labor organizations without express constitutional or statutory authority to do so. (*International Union of Operating Engineers, Local 321* v. *Water Works Board of the City of Birmingham*, (Ala. S. Ct. 1964) 163 So.2d 619).
- Public employee strikes are illegal. (O.A.G. 6/18/57). Therefore, striking employees may be discharged. (*United Steelworkers of America, et al.* v. *Univ. of Alabama*, (USCA, 5th Cir.) No. 77-2258, 7/18/79).

ALASKA

COVERAGE: State and local employees unless local legislature rejects application of Act by ordinance or resolution.

AUTHORITY: Alaska Statutes Title 23, Ch. 40, Sec. 23.40.070 et seq. as last amended eff. 7/13/78.

EXCLUSIONS: Teachers and non-certificated employees of school district; elected or appointed officials.

ADMINISTRATIVE AGENCY:
For State employees:
Alaska Labor Relations Agency
P.O. Box 6701
Anchorage, Alaska 99502
(907) 243-6955

For local employees:
Department of Labor
P.O. Box 1149
Juneau, Alaska 99801
(907) 465-2700

UNIT DETERMINATION: Administrative agency.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Wages, hours and working conditions
- History of collective bargaining
- Desires of employees
- Avoid over-fragmentation
- Supervisors, nonsupervisors and confidential employees may not be combined (PERA Rules)

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment; excluding general policies describing functions and purpose of employer.

GRIEVANCE PROCEDURE: Arbitration required.

EMPLOYEE RIGHTS: To organize, form, join or assist a labor organization; engage in concerted activities; bargain collectively.

UNION SECURITY: Dues deduction mandatory. Union or agency shop permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith

IMPASSE PROCEDURE:
Mediation: Either party may request or administrative agency may initiate mediation; mediator may be appointed by parties or administrative agency.

Arbitration: Mandatory for law enforcement and fire protection employees; jail, prison and other correctional institution employees; and hospital employees. Voluntary in other cases.

STRIKE POLICY: Strikes prohibited for law enforcement and fire protection employees; jail, prison and other correctional institution employees; and hospital employees. Strikes may be enjoined. Public utility, snow removal, sanitation, public school and other educational institution employees may strike until there is a threat to public health, safety and welfare. At that time the court may enjoin strike and order arbitration. All other employees may strike after majority vote.

NOTE:
- Contract duration may not exceed 3 years.
- Up to three student representatives shall be allowed to attend and observe negotiation sessions involving public postsecondary institutions.

PERTINENT CASE LAW:
- Alaska Division of Marine Transportation is covered by the Act, (*Alaska State Personnel Board and Alaska State Labor Relations Agency* v. *Inland Boatman's Union of the Pacific*, (Alaska S. Ct.) File No. 3438, 10/6/78).

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COVERAGE: Teachers.

AUTHORITY: Alaska Statutes Title 14, Ch. 20, Sec. 550 et seq. (1970) as last amended 1975.

EXCLUSIONS: Superintendent of schools.

UNIT DETERMINATION: Statute.
All teachers in school district; administrative personnel may choose to be in a separate unit.

RECOGNITION: Exclusive; voluntary requires showing of interest from majority in unit; election requires 25% to petition.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Matters pertaining to employment and fulfillment of professional duties.

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GRIEVANCE PROCEDURE: Arbitration required.

IMPASSE PROCEDURE: Parties may appoint own mediator or request mediator from FMCS; mediator issues report on unresolved issues; parties have 10 days to accept or reject report; if rejected, mediator has 5 days to review objections and prepare a final report.

If final report is rejected, Governor may appoint an advisory arbitrator to review and recommend.

NOTE:
- Negotiations may be held in executive session by mutual agreement, final agreements public.
- Contract duration may not exceed 3 years.
- Each party may not select more than five representatives to negotiate for them.

ARIZONA

Arizona does not have a collective bargaining statute for public employees.

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COVERAGE: State officers and employees.

AUTHORITY: S.B. 1344, Ch. 140 (1977).

UNION SECURITY: Dues deduction mandatory if labor organization represents at least 25%; rescinded if membership falls below 25% or if members engage in a work slowdown or stoppage.

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NOTE:
- Arizona has a right to work law which applies to the State and its agencies. (Arizona Constitution Art. XXV).
- City of Phoenix has a comprehensive ordinance providing for collective bargaining for its public employees, (eff. 12/16/75).

PERTINENT CASE LAW:
- Exclusive representation prohibited for public employees; public employers may meet and confer with employees on wages, terms of employment, and working conditions but can't be compelled to do so; merit system takes precedence over any other agreements, (O.A.G. 74-11 (R-24), 1974).
- Dues checkoff may be granted in teacher contracts of employment, (*Edwards v. Alahambra Elementary School*, (Ariz. S. Ct. 1971) 488 P.2d 498).
- Teacher's labor organization was preliminarily enjoined from striking or picketing when immediate and irreparable loss would have been suffered by the district if strike continued, (*Kitchell v. Scottsdale Education Association*, (Ariz. 1971) Super. Ct., 2 PBC 137).
- All meetings of public bodies are to be open to the public. Exempt from this requirement are discussions with representatives of public employee labor organizations regarding salaries, salary schedules, and fringe benefits, (O.A.G. #179-126, 5/4/79).
- Before a contract becomes effective, it must be implemented by a city ordinance, (*Tucson Police and Fire Fighters Assn. v. City of Tucson*, (Ariz. Ct. of Apps. 1977) 574 P.2d 850).

ARKANSAS

Arkansas does not have a collective bargaining statute for public employees.

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COVERAGE: State employees.

AUTHORITY: Sec. 11A3 (1955) as last amended eff. 1975.

UNION SECURITY: Dues deduction permitted.

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NOTE:
- Arkansas has a right to work law that applies to public employees, (Ark. Const. Am. 34).

PERTINENT CASE LAW:
- Public employers are not required to bargain, (*City of Fort Smith v. Arkansas State Council No. 38, AFSCME*, (Ark. S. Ct. 1968) 433 S.W. 2d 153).
- Public employers may bargain, (O.A.G. 9/25/68).
- Public employees may join labor organizations, (O.A.G. 9/25/68).
- Strikes by public employees are illegal, (*Potts v. Hay*, (Ark. S. Ct. 1958) 318 S.W. 2d 826).
- Discrimination on account of membership in a labor organization is prohibited, (Ark. Const. Am. 34, Ark. Code Sec. 81-201-203).
- Negotiation meetings between a school system's administration and a teachers' labor organization are not required to be open to the public, (O.A.G. #79-169, 12/13/79).

CALIFORNIA

COVERAGE: State civil service employees and teachers employed by the Department of Education or Superintendent of Public Instruction; supervisors have limited coverage under the Act.

AUTHORITY: Gov. C.A. Ch. 10.3, Sec. 3512 et seq. (1977) as last amended eff. 1/1/81.

EXCLUSIONS: Managerial and confidential employees; employees of Legislative Counsel Bureau; employees of the PERB; nonclerical employees of the State Personnel Board engaged in personnel functions; conciliators of the State Conciliation Service within the Department of Industrial Relations.

ADMINISTRATIVE AGENCY
Public Employment Relations Board
923 - 12th Street
Sacramento, California 95814
(916) 322-3088

UNIT DETERMINATION: PERB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Effect on meet and confer relationship
- Effect on efficient operations
- Number of employees and classifications
- Impact on meet and confer created by fragmentation
- Craft employees have right to a separate unit
- Presumption that professionals should not be in the same unit as nonprofessionals -- may be rebutted
- Supervisors may not be in nonsupervisory units

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment; excluding merits, necessity or organization of any service provided by law or Executive Order; other subjects not under scope may be included in memorandum by agreement of the parties.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; employees may represent themselves in employer-employee matters.

UNION SECURITY: Dues deduction mandatory. Maintenance of membership permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, intimidate, restrain, coerce or discriminate against employees
- Deny labor organization rights guaranteed under the Act
- Refusal or failure to meet and confer in good faith
- Dominate labor organizations
- Refusal to participate in mediation in good faith

Labor Organization:
- Cause or attempt to cause employer to commit a ULP
- Interfere, intimidate, restrain, coerce or discriminate against employees
- Refusal or failure to meet and confer in good faith
- Refusal to participate in mediation in good faith

IMPASSE PROCEDURE:
Mediation: Either party may request PERB to appoint a mediator or the parties may mutually appoint a mediator; costs shared equally by the parties if they appoint their own; if PERB appoints, costs borne by PERB.

NOTE:
- All initial meet and confer proposals shall be presented at public meetings. No meeting and conferring for at least 7 days so that the public can become informed and express opinions in a public meeting. New proposals arising in negotiations shall be made public within 48 hours.
- In cases where specified provisions of the law relating to State civil service are in conflict with provisions of a memorandum of understanding entered into pursuant to the act, memorandum is controlling, except where expenditures of funds are required.

PERTINENT CASE LAW:
- This Act was declared unconstitutional in its entirety, (*Pacific Legal Foundation, et al. v. Edmund G. Brown et al. and CSEA, et al.; The People ex rel. George Deukmejian as Attorney General v. Edmund G. Brown, Jr. as Governor, et al. and CSEA, et al.*, (Calif. Ct. of App., 3d App. Dist.) Nos. 3 Civil 18364 and 3 Civil 18412, 3/25/80). Appeal pending before the Calif. Supreme Court.

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COVERAGE: State noncivil service employees; employees of Legislative Counsel Bureau; employees of the PERB; nonclerical employees of the State Personnel Board engaged in personnel functions; conciliators of the State Conciliation Service within the Department of Industrial Relations.

AUTHORITY: Gov. C.A. Ch. 10.5, Sec. 3525 et seq. (1971) as last amended eff. 6/6/79.

EXCLUSIONS: Elected or appointed officials; State civil service employees; employees of University of California, Hastings College of Law, and California State University and Colleges; employees of California Maritime Academy; managerial and confidential employees.

CRITERIA FOR UNIT DETERMINATION:
- Professionals may be represented separately from nonprofessionals
- State may adopt rules requiring peace officers to be represented by labor organizations composed solely of such employees

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours and other terms and conditions of employment.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; employees may represent themselves in employer-employee matters

UNFAIR LABOR PRACTICES:
- Interfere, intimidate, restrain, coerce or discriminate against employees

NOTE:
- All initial meet and confer proposals shall be presented at public meetings. No meeting and conferring for at least 7 days so that the public can become informed and express opinions in a public meeting. New proposals arising in negotiations shall be made public within 48 hours.

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COVERAGE: Local government employees.

AUTHORITY: Gov. C.A. Ch. 10, Sec. 3500 et seq. (1961) as last amended 1971.

EXCLUSIONS: Elected or appointed officials; school district employees.

UNIT DETERMINATION: Absent local procedures, disputes submitted to the Department of Industrial Relations.

CRITERIA FOR UNIT DETERMINATION:
- Professionals may be in their own units
- Governing body may adopt rules requiring peace officers to be represented by labor organizations composed solely of such employees

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours and other terms and conditions of employment; excluding merits, necessity or organization of any service or activity provided by law or Executive Order.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; may represent themselves in employer-employee matters.

UNFAIR LABOR PRACTICES:
- Interfere, intimidate, restrain, coerce or discriminate against employees on account of membership in a labor organization

IMPASSE PROCEDURE:
Mediation: Parties may mutually agree to mediation; costs shared equally by the parties.

NOTE:
- 44 of 48 cities over 70,000 and 42 of 58 counties (including city and county of San Francisco) have local ordinances providing for collective bargaining for their employees.
- Strikes by fire fighters are prohibited, (Lab. C.A. Ch. 4, Sec. 1962 (1959)).

PERTINENT CASE LAW:
- Agency shop provisions are unlawful, (*City of Haywood et al. v. United Public Emps., Local 390, SEIU*, (Calif. Ct. of App., 1st Dist., Div. 4, 1976) 54 C.A. 3d 761).
- Strikes by public employees are illegal; striking employees may be fired. (*Operating Engineers, Local 39 et al., v. San Juan Suburban Water District et al.*, (Calif. Ct. of App., 3d Dist., 3/21/79) Case No. 16928).

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COVERAGE: Employees of school and community college districts.

AUTHORITY: Gov. C.A. Ch. 10.7, Div. 4, Title 1, Sec. 3540 et seq. (1975) as last amended eff. 1/1/81.

EXCLUSIONS: Elected or appointed officials; managerial and confidential employees.

ADMINISTRATIVE AGENCY:
Public Employment Relations Board
923 - 12th Street
Sacramento, California 95814
(916) 322-3088

UNIT DETERMINATION: PERB in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Extent of organization
- Effect on efficient operations of employer
- Unit of classroom teachers must include all teachers except managerial, confidential and supervisory employees
- Unit of supervisors must include all supervisors and must be represented by a different labor organization than nonsupervisory unit
- Classified and certificated employees may not be included in the same unit

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment; consultation on policy.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; present grievances.

UNION SECURITY: Dues deduction mandatory. Agency shop or maintenance of membership permitted. Employer may require separate ratification of union security provision.

Persons whose religious beliefs prohibit payment of dues may pay an equivalent amount to a nonreligious charity; labor organization may charge such persons the reasonable cost of processing a grievance.

UNFAIR LABOR PRACTICES:
Employer:
- Threaten, discriminate, interfere, restrain or coerce employees
- Deny labor organization rights guaranteed under the Act
- Refusal to meet and negotiate in good faith
- Dominate labor organizations
- Refusal to participate in impasse procedure in good faith

Labor Organization:
- Attempt to cause employer to commit a ULP
- Threaten, discriminate, interfere, restrain or coerce employees
- Refusal to meet and negotiate in good faith
- Refusal to participate in impasse procedure in good faith

IMPASSE PROCEDURE:
Mediation: Either party may request PERB to appoint a mediator or parties may mutually appoint a mediator; costs shared equally by the parties if they appoint their own; if PERB appoints, costs borne by PERB.

Fact Finding: Either party may request after 15 days of mediation; tripartite panel; report issued within 30 days, made public after 10 days; mutually incurred costs shared equally by the parties, chairperson paid by the PERB.

Criteria for Fact Finding Report:
- Applicable State and Federal laws
- Stipulations of the parties
- Interest and welfare of the public and ability to pay
- Comparison with employees performing similar services and other employees generally in comparable communities
- Cost of living
- Overall compensation
- Other factors normally considered

NOTE:
- Initial proposals must be made in public.

PERTINENT CASE LAW:
- Strikes by public school employees prohibited in the absence of legislative authority, (*Pasadena Unified School District v. Pasadena Federation of Teachers, AFT Local 1050*, (Calif. Ct. of App. 2nd Dist., Div. 3, 7/28/78) 72 C.A. 3d 100).

* * *

COVERAGE: Employees of the University of California, Hastings College of Law and California State University and Colleges.

AUTHORITY: Gov. C.A. Ch. 12, Div. 4, Title 1, Sec. 3560 et seq. (1979) as last amended eff. 1/1/80.

EXCLUSIONS: Managerial and confidential employees.

ADMINISTRATIVE AGENCY:
Public Employment Relations Board
923-12th Street
Sacramento, California 95814
(916) 322-3088

UNIT DETERMINATION: PERB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Effect on meet and confer relationship
- Effect on efficient operations of employer
- Number of employees and classifications
- Impact on meet and confer relationship created by fragmentation
- Presumption that professionals and nonprofessionals shall be in separate units
- Skilled craft employees have the right to be in separate units
- Peace officers shall not be in units with other employees
- Supervisors must be in separate units

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; present grievances.

MANAGEMENT RIGHTS:
- Merits, necessity or organization of service, activity or program established by law
- Fees which are not a condition of employment
- Admission and degree requirements of students, content and supervision of courses and research programs
- Appointment, tenure, promotion of members of academic senate, grievance procedure for senate (consultation rights on this category)

UNION SECURITY: Dues deduction mandatory. Maintenance of membership permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Threaten, discriminate, interfere, restrain or coerce employees
- Deny labor organizations rights guaranteed under the Act
- Refusal to meet and confer

- Dominate labor organizations
- Refusal to participate in impasse procedure
- Consult with group other than exclusive representative

Labor Organization:
- Interfere, restrain or coerce employees
- Cause or attempt to cause employer to commit a ULP
- Refusal to meet and confer
- Refusal to participate in impasse procedure
- Failure to represent all employees fairly
- Charge excessive service fees
- Cause or attempt to cause employer to pay for services not rendered

IMPASSE PROCEDURE:

Mediation: Either party may request PERB to appoint a mediator; costs borne by PERB; parties may establish their own procedure in which case costs are shared equally by the parties.

Fact Finding: Either party may request after 15 days of mediation; tripartite panel; report issued within 30 days, made public within 10 days; mutually incurred costs shared equally by the parties, chairperson paid by PERB.

NOTE:
- Initial proposals must be made at a public meeting.
- A student representative shall be allowed to attend meet and confer sessions involving student service or academic personnel.

COLORADO

Colorado does not have a collective bargaining statute for public employees.

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NOTE:
- Colorado has a statute which deals with a grievance procedure for State employees; State Personnel Board makes final decisions which may be subject to advisory arbitration, (State Personnel System, Colo. Stats. Sec. 24-50-101 et seq. (1973) as last amended 1977).
- City and County of Denver have a comprehensive combined charter providing for collective bargaining for its fire fighters, (eff. 5/25/79).

PERTINENT CASE LAW:
- School boards may enter into bargaining agreements without specific legislative authority, if agreements do not conflict with existing law, (*Littleton Education Association v. Arapahoe County School District #6 et al.*, (Colo. S. Ct. 1976) 553 P. 2d 793).
- Public employers cannot be forced to arbitrate disputes over contract terms; authority to make collective bargaining decisions rests with elected representatives, not an outside arbitrator, (*Greeley Police Union v. City Council of Greeley*, (Colo. S. Ct. 1976) 553 P. 2d 790).
- Labor agreements negotiated in closed sessions violate the State Open Meetings Law, (C.R.S. 22-32-108, 19-9-101); and are therefore void, (*Sch. Dist. No. 11, County of El Paso v. Colorado Springs Teachers Assn., et al.*, (Colo. Ct. of Apps., Div. 2, 1978) 583 P. 2d 952).
- Public employee strikes prohibited; striking employees refusing to obey back-to-work orders and labor organizations supporting actions of striking members are subject to fines, (*Bd. of Water Works of Pueblo v. Pueblo Water Works Emps., Local 1045, AFSCME, et al.*, (Colo. S. Ct. 1978) 586 P. 2d 18).

CONNECTICUT

COVERAGE: State employees.

AUTHORITY: Conn. Gen. Stats. Title 5, Sec. 5-270 et seq. (1975) as last amended eff. 5/16/78.

EXCLUSIONS: Legislative employees; elected or appointed officials; board and commission members; part-time and confidential employees.

ADMINISTRATIVE AGENCY:
State Board of Labor Relations
200 Folly Brook Blvd.
Wethersfield, Connecticut 06109
(203) 566-4398

UNIT DETERMINATION: SBLR.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Effects of over-fragmentation
- Professionals must vote for inclusion in nonprofessional units
- Statewide bargaining
- Separate units for public institutions of higher education and non-faculty professional staff unless both vote for inclusion in one unit

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other conditions of employment; excluding merit system.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain collectively; engage in other concerted activities; present grievances.

UNION SECURITY: Agency shop mandatory.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees, including a lockout
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Refusal to reduce agreement to writing and sign such agreement
- Violate SBLR rules regarding conduct of representation elections

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Violate SBLR rules regarding conduct of representation elections
- Refusal to reduce agreement to writing and sign such agreement

IMPASSE PROCEDURE:

Mediation: May be requested from the State Board of Mediation and Arbitration.

Fact Finding: Either party may request fact finding from SBMA or SBMA may initiate; single fact finder; report issued within 30 days; costs shared equally by the parties except where a party has been found to have not bargained in good faith and may be ordered to pay the full cost; fact finder may mediate.

Arbitration: Voluntary.

STRIKE POLICY: Prohibited.

NOTE:
- No labor organization shall be eligible to participate in a recognition election until it has been in existence in State employment for at least six months.

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COVERAGE: Municipal employees.

AUTHORITY: Conn. Gen. Stats. Title 7, Sec. 7-467 et seq. (1965) as last amended eff. 10/1/79.

EXCLUSIONS: Elected and administrative officials; board and commission members; certified teachers; part-time employees; department heads and some supervisors.

ADMINISTRATIVE AGENCY:
State Board of Labor Relations
200 Folly Brook Blvd.
Wethersfield, Connecticut 06109
(203) 566-4398

UNIT DETERMINATION: SBLR.

CRITERIA FOR UNIT DETERMINATION:
- Single unit for each fire and police department consisting of uniformed and investigatory employees
- Professionals must vote for inclusion in nonprofessional units
- Community of interest
- No unit shall include both supervisory and nonsupervisory employees except for police and fire

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other conditions of employment; excluding merit system.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain collectively; engage in other concerted activities; present grievances.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of testimony
- Refusal to bargain in good faith
- Refusal to discuss grievances
- Refusal to comply with an arbitration award

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Refusal to comply with an arbitration award

IMPASSE PROCEDURE:

Mediation: If there is no agreement within 30 days of commencement of negotiations or either party has not requested mediation, State Board of Mediation and Arbitration will appoint a mediator.

Fact Finding: Either party may request fact finding from SBMA; parties may select a fact finder or SBMA will appoint one; report issued within 30 days; costs shared equally by the parties except where a party has been found to have not bargained in good faith and may be ordered to pay the full cost; fact finder may mediate.

If parties do not request fact finding within 75 days of commencement of negotiations, SBMA will initiate fact finding; fact finding report due within 14 days prior to expiration of current agreement.

Arbitration: Mandatory; if either party rejects fact finder's report, either party may request arbitration from SBMA; tripartite panel; final offer on an issue-by-issue basis; costs of chairperson shared equally by the parties.

If neither party requests arbitration within 90 days after the expiration of the present collective bargaining agreement, SBMA will impose final offer arbitration on an issue-by-issue basis; tripartite panel; parties must supply cost data for all provisions of their proposed agreement; costs of chairperson shared equally by the parties.

Criteria for Arbitration Award:
- Prevailing labor market wages, salaries, fringe benefits and working conditions
- Ability to pay
- Interest and welfare of the employees

STRIKE POLICY: Prohibited.

NOTE:
- No labor organization shall be eligible to petition for exclusive recognition or to participate in recognition election unless it has been in existence for not fewer than six months.
- Arbitration awards are not subject to legislative approval.

PERTINENT CASE LAW:
- Agency shop arrangements are not in violation of the Act since legislature had impliedly authorized union security agreements by failing to prohibit such arrangements, (Matter of City of New Haven Dept. of Parks, State Bd. of Labor Rel., Case No. MPP-4470, 7/27/79).
- Compulsory interest arbitration found constitutional, (*Town of Berlin et al. v. Frank Santaguida et al.*, (Conn. S. Ct.) 7/1/80).

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COVERAGE: Teachers.

AUTHORITY: Conn. Gen. Stats. Title 10, Ch. 166, Sec. 10-153a et seq. (1958) as last amended eff. 6/6/80.

EXCLUSIONS: Superintendent and assistant superintendent; employer's negotiators; personnel or budget employees; temporary substitutes; non-certified employees.

ADMINISTRATIVE AGENCY:
For representation and impasses:
State Board of Education
165 Capital Avenue
Hartford, Connecticut 06115
(203) 566-5371

For prohibited practices:
State Board of Labor Relations
200 Folly Brook Blvd.
Wethersfield, Connecticut 06109
(203) 566-4398

UNIT DETERMINATION: Statute; 2 units established:
- Administrators
- Teachers

RECOGNITION: Exclusive; voluntary requires showing of interest from majority in unit; election requires 20% to petition.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salaries and other conditions of employment.

EMPLOYEE RIGHTS: To form, join or assist labor organizations; refrain from doing so; present grievances.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of testimony
- Refusal to bargain in good faith
- Refusal to participate in mediation or arbitration in good faith

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Discriminate on account of testimony
- Refusal to bargain in good faith
- Refusal to participate in mediation or arbitration in good faith
- Solicit or advocate support of students

UNION SECURITY: Agency shop permitted.

IMPASSE PROCEDURE:
Mediation: Either party may request mediation from the Commissioner of the State Board of Education; if no agreement 120 days prior to budget submission and mediation has not been initiated, Commissioner of the Board will initiate mediation; costs shared equally by the parties.

Arbitration: If mediation fails by the 4th day or 90 days prior to the budget submission date, the Commissioner of the State Board of Education shall initiate arbitration; parties may mutually agree to a single arbitrator, otherwise tripartite panel; final offer on an issue-by-issue basis; award due within 15 days; costs of neutral and other incidental costs shared equally by the parties.

Criteria for Arbitration Award:
- Negotiations prior to arbitration
- Public interest
- Ability to pay
- Interests and welfare of the employees
- Existing conditions of employment of employees and those of similar groups
- Prevailing salaries, benefits and other working conditions in State labor market

STRIKE POLICY: Prohibited; enjoinable by courts.

NOTE:
- Arbitration awards are not subject to legislative approval.

PERTINENT CASE LAW:
- Agency shop clauses found constitutional, (*Gloria M. Dowaliby, et al. v. Hartford Federation of Teachers, Local 1018, et al.*, (Conn. S. Ct.) 5/6/80).

DELAWARE

COVERAGE: State and county government employees and employees of local governments that elect coverage.

AUTHORITY: Delaware Code Title 19, Sec. 1301 et seq. (1965) as last amended eff. 7/9/73.

EXCLUSIONS: Teachers; elected or appointed officials; inmates.

ADMINISTRATIVE AGENCY:
Department of Labor
Division of Industrial Affairs
820 North French Street
Wilmington, Delaware 19801
(302) 571-2882

UNIT DETERMINATION: Department of Labor.

CRITERIA FOR UNIT DETERMINATION:
- Duties, skills and working conditions
- History of bargaining
- Extent of organization
- Employee desires

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, salaries, hours, vacations, sick leave, grievance procedure and other terms and conditions of employment; excluding subjects that conflict with civil service law.

EMPLOYEE RIGHTS: To organize and select bargaining representatives; present grievances.

UNION SECURITY: Dues deduction mandatory.

IMPASSE PROCEDURE: Any issue in dispute, except wages and salaries, may be submitted to the Department of Labor or, if agreed to by the parties, to an arbitrator.

STRIKE POLICY: Prohibited.

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COVERAGE: Teachers.

AUTHORITY: Delaware Code Title 14, Sec. 4001 et seq. (1969) as last amended eff. 2/9/73.

EXCLUSIONS: Supervisory and staff personnel.

ADMINISTRATIVE AGENCY:
State Department of Public Instruction
Townsend Building
Dover, Delaware 19901
(302) 736-4601

RECOGNITION: Exclusive; voluntary requires showing of interest from majority of unit; in an election, certification requires majority of employees in unit.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salaries, benefits and working conditions.

GRIEVANCE PROCEDURE: Arbitration prohibited.

EMPLOYEE RIGHTS: To join labor organizations; refrain from doing so; represent themselves on matters relating to employment relations.

UNION SECURITY: Dues deduction mandatory.

IMPASSE PROCEDURE:
Mediation: Either party may request mediation by any method mutually agreed upon; if no method agreed to, mediator selected by mutual agreement; if no agreement on mediator, tripartite mediation committee formed; costs shared equally by the parties.

Fact Finding: Either party may request; tripartite; costs shared equally by the parties.

Arbitration: Prohibited.

STRIKE POLICY: Prohibited; recognition revoked for 2 years, dues deduction for 1 year; penalties are mandatory, (O.A.G. #75-005, 3/4/75).

NOTE:
- Contract duration must be for minimum of 2 years.
- Certification of an exclusive bargaining representative shall be for a minimum of 24 months.

DISTRICT OF COLUMBIA

COVERAGE: All public employees of District of Columbia government.

AUTHORITY: D.C. Law 2-139, Sec. 103 et seq. (1978) as last amended eff. 4/4/80.

EXCLUSIONS: Chief judges, associate judges and non-judicial personnel of Superior Court and Court of Appeals; heads of academic units at the University of the District of Columbia; supervisors, management officials or employees whose participation in a labor organization would result in a conflict of interest.

ADMINISTRATIVE AGENCY:
Public Employee Relations Board
The Presidential Building
415 Twelfth Street, N.W.
Suite 309
Washington, D.C. 20004
(202) 727-1822

UNIT DETERMINATION: PERB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Promotion of effective labor relations
- Efficiency of agency operations
- Skills, working conditions, common supervision, physical location, organizational structure, distinctiveness of functions performed and existence of integrated work process
- Extent of organization
- Supervisors must be in separate units except with respect to fire fighters
- No unit shall include confidential employees, employees engaged in personnel work other than in a clerical capacity, employees engaged in administering this Title and employees of the Council
- Professionals must vote for inclusion in nonprofessional unit

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Compensation, hours, union security and terms and conditions of employment.

EMPLOYEE RIGHTS: To organize, join or assist labor organizations; bargain collectively; refrain from doing so; present grievances.

MANAGEMENT RIGHTS:
- Direct employees
- Hire, promote, transfer, assign and retain employees
- Suspend, demote, discharge or take other disciplinary action against employees for just cause
- Relieve employees from duties due to lack of work; maintain efficiency
- Determine mission of agency, budget, number of employees, types and grades of positions or employees assigned to organizational unit
- Determine technology of work and internal security practices; take whatever actions may be necessary to carry out mission in emergencies

UNION SECURITY: Dues deduction mandatory. Agency shop permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith

Labor Organization:
- Interfere, restrain or coerce employees
- Cause or attempt to cause management to coerce employees
- Refusal to bargain in good faith
- Participate in a strike or work stoppage
- Recognitional strikes or secondary boycott

IMPASSE PROCEDURE (COMPENSATION):
Mediation: Any party may request or Board may impose anytime if at impasse, after 180 days of bargaining, or 90 days before expiration of contract.

Arbitration: Any party may request after 30 days or less of mediation; final offer by package; award due within 20 days.

IMPASSE PROCEDURE (TERMS AND CONDITIONS): Board may impose procedures of its choice.

Criteria:
- Existing laws, rules and regulations
- Ability of District to comply with award
- Public safety, health and welfare
- Need to maintain fair, reasonable and consistent personnel policies

STRIKE POLICY: Prohibited; labor organization may be decertified.

NOTE:
- Collective bargaining sessions shall not be open to the public; fact finding proceedings shall be open to the public.

FLORIDA

COVERAGE: All public employees.

AUTHORITY: Fla. Stats. Ch. 447, Sec. 447.201 et seq. (1974) as last amended eff. 7/7/80.

EXCLUSIONS: Appointed or elected officials; agency heads; members of boards and commissions; militia; employer's negotiators; managerial and confidential employees; legislative employees; inmates.

ADMINISTRATIVE AGENCY:
Public Employees Relations Commission
2600 Blair Stone Road, Suite 300
Tallahassee, Florida 32301
(904) 488-8641

UNIT DETERMINATION: PERC.

CRITERIA FOR UNIT DETERMINATION:
- Principles of efficient administration of government
- Number of labor organizations employer must negotiate with
- Compatibility with public interest
- Power of employer to agree or recommend action
- Organizational structure
- Community of interest
  - manner in which wages and other terms are determined
  - manner in which job and salary classifications are determined
  - interdependence of jobs and interchange of employees
  - desires of employees
  - history of bargaining
- Statutory authority of employer
- Professionals and nonprofessionals must be in separate units unless both groups vote for inclusion
- Other factors prescribed by PERC
  - avoid excess fragmentation
  - possible conflicts of interest
  - reasonable expectancy of permanent employment

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and terms and conditions of employment; excluding pensions.

GRIEVANCE PROCEDURE: Arbitration required; certified labor organizations not required to process grievances for nonmembers; career service employees may use civil service appeal procedure as an alternative.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; be represented by a labor organization in negotiations and grievances; present grievances; engage in concerted activities; refrain from doing so.

MANAGEMENT RIGHTS:
- Determine purpose
- Set standards of service
- Exercise discretion and control over organization and operation
- Direct employees
- Discipline for proper cause
- Relieve employees from duty for legitimate reason

UNION SECURITY: Dues deduction mandatory.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith or refusal to sign final agreement
- Dominate labor organizations
- Refusal to discuss grievances in good faith

Labor Organization:
- Interfere, restrain or coerce employees
- Cause or attempt to cause employer to commit a ULP
- Refusal to bargain in good faith
- Discriminate on account of testimony
- Participate in a strike
- Solicit support from students

IMPASSE PROCEDURE:
Mediation: Either or both parties may appoint or request appointment of a mediator; costs shared equally by the parties.

Fact Finding: If mediator has not been appointed or if either party requests, PERC will appoint a fact finder; report issued within 15 days; report deemed acceptable unless specifically rejected by either party; costs shared equally by the parties.

Criteria for Fact Finding Report:
- Comparison of annual income with other employees in the locality
- Comparison of annual income with other employees in the State
- Interest and welfare of the public
- Peculiarities of employment
- Availability of funds

Other: If either party rejects fact finder's report, the impasse is submitted to the legislature for resolution; if not ratified, legislatively imposed items are effective only for remainder of fiscal year; legislature cannot impose such contract provisions as preambles, recognition clauses, or duration.

STRIKE POLICY: Prohibited; enjoinable by courts; labor organization may be fined up to $5000 and its officers $50-100 per day for contempt; PERC may fine labor organization up to $20,000 per day; employer may receive damages; employee may be dismissed or put on probation for 6 months; certification and/or dues deduction may be revoked.

NOTE:
- Contract duration may not exceed 3 years.
- Collective bargaining negotiations shall be open to the public. (Florida Statutes, Sec. 286.011).
- Florida has a right to work law that is applicable to public employees, (Fla. Const., Declaration of Rights, Sec. 6).
- A total of two student representatives shall be allowed to attend and observe negotiation sessions involving public postsecondary institutions.

PERTINENT CASE LAW:
- Union shop and maintenance of membership agreements are in violation of right to work law, (United Faculty of Palm Beach Junior College, (PERC 1977) Case No. SH-CA-754-4158).
- Agency shop provisions violate State constitutional provision establishing right not to join a labor organization, (*Fla. Educ. Assn. v. PERC*, (Fla. Dist. Ct. of App., 1st Dist.) No. BB-246, (1/26/77)).

GEORGIA

COVERAGE: State employees.

AUTHORITY: Code of Georgia Title 89, Sec. 89-1301 et seq. (1962).

STRIKE POLICY: Prohibited; dismissal with 3 year ban on rehiring; no salary increase for 3 years and 5 year probation; inciting a strike is a misdemeanor punishable by up to 1 year imprisonment, a fine of $100-1000, or both.

* * *

COVERAGE: Fire fighters in municipalities that elect coverage.

AUTHORITY: Code of Georgia Title 54, Sec. 54-1301 et seq. (1971).

EXCLUSIONS: Municipalities under 20,000 population.

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Wages, rates of pay, hours, working conditions and all other terms and conditions of employment.

IMPASSE PROCEDURE:
Fact Finding: Mandatory 30 days from first negotiation session; tripartite panel; report issued within 10 days of hearing; costs of chairperson shared equally by the parties.

Criteria for Fact Finding:
- Comparison with comparable fire departments
- Interest and welfare of the public
- Comparison of skills, qualifications and hazards

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 1 year.

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PERTINENT CASE LAW:
- Local school boards may meet and confer, (O.A.G. 9/1/66).
- Absent legislative authority, a government body may not enter into a binding contract with a labor organization; contracts between school boards and labor organizations are an illegal delegation of power and therefore void, (*Chatham Association of Educators v. Board of Public Education for the City of Savannah and the County of Chatham*, 231 Ga. 306 (1974)).
- Georgia's right to work law excludes the State and its political subdivisions from coverage, (Ga. Code Ch. 54-9).

HAWAII

COVERAGE: All public employees.

AUTHORITY: Hawaii Rev. Stats. Ch. 89, Sec. 89-1 et seq. (1970) as last amended eff. 6/13/80.

EXCLUSIONS: Elected or appointed officials; members of boards or commissions; employer's representatives who are top-level managerial and administrative personnel; confidential employees; part-time and temporary employees; employees in the Governor's office, Lt. Governor's office and Mayor's office; household employees in Governor's residence; legislative employees; legislative branch employees of city and county of Honolulu and counties of Hawaii, Maui and Kauai, except for clerk's office employees; inmate, patient, ward or student of a State institution; student help; national guard.

ADMINISTRATIVE AGENCY:
Hawaii Public Employment Relations Board
550 Halekauwila Street, Second Floor
Honolulu, Hawaii 96813
(808) 548-6267

UNIT DETERMINATION: Statute.
The following consolidated Statewide units are designated by statute.
- Nonsupervisory blue collar employees
- Supervisory blue collar employees
- Nonsupervisory white collar employees
- Supervisory white collar employees
- Teachers
- Educational officers
- University of Hawaii and community college faculty
- Non-faculty personnel of University of Hawaii and community colleges
- Registered nurses
- Nonprofessional hospital and institutional employees
- Fire fighters
- Police officers
- Professional and scientific employees

The last 5 groups may vote to be included in the general white or blue collar units. Supervisors may vote to be included in nonsupervisory units.

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment; excluding classification and reclassification, health fund, retirement, salary ranges and number of incremental and longevity steps, matters inconsistent with merit principle, or managerial discipline and control; consultation on all other matters affecting employee relations.

GRIEVANCE PROCEDURE: Arbitration permitted; absent such procedure, disputes submitted to HPERB for final decision.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; engage in lawful concerted activity; refrain from doing so; present grievances.

MANAGEMENT RIGHTS:
- Direct employees
- Determine qualifications and standards of work
- Hire, promote, transfer, assign and retain employees
- Discipline employees for proper cause
- Relieve employees due to lack of work or other legitimate reason
- Maintain efficiency of operations
- Determine methods, means and personnel to implement operations
- Take actions as might be necessary to carry out mission of agency in cases of emergency

UNION SECURITY: Dues deduction mandatory. Agency shop mandatory; PERB must approve fee.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Refusal to participate in impasse procedure in good faith
- Refusal to comply with statute
- Violate terms of agreement

Labor Organization:
- Interfere, restrain or coerce employees
- Refusal to bargain in good faith
- Refusal to participate in impasse procedure in good faith
- Refusal to comply with statute
- Violate terms of agreement

IMPASSE PROCEDURE: Parties may establish their own procedure with arbitration as the final step; absent such procedures, the parties may request assistance or HPERB may initiate.

Mediation: Mediator(s) appointed by HPERB within three days after date of impasse; costs borne by HPERB.

Fact Finding: (excluding fire fighters) Begins 15 days after date of impasse; HPERB appoints panel of not more than three members; report issued within 10 days, made public within 5 days if not referred to arbitration; costs borne by HPERB.

Arbitration:
- Voluntary (excluding fire fighters); begins 30 days after date of impasse; tripartite panel; award due within 20 days; costs of arbitration hearing and neutral arbitrator shared equally by the parties.
- Mandatory (fire fighters only); begins 15 days after date of impasse; parties may agree upon their own procedure and arbitrator(s) to be used, if not agreed upon after 18 days, dispute submitted to tripartite panel; award due within 30 days of conclusion of hearing based on the most reasonable final offer package; costs of neutral arbitrator shared equally by the parties.

Criteria for Fire Fighter Arbitration Award:
- Lawful authority of employer
- Stipulations of the parties
- Interest and welfare of public
- Ability to pay
- Present and future economic conditions
- Comparability with persons performing similar services and other State and county employees
- Cost of living
- Overall compensation
- Changes in circumstances
- Other factors normally considered

Other: If parties do not submit to arbitration, employer, labor organization and fact finder submit recommendations on all cost items to appropriate legislative body.

STRIKE POLICY: Prohibited unless impasse procedures have been complied with, impasse is not submitted to arbitration, 60 days have elapsed since fact finding report, 10 day notice of intent to strike is given, employees are part of the bargaining unit and employees have been designated by PERB as being nonessential; may set requirements to avoid or remove danger to public health or safety; strikes in violation of these procedures may be enjoined.

IDAHO

COVERAGE: Teachers.

AUTHORITY: Idaho Code Ch. 103, Sec. 33-1271 et seq. (1971) as last amended eff. 7/1/77.

EXCLUSIONS: Superintendents, supervisors and principals may be excluded by collective bargaining agreement.

ADMINISTRATIVE AGENCY:
State Superintendent of Public Instruction
Len B. Jordan Office Building
Boise, Idaho 83720
(208) 384-3300

RECOGNITION: Exclusive; designated or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Matters and conditions subject to negotiations by agreement of the parties.

MANAGEMENT RIGHTS: To take necessary actions in cases of emergency.

IMPASSE PROCEDURE:
Mediation: Either party may request mediation; procedures and compensation determined by the parties.

Fact Finding: Either party may request fact finding if mediation fails; one or more fact finders appointed by mutual agreement of parties; if no agreement within 30 days, appointment made by Superintendent of Public Instruction; report issued within 30 days.

NOTE:
- Accurate records of negotiation proceedings shall be kept and made available for public inspection; joint ratification of all final settlements shall be made in open meetings.

PERTINENT CASE LAW:
- Public school teachers are not inferentially granted the right to strike even though such strikes are not expressly prohibited by law. (*School Dist. #351 v. Oneida Educ. Assn.*, 98 Idaho 486, 567 P. 2d 830 (1977)).

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COVERAGE: Fire fighters.

AUTHORITY: Idaho Code Ch. 138, Sec. 44-1801 et seq. (1970) as last amended eff. 7/1/77.

EXCLUSIONS: Supervisors.

ADMINISTRATIVE AGENCY:
Department of Labor and Industrial Services
State House
317 Main Street, Room 400
Boise, Idaho 83720
(208) 384-2327

RECOGNITION: Exclusive; selected by majority.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, rates of pay, working conditions and all other terms and conditions of employment.

EMPLOYEE RIGHTS: Bargain collectively and be represented by a labor organization.

IMPASSE PROCEDURE:
Fact Finding: Begins 30 days after negotiations commence; tripartite panel; costs incurred by fact finding panel shared equally by the parties.

STRIKE POLICY: Prohibited during term of contract.

PERTINENT CASE LAW:
- Fire fighters have the right to strike when collective bargaining agreement prohibiting strikes expire and employer has engaged in bad faith bargaining, (*I.A.F.F., Local 1494 v. City of Coeur d'Alene*, 99 Idaho 630, 586 P. 2d 1346 (1978)).

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OTHER PERTINENT CASE LAW:
- Absent enabling legislation for the State or its political subdivisions, authority to bargain collectively cannot be implied. (O.A.G. #80-6, 2/19/80).

ILLINOIS

COVERAGE: State employees under Governor.

AUTHORITY: Executive Order #6 (1973).

EXCLUSIONS: Supervisors; managerial and confidential; emergency and temporary employees.

ADMINISTRATIVE AGENCY:
Office of Collective Bargaining
525 West Jefferson, Room 200
Springfield, Illinois 62702
(217) 782-3223

UNIT DETERMINATION: OCB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Presumption favoring statewide units
- Separate units for professionals unless OCB determines no conflict and majority of professionals vote for inclusion

Additional criteria by OCB rules:
- Efficiency of operations
- Appropriate size of unit
- Promotion of effective collective bargaining
- Functional integration and interchange
- Geographical location
- History of collective bargaining

RECOGNITION: Exclusive; in an election, certification requires majority of employees in unit.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment subject to laws, appropriations and expenditures and personnel rules; excluding merit system and examinations, policies, programs and functions, budget and structure, standards, scope and delivery of services, utilization of technology, retirement and life insurance programs.

EMPLOYEE RIGHTS: To form, join or assist labor organizations; refrain from doing so.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain and coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Cause or attempt to cause employer to discriminate against an employee on account of membership in a labor organization

(ULP's are defined in Public Employee Bargaining Regulations issued by the Director of Personnel.)

IMPASSE PROCEDURE: Parties may develop their own procedures.

Mediation: Either party may request mediation from Director of Labor, or Director will appoint a mediator if no agreement is reached by May 1.

Fact Finding: Upon request of either party, Advisory State Impasse Resolution Panel may initiate fact finding; report made public within 5 days; costs shared equally by the parties.

Criteria for Fact Finding Report:
- Lawful authority of employer
- Interest and welfare of the public
- Ability to pay
- Comparison to other private and public employees performing similar services
- Overall compensation, continuity and stability of employment
- Other relevant factors

Arbitration: Voluntary; costs shared equally. Impasse procedure defined in Public Employee Bargaining Regulations issued by Director of Personnel.)

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COVERAGE: Fire fighters in municipalities with populations of 5,000 or more.

AUTHORITY: Illinois Annot. Stats. Ch. 24, Sec. 10-3-8 et seq. (1961).

SCOPE OF BARGAINING: Wages, hours and conditions of employment.

IMPASSE PROCEDURE:
Fact Finding: Mandatory; 5-member board serves without compensation.

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NOTE:
- Illinois has a statute covering employees of Regional Transportation Authority, (Illinois Rev. Stats. Ch-111 2/3, Sec. 702.19).

PERTINENT CASE LAW:
- Cities may enter into bargaining agreements with employees, (*Chicago Division of Illinois Education Association v. Board of Education of City of Chicago*, (Ill. App. Ct. 1966) 222 N.E. 2d 243).
- Cities are not required to recognize a labor organization or to bargain collectively, (*Cook County Police Assn. v. City of Harvey*, (App. Ct. 1972) 289 N.E. 2d 226).
- Chicago Board of Education has power to enter into collective bargaining agreements for a up to 3 years, (Illinois School Code 34-49 (1)).
- Strikes by public employees are illegal and striking employees may be fired, (*Strobeck v. Ill. C.S.C.*, (App. Ct. of Ill. 1979) 388 N.E. 2d 912).

INDIANA

COVERAGE: Teachers.

AUTHORITY: I.C. 20, Sec. 1 et seq. (1973) as last amended eff. 5/1/78.

EXCLUSIONS: Supervisors, confidential and part-time employees; employees performing security work; non-certificated employees.

ADMINISTRATIVE AGENCY:
Education Employment Relations Board
9247 N. Meridan Street, Suite 260
Indianapolis, Indiana 46260
(317) 844-3161

UNIT DETERMINATION: EERB in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
- Efficient administration of school operations
- Community of interest
- Avoidance of over-fragmentation
- Recommendations of the parties

RECOGNITION: Exclusive; voluntary requires showing of interest from majority in unit; election requires 20% to petition or intervene; certification requires majority of employees in unit.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salaries, wages, hours and salary and wage related fringe benefits. Duty to discuss curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline, expulsion or supervision of students; pupil-teacher ratio; class size; budget appropriations and other conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join or assist labor organizations; participate in bargaining; engage in other activities; present grievances.

MANAGEMENT RIGHTS:
- Direct work
- Establish policy
- Hire, promote, demote, transfer, assign or retain employees
- Suspend or discharge employees
- Maintain efficiency of school operations
- Relieve employees due to lack of work
- Take actions necessary to carry out mission

UNION SECURITY: Dues deduction mandatory.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain or discuss
- Failure or refusal to comply with statute

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Cause or attempt to cause employer to commit a ULP
- Refusal to bargain
- Failure or refusal to comply with statute

IMPASSE PROCEDURE:

Mediation: Either party may request EERB for appointment of a mediator or EERB shall appoint a mediator if no agreement 75 days prior to budget submission date; costs borne by EERB.

Fact Finding: Either party may request fact finding after 5 days of mediation or EERB shall appoint a fact finder if no agreement 45 days prior to budget submission date; report issued, made public within 10 days; upon petition of both parties, EERB may bypass mediation; fact finder may mediate; costs borne by EERB.

Criteria for Fact Finding Report
- Past agreements
- Comparison with public and private sector employees doing comparable work, giving consideration to factors peculiar to schools
- Public interest
- Financial impact

Arbitration: Voluntary; arbitrator appointed by the EERB; costs shared equally by the parties.

STRIKE POLICY: Prohibited; labor organization loses dues deduction for one year, and employees may not be paid for strike days.

NOTE:
- Election bar of 2 years.

PERTINENT CASE LAW:
- Agency shop agreements are illegal. (*Edna Mae Alexander v. Anderson Federation of Teachers et al.*, Indiana, Madison Cty. Superior Ct. #2, Case No. 25-77-361, 5/10/79).

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NOTE:
- The Public Employee Labor Relations Act (I.C. Sec. 1 et seq. 1971) was declared unconstitutional in its entirety. (*Indiana Education Employment Relations Board et al. v. Benton Community School District.* (Ind. S. Ct.) No. 776 S 203, 7/12/77).
- The Indiana Labor-Management Committee for Police and Fire was establisned on September 1, 1979. The nonstatutory, tripartite Committee renders assistance in resolving impasses on joint request funded by foundation grant through August 31, 1981.

IOWA

COVERAGE: All public employees.

AUTHORITY: Code of Iowa Ch. 20, Sec. 20.1 et seq. (1974) as last amended eff. 1/1/79.

EXCLUSIONS: Elected or appointed officials; members of boards and commissions; employer's representatives; chief executive officers and deputies; supervisors; confidential employees; students working part-time; temporary employees; national guard; judges and their employees; patients; inmates; Department of Justice employees; Commission of the Blind employees.

ADMINISTRATIVE AGENCY:
Public Employment Relations Board
507 10th Street, Des Moines, Iowa 50309
(515) 281-4414

UNIT DETERMINATION: PERB.

CRITERIA FOR UNIT DETERMINATION:
- Efficient administration
- Community of interest
- History and extent of organization
- Geographic location
- Recommendations of the parties
- Separate units for professionals and nonprofessionals unless both groups vote for inclusion

RECOGNITION: Exclusive: by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours, vacations, insurance, holidays, leave, shift differential, overtime, supplemental pay, seniority, transfer procedures, job classifications, health and safety, evaluation, staff reduction, in-service training, and other mutually agreed upon matters; excluding merit system and retirement.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; negotiate; engage in other concerted activities; refrain from doing so; meet and adjust individual complaints with employer.

MANAGEMENT RIGHTS:
- Direct work of employees
- Hire, promote, demote, transfer, assign and retain
- Discipline employees
- Maintain efficiency of operations
- Relieve employees from duty due to lack of work
- Determine means to implement operations
- Prepare budget
- Exercise all powers granted by law

UNFAIR LABOR PRACTICES:

Employer:
- Refusal to bargain in good faith
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Deny labor organization its rights
- Refusal to participate in impasse procedure in good faith
- Lockout

Labor Organization:
- Refusal to bargain in good faith
- Interfere, restrain or coerce employees or employer's representative
- Refusal to participate in impasse procedure in good faith
- Strike
- Picket

IMPASSE PROCEDURE: Parties must attempt to agree upon impasse procedure; if no agreement is reached, the following procedure shall be used.

Mediation: Begins 120 days prior to budget submission date; mediator appointed by PERB at request of either party.

Fact Finding: Fact finder appointed by PERB 10 days after mediator's appointment; report due within 15 days and made public 10 days later if no agreement reached.

Arbitration: Either party may request arbitration; tripartite or single arbitrator; arbitrator may select final offer of either party or fact finder's recommendations on an issue-by-issue basis; arbitrator(s) may not mediate; award due in 15 days; costs of chairperson and all other costs shared equally; hearings open to public.

Criteria for Arbitration Award:
- Past agreements
- Comparison to comparable public employees, considering factors peculiar to area or job
- Interest and welfare of the public
- Ability to pay
- Effect of award on standard of services
- Employer's taxing or appropriating power

STRIKE POLICY: Prohibited; enjoinable by court with violation punishable by up to $500 individual fine or $10,000 fine for the labor organization for each day of violation and/or up to 6 months of imprisonment; individuals ineligible for re-employment for 1 year and labor organization decertified for 1 year.

NOTE:
- All agreements and/or arbitration awards must be completed no later than March 15.
- Iowa has a right to work statute. (Sec. 736A.3).
- Initial proposals must be made in a session open to the public; all other sessions are closed.
- Labor organizations shall not negotiate or attempt to negotiate with employer's governing board if the employer has designated a bargaining representative.

KANSAS

COVERAGE: All public employees.

AUTHORITY: K.S.A. Ch. 264, Sec. 75-4321 et seq. (1971) as last amended eff. 7/1/80.

EXCLUSIONS: Supervisors (at employer's discretion); professional employees of school districts; elected and management officials; confidential employees.

ADMINISTRATIVE AGENCY:
Public Employee Relations Board
610 West Tenth Street, Topeka, Kansas 66612
(913) 296-3094

UNIT DETERMINATION: PERB in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
- Efficient administration of government
- Community of interest
- History and extent of organization
- Geographical location
- Effects of over-fragmentation
- Recommendations of parties
- Separate units for professionals unless majority vote for inclusion in nonprofessional unit
- Separate units for uniformed police, security guards and fire fighters

RECOGNITION: Exclusive: voluntary or by election.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Wages, salaries, hours and other conditions of employment; excluding subjects pre-empted by Federal, State, or municipal law, employee and employer rights and merit system.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so.

MANAGEMENT RIGHTS:
- To direct work of employees
- Hire, promote, demote, transfer, assign and retain
- Discipline employees for proper cause
- Maintain efficiency
- Relieve employees due to lack of work
- Carry out mission of agency in emergencies
- Determine methods and means for carrying out operations

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to meet and confer in good faith
- Deny labor organization its rights
- Avoid participation in impasse procedure
- Lockout

Labor Organization:
- Interfere, restrain or coerce employees
- Interfere with employer's rights and representatives
- Refusal to meet and confer in good faith
- Avoid participation in impasse procedure
- Strike
- Endorse candidates or make political contributions

IMPASSE PROCEDURE: Parties may agree upon an impasse procedure prior to negotiations; if no agreement, the following procedure shall be used.

Mediation: Either party or PERB may request appointment of a mediator from the Secretary of Human Resources; costs borne by Secretary.

Fact Finding: If impasse exists 7 days after appointment of mediator, PERB requests appointment of fact finding board from Secretary of Human Resources; report due within 21 days, made public 14 days after submission; costs borne by Secretary.

Other: (Except for State, its agencies and employees) If impasse continues for 40 days or 14 days prior to budget submission, the local governing body determines what action to take with consideration given to fact finder's recommendations and positions of the parties.

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 3 years.
- Kansas has a right to work law which specifically applies to public employees. (Kansas Con., Sec. 12).

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COVERAGE: Teachers.

AUTHORITY: K.S.A. Ch. 284, Sec. 72-5413 et seq. (1970) as last amended eff. 7/1/80.

EXCLUSIONS: Administrative employees.

ADMINISTRATIVE AGENCY:
Secretary of Human Resources
610 West 10th Street, Topeka, Kansas 66612
(913) 296-3094

UNIT DETERMINATION: Secretary of Human Resources.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Desires of employees and/or established practice, including extent of organization
- Unit of classroom teachers must include all teachers in the district

RECOGNITION: Exclusive; voluntary or by election; majority of employees must vote in order for election to be valid.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salaries, wages, hours and terms and conditions of professional service; excluding matters fixed by statute or State Constitution.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join or assist labor organizations; participate in negotiations; refrain from doing so.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Deny labor organization its rights
- Refusal to participate in impasse procedure in good faith
- Lockout

Labor Organization:
- Interfere, restrain or coerce employees
- Interfere with employer's rights and representatives
- Refusal to bargain in good faith
- Refusal to participate in impasse procedure in good faith
- Engage in strikes or picketing

IMPASSE PROCEDURE: Secretary of Human Resources must establish that impasse exists before impasse procedure can be used.

Mediation: Mediator appointed by Secretary of Human Resources; costs shared equally.

Fact Finding: Either party may request fact finding; each party shall submit to the Secretary their final position on each issue; Secretary appoints fact finding board of not more than 3 members; report issued within 10 days and made public 10 days later; if no resolution, Board of Education shall take any action it deems in the public interest; costs shared equally by the parties.

STRIKE POLICY: Prohibited.

NOTE:
- Every meeting, conference, consultation and discussion during negotiations is subject to the open meeting law.
- Any hearings held by Secretary during course of impasse determination are subject to open meetings law.
- Contract duration may not exceed 2 years.
- Kansas has a right to work law which applies to public employees, (Kansas Con., Sec. 12).

KENTUCKY

COVERAGE: Fire fighters in cities with populations of 300,000 or more or cities electing coverage.

AUTHORITY: Kentucky Rev. Statutes Ch. 345, Sec. 345.010 et seq. (1972) as last amended eff. 6/21/76.

ADMINISTRATIVE AGENCY:
State Labor Relations Board
127 Building
Frankfort, Kentucky 40601
(502) 564-3070

UNIT DETERMINATION: SLRB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Wages, hours and working conditions of employees involved
- History of collective bargaining
- Desires of employees

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other conditions of employment.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain collectively.

UNION SECURITY: Dues deduction mandatory. Union shop permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith

IMPASSE PROCEDURE:
Mediation: Commissioner of Labor may mediate upon request of either party for fact finding after 30 days of bargaining.

Fact Finding: Either party may request; tripartite panel; report issued within 120 days of first request for fact finding; costs shared equally by the parties.

STRIKE POLICY: Prohibited.

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COVERAGE: Police in counties with populations of 300,000 or more that have adopted the merit system.

AUTHORITY: Kentucky Rev. Statutes Ch. 78, Sec. 78.400 et seq. (1972).

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and terms and conditions of employment; excluding managerial policy.

EMPLOYEE RIGHTS: To organize, form, join or participate in labor organizations; bargain; refrain from doing so.

STRIKE POLICY: Prohibited.

PERTINENT CASE LAW:
- Collective bargaining agreements under this statute cannot be enforced if violated, (O.A.G. #75-607, 9/17/75).

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OTHER PERTINENT CASE LAW:
- Teachers cannot be granted negotiating rights by Executive Order and have no right to strike, (O.A.G. #175-126, 2/12/75).
- Local school boards have the authority to enter into collective bargaining at their own discretion, (O.A.G. 65-84).
- Collective bargaining sessions between public employers and their employees or their representatives may be closed but public labor policy meetings must be open to the public, (O.A.G. 76-456).
- Strikes by public employees are prohibited, (*Jefferson County Teachers Association* v. *Board of Education*, (Kentucky Ct. of App. 1970) 463 S.W. 2d 627).
- State employees may join labor organizations but State does not have authority to bargain; striking employees subject to disciplinary action, including dismissal, (Memorandum of the Commissioner of the Dept. of Personnel, 12/20/66).

- University of Kentucky can bargain and enter into contracts, but can't recognize the labor organization as the exclusive representative, (*Bd. of Trustees, Univ. of Ky. v. Pub. Emps. Council 51, AFSCME* (Ky. S. Ct. 1978) 571 S.W. 2d 616).

LOUISANA

Louisiana does not have a collective bargaining statute for public employees.

* * *

COVERAGE: All public employees.

AUTHORITY: Act #419 (1966).

UNION SECURITY: Dues deduction permitted.

* * *

NOTE:
- Louisiana has a right to work law, (Stat. 23, Title 23, Sec. 981 et seq.).
- Executive sessions are excepted from open meeting requirement; no final or binding action shall be taken in executive session, (Act 681).

PERTINENT CASE LAW:
- Lawful for teachers and other public employees to engage in collective bargaining with their employers, (O.A.G. #74-413, 4/4/74).
- Negotiated agreements may not violate any law and the subject matter must be in an area which the employer is lawfully authorized to negotiate, (*Zbosen v. Department of Highways*, (La. 19 Jud. Dist. Ct.) #163,480, 7/6/73).
- Municipal police officers and ranking members of the police department may join a labor organization, (O.A.G. 10/22/69).
- Police officers do not have the right to strike, (*City of New Orleans v. Police Assn. of La., Teamsters, Local 253* (La. Ct. of App. 1979) 369 So. 2d 188); labor organizations violating strike ban may be fined $500 for contempt, (*City of New Orleans v. Police Assn. of La., Teamsters, Local 253* (La. Ct. of App. 1979) 371 So.2d 638).
- An agreement between a city and a fire fighters labor organization may be enforced in court, (*New Orleans Fire Fighters Association v. City of New Orleans*, (La. Ct. of App. 1967) 204 So. 2d 690).
- Louisiana law neither requires nor prohibits collective bargaining with municipal labor organizations, (*Beauboeuf v. Delgado College*, (Ed. La. 1969) 303 F. Supp. 361, affirmed (USCA, 5th Cir., 1970) 428 F. 2d 470).
- In the absence of statutory policy, recognition of labor organizations by State agencies is not a question of law but rather a policy determination to be made administratively, (Opinion of Special Counsel to the Attny. Gen. 4/3/72).

MAINE

COVERAGE: State employees.

AUTHORITY: M.R.S. Title 26, Ch. 9-B, Sec. 979 et seq. (1974) as last amended eff. 10/13/79.

EXCLUSIONS: Elected or appointed officials; confidential employees whose duties relate to collective bargaining matters; department heads; persons employed less than 6 months; temporary, seasonal or on-call employees; militia and national guard; staff attorney, assistant and deputy attorney general.

ADMINISTRATIVE AGENCY:
Maine Labor Relations Board
State Office Building
Augusta, Maine 04333
(207) 289-2016

UNIT DETERMINATION: Executive Director in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
- Insuring employees fullest freedom
- Supervisors excluded from units which include nonsupervisory employees
- Community of interest
- Avoidance of over-fragmentation

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: All matters relating to the relationship between employer and employees including wages, work schedules and general working conditions. Excluded are matters proscribed by law; regulations governing application for State service; merit system principles and personnel laws.

GRIEVANCE PROCEDURE: Arbitration permitted; if no provision, grievances submitted to the State Employees Appeals Board.

EMPLOYEE RIGHTS: To join, form and participate in labor organizations; present grievances.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Discriminate on account of labor organization membership or testimony
- Dominate labor organizations
- Refusal to bargain
- Blacklist

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Refusal to bargain
- Engage in work stoppages, slowdowns, strikes or blacklist employer

IMPASSE PROCEDURE:
Mediation: Either party may request or MLRB or Executive Director may initiate; services of members of State's panel of mediators, to a maximum of 3 mediation days per case, available at no cost; thereafter costs shared equally by the parties.

Fact Finding: Either party may request; MLRB appoints three-member panel; mediator may not be fact finder; costs shared equally by the parties.

Arbitration: If no resolution within 45 days of fact finding, either party may request arbitration; single or tripartite arbitration; award is due within 30 days; award is advisory as to salaries, pensions and insurance, binding on all other issues; costs of arbitration hearing and neutral arbitrator shared equally by the parties; services of State Board of Arbitration and Conciliation are available to the parties without cost.

Criteria for Arbitration Award:
- Interest and welfare of the public
- Ability to pay
- Comparison with other private or public sector employees doing similar work
- Overall compensation
- Other factors normally considered including Consumer Price Index
- Need for qualified employees
- Conditions of employment for similar positions outside the State government
- Relationships between groups of employees
- Need for fair and reasonable conditions in relation to job qualifications and responsibilities

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 2 years.
- Either party may publicize the parties' written initial proposals 10 days after both parties have made their initial proposal.

PERTINENT CASE LAW:
- Fair share provisions in contracts are valid, (Opin. to the House (Me. S. Jud. Ct. 1979). 401 A. 2d 135).

* * *

COVERAGE: All municipal employees, school and other district employees and Maine Turnpike Authority employees.

AUTHORITY: M.R.S.A. Title 26, Ch. 9-A, Sec. 961 et seq. (1969) as last amended eff. 10/13/79.

EXCLUSIONS: Elected or appointed officials; confidential employees whose duties relate to collective bargaining or labor relations matters (MLRB decision); department heads; superintendents or assistant superintendents of schools; persons employed for less than 6 months; temporary, seasonal or on-call employees.

ADMINISTRATIVE AGENCY:
Maine Labor Relations Board
State Office Building
Augusta, Maine 04333
(207) 289-2016

UNIT DETERMINATION: Executive Director in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
- Insuring employees fullest freedom
- Supervisors excluded from units which include nonsupervisory employees
- Community of interest
- Professionals must vote for inclusion in nonprofessional units

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours, working conditions and grievance arbitration; teachers may meet and consult on educational policy; excluding merit system for appointments and promotions.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; present grievances.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Discriminate on account of labor organization membership or testimony
- Dominate labor organizations
- Refusal to bargain
- Blacklist

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Refusal to bargain
- Engage in work stoppages, slowdowns, strikes or blacklist employer

IMPASSE PROCEDURE:
Mediation: Either party may request or MLRB or Executive Director may initiate; MLRB may appoint more than one mediator; services of members of State's panel of mediators, to a maximum of 3 mediation days per case, available at no cost; thereafter costs shared equally by the parties.

Fact Finding: Either party may request; MLRB appoints a three-member panel; mediator may not be a fact finder; report may be made public after 30 days; fact finding may be waived upon joint request; costs shared equally by the parties.

Arbitration: If no resolution within 45 days of report, parties may mutually agree to an arbitration process; failing that, either party may petition MLRB for arbitration; tripartite panel; mediators and fact finders may serve on the panel only

with consent of both parties; award is advisory as to salaries, pensions and insurance, binding on all other issues; costs shared equally by the parties; services of State Board of Arbitration and Conciliation are available to the parties without cost.

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 3 years.
- Either party may publicize the parties' written initial proposals 10 days after both parties have made their initial proposal.

PERTINENT CASE LAW:
- Agency shop illegal, (*Maine School Administration District #49 v. Teachers Association District #49*, (Maine S. Ct.) Decision #1560, 11/18/77).
- Mandatory/permissive subjects of bargaining defined, (*City of Biddeford v. Biddeford Teachers Association*, (Me. S. Jud. Ct. 1973) 304 A.2d 387).
- Interest arbitration found constitutional, (*City of Biddeford v. Biddeford Teachers Association*, (Me. S. Jud. Ct. 1973) 304 A. 2d 387).

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COVERAGE: University of Maine employees; Maine Maritime Academy employees; vocational-technical institute employees; State schools for practical nursing employees.

AUTHORITY: 26 M.R.S.A., Ch. 12, Sec. 1021 et seq. (1975) as last amended eff. 10/13/79.

EXCLUSIONS: Appointed officials; Vice President, Dean, Director or member of Chancellor's or Superintendent's immediate staff; confidential employees whose duties relate to collective bargaining matters; probationary employees; classified employees of the vocational-technical institute and schools for practical nursing.

ADMINISTRATIVE AGENCY:
Maine Labor Relations Board
State Office Building
Augusta, Maine 04333
(207) 289-2016

UNIT DETERMINATION: Statute.
The following are units structured on a University system-wide basis:
- Faculty
- Professional and administrative staff
- Clerical, office, laboratory and technical
- Service and maintenance
- Supervisory classified
- Police

The following are units for Maine Maritime Academy employees:
- Faculty
- Administrative staff
- Classified employees

The following are units for vocational-technical institute and schools for practical nursing employees:
- Faculty and instructors
- Administrative staff

CRITERIA FOR UNIT DETERMINATION: In case of dispute over placement in a unit, community of interest and work tasks are considered; additional units may be created by MLRB using criteria of community of interest, legislative desire to avoid over-fragmentation and intent to give employees their full rights under the law.

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours, working conditions and grievance arbitration.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To join, form and participate in labor organizations.

UNION SECURITY: Closed shop prohibited.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Discriminate on account of labor organization membership or testimony
- Dominate labor organizations
- Refusal to bargain
- Blacklist

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Refusal to bargain
- Engage in work stoppages, slowdowns, strikes or blacklist employer

IMPASSE PROCEDURE:
Mediation: Either party may request or MLRB may initiate; services of members of State's panel of mediators, to a maximum of 3 mediation days, available at no cost; thereafter costs shared equally by the parties.

Fact Finding: Either party may request fact finding panel from MLRB; three-member panel; mediator may not be a fact finder; report may be made public after 30 days; costs shared equaly by the parties.

Arbitration: Either or both parties may request MLRB for arbitration; single arbitrator or tripartite panel; award due within 60 days; award is advisory as to salaries, pensions and insurance, binding on all other issues; costs shared equally by the parties; services of State Board of Arbitration and Conciliation are available to the parties without cost.

Criteria for Arbitration Award:
- Interest and welfare of students and the public
- Ability to pay
- Comparison with other private or public sector employees doing similar work
- Overall compensation
- Other factors normally considered
- Need for qualified employees
- Conditions of employment in similar positions
- Need to maintain appropriate relationships between different occupations
- Need to establish fair and reasonable conditions in relation to job qualifications and responsibilities

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 2 years.
- Panel of three students shall be allowed to meet and confer with parties prior to bargaining and at reasonable times with University bargaining team during the course of negotiations.
- Either party may publicize the parties' written initial proposals 10 days after both parties have made their initial proposal.

MARYLAND

COVERAGE: Teachers.

AUTHORITY: Title 6, Sec. 6-401 et seq. (1978).

EXCLUSIONS: Superintendent of schools; employer's negotiators.

ADMINISTRATIVE AGENCY:
State Board of Education
P.O. Box 8717
Baltimore-Washington International Airport
Baltimore, Maryland 21240
(301) 796-8300

UNIT DETERMINATION: Jointly by parties.

CRITERIA FOR UNIT DETERMINATION:
- No more than 2 units in any county or Baltimore City
- All teachers must be in 1 unit

RECOGNITION: Exclusive for minimum of 2 years; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, salaries, hours and other working conditions; excluding tenure.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so.

UNFAIR LABOR PRACTICES:
- To interfere, intimidate, restrain, coerce or discriminate against employees

IMPASSE PROCEDURE:
Mediation: On consent of both parties, mediation by State Board of Education; absent such consent, at request of either party, mediation by tripartite panel; costs shared equally by the parties.

Fact Finding: Tripartite panel; report issued within 30 days; costs shared equally by the parties.

STRIKE POLICY: Prohibited; recognition revoked for 2 years, dues deduction for 1 year; penalties are mandatory, (O.A.G. 8/15/74).

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COVERAGE: Non-certified public school employees.

AUTHORITY: Title 6, Sec. 6-501 et seq. (1978).

EXCLUSIONS: Caroline, Carroll, Cecil, Dorchester, Frederick, Howard, Kent, Queen Anne, Somerset, Talbot, Wicomico and Worcester Counties; employees of Baltimore City, Mayor and Baltimore City Council; employees covered by a collective bargaining agreement prior to July 1, 1974; management personnel; confidential employees; employer's negotiators.

UNIT DETERMINATION: Jointly by the parties.

CRITERIA FOR UNIT DETERMINATION:
- No more than 3 units per county
- No supervisors in nonsupervisory units

RECOGNITION: Exclusive for minimum of 2 years; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salaries, wages, hours and other working conditions.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join or participate in labor organizations; refrain from doing so.

UNION SECURITY: Agency shop mandatory in Montgomery and Prince George's Counties.

UNFAIR LABOR PRACTICES:
- Interfere, intimidate, restrain, coerce or discriminate against employees

IMPASSE PROCEDURE:
Mediation: On consent of both parties, mediation by State Board of Education; absent such consent, at request of either party, mediation by tripartite panel; costs shared equally by the parties.

Fact Finding: By mediation panel; report issued within 30 days; costs shared equally by the parties.

STRIKE POLICY: Prohibited; recognition revoked for 2 years, dues deduction for 1 year.

* * *

NOTE:
- Maryland has a statute prescribing a grievance procedure for State employees. (Ch. 727, Sec. 52 et seq. (1977) as last amended eff. 7/1/78).
- Allegany, Anne Arundel, Baltimore, Harford, Howard, Montgomery and Prince George's Counties and the Cities of Baltimore, Annapolis, Bowie, Hagerstown, New Carrollton, and Rockville have local ordinances of varying scope. Only Prince George's County provides for an impartial administrative agency.
- Referendum passed on 11/4/80 provides interest arbitration for police and fire in Prince George's County and for police in Montgomery County.

MASSACHUSETTS

COVERAGE: All public employees.

AUTHORITY: M.G.L.A. Ch. 150E, Sec. 1 et seq. (1973) as last amended eff. 10/4/79.

EXCLUSIONS: Elected or appointed officials; members of boards and commissions; employer's representatives; managerial and confidential employees; members of militia and national guard; employees of the Commission; officers and employees of Departments of State Secretary, State Treasurer, State Auditor and Attorney General.

ADMINISTRATIVE AGENCY:
Labor Relations Commission
1604 Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202
(617) 727-3505

Board of Conciliation and Arbitration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202
(617) 727-3466

UNIT DETERMINATION: LRC.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Efficiency of operations and effective dealings
- Rights of employees for effective representation
- Professionals must vote for inclusion in nonprofessional units
- No uniformed members of the fire department below the rank of chief may be classified as managerial, professional or confidential
- For state police, appropriate unit is all ranks up to and including sergeant; others may be in own unit
- For judicial employees, probation and court officers in one unit, nonmanagerial and nonconfidential staff and clerical personnel in another unit
- For metropolitan district commission police, appropriate unit is all ranks subordinate to captain
- For state lottery commission, appropriate unit is all employees below rank of assistant director

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours, standards of productivity and performance and other terms and conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted; if not in contract, may be ordered by LRC upon request of either party.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; engage in lawful concerted activities; refrain from doing so; present grievances.

UNION SECURITY: Dues deduction mandatory (Gen. Laws Ch. 180, Sec. 17A et seq. as last amended eff. 9/23/78).
Agency shop permitted by election; service fee equal to membership dues; labor organization must establish procedure to rebate portion of service fee not germaine to services as bargaining agent if requested by employee.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Refusal to participate in impasse procedure in good faith

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Refusal to participate in impasse procedure in good faith

IMPASSE PROCEDURE:
Mediation: Either party may request mediation from Board of Conciliation and Arbitration or name their own mediator.

Fact Finding: After 20 days of mediation, either party may request fact finding from BCA or name their own fact finder; fact finder may mediate; report due within 30 days; made public after 10 days of issuance; parties may jointly agree to waive fact finding and petition BCA for arbitration.

Arbitration: Voluntary, excluding police and fire fighters.

STRIKE POLICY: Prohibited; enjoinable; labor organization may be fined for illegal strike. (*Mass. Labor Relations Commission* v. *Boston Teachers Union Local 66 et al.*, (1973) Mass. S. Ct.).

NOTE:
- Contract duration may not exceed 3 years.
- Arbitration awards are binding on the parties and on the appropriate legislative body.

PERTINENT CASE LAW:
- Act covers only executive branch employees; judicial employees excluded from coverage. (*Mass. Probation Assn.* v. *Commissioner of Admin., et al.*, (Mass S. Jud. Ct. 1976) 352 N. E. 2d 684).

* * *

COVERAGE: State and special district police; municipal police and fire fighters.

AUTHORITY: Ch. 1078, Sec. 4 (1973) as last amended eff. 10/4/79, expires June 30, 1983. Sec. 4A (1977) as last amended eff. 7/1/79 establishes the Joint Labor-Management Committee. Sec. 4B eff. 10/4/79 applies to State and special district police, expires June 30, 1982.

EXCLUSIONS: Police or fire fighters working less than full-time.

ADMINISTRATIVE AGENCY:
Board of Conciliation and Arbitration
100 Cambridge Street
Boston, Massachusetts 02202
(617) 727-3466

Joint Labor-Management Committee
130 Bowdoin Street, Room 408
Boston, Massachusetts 02108
(617) 727-9690

IMPASSE PROCEDURE:
Arbitration: If impasse continues for 30 days after fact finder's report is published or if both parties have waived fact finding, the labor organization petitions BCA for arbitration; single or tripartite panel; hearings begin within 10 days, must conclude within 40 days; at conclusion of hearings, each party submits its last best offer on each issue; the panel or single arbitrator then must select one of the final offers or the recommendations of the fact finder; costs of arbitration hearing and neutral arbitrator shared equally by the parties.

Scope of Arbitration Award:
- For State and municipal police, scope limited to wages, hours and conditions of employment; shall not include right to appoint, promote, assign and transfer employees.
- For fire fighters, scope does not include right to appoint and promote employees; assignments except for matters of initial station assignments upon appointment or promotion; transfers except for the relationship of seniority to transfer; disciplinary and punitive action.
- Subject of minimum manning and staffing coverage is a permissive subject.

Criteria for Arbitration Award:
- Ability to pay
  - reimbursements and assessments
  - long and short term indebtedness
  - estimated share in metropolitan district commission deficit
  - estimated share in Mass. Bay Transportation Authority's deficit
  - average per capita property tax burden, average annual income of community members and effect of award on property tax rates
- Interest and welfare of the public
- Hazards of employment and skills involved
- Comparison with other private or public sector employees doing similar work
- Fact finder's recommendations
- Cost of living
- Overall compensation
- Changes in circumstances
- Stipulations of the parties
- Other factors normally considered

STRIKE POLICY: Prohibited; enforceable by court; fines determined by court.

NOTE:
- Arbitration awards involving municipal police and fire fighters are binding on the parties and on the appropriate legislative agency.
- The Joint Labor-Management Committee has discretionary jurisdiction over any police or fire negotiation dispute. Either party may petition. If Committee declines jurisdiction or fails to act within 30 days, petition is automatically referred to BCA. The Committee may meet with the parties, conduct conferences, and take other steps, including mediation, to encourage agreement. The Committee may remove, at any time, any dispute in which the BCA has exercised jurisdiction.

  If Committee determines impasse exists, Committee shall:
  - specify issue(s) to be arbitrated, may direct further negotiations concerning issues not specified for arbitration
  - nominate panel of neutral arbitrators; if parties cannot agree, Committee appoints arbitrator(s)
  - determine form of arbitration
  - determine procedures to be followed

  In dispute resolution conducted by other than the Committee or staff, the parties share equally all costs.

PERTINENT CASE LAW:
- Interest arbitration for police and fire fighters found constitutional, (*Town of Arlington* v. *Bd.*

of Conciliation and Arbitration, (Mass. S. Jud. Ct. 1976) 352 N.E. 2d 914).

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NOTE:
- Voters passed a referendum on 11/4/80 calling for the repeal of the Police and Fire Arbitration Act; school boards will be required to get city council approval of contract terms.

MICHIGAN

COVERAGE: State civil service employees.

AUTHORITY: Michigan Civil Service Commmission Employee Relations Policy, Mich. Const. Art. XI, Sec. 1-101 et seq. (1980).

EXCLUSIONS: Managerial supervisory and confidential employees.

ADMINISTRATIVE AGENCY:
Employment Relations Board
Lewis Cass Building
320 S. Walnut
Lansing, Michigan 48909
(517) 373-3026

UNIT DETERMINATION: State Personnel Director; appealable to the Board.

CRITERIA FOR UNIT DETERMINATION:
- Criteria defining most appropriate unit
  - broad occupational unit of employees with community of interest
  - unit that facilitates negotiation of state service-wide issues and administration of State government
  - unit comprising a broad grouping of occupationally related classes
- History of organization considered but not controlling

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment; excluding merit system.

GRIEVANCE PROCEDURE: Established by State Personnel Director; labor organization may negotiate on the procedure.

EMPLOYEE RIGHTS: To organize, form, assist and join labor organizations; engage in concerted activities; refrain from doing so; present grievances.

MANAGEMENT RIGHTS:
- Determine matters of managerial policy
- Mission of agency
- Budget
- Method, means and personnel
- Organizational structure
- Standards of service and maintenance of efficiency
- Select, direct, assign, transfer or discipline employees
- Take necessary actions in cases of emergency

UNION SECURITY: Dues deduction mandatory. Agency shop permitted; agency fee may not include political contributions or other purposes not directly related to costs of representation.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith.

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Strike

IMPASSE PROCEDURE:
Fact Finding: Board may establish or may serve as an impasse panel; panel submits recommendations.

Criteria for Impasse Panel Report:
- Stipulations and agreements
- Interest and welfare of the public
- Ability to pay
- Comparison with employees performing similar services and other employees generally
- Overall compensation
- Other factors normally considered

STRIKE POLICY: Prohibited; employees may be suspended or dismissed.

NOTE:
- Election bar of 2 years.

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COVERAGE: Municipal and local government employees.

AUTHORITY: M.C.L.A., Sec. 423.201 et seq. (1947) as last amended eff. 10/9/78.

EXCLUSIONS: Employees in the State classified civil service.

ADMINISTRATIVE AGENCY:
Michigan Employment Relations Commission
State of Michigan Plaza Building
1200 6th Avenue, 14th Floor
Detroit, Michigan 48226
(313) 256-3540

UNIT DETERMINATION: MERC.

CRITERIA FOR UNIT DETERMINATION:
- History of bargaining
- Avoid over-fragmentation
- One person units permitted provided same labor organization represents other employees in same craft or occupation
- In fire fighter units, employees below rank of commissioner are considered nonsupervisory and are included in the unit

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; engage in lawful concerted activities; present grievances.

UNION SECURITY: Agency shop permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain

Labor Organization:
- Restrain or coerce employees or employer's representative
- Cause or attempt to cause employer to commit a ULP
- Refusal to bargain

IMPASSE PROCEDURE:
Mediation: Either party may request or MERC appoints a mediator if no resolution 30 days prior to expiration of current agreement.

Fact Finding: Either party may request or MERC may initiate; tripartite panel or single ad hoc fact finder; hearings held within 20 days, report issued within 10 days; costs shared equally by the parties.

STRIKE POLICY: Prohibited.

PERTINENT CASE LAW:
- While agency shop agreements are permitted, that fee may not include political contributions, dues for nonbargaining activities or special assessments for strike payments which would not benefit the nonmember. (Garden City School District and Garden City Education Assn., MEA and NEA, and Paul E. and Lore M. Chamberlain, (MERC) Case Nos. C76S-344, CU6J-45 and CU6J-46, 10/19/78).
- The Public Employment Relations Act may be applied to judicial employees; the Act does not require the exhaustion of collective bargaining remedies as a condition of invoking the jurisdiction of MERC. (*Judges of the 60th Jud. Dist. Ct. v. MERC et al.*, (Mich. Ct. of App.) Nos. 78-799/903. 11/13/78).

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COVERAGE: State police troopers and sergeants; municipal police, fire fighters, emergency medical personnel employed by police or fire department and emergency telephone operators employed by police or fire department.

AUTHORITY: M.C.L.A., Sec. 423.271 et seq. (1980) applies to State police; M.C.L.A., Sec. 423.231 et seq. (1969) as last amended eff. 1/4/78 applies to municipal police and fire fighters.

ADMINISTRATIVE AGENCY:
Michigan Employment Relations Commission
State of Michigan Plaza Building
1200 6th Avenue, 14th Floor
Detroit, Michigan 48226
(313) 256-3540

IMPASSE PROCEDURE:
Arbitration: Either party may petition MERC for arbitration after 30 days of mediation; tripartite panel; hearings within 15 days; final offer arbitration on an issue-by-issue basis for economic issues, conventional for noneconomic issues; award due within 30 days; either party may be fined $250 per day for failing to comply with arbitration award; costs of arbitration hearing and neutral arbitrator shared equally by the parties and the State.

Criteria for Arbitration Award:
- Lawful authority of employer
- Stipulations of the parties
- Interest and welfare of public
- Ability to pay
- For municipal police and fire fighters - comparison with public and private sector employees performing similar work in comparable communities
- For State police - comparison with State police troopers and sergeants in comparable states
- Cost of living
- Overall compensation
- Changes in circumstances
- Other factors normally considered

STRIKE POLICY: Prohibited; parties may be fined no more than $250 per day for violation.

NOTE:
- Arbitration awards are not subject to legislative approval.

PERTINENT CASE LAW:
- Compulsory interest arbitration for police and fire fighters found constitutional. (*City of Detroit v. Detroit Police Officers Assn., et al.*, (Mich. S. Ct.) No. 63929, 6/6/80).

MINNESOTA

COVERAGE: All public employees.

AUTHORITY: M.S.A. Ch. 33, Sec. 179.61 et seq. (1971) as last amended eff. 4/25/80.

EXCLUSIONS: Elected officials; election officers; national guard; emergency, part-time, temporary or seasonal employees; employees of charitable hospitals; students; Bureau of Mediation Services staff.

ADMINISTRATIVE AGENCY:
Bureau of Mediation Services
Veterans Service Building
St. Paul, Minnesota 55155
(612) 296-2525

Appeals:
Minnesota Public Employment Relations Board
Space Center Building
444 Lafayette Road, Room 598
St. Paul, Minnesota 55101
(612) 296-8947

UNIT DETERMINATION: BMS; appealable to MPERB.

CRITERIA FOR UNIT DETERMINATION:
- Generally excludes supervisory, confidential employees, school principals and assistant principals
- Essential and other-than-essential employees may not be in the same unit
- All employees under same appointing authority in one unit except when factors require otherwise, such as: employees' classification and compensation, profession or craft; relevant administrative supervisory levels of authority; geographical location; history and extent of organization; wishes of the parties
- State and University of Minnesota units are statutorily established.

RECOGNITION: Exclusive; by election or verified majority or joint petition.

BARGAINING RIGHTS: Duty to bargain; meet and confer with professional employees on policy.

SCOPE OF BARGAINING: Grievance procedure, hours, fringe benefits and terms and conditions of employment; excluding retirement contributions or benefits and employer's personnel policies.

GRIEVANCE PROCEDURE: Arbitration mandatory.

EMPLOYEE RIGHTS: To form or join labor organizations; refrain from doing so.

MANAGEMENT RIGHTS: Policy, budget, technology, organizational structure and selection of personnel.

UNION SECURITY: Dues deduction mandatory. Agency shop permitted; fair share fee limited to no more than 85% of dues.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Blacklist
- Refusal to comply with grievance procedure
- Violate rules and regulations of BMS
- Refusal to comply with arbitration award
- Violate or refuse to comply with orders of Director of BMS or MPERB
- Refusal to provide budget information to labor organization

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Violate rules and regulations of BMS
- Refusal to comply with arbitration award
- Call a jurisdictional strike
- Restrain or coerce any person to: force or require employer to cease dealing with any other person; force or require employer to recognize a noncertified labor organization; refuse to handle goods or perform services; prevent employee from providing services to employer
- Damage property or endanger safety of persons while on strike
- Force or require employer to assign work to certain employees in a particular labor organization
- Cause or attempt to cause employer to pay for services not performed
- Engage in unlawful strike
- Picketing which has unlawful purpose
- Picketing which unreasonably interferes with access to employer's facilities
- Seize, occupy or destroy employer's property
- Violate or refuse to comply with orders of Director of BMS or MPERB

IMPASSE PROCEDURE:

Mediation: Either party may petition BMS for mediation or Director of BMS may initiate.

Arbitration: Mandatory for essential employees in the event the parties are determined to be at impasse by the Director of BMS; three-member arbitration panel unless parties agree to single arbitrator; final offer on an issue-by-issue basis; costs shared equally by the parties. Voluntary for nonessential employees.

STRIKE POLICY: Prohibited for essential employees; nonessential employees may strike provided the contract has expired, a mandatory mediation period has been completed, and a strike notice has been served; labor organizations who violate strike ban lose representative status and are ineligible for certification and dues deduction for 2 years.

NOTE:
- All negotiations, mediation sessions and hearings between public employer and labor organization shall be in public except as provided by Director of BMS.
- Contract duration may not exceed 3 years except teacher contract duration may not exceed 2 years.
- Legislative Commission on Employee Relations established to oversee progress of negotiations with State employees and approve or disapprove negotiated agreements or arbitration awards. Approval or disapproval by the Commission is not binding on the Legislature. (M.S.A. Ch. 3, Sec. 985, (1979) as last amended eff. 4/25/80).

PERTINENT CASE LAW:
- Sympatny strikes are illegal. (*Teamsters Local 120 et al. v. City of St. Paul*, (Minnesota S. Ct.) Case No. 57, 9/1/78).
- Interest arbitration found constitutional, (*City of Richfield v. Local No. 1215, Intl. Assn. of Fire Fighters*, 276 N.W.2d 42 (Minn. 1979)).

MISSISSIPPI

Mississippi does not have a collective bargaining statute for public employees.

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NOTE:
- Mississippi has a right to work law, (Miss. Const., Sec. 198-A (1960)).

MISSOURI

COVERAGE: All public employees.

AUTHORITY: F.S.Mo. Supp., Sec. 105.500 et seq. (1967).

EXCLUSIONS: Police; deputy sheriffs; highway patrol; national guard; teachers at schools, colleges and universities.

ADMINISTRATIVE AGENCY:
State Board of Mediation
207 Adams Street, Jefferson City, Missouri 65101
(314) 751-3614

UNIT DETERMINATION: SBM; appealable to court.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Supervisors cannot be included in unit with employees whom they supervise (by SBM decision)

RECOGNITION: Exclusive; designated or selected by majority of employees in unit.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Salaries and other conditions of employment.

EMPLOYEE RIGHTS: To form and join labor organizations; present proposals through representatives.

STRIKE POLICY: Prohibited.

PERTINENT CASE LAW:
- Prohibition against membership in a labor organization for police officers is unconstitutional: exclusion from bargaining is lawful, (*Vorbeck v. McNeal*, (U.S. S. Ct. 1976) 96 S. Ct. 3160).
- Insofar as true collective bargaining is concerned, no such right is granted to any public employee in Missouri by Sec. 105.510 or any other statute. Act prohibits teachers from forming labor organizations and from engaging in statutory bargaining procedures, (*St. Louis Teachers Assn. v. Board of Education of the City of St. Louis*, (Missouri 1976) Ct. of App.).
- Agreement between teachers association and school board is lawful where it provides for consultation and recommendation that Board is free to accept or reject, (*Richard E. Peters v. Board of Education of Reorganized School District #5*, (Mo. S. Ct. 1974) 506 S.W. 2d 429).
- Teachers have right to join labor organizations and present proposals, (O.A.G. #276, 12/28/68).
- Civilian employees of national guard are authorized to form and join labor organizations and to present proposals, (O.A.G. #285, 12/10/68).
- Bargaining sessions are exempt from State's open meeting law, (*State Bd. of Public Utilities of the City of Springfield v. Crow*, (Mo. Ct. of Apps., Southern Dist.) No. 11119, 12/17/79).

MONTANA

COVERAGE: All public employees.

AUTHORITY: Title 39, Ch. 31, Parts 1-4, MCA as last amended eff. 7/1/79.

EXCLUSIONS: Elected or appointed officials; supervisors; managerial and confidential employees; members of boards and commissions; clerks and administrators of school districts; registered professional nurses; professional engineers or engineers-in-training.

ADMINISTRATIVE AGENCY:
Board of Personnel Appeals
Capitol Station, 35 South Last Chance Gulch
Helena, Montana 59601
(406) 449-5600

UNIT DETERMINATION: Board.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Wages, hours, fringe benefits and other working conditions
- History of bargaining
- Common supervision and personnel policies
- Extent of integration and interchange of work functions
- Desires of employees
- Board employees may not be represented by a labor organization affiliated with any group representing non-board employees

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours, fringe benefits and other conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain collectively through chosen representatives; engage in concerted activities.

MANAGEMENT RIGHTS:
- Direct employees
- Hire, promote, transfer, assign and retain employees
- Relieve employees due to lack of work or funds or when continuation of work would be inefficient
- Maintain efficiency of government operations
- Determine methods, means, job classifications and personnel
- Take necessary actions in cases of emergency
- Establish methods and processes by which work is performed

UNION SECURITY: Dues deduction mandatory. Agency shop permitted; persons whose religious beliefs prohibit payment of dues may pay an equivalent amount to a non-religious, non-union charity designated by the labor organization.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Use agency shop fees for political purposes

IMPASSE PROCEDURE:

Mediation: Parties must request mediation after reasonable period of time or upon expiration of the agreement.

Fact Finding: Either party may request or Board may initiate fact finding upon expiration of the agreement or 30 days after certification of the labor organization; single fact finder; report issued within 20 days of appointment; report made public if no resolution within 15 days; fact finder may mediate; costs shared equally by Board and the parties.

Arbitration: Voluntary.

For fire fighters only (Sec. 39-34-101 et seq., eff. 7/1/79) - either party may request from Board; final offer on an issue-by-issue basis; arbitrator may remand back to parties for further negotiations; costs shared equally by the parties.

Criteria for Fire Fighter Arbitration Award:
- Comparison with other employees performing similar services and other services generally
- Interest and welfare of the public
- Ability to pay
- Cost of living
- Other factors normally considered

STRIKE POLICY: For fire fighters only - prohibited.

NOTE:
- Fire fighter arbitration awards are not subject to the approval of any governing body.
- Persons wishing to serve as arbitrators and fact finders must complete a special education course established by the Board or complete an equivalent program.
- At negotiations involving institutions of higher education, a student observer may be designated to meet and confer with the parties prior to bargaining, attend negotiation sessions, and meet and confer with the board of regents regarding the terms of agreement prior to execution of the contract.

PERTINENT CASE LAW:
- Employees have the right to strike; right to engage in concerted activities includes the right to strike, (*State of Montana Dept. of Highways v. Public Employees Craft Council of Montana*. (Montana S. Ct. 1974) 529 P. 2d 785).
- Bargaining meetings must be open except where privacy rights clearly exceed public's right to know, (O.A.G. #170, 11/27/78).

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COVERAGE: Nurses (RN's and LPN's).

AUTHORITY: Sec. 39-32-101 et seq., MCA (1969) as last amended eff. 1979.

EXCLUSIONS: Members of religious orders assigned to health care facilities.

ADMINISTRATIVE AGENCY:
Personnel Appeals Division
Department of Labor and Industry
Capitol Station, 35 South Last Chance Gulch
Helena, Montana 59601
(406) 449-5600

UNIT DETERMINATION: Voluntary or by Department of Labor and Industry.

CRITERIA FOR UNIT DETERMINATION:
- Majority of professionals must vote for inclusion in nonprofessional unit
- Similarities of duties, licensure and conditions of employment
- Other relevant factors

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Establishment and maintenance of desirable employment practices.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Prevent employees from working in order to interfere, restrain or coerce employees in exercise of rights under the Act

STRIKE POLICY: Permitted upon 30 days notice provided that there is no other strike at a health care facility within a 150 mile radius.

NEBRASKA

COVERAGE: All public employees, including public utilities.

AUTHORITY: R.S. Neb. Ch. 48, Sec. 48-801 et seq. (1969) as last amended eff. 5/22/79.

EXCLUSIONS: National guard or State militia.

ADMINISTRATIVE AGENCY:
Commission of Industrial Relations
301 Centennial Mall South, P.O. Box 94864
Lincoln, Nebraska 68509
(402) 471-2935

UNIT DETERMINATION: CIR.

CRITERIA FOR UNIT DETERMINATION:
- Police or fire fighters including all ranks subordinate to chief may be included in one unit
- Established bargaining units and employer policies
- Presumption that units less than departmental size are not appropriate

The following criteria are by CIR decree:
- Community of interest
- Similarity in skills and duties
- Desires of employees
- Supervisors must have own units
- No over-fragmentation

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and conditions of employment.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; present grievances.

UNFAIR LABOR PRACTICES:
- Strike or lockout
- Induce or coerce employees to strike
- Aid or assist a strike or lockout

The following are by CIR decree:
- Interfere, restrain or coerce employees
- Dominate labor organizations

IMPASSE PROCEDURE:

Mediation: CIR has authority to establish panels of qualified as mediators; CIR may order mediation.

Fact Finding: CIR has authority to establish panel of qualified members of fact finding boards; CIR may order fact finding; teachers must use Sec. 79-1287 et seq. before seeking arbitration.

Arbitration: CIR holds hearings to determine wages, hours and conditions of employment; decisions appealable to Neb. S. Ct.

Criteria for Arbitration Award:
- Comparison with employees having similar skills and working conditions
- Overall compensation
- Prevailing economic conditions

STRIKE POLICY: Strikes and lockouts prohibited; violators guilty of a class I misdemeanor.

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COVERAGE: Teachers in Class III, IV and V school district.

AUTHORITY: R.S. Neb. Ch. 79, Sec. 79-1287 et seq. (1967).

UNIT DETERMINATION: All teachers in the district.

RECOGNITION: Exclusive; recognition is for 1 year; if there is more than one labor organization requesting certification, Board of Education may recognize the labor organization which has enrolled a majority of employees in the two preceding years.

BARGAINING RIGHTS: Meet and confer if majority of school board members agree to recognize the teacher organization.

SCOPE OF BARGAINING: Terms of employment and labor-management relations.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; present grievances.

IMPASSE PROCEDURE:

Fact Finding: Tripartite; report issued in 30 days.

NOTE:
- If no resolution of dispute, procedures in general public employee statute apply.

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NOTE:
- Nebraska has a right to work law, (Neb. Const. Art. 15, Sec. 13, 14 and 15).
- Dues deduction mandatory for teachers and administrators, (L.B. 53 eff. 8/24/79).

PERTINENT CASE LAW:
- Negotiation subjects include salary, leave, organization dues, dress codes, school calendars and noon duty, (Steward Education Assn. (CIR 1971) 1 CIR 39-1 affirmed (Neb. S. Ct.) 1972).
- Definition of terms of employment restricted to subjects not generally considered to be preogatives of management, (Norfolk Education Assn. (CIR 1971) 1 CIR 40-1).

NEVADA

COVERAGE: Local government employees.

AUTHORITY: N.R.S., Sec. 288.010 et seq. (1969) as last amended eff. 7/1/79.

EXCLUSIONS: Confidential employees.

ADMINISTRATIVE AGENCY:
Local Government Employee-Management Relations Board
c/o State Mail Room Complex
Las Vegas, Nevada 89158
(702) 386-5252

UNIT DETERMINATION: Board in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Principals, assistant principals or other school administrators below the rank of superintendent, associate superintendent or assistant superintendent shall not be members of the same bargaining unit with teachers, unless school district employs fewer than 5 principals, but may join with others of same rank in a separate unit
- Department heads and supervisors shall not be in the same unit as employees they supervise; may form their own unit
- Police officers may only join labor organizations composed of law enforcement personnel

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING:
- Salary or wage rates or other forms of direct monetary compensation
- Sick leave
- Vacation leave
- Holidays
- Other paid or nonpaid leaves of absence
- Insurance benefits
- Total hours of work required of an employee on each work day or work week
- Total number of days of work required of an employee in a work year
- Discharge and disciplinary procedure
- Recognition clause
- Method used to classify employees in the negotiating unit
- Deduction of dues for the recognized labor organization
- Protection of employees in the negotiating unit from discrimination due to participation in recognized labor organizations consistent with the provisions of this chapter
- No strike provisions consistent with the provisions of this chapter
- Grievance and arbitration procedures for resolution of disputes relating to interpretation or application of collective bargaining agreements
- General savings clauses
- Duration of collective bargaining agreements
- Safety
- Teacher preparation time
- Procedures for reduction in work force

EMPLOYEE RIGHTS: To join or refrain from joining any labor organization; present grievances.

MANAGEMENT RIGHTS:
- Manage operations in the most efficient manner consistent with the public interest
- Take necessary actions in cases of emergency
- Hire, direct, assign or transfer an employee, but excluding the right to assign or transfer an employee as a form of discipline
- Reduce in force or layoff any employee due to lack of work or lack of funds, subject to established procedures
- Determine appropriate staffing levels and work performance standards except for safety considerations
- Determine the content of the work day, including, without limitation, workload factors, except for safety considerations
- Determine the quality and quantity of services to be offered to the public
- Determine the means and methods of offering those services

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith, including impasse procedure
- Discriminate on account of race, color, religion, sex age, physical or visual handicap, national origin or political or personal reasons or affiliations
- Fail to provide information requested by labor organization concerning matters to be negotiated

Labor Organization:
- Interfere, restrain or coerce employees
- Refusal to bargain in good faith, including impasse procedure
- Discriminate on account of race, color, religion, sex, age, physical or visual handicap, national origin or political or personal reasons or affiliations
- Fail to provide information requested by employer concerning matters to be negotiated

IMPASSE PROCEDURE: As first step in negotiations, the parties shall discuss procedures to be followed in case of impasse.

Mediation: If parties don't reach agreement by March 1, or if either party does not follow impasse procedure agreed upon, the parties may select a mediator; if parties cannot agree upon a mediator, the labor commissioner will appoint one.

Fact Finding: If agreement has not been reached by April 25, either party may request fact finding before May 25; single fact finder; report due within 30 days of conclusion of hearings; costs shared equally by the parties.

Arbitration: Parties may agree in advance to be bound by any or all parts of the fact finding report; Governor may order that the report be final and binding at the request of either party before June 1, based on public interest, fiscal effect and public safety; Governor considers each request on a case-by-case basis and may send all, any or none of the issues to binding fact finding; costs shared equally by the parties.

For fire fighters only - if parties have not agreed in advance to be bound by fact finder's report, dispute submitted to arbitration; hearings within 10 days of selection of arbitrator; last best offer by package; award due within 10 days of submission of last best offers; costs shared equally by the parties (expires 7/1/81).

Criteria for Arbitration Award: Ability to pay must be established first, then normal standards used in interest disputes are applied.

STRIKE POLICY: Prohibited; strikes may be enjoined; labor organization may be fined $50,000 per day, its leaders may be fined $1,000 per day or jailed; employer may dismiss, suspend or demote strikers, cancel collective bargaining agreement, or withhold wages for period of strike.

NOTE:
- An employee-management committee has been created consisting of three designees of labor organizations and three designees of local government employers. Duties include:
  - interviewing applicants and submitting an agreed upon list of applicants to the Governor for positions on the Board
  - advising the Board
  - filing a report with the legislature regarding procedures in the Act and recommending desireable legislation

NEW HAMPSHIRE

COVERAGE: All public employees.

AUTHORITY: R.S.A. Ch. 273-A and B (1975) as last amended eff. 8/22/79.

EXCLUSIONS: Elected or appointed officials; confidential employees; probationary or temporary employees.

ADMINISTRATIVE AGENCY:
Public Employee Labor Relations Board
Pine Inn Plaza, Building 2
117 Manchester Street
Concord, New Hampshire 03301
(603) 271-2587

UNIT DETERMINATION: PELRB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
  - same conditions of employment
  - history of bargaining
  - same craft or profession
  - employees within the same organizational unit
- Minimum size of unit is 10 employees
- Both professionals and nonprofessionals must vote for inclusion in the same unit
- Supervisors may not be in a unit of employees whom they supervise

RECOGNITION: Exclusive; election requires 30% or 100 employees, whichever is less, to petition.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and other conditions of employment; excluding merit system.

GRIEVANCE PROCEDURE: Mandatory in all collective bargaining agreements; arbitration permitted.

EMPLOYEE RIGHTS: To organize and be represented by a labor organization; present grievances.

MANAGEMENT RIGHTS: Functions, programs and methods of employer, including use of technology, employer's organizational structure and selection, direction and number of employees.

UNFAIR LABOR PRACTICES:
Employer:
- Restrain, coerce or interfere with employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Lockout
- Failure to comply with statute
- Adopt any law or regulation that would invalidate any part of agreement
- Breach a collective bargaining agreement

Labor Organization:
- Restrain, coerce or interfere with employees or employer's representative
- Cause or attempt to cause employer to discriminate on account of membership
- Refusal to bargain in good faith
- Strike
- Breach a collective bargaining agreement
- Failure to comply with statute

IMPASSE PROCEDURE:
Mediation: Parties may request mediation at impasse or 60 days, or in the case of State employees 90 days, prior to budget submission date PELRB will initiate; costs shared equally by the parties.

Fact Finding: Parties may request or may be initiated by PELRB 45 days, or in the case of State employees 75 days, prior to budget submission date; parties select neutral or PELRB appoints; report made public after 10 days; if report rejected by either party, it is submitted to employer's board and labor organization membership; if rejected by either one, report is then submitted to legislature which votes to accept or reject any part of the report; if still no resolution, negotiations may be reopened; costs shared equally by the parties.

Arbitration: Voluntary on non-cost items only.

STRIKE POLICY: Prohibited; enjoinable by court; employer may be awarded costs and legal fees at discretion of the court.

NOTE:
- Statewide bargaining for State employees; unique terms and conditions to be bargained with individual units.
- Joint committee on employment relations has been created composed of key legislators. Joint committee shall meet with State negotiating team to discuss the State's objectives prior to and during bargaining with State employees

NEW JERSEY

COVERAGE: All public employees.

AUTHORITY: N.J.S.A. Title 34, Sec. 34:13A-1 et seq. (1968) as last amended eff. 7/1/80.

EXCLUSIONS: Elected officials; members of boards and commissions; managerial executives and confidential employees.

ADMINISTRATIVE AGENCY:
Public Employment Relations Commission
429 East State Street
Trenton, New Jersey 08608
(609) 292-9830

UNIT DETERMINATION: PERC in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
Except where established practice, prior agreement or special circumstances dictate to the contrary:
- Supervisors may not be in nonsupervisory units
- Police may not join nonpolice organizations
- Community of interest
- Professionals may not be in same unit as nonprofessionals unless majority of professionals vote for inclusion
- Craft employees may not be in same unit as noncraft unless majority of craft employees vote for inclusion

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Grievance procedure and terms and conditions of employment.

GRIEVANCE PROCEDURE: Mandatory in all agreements; arbitration permitted.

EMPLOYEE RIGHTS: To form, join and assist labor organizations; refrain from doing so.

UNION SECURITY: Dues deduction mandatory, (Ch. 310, (1967) as last amended eff. 12/12/77).

Agency shop permitted; fair share fee limited to no more than 85% of dues; must provide for a procedure for rebate upon demand of any employee of the pro rata share for activities or causes only incidentally related to terms and conditions of employment.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of membership or nonmembership in a labor organization
- Discriminate on account of testimony
- Refusal to bargain or process grievances in good faith
- Refusal to reduce agreement to writing and sign it
- Violate PERC rules and regulations

Labor Organization:
- Interfere, restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Refusal to reduce agreement to writing and sign it
- Violate PERC rules and regulations
- Discriminate on account of membership or nonmembership in a labor organization

IMPASSE PROCEDURE:
Mediation: Either party may request; costs borne by PERC.

Fact Finding: PERC may initiate or recommend fact finding; single or tripartite; statute provides costs to be borne by PERC, however, recent appropriations require costs of hearing and neutral to be shared equally by the parties.

Arbitration: Voluntary; tripartite; costs of hearing and neutral shared equally by the parties.

NOTE:
- Statute also covers private sector employees.
- PERC, in conjunction with Rutgers University, shall develop and maintain an employee-management program for the guidance, assistance and training of public employees and employers.

* * *

COVERAGE: Police and fire fighters.

AUTHORITY: Ch. 85, Sec. 34:13A-14 et seq. (1977).

ADMINISTRATIVE AGENCY:
Public Employment Relations Commission
429 East State Street
Trenton, New Jersey 08608
(609) 292-9830

IMPASSE PROCEDURE:
Mediation: Either party may request or PERC may initiate; costs borne by PERC.

Fact Finding: Either party may request; costs borne by PERC.

Arbitration: Mandatory; 60 days prior to budget submission, parties must submit arbitration procedure mutually agreed upon to PERC for approval, or must use prescribed procedure.

Types of arbitration procedures that are approvable include, but are not limited to:
- Conventional
- Last offer by package
- Last offer by issue
- Last offer or fact finder's recommendations by package
- Last offer or fact finder's recommendations by issue
- Last offer on economic items as a package and last offer on noneconomic items by issue

Arbitration Procedure Imposable by PERC:
If parties do not agree upon an arbitration procedure 50 days prior to budget submission, parties submit disputed issues to PERC with reasons for lack of agreement on arbitration procedure.

Arbitration by single or tripartite panel on the basis of last best offer of employer or labor organization on economic items as a single package and last best offer of employer or labor organization on noneconomic issues on an issue-by-issue basis; arbitrator(s) may mediate; costs of hearing and neutral shared equally by the parties.

Criteria for Arbitration Award:
- Interest and welfare of public
- Comparison of wages, hours and conditions of employment of employees performing same or similar work:
  - in public employment in same or comparable jurisdiction
  - in comparable private employment
  - in public and private employment in general
- Overall compensation presently received
- Stipulations of the parties
- Lawful authority of the employer
- Financial impact on governing unit and its residents and taxpayers
- Cost of living
- Continuity and stability of employment
- Other factors normally considered

NOTE:
- Arbitration awards are not subject to legislative approval.

* * *

PERTINENT CASE LAW:
- Strikes prohibited, (*Board of Education, Borough of Union Beach v. New Jersey Education Association*, (1968) 247 A.2d 867).
- Interest arbitration found constitutional, (*Division 540, Amalgamated Transit Union v. Mercer County Improvement Authority*, 386 A.2d 1290 (N.J. 1978)).

NEW MEXICO

COVERAGE: State employees in the classified service.

AUTHORITY: State Personnel Board Regulations for Labor-Management Relations in the Classified Service of State Employees (1972) as last reissued eff. 2/31/78.

EXCLUSIONS: Managerial, supervisory or confidential employees; temporary, temporary part-time or seasonal employees.

ADMINISTRATIVE AGENCY:
State Personnel Board
130 South Capitol
Santa Fe, New Mexico 87501
(505) 827-5201

UNIT DETERMINATION: Parties; Board may approve, amend or reject.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Desires of employees and agency
- Effect on efficient operations
- Administrative structure of agency
- Unnecessary fragmentation
- Unit may not cross agency lines
- Supervisory, managerial or confidential employees must be excluded from unit
- Temporary, temporary part-time or seasonal employees must be excluded from unit
- Law enforcement officers may not be included in units of other employees

RECOGNITION: Exclusive; by election unless the agency chooses not to permit an election.

BARGAINING RIGHTS: Duty to bargain unless agency does not permit an election.

SCOPE OF BARGAINING: Terms and conditions of employment.

GRIEVANCE PROCEDURE: Required in all agreements; arbitration permitted; grievance procedure may not cover suspensions, demotions, dismissals, Board rules and regulations, management rights or conflict with law; if parties cannot agree to using voluntary arbitration, Board may direct the use of arbitration; either party may file exceptions to arbitrator's award to the Board; Board may set aside the award in whole or in part if the award doesn't comply with the collective bargaining agreement, violates law or fails to consider rights and obligations of agency; costs shared equally by the parties.

EMPLOYEE RIGHTS: To form, join or assist labor organizations; refrain from doing so; present grievances.

MANAGEMENT RIGHTS:
- Direct employees
- Hire, promote, transfer, assign, retain and discipline employees
- Relieve employees due to lack of work
- Maintain efficient operations
- Determine methods, means and personnel to perform operations
- Provide standards and rules for employees' safety
- Take necessary actions in cases of emergency
- Manage, make decisions and act on all matters not covered by Regulations or collective bargaining agreement

UNION SECURITY: Dues deduction mandatory. Agency shop, union shop or maintenance of membership prohibited.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Discriminate on account of labor organization membership or testimony
- Refusal to consult, confer or negotiate in good faith
- Dominate labor organizations
- Violate election procedures

Labor Organization:
- Interfere, restrain or coerce employees
- Induce employer to coerce employees
- Refusal to consult, confer or negotiate in good faith
- Coerce or discipline an employee in an effort to hinder job performance
- Violate election procedures

IMPASSE PROCEDURE:

Mediation: Voluntary.

Fact Finding: Either party may request fact finding from Board if mediation fails; if Board determines that an impasse exists, a fact finder will be appointed; report made public; costs shared equally by the parties; if fact finding fails, Board may take whatever action necessary to resolve the impasse.

STRIKE POLICY: Prohibited; striking is cause for disciplinary action and labor organization may lose dues deduction privileges and certification.

NOTE:
- Contract duration may not exceed 3 years.

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PERTINENT CASE LAW:
- Bargaining permitted to the extent that civil service laws do not preempt the subject matter of negotiations, (*IBEW v. Town of Farmington*, (N.M. S. Ct. 1965) 405 P. 2d 233).

NEW YORK STATE

COVERAGE: All public employees except those employed by mayoral agencies in New York City.

AUTHORITY: Civil Service Law, Sec. 200 et seq. (1967) as last amended 7/10/79.

EXCLUSIONS: Appointed officials; state militia; confidential and managerial employees; court system judges.

ADMINISTRATIVE AGENCY:
Public Employment Relations Board
50 Wolf Road
Albany, New York 12205
(518) 457-6483

UNIT DETERMINATION: PERB determines most appropriate unit.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Employer's recommendations on which jobs are similar
- Unit must not interfere with joint responsibility of employer and employees to serve the public

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours, grievance procedure and other terms and conditions of employment.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so; be represented in negotiations or grievance administration.

UNION SECURITY: Dues deduction mandatory. Agency shop mandatory for State bargaining units, permitted at local level, (eff. 7/1/77, expires 7/1/81); must provice for a procedure for rebate upon demand of any employee of the pro rata share of expenditures for activities or causes only incidentally related to terms and conditions of employment.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of membership in a labor organization
- Refusal to bargain in good faith

Labor Organization:
- Interfere, restrain or coerce employees
- Cause or attempt to cause an employer to interfere, restrain or coerce employees
- Refusal to bargain in good faith

IMPASSE PROCEDURE: Parties may establish their own impasse procedure which may include arbitration; absent such agreement, the following procedure is implemented:

Mediation: Either party may request or PERB may initiate; costs borne by PERB.

Fact Finding: Neutral panel of up to 3 members appointed by PERB; costs borne by PERB; in police and fire fighter disputes, parties go directly from mediation to arbitration.

Arbitration: Mandatory for police and fire fighters; tripartite panel; conventional arbitration; panel must specify basis for award; each party pays for its member, parties share costs of neutral chairperson; police and fire fighter arbitration provision expires 7/1/81; award as to duration of agreement shall not exceed 2 years. Voluntary for all other employees.

Criteria For Police and Fire Fighter Arbitration Awards:
- Comparison with employees in public and private sector doing similar work in comparable communities
- Interest and welfare of the public
- Ability to pay
- Peculiar hazards, qualifications, training and skills
- Past negotiated terms of collective bargaining agreement

Other: If either side (except in police, fire fighter and school district negotiations) rejects the fact finder's report, the legislative body holds a hearing and takes such action as may be necessary to end the impasse; legislative determination of terms effective for only 1 year. (PERB 1976, Case # U-2149).

STRIKE POLICY: Prohibited; loss of 2 days pay for each day or part thereof of the strike; labor organization loses dues deduction privileges and agency shop fee deductions; employer may seek to enjoin the strike.

NOTE:
- Police and fire fighter arbitration awards are not subject to legislative approval.
- Delaware County, Hempstead, Nassau County, Town of North Hempstead, Onandaga County, Town of Rye, Suffolk County, Syracuse City, Syracuse School District, Tompkins County and Westchester County have local ordinances providing for collective bargaining for their public employees.

PERTINENT CASE LAW:
- Compulsory interest arbitration for police and fire fighters found constitutional. (*City of Amsterdam v. Helsby*, (N.Y. Ct. of Apps. 1975) 332 N.E. 2d 290).

NEW YORK CITY

COVERAGE: All city employees except teachers and transit workers.

AUTHORITY: N.Y. City Charter Ch. 54; N.Y. City Admin. Code, Sec. 1173-1.0 et seq. (1967) as last amended 1975.

EXCLUSIONS: Managerial and confidential employees.

ADMINISTRATIVE AGENCY:
Office of Collective Bargaining
250 Broadway
New York, New York 10007
(212) 566-3932

(OCB is composed of 2 boards: Board of Certification and Board of Collective Bargaining).

UNIT DETERMINATION: Board of Certification.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest; efficient operation of governmental agency; promotion of sound labor relations
- Separate units for supervisory or professional employees unless majority vote for inclusion in nonsupervisory or nonprofessional units
- Police may not belong to labor organizations which include, or are affiliated with, directly or indirectly, nonpolice employees

RECOGNITION: Exclusive; by election or proof of majority by dues checkoff showing.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums); hours (including but not limited to overtime and leave benefits); working conditions; impact of items listed under management rights are subject to bargaining; city wide multi-union bargaining required where matters must be uniform for all employees of a mayoral agency or department.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations and bargain collectively; refrain from doing so; present grievances.

MANAGEMENT RIGHTS:
- Determine standards of service
- Determine standards of selection for employment
- Direct employees
- Take disciplinary action
- Relieve employees due to lack of work
- Maintain efficient operations
- Determine methods, means and personnel to deliver services
- Determine job content
- Take necessary actions in cases of emergency
- Control organization and technology of performing work

UNION SECURITY: Agency shop permitted; must provide for a procedure for rebate upon demand of any employee of the pro rata share of expenditures for activities or causes only incidentally related to terms and conditions of employment.

UNFAIR LABOR PRACTICES:

Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of membership in a labor organization
- Refusal to bargain in good faith

Labor Organization:
- Interfere, restrain or coerce employees
- Cause or attempt to cause employer to interfere, restrain or coerce employees
- Refusal to bargain in good faith

IMPASSE PROCEDURE:

Mediation: Either party may request or OCB may initiate; costs shared equally by the parties.

Fact Finding: If BCB deems it appropriate or upon request of both parties, the Director shall appoint an impasse panel; panel may mediate; if impasse not resolved the panel must render a written report; costs shared equally by the parties.

Criteria for Impasse Panel Report:
- City's ability to pay is limited to current level of resources and must be accorded substantial weight by the impasse panel, (Financial Emergency Act Subd. 7, Sec. 3(a), exp. 12/31/82).
- Comparison with other public and private sector employees
- Overall compensation
- Cost of living
- Interest and welfare of public
- Other factors normally considered

Arbitration: Either party may reject any part of the impasse panel report; BCB holds hearings to review report and may affirm or modify report after first determining whether recommended wage and fringe benefits are within the City's ability to pay; BCB's decision is binding; any provision of the BCB determination which requires enactment of a law is not binding until legislative body enacts such a law; special proceedings provide for appellate division review of BCB threshold decision and other elements of award.

Other: Parties may agree on an impasse procedure including arbitration. Questions, issues or disputes as to arbitrability or scope of bargaining shall be determined by BCB only.

STRIKE POLICY: Prohibited; penalties determined by court upon petition of City; enjoinable.

NOTE:
- Ability to pay is limited to current level of resources and must be accorded substantial weight by the impasse panel. (Financial Emergency Act Subd. 7, Sec. 3(a), exp. 12/31/82).

All collective bargaining agreements are subject to approval by the Financial Control Board as a result of the City's financial crisis. The FCB may order renegotiation of contracts which do not comply with its labor guidelines.

NORTH CAROLINA

North Carolina does not have a collective bargaining statute for public employees

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NOTE:
- All public employee contracts are illegal and void as against public policy, (N.C.G.S. Ch. 95, Sec. 95-98 (1959)).

PERTINENT CASE LAW:
- Employees may join labor organizations, (*Atkins v. City of Charlotte*, (W.D.N.C. 1969) 296 F. Supp. 1068).
- There is no right to dues deduction in the absence of a statute, even if employer makes other deductions for other groups, (*City of Charlotte v. Local 660, IAFF, et al.* (U.S. S. Ct. 1976) 96 S. Ct. 2036).

NORTH DAKOTA

COVERAGE: All public employees.

AUTHORITY: Century Code Ch. 34-11, Sec. 34-11-01 et seq. (1951).

IMPASSE PROCEDURE: Either party may request the appointment of a mediation board by the chief executive officer of the governmental unit; tripartite board; mediation board issues recommendations within 30 days; upon rejection of the recommendations by either party, the mediation board holds new hearings; members serve without compensation, actual expenses borne by the employer.

GRIEVANCE PROCEDURE: Same as impasse procedure above.

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COVERAGE: Teachers and administrators in school districts.

AUTHORITY: Century Code Ch. 15-38.1, Sec. 15-38.1-01 et seq. (1969) as last amended 1979.

ADMINISTRATIVE AGENCY:
Education Fact Finding Commission
502 East Central
Bismark, North Dakota 58501
(701) 255-3129

UNIT DETERMINATION: School board.

CRITERIA FOR UNIT DETERMINATION:
- Common interest
- Common problems
- Common employer
- History of common representation
- Administrators and teachers must be in separate units

RECOGNITION: Exclusive; voluntary requires showing of interest from majority in unit; election requires 25% to petition.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salary, hours and other terms and conditions of employment; employer-employee relations.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; refrain from doing so.

UNION SECURITY: Dues deduction mandatory if a majority of teachers petition.

UNFAIR LABOR PRACTICES:

Employer:
- Discriminate against employees

IMPASSE PROCEDURE:

Mediation: After a reasonable period of negotiations, the parties may mutually agree to mediation and to distribution of the cost of mediation.

Fact Finding: If mediation fails or is not used, either party may ask the Commission for assistance; Commission may act as a fact finding commission or appoint a fact finder; report issued within 40 days of request for assistance; report made public 10 to 20 days thereafter if impasse continues; costs shared equally by the parties.

STRIKE POLICY: Prohibited; employee may be denied pay for the period of the strike.

PERTINENT CASE LAW:
- School board's collective bargaining and its consideration of contract proposals must be held in public, (*Dickinson Ed. Assn. v. Dickinson Pub. Sch. Dist. No. 1*, (N.D. S. Ct. 1977) 252 N.W. 2d 205).

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NOTE:
- North Dakota has a right to work law, (Sec. 34-0114, Supp. 1975).

PERTINENT CASE LAW:
- Strikes are prohibited, (*City of Minot v. Teamsters, Local 74*, (N.D. S. Ct. 1966) 142 N.W. 2d 612).

OHIO

Ohio does not have a collective bargaining statute for public employees.

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COVERAGE: All public employees.

AUTHORITY: Ohio Revised Code Vol. I, General Provisions Ch. 9, Sec. 9.41 (1959).

UNION SECURITY: Dues deduction permitted.

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COVERAGE: All public employees.

AUTHORITY: Ohio Revised Code Title 41, Sec. 4117.01 et seq. (1953).

STRIKE POLICY: Prohibited; employees may be terminated; 1 year freeze on salary upon rehire and 2 year probationary period; enjoinable by the courts.

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PERTINENT CASE LAW:
- Board of Education has the authority to negotiate and enter into collective bargaining agreements; grievance arbitration clauses in contracts must be honored, (*Dayton Classroom Teachers Assn. v. Dayton Board of Education*, (Ohio S. Ct. 1975) 323 N.E. 2d 714).
- Contract requirements for compulsory arbitration of impasses cannot be honored, (*Xenia City Board of Education v. Xenia Educational Assn.*, (Ohio Ct. of App. 1977) 52 Ohio App. 2d 373).
- Civil Service employees have the right to bargain and designate labor organizations to represent them, (*Foltz v. City of Dayton*, (Ohio Ct. of App. 1970) 272 N.E. 2d 169).
- Agency shop agreements illegal, (*Foltz v. City of Dayton*, (Ohio Ct. App. 1970) 272 N.E. 2d 169).
- Agency shop provisions are legal in teacher collective bargaining agreements, (*Youngstown State University v. Ohio Education Assn.*, Mahoning County Court of Common Pleas, Case #76 CV 564, 11/18/77).
- Discretionary on part of employer to invoke or disregard strike remedies; however, once employer has invoked the Act's provisions, employer must proceed to a final determination on the merits, (*Markowski v. Backstrom*, (Ohio Ct. of Common Pleas 1967) 226 N.E. 2d 825).
- Compulsory membership in a labor organization is contrary to the constitutional, statutory and case law of Ohio, (*Sheehy v. Ensign*, (Ohio 1971) Ct. of Common Pleas, 2).
- Court employees are barred from bargaining, (*Malone, et al. v. Ct. of Cmn. Pleas of Cuyahoga Cnty.*, (Ohio S. Ct. 1976) 45 Ohio St. 2d 245).

OKLAHOMA

COVERAGE: Public school employees.

AUTHORITY: 11 Ok. Stat. Ann., Sec. 509.1 et seq. (1971) as last amended eff. 7/28/78.

EXCLUSIONS: Employees may individually petition school board for exclusion from the unit.

UNIT DETERMINATION:
- Professional and nonprofessional educational employees must be in separate units
- Principals and assistant principals must be in own unit in districts which average over 35,000 in daily attendance

RECOGNITION: Employees may individually petition school board for exclusion from representation and may enter into individual agreements with the school board; in school districts which average less than 35,000 in daily attendance, recognition is by card count; in school districts which average over 35,000 in daily attendance, recognition is by election and requires 25% to petition.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Professional employees - items affecting the performance of professional services; nonprofessional employees - terms and conditions of employment.

UNFAIR LABOR PRACTICES: Discriminate on account of membership in a labor organization.

IMPASSE PROCEDURE: Parties should establish their own procedure for resolving disputes.

Fact Finding: In the absence of an agreed procedure, tripartite panel formed.

STRIKE POLICY: Prohibited; employees may not be paid for duration of strike; labor organization loses recognition.

NOTE:
- Contract duration may not exceed 1 year.
- Oklahoma's Open Meeting Law requires that the Board of Education meet publicly and vote publicly when discussing collective bargaining matters; Board may label the meeting an executive session and close it to the public.
- Election bar of 2 years.

PERTINENT CASE LAW:
- Loss of labor organization's recognition as a strike penalty lasts for only the duration of the strike, (*Independent School District No. 89 of Okla. Cty. v. Okla. Federation of Teachers, Local 2309, AFT*, (Okla. S. Ct.) Case Nos. 54,235 and 54,554, 6/10/80).

* * *

COVERAGE: Police and fire fighters.

AUTHORITY: LI O.S. Ch. 256, Sec. 51-101 et seq. (1977) eff. 7/1/78.

EXCLUSIONS: Chief of police and an administrative assistant; chief of fire department and an administrative assistant.

ADMINISTRATIVE AGENCY:
Public Employees Relations Board
556 W. First National Center
Oklahoma City, Oklahoma 73102
(405) 232-8501

(PERB is scheduled to terminate 7/1/83; its powers, duties and functions are to be abolished one year later).

UNIT DETERMINATION: PERB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Wages, hours and other working conditions
- History of bargaining
- Desires of employees

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Wages, salaries, hours, rates of pay, grievances, working conditions and all other terms and conditions of employment.

GRIEVANCE PROCEDURE: Provisions for the mediation and fact finding of grievances are required; absent such a procedure, disputes may be submitted to arbitration.

EMPLOYEE RIGHTS: Organize, be represented by a labor organization and bargain collectively; refrain from doing so.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain, intimidate or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Refusal to process grievances in good faith
- Attempt to institute a lockout

Labor Organization:
- Interfere, restrain, intimidate or coerce employees or employer's representative
- Refusal to bargain in good faith
- Refusal to process grievances in good faith

IMPASSE PROCEDURE:
Fact Finding: Either party may request after 30days of bargaining; tripartite panel; hearings within 10 days, report due 10 days thereafter; costs of neutral shared equally by the parties.

Criteria for Fact Finding Report:
- Comparison with skilled employees in building trades in the locality
- Comparison with other employees doing similar work in the locality
- Comparison with other departments of similar size and economic status
- Interest and welfare of the public
- Ability to pay
- Peculiar qualifications, skills or hazards

STRIKE POLICY: Prohibited; employees may be fined $10-100 per day and dismissed upon conviction.

NOTE:
- Contract duration may not exceed 1 year.
- Oklahoma's Open Meeting Law require all meetings to be held in public unless agency makes a motion to close, (Title 25 Okla. Stat. Supp. (1977) Sec. 301 et seq.).

PERTINENT CASE LAW:
- Under this law, police and fire fighters can only discuss grievances and terms and conditions of employment with municipalities but that the municipalities retain the right to make all final decisions on all issues discussed, (*Midwest City v. Cravens*, (Okla. S. Ct. 1975) 532 P. 2d 829).

OREGON

COVERAGE: All public employees.

AUTHORITY: O.R.S., Sec. 243.650 et seq. (1963) as last amended eff. 10/2/79.

EXCLUSIONS: Elected officials; members of boards and commissions; confidential and supervisory employees.

ADMINISTRATIVE AGENCY:
Employment Relations Board
528 Cottage Street, N.E., Suite 400
Salem, Oregon 97310
(503) 378-3807

UNIT DETERMINATION: ERB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Wages, hours and other working conditions
- History of collective bargaining
- Desires of employees

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedure and other conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and participate in labor organizations; present grievances.

UNION SECURITY: Dues deduction mandatory. Agency shop permitted; persons whose religious beliefs prohibit payment of dues may pay an equivalent amount to a non-religious charity or other charitable organization mutually agreed to by the labor organization and employee.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Refusal to comply with provisions of the statute
- Violate contract or arbitration award
- Refusal to reduce agreement to writing and sign it
- Communicate with employees other than representatives during negotiations regarding employment relations

Labor Organization:
- Interfere, restrain or coerce employees
- Refusal to bargain in good faith
- Refusal to comply with provisions of the statute
- Violate contract or arbitration award
- Refusal to reduce contract to writing and sign it
- Communicate with employer other than representatives during negotiations regarding employment relations

IMPASSE PROCEDURE:
Mediation: Either party may request or ERB may initiate mediation after reasonable period of negotiations; ERB assigns mediator from State Conciliation Service.

Fact Finding: Either or both parties may request or ERB may initiate after 15 days of mediation; single or panel of 3 neutrals; report issued within 30 days of hearing and made public 10 days thereafter; costs shared equally by the parties.

Arbitration: Mandatory for police, fire fighters and guards at prisons and hospitals; single or panel of 3 neutrals; award due within 30 days of hearing; costs shared equally by the parties. Voluntary for all other public employees.

Criteria for Police, Fire Fighter and Guards Arbitration Award:
- Lawful authority of employer
- Stipulations of parties
- Public interest and welfare
- Ability to pay
- Comparison with other employees doing similar work and employees in general in public and

private employment in comparable communities
- Cost of living
- Overall compensation
- Changes in circumstances
- Other factors normally considered

STRIKE POLICY: Prohibited for police, fire fighters and guards at prisons and hospitals; permitted for all other employees after use of mediation and fact finding provided 10 days notice is given and 30 days have elapsed since report was made public; employer may seek injunction where there is a clear and present danger to public health, safety and welfare; court may order dispute to be submitted to arbitration; strikes in violation of injunction are subject to fines; ULP is not a defense to a prohibited strike; employees may not strike unless labor organization is recognized by the employer or certified by ERB or where there is an interest arbitration provision; employees other than those engaged in a non-prohibited strike who refuse to cross a picket line are deemed to be engaged in a prohibited strike.

NOTE:
- Local ordinances in effect on October 5, 1973 not in conflict with the Act may remain in force after ERB determination. (Sec. 772).
- There are presently approximately 50 local ordinances passed under home rule authority. ERB is presently exerting jurisdiction over these home rule cities and a test in the courts is expected.
- Three student representatives may be designated to attend and observe negotiation sessions involving public postsecondary institutions.
- Arbitration award is not subject to legislative approval.

PERTINENT CASE LAW:
- Union shop is a prohibited subject for bargaining, (*Oregon State Employees' Association v. Oregon State University*, (Ore. Ct. of Apps. 1977) 567 P.2d 1085).
- Fair share provisions are constitutional, (O.A.G. #7591, 3/21/78).
- Compulsory interest arbitration found constitutional, (*Medford Fire Fighters Assn., Local 1431, IAFF v. City of Medford*, (Ore. Ct. of Apps. 1979) 40 Or. App. 519).

PENNSYLVANIA

COVERAGE: All public employees.

AUTHORITY: 43 Penn. CSA, Sec. 1101.101 et seq. Act #195 (1970) as last amended eff. 6/27/78.

EXCLUSIONS: Police and fire fighters; elected or appointed officials; managerial or confidential employees; clergy or employees of church offices.

ADMINISTRATIVE AGENCY:
Pennsylvania Labor Relations Board
1617 Labor and Industry Building
7th and Foster
Harrisburg, Pennsylvania 17120
(717) 787-4895

UNIT DETERMINATION: PLRB.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Avoidance of over-fragmentation
- Majority of professionals must vote for inclusion in nonprofessional units
- Prison and mental hospital guards, court employees and security guards must form their own units; security guards may not affiliate with labor organizations representing other job classifications
- Statewide units for statewide bargaining
- Supervisors must form their own units

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain; meet and confer for supervisors.

SCOPE OF BARGAINING: Wages, hours and other terms and conditions of employment; impact of decisions made on issues within management rights.

GRIEVANCE PROCEDURE: Arbitration required.

MANAGEMENT RIGHTS:
- Functions and programs of employer
- Standards of services
- Budget
- Technology
- Direction of personnel and organizational structure
- Hire or discharge employees for just cause

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; engage in lawful concerted activities; refrain from doing so; present grievances.

UNION SECURITY: Maintenance of membership permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith, including grievance processing
- Refusal to reduce agreement to writing and sign it
- Violate PLRB rules and regulations regarding conduct of representation elections
- Refusal to implement arbitration award
- Refusal to meet and confer

Labor Organization:
- Restrain or coerce employees or employer's representative
- Refusal to bargain in good faith
- Violate PLRB rules and regulations regarding conduct of representation elections
- Refusal to reduce agreement to writing and sign it
- Strike or boycott for jurisdictional reasons
- Secondary boycott
- Refusal to implement arbitration award
- Refusal to meet and confer

IMPASSE PROCEDURE:
Mediation: If no agreement is reached within 21 days of negotiations or 150 days prior to budget submission date, Pennsylvania Bureau of Mediation must be called in; if no agreement after 20 days or 130 days prior to budget submission date, Bureau of Mediation notifies PLRB.

Fact Finding: PLRB may name a single or three-member panel; report due within 40 days of Bureau of Mediation notice to PLRB; State pays for half the cost, parties each pay one-fourth.

Arbitration: Mandatory for prison and mental hospital guards and court employees; voluntary for all other employees; tripartite; PLRB pays for neutral, parties pay for their representative; any part of the award requiring legislation is advisory.

STRIKE POLICY: Prohibited for prison and mental hospital guards and court employees; other employees may strike after mediation and fact finding; employer may seek injunction where there is a clear and present danger to public health, safety and welfare; employee may not be paid for period of strike; court may punish violation of injunction with fines and imprisonment; employees other than those on strike who refuse to cross picket lines are deemed to be engaged in a prohibited strike; ULP is not a defense to an illegal strike.

PERTINENT CASE LAW:
- Agency shop illegal, (*PLRB v. Zelem*, (Pa. 1974) 329 A.2d 477).

* * *

COVERAGE: Police and fire fighters.

AUTHORITY: Penn. Stats. Annot. Title 43, Sec. 217.1 et seq. (1968).

RECOGNITION: Exclusive; by fifty percent showing.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Compensation, hours, working conditions, retirement, pensions and other benefits and terms and conditions of employment.

EMPLOYEE RIGHTS: To bargain and settle grievances.

IMPASSE PROCEDURE:
Arbitration: Upon request of either party; impasse exists if no agreement after 30 days of bargaining or if legislature has not approved an agreement within 1 month after settlement (local government) or within 6 months (State); tripartite; award due within 30 days of appointment of neutral chairperson; labor organization pays for its panel member, employer pays all other costs.

NOTE:
- Arbitration awards are not subject to legislative approval.

PERTINENT CASE LAW:
- Interest arbitration found constitutional, (*Harney v. Russo*, 225 A.2d 560, (Pa. 1969)).
- Pennsylvania Labor Relations Board has the authority to conduct representation elections and settle representational questions. (*Philadelphia Fire Officers Assn. v. PLRB*, (Penn. S. Ct. 1977) 369 A.2d 259).

PUERTO RICO

COVERAGE: All public employees.

AUTHORITY: Act. No. 134 (7/19/60) and Act. No. 139 (6/30/61).

UNION SECURITY: Dues deduction mandatory.

* * *

NOTE:
- Employees of government agencies operating as private businesses or enterprises have the rights to organize and bargain collectively, (Const. Art. II, Section 17).
  Act. No. 142 (6/30/61) authorizes the Labor Relations Board to determine whether a particular government agency operates as a private enterprise. The Act also establishes a grievance procedure ending in a final and binding decision and an impasse procedure providing for mediation and compulsory arbitration.

PERTINENT CASE LAW:
- Agreements between municipalities and their employees cannot be authorized, (1961 Op. Sec. Jus. No. 27).

RHODE ISLAND

COVERAGE: State employees.

AUTHORITY: R.I. General Laws, Sec. 36-11-1 et seq. (1958) as last amended eff. 5/16/80.

EXCLUSIONS: State police having rank of lieutenant or higher; casual or seasonal employees.

ADMINISTRATIVE AGENCY:
State Labor Relations Board
220 Elmwood Avenue, Room 125
Providence, Rhode Island 02907
(401) 277-2752

UNIT DETERMINATION: SLRB, (R.I. General Laws Title 28, Ch. 7).

CRITERIA FOR UNIT DETERMINATION:
- Supervisors must be in separate units

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and working conditions.

EMPLOYEE RIGHTS: To organize and choose a bargaining representative.

UNION SECURITY: Dues deduction mandatory, (Sec. 36-6-17).
Agency shop mandatory; service fees are to be equivalent to membership dues.

UNFAIR LABOR PRACTICES:
- Discriminate on account of membership in a labor organization.

IMPASSE PROCEDURE:
Fact Finding: If no agreement within 30 days of bargaining, parties must submit disputed issues to SLRB; SLRB appoints a fact finder; report due within 10 days.

Arbitration: Mandatory; all unresolved issues submitted to arbitration; single arbitrator; hearings concluded within 20 days and report issued within 10 days; award is advisory as to wages and binding on all other issues; costs of transcripts borne by the State, all other costs shared equally by the parties.

Criteria for Arbitration Award:
- Comparison with public and private sector employees doing similar work in the region
- Interest and welfare of the public
- Peculiarities of employment such as hazards, qualifications, training and skills

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 3 years.

* * *

COVERAGE: State police.

AUTHORITY: R.I. General Laws Ch. 311, Sec. 28-9.5-1 et seq. (1979).

ADMINISTRATIVE AGENCY:
State Labor Relations Board
220 Elmwood Avenue, Room 125
Providence, Rhode Island 02907
(401) 277-2752

UNIT DETERMINATION: All full-time state police from rank of trooper up to and including the rank of sergeant.

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, rates of pay, hours, working conditions and all other terms and conditions of employment.

EMPLOYEE RIGHTS: To organize, be represented and bargain collectively.

IMPASSE PROCEDURE:
Arbitration: Mandatory; all unresolved issues are submitted to arbitration after 30 days of bargaining; tripartite panel; hearings must be concluded within 20 days; award issued within 10 days; award binding on all issues; costs of arbitration shared equally by the parties.

Criteria for Arbitration Award:
- Comparison with building trades and industry in the State
- Comparison with State police departments in other States
- Interest and welfare of the public
- Peculiar qualifications, training, skills and hazards

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 3 years.

* * *

COVERAGE: Municipal employees.

AUTHORITY: R.I. General Laws, Sec. 28-9.4-1 et seq. (1967).

EXCLUSIONS: Elected or administrative officials; members of commissions and boards; certified teachers; police; fire fighters; part-time employees and supervisors.

ADMINISTRATIVE AGENCY:
State Labor Relations Board
220 Elmwood Avenue, Room 125
Providence, Rhode Island 02907
(401) 277-2752

UNIT DETERMINATION: SLRB.

RECOGNITION: Exclusive; by election; requires 20% to petition and 15% to intervene.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Hours, salaries, working conditions and all other terms and conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, be represented, negotiate and bargain collectively.

UNFAIR LABOR PRACTICES:
Employer:
- To spy or keep surveillance on employees or their representatives
- Blacklist
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Require employee, as a condition of employment, to join a "company union" or any other labor organization
- Refusal to discuss grievances
- Interfere, restrain or coerce employees
- Refusal to bargain in good faith

(Employer ULP's are cross-referenced to the State Labor Relations Act, Sec. 28-7-13).

Labor Organization:
- Refusal to bargain in good faith

IMPASSE PROCEDURE:
Mediation: Either party may request mediation and conciliation after 30 days of bargaining.

Arbitration: Voluntary; if mediation or conciliation fail or after 30 days of negotiations, either party may request arbitration; tripartite panel; hearings concluded within 20 days; award issued within 10 days; award is binding on all non-monetary issues; costs of arbitration shared equally by the parties.

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 3 years.

* * *

COVERAGE: Fire fighters.

AUTHORITY: R.I. General Laws Ch. 149, Sec. 28-9.1-1 et seq. (1961) as last amended eff. 5/14/76.

ADMINISTRATIVE AGENCY:
State Labor Relations Board
220 Elmwood Avenue, Room 125
Providence, Rhode Island 02907
(401) 277-2752

UNIT DETERMINATION: All uniformed members and all employees of any paid fire department in any city or town.

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, rates of pay, hours, working conditions and all other terms and conditions of employment.

EMPLOYEE RIGHTS: To organize, be represented and bargain collectively.

IMPASSE PROCEDURE:
Arbitration: Mandatory; all unresolved issues are submitted to arbitration after 30 days of bargaining; tripartite panel; hearings must be concluded within 20 days; award issued within 10 days; award binding on all issues; costs of arbitration shared equally by the parties.

Criteria for Arbitration Award:
- Comparison with building trades and industry in the local area
- Comparison with other employees with same or similar skills in the local area
- Comparison with other fire departments in cities of comparable size
- Interest and welfare of the public
- Peculiar qualifications, skills, training and hazards of the job

STRIKE POLICY: Pronibited.

NOTE:
- Contract duration may not exceed 3 years.

PERTINENT CASE LAW:
- Compulsory interest arbitration found constitutional, (*City of Warwick v. Warwick Firemen's Assn.*, (R.I. S. Ct. 1969) 256 A.2d 206).

* * *

COVERAGE: Police.

AUTHORITY: R.I. General Laws Ch. 54, Sec. 28-9.2-1 et seq. (1963) as last amended eff. 5/14/76.

ADMINISTRATIVE AGENCY:
State Labor Relations Board
220 Elmwood Avenue, Room 125
Providence, Rhode Island 02907
(401) 277-2752

UNIT DETERMINATION: All full-time police in any city or town.

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, rates of pay, hours, working conditions and all other terms and conditions of employment.

EMPLOYEE RIGHTS: To organize, be represented and bargain collectively.

IMPASSE PROCEDURE:
Arbitration: Mandatory; all unresolved issues are submitted to arbitration after 30 days of negotiations; tripartite panel; hearings must be concluded within 20 days; award issued within 10 days; award binding on all issues; costs of arbitration shared equally by the parties.

Criteria for Arbitration Award:
- Comparison with building trades and industry in the local area
- Comparison with police departments in cities of comparable size
- Interest and welfare of the public

- Peculiar qualifications, training, skills and hazards.

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 3 years.

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COVERAGE: Teachers.

AUTHORITY: R.I. General Laws Ch. 146, Sec. 28-9.3-1 et seq. (1966) as last amended eff. 5/8/75.

EXCLUSIONS: Superintendents, assistant superintendents, principals and assistant principals.

ADMINISTRATIVE AGENCY:
State Labor Relations Board
220 Elmwood Avenue, Room 125
Providence, Rhode Island 02907
(401) 277-2752

UNIT DETERMINATION: All teachers in any city, town or school district.

RECOGNITION: Exclusive; by election; requires 20% to petition and 15% to intervene.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Hours, salaries, working conditions and other terms and conditions of professional employment.

EMPLOYEE RIGHTS: To organize, be represented, negotiate and bargain collectively; refrain from doing so.

UNION SECURITY: Agency shop mandatory; service fees are to be equivalent to membership dues.

UNFAIR LABOR PRACTICES:
Employer:
- To spy or keep surveillance on employees or their representatives
- Blacklist
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Require employee, as a condition of employment, to join a "company union" or any other labor organization
- Refusal to discuss grievances
- Interfere, restrain or coerce employees
- Refusal to bargain in good faith

(Employer ULP's are cross-referenced to the State Labor Relations Act, Sec. 28-7-13).

Labor Organization:
- Refusal to bargain in good faith

IMPASSE PROCEDURE:
Mediation: Either party may request if no agreement after 30 days of negotiations.

Arbitration: If mediation or conciliation fail or after 30 days of negotiations, either party may request arbitration; tripartite panel; hearings concluded within 20 days; award issued within 10 days; award binding on all non-monetary items; costs of arbitration shared equally by the parties.

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 3 years.

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OTHER NOTE:
- Bill 79-S 674 amending Sections 28-7-13 and 28-9-18 of the State's labor relations code (eff. 5/5/79) makes it an employer unfair labor practice to fail to implement an arbitrator's award unless there is a stay of its implementation by a court or upon the removal of any such stay.

SOUTH CAROLINA

South Carolina does not have a collective bargaining statute for public employees.

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NOTE:
- South Carolina has two statutes which deal with grievance procedures for State and local employees.
- South Carolina has a right to work law, Section 40-46.

PERTINENT CASE LAW:
- Employers may enter into collective bargaining agreements, (O.A.G. 9/27/78).
- Public employees are prohibited from striking, (O.A.G. #2969, 1970).

SOUTH DAKOTA

COVERAGE: All public employees.

AUTHORITY: S.D.C.L. Ch. 88, Sec. 3-18-1 et seq. (1969) as last amended eff. 7/1/78.

EXCLUSIONS: Elected or appointed officials; members of boards or commissions; administrators, except elementary and secondary school administrators; supervisors; students working part-time; temporary employees; national guard; judges and employees of unified court system.

ADMINISTRATIVE AGENCY:
Division of Labor and Management
Foss Building
Pierre, South Dakota 57501
(605) 773-3681

UNIT DETERMINATION: Division of Labor and Management.

CRITERIA FOR UNIT DETERMINATION:
- Principles of efficient administration
- Position classification and compensation plans
- History and extent of organization
- Occupational classification
- Administrative and supervisory levels of authority
- Geographical location
- Recommendations of the parties

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Rates of pay, wages, hours of employment or other conditions of employment.

GRIEVANCE PROCEDURE: Each employer shall enact a grievance procedure; if employer does not enact a grievance procedure, Division of Labor and Management shall establish that procedure; Division hears appeals, conducts hearings and renders a binding decision on appeals under either procedure.

EMPLOYEE RIGHTS: To form and join labor organizations; refrain from doing so; present grievances.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Failure or refusal to comply with the Act

Labor Organization:
- Restrain or coerce employees or employer's representative
- Cause or attempt to cause employer to discriminate
- Refusal to bargain in good faith

IMPASSE PROCEDURE: Either party may request intervention of Division of Labor and Management; Sec. 60-10-1 to 60-10-3 authorizes the Division to perform conciliation services and if impasse continues, to make recommendations for settlement; parties may adopt their own procedure for settlement.

STRIKE POLICY: Prohibited; labor organization found guilty of inciting or encouraging a strike may be fined up to $50,000; employees who incite or encourage a strike may be fined up to $1,000 or jailed for up to 1 year or both; employer may seek an injunction.

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NOTE:
- South Dakota has a right to work law applicable to public employees, (Sec. 2, Act. VI State Const. as amended 1952 Supp.).

PERTINENT CASE LAW:
- Firemen's and Policemen's Arbitration Act (S.D.C.L., Sec. 9-14A-1 et seq., 1971) declared unconstitutional in its entirety, (*City of Sioux Falls v. Sioux Falls Fire Fighters, Local #184, et al.*, (S.D. S. Ct. 1975) 234 N.W. 2d 35).

TENNESSEE

COVERAGE: Teachers.

AUTHORITY: Tenn. Code Ch. 570, Sec. 49-5501 et seq. (1978).

EXCLUSIONS: Managerial employees may not be considered part of the bargaining unit (maximum allowable number of managerial personnel determined by pupil attendance).

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salaries or wages, grievance procedure, insurance, fringe benefits (excluding pensions or retirement), working conditions, leave, student discipline procedure, payroll deductions; cannot violate Federal or State law or municipal charter, employee rights or Board of Education rights.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; engage in other concerted activities; refrain from doing so.

UNFAIR LABOR PRACTICES:
Employer:
- Threaten or discriminate against employees
- Interfere, restrain or coerce employees
- Refusal to bargain in good faith or execute a written memorandum
- Deny access at reasonable times to labor organization
- Discriminate on account of labor organization membership or testimony
- Dominate labor organizations
- Refusal to participate in impasse procedure in good faith

Labor Organization:
- Cause or attempt to cause employer to violate Act
- Refusal to bargain in good faith or execute a written memorandum
- Interfere, restrain or coerce employees or employer
- Refusal to participate in impasse procedure in good faith
- Strike
- Urge, coerce or encourage others to engage in unlawful acts
- Enter work area that will interfere with normal operations

IMPASSE PROCEDURE:

Mediation: Either party may request the services of FMCS; if such service is not available, a mediator shall be selected by a tripartite panel; costs borne by the party requesting mediation.

Fact Finding: If mediation fails, either party may request fact finding; either party may request that AAA designate a neutral; report due within 30 days of appointment; costs borne by the party requesting fact finding.

STRIKE POLICY: Prohibited; employer may seek an injunction; employees may be dismissed or forfeit tenure for 3 years.

NOTE:
- Contract duration may not exceed 3 years.
- Management representatives must be full-time employees of the school board or school district.
- Initial recognition shall be for 24 months.

PERTINENT CASE LAW:
- Closed shop prohibited, (O.A.G. #188, 6/14/79).
- Mandatory agency shop provisions are unlawful, (O.A.G. #5, 7/30/79).
- Dues deduction permitted, (O.A.G. #175, 3/4/80).

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COVERAGE: State employees.

AUTHORITY: Tenn. Code Ann. Ch. 792, Sec. 8-23-204 (1980).

UNION SECURITY: Dues checkoff permitted as long as labor organization has maintained membership of at least 20%.

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NOTE:
- Tennessee has a Sunshine Law which includes negotiations in its coverage, (L. 1979, Ch. 41 eff. 3/13/79). Strategy sessions must also be open to the public, (O.A.G. #185, 5/8/79).
- City of Memphis has adopted an ordinance covering all city employees which provides final offer arbitration by package for the resolution of negotiations impasses. It provides for an impasse panel composed of one city council member chosen by the labor organization, one city council member chosen by management and a neutral third city council member chosen by the two.
- Memphis city charter prohibits strikes, striking employees discharged may only be rehired as new employees.

PERTINENT CASE LAW:
- Absent enabling legislation, public employers are not authorized to enter into collective bargaining agreements, (*City of Chattanooga, et al. v. Chattanooga Fire Fighters Assn., Local 820, et al.*, (Tenn. Ct. of Apps., Eastern Section) 1/30/80).

TEXAS

COVERAGE: All public employees except police and fire fighters.

AUTHORITY: V.A.C.S. Art. 5154C, Ch. 133, Sec. 1 et seq. (1947).

RECOGNITION: It is against public policy to recognize a labor organization as a bargaining agent for any group of employees.

BARGAINING RIGHTS: Collective bargaining agreements are null and void; no bargaining may take place.

GRIEVANCE PROCEDURE: Employees have the right to present grievances about wages, hours of work or working conditions individually or through representatives not claiming the right to strike.

EMPLOYEE RIGHTS: No person may be denied employment due to membership in a labor organization.

STRIKE POLICY: Prohibited.

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COVERAGE: Police and/or fire fighters in cities, towns and political subdivisions where collective bargaining has been approved by a majority of voters.

AUTHORITY: V.A.C.S. Art. 5154c-1, Sec. 1 et seq. (1973).

EXCLUSIONS: Chief of the police and fire department, volunteer fire fighters.

UNIT DETERMINATION: Fire and police departments in any city, town or other political subdivision shall constitute separate units.

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours, working conditions and other terms and conditions of employment.

EMPLOYEE RIGHTS: To organize and bargain.

IMPASSE PROCEDURE:

Mediation: May be invoked by either party when impasse is reached or if employer's legislative body fails to approve a contract; impasse exists after 60 days of bargaining.

Arbitration: Voluntary, within 5 days of impasse; tripartite panel; hearing must be concluded within 20 days; award issued within 10 days; costs of arbitration hearing and neutral arbitrator shared equally by the parties.

Criteria for Arbitration Award:
- Hazards of employment
- Physical qualifications
- Educational qualifications
- Mental qualifications
- Job training
- Skills

Other: In the absence of arbitration, the labor organization may bring suit in district court to require employer to meet the prevailing conditions of employment of comparable private sector employees in the local market.

STRIKE POLICY: Prohibited; court may enjoin and fine each employee up to $2000; labor organization may be fined $2500-20,000 per day and suspension of dues deduction for 1 year; court may reduce fine if employer provoked the strike; employees may not receive a wage increase for 1 year and are on probation for 2 years.

NOTE:
- Joint police and fire negotiations are permitted.
- Arbitration awards are not subject to legislative approval.

PERTINENT CASE LAW:
- Portions of police-fire fighter bargaining law which delegate arbitration functions to district courts are void, (*IAFF, Local 2390, et al. v. City of Kingsville*, (Texas S. Ct.) No. 1249, 4/27/78).

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COVERAGE: Teachers.

AUTHORITY: Tex. Ed. Code Ch. 13, Sec. 13.216 et seq. (1971).

BARGAINING RIGHTS: Consultation allowed.

SCOPE OF BARGAINING: Matters of educational policy and conditions of employment.

EMPLOYEE RIGHTS: Join labor organizations; refrain from doing so.

STRIKE POLICY: Prohibited; striking teachers shall be suspended.

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COVERAGE: Employees of counties of 20,000 or more in population.

AUTHORITY: V.A.C. Title 44 Art. 2372h-4 (1969) as last amended eff. 9/1/75.

UNION SECURITY: Counties may authorize dues deduction; costs borne by the labor organization.

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COVERAGE: Employees of cities of 10,000 or more in population..

AUTHORITY: V.A.C.S. Title 110A Art. 6252-3a (1967).

UNION SECURITY: City may authorize dues deduction; costs borne by the labor organization.

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NOTE:
- Texas has an open meeting law applicable to public sector collective bargaining.
- Texas has a right to work law, (RCS 5207A).

UTAH

Utah does not have a collective bargaining statute for public employees.

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COVERAGE: All public employees.

AUTHORITY: Utah Code, Sec. 34-32-1.

UNION SECURITY: Dues deduction mandatory; may be up to 3% of monthly wages.

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NOTE:
- Utah has a right to work law, (Laws of 1955, Sec. 34-3A-7).
- Salt Lake City has a local ordinance providing for collective bargaining for its employees, (Ut. Code Annot., Sec. 1 et seq. (1977) as last amended eff. 2/7/78).
- Utah has a statute prescribing a grievance procedure for State employees, (Utah Code Ch. 262, Sec. 67-17-1 et seq. (1977)).

PERTINENT CASE LAW:
- Fire Fighters Wage Negotiations Act (Utah Code, Sec. 1 et seq. 1975) declared unconstitutional in its entirety, (*Salt Lake City v. IAFF*, (Utah S. Ct. 1977) 563 P.2d 786).
- State may not engage in collective bargaining but employees may join labor organizations and present proposals; strikes terminate employment relationship, (O.A.G. 60-003, 1/20/60).
- Utah's private labor code can't be used to give collective bargaining rights to municipal employees, (*Westly and the IPBO, Local 470 v. Bd. of City Commissioners of Salt Lake City Corp.*, (Utah S. Ct.) No. 14842, 1/4/78).

VERMONT

COVERAGE: State employees.

AUTHORITY: 3 V.S.A. Ch. 27, Sec. 901 et seq. (1969) as last amended eff. 7/3/77.

EXCLUSIONS: Exempt or excluded employees under State Classified Service, Title 3, Sec. 311 (except State police in the Department of Public Safety); employees of the lieutenant governor; legal assistants to the Attorney General; department heads and their deputies; managerial employees; private secretaries; employees of the personnel department; certain budget department employees; employees with a conflict of interest; confidential employees; legislative and judicial employees.

ADMINISTRATIVE AGENCY:
Vermont Labor Relations Board
100 State Street
Montpelier, Vermont 05602
(802) 828-2700

UNIT DETERMINATION: VLRB determines most appropriate unit.

CRITERIA FOR UNIT DETERMINATION:
- Authority of employer to take positive action on matters subject to negotiation
- Community of interest
- Desires of employees
- Avoidance of over-fragmentation
- Extent of organization is not controlling
- Supervisors must be in separate units

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, salaries and benefits; minimum hours; working conditions; overtime; leave; reduction in force procedures; grievance procedure; insurance programs; personnel rules, excluding classified service under Section 311 and merit system.

GRIEVANCE PROCEDURE: VLRB prescribes procedure, conducts hearing and makes the final determination; nonmembers must pay service fee if using exclusive representative for grievance procedure.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain; engage in concerted activities; refrain from doing so; present grievances.

MANAGEMENT RIGHTS:
- Carry out statutory goals and mandates of agency
- Utilize personnel, methods and means in most appropriate manner
- Take necessary actions in cases of emergency

UNION SECURITY: Union or agency shop prohibited.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain
- Discriminate on account of race, color, creed, sex or national origin
- Boycott any other product or person by agreement with the labor organization

Labor Organization:
- Restrain or coerce employees or employer's choice of representative
- Cause or attempt to cause employer to discriminate
- Refusal to bargain
- Strike or boycott
- Threaten, restrain, coerce or require employees to join a labor organization or participate in secondary boycotts or jurisdictional disputes
- Cause or attempt to cause employer to pay for services not rendered
- Picket for recognitional purposes
- Engage in unlawful activities under Section 903 of the Act

IMPASSE PROCEDURE:
Mediation: Either party may request mediator from VLRB.

Fact Finding: Either party may request fact finding from VLRB; tripartite panel; fact finding panel may mediate; panel issues report; mutually incurred costs shared equally by the parties.

Criteria for Fact Finding Report:
- Prevailing rate for comparable work within the State
- Employees needs and public's requirement for continuous service
- Generally accepted safety standards and working conditions within the State

Other: If impasse continues after 15 days of issuance of fact finding report, each party shall submit its last offer as a single package to VLRB; VLRB shall select between the last offers within 30 days and make recommendations to the General Assembly; these recommendations become effective subject to appropriations; General Assembly may enact laws amending provisions of any collective bargaining agreement.

STRIKE POLICY: Prohibited.

NOTE:
- Contract duration may not exceed 2 years (except higher education).

* * *

COVERAGE: Municipal employees.

AUTHORITY: 21 V.S.A. Ch. 22, Sec. 1721 et seq. (1973) as last amended eff. 7/1/78.

EXCLUSIONS: Elected officials; members of boards and commissions; executive officers; supervisors; probationary, part-time, seasonal or temporary employees; confidential employees; certified employees of school districts.

ADMINISTRATIVE AGENCY:
Vermont Labor Relations Board
100 State Street
Montpelier, Vermont 05602
(802) 828-2700

UNIT DETERMINATION: VLRB in cases of dispute.

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Majority of professionals must vote for inclusion in nonprofessional unit
- Avoidance of over-fragmentation
- Extent of organization is not controlling
- Desires of employees

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and conditions of employment; excluding managerial prerogatives.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join or assist labor organizations; present grievances.

UNION SECURITY: Agency and union shops permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Refusal to appropriate sufficient funds to implement an agreement
- Discriminate on account of race, color, religion, creed, sex, national origin, age or political affiliation
- Discriminate against employees for nonpayment of service fee or for nonmembership if:
  - membership is not available uniformly
  - membership is denied for reasons other than nonpayment of initiation fees

Labor Organization:
- Restrain or coerce employees or employer's representative
- Cause or attempt to cause employer to discriminate
- Refusal to represent all employees
- Refusal to bargain in good faith
- Strike or boycott
- Charge excessive initiation fees
- Cause employer to pay for services not rendered
- Picket for recognitional purposes
- Discriminate against employee for nonpayment of service fee or for nonmembership if:
  - membership is not available uniformly
  - membership is denied for reasons other than nonpayment of dues or initiation fees

IMPASSE PROCEDURE:
Mediation: Either party may petition or Commissioner of Labor and Industry may initiate mediation; Commissioner may act as mediator or appoint one; costs shared equally by the parties.

Fact Finding: Either party may request fact finding after 15 days of mediation; fact finder may mediate; report due within 30 days of conclusion of hearings; costs shared equally by the parties.

Criteria for Fact Finding:
- Lawful authority of the employer
- Stipulations of the parties
- Interest and welfare of the public
- Ability to pay
- Comparison with public and private sector employees doing similar work in comparable communities
- Cost of living
- Overall compensation

Arbitration: Voluntary unless made compulsory by referendum; initiated 20 days after fact finder's report made public; tripartite panel; award due within 30 days.

Criteria for Arbitration Award: Same as criteria for fact finding.

STRIKE POLICY: Limited right to strike; prohibited in cases where it:
- Occurs within 30 days of issuance of fact finder's report
- Occurs after parties have agreed to arbitration or award has been issued
- Endangers public health, safety and welfare

Employer may seek injunction for strikes in violation of limitations.

NOTE:
- Fact finding hearing shall be open to the public at the request of any party.

* * *

COVERAGE: Teachers.

AUTHORITY: 16 V.S.A. Ch. 57, Sec. 1981 et seq. (1969).

EXCLUSIONS: Superintendent and assistant superintendent.

UNIT DETERMINATION: If disputed, unit limited to all teachers in school district.

CRITERIA FOR UNIT DETERMINATION: Principals, assistant principals and administrators may join administrators' labor organization or form a separate unit of any teachers' organization.

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Salaries, related economic conditions of employment, procedures for processing complaints and grievances and any mutually agreed upon matters not in conflict with statutes and laws of Vermont.

EMPLOYEE RIGHTS: To join, assist or participate in labor organizations; refrain from doing so.

UNFAIR LABOR PRACTICES: As prescribed in Municipal Employees Act (Sec. 1726-1729).

IMPASSE PROCEDURE:
Mediation: Upon mutual agreement of the parties; costs shared equally by the parties.

Fact Finding: Either party may request fact finding if mediation fails or is not requested; tripartite panel; report due within 30 days of panel appointment; made public within 10 days of issuance; costs shared equally by the parties.

VIRGINIA

Virginia does not have a collective bargaining statute for public employees.

* * *

COVERAGE: All public employees.

AUTHORITY: Code of Va., Sec 40.1-55 et seq. (1970) as last amended eff. 7/1/72.

STRIKE POLICY: Prohibited; striking employees deemed to have terminated employment; ineligible for any public employment for 1 year.

* * *

NOTE:
- Virginia has three statutes which deal with grievance procedures for State employees, local employees and teachers.

PERTINENT CASE LAW:
- Absent enabling legislation, a local government or school board may not negotiate or enter into binding contracts; public employers have no implied power to bargain, (*Commonwealth of Virginia v. County Board of Arlington County*, (Va. S. Ct. 1977) 232 S.E. 2d 30).

VIRGIN ISLANDS

COVERAGE: All public employees, including employees of the Port Authority, Water and Power Authority, Housing Authority, College of Virgin Islands and the Public Television System.

AUTHORITY: Virgin Islands Code Ch. 14, Sec. 361 et seq. (1980) eff. 9/1/80.

EXCLUSIONS: Elected or appointed officials; employees of the Legislature, judges and employees of the Territorial Court.

ADMINISTRATIVE AGENCY:
Public Employees Relations Board
P.O. Box 708
Christiansted, St. Croix, Virgin Islands 00820

UNIT DETERMINATION: PERB.
Each bargaining unit shall be classified as Class I, II, or III (see NOTE).

CRITERIA FOR UNIT DETERMINATION:
- Community of interest
- Homogenity of wages, hours and working conditions
- Desires of employees
- Effects of over-fragmentation
- Both professionals and nonprofessionals must vote for inclusion in the same unit
- Separate unit(s) for police officers, corrections officers, fire fighters, prison guards and other public safety employees from other public employees
- Separate unit(s) for supervisory employees

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Rates of pay, hours, salaries, employee benefits and terms and conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To form, join and assist labor organizations; refrain from doing so; engage in lawful concerted activities; present grievances.

MANAGEMENT RIGHTS:
- Direct and supervise employees
- Determine qualifications and standards for hiring and content of examinations
- Hire, promote, transfer, assign, retain, discipline, suspend, demote or discharge employees for cause
- Maintain efficiency of operations
- Determine methods, means and personnel for carrying out operations
- Take necessary actions in cases of emergency

UNION SECURITY: Agency shop permitted.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain in good faith
- Refusal to participate in impasse procedure in good faith
- Violate or fail to comply with the Act
- Violate or fail to comply with negotiated agreement

Labor Organization:
- Interfere, restrain or coerce employees
- Refusal to bargain in good faith
- Refusal to participate in impasse procedure in good faith
- Violate or fail to comply with Act
- Violate or fail to comply with negotiated agreement

IMPASSE PROCEDURE: Parties may establish own impasse procedure which must include arbitration; absent such agreement, the following procedure is implemented for Class III units and Class I and II units upon approval of both parties:

Mediation: Either party may request or PERB may initiate; costs borne by PERB.

Arbitration: Mandatory if no resolution within 14 days of mediation; tripartite panel; award due within 30 days; costs shared equally by the parties.

STRIKE POLICY: Prohibited for Class III units. Class II units may strike unless enjoined as seriously harmful to public health or safety. 72 hour notice of intent to strike is not given, labor organization has not bargained in good faith, or strike is in violation of the Act; if strike is enjoined, issues in dispute submitted to above prescribed impasse procedure. Class I units may strike unless both parties have agreed to use above prescribed impasse procedure.

NOTE:
- Class I units consist of employees who perform services in which work stoppage may be sustained for extended periods without serious effects on health and safety of the public. Class II units consist of employees who perform services in which work stoppage may be sustained for a limited period of time without serious effects on health and safety of the public. Class III units consist of employees who perform services in which work stoppage may not be sustained for even the shortest period of time; this unit consists of police officers, corrections officers, fire fighters, prison guards, other public safety employees, employees who maintain or operate water and power equipment, and physicians.

WASHINGTON

COVERAGE: State civil service employees.

AUTHORITY: RCW, Sec. 41.06.150 et seq. (1967) as last amended eff. 6/6/73.

ADMINISTRATIVE AGENCY:
Washington State Department of Personnel
600 South Franklin Street
Olympia, Washington 98504
(206) 753-5368

UNIT DETERMINATION: State Department of Personnel.

CRITERIA FOR UNIT DETERMINATION:
- Duties, skills and working conditions
- History of collective bargaining
- Extent of organization
- Desires of employees

RECOGNITION: Exclusive; by election or cross-check of cards.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Grievance procedure and all personnel matters over which agency may lawfully exercise discretion.

GRIEVANCE PROCEDURE: On matters within agency authority.

EMPLOYEE RIGHTS: To organize and bargain.

UNION SECURITY: Dues deduction mandatory.
Union shop permitted upon referendum of employees in the unit; persons whose religious beliefs prevent membership must be permitted to make alternative charitable contribution.

UNFAIR LABOR PRACTICES: As prescribed in Public Employees Collective Bargaining Act, RCW, Sec. 41.56.010 et seq.

STRIKE POLICY: Prohibited.

PERTINENT CASE LAW:
- Managerial and supervisory employees have a right to bargain, (Wash. Ct. of Apps., 2/80).
- Agency shop provisions are constitutional, (*Assn. of Capitol Powerhouse Engineers v. State of Washington*, Wash. S. Ct. 1977) 570 P.2d 1042).

* * *

COVERAGE: State civil service employees in institutions of higher education.

AUTHORITY: RCW, Sec. 28B.16.100 et seq. (1971).

EXCLUSIONS: Non-civil service employees and faculty.

ADMINISTRATIVE AGENCY:
Higher Education Personnel Board
1202 Black Lake Blvd.
Olympia, Washington 98504
(206) 753-3850

UNIT DETERMINATION: Higher Education Personnel Board.

CRITERIA FOR UNIT DETERMINATION:
- Duties, skills and working conditions
- History of bargaining
- Extent of organization
- Desires of employees

RECOGNITION: Exclusive; by election or cross-check of cards.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Grievance procedure and personnel matters over which the institution may lawfully exercise discretion.

GRIEVANCE PROCEDURE: Permitted on matters within institution authority.

EMPLOYEE RIGHTS: To organize and bargain.

UNION SECURITY: Union shop permitted upon referendum of employees in unit; persons whose religious beliefs prevent membership must be permitted to pay agency fee.

UNFAIR LABOR PRACTICES: As prescribed in Public Employees Collective Bargaining Act, RCW, Sec. 41.56.010 et seq.

STRIKE POLICY: Prohibited.

NOTE:
- Managerial and supervisory employees have a right to bargain. (Wash. Ct. of Apps., 2/80)

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COVERAGE: Municipal employees in cities, counties, political subdivisions and municipal corporations.

AUTHORITY: RCWA, Sec. 41.56.010 et seq. (1967) as last amended eff. 5/14/79.

EXCLUSIONS: Elected or appointed officials; confidential employees; state employees; teachers; port district employees; public utility employees.

ADMINISTRATIVE AGENCY:
Public Employment Relations Commission
603 Evergreen Plaza Building
Olympia, Washington 98504
(206) 753-3444

UNIT DETERMINATION: PERC.

CRITERIA FOR UNIT DETERMINATION:
- Duties, skills and working conditions of employees
- History of collective bargaining
- Extent of organization
- Desires of employees

RECOGNITION: Exclusive; voluntary, by election or cross-check of cards.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and working conditions.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize; bargain; present grievances.

UNION SECURITY: Dues deduction mandatory.
Closed shop prohibited; all other forms permitted providing that persons whose religious beliefs prevent membership must be permitted to donate equivalent amount to non-religious charities.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate against employees on account of filing a ULP charge
- Refusal to bargain

Labor Organization:
- Interfere, restrain or coerce employees
- Induce employer to commit a ULP
- Discriminate against employees on account of filing a ULP charge
- Refusal to bargain

IMPASSE PROCEDURE:
Mediation: Non-uniformed employees - either party may request mediation by PERC. Uniformed employees (police in cities with populations of over 15,000, counties with populations of over 500,000, and all firefighters) - either party may request PERC mediation after 60 days of negotiations.

Arbitration: Uniformed employees - tripartite panel created if no settlement within a reasonable period of negotiations and mediation; award due 30 days after conclusion of hearings; each party pays for its panel member; if neutral member is selected by parties, costs shared equally; if neutral member is appointed by PERC, costs borne by PERC.

Criteria for Arbitration Award:
- Authority of employer
- Stipulations of the parties
- Comparison with uniformed personnel in comparable cities and counties on the West Coast
- Cost of living
- Changes in circumstances
- Other factors normally considered

STRIKE POLICY: Non-uniformed employees - prohibited under common law. Uniformed employees - prohibited and fine up to $250 per day.

NOTE:
- Contract duration may not exceed 3 years.

PERTINENT CASE LAW:
- Binding interest arbitration found constitutional, (*City of Spokane* v. *Spokane Police Guild*, (Wash. Ct. of Apps.) No. 43954, 9/2/76).

• • •

COVERAGE: Teachers.

AUTHORITY: RCW, Sec. 41.59.010 et seq. (1975) as last amended eff. 9/1/79.

EXCLUSIONS: Chief executive and administrative officers; confidential employees.

ADMINISTRATIVE AGENCY:
Public Employment Relations Commission
603 Evergreen Plaza Building
Olympia, Washington 98504
(206) 753-3444

UNIT DETERMINATION: PERC.

CRITERIA FOR UNIT DETERMINATION:
- Duties, skills and working conditions
- History of bargaining
- Extent of organization
- Desires of employees
- All nonsupervisory employees are to be in a single unit
- Unit of only supervisors is appropriate upon vote of majority
- Unit of only principals and assistant principals is appropriate upon vote of majority
- Unit of principals and assistant principals and other supervisory employees is appropriate upon vote of both groups
- Unit that includes supervisors and/or principals and assistant principals and nonsupervisory employees is considered appropriate upon vote of both groups
- Vocational, technical or occupational skill center employees may have a separate unit if history of bargaining so justifies

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and terms and conditions of employment; units of supervisors and/or principals and assistant principals limited to compensation, hours and number of days of work per year.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain; present grievances; refrain from doing so.

UNION SECURITY: Dues deduction mandatory.
Closed and union shop prohibited; agency shop permitted providing that persons whose religious beliefs prevent membership must be permitted to donate equivalent amount to non-religious charities.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain

Labor Organization:
- Restrain or coerce employees or employer's representative
- Cause or attempt to cause employer to commit a ULP
- Refusal to bargain

IMPASSE PROCEDURE:
Mediation: Either party may request PERC to appoint a mediator; costs borne by PERC.

Fact Finding: Either party may request after 10 days of mediation; single fact finder; report due within 30 days of appointment; costs borne by PERC.

STRIKE POLICY: Prohibited; enjoinable by the courts under common law.

• • •

COVERAGE: Community college districts (academic employees).

AUTHORITY: RCW, Sec. 288.52.010 et seq. (1971) as last amended eff. 1/1/76.

EXCLUSIONS: Chief administrative officer and administrators in each community college district.

ADMINISTRATIVE AGENCY:
Public Employment Relations Commission
603 Evergreen Plaza Building
Olympia, Washington 98504
(206) 753-3444

UNIT DETERMINATION: Academic employees within a community college district; supervisors may be in nonsupervisory units upon majority vote of both groups.

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Meet and confer.

SCOPE OF BARGAINING: Including, but not limited to, curriculum, textbooks, in-service-training, student-teaching programs, personnel, hiring and assignment practices, leaves of absence, salary and salary schedules and noninstructional duties.

EMPLOYEE RIGHTS: Employees may appear in their own behalf.

IMPASSE PROCEDURE:
Mediation: PERC mediates upon consent of both parties.

Fact Finding: PERC conducts fact finding upon consent of both parties.

Other: If no agreement by means provided, parties may request assistance from PERC.

NOTE:
- Contract duration may not exceed 3 years.

PERTINENT CASE LAW:
- Agency shop prohibited, (O.A.G. #7, 4/22/75).

* * *

NOTE:
- Washington State has additional statutes covering specific groups of public employees:
  - Port Districts, RCW Ch. 53.18, Sec. 53.18.010 et seq. (1967)
  - Public Utility Districts, RCW, Sec. 54.04.170, 180 (1963)
  - State Ferries System, RCW Ch. 47.64, Sec. 47.64.010 et seq. (1949)
- Final ratification and approval of contracts must be made in public.

WEST VIRGINIA

West Virginia does not have a collective bargaining statute for public employees.

* * *

PERTINENT CASE LAW:
- Public employees may join labor organizations and employer may discuss wages and hours with such organizations, but final determination of wages, hours and working conditions rests with the governmental authorities and cannot be delegated away, (O.A.G. 762).
- County school board may officially recognize labor organizations; board may negotiate and enter into written agreements; grievance arbitration is an unlawful delegation of board's authority; board may agree to the appointment of a mediator or fact finder to resolve disputes, (O.A.G. 6/26/74).

WISCONSIN

COVERAGE: State employees.

AUTHORITY: WSA Ch. III, Sec. 111.80 et seq. (1966) as last amended eff. 2/16/78.

EXCLUSIONS: Unclassified, limited term, and seasonal employees; managerial and confidential employees; WERC employees.

ADMINISTRATIVE AGENCY
Wisconsin Employment Relations Commission
14 West Mifflin Street, Room 200
Madison, Wisconsin 53703
(608) 266-1381

UNIT DETERMINATION: Statute.
- Clerical and related
- Blue collar and non-building trades
- Building trade crafts
- Security and public safety
- Technical
- Professional (9 separate units)
- Statewide units of nonprofessional and professional supervisors may be certified if representatives are not affiliated with organizations representing employees in the statutory units

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wage rates (including general salary schedules and temporary assignments), hours and conditions of employment; excluding management rights, mission and goals of agency and merit system; limited to wages and fringe benefits for supervisors.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain; engage in lawful concerted activities; present grievances; refrain from doing so.

MANAGEMENT RIGHTS: To carry out statutory goals using the most appropriate means and personnel; manage employees; hire, fire, promote, transfer or assign; establish work rules; discipline employees.

UNION SECURITY: Dues deduction mandatory.
Agency shop permitted with 2/3 vote of employees in the unit; can be rescinded by vote or if labor organization discriminates on the basis of race, color or creed.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Discriminate on account of labor organization membership or testimony
- Refusal to bargain
- Violate any collective bargaining agreement, agreement to arbitrate or arbitrator's award
- Deduct dues without authorization

Labor Organization:
- Coerce or intimidate employees
- Induce employer to commit a ULP
- Refusal to bargain
- Violate any collective bargaining agreement, agreement to arbitrate or arbitrator's award
- Strike
- Coerce or intimidate supervisors to join the labor organization

IMPASSE PROCEDURE:
Mediation: Either party may request, or WERC may assign a mediator.

Fact Finding: Jointly requested by parties; WERC assigns single or three-member panel according to parties' wishes; fact finder may mediate; costs shared equally by the parties.

Criteria for Fact Finding Report:
- Efficient and effective administration

STRIKE POLICY: Prohibited; employer may seek injunction, file ULP charge, or both; employer may discipline strikers, cancel reemployment eligibility, request fines or sue for damages from labor organization or strikers.

NOTE:
- Tentative agreements must be submitted to the legislative Joint Committee on Employment Relations for approval. If Committee disapproves, tentative agreement must be renegotiated.

* * *

COVERAGE: Municipal employees, including teachers, police and fire fighters.

AUTHORITY: WSA Ch. 111, Sec. 111.70 et seq. (1959) as last amended eff. 6/7/78.

EXCLUSIONS: Independent contractors; supervisors (except law enforcement supervisors in first class cities); confidential, managerial or executive employees.

ADMINISTRATIVE AGENCY:
Wisconsin Employment Relations Commission
14 West Mifflin Street, Room 200
Madison, Wisconsin 53703
(608) 266-1381

UNIT DETERMINATION: WERC.

CRITERIA FOR UNIT DETERMINATION:
- Avoid fragmentation
- Separate units for professionals and nonprofessionals unless majority of professional employees vote for inclusion in nonprofessional unit
- Separate units for craft and noncraft employees unless majority of craft employees vote for inclusion
- Desires of employees

RECOGNITION: Exclusive; voluntary or by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, hours and conditions of employment.

GRIEVANCE PROCEDURE: Arbitration permitted.

EMPLOYEE RIGHTS: To organize, form, join or assist labor organizations; bargain; engage in lawful concerted activities; present grievances; refrain from doing so.

UNION SECURITY: Dues deduction mandatory.
Agency shop permitted; rescinded if less than majority of unit supports continuation in an election or if labor organization refuses membership on the basis of race, color, creed or sex.

UNFAIR LABOR PRACTICES:
Employer:
- Interfere, restrain or coerce employees
- Dominate labor organizations
- Refusal to bargain
- Violate any collective bargaining agreement
- Deduct dues without authorization
- Refuse or fail to implement an arbitration decision
- Discriminate on the basis of membership in a labor organization

Labor Organization:
- Coerce or intimidate employees
- Coerce, intimidate or induce employer to commit a ULP
- Refusal to bargain
- Violate any collective bargaining agreement
- Coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employee to join labor organization
- Refuse or fail to implement an arbitration decision

IMPASSE PROCEDURE:
Mediation: Mandatory for law enforcement and fire fighters (except Milwaukee) if ordered by WERC; for other municipal employees - either party may request or WERC may initiate.

Fact Finding: Either or both parties may request fact finding; WERC appoints a single fact finder or parties may jointly request a tripartite panel; fact finder may mediate; costs shared equally by the parties (applies only to Milwaukee fire fighters until 10/31/81).

Mediation-Arbitration: For municipal employees, excluding police and fire - either party may petition WERC for mediation-arbitration on the basis of their final offers; mediator-arbitrator mediates and if no resolution will arbitrate on the basis of the parties' final offers; costs shared equally by the parties (Exp. 10/31/81).

Arbitration: Police and fire fighters - duty to participate in binding arbitration if requested by either party and ordered by WERC; must be final offer unless parties agree to conventional arbitration; costs shared equally by the parties.

Criteria for Police and Fire Arbitration Award:
(Same criteria for mediation-arbitration award)
- Lawful authority of the employer
- Stipulations of the parties
- Interest and welfare of the public
- Ability to pay
- Comparison with employees in public and private sectors doing similar work in comparable communities
- Cost of living
- Overall compensation
- Changes in circumstances
- Other factors normally considered

STRIKE POLICY: Under Mediation-Arbitration for municipal employees - if both parties withdraw their

final offers, prior to final and binding arbitration, the labor organization may strike if it gives 10 day notice to WERC and the employer; otherwise prohibited; agency shop may be rescinded if court finds that the labor organization authorized an illegal strike.

NOTE:
- Presentation of initial proposals, along with supporting rationale shall be open to the public.
- Contract duration may not exceed 3 years.

WYOMING

COVERAGE: Fire fighters.

AUTHORITY: W.S. Ann., 1977 Rep. Ed., Sec. 27-10-101 et seq. (1977).

RECOGNITION: Exclusive; by election.

BARGAINING RIGHTS: Duty to bargain.

SCOPE OF BARGAINING: Wages, rates of pay, working conditions and all other terms and conditions of employment.

EMPLOYEE RIGHTS: To bargain and be represented by a bargaining agent.

IMPASSE PROCEDURE:

Arbitration: Mandatory if no agreement reached within 30 days of bargaining; tripartite panel; arbitration shall proceed pursuant to provisions of the Uniform Arbitration Act, (Sec. 1-36-101 et seq.).

NOTE:
- Contract duration may not exceed 1 year.

PERTINENT CASE LAW:
- Compulsory interest arbitration found constitutional. (*State ex. rel Fire Fighters Local 946, IAFF v. City of Laramie*, (Wyo. S. Ct. 1968) 437 P.2d 295).

* * *

OTHER PERTINENT CASE LAW:
- Wyoming Statute 27-7-101 which relates to the statutory policy toward organization and collective bargaining was construed to apply to private industry and not to the public sector. (*Retail Clerks Local 187, AFL-CIO v. University of Wyoming*, (Wyo. S. Ct. 1975) 531 P.2d 884).
- Wyoming has a right to work statute applicable to the public sector. (Ch. 39, Sec. 27-7-108 et seq. (1963)).

KEY

AL	Alabama
AK	Alaska
AZ	Arizona
AR	Arkansas
CA	California
CO	Colorado
CT	Connecticut
DE	Delaware
DC	District of Columbia
FL	Florida
GA	Georgia
HI	Hawaii
ID	Idaho
IL	Illinois
IN	Indiana
IA	Iowa
KA	Kansas
KY	Kentucky
LA	Louisiana
ME	Maine
MD	Maryland
MA	Massachusetts
MI	Michigan
MN	Minnesota
MS	Mississippi
MO	Missouri
MT	Montana
NB	Nebraska
NV	Nevada
NH	New Hampshire
NJ	New Jersey
NM	New Mexico
NY	New York
NYC	New York City
NC	North Carolina
ND	North Dakota
OH	Ohio
OK	Oklahoma
OR	Oregon
PA	Pennsylvania
PR	Puerto Rico
RI	Rhode Island
SC	South Carolina
SD	South Dakota
TN	Tennessee
TX	Texas
UT	Utah
VT	Vermont
VA	Virginia
VI	Virgin Islands
WA	Washington
WV	West Virginia
WI	Wisconsin
WY	Wyoming

SELECTED INDEX

Administrative Agency:
Separate agency—AK, CA, CT, DC, FL, HI, IL, IN, IA, KA, KY, ME, MA, MI, MN, MO, NB, NV, NH, NJ, NY, NYC, ND, OK, OR, PA, RI, VT, VI, WA, WI
Existing agency—AK, CT, DE, ID, MD, MI, MT, NM, SD, WA

Bargaining Rights:
Duty to bargain—AK, CA, CT, DE, DC, FL, HI, ID, IL, IN, IA, KA, KY, ME, MD, MA, MI, MN, MT, NB, NV, NH, NJ, NM, NY, NYC, ND, OK, OR, PA, RI, SD, TN, TX, VT, VI, WA, WI, WY
Meet and confer—CA, GA, KA, MN, MO, OK, PA, WA
Consultation—AL
No statutory bargaining rights—AZ, AR, CO, GA, LA, MS, NC, OH, PR, SC, UT, WV
Prohibited—TX, VA

Contract Duration:
Specified—AK, DE, FL, GA, KA, ME, MA, MN, NM, OK, RI, TN, VT, WA, WI, WY

Grievance Arbitration:
Mandatory—AK, FL, HI, MN, PA, SD, VT
Prohibited—DE, WV

Impasse Procedure:
Fact Finding:
Criteria—CA, DC, FL, GA, IL, IN, MI, NYC, OK, VT, WI
Arbitration:
Mandatory, conventional—AK, ME, MI, NB, NJ, NY, OR, PA, RI, VI, WA, WI, WY
Mandatory, final offer, package—DC, HI, MA, MT, NV, NJ, WI
Mandatory, final offer, issue-by-issue—CT, IA, MI, MN, MT, NJ
Prohibited—DE, OH
Criteria—CT, DC, HI, IA, ME, MA, MI, MT, NB, NV, NJ, NY, OR, RI, TX, VT, WA, WI
Other—FL, HI, KA, NV, NY, NYC,TX, VT, WA, WI

Management Rights:
Defined—CA, DC, FL, HI, IN, IA, KA, MI, MN, MT, NV, NH, NM, NYC, PA, VT, VI, WI

Recognition:
By election only—CA, DE, GA, HI, ID, IL, IA, MI, MO, NH, NM, OK, RI, TN, VT, VI, WI, WY
Voluntary or by election—AK, CA, CT, DE, DC, FL, ID, IN, KA, KY, ME, MD, MA, MI, MN, MT, NB, NV, NJ, NY, NYC, ND, OK, OR, PA, RI, SD, TX, VT, WA, WI

Right to Work:
Apply to State and local employees—AL, AZ, AR, FL, IA, KA, LA, MS, NB, ND, SC, SD, TX, UT, WY

Strike:
Limited right—AK, HI, ID, MN, MT, OR, PA, VT, VI, WI
Mandatory strike penalties—DE, GA, IN, MD, MN, NY, OK

Sunshine Bargaining: CO, FL, KA, MN, MT, ND, OK, TN, TX

Supervisors:
Excluded from coverage—DE, DC, ID, IL, IN, IA, KA, MI, MN, MT, NM, OR, RI, SD, VT, WI
Included, separate units—AK, CA, CT, DC, HI, ME, MD, MO, NB, NV, NH, NJ, NYC, ND, PA, RI, VT, VI, WA, WI

Union Security:
Dues deduction:
mandatory—AL, AK, AZ, CA, DE, DC, FL, HI, IN, KY, MA, MI, MN, MT, NB, NJ, NM, NY, ND, OR, PR, RI, UT, WA, WI
Agency shop:
mandatory—CT, HI, MD, NY, RI
permitted—AK, CA, CT, DC, ME, MA, MI, MN, MT, NJ, NY, NYC, OH, OR, VT, VI, WA, WI
prohibited—CA, FL, IN, ME, NM, OH, PA, TN, VT, WA
Union Shop:
permitted—AK, KY, VT, WA
prohibited—FL, NM, OH, OR, VT, WA

Unit Determination:
Mutual consent of the parties—MD
Administrative agency—AK, CA, CT, DE, DC, FL, IL, IA, KA, KY, MA, MI, MN, MO, MT, NB, NH, NM, NY, NYC, OK, OR, PA, RI, SD, VT, VI, WA, WI
Administrative agency in cases of dispute—CA, IN, KA, ME, MT, NV, NJ, VT
Employer—ND
Statute—AK, CT, HI, ME, NB, RI, TX, WI
Criteria—AK, CA, CT, DE, DC, FL, IL, IN, IA, KA, KY, ME, MD, MA, MI, MN, MO, MT, NB, NV, NH, NJ, NM, NY, NYC, ND, OK, OR, PA, RI, SD, VT, VI, WA

1975

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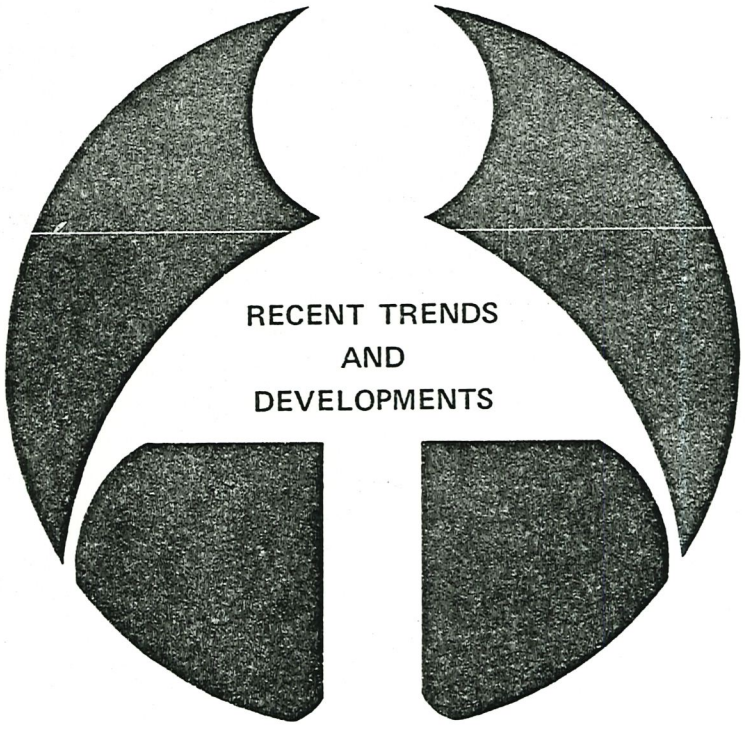
Att. #11

Public Sector Labor Relations



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Contents

Foreword

The Council of State Governments and its associated organizations have for some time recognized the growing importance of state and local government labor relations. At the 1966 annual meeting of the National Governors' Conference, it was noted that labor relations with public employees was becoming one of the major governmental problems of the decade. Subsequently, the Council of State Governments arranged for a grant from the Carnegie Corporation to assist the Governors through a task force study, conducted by Public Personnel Association, predecessor of the International Personnel Management Association, under supervision of the Executive Committee of the National Governors' Conference.

The task force study, *Report of Task Force on State and Local Government Labor Relations*, was utilized as a major program element of the annual meeting of Governors. Supplements to that study were published annually by Public Personnel Association during the years 1968, 1969, and 1970.

In 1970 the Council of State Governments issued a new summary report on the subject, entitled *State-Local Employee Labor Relations*. Its purpose was to identify policy options, among which the state and local governments must choose in their basic approach to problems that clearly will neither solve themselves nor evaporate. Since 1970 there have been many new developments, both legislative and judicial, as the States have continued to wrestle with situations that do not lend themselves to easy solutions. Hence the need for an updated review containing authoritative but concise information to assist those state officials and legislators who "need to know."

The Council of State Governments is pleased to publish this report, *Public Sector Labor Relations*, which emphasizes developments that have most significantly impacted upon public sector employee relations from 1972 to mid-1974. The study focuses special attention on decisions of courts and administrative agencies that delineate the collective bargaining rights and duties of government employers and employees. The International Personnel Management Association developed this report and Mr. Hugh Jascourt, Director of the Public Employment Relations Research Institute, wrote it. He has done a thorough job of

analyzing the outstanding issues in contemporary public sector labor relations. The cases and trends noted in this study are more fully explained in *Trends in Public Sector Labor Relations: An Information and Reference Guide for the Future*, being published by the International Personnel Management Association in the next few months.

Lexington, Kentucky
January 1975

Brevard Crihfield
Executive Director
The Council of State Governments

Eugene F. Berrodin
Executive Director
International Personnel Management Association

Introduction

The activity, rate of change, and nature of labor relations developments in the public sector from 1972 to 1974 have been so staggering that they are equivalent to at least a decade of development of private sector labor relations. Nevertheless, the basic issues posed in 1967 by the National Governors' Conference *Report of Task Force on State and Local Government Labor Relations* (published by Public Personnel Association) are essentially the same problems that must be met today. Legislation still is the focal point, and strikes and efforts to create effective substitutes for collective action by unions still command public attention. However, the terminology has changed. It is now acceptable to refer to the negotiation process as "collective bargaining." Employee organizations may now be called "unions" without creating emotional disturbances. Those responsible for directing the activities of government as an employer are now accepting the title of "management" and the responsibilities that go with it.

The difficulties that persist in public sector labor relations go far beyond the usual differences in approach between unions and employers. More often disagreement is traceable to varying perceptions as to applicability or nonapplicability of standards and practices utilized in private sector labor relations. The "need" for special rules consistent with the nature of public employment is used to explain the array of different approaches toward such issues as the scope of bargaining, union security, and strikes.

Regardless of whether one is persuaded that disparate treatment from the private sector is necessary or whether one believes that the "nature of public employment" is merely a ruse to give public employees "lesser" rights, all must realize that a public employer is a creature of law and acts through law. Therefore, the "rights" of public employees are apt to be tested by means of a constitutional standard.

1 | Legal Factors

Constitutional Protections

In 1967, the U.S. Supreme Court established the principle that public employment could not be premised on relinquishment of First Amendment rights [*Keyishian* v. *Board of Regents* (1967)]. One year later, the Court held that the dismissal of a teacher for writing a letter critical of the action of the Board of Education to the editor of a local newspaper violated his First Amendment rights. In that case, *Pickering* v. *Board of Education* (1968), Justice Marshall wrote:

> It cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Although the Court refused to lay down a general standard against which all expression by government employees may be judged, it indicated some of the considerations which should be weighed apparently on an ad hoc basis. These were: (1) whether the expression affected working relationships with superiors or co-workers; (2) whether the expression adversely affected the daily operation of the school; and (3) whether the expression indicated an inability to perform classroom responsibilities. Since Pickering's comments were not directed toward anyone he worked with directly and, in fact, were met with universal indifference by everyone but those who sought to fire him, his speech was found to be protected.

The establishment of a constitutionally protected right to publicly criticize one's employer appeared to greatly expand the First Amendment rights of public employees. However, it has now become apparent that when the balancing test is applied the constitutional protection may offer only a very limited right

of free speech to public employees unless their expression is virtually ignored, as Pickering's was, or they are reporting blatantly illegal activity by fellow employees, as was the Chicago detective in *Muller* v. *Conlisk* (1970). The problem is that the test requires the balancing of vague factors that are difficult to assess objectively. Thus, employees who have criticized their employer frequently have not fared very well despite *Pickering*.

For example, in *Tygrett* v. *Washington* (1972), the dismissal of a District of Columbia probationary police officer who made statements about a "blue-flu" and a "sick-out" was upheld. The court found that:

elements which were absent in *Pickering* are, however, clearly present in the instant case. Plaintiff's interest in stating that he would falsely report himself sick and organize and lead such a "sick-out" if that were the "general consensus" of the other officers has to be balanced against the Police Department's interests in maintaining: (1) discipline by immediate superiors; (2) harmony and morale among its officers; (3) personal loyalty of its officers to the department and to the community; and (4) the professional reputation of the department in the community.

The court found that in this case the interests of the police department outweighed the interests of the employee, despite the fact that there was no evidence that his statements caused any dissension or disruption in the department.

Another example was *Fisher* v. *Walker* (1972). In that case, a Salt Lake City, Utah, fireman, who was the union president, was suspended for five days without pay because of a column in a union newsletter which was very critical of officers who were in the process of forming a separate union. Upholding the suspension, the court found that the column had a divisive effect in the department and was injurious to morale despite the evidence of divisiveness and poor morale before the publication.

In *Duke* v. *North Texas State University* (1972), the court allowed the dismissal of a teacher who allegedly made obscene and critical speeches of her university administration. The court upheld the dismissal because of the interests of the university in maintaining a competent faculty and in perpetuating public confidence in the university. The evidence produced to support this ruling consists of statements by other members of the faculty and the university president about the loss of respect the teacher suffered with them as a result of her speeches and the bad publicity the university received. There is no evidence of actual disruption in the operation of the school or of irreparable harm in working relationships beyond their disapproval of her. The test which the court applied seems to be one which no employee could ever overcome.

As a past and prospective instructor, Mrs. Duke owed the University a minimal duty of loyalty and civility to refrain from extremely disrespectful and

grossly offensive remarks aimed at the administrators of the University. By her breach of this duty, the interests of the University outweighed her claim for protection. . .She publicly expressed her remarks, threatened confidence in the institution and displayed her incompetence by the words she used.

With the exception of direct criticism of the employer, other public employee expressions have received broad protection by the courts. Perhaps the extremes are represented by *Ocania Chalk* v. *State Civil Service Commission* (1971), in which the Pennsylvania Supreme Court reinstated a social worker who was suspended for urging welfare recipients to agitate for their rights, and by *Dause* v. *Bates* (1973), wherein teachers and principals who gave written and oral support to an illegal strike of school teachers were deemed to be protected from discharge by the First Amendment "even to the point of advocating conduct which might prove to be civilly illegal." (Later reversed by a court of appeals for lack of federal pendant jurisdiction.)

This year, in *Arnett* v. *Kennedy* (1974), the Supreme Court, in upholding the discharge of a union officer-federal employee from the Office of Economic Opportunity (OEO) who publicly accused his superior of bribery, used the balancing test to affect due process. The Seventh Circuit Court had found unconstitutionally vague the old Lloyd-LaFallotte Act standard of removal "only for such cause as will promote the efficiency of the service." The Supreme Court found that there has to be a balance between the need for greater specificity and "the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for cause." It, therefore, overturned the lower court and upheld the old standard, but by only a 5-4 split vote.

The Court also found that, although a public employee has a property right in his job, it is not necessary that he receive a trial-type hearing prior to discharge, provided that he is afforded such an opportunity at some stage.

Although the tide may have turned with respect to the degree to which individual employees may express themselves about their governmental employer under the First Amendment, constitutional protections such as the right of association may continue to be used by unions to further union activity in the absence of statutory protections.

A significant amount of union activity in States without laws permitting collective bargaining has been encouraged by a long line of court decisions, starting in Illinois in 1967 with *McLaughlin* v. *Tilendis*, when the Seventh Circuit Court ruled that public employees were protected from discharge for union activity by the First Amendment right of association. The U.S. District Court for Eastern Virginia carried this one step further by finding as a valid cause of action the allegation that the school board's refusal to recognize the union chilled the employees' right of association, despite the absence of a law either allowing negotiations or permitting some form of union recognition [*Richmond Education Association* v. *Crockford* (1972)].

This line of reasoning has been carried even further by a Chief Justice of the Rhode Island Supreme Court, although he did not persuade his colleagues on the bench to join him in it. In a dissent sure to be cited by unions, he reasoned: "if the right to organize and to bargain collectively is constitutionally protected, then the right to strike. . .must be an integral part of the collective bargaining process" and must be accorded similar constitutional protection. He concluded that public employees cannot be compelled to forfeit that right [*School Committee of the Town of Westerly* v. *Westerly Teachers Association* (1973)].

Perhaps even more far-reaching is the opinion of a Chief Justice of the Florida Supreme Court who had opposed a provision in the state constitution according employees the right to engage in collective bargaining. After the provision was inserted in the new state constitution and later interpreted by the court to apply to public employees, the Chief Justice, speaking for the majority, warned the State Legislature that failure to enact legislation to implement the constitutional requirement would result in issuance of guidelines by the court to substitute for legislation. The court's authority was construed to be predicated on the same reserve powers that enabled courts to draw election boundaries in reapportionment cases when state legislation did not meet the one man, one vote requirement, to draw school boundaries, and to effect other remedies when schools did not desegregate [*Dade County Classroom Teachers* v. *Legislature of the State of Florida* (1972)]. Moreover, when the State Legislature failed to enact legislation in 1973, the court immediately appointed a study committee to prepare for its issuance guidelines on collective bargaining by public employees. Shortly after the proposed guidelines were announced in 1974, the Legislature enacted a statute that was signed by the Governor.

Another important constitutional development occurred in 1973. Despite numerous predictions that the Hatch Act, which bars political activity by public employees, would be declared unconstitutional, the act was upheld in *U.S. Civil Service* v. *NALC* (1973). Several weeks before the Supreme Court for Eastern New York, in *Lecci* v. *Cahn*, declared the New York State Little Hatch Act to be unconstitutional on the reasoning that recent Supreme Court decisions had swept away the balancing test used in *Public Workers* v. *Mitchell* (1947) when the Supreme Court first upheld the federal Hatch Act. Reaffirming the balancing test of *Mitchell*, Justice Byron White concluded in the NALC decision:

> Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance as it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.

Legal Impediments to Collective Bargaining

The special legal obligations imposed upon the government employer have sometimes resulted in greater freedom for employees, but that special relation-

ship has also sometimes resulted in greater limitations upon union activity. The difficulty stems from the need to find legal authority to engage in a bilateral relationship with a representative of a group of employees to the exclusion of others who may purport to be representative of employees in the same group. Relationships between employers and employee representatives have been traditionally viewed in terms of power. In the situation of the public employer, power other than that vested in the parties may play a significant role. For example, a public entity thought to have abused its authority by dealing with a union could be challenged in court by a taxpayer. A dissatisfied citizenry may also express itself in the voting booth at election time. Therefore, the legal propriety of a public employer to engage in collective bargaining with a union in the absence of statute has continued to be a matter of debate, despite the general acceptance of such relationships in the public sector and the general presence of de facto arrangements where no statutory system exists.

There has been greater acceptance of the reasoning that a public employer, by virtue of its power to "do business," implicitly has the power to engage in a contractual relationship with a union even where no specific statute authorizes it. An example of this was the decision of the Court of Appeals, Third District in Indiana, in *East Chicago Teachers Union Local 311* v. *Board of Trustees* (1972). Other courts have upheld the relationship, provided the agreement reached is not viewed as binding. [For examples, see the Arizona case of *Board of Education of Scottsdale High School District No. 212* v. *Scottsdale Education Association* (1972) and the Alabama case of *Nichols* v. *Bolding* (1973)]. Other courts have continued to insist that there must be specific statutory authorization, as in the case of *Chatham Association of Educators* v. *Board of Public Education for City of Savannah and County of Chatham* (1974), in which the Georgia Supreme Court held that the union could not enforce the contract adopted by school board resolution.

This difficulty is not confined to situations involving a controversy over whether there should be collective bargaining. It also arises in the context of whether a particular union demand or a specific contractual provision would result or does result in the employer exceeding the bounds of its authority. For example, a school board in Colorado (where there is no collective bargaining law) reached a collective bargaining agreement with the teachers' association. The contract stated that "when filling vacancies or staffing new schools, currently employed teachers shall be given priority." Nevertheless, a teacher from outside the school district was chosen over a "currently employed" teacher in the district for a new position. The school board defended a court action to enforce the contract by pleading that the implementation of the contractual provision would result in an illegal delegation of authority. The Colorado Court of Appeals, Div. 1, in *Rockey* v. *School District No. 11, El Paso County* (1973), did not accept this theory. Instead, it ruled that the board did not surrender its decision-making power to the teachers' association, but "only agreed to a policy

of giving priority to teachers employed in the district for openings within the district."

Perhaps the most startling example of judicial enforcement of a collective bargaining agreement in the absence of specific statutory authority is provided by the precedent-breaking decision of the U.S. Court of Claims in *National Maritime Union* v. *U.S.* (1973). Prior to this decision, agreements reached pursuant to Executive Orders 10988 or 11491 were viewed as valid but not enforceable by a court. Only the Federal Labor Relations Council was viewed as a tribunal with such power to enforce, because the members of that body were in the executive branch and occupied positions deemed to reflect its policy and position. Nevertheless, the court held the contract was enforceable because the executive order was "based upon statutory authority conferred upon the President to prescribe regulations for the conduct of employees and Executive Orders promulgated by the President thereunder." The decision went on to declare: "Obligations created in the instruments evolved are stated in the form of contractual undertakings and are not mere monuments to future predictions or hopeful intentions."

2 | Legislation

Legislation Enacted

It is in the context of judicial acceptance of unions in the public sector environment that legislative activity has intensified the past two years. In 1972, a year of technical amendments, legislation was largely limited to modifications of existing laws. In some cases these modifications were significant, as in Alaska where some employees were granted a limited right to strike and others were given an unlimited right to strike.

Many of these amendments broadened the rights of employees of state governments. Rhode Island widened the scope of bargaining to such employees by allowing negotiations on wages and by removing the merit system as an impediment to bargaining. It also allowed agency shop and required binding arbitration for nonwage items. Similarly, Wisconsin allowed state employees to bargain on wages and on agency shop, subject to approval of two thirds of those in the unit. It established by statute 14 statewide units that could be modified after July 1, 1974. While supervisors were permitted to engage in collective activity under the new Wisconsin law, they could do so only when represented by unions that did not represent other state employees. Kansas and Nebraska amended their laws to emcompass employees of the state government, and Nebraska authorized exclusive recognition and bargaining on wages. Kansas was included in the trend toward establishing a category entitled "managerial employees" who were excluded from the act.

Compulsory arbitration for police and firefighters took stronger hold in Michigan when that State extended the life of its arbitration law for such employees and added the option of final-offer selection (a process in which the arbitrator must select the last offer of either the union or management without modification). Wisconsin added a similar law for uniformed personnel in which either management or the union could call for compulsory arbitration, including the final-offer selection method.

Both Maine and Oklahoma created state public employee relations boards, and the latter State extended its bargaining law for police and firefighters to general local employees in cities of more than 25,000 population.

The year 1973 brought more profound change. The most significant changes were the greater acceptance of comprehensive laws covering public employees, the limited right to strike, and of some form of agency shop. Statutorily authorized bargaining came to Illinois for the first time (by executive order for state employees); to Indiana (for teaching personnel); and to Texas (for police and firefighters in jurisdictions adopting the state law at a local election). Montana granted state and local employees collective bargaining rights, including the ability to negotiate agency shop. Oregon scrapped its four separate laws and replaced them with a comprehensive law for all public employees and permitted a limited right to strike. Similarly, Massachusetts replaced its law with a comprehensive law for all public employees. The most significant change from the previous set of statutes was the new provision enabling a collective bargaining agreement to prevail over personnel rules and regulations and certain statutory provisions if the subject matter involved is otherwise within the scope of bargaining. Minnesota amended its law to permit strikes under certain circumstances. Vermont rewrote its law, but retained provisions allowing a limited right to strike and agency shop. The enactments in Oregon, Massachusetts, and Minnesota also provided for agency shop. Michigan, Rhode Island, and Washington adopted provisions enabling agency shop. South Dakota's amendments included a reduction in strike penalties, and Prince George's County, Maryland, in the absence of a state law, adopted a comprehensive labor code permitting a limited right to strike and agency shop.

The year 1974 does not appear as if it will be as active as 1973, although Iowa has adopted a comprehensive law for its public employees and Florida met the challenge of the Florida Supreme Court by passing a comprehensive law in the last days of the legislative session. The Iowa and Florida laws, effective in 1975, demonstrate that the liberal nature of the 1973 enactments have not influenced all State Legislatures. Both laws contained a strong management rights clause, a prohibition against agency shop, and stringent antistrike provisions. Iowa limited union political activity, and Florida required bargaining to be conducted in public and allowed localities, including school boards, to adopt substantially equivalent laws. In addition, Maine, for the first time, statutorily established collective bargaining rights for employees of the state government. The law was a comprehensive one and placed administrative responsibility in the Public Employees Relations Board that oversaw the previously existing law covering all local employees including those employed by schools.

There is pressure for laws in a great number of other States, including jurisdictions such as Ohio and Illinois where de facto bargaining is quite pervasive. The most likely candidate for a full-scale law is California, where a study commission has recommended a comprehensive law for all public employees and advocated a limited right to strike. Unlike most other jurisdictions where unions have been the only advocate for a law, the League of California Cities, the County Supervisors Association of California, and the California Taxpayers'

Association have joined in advocating their own version of a law for local government employees. The chart on the following page outlines the present status of coverage by statute without regard to the quality of the laws, the nature of their provisions, or the presence of local ordinances.

Inclusion or exclusion from the table varies drastically with the criteria utilized. Some laws provide nothing more than a minimal statement of rights. North Dakota's law merely established mediation. Missouri and Alabama established only a meet-and-confer law without an obligation to bargain. The Texas law does not become operative unless the electorate in a local jurisdiction votes approval. In some States, such as Wyoming, there are no administrative bodies to oversee the relationships of the parties. In some States with "full" laws, such as New Jersey, there are no unfair labor practices set forth or administrative procedures established to quickly enforce rights. Then there are other States, such as Washington, where there are no laws establishing collective bargaining for employees of the state government but where extensive collective bargaining takes place through executive order, modification of the state civil service law, and informal arrangements.

Proposed Federal Legislation

Unhappy with their failure to obtain statutory recognition of collective bargaining rights and with the diversity that exists where statutory rights have been afforded, unions have pressed for national legislation. The AFL-CIO unions have proceeded on the ground that public sector workers should have the same rights as private sector employees. Congressman Frank Thompson, Jr., of New Jersey has introduced H.R. 9730 to amend the National Labor Relations Act (NLRA) to extend its full coverage to the public sector. However, a coalition of the National Education Association (NEA), the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, and the National Treasury Employees Union (NTEU) have allied themselves as the Coalition of American Public Employees (CAPE) and have advocated a separate bill for the public sector. Congressmen William Clay of Missouri and Carl D. Perkins of Kentucky have introduced that proposal in the form of H.R. 8677, which would establish a public sector National Labor Relations Board (NLRB), allow the right to strike, and permit the national law to supersede local laws, including civil service legislation, except when the state law is substantially equivalent. Hearings were held in 1973 and 1974 by a special subcommittee and support was elicited for some form of a national law by a number of neutrals and public officials.

In addition, the Assembly of Governmental Employees (AGE) has been responsible for introducing legislation to establish minimal standards protected by a public sector NLRB. This proposal would protect specified civil service standards from collective bargaining arrangements, and it has been introduced as H.R. 4293 by Congressman Teno Roncalio of Wyoming and duplicated in the Senate under the sponsorship of Senator Gale McGee of Wyoming.

Coverage of Public Labor Relations Legislation*
(As of mid-1974)

State	*All employees (a)*	*State employees*	*Teachers*	*Firefighters*	*Police*	*Local employees*
Alabama	--	--	--	★(c)	--	--
Alaska	☆	--	★	--	--	--
California	☆(c)	★	★(c)	★(c)	--	--
Connecticut	--	--	★	--	--	★
Delaware	☆	--	★	--	--	--
Florida	★(b)	--	--	--	--	--
Georgia	--	--	--	★(c)	--	--
Hawaii	★	--	--	--	--	--
Idaho	--	--	★	★	--	--
Indiana	--	--	★	--	--	--
Iowa	★	--	--	--	--	--
Kansas	☆	--	★	--	--	--
Kentucky	--	--	--	★	★	--
Maine	☆	★	--	--	--	--
Maryland	--	--	★	--	--	--
Massachusetts	★	--	--	--	--	--
Michigan	★(e)	--	--	--	--	--
Minnesota	★	--	--	--	--	--
Missouri	★(f)	--	--	--	--	--
Montana	☆	--	★	--	--	--
Nebraska	☆	--	★	--	--	--
Nevada	--	--	★	--	--	★
New Hampshire	--	★	--	--	★(d)	--
New Jersey	★	--	--	--	--	--
New York	★(b)	--	--	--	--	--
North Dakota	☆	--	★	--	--	--
Oklahoma	--	--	★	--	--	★
Oregon	★(b)	--	--	--	--	--
Pennsylvania	☆	--	--	★	★	--
Rhode Island	☆	★	★	★	★	★
South Dakota	☆	--	--	★	★	--
Texas	--	--	--	★(c)	★(c)	--
Vermont	☆	★	★	--	--	★
Washington	--	--	★	--	--	★
Wisconsin	☆	★	--	--	--	★
Wyoming	--	--	--	★	--	--

* Prepared by the Council of State Governments from material furnished by the author.
(a) ★= comprehensive law; ☆= by separate laws.
(b) Allows local governments to have their own systems, if in conformity with state law.
(c) Law operative only upon enactment of local ordinances.
(d) Local police only.
(e) Except state civil service.
(f) Except police and teachers.

Hearings have been held also with respect to the federal sector, even though the Federal Labor Relations Council has reviewed Executive Order 11491 (as amended) and appears certain to recommend a number of changes. Congressman David N. Henderson of North Carolina is chairman of the House Post Office and Civil Service Committee's Subcommittee on Manpower and Civil Service, which held hearings on three sets of bills, including H.R. 10700 introduced by him and full committee Chairman Thaddeus J. Dulski of New York, allegedly "as a vehicle for discussion." The Henderson-Dulski measure is parallel to Executive Order 11491 in many respects. Also being considered are two union supported bills: H.R. 9784 introduced by Congressman William D. Ford of Missouri which is backed by NTEU and which would allow a limited right to strike; and H.R. 13, introduced by Frank J. Brasco of New York, with the backing of AFL-CIO unions.

Although not directly relevant, it is significant that this strong move for legislation comes on the heels of congressional actions that (1) brought the Postal Service under the NLRA without the right to strike (although Congress is now considering adding a qualified right to engage in such concerted activity); (2) extended the Title VII equal employment opportunity provision of the Civil Rights Act to the federal service and to state and local government; and (3) broadened the coverage of the Fair Labor Standards Act to encompass the federal sector and now state and local governments.

3 | Defining the Actors

Coverage

The thrust of newer laws was to encompass all public employees under a single law. This was reflected by the 1972 amendments in Kansas and Nebraska to include employees of the state government in the already existing general coverage. It was further reflected in the new omnibus laws for Oregon and Massachusetts where there had previously been separate laws for different categories of employees. The new Iowa law, which created statutory rights for the first time in the State, and the Florida law, where only firefighters previously had statutory rights, also followed that trend. However, the new laws for police and firefighters (Texas) and teachers (Indiana) counteract that apparent "trend." These were the only categories of employees possessing statutory rights in their respective States. Also against the trend is the new law for state employees in Maine, which existed side by side with a law for other public employees.

Perhaps a significant indicator of the future is the coalition of AFSCME and the NEA on both a national level and in several States in the form of the Coalition of American Public Employees (CAPE). Since teachers are the employee group most likely to have a special law, it is likely that union pressure will be to obtain omnibus legislation. For the most part, affiliates of the Assembly of Governmental Employees (AGE) do not appear to be pressing for omnibus laws, despite the introduction of a national bill (that may have been more for "political" purposes). AGE affiliates, which in most instances represent employees of state government, are more likely to oppose legislation covering state employees or to desire a separate law for such employees.

Administrative Agency

The largest factor in influencing performance of the parties and in determining whether the law achieves its objectives may be the composition of the administrative body that enforces the law. Based on the concept that the attitude of the parties towards making the law work is more important than the

substantive provisions themselves, the Prince George's County labor code called for a public employee relations board consisting of representatives of the partisan interests who will choose the neutrals. Since there was fear of inequities from some predesignated selection of union "interests," this tripartite scheme was deferred until unions represented a majority of those eligible for representation in the county. In the interim a board was chosen by the National Center for Dispute Settlement, although nominally the county executive appointed the board members subject to confirmation of the county council.

In contrast, the biggest barrage being fired by federal unions in their quest for "labor relations by law" is aimed at the Federal Labor Relations Council (FLRC) which is accused of being management oriented. The chairman is also the Chairman of the Civil Service Commission and the remaining two members are the Director of the Office of Management and Budget and the Secretary of Labor. In practice, neither of these last two officials have really participated, other than through designees acting on their behalf. Ironically, both the FLRC and the Assistant Secretary of Labor, who is responsible for issuing decisions on representation and unfair labor practice cases subject to appeal to the FLRC, have been subjected to much criticism by management, too.

The new laws did not appear to be much of an indicator for the future, other than the establishment of a complete board under the Indiana teachers statute. In most situations where a separate law for teachers was adopted, either there was no enforcement agency or the oversight functions were vested in the state board of education.

Who Are the Bargaining Agents?

One of the most difficult problems in adapting some form of collective bargaining to the public sector is that the public employer, unlike its private sector counterpart, is bifurcated by the traditional separation of powers—the executive branch independent of the legislative branch. Thus, it may be difficult to determine who has the ultimate power to make binding agreements with employees. The problem is exemplified by the dilemma that faced the Pennsylvania Labor Relations Board (PLRB) in *PLRB* v. *City of Pittsburgh* (1973). Some city employee positions have been eliminated, and the PLRB found unilateral elimination of such positions to be generally an unfair labor practice. However, the PLRB then held that case to be an exception because the action was initiated by the city council and effected only over the veto of the mayor. The PLRB also declared that the Public Employee Relations Act was not designed to limit legislative actions.

The separation of power results in difficulties for unions in determining with whom to negotiate and for management in establishing a team that can be cohesive and not conducive to whipsawing. The new law may indicate whether:

1. Statutorily established responsibilities for bargaining can ameliorate the problem; or

2. Informal arrangements have to be created to meet the needs of the bargaining process; or

3. The structure of government will have to be changed, as it was in Canada with respect to bargaining for federal employees; or

4. The bargaining process itself will have to be changed.

Some jurisdictions are attempting to solve the problem by statutorily establishing responsibilities. Kansas, for example, set forth responsibility for each type of governmental unit. For state employees it was a team composed of a designee of the Secretary of Administration and the head of the state agency or agencies involved. Minnesota, also dealing with employees of the state government, assigned joint responsibility to the Commissioner of Administration and the Director of Civil Service and required that each appointing authority cooperate with the negotiating team. On the local level, the new Massachusetts law designated the school board and the chief executive of the local government agency as bargaining agents. In the state service, bargaining authority was reposed in the Board of Trustees for the state university system and the Commissioner of Administration for the rest of state employment. The Florida law required that "In conducting negotiations with the bargaining agent, the chief executive officer or his representative shall consult with, and attempt to represent the views of the legislative body of the public employer." The Maine law for state employees addressed this issue by an explicit statement of duties for the two branches.

The most unique approach in dealing with the perceived need to channel unions into bargaining with the executive and away from lobbying with the legislative body to win what was not gained at the bargaining table was the Oregon provision. This statute made it an unfair labor practice for the exclusive representative to "communicate directly or indirectly during the period of negotiations with officials other than those designated to represent the employer regarding employment relations."

The new laws indicate that the separation-of-powers problem is being recognized in most jurisdictions, even if it is not clear whether a legislative solution is possible.

4 | Representation Matters

Unit Determination

An acute problem in the public sector arises out of the historical fact that high-ranking employees, such as supervisors, have historically been members of unions and independent associations prior to the advent of a statute. The situation is exacerbated by public employment's hierarchical tiers of titles and responsibilities that result in a disproportionate number of employees with some supervisory responsibility or at least a title superficially denoting such responsibility. In this context it is sometimes difficult to establish an acceptable definition of "supervisor" or to exclude those so defined from representation and bargaining rights.

Many of the earlier statutes avoided, perhaps purposely, dealing with this problem. The more recent response has been to place "managerial" employees, at least, outside the realm of union representation. In New York, for example, managerial employees have been prohibited from membership in unions, even though this has sometimes meant ineligibility to continue in insurance programs that represent public employees. The highest court in the State held that such an exclusion was constitutionally valid in *Shelofsky* v. *Helsby* (1973). Florida, Massachusetts, and Wisconsin merely excluded managerial employees from the coverage of the law.

There has also been a stronger move to view supervisors as management representatives and, therefore, ineligible for representation. Such is the case in Indiana (teachers), Iowa, Montana, Oregon, and Vermont (the revised law for local government employees). Minnesota law made supervisors eligible for a meet-and-confer relationship only. There were also some statutes, such as the new Maine law, which gave supervisors "full" rights although they may be placed in separate units.

The exclusionary view has met with some approval, even by employees organizations. The NEA, which accepted the exclusionary view, was divorced by (or has divorced itself from) the National Association of Elementary School Principals, the National Association of Secondary School Principals, and the

American Association of School Administrators—affiliates that did not share the NEA view. The NEA, however, is not monolithic and, therefore, not all NEA state and local bodies share this view. Unions are not monolithic either. In fact, the AFL-CIO is equally schizoid. The American Federation of Teachers (AFT) an AFL-CIO affiliate, has long disavowed interest in representing supervisors and has castigated the NEA for being management dominated. Nevertheless, the AFL-CIO formed the School Administrators and Supervisors Organizing Committee in 1971 and now claims over 15 locals in large cities.

The criteria used to determine the unit of employees appropriate for representation have also been modified to take into account what may be termed management considerations or at least criteria other than those that would leave the options primarily to the desires of the employees within the broad parameters of "community of interest." Thus, the revised Vermont law for local government employees took fragmentation and effective operations of the employer into account, as well as "effective representation" of employees. Similarly, Massachusetts added to its unit criteria "efficiency of operations" and "effective dealings." Iowa included among its unit criteria both "the principles of efficient administration of government" and "the recommendations of the parties involved." Florida reflected similar concerns.

It is not clear whether these criteria necessarily require larger units. In fact, a number of federal sector unit determinations by the Assistant Secretary of Labor utilizing similar criteria have been subjected to considerable management criticism on the basis that more fragmentation is being allowed. Leaving less to chance, the new Oregon law and the Maine law for state employees allowed the state boards to select "the" unit. The Illinois executive order for state employees made statewide units presumptively appropriate, and Wisconsin's law for state employees, which temporarily established 14 statewide units, could be modified after July 1, 1974.

The state labor relations boards have split on this issue. The New Jersey board indicated a strong preference for statewide units when, in *State of NJ and Patterson State Federation of College Teachers* (1972), it rejected an earlier decision and found a statewide unit for faculty members of eight statewide colleges. In contrast, the Pennsylvania board specifically rejected the New Jersey decision and denied a request for a single unit for the scattered campuses of Pennsylvania State University, in *Employees of Pennsylvania State University* (1973). The Connecticut State Board of Labor Relations reacted to the problem of larger units sometimes totally denying employees an effective opportunity to obtain or select a representative. In *Waterbury Hospital and RWDSU Local 1199* (1972), the Connecticut board allowed maintenance employees in a hospital to have their own unit since no union desired to represent the larger group of service employees. The board dealt with the dilemma of the possible consequent fragmentation by declaring that it would reopen the entire unit question if a different union ever petitioned to represent the service employees (inferring the

unit would be enlarged if the same union won recognition rights for both groups of employees).

One type of fragmentation that has been allowed in most circumstances is that which is caused by the private sector practice of professional self-determination. Professional employees are usually afforded the right to determine whether to be merged with nonprofessionals or to have a separate unit. The circumstances of public employment are such that the professionals might outnumber the nonprofessionals and thereby might be able to impose their will on the minority. Concern over the potential inequity that might arise is reflected in the decision of the Connecticut State Labor Relations Board, in *Beers Guidance Clinic and AFSCME Local 1303* (1973), that clericals could bar the inclusion of the professionals despite the wishes of the professionals for such an amalgam. The new Iowa law specifically provided that: "Professional and nonprofessional employees shall not be included in the same bargaining unit unless a majority of both agree."

Election Problems

Management has expressed concern that, once a unit has been determined, a union should not be officially recognized unless there is an election and unless the election result demonstrates that a majority of those in the unit—not just those voting—desire the union as their representative. An election is required in many States, although the revised Vermont law and the Florida law permitted recognition without an election. Most States, however, required only that the union obtain a majority vote of the valid ballots cast. Minnesota joined this group by dropping its former requirement. However, when the new Iowa law goes into effect, it shall require a union, in order to win an election, to be "the majority choice of the employees who could be represented by an employee organization."

Iowa also joined a small group of jurisdictions which specifically permitted the public employer to engage in "free speech" during an election campaign. This meant, for example, that an employer will not be engaging in an unfair labor practice by urging employees to vote against the union. The Vermont law revised many of its former provisions but retained the section on employer free speech. The Florida statute and the Prince George's County labor code included a similar free speech provision.

Recognition

The special nature of public employment, or at least the obligation of the public employer, has had an impact upon the concept of exclusive recognition. One such case was the decision of the Assistant Secretary of Labor in *A/SLMR No. 301* (1973). A Veterans Administration (VA) hospital in Muskogee, Okla-

homa, heeded the urging of President Nixon to take into account such special problems of its employee population as "youth" and established a Youth Advisory Committee from its employees. The VA hospital allowed a group of young employees (under age 35) to observe and comment at management staff meetings dealing with safety and fire protection, employee training, personnel transfers, and employee leave policy, only to find that it had committed an unfair labor practice by "dealing" with other than the exclusive representative on items within the scope of negotiations. The decision challenges public management to find mechanisms to bring "other" views into play, such as those of minority employees, without violating the traditional employer-union relationship.

5 | The Collective Bargaining Agreement

The Impact of Civil Service Systems

The civil service system has continued to be under attack. Some have viewed the examination process as an obstacle to entry into the public service by minorities unable to demonstrate their job competence due to alleged inequities in the tests used. Others have viewed civil service systems as going so far beyond merit principles as to unnecessarily restrict the collective bargaining process. In fact, the National Civil Service League, whose efforts led to the Nation's first civil service law in the form of the Pendleton Act, has advocated a model personnel law which would scrap the Civil Service Commission. It would relieve the personnel function of any duty to be neutral and would make the personnel director an integral member of the management team by giving him cabinet rank. The neutral function could be handled by an ombudsman and citizen input could be obtained from an advisory board. In the process, the scope of collective bargaining could be widened.

This line of thinking, however, was not persuasive to the Court of Chancery, Kent County, Delaware, in the case of *Laborer's International Union, Local 1029* v. *The State of Delaware* (1973). The union had attempted to negotiate on such matters as premium pay and leave with pay for union officials to conduct internal union business. However, the state government refused to bargain on these and other similar items, contending that they were covered by the state merit system law. The court agreed, declaring that "any doubt should be resolved in favor of the Merit System."

Proponents of the supremacy of the civil service system did not fare as well in State Legislatures. In 1972, Rhode Island removed the merit system as an impediment to bargaining for state employees and, one year later, the new Massachusetts law rejected the previous statutory prohibitions and allowed the collective bargaining agreement to prevail over personnel rules and regulations.

Two other States implicitly allowed the bargaining process to encompass civil service covering employees of the state government while at the same time protecting it by making the civil service director a mandatory member of the

management bargaining team. Minnesota is one example. Oregon dealt with the problem by requiring all unions that represent similar classifications to meet jointly with the employer on economic benefits requiring legislation or action by the State Personnel Division. The statutory provision to deal with the need for uniformity appears to be a response to a decision of the Oregon PERB, in *AFSCME Local 1723* v. *University of Oregon Medical School* (1972), that the state merit system requiring uniform wage rates did not give the State Personnel Division the right to bargain solely with the Oregon State Employees Association which represented 90 percent of the employees, once AFSCME, as the representative of the other employees, had refused to engage in coalition bargaining. The board also held that the requirement of a uniform rate did not necessarily require that there be a statewide rate and that uniformity within a geographical area met the statutory requirement. Particularly significant is the implicit view in both holdings that the power of the Personnel Division to establish uniform wage rates does not preclude bargaining on wages.

Union Security

Even those attacking merit systems as a guise to protect personnel rules unilaterally established by management through negotiations, have left the principles of merit and fitness in much of their original state of inviolate sanctity. The most significant intrusion has been in the area of union security, if the argument is valid that discharge of an employee who failed to pay dues or fees to a union violates the merit and fitness standard. A serious blow to opponents of union security was dealt by the the Rhode Island Supreme Court in *Town of North Kingstown* v. *North Kingstown Teachers Association* (1972). The agency shop was upheld in the face of language in state legislation that guaranteed teachers the freedom to join or to decline to join any association. The court explained:

> that it would be manifestly inequitable to permit those who see fit not to join the union to benefit from its services without at the same time requiring them to bear a fair and just share of the financial burdens; and that no member of a bargaining unit, be he a joiner or a nonjoiner, should expect or be allowed a "free ride."

It is significant, however, that the Rhode Island statutory right to refrain did not contain words extending the declination to "participating" in or "assisting" a union. The insertion of such language was construed to prohibit agency shop in New York in *Farrigan* v. *Helsby* (1973), and in New Jersey in *NJ Turnpike Employees Union, Local 194,AFTE* v. *NJ Turnpike Authority* (1973).

Opponents of agency shop might take heart from the further declaration of the Rhode Island Supreme Court that the agency-shop fee could not exceed the

cost of the benefits conferred. The Michigan Supreme Court similarly limited the scope of an agency-shop requirement where there was no specific statutory prohibition against agency shop in *Smigel* v. *Southgate Community School District* (1973). The decision was widely misconstrued as finding agency shop to be invalid unless specifically authorized by statute, and the matter was never clarified when the State Legislature rapidly amended the law to not only legalize agency shop but also to allow the fee to be equivalent to union dues.

Typifying the greater acceptance of union security, the Delaware Superior Court (Newcastle County), in *State of Delaware* v. *Unemployment Insurance Appeals Board* (1972), held that a state employee was ineligible for unemployment benefits when she failed to comply with a union shop requirement and was discharged for her refusal to join the union since her refusal "amounts to a voluntary quitting without good cause."

Although 1972 saw the legalization of agency shop in Alaska, Rhode Island (state employees), and Wisconsin (state employees subject to approval of a 2/3 vote of those in the unit), it did not foreshadow the wave to follow in 1973. In addition to the statutory approval of agency shop in Michigan, the revised Minnesota law accepted agency shop; Washington amended its state civil service law to allow agency shop and its bargaining law for local government employees to allow both agency and union shop (employees may decline for religious reasons to join, but must contribute "dues" to a charitable organization); the revised Vermont law retained its agency shop provision and added approval of union shop; and Oregon's new law (replacing the four statutes in existence) added agency shop, if approved by a majority of those in the unit. In addition, Montana created its first collective bargaining law for state and local employees and permitted agency shop.

In Massachusetts, where there had been several special laws allowing some small groups of employees to negotiate agency shop, the new omnibus law required agency shop when approved by a majority of the employees in the unit voting. Massachusetts was one of the States limiting the agency-shop fee to an amount commensurate with the cost of collective bargaining and contract administration. Rhode Island again amended its statute for state employees in 1973, requiring bargaining unit members to pay an agency-shop fee to the exclusive representative. In Indiana and Texas, the only other States establishing new collective bargaining rights, the laws appeared to be silent on agency shop. The Prince George's County labor code established bargaining rights for employees and specifically permitted agency shop.

The trend, however, has not been completely overpowering. The 1974 Iowa law specifically prohibited compulsory "payment of any dues, fees or assessments, or service fees of any type."

A related but frequently overlooked device is allowing checkoff (deduction of union dues by the employer) only to the exclusive representative. In many States checkoff had been permitted by law even prior to statutes authorizing

bargaining or exclusive recognition. Collective bargaining laws were then passed without modification of the previously existing law concerning checkoff. Thus, exclusive recognition became the rule, presumably on the theory that it was a device to promote stability, while minority organizations were still able to maintain existence through the assistance of the employer via checkoff. Theoretically, at least, the desired stability is often hindered by such assistance to minority organizations since they will criticize the exclusive representative in order to hang on to those employees it already has on checkoff and since such criticism may prod the majority organization into unwarranted militantism.

It is not clear whether the situation exists through oversight or as a result of a purposeful desire to retain checkoff for all employee organizations or because exclusive checkoff is viewed as an improper limitation on minority unions. Of the 10 States that do preclude checkoff to minority organizations, four were jurisdictions that enacted legislation in the 1972-73 period: Indiana (teachers), Minnesota (allows checkoff to others when there is no exclusive representative), Montana, and Vermont (local employees). The new Florida law, which made costs to the employer a negotiable subject, was also in this category.

Scope of Bargaining

The issue of what is negotiable has been an endless controversy in the private sector, and the controversy is more strident and more emotional in the public sector because some unions see limitations on negotiability as an attempt to frustrate the fruits of unionization after a statute has been enacted to require bargaining and as an unfair shield for management to hide behind. In contrast, some public employers and members of the public see bargaining as an intrusion into the domain entrusted to the elected public official or the legislative process. Consequently, state laws and the federal Executive Order 11491 have promulgated various standards for negotiations. Those standards fell somewhere along the spectrum between the two polar extremes, according to the perceptions of the lawmakers. The Kansas law is the most explicit. It states:

(4) There neither is, nor can be, an analogy of statutes between public employees and private employees, in fact of law, because of inherent differences in the employment relationship arising out of the unique fact that the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions, and

(5) The difference between public and private employment is further reflected in the constraints that bar any abdication or bargaining away by public employers of their continuing legislative discretion and in the fact that constitutional provisions as to contract, property, and due process do not apply to the public employer and employee relationship.

Other jurisdictions, realizing the evocative nature of such a key issue, have refrained from attempting to establish any well-defined parameters. In either case, the courts and the state boards have been faced with the task of answering the questions of what is within the scope of bargaining or what is the nature of the public employer's obligation. Perhaps the plethora of litigation on this point, in contrast to the dearth of case material on scope of bargaining four years ago, indicates the arena of conflict has shifted from union organizing attempts.

The difficulty in determining the limits of an employed obligation is illustrated in *Westwood Community Schools* (1972), which was decided by the Michigan Employment Relations Commission (MERC). MERC, which has a record of being assiduous in giving full meaning to union rights, explained that "A balancing approach to bargaining may be more suited to the realities of the public sector than the dichotomized scheme—mandatory and nonmandatory—used in the private sector." To balance the interests of each "side," MERC posed these questions: "Is the subject of such vital concern to both labor and management that it is likely to lead to controversy and industrial conflict?" and "Is collective bargaining appropriate for resolving such issues?" Using this conceptual framework, MERC found that establishing the opening of school is within the scope of bargaining on the basis that "the rather substantial interest which the school teachers have in planning their summer activities outweighs any claim of interference with the right to manage the school district."

Apparently, different state boards arrive at conflicting assessments of where the balance lies. In *Petition for Declaratory Ruling by Department of Education* (1973), the Hawaii Public Employment Relations Board found the state teachers association proposal on teacher workload to be outside the scope of bargaining, reasoning that:

> The specific proposal. . .at issue, while admittedly concerned with a condition of employment because it may affect the amount of work expected of a teacher, nevertheless, in far greater measure, interferes with the DOE's responsibility to establish policy for the operation of a school system, which cannot be relinquished if the DOE is to fulfill its mission of providing a sound educational system and remaining responsive to the needs of the students while striving to maintain efficient operations.

Similarly, the board found teacher preparation time to be nonnegotiable, reasoning that "while we find that preparation periods constitute a condition of employment, the specific issue herein concerns the scheduling of preparation periods. . .which has been, and should remain, the right of DOE as an employer."

There are a number of ways to explain the apparent disparity between the two state boards, but perhaps an explanation may be derived from the fact that the Michigan law does not contain a management-rights provision setting forth

the reserved rights of the public employer while the Hawaii law does contain such a provision.

A management-rights provision, however, does not necessarily mean that the administrative body will take a restrictive view. This is illustrated by some of the interpretations of the management-rights provisions of Executive Order 11491 by the FLRC (previously mentioned as not looked upon by unions as being imbued with protecting their rights). Nevertheless, in *Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center* (1972), the FLRC rejected the Navy's contention that a union proposal defining the basic workweek in a 24-hour, seven-day operation as "five eight-hour days, Monday through Friday" was nonnegotiable. Although Section 12(b) of Executive Order 11491 provides that management officials retain the right to hire, promote, transfer, assign, and retain employees in positions within the agency, in *Veterans Administration Independent Service Employees Union* (1972), the FLRC ruled as negotiable union proposals to establish procedures to be used in the promotion process.

On the other hand, the management-rights provision in a statute can be interpreted in a manner to give the public employer significant leverage. An example was the construction by the Pennsylvania Commonwealth Court in *State College Education Association* v. *Pennsylvania Labor Relations Board* (1973), that the state law's restriction on negotiating "inherent managerial rights" precluded bargaining on maximum classroom size, teacher preparation time, timely notice of teacher assignments for the coming year, permission for a teacher to leave the building during the school day, and the provision of separate desks and lockable drawer space for each teacher. The court construed the management-rights provision, in the context of public education, to not require bargaining on any policy matter, despite the impact it may have on wages, hours, or terms and conditions of employment.

Of perhaps greater significance, because of its possible applicability to other jurisdictions, is a decision of the New York City Office of Collective Bargaining. In *Communications Workers of America and the City of New York* (1972), the OCB held that a management-rights provision, which relieved the city of an obligation to bargain a contractual provision banning lateral transfers, continued to apply even when the city had previously bargained on the matter. Thus, the employer was able to unilaterally remove the item from the contract and the bargaining table at the next round of negotiations because the OCB declared that management cannot waive its inherent rights.

Nonnegotiability does not always mean that the employer has no further obligation with respect to the union proposal, however. For example, a ruling by the New Jersey Supreme Court in *Dunellen Board of Education* v. *Dunellen Education Association* (1973), stated that the school board could not negotiate a grievance procedure to apply binding arbitration to a dispute concerning the consolidation of departments. However, the court went on to add:

The holding that the consolidation was predominantly a matter of education policy not mandatorily negotiable does not indicate that the Board would not have been very well advised to have voluntarily discussed it in timely fashion with the representatives of the teachers.

The New York Public Employment Relations Board has spelled out the point where bargaining is necessary even when the basic management decision is outside the scope of bargaining. In *The City of White Plains and IAFF Local 274* (1972), the board held that the city was not required to negotiate with respect to its decision to abolish positions, but that it was obligated to bargain on the impact of that decision. In the same decision, the board declared that, although a city may unilaterally impose the rule that a specified number of firefighters must be on duty at all times, the city is obligated to negotiate with respect to the individual schedules of specific firefighters. In other words, the city has complete discretion to determine the extent of fire protection it needs at various hours, but is obligated to negotiate on the implementation of such a decision with respect to how it affects the working hours of individual firefighters. The board went on to further display the art of drawing a fine line. Although the total number of firefighters on duty was deemed nonnegotiable, the minimum number needed to man an engine was deemed negotiable because the union demand had a direct relationship to safety. However, the firefighters could not require the city to negotiate on the rank of the firemen who would have to be with each engine. Although the firefighters were conceded to "have a legitimate interest in adequate supervision because it is directly related to their safety while fighting fires," PERB held without further explanation that this demand was outside the scope of bargaining because "the rank assigned to supervisors is a management prerogative."

Just how far a management-rights provision can go to remove from bargaining a matter deemed an integral component of the bilateral relationship is indicated by the Michigan Employment Relations Commission's treatment of a contractual management-rights provision that the employer "has the responsibility for the selection and direction of the working forces including the right. . .to relieve employees from duty because of lack of work or for other legitimate reasons." In *Van Buren Public Schools and AFSCME Council 23* (1973), MERC held that this provision did not permit the school board to unilaterally terminate school bus drivers and to contract-out their school transportation services to a private firm regardless of the economic reasons therefor.

Although MERC is significantly persuaded by private sector precedent, it takes a close look at contracting-out situations. Thus, in *Davison Board of Education and AFSCME, Flint Council 29* (1973), the school board was barred from contracting-out maintenance and custodial work on a new senior high on the ground that the new school was an accretion to the existing unit. The school

board's argument that future subcontracting resulted in no significant detriment to the employees did not persuade MERC. Of particular interest are the remedies applied by MERC in these cases. In *Van Buren* the school board, which had disposed of its buses when it contracted-out the operation to a private bus company, was ordered to terminate that contract, requiring the board to purchase new buses. In *Davison*, the school board also had to terminate its contract with the private maintenance company.

The weight attached to private sector precedent profoundly affects the results in such cases. For example, work-preservation clauses have been held to be mandatory subjects of bargaining by the NLRB. In contrast, the Federal Labor Relations Council held, in *Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia* (1973), that the agency's right under Section 12(b)(5) of Executive Order 11491, to determine the "methods, means and personnel by which operations are to be conducted," precluded a union proposal to place conditions upon the extent to which management could contract-out work normally assigned to employees in the bargaining unit. The council was not persuaded by the NLRB rulings because there is "no counterpart in the private sector statute to the absolute reservation of authority in the agency management which is mandated by Section 12(b) of the Order and which must be included verbatim in agreements negotiated in the Federal sector" and because the council viewed the union proposal as an interference with the exercise of the rights themselves.

The obligation to bargain cannot be determined solely by looking at the precise wording of statutes. The relationship of the parties is affected by the environment in which it exists, and some of this environment is created by past practices. Thus, the Assistant Secretary of Labor ruled that when the NLRB unilaterally began strict enforcement of "time targets" for the processing of cases by its staff attorneys after having been lax for many years, it had committed an unfair labor practice [A/SLMR No. 246 (1973)]. In other words, the federal agency was obligated to negotiate on the change in its long continued practice although there was no reference to this practice in the collective bargaining agreement between the NLRB and the union representing the attorneys.

The environment is sometimes shaped by the employer's dealings with others, as in the case of the *City of New London and New London Police Local 724* (1973). The Connecticut State Board of Labor Relations made the surprising determination that the city, by agreeing to give the firefighters wages in parity with the police contrary to the desires of the police, unlawfully interfered with the bargaining rights of the police. The rationale behind this holding was that the parity provision would induce the city to resist giving the police anything more than it gave to the firefighters due to the "double" cost of any new benefit.

The government environment is often pieced together by multiple agencies

having some control or responsibility toward the terms and conditions of employment of the same unit of employees. This splintering of authority has sometimes posed difficulties in determining the obligation of the "immediate" employer. In *AFSCME Local 119 and County of Los Angeles Department of Personnel* (1973), the Los Angeles County Employment Relations Commission ruled that job classification was subject to bargaining, even though any agreement on that issue would not be final and binding because it would have to be submitted to the Civil Service Commission for approval.

In addition, the environment usually includes a number of laws other than the state collective bargaining statute which affects the employment terms and conditions of those represented by unions. Two recent court decisions indicate a judicial attitude intolerant towards narrowing the scope of bargaining through legislative means other than the state bargaining law. The Michigan Supreme Court backed up a line of MERC decisions, in *Detroit Police Officers Association* v. *City of Detroit and Michigan Employment Relations Commission* (1974), and held that a residency requirement cannot be imposed upon the police even if a voter referendum amended the city charter to establish such a requirement. The court explained that "residency is a mandatory subject of bargaining under PERA (the state bargaining law) and collective bargaining cannot be avoided through the enactment of a city ordinance."

However, the Michigan decision does not deal with a statute enacted by the same legislative body that adopted the bargaining law. The highest court of New York dealt with this issue in *Board of Education of Union Free School District No. 3* v. *Associated Teachers of Huntington* (1972). The school board refused to bargain on certain economic proposals and on arbitration of disputes concerning disciplinary action taken against tenured teachers. The school board justified its refusal on the basis that it had no specific statutory authority to negotiate and that other state laws already dealt with these aspects of the employment relationship. The court responded that when an item in question constitutes a term or condition of employment (as was the case here), there is an obligation to bargain upon that subject unless some statutory provision circumscribes the public employer's power to do so. To assert that it lacked power to agree to any term or condition of employment, the school board, according to the court, would have "the burden of demonstrating the existence of a specific statutory provision which circumscribes the exercise of such power." This burden of proof, said the court, would require a showing that the statutory provisions "expressly prohibit collective bargaining as to a particular term or condition of employment."

Thus, the prime determinant of the scope of bargaining remains the state collective bargaining law. Recent legislation in this area indicates no clear trend. The 1972 enactments did sanction a full scope of bargaining when Rhode Island and Wisconsin amended their laws pertaining to state government employers to include bargaining on wages for the first time. The inclusion of state government

employees into already existing bargaining laws by Nebraska and Kansas, without restrictions on negotiating wages, perhaps denotes the end of the era in which state employees were conferred with negotiating "rights" that excluded wages. Even the 1973 Illinois executive order for state employees included wages in the scope of bargaining, although a management-rights provision in the order excludes negotiations on state retirement, health, and life insurance plans. Of course, the federal government remains the most prominent employer, under some comprehensive system calling for collective bargaining, that is precluded from engaging in economic negotiations with unions representing its employees.

The Illinois order was not the only 1973 provision setting forth a management-rights provision. The Indiana teachers law contained such a section, the Minnesota law retained its restrictions, and Vermont's law for local government employees excluded from bargaining "inherent managerial policy," a term which was not defined. In contrast, the Massachusetts statute did not contain a management-rights provision and expanded the scope of bargaining to standards of productivity. Montana, Oregon, South Dakota, and Texas were all silent.

The enactments in 1974 did not offer any trend either. The Florida statute contained a comprehensive management-rights provision, but opened the employer's exercise of its management rights to the possibility of being subject to a negotiated grievance procedure. The generally conservative Iowa law, although it protected certain civil service commission powers, excluded only the public employee retirement system. The Maine law for state government employees removed from the bargaining process only rules and regulations relating to applicants for employment in the state service.

Maine allowed bargaining on matters otherwise covered by personnel rules and regulations, reflecting a trend in recent statutes to recognize a potential conflict between a collective bargaining agreement and other enactments or issuances with the force of law. In this case, Maine made a distinction between regulations and laws, and called for other laws to remain undiminished by the bargaining statute.

Among the 1973 laws, Massachusetts reversed its previous requirements by declaring that the collective bargaining agreement prevails over personnel rules and regulations and certain statutory provisions and regulations, if the subject matter is otherwise within the scope of bargaining. Similarly, the Vermont law for municipal employees allowed the contract to prevail over existing ordinances, and Texas (for police and firefighters) gave its bargaining laws precedence over other acts, civil service regulations, and home-rule legislation.

Negating this thrust, the Indiana teachers law precluded negotiations on matters conflicting with state law, and the Florida law required the chief executive officer of the public employer to submit to the appropriate governing body a proposed amendment to any law, ordinance, rule, or regulation that conflicted with the bargaining agreement and over which the executive officer

had no amendatory power. This requirement necessitates a discussion of the next problem area, how a contract becomes law.

How a Contract Becomes Law

The process used to reach an agreement and to make it effective is the aspect of public sector labor relations which is most distinguishable from the private sector. The state service also provides the clearest example of the impact of the separation of powers on the bargaining process. Wisconsin's 1972 law for employees of the state government vividly illustrates the complexity of fitting bargaining into the legislative process, as indicated by the following provision:

> Tentative agreements reached between the department of administration, acting for the executive branch, and any certified labor organization shall, after official ratification by the union, be submitted to the joint (legislative) committee on employment relations, which shall hold a public hearing before determining its approval or disapproval. If the committee approves the tentative agreement, it shall introduce in companion bills, to be put on the calendar, that portion of the tentative agreement which requires legislative action for implementation, such as salary and wage adjustments, changes in fringe benefits, and any proposed amendments, deletions or additions to existing law. . .if the joint committee. . .does not approve the tentative agreement, it shall be returned to the parties for renegotiation. If the legislature does not adopt without change that portion of the tentative agreement introduced by the joint committee on employment relations, the tentative agreement shall be returned to the parties for negotiation.

In contrast, Montana's 1973 law, perhaps on the premise that coordination between the legislative and executive branches must operate informally, declared that a contract becomes effective when signed by the union and the chief executive, needing no publication or legislative ratification. The Prince George's County labor code used the theory that a legislative body could make a contractual provision a "hostage" to compel political support. Therefore, the code required that the contract be kept together as a total package and imposed a time limit for the county council to act. It also ordered the council to explain to the parties why it rejected the agreement.

The new Iowa law required the terms of a proposed agreement be made public and the public employees be given reasonable notice before a mandatory ratification election, where the agreement to become effective must be ratified by a majority of those voting by secret ballot. The law specifically exempts the negotiation process from the open meetings law. In contrast, the Texas police and firefighters law required:

All deliberations pertaining to collective bargaining between an association and a public employer or any deliberation by a quorum of members of an association authorized to bargain collectively shall be open to the public.

Two years after the Florida Supreme Court held, in *Bassett* v. *Dade County Classroom Teachers Association* (1972), that the state open meetings law did not require labor negotiations to be held in public, the State Legislature made the law applicable to the negotiation process. The 1974 statute exempted from the open meetings law "all discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining" and "all work products developed by the public employer in preparation for negotiations and during negotiations." In this context, the agreement is not effective until ratified by public employees and by the public employer at a regularly scheduled meeting. Rejection would result in the agreement being returned to the bargaining table for further negotiations.

Effect of Budget Deadlines

Since it is claimed that often as much as 70 percent of a local government operating budget is devoted to personnel, the economic terms of an agreement become items of great significance to the public jurisdiction. Such agreements have potentially great political consequences and may place great stress on fiscal planning.

In two situations, courts have held that, once an agreement has been reached, the public employer is obligated to make available the funds necessary to implement it. The Rhode Island case of *Town of Scituate* v. *Scituate Teachers Association* (1972), the school committee of the town reached a collective bargaining agreement with the teachers association, only to have its budget reduced by $110,000 at a financial town meeting by motion of a taxpayer. Despite the claim that the budget deficit made it impossible to grant the pay raise called for by the contract, the court held that the school committee was obligated to honor its commitment. "Otherwise," explained the court, "the collective bargaining process would be useless, and indeed farcical." Similarly, the Kenton (Kentucky) Circuit Court, 2nd Div., held, in *Wheatley* v. *City of Covington* (1972), that a lack of funds did not relieve the City of Covington from paying firefighters wage adjustments provided for in a collective bargaining agreement.

Consistent with this approach, the Vermont law made it an unfair labor practice for the employer to fail to appropriate funds to implement the contract. On the other hand, the Indiana teachers law barred a contract that would have resulted in deficit financing. The 1974 Iowa enactment went further in its provision:

No collective bargaining agreement or arbitrator's decision shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer's funds, spending, or budget or would substantially impair or limit the performance of any statutory duty by the public employer. A collective bargaining agreement or arbitrator's award may provide for benefits conditional upon specified funds to be obtained by the public employer, but the agreement shall provide either for automatic reduction of such conditional benefits or for additional bargaining if the funds are not obtained or if a lesser amount is obtained.

The 1974 Florida law required the chief executive to request sufficient funding but stated that the agreement shall be administered "on the basis of the amounts appropriated" even if the amount is less than requested. Although the chief executive was mandated to "consult with, and attempt to represent the views of the legislative body," the failure of the legislative body to appropriate sufficient funds shall not be evidence of any unfair labor practice.

To facilitate bargaining, the amendments to the Minnesota law made it an unfair labor practice if the public employer did not divulge its budget information to the exclusive representative. Timing is a critical factor. Finding difficulty in legislating a firm timetable, Oregon urged the parties to make "every reasonable effort" to have the bargaining process coincide with schedules of appropriations and the budget process. Some jurisdictions attempt to tie the steps of impasse devices or dispute resolution procedures into the budget process. This is discussed under the section dealing with impasses.

Despite the obviously critical nature of the budgetary process, most jurisdictions have not dealt directly with the problems confronting the parties—perhaps because it is not clear whether any mechanism is politically feasible and practically effective. Perhaps reluctance to deal with the problem is predicated on a perception that this is one area in which either collective bargaining will have to be modified to accommodate the budget process or the governmental processes will have to be restructured to accommodate collective bargaining.

6 | Dispute Resolution Procedures

Treatment of Grievance Machinery

In the private sector, arbitration of disputes between the parties as to the meaning of the collective bargaining agreement and sometimes as to the interpretation of employer work practices has been given priority. The NLRB has deferred to grievance procedures matters that were subject to the unfair labor practice provisions of the National Labor Relations Act, in *Collyer Insulated Wire* (1971). The application of *Collyer* to two public sector cases, in 1972 by Michigan in *The Board of County Road Commission of Wayne County*, and in 1973 by the Massachusetts State Labor Relations Commission in *Cohassett School Committee and Cohasset Teachers Association*, has given similar high standing to grievance arbitration procedures in the public sector.

Whether or not *Collyer* is appropriate to the pubiic sector setting, an important distinction between private sector and public sector grievance arbitration needs to be noted. In private industry there has not generally been an extensive body of personnel regulations and the grievance machinery is usually bilaterally created to provide an avenue for the contract to be interpreted in a manner suited to deal with day-to-day problems. In the public service, either most employers had issued extensive personnel regulations and grievance procedures or civil service appeals procedures provided employees channels to protest action of the employer. In other words, these procedures often pre-existed collective bargaining and sometimes even unions.

With this historical setting, it is not surprising that the new Florida law required the parties to negotiate a grievance procedure and to provide final and binding arbitration as the terminal step of that process. The grievance procedure, however, was limited to the interpretation and application of the agreement. That same law gave civil service employees the option of choosing the civil service system appeals procedure or the negotiated grievance procedure, on the condition that the employee could only use one route, not both. Florida also made it an unfair labor practice for an employer to refuse "to discuss grievances in good faith."

The revised Vermont law for local employees similarly closed the door to multiple appeal routes by declaring that the negotiated procedure becomes exclusive, notwithstanding any other procedure established by law once a grievance goes to the arbitration step. Both the Iowa and Maine (for state employees) laws provided that when there is an existing negotiated grievance procedure, it shall be the exclusive route. These laws, however, permitted rather than compelled binding arbitration as the terminal step. Thus, after many years of debate on the propriety of denying an employee access to existing civil service or other appeals channels, it appears there may be agreement on the exclusivity of the negotiated procedure.

There is still debate whether the statute should limit the grievance procedure solely to the application and interpretation of the negotiated contract. New York City is a jurisdiction which takes a middle approach. It statutorily limits the scope of the grievance procedure but allows it to apply also to violations of rules or regulations. However, in *Office of Labor Relations and Teamsters Local 237* (1972), the New York City Office of Collective Bargaining held work practices to be outside this category because the passage of time does not convert a practice into a rule or regulation.

Debate persists over who determines arbitrability. The Superior Court of New Jersey, Chancery Division, Monmouth County, held that the State Commissioner of Education should determine what is or what is not the proper subject of a grievance procedure in a contract with a local school board. That decision, in *Board of Education of the Township of Ocean* v. *TOTA* (1972), was necessary, said the judge, because:

> I can envision arbitrators all over the state of New Jersey arbitrating questions which involve perhaps more than this does, questions of education, policy and so forth, which would create chaos and havoc if decisions were made contrary to educational programs which boards of education are charged with administering under the law.

The more prevalent view is that of the New York Court of Appeals, *Board of Education* v. *Association Teachers of Huntington* (1972), which rejected the concept of the school board being more competent to judge such matters. It also construed the law to allow a contract to preclude an employee from following a second appeal route after having first pursued another.

Unfair Labor Practices

One of the most difficult problems involving unfair labor practices is the power of the labor relations board to compel a legislative body to take action. In *PLRB* v. *City of Pittsburgh* (1973), the Pennsylvania State Labor Relations Board held it had no authority over legislative actions. In the case of *Township*

of Royal Oak and Local 574, AFSCME (1973), the Michigan Employment Relations Commission took the opposite approach. When the township refused to execute a contract it had previously led the union to believe was accepted, MERC ordered the legislative body to reject or approve it within 20 days; otherwise, silence would be construed to constitute acceptance and the employer would be compelled to execute it.

Insofar as statutes are concerned, it had not been uncommon for unfair labor-practice provisions to be absent or for power to provide remedies to be unmentioned. Even States with an otherwise comprehensive law, such as New Jersey, did not include such language. An attempt by the New Jersey State Public Employee Relations Commission to establish them through rules to effectuate the statute was invalidated by the State Supreme Court, but this situation is reportedly being remedied in a special session of the State Legislature.

Although the new Texas law for police and firefighters did not contain unfair labor-practice provisions, the establishment of such requirements has become almost universal. States that had originally omitted them added them later, as in Michigan (which had previously provided for unfair labor practices only against employers as in the old Wagner Act), Minnesota, and South Dakota.

Although wording may differ from State to State, the provisions are essentially the same, except some States term as unfair labor practices the failure to comply with grievance procedures or with impasse procedures or to meet strike limitations. A few States have used the unfair labor-practice mechanism as a device to curb other abuses perceived by the State Legislature. For example, Oregon made it an unfair labor practice "to communicate directly or indirectly during the period of negotiations with officials other than those designated to represent the employer regarding employment relations." Minnesota prohibits employers from failing to properly divulge budget information to the exclusive representative. Vermont (local employees) made it unfair labor practice if an employer did not appropriate funds to implement an approved contract. Florida prohibited a union from "instigating or advocating support, in any positive manner, for an employee organization's activities from high school or grade school students, or institutions of higher learning."

One other novel approach needs examination. Prince George's County followed the examples of federal Executive Order 11491, New York City, and Wisconsin (local employees), and provided a separate mechanism to determine whether a bargaining proposal is negotiable. The premise for that approach was that private sector management has no qualms about refusing to bargain on an item it feels is outside the scope of bargaining and having the matter go through the NLRB processes, but public employers are very reluctant to be found to have engaged in an unfair labor practice, even though their refusal to negotiate was the result of a genuine belief in the nonnegotiability of the item. In some situations, the sensitivity is to a public response that may not appreciate the fine

points of labor relations law. In addition, the usual unfair labor-practice decisions have been so time-consuming that unions have complained that the remedy has not been worth the wait. The procedure to determine negotiability is intended to achieve quick resolutions. At this point, however, it is not known whether the procedure will be effective or whether the ingenuity of a party seeking delay will nevertheless prevail. Massachusetts had a different response. It could order fact-finding if a refusal-to-bargain charge is substantiated.

Most of the developing case law was noteworthy only for an implicit reliance on NLRB precedent, regardless of the composition of the state board and of assertions by the board or even requirements of the law that private sector precedent is not controlling. Perhaps the situation is attributable more to the availability of NLRB decisions and the unavailability of decisions by other state bodies with respect to precedent-making cases being considered than to the persuasiveness of the NLRB or even familiarity with its decisions. The most recent decisions do reflect a greater effort by state boards to determine what else has been done in the public sector on the point in issue.

Two decisions, worth citing because they may be relied upon in other jurisdictions, related to the difficult problems of unions' fair representation and of involving the public in the bargaining process. With respect to the first issue, the Milwaukee County Court ruled that the Wisconsin Employment Relations Commission had exclusive jurisdiction over a suit, *Bodensack* v. *AFSCME Local 587* (1972), by school clerks that alleged AFSCME failed to negotiate overtime back pay for them because they did not belong to the union. The spread of agency shop could make such allegations more frequent.

In the other case, *Zoll and IAFF Local 1780* (1972), a Massachusetts city's insistence on "public view" bargaining as a precondition to bargaining was held to be an unfair labor practice because "public view" (before reporters and other employers) was not a mandatory subject of bargaining and because "such practice would be tantamount to ignoring the charging party's certification and conducting city-wide bargaining in violation of exclusive representational lines."

Impasse Resolution

Most laws pertaining to public employee bargaining require multiple forms of impasse resolution, as distinguished from the private sector where the parties are left to their own devices upon reaching bargaining impasse. If two recent decisions are any indication, the impasse resolution procedure requirement in the public sector is apt to have a marked influence on negotiation strategies and options.

In *Triborough Bridge and Tunnel Authority and District Council 37, AFSCME* (1972), the Public Employment Relations Board of New York held that the employer could not use the expiration of a contract as the basis for instituting any changes in the terms and conditions of employment, even if they

were not subject to the expired contract, because:

the statutory prohibition against an employee organization resorting to self help by striking imposes a correlative duty upon a public employer to refrain from altering terms and conditions of employment during the course of negotiations. This duty of an employer in the public sector to refrain from self help is greater than is the similar duty of private sector employers.

The decision of *East Hartford Education Association* v. *East Hartford Board of Education* (1972) froze the status quo in a no-strike situation even beyond the impasse resolution procedure stage. It held an employer that reached impasse, went through mediation, and then through nonbinding arbitration where neither party accepted the arbitrator's award, is not relieved of its legal duty to continue to negotiate upon the request of the union.

Elsewhere, the pattern of court confirmation of the constitutionality of compulsory arbitration laws has been marred. First, Michigan's compulsory arbitration law for police and fire personnel was upheld by the Michigan Court of Appeals in *Dearborn Fire Fighters Union Local No. 412* v. *City of Dearborn* (1972). The court rejected arguments that the statute divested home-rule cities of powers granted to them by the state constitution; that it caused an illegal delegation of legislative and administrative power to private persons; that it established standards insufficient to adequately circumscribe the arbitrator's exercise of authority; and that it unconstitutionally surrendered the power of the city to impose taxes. The Michigan law expired in 1972, but was renewed with the addition of final-offer selection (described later) to the more traditional arbitration.

However, the Maine Statute's applicability to teachers and school boards barely withstood a challenge, on the grounds of inadequate standards, as the Maine Supreme Court was equally divided in the detailed 93-page official opinion of *City of Biddeford* v. *Biddeford Teachers Assn.* (1973). In a much shorter opinion offering little explication, the compulsory arbitration provisions of the South Dakota Firemen's and Policemen's Arbitration Act were declared to be unconstitutional by the Fourth Judicial Circuit Court of South Dakota in *City of Sioux Falls* v. *City of Sioux Falls Firefighters Local 813* (1973) due to their unlawful delegation of legislative power.

Fact-finders' and arbitrators' decisions have increasingly taken into account the public employer's ability to pay, as in *Protective Assn. and Las Vegas* (1972). However, there have been other decisions, such as *City of Patterson, N.J. and PFMBA and PPBA* (1973), where the arbitrator decided that he should consider ability to pay as a factor but then determined that it was bad faith bargaining by the employer to cut taxes, reduce the budget, and then plead poverty as the result of a "self generated loss of revenues."

Every new law passed—Montana, Oregon, Texas, and Vermont in 1973; Florida, Iowa, and Maine (state employees)—included mediation provisions. The Washington law for local employees added mediation and fact-finding to its existing provisions. Oregon required genuine impasse as a prerequisite to use of the state agency's procedures. In the limited-right-to-strike States (Alaska, Minnesota, Oregon, and Vermont) exhaustion of impasse procedures was prerequisite to the strike. The previous Vermont law permitted the strike but had not required exhaustion of these procedures.

Almost all the new laws allow the parties to agree voluntarily to binding arbitration, but it is compulsory arbitration concerning impasses over terms of a collective bargaining agreement that has become the order of the day. In 1972, Rhode Island imposed binding arbitration for nonwage items of employees of the state government. New York City changed its procedures to require parties to accept impasse panel decisions as final and binding, reach their own agreement, or appeal to the Office of Collective Bargaining. The OCB has the power to decide the matter even if there is no appeal, and its decision is final. As previously mentioned, Michigan renewed its compulsory arbitration law, but changed the procedure on economic matters so that the arbitrator had to choose without modification either the final offer of the employer or of the union on each item. The theory behind final-offer selection is that the parties will make more realistic offers to each other and not hold something back for the arbitrator since the arbitrator cannot compromise the offers. The final-offer method is not usually applied on an item-by-item basis, as in Michigan and Iowa, but with regard to the entire contractual package, although sometimes the parties are allowed to submit two final offers. In addition, Alaska required arbitration in situations where the strike was prohibited.

The trend became pronounced in 1973. Massachusetts added final-offer selection (if fact-finding was unsuccessful) for police and firemen, and Wisconsin renewed its police and firefighters compulsory arbitration law, giving the parties the choice of the traditional arbitration method or final-offer selection. New York also amended its law, providing that police and firefighter (except in New York City) impasses not resolved by fact-finding shall be resolved by binding arbitration. However, the arbitration panel was not bound by the fact-finder's recommendations and could refer the issues back to the parties for further negotiations.

In addition to Alaska, Oregon required binding arbitration in situations where the strike was prohibited. Vermont did not have such a requirement, and Minnesota had a different twist. If the Director of Mediation in Minnesota determined that mediation could not resolve the impasse, he could decide which items were still unresolved and send them to binding arbitration. However, the employer can reject binding arbitration or can go to arbitration and then reject the award. In either case, the union could strike upon such rejection by the employer.

The trend continued in 1974, as the three new laws imposed some form of compulsory binding arbitration of negotiation impasses. Florida had a different variation in that the impasse steps are mediation-tied into the budget submission date and/or arbitration by a "special master" who can also mediate, and then if one of the parties rejects the award, a final decision by the legislative body after a public hearing on the matter. Many of the States statutorily mandated a time after which impasse was automatically declared; a time by which mediation must be finished; and a time when fact-finding must be completed, despite criticism that this did not allow the neutral flexibility to deal with the situation and merely established a known timetable for a party that wishes to reach a particular stage.

The Iowa law required fact-finding if mediation did not resolve the dispute within 10 days. The fact-finders' report was made public if the parties did not resolve the matter in 10 days after his award. Thereafter, the state board could, upon the request of a party, impose arbitration with respect to items considered by the fact-finder and upon which the parties have not reached agreement. The law provided that "the arbitration award shall be restricted to the final offers on each impasse item submitted by the parties to the arbitration board or to the recommendation of the fact finder on each impasse item" and that the arbitration board cannot mediate or settle the dispute in any other manner. The criteria set forth for the panel to consider included not just the ability to pay but also the "effect of such adjustments on the normal standard of services." They also inlcuded "the power of the public employer to levy taxes." Iowa had special provisions with respect to firemen.

Maine's law for state employees had still another variation. If mediation and fact-finding were unsuccessful, there was a 45-day period for the parties to resolve their dispute. If still no agreement was reached, then either party could petition the state board to initiate compulsory arbitration, which would be ordered if it was determined that a genuine impasse existed. However, the arbitration was not binding on salaries, pensions, and insurance. Among the criteria, which differ from the norm, to be considered by the arbitrator are "the need of State Government for qualified employees," "the need to maintain appropriate relationships between different occupations in State Government," and "the need to establish fair and reasonable conditions in relation to job qualifications and responsibilities."

These provisions clearly indicate that legislators have made an intense effort to find an alternative to the strike and that the term "compulsory binding arbitration," as applied to the public sector, has almost as many meanings as there are jurisdictions using it. It should be further noted that most of such provisions dealing with other than the protective services have been enacted since 1972. Therefore, there has not been sufficient experience to evaluate the results of their use.

Strikes

Although the words of President Franklin D. Roosevelt that strikes "looking toward the paralysis of Government by those who have sworn to support it, is unthinkable" are still quoted, public employee strikes are increasingly becoming more "thinkable," and are more frequently receiving legal protection.

The first area of protection is the assertion of the right to strike. When a teachers association threatened to strike an Illinois school board (which was not obligated by law to either recognize the union or negotiate with it), the board stopped negotiations, withdrew recognition from the union for violating its policy not to deal with unions that assert the right to strike, and sent new contracts to the teachers. The contracts contained a provision in which the signer agreed that the union was to be denied recognition because of its strike threat. The Seventh Circuit Court overturned the decision of the U.S. District Court for Northern Illinois and held, in *Aurora Education Association* v. *Board of Education, District No. 131* (1973), that teachers who refused to sign the new contract had a valid cause of action to declare the school board policy invalid on First Amendment grounds. Similarly, the National Union of Police Officers was able to be placed on the ballot in a representation election despite the District of Columbia code provision prohibiting police officers from becoming members of a union which asserts the right to strike. In *Police Officers Guild* v. *Washington* (1973), the District of Columbia District Court found this prohibition to be unconstitutional despite the city's valid interest in preventing strikes.

The exercise of the strike itself has been accorded with some judicial protection. A Chief Justice of the Rhode Island Supreme Court asserted that there is a constitutionally protected right to strike as an integral part of the collective bargaining process, on the rationale that "the collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism." Although he was alone in his opinion and his colleagues on the bench found the strike to be illegal, they refused to enjoin it in the case of *School Committee of the Town of Westerly* v. *Westerly Teachers Assn.* (1973). The majority explained that to automatically grant an injunction would make the court "an unwitting third party at the bargaining table and potential coercive force in the collective process." In also repudiating ex parte relief, the court embraced the irreparable harm standard of *School District* v. *Holland Education Assn.* (1968), which also indicated that the petitioning party had to come into court with clean hands (having exhausted impasse procedures and being innocent of unfair labor practices), explaining:

> We must concede that the mere failure of a public school system to begin its school year on the appointed day cannot be classified as a catastrophic event. We are also aware that there has been no public furor when schools are closed for inclement weather, or on the day a presidential candidate comes to town, or when the basketball team wins the championship.

The same reasoning was used by the New Hampshire Supreme Court [*Timberlane Regional School District* v. *Timberlane Teachers Assn.* (1974)] in upholding the refusal of a lower court to issue an injunction in reliance on *Westerly*.

Although a number of courts have not freely granted antistrike injunctions, the majority still impose injunctions and other strike sanctions. In the case of *Arapahoe County School District No. 6* v. *Littleton Education Assn.* (1974), the Colorado District Court for Arapahoe County, after denying a temporary restraining order, finally did grant a preliminary injunction when no settlement was in sight because the students were deemed to have a constitutional right to free public education and because of the damage they were incurring from the loss of schooling.

Ironically, while decisions such as *Westerly* were adopting a judicial standard comparable to that statutorily established in States allowing a limited right to strike, two courts in Pennsylvania, a jurisdiction permitting strikes under certain circumstances, enjoined teacher strikes at the outset. In *Ross* v. *Sullivan* (1973), the Philadelphia Court of Common Pleas found that the strike created "a clear and present danger or threat to the health, safety or welfare of the public" because of the jeopardy to 120,000 children "at or below the functional level of literacy" (out of a school population of 280,000) and to 18,000 mentally retarded or disturbed children; the increased likelihood of gang violence; the costs of police protection; the potential loss of income to parents at the poverty level; and the threat to continue state funding of education. Another strike was enjoined by the Common Pleas Court of Bucks County in *School District of Bristol Twp.* v. *Bristol Township Education Assn.* (1973), despite a school population of only 14,461, as was another strike in Central Pennsylvania, which this time was overturned by the Commonwealth Court in *Bellefonte Area Education Assn.* v. *Board of Education* (1973) on the basis that the law was premised on the acceptance of certain inconveniences.

In one other noteworthy judicial development, *Grasko* v. *Los Angeles City Board of Education* (1973), the 2nd Appellate District Court of California held that a strike settlement agreement was invalid in the face of the statutory requirement for relations between school boards and teachers unions to be embodied in school board resolutions reached after discussions with teacher councils based on proportional, not exclusive, representation.

The State Legislatures also have been growing more permissive with regard to strike limitations. In 1972, Alaska amended its law to permit strikes by employees in "those services in which work stoppages may be sustained for extended periods without serious effects on the public" provided the strike was approved by a majority secret ballot vote of all employees in the unit. As for "those services which may be interrupted for a limited period but may not for an indefinite period," such as public utility, snow removal, sanitation, public school, and other educational institution employees, a strike could not be

permitted unless authorized by a majority of employees in the unit and unless mediation had been exhausted. If the court, after considering the "total equities," including the extent to which the parties have met their statutory obligations and whether the strike had begun to threaten the health, safety, or welfare of the public, enjoined the strike, the parties had to submit to arbitration. A third category of employees in "those services which may not be given up for even the shortest period of time," such as police, fire protection, correctional institution employees, and hospital employees, were barred from striking under any conditions and were subject to compulsory binding arbitration.

Also in 1972, Maine deleted its provision pertaining to temporary restraining orders, while strike prohibitions were imposed in Kentucky (firefighters and police); New Hampshire (police); New Mexico (employees of the state government); Oklahoma (local, police and firefighters) setting forth penalties; and Wisconsin (state employees) clarifying, through an amendment, that penalties were possible. Minnesota, Oregon, and Prince Georges County joined the ranks of the limited-right-to-strike jurisdictions in 1973 and Vermont's completely revised law retained the limited-strike right. Hawaii, Montana (nurses), Pennsylvania, and Vermont (teachers) already had such laws.

Technically speaking, the strike is still illegal in Minnesota. However, it is a successful defense to the prohibition if the public employer refused to submit a dispute to binding arbitration or refused to comply with a valid decision of a binding arbitration panel, provided employees were not subject to the Charitable Hospital Act or were not "essential." The law defined essential employees as those whose services, if withheld, "would create a clear and present danger to the health or safety of the public," as determined by the local court. There were stringent penalties against illegal strikes, although violation of the collective bargaining law or an unfair labor practice by the employer could have been considered by the court in mitigation or retraction of penalties.

In Oregon a strike by other than policemen, firemen, and guards at correctional institutions and mental hospitals was permitted except where the strike created or would have created "a clear and present danger or threat to the health, safety or welfare of the public." An unfair labor practice by the employer did not justify a strike. As a prerequisite to a strike, the parties must have exhausted mediation and fact-finding and must have consumed a 30-day cooling-off period. The union must thereafter have given 10 days notice of its intent to strike and stated to the state board and the public its reasons for the strike. If the court prohibited the strike it had to order final and binding arbitration within 10 days after the order. The Prince Georges County law is fairly similar, except the Public Employee Relations Board determined whether the strike met the standard of public health and safety and could have imposed whatever form of dispute resolution it deemed appropriate (including binding arbitration if any), if it prohibited the strike.

The Vermont law was significant in that the strike freedom was retained despite total revamping of the law. In fact, the previous version stated "no public employee may strike. . .if the strike will endanger the health, safety or welfare of the public." The new law had a different tone in starting with the words "a strike shall not be prohibited unless," followed by the same standard. Also new was a requirement that 30 days must have elapsed after delivery of the fact-finder's report to the parties and that the strike was illegal in a situation where the parties voluntarily agreed to binding arbitration.

Also in 1973, South Dakota reduced its strike penalties and removed its requirement that an employer was compelled to seek an injunction. On the other hand, Washington added strike prohibitions combined with penalties with respect to police and firemen; Texas did the same thing in its police and firemen's act; Indiana proscribed the strike in its teacher's law; and Massachusetts continued the strike ban in its totally revised law.

The 1974 laws passed to date have squelched the claims of those who now foresee legalization of the strike as a clear trend. Florida, consistent with the prohibition in its state constitution, prohibited the strike and set forth stringent sanctions, including the payment of damages, against unions and employees, although the state commission took into consideration provocation by the employer. The Maine law for employees of the state government made the strike an unfair labor practice. In Iowa, where there had been no previous statutory proscription, not only was the strike outlawed, but taking into account the *Westerly* decision, the employer was relieved of making any showing of great or irreparable injury in order to obtain a temporary restraining order. In addition to listing various penalties and sanctions against the union and the employee, it prohibited the union or employer from engaging in bargaining over suspension or modification of the penalties or over the employer requesting the court to modify or suspend any penalty.

7 | The Future

With the great diversity of approaches described, any attempt to predict the future would be pure speculation or giving vent to the author's prejudices.

There is clearly an overwhelming need for more information. That so many legal systems are based on conflicting assumptions illustrates the dearth of research and credible information on the behavioral responses to the systems legislated. Research on the results of the law could reveal any needed legislative modifications, guide the parties to more realistic expectations, assist neutrals perform their roles more ably, and identify training and information needs.

Moreover, many of the parties are new to the collective bargaining process and are apt to respond to situations influenced by fears or preconceptions. Those who are knowledgeable, nevertheless, are not apt to properly take into account mistakes caused by being ill-informed and are more likely to impute evil motives to the wrongdoer. In either event, the parties are usually not equipped to deal with the new rules of the game and the academic community, being equally new, is similarly unprepared. Few States have tried to avoid these pitfalls by giving the state agency responsibilities in this regard. The 1973 Indiana enactment for teachers and the Oregon law did give the state board such responsibility, and the Oregon board was also given the task of providing data to the parties and neutrals to assist them in resolving disputes. In addition, the 1974 Iowa statute charged the state board with collecting data and conducting studies "relating to wages, hours, benefits and other terms and conditions of employment" and making data available to interested persons and organizations.

The need for information has been instrumental in pushing loose confederations to reject their distaste for nationally based operations and to become more centrally oriented. The same need has impelled, to a large degree, the formation of the National Public Employer Labor Relations Association and the creation of several regional entities to service public employers.

The information gap has also given rise to a Division of Public Employee Labor Relations within the Labor Management Services Administration of the U.S. Department of Labor, and a Division of Technical Services within the Federal Mediation and Conciliation Service. Two private nonprofit organizations

have also been created in response to the information crisis: The National Center for the Study of Collective Bargaining in Higher Education (at Baruch College in New York) and the Public Employment Relations Research Institute based in Washington, D.C. The International Personnel Management Association continues to be a leading source of research, training, and publications in the field of public sector labor relations.

It remains to be seen whether the information gathered by those agencies and associations will be profitably put to use by the parties or whether "trial by ordeal" will continue to be the order of the day. Also uncertain is whether experimentation will bring about insights or whether it will cause a demand for a national uniform system as a more desirable alternative to the present diversity.

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GLOSSARY

Glossary terms are arranged in alphabetical order. Terms used in definitions which are defined elsewhere in the glossary are italicized.

A

Accretion to unit -- See *unit clarification*

Adjudication -- Sitting in judgement; distinguished from the *mediation* function. Settlement of a dispute by the imposition of terms which result from taking of testimony and findings of fact. Adjudicatory functions include determinations in representation, *scope of bargaining* and *unfair labor practice* cases. Adjudication is legal in nature; dispute resolution is compromise oriented and based on voluntarism.

Advisory arbitration -- See *arbitration*

Agency shop -- See *union security*

Amendment to certification -- See *unit clarification*

Appropriate unit -- See *bargaining unit*

Arbitration -- Dispute resolution in which neutral third party renders a decision on an issue submitted by the parties.

Advisory arbitration -- The terms of settlement rendered by the arbitrator are in the nature of recommendations which the parties are not obliged to accept.

Binding arbitration -- The parties are compelled to accept and abide by the terms of the arbitrator's award which is enforceable in the courts.

Compulsory arbitration -- Mandated by statute for the resolution of *impasses;* distinguished from voluntary *arbitration* which is invoked by the parties themselves through their negotiated or jointly formulated agreement to arbitrate.

Final-offer arbitration -- A form of *interest arbitration* in which a neutral third party (arbitrator) selects one side or the other's last proposal(s) as a means of imposing the terms of settlement.

Grievance arbitration -- Settlement of *grievances* by submission of a dispute, usually involving interpretation and application of the *collective bargaining agreement,* to a neutral third party.

Interest arbitration -- Procedure for the resolution of disputes over the terms of new contracts; distinguished from *grievance* (or rights) *arbitration.* A neutral third party is chosen by the parties or appointed by an administrative agency as in other forms of *arbitration.*

B

Bar rules -- Barriers to challenges of the majority representative.

Certification bar -- A newly certified representative is protected for a period of at least one year from the possibility of facing another election.

Contract bar -- An incumbent organization is entitled to a period of unchallenged representation status which is ordinarily keyed to the expiration of a collective agreement.

Election bar -- An election is prohibited in any negotiating unit or subdivision thereof in which a valid election was held during the preceding 12-month period.

Bargaining unit, collective bargaining unit -- A group of employees organized by a union or other association for the purposes of negotiating with the employer which is voluntarily recognized by the employer and/or *certified* by an administrative agency.

Binding arbitration -- See *arbitration*

C

Cease and desist order -- An order prohibiting continuation of an act, e.g. one which constitutes an *unfair labor practice.* Such an order is made as a *remedy.*

Certification (of a *bargaining unit*) --Certification is the term applied to a *bargaining unit* which has been determined by an administrative agency to be appropriately constituted for purposes of *collective bargaining;* official recognition of suitability.

Decertification -- Accomplished through a petition to the administrative agency alleging that the union or association no longer represents a majority of the employees; i.e. the basis for *certification* no longer exists.

Certification bar -- See *Bar rules*

Check-off -- A *union security* device by which union fees or dues are collected through payroll deductions.

Closed shop -- See *union security*

Collective bargaining (collective negotiations) -- The process in which representatives of labor and management meet to establish *terms and conditions of employment* for the employees in a *bargaining unit*. Collective bargaining is defined under the N.L.R.A., Section 8(d) as "The performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment...and the execution of a written contract...but such obligation does not compel either party to agree to any proposal or require the making of a concession."

Collective bargaining agreement -- The document incorporatng the results of the negotiations between the parties; a written instrument setting forth the *terms and conditions of employment,* dispute resolution procedures and any other accords resulting from *collective bargaining.* Also known as the contract, agreement, etc.

Collective bargaining unit -- See *bargaining unit*

Community of interest -- See *unit determination criteria*

Company union -- A union dominated by the employer. Such domination, if alleged and proved, is an *unfair labor practice* under the N.L.R.A. and some states' statutes.

Compulsory arbitration -- See *arbitration*

Concerted activity -- Usually means a strike but refers to any kind of job action by an employee group or groups of employees.

Conciliation -- A process through which *impasses* are resolved by a neutral third party; distinguished by some from *mediation* and characterized as less actively intervening than mediation. See *mediation.*

Consolidation of unit – See *unit clarification*

Contract administration -- Living under, interpreting and applying the collective bargaining agreement.

Contract bar – See *bar rules*

D

Decertification -- See *certification*

Deferral policies -- Administrative rationale for allowing or requiring parties to exhaust other procedures or avenues prior to proceeding before the agency. For instance, an *unfair labor practice* charge may also be the subject of *grievance arbitration* under the parties' *collective bargaining agreement.*

Demand (for arbitration) -- The notice one party serves on another or on the administrative agency expressing its intent to carry a dispute to *arbitration*

Due process -- The procedural protections that are enjoyed by all people including government employees in their relationships with their various governments; substantive protections that the Constitution and statutes afford public employees.

Duty of fair representation -- Applies to a union's duty to represent all members of a bargaining unit that the organization has been designated to represent.

Duty to bargain -- See *unfair labor practice*

E

Election bar -- See *bar rules*

Employee organization -- See *labor organization*

End run bargaining -- The exercise of political power outside of bargaining to secure an agreement as to certain negotiation items where a party otherwise might not have been able to do so.

Exclusive representation -- Distinguished from members only or proportional representation by more than one *labor organization.* The benefits of bargaining are equally applied to all employees in the unit. Not only is no other union permitted to represent the employees but the individual employee is not free to negotiate his own contract with his employer.

F

Fact-finding -- An impasse resolution tool. Typically, the fact-finder is expected to analyze the issues between the parties in order to provide them with a factual statement of issues, supporting information and recommended terms of settlement. Fact-finding has been compared to *advisory arbitration.*

Final offer arbitration -- See *arbitration*

G

Globe election -- Where the *bargaining units* proposed by competing bargaining agents are equally appropriate, no initial unit determination is made; the determination as to the appropriateness of the unit is established by the wishes of the employees as expressed in the election for representation.

Grievance -- A complaint by an employee or a union, sometimes by the employer or employer association, arising out of interpretation or application of the collective bargaining agreement; covers any aspect of the employment relationship. Many *collective bargaining agreements* limit those issues that may be termed grievances by defining the term with some precision.

Grievance arbitration -- See *arbitration*

Grievance procedure -- The mechanism outlined in the contract including grievance definition, in some cases; the steps to be followed, personnel levels and parties to be involved as well as any of the other details the parties specify for the orderly resolution of *grievances.*

I

Illegal (subjects for bargaining) -- Those areas which have been determined by the administrative agency or by the courts to be areas over which the parties may not bargain; subject over which the employer has no authority to bargain.

Impasse -- Stalemate or deadlock in *collective bargaining* between management and labor representatives; a point at which either or both parties to negotiations determine that no further progress toward settlement can be made. In some statutory schemes, impasse is technically declared at the point in time by which the parties should have reached agreement; the employer's budget submission date, for example

Injunction -- An order prohibiting a threatened act which act, it is perceived, will do irreparable harm; often used in connection with threatened strikes.

Interest arbitration -- See *arbitration*

Interim relief -- A temporary or provisional *remedy*. Provision for a temporary solution to a problem. On occasion, a party making an *unfair labor practice* charge seeks interim relief, alleging that the respondent's conduct will cause the charging party to suffer an irreparable injury before the litigation of the charge can be completed.

J

Jurisdiction -- The extent or range of authority; usually arises in connection with the agency's or the neutral's authority to act.

Just cause -- This standard has come to denote a variety of "due process"safeguards to assure that there is good and sufficient reason for imposition of discipline in any given case. Burden of proof of the offense falls on the employer.

L

Labor organization – The N.L.R.A. at (29 U.S.C. §152(5)) defines a labor organization as "any organization of any kind, or any agency or employee representative, committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work."

Leap-frogging – The effort of one employee group to set its wages at a level higher than another group's, usually another group of employees of the same employer.

Limited right to strike – Under a limited right to strike provision, unions must first exhaust the *impasse* resolving mechanisms of *mediation* and *fact-finding* and a strike may be enjoined by the courts if it would jeopardize the community's health, safety or welfare.

Lockout – A temporary withholding of work from employees by an employer.

M

Maintenance of membership – See *union security*

Make whole remedy – Undoing a wrong so as to restore the employee to her or his status before the objectionable or erroneous action was taken. Back pay awards are seen to make an employee whole for lost wages.

Management prerogative – Areas in which employers are held to have the right to make unilateral determinations. These are generally concerned with the operation of the business in terms of technology and product, production schedules, etc.; distinguished from *terms and conditions of employment* in the context of *scope of bargaining* determinations.

Management rights clause – A contract provision spelling out areas where the employer reserves discretion or expressing areas over which the employer retains control.

Managerial employees – Defined under the N.L.R.A. as those who formulate and effectuate management policies by expressing and making operative the decisions of their employer.

Mandatory or required subjects for bargaining – See also *scope of bargaining* – Those areas held by the administrative agency or the courts to be subjects over which the employer must agree to bargain if the union raises them.

Mediation – Involvement in a labor dispute of neutral third party who attempts to assist parties in resolving their dispute by suggesting possible areas of compromise, bringing a different point of view; clarifying issues and other techniques designed to bring the parties closer together and narrow the disagreement. The function of mediation is to assist the parties by being creative and innovative in finding areas of agreement and compromise to reach final resolution of the impasse.

> **Preventive mediation** – using the techniques of *mediation* before disputes arise; includes such devices as labor-management committees, informal pre-negotiations discussions, use of the mediator as a consultant and training programs for contract administrators.

Med-arb – A combination of *mediation* and *arbitration* in which a neutral works to bring the parties together but retains the power to impose terms of settlement. When a mediator selected by the parties is unable to effect a joint resolution, she or he issues a binding award on the issues remaining in dispute.

Merit -- A term used in the context of merit systems in civil service employment. Two merit principle examples are -- employment of people on an objective basis related to worth and the provision of some form of tenure. A merit system is a set of personnel administrative practices.

Multilateral bargaining -- Phenomenon where individuals or groups not in the position of primary bargainers seek to influence the bargainers or are approached by the bargainers to affect the outcome of negotiations.

O

Open period -- Petitions for *exclusive representative* status are *timely* during a period prior to the expiration of a contract. This time is sufficiently in advance of the expiration of the contract so as to leave ample time for the negotiation of a successsor contract by the organization victorious in the representation proceeding.

P

Parity -- An equivalence between groups of employees with respect to rates of pay; often seen in discussions of police and fire-fighter salaries. The percentage ratio maintained in the salaries of two groups.

Permissive (subject for bargaining) -- Subjects about which the parties may bargain if they choose; distinguished from *mandatory* and *illegal* subjects for bargaining.

Preventive mediation -- See *mediation*

Probationary employee -- An employee whose status in employment is not yet permanent. The probationary period is a trial period.

Proliferation of units -- Excessive or rapid growth in the number of collective *bargaining units* of employees of one employer.

Protected activity -- Those activities with respect to pursuit of rights under labor relations statutes which are specifically allowed. For instance, organizing for purposes of *collective bargaining* is specifically permitted under many labor relations statutes, and activities to further that aim are protected from interference or restraint.

R

Remedy, remedial order -- An order of an administrative agency, court or arbitrator to correct a defect; relief or cure.

Reopener clause -- An agreement within a contract to discuss again issues which have been deliberately deferred until a later time such as wage reopeners.

Runaway shop -- Unionized businesses' or employers' efforts to escape the constraints of collective bargaining, the costs of contract, and imposition of legislative limitations on management freedom by moving business to non-union southern and northern rural areas.

S

Scope of bargaining -- The range of subjects dealt with by union and management and covered in the *collective bargaining agreement.* Subjects within the scope of bargaining may be *mandatorily* or *permissively* negotiable. *Illegal* subjects of bargaining are outside the scope of bargaining.

Showing of interest -- Evidence that a certain number of the employees in the proposed bargaining unit wish to be represented by the petitioner for the purposes of *collective bargaining.*

Sovereignty doctrine -- The proposition that the government, as sovereign, may determine the wages, hours and working conditions of its employees. It has been used as an argument against collective bargaining in the public sector and continues to be used as an argument against *interest arbitration* in the public sector.

Status quo -- The existing state of things at a given point in time; sometimes, the state of things before a unilateral change is made in *terms and conditions of employment.*

Stipulation -- Specification of points on which there is agreement.

Subjects for bargaining -- See *scope of bargaining* and *mandatory, illegal* and *permissive.*

Sunshine laws -- The requirement that the business of a public entity be conducted in such a manner that the public's right to know is protected. Open public meeting laws are such requirements.

Surface bargaining -- Lack of intent to reach an agreement; superficial negotiating in bad faith. Surface bargaining constitutes a refusal to bargain and is an *unfair labor practice* in many jurisdictions.

Sweetheart agreement (or arrangement) -- A derogatory term applied to an illegitimate relationship between a union and an employer where the purpose of the agreement is to prevent the employees' being adequately represented.

T

Tenure -- Status in a job; permanent status conveying certain job rights. An employee may not be removed from a tenured position without *due process.*

Terms and conditions of employment -- Generally speaking, wages, hours, working conditions and fringe benefits. An issue may be a term or condition of employment if it has a substantial impact upon an employee's wage, hours or working conditions.

Timeliness -- Within specified time limits; within a certain period.

Tripartite (panels, boards, *arbitration* proceedings, etc.) -- In labor relations implies a representative each from management and labor and neutral, usually occupying the chairperson's role.

U

Unfair labor practice; unfair practice -- Defined as various offenses under different statutes which may be committed by either management or unions. The typically prohibited practices are spelled out in the text. Both employers and employee organizations are prohibited from engaging in certain practices with the *collective bargaining* context.

Union animus (also known as anti-union animus) – Discrimination against employees based on their union activities. Literally, hostility toward unions.

Union security – Provisions in *collective bargaining agreements* as forms of protection for unions. Various forms of union security offer differential degrees of protection in requiring union membership, dues payment or fee payment and arrangements for the collection of those monies.

An agency shop or fair share arrangement requires all *bargaining unit* employees to pay a fee or dues. This fee is presumed to offset the cost to the union of representing the employees in negotiations and *contract administration.*

Maintenance of membership is a form of *union security* under which an employee who voluntarily joins a union must retain membership for the duration of the contract in order to retain the job.

Union shop agreements require all employees to join the union within a certain period of time after having been hired. They must remain members for the duration of their employment.

Union shop – See *union security*

Unit clarification or modification – A change in the original composition of the *bargaining unit* through amendment to certification, consolidation, and accretion. Unit clarification is a procedure for eliminating or adding certain employees to existing *bargaining unit. Accretion* assimilates employees in positions created after *certification* into an existing unit; *amendments to certification* allow the *exclusive representative* to reflect name changes or affiliation. *Consolidation* is a means for overcoming fragmentation of unit; a combination of existing units into one comprehensive unit.

Unit determination – A procedure by which a labor relations agency makes a finding as to the appropriateness of including certain employees within a group for *collective bargaining* purposes *(bargaining units). Unit determination criteria* are frequently established by statute and provide guidelines to the agency in judging the fitness of the unit.

Unit determination criteria -- Factors established for guidance in creating *bargaining units.* These include community of interest: the existence of a common enough aspect of employment to make it reasonable for a group to negotiate together; efficiency of operation: the employer's capacity to function in view of the inclusion of certain employees in the same unit; the bargaining history of the parties: the manner in which they have previously functioned; and others.

Unit for bargaining – See *bargaining unit*

W

Whipsawing – A union tactic for gaining more favorable terms of its members by using some other unit's terms as a basis for negotiations.

Y

Yellow dog contract -- An agreement by a prospective employee as a condition of employment not to seek union membership. Such agreements are illegal.

Z

Zipper clause -- A clause expressing the parties' agreement that the contract as it is represents the complete agreement between them. Thus the right to negotiate a matter not contained in the contract is waived.

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PUBLIC EMPLOYEE UNIONIZATION — AN OVERVIEW

*Walter J. Gershenfeld**

INTRODUCTION

Public employee unionism and consequent collective bargaining have grown rapidly in recent years. A generation ago, public sector labor relations were limited. Some federal employees were organized, notably craft and postal workers, but bargaining activity was subordinate to lobbying. A few local jurisdictions, e.g., Philadelphia and New York City, had granted bargaining rights to their employees, but by and large, state and local employees were not organized. The new wave began with the passage of public employee legislation in Wisconsin in 1959. Major impetus, however, came from the issuing of Executive Order 10988 by President Kennedy in 1962, permitting federal employee organization and bargaining. Following that order, a majority of the states granted bargaining rights to selected or broad groups of state and local employees.

Today, some one-quarter of all organized employees are in the public sector. Almost one-half of full-time state and local employees belong to unions or associations which bargain for them. More than one-half of federal employees are covered by collective bargaining. In the sections which follow, both the growth of and problems associated with the burgeoning public employee labor relations field will be examined.

We will first examine the background of private sector labor relations and then consider the origins and jurisdictional coverage of public employee labor relations. Variability in the decentralized nature of the activity will be a recurrent theme. Interest in uniform public

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employee labor relations law will be discussed along with the organizations active in the public sector. The controversy over difference versus similarity in public and private sector bargaining will be examined. Following these introductory matters, the sinews of the process will be examined. It will be convenient to look at state and local labor relations apart from the federal sector, which includes the postal service. At the state and local level, we will examine the specialized concerns associated with agency labor relations administration, unit determination, impasse procedure, strikes, outcomes and contract administration. The discussion will serve as an introduction to a fuller treatment of these issues in later chapters in this book.

PRIVATE SECTOR BACKGROUND

The past is prologue; that is, the development of private sector unionism in the United States provides clues to understanding the present widespread labor relations activity in the public sector. Unions in this country date back to the latter part of the eighteenth century. Among the earliest to organize were printers, cordwainers (shoemakers) and carpenters in large Eastern cities. The early unions generally did not negotiate the detailed agreements of today. They concentrated on the rates or piece prices at which they were willing to work. They were also concerned about entry to the trade and sought the closed shop and regulation of the apprenticeship system. As unions grew, employers turned to the courts for assistance. In a key 1806 case involving the Philadelphia cordwainers, the notion that unions might be criminal conspiracies emerged. The doctrine held that combinations of workers to advance themselves at the expense of others, including the public, were illegal criminal conspiracies violative of the common law. Not all courts enforced the conspiracy doctrine rigorously, but it operated as a barrier to significant collective bargaining.

Despite judicial opposition, craft unions began to grow in cities like Boston, New York and Philadelphia. Some attempts at federation and formation of national unions arose in the early part of the nineteenth century. A pattern emerged which was to continue unrelieved until well into the twentieth century. Unions tended to grow and concentrate on economic items during periods of prosperity when they had a relative power advantage. During periods of depression, they became weak and interested in more visionary re-organization of society.

The conspiracy doctrine was given a fatal blow in a decision by the Massachusetts Supreme Court in 1842. In *Commonwealth v. Hunt*, 45 Mass. III, 38 Am. Dec. 346, the Court held that combinations of

workers were not illegal *per se*, nor were their attempts to improve their condition, unless illegal means were used. Workers might organize but their efforts to achieve recognition remained dependent on economic strength.

The Industrial Revolution came to this country beginning around 1840. The widening of the market leading to large-scale enterprise and the consequent gulf between worker and employer led to growing worker interest in unionization. National unions of consequence began to appear in the 1850s. The attempts that were made to form larger groups of unions met with little success. One of the major early attempts to form a national federation, the Knights of Labor, began in 1869. It enjoyed some success for most of two decades. The Knights of Labor varied from the craft pattern, seeking to be the "one big union" which would enroll all workers and change the wage system. The Knights of Labor lost favor in the late 1880s but had set the stage for the formation of the American Federation of Labor (AFL) in 1886 under the leadership of Samuel Gompers.

The AFL learned its lessons from the Knights of labor and concentrated on wages, hours and working conditions or business unionism. It recognized the strategic power of skilled workers and offered its member unions exclusivity of jurisdiction. The new federation also emphasized collective bargaining autonomy for its unions. The AFL supported the economic system and disavowed radical unions. It declined to seek the formation of a labor party. Instead, a principal role of the federation was that of spokesman for the labor movement and lobbyist for favorable legislation. In Gomper's terms, politically the AFL sought to reward its friends and punish its enemies.

The AFL quickly faced the growth of a legal weapon, the injunction. Employers could seek court injunctions prohibiting activity which threatened or actually represented damage to property, injury to persons, or even loss of business. Enforcement of relatively easily obtained injunctions led to many violent incidents in American labor history. Nevertheless, the AFL managed to grow, particularly in prosperous periods. Noteworthy was the growth of the AFL during World War I. Employers turned to more sophisticated weapons in the 1920s. Personnel departments grew and began to emphasize worker welfare. Employers tried to reach the workers and their families through the printed word to convince them of the desirability of the open or non-union shop. The yellow-dog contract became more common. This was a device whereby a prospective employee agreed, as a condition of employment, not to seek membership in a union.

As a result of the depression of the 1930s, the legality of

collective bargaining in the United States was established to provide workers with representation in work place matters and to promote their purchasing power. The roots of public employee state laws based on employee majority vote on union representation are found in legislation enacted during the New Deal years.

The Norris-LaGuardia Act made injunctions difficult to obtain in federal courts and made the yellow-dog contract unenforceable. In 1935, the Wagner Act stated that collective bargaining was the public policy of the United States for those employees in interstate commerce who desired to be represented by a union. The ballot box was substituted for the strike as the approved method of achieving recognition. The Wagner Act, however, specifically excluded public employees from coverage. President Franklin Roosevelt was on record indicating that he saw no basis for federal employees to bargain collectively. Given the relatively secure work of public employees in the midst of a great depression and their coverage under civil service procedures, Congress agreed that it was inappropriate for the pubic employee to enjoy the benefit of the new labor relations policy.

The year 1935 also marked the start of the CIO. Originally the Commttee for Industrial Organization, it later broke away from the AFL and became the Congress of Industrial Organizations. Under the early leadership of John L. Lewis, the CIO concentrated on organizing vertically or industrially all of the employees in the mass production industries of the country. Growth of both the AFL and CIO continued and was accelerated by their cooperative role in setting labor relations policy as a part of the tripartite War Labor Board in World War II.

Following World War II, a wave of strikes in 1946 and adverse public reaction to some of labor's goals and tactics led to regulation by the Taft-Hartley Act in 1947. Unions entered into a period of relative decline. The economy was shifting from manufacturing to service industries, and the geography of employment was tilting to the sunbelt. Growth was occurring in precisely those areas where the unions were historically weak. Further, some unions were labeled as communist or racketeer dominated, and both the AFL and CIO were busy cleaning house. By 1955, the basis for the separation of the AFL and CIO was gone. The horizontal or vertical forms of unionism were no longer a divisive issue. The AFL organized vertically when appropriate. Differences between CIO and AFL leaders were no longer pertinent since those leaders were either gone or inactive. Competition in a difficult market was wasteful. The two groups merged in 1955.

Unions were subject to further regulation in 1959 when the Landrum-Griffin Act was passed. While the Wagner Act had been basically procedural, the Taft-Hatley Act both tightened procedures

and began substantive regulation as well. It outlawed the closed shop but permitted the union shop unless a state elected to make the union shop illegal. Some twenty states have done so. The secondary boycott was also outlawed. The Landrum-Griffin Act carried regulation heavily into the internal affairs of unions. Detailed financial and other reports were required, and unions had to observe democratic procedures as spelled out in the law.

At the start of the Sixties, the labor movement was generally considered to have lost some of its strength and vitality. In the public sector, its role was relatively minimal. Little public employee bargaining took place. Some groups of public employees were heavily organized, postal workers, for instance, but they concentrated on lobbying. The public employee represented a major source of growth for the labor movement. The public employee was interested. It was against this background that the great leap foward in public sector labor relations activity began.

ORIGINS AND STATUS OF PUBLIC EMPLOYEE UNIONISM

Growth and Jurisdictional Coverage

Public sector labor relations has moved from a minor activity to a major one. There is debate over whether permissive legislation and executive or court action were cause or effect in the growth of public employment and society in general were important factors in bringing about collective bargaining coverage for public employees. The historic stability and relatively acceptable pay enjoyed by public employees had been eroded over the years in the perception of public employees. Public sector jobs were, in many cases becoming more difficult and, at times, hazardous. Stability of employment was threatened. Social change was at work, and the government responded with an expansion of services. Many low-paid public employees saw unionization as an important tool in raising status and earnings. Other public employees with professional backgrounds were concerned about status without earnings and lack of participation in such professional matters as the provision of their services. Public officials concerned with electoral support but often with a clear recognition of the inconsistency in denying collective bargaining rights for public employees while routinely supporting such activity for private sector employees, backed and passed public employee labor relations laws. Cause and effect are difficult to separate in this context, but it is clear that there was symbiotic activity originating both from the employees involved and from newly passed legislation.

The immediate impact is clear. Some 40 states provide broad or limited legislative coverage of collective bargaining rights for public employees. Approximately half of these states do so under a comprehensive statute which provides coverage for all or almost all of the state and local public employees in the jurisdiction. The remainder of these states provide collective bargaining rights for a specialized group or groups of public employees. Twenty-seven states have boards or commissions established to administer their public employee bargaining law(s).

Five states provide some coverage, including grievance procedure, through court and attorney general opinions. Six states do not have any coverage of employees by state-wide legislation or decision. Two of these states have had their broad public employee statutes found unconstitutional. It should be noted that *de facto* bargaining exists in some of these states and in other states for employees not covered by legislation. Under this panoply of legislation and other facilitative activity, considerable unionization and collective bargaining has taken place.

At the state and local level, more than 4.7 million employees belonged to public employee unions or associations in 1976. Bargaining units existed in 41 state governments and more than 9,000 local governments. These bargaining units included some 4.4 million state and local employees. The vast majority of bargaining units were engaged in bilateral collective bargaining, or collective negotiations as some jurisdictions prefer to term it, while meet and confer arrangements were in effect for less than one-quarter of organized public employees. Fire fighters reported over 70 percent of their number organized. Teachers were also among the most heavily organized with some 64.2 percent of employees of independent school districts organized.[1]

At the federal level, as of November 30, 1977, the Civil Service Commission reported 1.2 million non-postal service employees in exclusive representation units. Eighty-nine percent of the organized federal employees are under agreement, which translates into 52 percent of the federal work force covered by union agreement. In the postal service, about 572,000 employees or 88 percent of all postal service employees are in collective bargaining units. Total federal sector union and association membership amounts to 1.3 million.[2]

Thus, some six million public employees are organized. The figure represents approximately one-half of all full-time public employees and thirty-nine percent of all public employees. Indeed, growth in the public sector has provided most of the numerical growth in the ranks of labor. Public employees are now one out of four of all organized workers in the United States.

As might be expected, considerable discussion has taken place over the proper forum for public employee collective bargaining. At the state and local level, many union leaders have supported coverage of state and local employees under the National Labor Relations Act. Specific legislation has also been advocated. In some cases, a single law was advocated as a uniform umbrella. Others argued for a minimum federal standards law. Under the former, uniformity and completeness of coverage would be assured. Under the latter, the states would be free to enact or not enact legislation, but the legislation would have to contain specific content as a baseline with permissible variation for other items. By and large, state and local officials have preferred fully decentralized autonomy with regard to collective bargaining rights for their employees.

This position received considerable support in a 1976 Supreme Court decision. In *National League of Cities et al. vs. Usery*, the Court held that Congress did not have the power to extend the minimum wage and maximum hour provisions of the Fair Labor Standard Act to employees of the states or their political sub-divisions.[3] Many authorities believe this decision forecloses, for the immediate future, the likelihood of any preemptive federal statute being enacted for state and local employee collective bargaining. Certainly, efforts to that end have withered.

No Man's Land

Mirror image to the problem of preemptive federal legislation is the problem of employees who are excluded from both federal and state coverage. The National Labor Relations Board has declined jurisdiction over private sector employment where there has been an intimate connection between a government and a private employer that is performing a public service on behalf of the government. Refusal of the National Labor Relations Board to assert jurisdiction in such instances eliminates collective bargaining rights for those employees unless a state law or local ordinance grants such rights to them. Some state laws, like that of New York, grant bargaining rights to private sector employees who do not fall within the jurisdiction of the National Labor Relations Board while in other states, such as Michigan, the public sector labor relations statute has been interpreted as extending to employees of the private company that is performing public services.[4]

The question of whether employment is subject to state or federal agency jurisdiction becomes more confused when a service is performed by a joint enterprise consisting of a public and private employer. The standard applied by the National Labor Relations

Board is that it will assert jurisdiction over a private company performing a public service if the public employer does not exercise substantial control over the labor relations policies of the private company.[5]

Organizations and Membership

Public employees have been a prolific source of membership growth for unions active in the public sector. The public employee unions and associations have been the beneficiaries of much of this growth. Table 1 lists the principal national organizations which concentrate on the public sector.

TABLE 1

Membership of Public Sector Unions and Associations

ORGANIZATION	MEMBERSHIP
National Education Association, Independent	1,470,000
American Federation of State, County and Municipal Employees, AFL-CIO	648,000
American Federation of Teachers, AFL-CIO	444,000
American Federation of Government Employees, AFL-CIO	300,000
American Postal Workers Union, AFL-CIO	249,000
National Association of Letter Carriers, AFL-CIO	232,000
International Association of Fire Fighters, AFL-CIO	172,000
Fraternal Order of Police, Independent	147,000
National Federation of Federal Employees, Independent	100,000

Source: U.S. Department of Labor, Bureau of Labor Statistics, Directory of National Unions and Employee Associations, 1975.

Most of the organizations listed above have shown dramatic membership growth following the organizing drives of the past two decades. Additionally, there are smaller national organizations and a variety of state and/or local organizations which hold bargaining rights for public employees. Finally, many of the conventional craft and industrial unions have been active in the public sector. Public employees have been organized by Teamsters, Auto Workers, Laborers and Service Employees among others. In point of fact, the Public

Employee Department of the AFL-CIO lists approximately 30 international union members of the department. Included among them and illustrative of the diversity of organizations in the public sector are the following unions:

International Chemical Workers Union
Communication Workers of America
International Union of Electrical, Radio and Machine Workers
International Brotherhood of Firemen and Oilers
Laundry and Dry Cleaning International Union
National Maritime Union
International Union of Operating Engineers
Transport Workers Union of America
International Typographical Union

Despite the large number of unions active in the public sector, membership is concentrated in the organizations listed in Table 1. Membership data here are for the year 1975, but the unions and associations listed have informally reported membership growth since 1975. The American Federation of State, County and Municipal Employees, AFL-CIO, in particular, has been growing at a rapid rate. Observers believe AFSCME has been adding as many as 1,000 members per week. Recently, the New York Civil Service Employees Association affiliated with AFSCME; CSEA represents 375,000 employees in New York State and claims 260,000 dues-paying members working in state, county and municipal government in New York.[6] As a result, AFSCME membership is now more than one million, making it the largest union affiliated with the AFL-CIO.

Many observers conclude that the rapid growth of public employee unions has not resulted in corresponding power within the ranks of organized labor. Special groups, e.g., teachers and postal workers, have long been recognized as having legislative influence at state and federal levels respectively, but there has been no corresponding translation of size into a stronger voice within the labor movement. It appears inevitable that this situation will change over time. One frequently discussed potential merger, that of the American Federation of Teachers and the National Education Association would be likely to hasten this process. The resultant organization would have a membership of almost two and a half million.

COMPARISON WITH PRIVATE SECTOR

Sharp differences of opinion exist as to the degree of variation or similarity between public sector and private sector labor relations. In

this section, the issues in the discussion are reviewed. Certain of the issues will be covered in greater detail later.

Doctrine of Sovereignty

For many years prior to legislation permitting public employee bargaining, the doctrine of sovereignty dominated the analysis. In its pure form, the sovereignty doctrine held that the state as sovereign had the right to determine the wages, hours and working conditions of its employees. This was not only a right but a duty and was to be considered non-delegable. Delegation, it was argued, constituted a shirking of the duties and responsibilities of elected public officials. However, inherent in sovereignty is the notion that the sovereign, under properly controlled conditions, may delegate some authority. In fact, the vast majority of public employee bargaining laws have been held to be consonant with a proper delegation of authority. It must be noted that ultimate sovereignty continues to reside with elected officials, and they are free to legislate changes in the rules under which collective bargaining takes place. Indeed, the privilege may be withdrawn in whole or in part.

Variety of Legislative Coverage

Although some private sector differences do exist, e.g., the Railway Labor Act and the 1974 health-care amendments to the National Labor Relations Act, the private sector picture is essentially one of uniform coverage. Not so with the public sector. A wide variety of approaches has been adopted by the states and the federal government in their handling of public sector labor relations. "Experimental laboratories" is a commonly used expression to describe public sector variability among the states.

Inexperience of the Bargainers

Neutrals associated with public sector labor relations and the parties themselves have reported unusual approaches and outcomes reflecting inexperienced public sector relationships. Most authorities agree, however, that public sector bargainers are engaged in telescoping the learning time of private sector bargainers. Public sector bargainers are becoming increasingly experienced and professional. On-the-job training and specialized programs have been of great assistance in this regard.

Bargaining Unit Determinations

As in the private sector, legislation usually spells out criteria for the determination of appropriate bargaining units. One sharp difference is that some public sector legislation goes beyond criteria and predetermines the configuration of bargaining units for at least some of the employees covered by the legislation.

Scope of Bargaining

This important area is in flux and shows both significant differences and similarities between the sectors. The private sector operates basically under National Labor Relations Board determination as to which bargaining subjects are mandatory, permissible or illegal as they relate to wages, hours and working conditions. Federal employees operate under a limited bargaining mandate in that key monetary items are not among the subjects of bargaining. At the state and local level, legislatures have usually reserved matters of managerial policy to management. Definition of policy and nonpolicy items has caused considerable difficulty, particularly in the case of organized professional bargainers who demand a voice in the manner in which their profession is to be practiced.

The scope question has been made more complex by the existence of parallel civil service merit system rules, education codes and the like. Often, in framing legislation, too little attention was paid to the interface between bargaining and these systems or codes. Case law has been resolving some of the difficulty as has legislative review, resulting in a sharper definition of the areas of primacy. There is little question but that unions and associations see collective bargaining or collective negotiations as the operative force for organized employees, and they frequently advocate limiting civil service activity to hiring standards, coverage of the unorganized and management assistance in collective bargaining.

Arbitration of both rights and interest presents special scope problems in the public sector. Although arbitrability is not an uncommon defense in private sector grievance arbitration, it is much more common in the public sector. Management rights appears as the basis for defense in both sectors, but public sector employers often relate the question to potential conflict with legislation or civil service systems. Interest arbitration in the public sector introduces additional scope difficulties as boards and/or neutrals are called upon to determine what may be arbitrated.

Overall, the question of scope in both bargaining and arbitration is more complex in the public sector than in the private sector. Legislation and court decisions have introduced limitations on scope but the scope of both bargaining and arbitraton is expanding in the public sector in practice. The parties appear willing in a growing number of relationships to emphasize problem solving. Nevertheless, scope of bargaining must be counted as a significant area of difference between the two sectors.

Multilateral Bargaining

Multilateral bargaining has been defined to include a variety of circumstances. Basically, it refers to the phenomenon that individuals or groups not in the position of primary bargainers, seek to influence the bargainers or are approached by the bargainers to affect the outcome. Thus, community groups organize to lobby the bargainers toward an outcome satisfactory to their interest. The parties at the bargaining table may try to influence public officials controlling funding for the activity.

Multilateral bargaining confronts the question of who is the employer. Often the nominal employer may have administrative charge of the activity but must seek funding from another group. It is inevitable that bargainers attempt to influence key individuals, or that elected individuals themselves feel constrained to interfere in the bargaining. The intervention may be informal, or in a crisis highly formal and visible. Multilateral bargaining takes many forms reflecting organizational reality in the public sector. Multilateral bargaining also raises the question of the public interest. A recent study of public interest in governmental labor negotiations illustrates the problem of identifying public interest. The study noted:

> ...with one or two exceptions, those groups that got involved in the bargaining process represented special interests and not the public interest. They did not represent the general public even in those few cases where the group actually was a public interest group, in the broad sense of having concerns beyond the immediate special interest of the group.[7]

Market Constraint

Early public sector literature pointed out that many public officials found it easy to agree with their newly unionized employees.

Frequently the employees had a good case for improvement of salaries and benefits. Furthermore, they constituted a sizeable electoral bloc of great influence.

Increasingly, public officials and their representatives have achieved sophistication in bargaining. They have expressed concern about the lesson of the private sector. As they perceive it, many industrial companies gave away too much of their managerial flexibility in bargaining. In addition, the taxpayer revolt has made it desirable for public officials to take a harder stand against the demands of their employees if they wish widespread community support.

Uniqueness of Service, Essentiality and Strikes

Public employee services are frequently not replicable. In some cases the services are essential and their withdrawal can bring a community to its knees. As a result, public employee strikes were generally outlawed. However, strikes took place despite legislative prohibitions. Some authorities concluded that the strike could perform a useful function. Thus a few states now provide a limited right to strike for public employees. Overall, however, the public employer has found the strike illegal, and considerable attention has been paid to the appropriateness of sanctions against strikes.

In sum, although the parties engage in apparently similar activities in both private and public sectors, there are considerable differences to be understood. The variety of circumstances in which they operate, the essentiality of many of the services, unique problems over scope of bargaining, limitations on the right to strike and extensive multilateral bargaining suggest that the public sector is a special case within the general system of collective bargaining.

At the same time, it should be noted that some of the differences appear to be narrowing. The scope of bargaining is widening, better legislative financial planning is placing more onus directly on the bargainers, the parties are developing professional bargaining expertise and the right to strike is being extended. The direction of change in the public sector has been toward greater similarity with the private sector.

STATE AND LOCAL BARGAINING

Agency Structure

No consensus exists as to the proper form of agency structure for the adminstration of public sector labor relations. At the state level, there are many permutations and combinations of organization

structure. The tasks to be performed fall into two broad categories: (1) adjudicatory--determinations in representation and unfair labor practice cases, and (2) neutral--the provision of mediation, fact-finding and/or arbitration services.

Unit Determination

Unit determination or the groupings of public employees for the purpose of representation is a complex and important topic. The nature of the unit selected as appropriate by a board or commission may well predetermine the likelihood of success in a representation election. The breadth of the unit may also have important implications for bargaining success.

Boards and commissions are usually given some guidance in enabling legislation as to the criteria to be followed in unit determination. These criteria reflect experience under the National Labor Relations Board and refer to such factors as compatability of duties and working conditions among members of a bargaining unit, location, desires of the employees, history of bargaining and employer structure. Certification of the appropriate bargaining unit may be a prerequisite for valid bargaining in the public sector.

Although administrative agencies generally have some latitude within listed criteria to determine bargaining units, some states have decided to specify the bargaining framework in their statutes. Thus, Hawaii lists eight mandatory and five optional units based on broad occupational groupings. Employees in optional units may either have their own units or opt to be part of one of the eight mandatory groupings. Wisconsin limits collective bargaining to fourteen occupation based units.

The rationale expressed in the Wisconsin law is the desire to avoid over fragmentation of units. This same goal is explicitly present in a number of other state laws, e.g., Alaska, Kansas, Pennsylvania, Maine and Vermont. In an attempt to avoid fragmentation, some states specify that the extent of existing organization may not be determinative when it does not balance the need to avoid fragmentation. Some states carry this fragmentation issue to its logical conclusion by indicating that the state, when it is the employer, will bargain on a state-wide basis. Illustrative here are Pennsylvania and Illinois. In Pennsylvania, some state bargaining takes place on a multi-unit basis in order to create uniformity with regard to personnel benefits and practices.

Many other criteria exist to guide public sector boards and commissions. One interesting provision is found in the New York State

Taylor Law. The concern that negotiators enjoy the power to consummate bargains, a frequent public sector problem where administration and financing may be separate, is covered as follows:

> The officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment upon which employees desire to negotiate; and the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.[8]

In sum, considerable unit determination guidance is offered by statute to public sector boards and commissions. At times, this guidance takes the form of specific unit definition or strong stricture to avoid fragmentation or to construct units on a state-wide basis. While considerable latitude for administrative judgment remains for most public sector boards and commissions, the overall thrust emphasizes the building of rational units from the point of view of employer, employee and the public.

Interest Disputes Settlement

Disputes over negotiating the terms of agreements, or interest disputes, typically go to mediation when impasse has been reached. Impasse is usually defined as the inability of the parties to settle within a given number of days from the start of bargaining and/or the budget adoption date. The role of mediation is to bring the parties together on their own terms. Most states with comprehensive public sector laws make available professional mediation services on a no-cost basis to the parties. Staff efforts may be supplemented by mediators appointed on an *ad hoc* basis during periods of heavy case load. When state services are unavailable, the Federal Mediation and Conciliation Service provides assistance within the limits of its resources. On occasion, the parties will arrange to appoint and compensate their own mediator.

Mediation enjoys an excellent reputation and is usually an automatic part of any public sector labor relations law. Considerable attention has been given by most jurisdictions to the upgrading of mediation staff and improvement of mediation services. One major issue involving mediation concerns the public service role of the mediator. Some mediators emphasize that mediation is limited to bringing the parties together. Some authorities hold that the mediator should represent the voice of the public at the bargaining table by

insuring that settlements reflect public interest needs. At this juncture, mediation generally plays the more limited role.

Fact-finding may be invoked when mediation has failed to produce an agreement. Fact-finding is used far less frequently than mediation. Although fact-finding is required under some state laws, it frequently is an optional step. There are various forms of fact-finding, but the most common type is a form of advisory arbitration.

The fact-finder is expected to analyze the issues between the parties in order to provide them with a factual statement of issues, supporting information and the recommendations of the fact-finder. The recommendations of the neutral are, in theory, designed to help the parties to achieve a settlement. Should a settlement not ensue, the recommendations of the fact-finder may be publicized. The publicity is supposed to place additional pressure on the parties to settle their dispute.

Most analysts of fact-finding conclude that it has some limited utility in this traditional role. State agencies, however, increasingly urge their fact-finders to perform more of a mediatory role. The belief is that a change in mediator may be helpful in moving the parties away from their intransigent positions. Considerable success has informally been reported with this approach.

In most jurisdictions, the parties are free to go to interest arbitration on a voluntary basis for, at least, mandatory subjects of bargaining. Although voluntary use of interest arbitration takes place, it is by no means a common phenomenon. Compulsory arbitration, on the other hand, is found in an increasing number of statutes covering security forces.

There are many forms of compulsory arbitration in existence. Traditional compulsory arbitration, where the arbitrators may adopt a range of position on issues, may utilize a tripartite or an all public board. The historical charge that compulsory arbitration would prove addictive, thereby atrophying bargaining, has not proven to be the case for most bargainers. Concern over outcomes and/or a desire to replicate the pressures of the strike without the dislocation of the strike have led to numerous experiments with various forms of final-offer arbitration. Final-offer arbitration is a procedure in which the arbitrator is required to choose the last offer of one of the parties. In its pure form, final offer by package, the notion is that the possibility of losing the entire package results in rational stands bringing the parties close together. Some jurisdictions, fearing the potential trauma of win or lose all, have turned to final offer by issue for some or all items in dispute.

There are numerous variations of these and other dispute

settlement approaches in use. For example, there is experimentation with a combination of mediation and arbitration (med-arb). This process, as its name suggests, involves the use of an individual to mediate a dispute, but with the reserve power to arbitrate should mediation prove unsuccessful. There has been a renewal of interest in the choice-of-procedures approach. Massachusetts had early experience (shortly after World War II) with this system principally designed by Sumner Slichter of Harvard. In choice-of-procedures, the executive has a variety of choices available to use in settling a dispute. Since the parties are uncertain as to which choice will be made, they are theoretically impelled to settle. Early evaluation concluded that choice-of-procedure was ineffectual in Massachusetts for political reasons, but there is growing interest in reviving it for use in interest disputes. Some recent writers, however, question the viability of the premise that uncertainty impels settlement. A variant, recently adopted in New Jersey, provides the parties themselves with a choice of six alternate procedures.

Finally, those states which do not provide for the use of neutrals as the final step in interest disputes usually elect one of three alternatives. The strike may be used to settle disputes unless health, welfare or safety are threatened, the employer's final decision may terminate the dispute (at least formally), or the dispute may be referred to the legislative body charged with ultimate responsibility for the financing of the organization involved.

Strikes

Not very long ago public employee strikes were both rare and received relatively little support in concept. It was argued that the government, representing the public, had a right to expect that its employees would never withdraw their sevices. Further, the importance and difficulty of replicating essential governmental functions made the strike an improper weapon. Other means had to be found to achieve finality in bargaining. While this position continues to be dominant in the setting of public policy, contrary arguments are receiving increased attention. These hold that, except for essential security services, public employees must be allowed to strike if bargaining is to be meaningful. Although this position was limited largely to union advocates originally, it has recently received some support from public sector management. These officials believe the discipline of the strike will help to achieve more realistic settlements. Most states continue to outlaw the strike. However, a number of states have made public sector strikes legal either for most or selected groups of public servants. Alaska,

Pennsylvania, Hawaii and Oregon provide broad opportunity for public employees, except those in protective services, to strike. Generally, the strike can be enjoined if the health, welfare or safety of the public is threatened. At least five other states provide more limited strike rights for their public employees.

The strike record itself is instructive. Turning back to 1960, it is noted that there were 36 public sector strikes. A major jump occurred in 1966 when 142 public sector strikes took place. From 1969 on, public sector strikes have ranged between 329 and 490 per year. The trend has not been consistently upward. For example, the high point of 490 strikes in 1975 was followed by 377 strikes in 1977. Local government strikes have been the most frequent, and among these, the teacher strike leads in number of occurrences.[9]

Lost time figures are low. Public sector strikes typically average less than one tenth of one percent of scheduled working time lost. The figures obviously mask the importance of many public sector strikes. When it is a particular community's garbage that is not being picked up or whose children are unable to attend school, public sector strikes assume serious proportions. Thus, the visibility of public sector strikes has led to some popular clamor for strong sanctions.

The question of appropriate sanctions for the illegal strike is receiving increased attention. Early laws were extremely punitive calling for heavy fines, prison terms and strong institutional penalties including loss of representation rights. The Condon-Wadlin Act of New York (predecessor to the Taylor Law in that state) is illustrative. There has been some movement toward more limited penalties. Imprisonment of union leaders does not take place lightly. It has been learned that a prison term may make a martyr of a union leader and seriously impair the ability of the parties to work out a settlement. Excessive organizational fines have been set aside either as a price of settlement or when it became clear that there was no realistic way for the union to meet the fine. If there is a trend in sanctions, it is toward individual and organizational penalties which are severe enough to have some deterrent value without becoming unreasonably excessive. Attention has turned to such fines for individuals as loss of two days' pay for each day of illegal strike and forfeiture of check-off rights for the union.

Outcomes

Considerable concern has been expressed over the level of public sector compensation as a result of bargaining or arbitration awards. It was apparent that a number of early bargaining settlements or

arbitration decisions were received with great favor by public employees. In some cases, the relative lowness of public sector compensation was the precipitating factor. In other cases, public officials were apparently willing to be generous in return for expected political support.

Later settlements have tended to be less favorable. Indeed, one thoughtful analyst of the wage impact literature has concluded:

> Despite its diversity, the lesson of the wage impact literature is clear. It would be a mistake for public officials to assume that unions are simply another form of wage setting with no impact on the final results. Unions can raise wages in government. The diverse findings of the studies undertaken simply suggests that many variables influence the magnitude of the union effect, but that the details of the interrelationship are not precisely known. On the other hand — the general effects which have been measured are not huge, suggesting that despite some of the more pessimistic analyses of government unions and their effects, the management side has simply not acquiesced to wage demands without resistance.[10]

What is clear is that there is a significant taxpayer revolt abroad in the country. One of its most visible manifestations was Proposition 13 in California. In 1978, California voters approved a constitutional amendment which had the effect of sharply reducing property taxes in that state. Similar action has been taken in other states and locations. With or without Proposition 13-like referenda or legislation, public officials have learned that they are expected to be frugal with the taxpayer's money. The likely effect on bargaining will be sharp. If public officials are to restrain budgetary increases, they must inevitably take a harder line in bargaining. In that sense, public employee bargaining will take on more of the coloration of private sector bargaining.

The lack of profit motive for public officials will increasingly be replaced by a desire to keep costs visibly down in order to achieve political survival. The pressure to avoid bankruptcy by major cities is felt by both public officials and bargainers. A search for productivity improvement has begun in some jurisdictions and is likely to become more widespread in the years ahead in the public sector.

Contract Administration

As all practitioners learn, contract negotiations is the tip of the

iceberg. Contract administration — living under, interpreting and applying the agreement, is the core of the labor-management relationship.

Contract administration and consequent grievance procedure utilization left much to be desired in the early days of public sector labor relations. Agencies and unions had limited experience, and their personnel were frequently new to the task. It took a while before sizeable public agencies had their own industrial relations specialists on staff. Public sector unions grew rapidly, and field personnel were often inexperienced in servicing their constituents. Labor relations training became an important matter. In-house and outside training programs became and are important in building the labor relations expertise of public sector actors. A good amount of this training takes place under the auspices of the Inter-Governmental Relations Act. As in the private sector, attention is being paid to the needs of line officials and union shop stewards.

Either on a negotiated basis, or as required by law, grievance procedures increasingly provide for arbitration as a terminal step. Both the parties and the arbitrators approached their new tasks somewhat warily. Public sector grievance arbitration lacked the acceptability it enjoyed in the private sector. As mentioned earlier, potential conflict with other laws and administrative codes required difficult arbitrability determinations as well as substantive applications. It was perhaps inevitable that the relative finality of private sector grievance arbitration has not been enjoyed in the public sector. Appeals to the courts have been common (more frequently from the employer side). Nevertheless, the use of grievance arbitration has grown and appears likely to become a stable part of public sector labor relations. As a concomitant, the parties and/or legislatures, guided by court decisions to a degree, have begun to identify the role of public sector grievance arbitration. Much of the task remains to be accomplished.

Federal Employees

Attempts to organize federal employees date back to the nineteenth century. These efforts were frequently greeted with managerial hostility. At the start of the present century, postal workers began to develop lobbying effectiveness. Presidents Taft and Theodore Roosevelt responded by issuing what became known as "gag rules." That is, federal employees were effectively prohibited from seeking to affect legislation. Following a campaign by the American Federation of Labor, Congress enacted the Lloyd-La Follette Act in 1912. This law recognized the right of postal employees to join unions, provided the

unions did not advocate the right to strike, and lobbying was permitted as a legitimate union activity. Although the law was addressed to postal employees, its tenets were extended to federal employees generally.

Postal unions grew and enjoyed a reputation for success in lobbying efforts. Other federal unions were less successful, but some organization, probably less than 10 percent of the universe, took place among classified service and wage employees. Some federal agencies were supportive of their employees' attempts to unionize and negotiated agreements with unions representing their employees. The Tennessee Valley Authority was a leading example. Nevertheless, until 1962, federal employees lacked a clear right to engage in collective bargaining.

The year 1962 must be considered the watershed year for federal employees. Following a favorable report by a task force headed by then Secretary of Labor Arthur Goldberg, President John F. Kennedy issued Executive Order 10988 on January 17, 1962. The Order provided limited bargaining rights for federal employees. Prime matters of wages and fringes were reserved for congressional action. A hodge-podge of units including informal, formal and exclusive was found to be permissible. Unions were not permitted to strike, and the highest form of union security available was the check-off. Grievance arbitration was limited to an advisory role. Despite the many limitations, federal employees responded by widespread unionization.

Following experience under the Order, a Civil Service Commission advisory committee recommended expansion of federal bargaining rights. This was accomplished by the issuance of Executive Order 11491 by President Richard Nixon in 1969. This order created a high level Federal Labor Relations Council to handle policy problems. A Federal Service Impasses Panel was established to work with the parties in the event of disputes in negotiations. The office of Assistant Secretary of Labor for Labor-Management Relations was established to handle representation matters. Secret ballot elections were mandated, and emphasis was placed on exclusive jurisdiction for bargaining agents. Binding grievance arbitration (subject to review) was permitted. The executive order thus amplified representation rights for federal sector unions.

Succeeding executive orders further improved the bargaining situation for federal employees. In 1971, President Nixon issued Executive Order 11616 which required negotiated grievance procedures in subsequent contracts and strengthened the bargaining role of union representatives. President Gerald Ford expanded the scope of bargaining when he issued Executive Order 11838 in May 1975. The order made agency regulations subject to negotiations unless the agency could show a compelling need to exclude an item from the negotiating

table. In addition, changes in personnel policies were designated as mandatory bargaining subjects even though a contract might be in force.

Public Law 95-454, effective January 1, 1979, moved the federal sector from an Executive Order system to one where bargaining rights are codified into law. The two principle functions of the law are to reorganize the Civil Service Commission and to consolidate federal labor relations functions into a single agency. The Civil Service Commission was replaced by an Office of Personnel Management and a Merit System Protection Board.

A new Federal Labor Relations Authority (FLRA) was created to bring together the functions previously performed by the Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations. The FLRA is composed of three full-time members appointed by the President with the advice and consent of the Senate. A general counsel, also appointed by the President with Senate confirmation, presents unfair labor practice complaints before the Authority. The Federal Service Impasses Panel is continued within the Authority to resolve negotiating impasses between federal employee unions and agencies.

Despite scope of bargaining limitations, federal sector activity has been important. It has provided a growing body of collective bargaining rights for federal employees and has served as a policy model in encouraging states to extend bargaining rights to state and local employees.

Postal Service

As indicated above, postal workers have long been heavily organized and were effective in lobbying activity. As federal employees they came under the executive orders and engaged in the limited bargaining permitted under these orders. The situation changed dramatically when President Richard Nixon announced a plan for postal reorganization late in 1969. The plan made no provision for postal worker salary increases. A walkout of mail workers began in New York City in March 1970 and spread to other large cities. The strike continued despite injunctive action by the federal government and the declaration of a national emergency by President Nixon. National guardsmen and reservists were called in to move the mail.

Congress immediately began debating a postal bill providing for postal reform, immediate increases for postal workers and establishment of a new industrial relations system for employees of the United States Postal Service. With this as background, postal workers

began returning to work and by March 25, 1970, the strike was effectively over.

Negotiations between postal workers and the government continued. By April 19, 1970, agreement had been reached on a plan which was submitted to Congress and subsequently adopted. Among the principle features of the new industrial relations system for postal workers was the right to negotiate over pay and working conditions in essentially the same manner and with the same bargaining content present in the private sector. The postal workers were no longer federal employees as such, but came under the aegis of the United States Postal Service, a semi-autonomous federal corporation. Of considerable importance to the workers was the fact that bargaining impasses were to be resolved by binding arbitration. This provision has been invoked twice since the passage of the postal reform package in 1970.

Thus, the first strike in the then almost 200 year history of the post office led to broad bargaining rights for postal workers. Sharpening of bargaining structure has taken place with the jointure of a number of postal unions into the American Postal Workers Union. This union and the National Association of Letter Carriers are now the two dominant unions in the field. Both postal worker unions and postal managements have pioneered in the use of expedited arbitration as the terminal step of the grievance procedure.

CONCLUDING STATEMENT

Public sector labor relations has grown faster than the expectations of most observers. Indeed, public sector growth has been the leading edge of new activity for the labor movement as a whole for the past two decades. Diversity in approaches to labor relations at the federal, state and local levels has been rich. Much experimentation has taken place with regard to design of bargaining units, determining the scope of bargaining and handling inevitable bargaining impasses.

Considerable debate has occurred over the desirability of a uniform labor relations statute for public employees. Of late, a new tone has entered the debate. Questions have arisen on the wings of the taxpayer revolt over the appropriateness of continuing to adapt the private sector model of collective bargaining to the public sector. Some observers believe a maturation is taking place which is leading to a healthy counterpart public sector bargaining system. Others believe a much more limited system of public employee representation rights is required if the public interest is to be protected.

The remaining chapters of this book provide the background

and information needed to understand the volatile public sector. The data and analysis will be useful to new practitioners, their more experienced colleagues and all those engaged in shaping the future of public sector labor relations in the United States.

5

SOCIAL OBJECTIVES AND RIGHTS OF EMPLOYEES AND THEIR REPRESENTATIVES

*James P. Kurtz**

The foregoing chapters have outlined some of the legal doctrines and the obstacles that had to be overcome before there was a recognition by government that public employees have the same constitutional and human right of free association, permitting them to bargain collectively over their employment conditions, as employees in the private sector. This chapter is a further inquiry into the social objectives achieved by the development of statutory and other law giving public employees the right to organize and bargain collectively. It analyzes some of the means utilized to implement the laws. Obviously, there is a wide range of social objectives depending upon the law as it develops from state to state, and even within a particular state the objectives of various laws are not necessarily harmonious or consistent with each other. In this regard, an historical perspective is essential.

For at least the past 20 years the most rapidly expanding sector of organized labor has been in public employment. It is also now generally accepted among public officials and administrators, albeit sometimes reluctantly, that there is wisdom in allowing public employees participation in the decisions affecting their terms and conditions of employment. The rapid expansion of the number of public employees as a percentage of the entire work force, and the fact that government has become a major source of employment within the total labor force, has helped to soften attitudes against such social change. Concurrent with recognition of public employee rights has been general acceptance of the fact that government is not just another industry, and that special approaches in public sector labor relations are necessary.

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SOCIAL OBJECTIVES OF PUBLIC SECTOR LABOR RELATIONS LAWS

The most basic objective underpinning public employment collective bargaining laws is to ensure the right of employees to organize to protect and promote their employment interests. These rights were solidified once and for all for private sector employees by the passage of the National Labor Relations Act (NLRA) in 1935, specifically Sections 7, 8 and 9 of the statute. There are many philosophical and sociological bases for the granting of such rights, which will not be analyzed in depth here, but it should be noted that the recognition of this right is a giant step from the days not too many years previously when the organization of workers was looked upon by many courts as a conspiracy of a criminal nature and punished as such. In the public sector collective bargaining has had to overcome a number of legal hurdles, such as the allegations that it is irreconcilable with the notion of sovereignty and that public employees owe extra loyalty to their governmental employers. These objections in large part have been slowly overcome by the courts, but extension of these rights to public employees did not begin in earnest until the mid-1960's.

Another important social objective in collective bargaining law is to assure public employees of their free choice of a collective bargaining representative without interference by the employer. Stated another way, these laws were designed to prevent imposition on the employees of an unwanted, and often ineffective, bargaining agent which might be tempted to enter into a "sweetheart" arrangement with the employer. The corollary of this social objective is the insurance that employees will have effective representation by a local organization that will not be dominated or controlled by the employer or by outside forces.

In order to effectuate the objectives of free choice of a bargaining representative and effective representation, most collective bargaining laws, or the administrative agencies established by the laws, provide for a system of choosing bargaining agents by means of representation elections, which procedures are discussed in more detail in following chapters. It is important to note that these representation procedures were conceived on the democratic principle followed in elections in the political arena in this country; the majority vote decides the issue. In some jurisdictions a vote of the majority employed in the particular bargaining unit is required, rather than merely a majority of those voting. As applied to representation elections, the majority rule principle results in the choice of an agent which represents for bargaining purposes and has obligations and responsibilities toward the

entire group or unit of employees involved in the elections.

With certain minor exceptions, federal and state statutes in this country have not provided for a members only, proportional, or other informal type of representation systems, but rather have endorsed systems based upon exclusive representation of all employees in a given bargaining unit, including dissenting employees. Here again, there are a number of weighty arguments favoring this approach which are not developed at length herein. It is generally felt that a system of exclusive representation is important for insuring a stable relationship between the employees and their employer in order to avoid or minimize internal disputes between factions within a given bargaining unit. These disputes are more likely to occur where groups of employees are represented by different bargaining agents, or where non-represented employees are contending with represented employees within the same bargaining unit.

Underlying all of the aforesaid social objectives is a conviction that labor relations statutes can help prevent interference with the operations of government by providing an orderly means of resolving disputes with public employees. As a general principle, strikes have never been recognized as a legal means of redress for public employees. Labor relations legislation which grants organizational rights to such employees is often the reciprocal to either concurrent or previous legislation or case law explicitly denying public employees the right to strike. The lesson learned from the private sector, that the number and intensity of labor disputes — especially recognition disputes — are diminished by providing for the peaceful resolution of these disputes, was not lost on state legislatures. Legislatures, elected officials and other government administrators have come to see the wisdom of providing a democratic means of handling employee disputes and grievances over working conditions by adopting accepted and workable procedures from the private sector.

Not only did labor relations statutes aim for a smoother running government operation from the standpoint of the public employer, but that legislation could also serve the objective of enhancing the rights of employees under the First Amendment of the U.S. Constitution "to petition government for a redress of grievances." The Supreme Court of the United States has recognized in many cases and in various contexts that the First Amendment guarantees certain rights to collective activity on the part of employees, both public and private. State public employment relations laws structure and facilitate the exercise of these basic rights guaranteed by the First Amendment. Further, the relatively large concentration of ethnic minorities, black workers, and women in public employment has created pressure to eliminate discrimination by

employers based on race, religion, sex or national origin. While prevention of discrimination is for the most part relegated to civil rights statutes, there is increasing recognition that there is an interplay between the elimination of discrimination and collective bargaining. Insofar as collective agreements promote equal and fair treatment of employees and eliminate some of the vices of the old spoils system, public employment relations legislation has a dimension that supplements the social objectives of civil rights legislation. On the other hand, collective agreements may attempt to protect present employees from perceived threats generated by the entry of minority groups into competitive employment.

Another special concern of labor relations legislation is the preservation of the integrity of what are perceived to be unique employment groups in public employment, such as skilled crafts or professionals. The impetus for preservation, undoubtedly, has come from those groups that have historically been organized for professional or similar purposes, as well as from public administration which may have its own preferences and ties to established organization. For example, in the highly organized fire departments in public and municipal employment there is recognition of the critical nature of that service to the citizens, and there is awareness of the unique problems of the departments, not only from the standpoint of determining bargaining units, but also in regard to working conditions and dispute resolution procedures.

Similarly, other employment groups, particularly teacher, police officer, and health care employees, have been the beneficiaries of special legislative consideration. The most obvious example of such special protections is the tenure laws that were applied to teachers before civil service legislation and subsequent collective bargaining legislation became a reality for public employees. It is obvious, however, that legislatures, courts, and administrative agencies encounter difficulties when attempting to balance the various laws that have had piecemeal development over a period of years. The enactment of collective bargaining legislation has supplanted and rendered obsolete much tenure and civil service legislation. There has been, however, resistance to the repeal of these laws by public administrators and leaders of public employees who have vested interest in their retention. Occasionally, this poses serious legal questions regarding the relationship of the various statutes to the duty to bargain.

RIGHTS OF ORGANIZATION

In each state or local jurisdiction it is important to ascertain the

legal foundation, usually statutory, which grants the right of public employees to organize for collective bargaining about their wages, hours and working conditions. As previously noted, the right to bargain collectively was not explicitly recognized in the English common law from which most of our law in the United States evolved. In most states, however, the desirability of recognizing that right has, in the past two decades, emerged in view of the growth of public employment and unsettled labor relations in the public sector, and has led to a number of either formal or informal solutions to the hiatus in the common law.

One solution, which has been necessitated by the absence of either statutory or case law granting employees the right to organize, has been informal recognition by a public employer of the right of employees to organize, which employer then meets with what is perceived to be the representative of the employees to work out common problems. In certain instances, the courts have acted on an *ad hoc* basis to implement such a right as a means of resolving a particular dispute. A further step is the recognition of such right by local ordinances, barring their prohibition or preemption by state law. A combination of state and local laws relating to collective bargaining rights is also possible but relatively rare.

A more sophisticated recognition of the right to organize is found in legislation enacted on a state level, either in the state constitution or by the enactment of labor relations laws for public employees by the state legislature. In view of the lack of the common law basis for the right of public employees to organize, most state constitutions contain no specific authorization although they do not usually prevent state legislatures from enacting public sector labor relations legislation. Thus, today the most common solution to the recognition of the right of public employees to organize is embodied in an increasing number of state laws, some of which are patterned after federal legislation governing the private sector. However, the differences from the federal pattern in the various states are significant, and each state tends to vary in important respects. For example, in regard to collective bargaining itself most states give the public employer the right to negotiate bilateral agreements with the representatives of the employees, but some have opted to provide that the employer need only meet and confer with the employee representatives leaving the final decision making entirely with the employing entity.

It is impossible and even dangerous to generalize in regard to the various state laws governing public sector labor relations. Each jurisdiction legislates in its own historical background and in consideration of other varying local conditions surrounding the passage

of the legislation. Also, the distinct nature of various professions or trades employed in the public sector, and the strength of their particular interest or lobbying groups, has led to a rather piecemeal development of state laws, some of which work at cross purposes with each other. Such well organized professional organizations as those representing teachers, police officers, and fire fighters have frequently succeeded in securing special legislative protections not accorded to other public employees. For example, compulsory interest arbitration statutes have been enacted for many police and/or fire bargaining units.

DEVELOPMENT OF LABOR ORGANIZATIONS

The right to organize requires the existence of a labor organization which is willing to undertake representation of the public employees in question, and which has access to the employees. Borrowing from rulings under the NLRA, any organization, association, or union (the terms are generally interchangeable for labor relations purposes) may represent a given bargaining unit as long as it is willing to undertake to do so regardless of its background or purpose of formation. Thus, for purposes of representation of public employees no distinction or restriction is placed upon whether the labor organization in question is an informal independent union, a professional organization, or an affiliated union. The type of union is frequently raised as an issue in police departments where employers are worried about representation by affiliated labor organizations. The courts generally give broad latitude to the free choice of the employees in these matters.

Most states define a "labor organization" or an "employee organization" in approximately the same way as does the NLRA (29 U.S.C. §152(5)), which states:[1]

> The term 'labor organization' means any organization of any kind, or any agency or employee representative, committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

The National Labor Relations Board (NLRB) and federal courts have broadly interpreted this definition to include groups of employees formed to deal with employers but which have not adopted constitutions or by-laws, elected officers, collected dues, or established eligibility rules. A temporary committee organized to represent

employees and collect dues is a labor organization, as is an employee-management committee which discussed smoking privileges, placement of additional timeclocks, and plant cafeteria problems. However, organizations formed solely as social clubs in which employees spouses and children are eligible for membership have been found not to be labor organizations if they do not present employee recommendations or grievances to the employer.

Public sector definitions which have followed that of the NLRA have similarly been given a liberal reading. The Michigan Employment Relations Commission has held that a bar association is a labor organization even though its by-laws did not list collective bargaining as one of its purposes. The Wisconsin Supreme Court has held that an association of attorneys is entitled to act as the collective bargaining representative for the attorneys employed by the City of Milwaukee, notwithstanding the city's protest that the attorneys were members of the city management team.

Although some public sector jurisdictions have followed the private sector definition of employee organization, a few have added some significant variations. In New York before an employee organization can be certified or recognized, the Public Employment Relations Board must determine that the organization does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such strike. The constitutionality of this requirement has been upheld by New York appellate courts. Also, in New York the Public Employment Relations Board has rejected a contention that an employee organization may not admit to membership private sector employees. The Board held that if the public employee members of the organization select their own negotiating committee and, without participation by private sector employees, ratify negotiation agreements, the organization is an employee organization within the meaning of the statute.

In Nevada, a public employer may not recognize an employee organization which has not adopted a no-strike pledge in writing, and the public employer may withdraw recognition from an employee organization which fails to present a copy of each change in its constitution or by-laws, or give notice of any change in the roster of its officers and representatives. The Wisconsin State Employment Labor Relations Act excludes from the definition of labor organization any group which advocates the overthrow of the constitutional form of government in the United States, or which discriminates with regard to terms or conditions of membership because of race, color, creed, sex, age or national origin. The Iowa Public Employment Relations Act

requires as a condition precedent to certification that the employee organization file with the Public Employment Relations Board a registration report accompanied by copies of the organization's constitution and by-laws. The organization must also file an annual report which includes its name and address and those of its officers, a statement of income and expenses, a financial audit, and a statement of the business and financial interests of the officers that conflict with their fiduciary obligations.

Representation campaigns often give rise to the question of whether the employer must permit union organization activities to take place on its premises. Given the public nature of government facilities (except for certain specialized facilities or parts of facilities such as hospitals or military installations), access to government workers is not the problem it is in private employment. Also, the development of public employee labor organizations is more frequently generated in the first instance by the employees themselves, rather than by the outside organizing efforts of large affiliated unions.

Historically, much of the initial or early organization of public employees was an outgrowth of fraternal or professional type associations to which the employees of a particular profession or trade belonged prior to the advent of collective bargaining. The most notable examples involve teachers, nurses, and police officers. As in the private sector, the earliest labor organizations designed to represent public employees were formed along craft or professional lines, one of the largest and more successful being the International Association of Fire Fighters. These craft and professional associations still tend to be among the strongest and most influential of the labor organizations representing public employees. This remains true despite the fact that many labor relations laws in the public sector maximize the size of bargaining units. Another important impetus for organization in the early stages of public employee unionism was by independent organizations formed by the public employees themselves. As public sector legislation has developed in scope and complexity, however, and as bargaining units have become larger and more comprehensive, independent or unaffiliated organizations have begun to give way to large affiliated labor organizations. Thus, today the largest single labor organization affiliated with the AFL—CIO is the American Federation of State, County and Municipal Employees (AFSCME), which is devoted almost exclusively to the representation of public employees. At least in part, the success of AFSCME is due to its merger, affiliation, or recertification with independent labor organizations or informal groups after the initial organizing of the public employees.

IDENTIFICATION OF THE EMPLOYER[2]

The variety of public and quasi-public entities which have been established to achieve numerous public purposes and their overlapping jurisdiction and statutory authority make the identification of the collective bargaining partner under a comprehensive labor relations statute somewhat difficult. Most jurisdictions granting collective bargaining rights to all public employees have broadly defined "public employer" to include municipalities, local governments, political subdivisions, school districts, public improvement or special districts, and a variety of miscellaneous public authorities, commissions, or benefit corporations exercising governmental powers under state law. Other states have passed more narrow legislation limiting collective bargaining rights only to the employees of municipalities, school districts, or public employers performing specific functions such as fire or police protection. In these latter statutes, the public employer is usually rather specifically defined. The public employer covered by appropriate state labor relations statute obviously is the entity that has the obligation to bargain in good faith with the exclusive bargaining representative of employees in an appropriate bargaining unit.

The identification of a public employer becomes more difficult where more than one branch of government is involved. In *Judges of 74th Judicial Dist. v. County of Bay*,[3] the Supreme Court of Michigan held that court employees were employees of the judicial district rather than the county government, even though the county government appropriated funds for the operation and maintenance of the district court. The Court held that the district court was an integral part of the judicial branch of government, and as a separate subdivision had full administrative authority over court personnel. A different result was reached when the Massachusetts Supreme Judicial Court held the state's public employee bargaining statute extended bargaining rights only to executive branch personnel and not to county probationary officers or other judicial employees.[4]

More complex problems involving the identification of the public employer arise where jurisdiction overlaps and one employer might be considered to be a joint employer with another. An example of a joint employer relationship between two separate and distinct public sector jurisdictions is illustrated in *AFSCME v. County of Lancaster*,[5] where the court held that a state department of welfare and a county department of welfare were joint employers of the county's welfare employees. The union filed a representation petition seeking to represent the county's public welfare employees. The court found that the state department is statutorily empowered to control most of the

important facets of labor management relations for county welfare employees. The court believed that the most crucial test for finding a joint employer relationship is the extent to which labor relations are under joint control. Because the state was so substantially involved in the labor relations of county employees, the court held that it and the county should be treated as one for personnel management purposes and for purposes of collective bargaining.

While the overlap of two public sector jurisdictions may give rise to a joint employer determination, the combination of a public and private employer performing services on behalf of the public employer creates a different set of problems. Recently, the NLRB in *Rural Fire Protection Co.*[6] declined to assert jurisdiction over the employees of a private company performing firefighting services for the City of Scottsdale, Arizona and surrounding communities. The Board believed that the employees were performing functions "intimately related" to municipal purposes. The Board did not examine whether the municipalities exercised substantial control over the labor relations policies of the private employer.

The refusal to assert jurisdiction in such instances eliminates collective bargaining rights for private sector employees unless a state or local law grants collective bargaining rights to such employees. In Arizona the absence of a public sector labor relations statute answers the question in the negative. However, in Michigan the state's public sector labor relations statute has been interpreted to grant collective bargaining rights to the employees of a private company performing county mental health services.

The problem of joint public and private employers arising under the NLRA in a state unlike Michigan may be mitigated by a recent decision of the NLRB in *National Transportaion Service Inc.*[7] holding that the intimate relation test stated in *Rural Fire Protection Co., supra,* would be abandoned. In this case the Board asserted jurisdiction over a private company performing school bus services for public school districts. The court noted that the "right to control" test is the proper method for determining whether it would assert jurisdiction over the private employer. Thus, where the public employer exercises no substantial control over the private company's labor relations policies, including determining wages, hours, and working conditions, the Board will assert jurisdiction. If such control does exist, the Board will not assert jurisdiction and the employees may have an opportunity to engage in collective bargaining under a public sector statute.

Although several states have been confronted with the problems of identifying the specific public employer which has the obligation to bargain in good faith, at least one state has established a conflict of

interest standard prohibiting certain persons from participating in collective bargaining negotiations. The Pennsylvania Public Employe Relations Act prohibits any person who is a member of the same local, state, national or international labor organization as the employee organization involved in bargaining from participating on behalf of the public employer in the collective bargaining process. The same bar applies to any person who has an interest in the outcome of the bargaining, which interest is in conflict with that of the public employer. A proviso allows such persons, if they are entitled, to vote on the ratification of a collective bargaining contract. This conflict of interest provision is designed to prevent persons who have interests in the negotiations from bargaining and maybe even processing grievances on behalf of the employer.

DEVELOPMENT OF BARGAINING UNITS

The general principle governing representation of any given unit of employees is almost always based upon the grant of exclusive bargaining rights to the majority representative of the employees in question. This form of representation must be distinguished from the forms of representation which are limited to members only or to a proportional non-exclusive type of representation by more than one labor organization. These forms are more common in European countries where unions are formally allied with competing political entities (e.g. communist and non-communist unions) and where legislation is more important than collective bargaining. The reasons for exclusivity or the majority rule concept include avoiding diffusion of negotiating strength, insuring that the benefits of bargaining are equally applied to all employees in the unit, and preventing rivalries among competing representatives of employees to the detriment of the employer. The grant of exclusive representation does not prevent labor organizations representing several different groups of public employees of a public employer from engaging in coalition bargaining. Nor does it prevent various groups of unions representing the employees of different public employers from attempting to bargain on a multi-employer basis. Coalition or multi-employer bargaining, however, is much less common in the public sector than in private employment. Aside from the fact that group bargaining tactics require the assent of both the employers and labor organizations alike, there is the obvious problem of a public entity delegating its responsibility for the labor relations of its employees to an agent representing various employers.

The principle of exclusive representation requires that a union represent the interests of all employees in the bargaining unit, even

those employees who for one reason or another do not side with the majority on a particular issue, or who may not wish to be represented at all. This principle of majority rule presents potential problems in regard to insuring that the rights of minorities and other protected groups are safeguarded and that other constitutional rights are not infringed upon. The development of public sector unionism from professional and trade associations, and the adoption of such private sector concepts as seniority, can lead to obvious civil rights problems. Creative thinking by both employers and labor organizations is needed to balance the interests of all employees in the bargaining unit both current and potential.

Even under the concept of exclusivity, individual employees have a constitutional right to address their public employer in an open meeting and express their views.[8] The Wisconsin Employment Relations Commission issued a cease and desist order against a public employer prohibiting it from permitting employees to appear and speak in meetings of a board of education. A teacher, not a member of the union, addressed the school board in an open meeting concerning an issue of union security - fair share arrangements. The union representing teachers opposed this procedure and filed a prohibited labor practice charge. The Wisconsin Supreme Court upheld a cease and desist order on the ground that the employee's statements constituted "negotiation" in derogation of the union's exclusive bargaining rights. The U.S. Supreme Court rejected this view in *Madison Joint School Dist. No. 8 v. WERC,*[9] and held that school teachers as citizens who are vitally concerned with school board proceedings have a right to address the school board in open meetings. The court held:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated — an issue we need not consider at this time — the participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or content of their speech.

Justice Brennan, writing a concurring opinion, noted that the Wisconsin Supreme Court was correct in stating that there is nothing unconstitutional about legislation commanding that in closed bargaining sessions the government body may admit, hear the views of, and respond to only the designated representatives of a union selected by a majority of its employees. According to Brennan, a state's concept of exclusive bargaining rights may constitutionally prohibit negotiations with individuals and minority organizations.

Even though individuals or representatives of less than a majority of the employees may appear in public meetings before public employers or enjoy consultation or meet and confer rights, some public jurisdictions have enforced the concept of exclusivity by preventing recognition or negotiation with rival groups, even prior to certification. Recognition or bargaining is generally prohibited in those instances where an exclusive representative has not been selected and a question of representation exists. The employer is, therefore, required to remain neutral until a representation election is held so that the representation rights of the competing organization may be determined.

Another problem affecting the development of labor organizations in public employment is the question of proliferation of units and overlapping bargaining units. One of the reasons for the widespread promotion of broad all-inclusive bargaining units is to prevent the development of a large number of small bargaining units among the employees of a given public employer. Not only may proliferation of units lead to ineffective representation of public employees due to the small size of the units and the union treasuries, but it presents even more serious problems for the public employer involved. Obviously, the more bargaining units a particular employer must deal with the more sets of negotiations it must engage in, leaving itself open to attempts by each of the labor organizations to justify its existence by obtaining some concession or benefit that has not been granted to the other organizations.

Not only are there managerial problems connected with having a number of labor organizations representing the employees of a public employer, but also problems involved with overlapping of bargaining units based upon various levels or grades of employees. Advancement in government employment has traditionally been accorded by setting up various pay grades based upon experience, tenure, educational background, and other factors which have become highly developed in various governmental civil service systems. These various levels of employment are usually based upon the expected proficiency of the employee and do not necessarily imply supervisory or managerial status, except in the limited sense of the more experienced employee

leading or guiding the less experienced. In setting up bargaining units there has frequently been the temptation to define the unit along occupational or grade levels, thereby resulting in different organizations representing various levels of employees or the same organization representing the levels in separate bargaining units. Further, in most jurisdictions supervisors are not placed in the same bargaining unit as non-supervisory employees. If supervisors are permitted to organize they are sometimes represented by the same organization as the non-supervisory employees creating further managerial problems and conflict of interest questions for the public employer. Other areas of concern by reason of organization along occupational levels are questions relating to promotions, the bargainability of promotional standards, and such things as transfer, layoff, and recall rights. Thus, some jurisdictions have found it preferrable to have all non-supervisory employees in one bargaining unit, and a separate unit (and often separate representative) established for all supervisory employees with certain limited exclusions based upon confidential or executive status.

UNION SECURITY

Once a labor organization is recognized as the exclusive bargaining agent of a group of public employees, its effectiveness and longevity frequently depend upon the traditional union security and check-off devices so commonly developed and utilized by private sector unions. The utilization of union security devices is a controversial and much litigated area both in public and private sector employment. Experience has shown, however, that the absence of security devices can cause serious factional problems among the employees in the bargaining unit, and tends to promote militancy in the labor organization which must remain concerned about its status among the employees in its bargaining unit.

The most common union security devices are the check-off clause used as a means of collecting dues by payroll deduction for the union representing the employee, and a union security clause providing for maintaining membership in, and support of, the labor organization representing the bargaining unit. Following the principle of exclusive union representation which underlies most private and public sector unionism, check-off clauses have not presented any serious problems and are usually granted to the exclusive collective bargaining agent of the employees. Only in relatively rare instances have there been arrangements whereby public employers agree to check-off dues or fees for a variety of organizations depending upon the designation of the

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public employee. Since check-off of dues or fees almost always depends upon a written or formal designation by the employee granting such check-off, this right of a labor organization rarely presents serious legal problems.

However, the various types of union security clauses have and continue to cause legal problems. There is, first, the traditional union security clause that requires an employee to become a member of the labor organization representing his or her classification as a condition of continued employment. The closed shop clause requiring membership prior to employment is virtually nonexistent, since this form of union security is banned under the NLRA for the private sector. There are also lesser types of union security, the most common being the agency shop or fair-share agreement which does not require an employee to become a member of the labor organization, but does require, as a condition of employment, the payment of the equivalent in dues or fees uniformly charged members by the bargaining representative. There are also various types of maintenance of membership security devices which usually require an employee to maintain his or her membership in a labor organization once he or she has joined, at least for the duration of the collective bargaining agreement in question. The varieties of union security are extensive and may pose additional problems for a minority of employees who for religious, idealistic, or other grounds do not wish to belong to or support the bargaining agent. Also, questions are frequently raised as to the extent to which union security devices can be utilized under existing statutory and constitutional provisions of the various states.

In 1977 the United States Supreme Court handed down its decision in *Abood v. Detroit Bd. of Ed.*[10] upholding the use of an agency shop clause in public employment insofar as the agency fees collected by the union are used to finance union expenditures for purposes of collective bargaining, contract administration, and grievance adjustment. The court, however, held that the freedom of association guaranteed under the First Amendment to the U.S. Constitution prevented the union from requiring the employees to contribute to support idealogical causes that they oppose, and it placed the burden on the union to designate those expenditures that are unrelated to its duties as exclusive bargaining representative. In upholding the agency shop provision, the court majority clearly held that the interest of public employees under the First Amendment to the U.S. Constitution in not being compelled to contribute to the costs of exclusive union representation are no stronger nor different from similar interests of private employees, and that "no special dimension results from the fact that a union represents public rather than private employees." The

court reiterated the fact that the union in carrying out its duties as exclusive representative is obliged to fairly and equitably represent all employees in the bargaining unit, both union and non-union.

The problem surrounding union security should not obscure the fact that members of labor organizations have certain rights as members and incur certain obligations or duties as a result of such membership. Thus, for example, the exclusive bargaining representative may under its constitution and by-laws require ratification of any collective bargaining agreement reached and ratification may be limited to members of the organization, thereby eliminating from the ratification vote those employees who are not members in good standing. Also, to maintain its viability as an organization, a union has a right to demand reasonable loyalty on the part of its membership and can discipline its members for failure to abide by its internal rules and regulations, even to the point of levying fines or expelling an employee from membership. However, internal matters of the union are generally not permitted to affect in any way the employment status of the employee in question. Internal affairs of unions are generally unregulated by the administrative agencies charged with administering labor relations statutes; aggrieved employees must resort to internal union remedies if available, or to traditional contract remedies in civil court for any alleged violation of the union's own constitution or by-laws.

In conclusion, the rights of employees and their representatives in public employment tend to follow very closely the rights accorded private employees and their representatives developed under the NLRA and other federal law. While there was and is some controversy as to whether private sector labor relations principles should automatically be applied to public employment union organizations, it seems clear that the guiding principles for both groups of employees will be substantially similar, and that it will be the task of government employers and unions to develop relevant distinctions where circumstances dictate.

FOOTNOTES

1. This and following thre material written by Joel
2. This section was adapte
3. 385 MICH 710, 78 LRF
4. *Massachusetts Probati Administration,* 352 N.
5. 196 NEB 89, 92 LRRM
6. 216 NLRB 584, 88 LRI
7. 240 NLRB No. 64, 100
8. This and the followin written by Joel D'Alba
9. 429 US 167, 93 LRRM
10. 431 US 209, 95 LRRM

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THE NATURE OF THE DUTY TO BARGAIN IN GOOD FAITH

*Joel A. D'Alba**

THE DUTY TO BARGAIN IN GOOD FAITH UNDER STATUTE

The duty to bargain in good faith in the public sector arises out of the various statutes granting employees the right to form labor organizations, engage in protected, concerted activities, vote in representation elections, and collectively bargain. The nature of duty to bargain has been defined in several jurisdictions and ranges all the way from a pure meet and confer or consultation obligation to collective bargaining as it is known in the private sector under the National Labor Relations Act. Under the typical statutory scheme, a public employer may be compelled to bargain in good faith or meet and confer with the lawfully certified collective bargaining representative of its employees. In the absence of a state law or municipal ordinance authorizing an employer to bargain, state courts have either allowed public employers to negotiate collective bargaining contracts or prohibit it. Even where courts have allowed bargaining, its nature is undefined. Therefore, in most situations, the duty to bargain in good faith is created, shaped and enforced under a comprehensive labor relations regulatory scheme. The obligation is enforceable by filing unfair labor practice charges with an appropriate state labor relations agency having public sector jurisdiction. Thus, a public employer may be compelled to bargain in

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good faith or meet and confer with the lawfully certified or recognized collective bargaining representative of its empoyees.

Definition of Bargaining in Good Faith

The duty to bargain is created when an employee organization that is either certified by a labor relations agency or voluntarily recognized by the employer as the representative of employees in an appropriate unit requests that the employer bargain. The bargaining obligation is usually defined by statute and interpreted by labor relations agency and court decision. The bargaining obligation in the public sector may be divided into two broad categories — collective negotiations and meet and confer. State laws granting bargaining rights to public employees have followed both approaches. The collective negotiations model is used by states which have closely followed the pattern established in the private sector. These states have adopted or slightly modified the language of the National Labor Relations Act, Section 8(d).[1] This statue defines collective bargaining as:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to any proposal or require the making of a concession.

This duty has been interpreted to mean that:

> [B]oth sides...enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages, and hours and conditions of employment, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and the guide for adjustment of differences.[2]

Another court has held that the duty to bargain requires an:

> [O]pen mind and a sincere desire to reach an agreement in a spirit of amity and cooperation. The cases setting forth this obligation are many, and it is well settled that a mere formal pretense at collective

> bargaining with a completely closed mind and without this spirit of co-operation and good faith is not a fulfillment of this duty.[3]

This collective negotiations model has, according to Harry Edwards, been adopted by states intentionally so as to incorporate by reference private sector precedent.[4] Michigan is an example.[5]

While the collective negotiations model requires genuine attempts to reach agreement and reduce such agreements to writing, the meet and confer model, in its purest form, is precisely the opposite. States attempting to protect management prerogatives have rejected the private sector model on the ground that it would be overly permissive if applied without qualification to the public sector.[6] Meet and confer can best be defined as the:

> [P]rocess of negotiating terms and conditions of employment intended to emphasize the differences between public and private employment conditions. Negotiations under 'meet and confer' laws usually imply discussions leading to unilateral adoption of policy by legislative body rather than written contract, and take place with multiple employee representatives rather than an exclusive bargaining agent.[7]

The pure meet and confer approach emphasizing consultations and discussions only has been adopted in Alabama, California and Missouri.[8] The Missouri statute provides that representatives of the employer and the exclusive bargaining representative:

> [S]hall meet, confer and discuss such proposals relative to salaries and other conditions of employment...upon completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, or resolution, bill or other form required for adoption, modification or rejection.[9]

Obviously, this approach is substantially more limited than collective bargaining as it is known in the private sector.

Meet and confer has been interpreted by the Missouri Supreme Court as being substantially different from the private sector collective negotiations model. In *Missey v. City of Caboll,* [10] the court held that the meet and confer provisions:

> [D]o not purport to give public employees the right of collective bargaining guaranteed...to employees in private industry and in the sense that term is usually known with its attendant connotation of unfair labor practice for refusal by the employer to execute and adopt the agreement produced by bargaining...and the use of strike as a bargaining device constitutionally protected to private employees, but expressly denied...to public employees. The act does not constitute a delegation or bargaining away to the union of the legislative power of the public body...because the prior discretion in the legislative body to adopt, modify or reject outright the results of discussions is untouched. The public employer is not required to agree but is required only to 'meet, confer and discuss,'....The act provides only a procedure for communication between the organization selected by public employees and their employer without requiring adoption of any agreement reached.[11]

Modified meet and confer bargaining has been adopted by states which rejected the pure meet and confer model in an effort to grant collective bargaining rights to exclusive bargaining agents and to give them more authority at the bargaining table, but not as much as they would have under the private sector scheme. An example is the Kansas Teacher Collective Bargaining Act[12] which defines professional negotiations as "...meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement with respect to the terms and conditions of professional service."[13] The Kansas Supreme Court in interpreting this statue noted its difference from the meet and confer acts adopted in other states.

In *National Education Association of Shawnee Mission, Inc.*[14] the court held that the term "professional negotiations" requires meeting and conferring in a good faith effort to reach agreement. If the school board were merely required to meet and confer, under a pure meet and confer statute, there would be no need for the legislative mandates of good faith in a mutual effort to reach agreement. The court also held that the school board is required to reduce an agreement to writing and be bound by it. Thus, the court distinguished between meeting and conferring and meeting and conferring in good faith to reach an agreement which may be binding of the parties.

Yet another variation of the meet and confer model appears in statutes combining elements of both meet and confer and collective

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negotiations. The public employment bargaining law of Hawaii covering all state and municipal employees[15] requires the parties to meet at reasonable times, including meetings in advance of the employer's budget making process and negotiate in good faith with respect to wages, hours and other terms and conditions of employment which are to be embodied in a written agreement. However, the statute requires only consultation among the parties as to all matters affecting employee relations, except those already mentioned, including matters that are or may be the subject of a regulation promulgated by the employer or any personnel director and changes in any major policy affecting employee relations. A similar bifurcation of the bargaining obligation between collective negotiations and meet and confer is incorporated in the Maine Public Employees Labor Relations Act covering school board and municipal employees.[16] Bargaining is defined as the mutual obligation to meet at reasonable times to confer and negotiate in good faith with respect to wages, hours and working conditions and contract grievance arbitration. School boards shall meet and consult *but not negotiate* with respect to educational policies. Educational policies shall not include wages, hours, working conditions or contract grievance arbitration.[17] The Hawaii and Maine statutes embodying elements of meet and confer and collective negotiations are attempts at accommodating the management right to unilaterally determine fundamental policies and the industrial democratic principle of mutual determination of working hours and working conditions. Thus, the polarized positions on collective bargaining and consultation have been balanced in a modified meet and confer model.

Harry Edwards has noted that the end product of collective bargaining even in states which have comprehensive collective negotiations statutes may be nothing more than an agreement conditioned upon approval by an approriate legislative body. Under New York's Taylor Law,[18] any labor agreement between a public employer and a union must include, "in type not smaller than the largest type used elsewhere in the agreement," the following clause.

> It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefore, shall not become effective until the appropriate legislative body has given approval.[19]

Thus, the appropriation of funds or implementation of certain contract provisions may be subject to legislative action.

Some states have included in the duty to bargain an obligation to request funds from the appropriate legislative body. In New Hampshire, a state which apparently follows the collective negotiations approach, the obligation to bargain in good faith specifically states:

> [O]nly cost items shall be submitted to the legislative body of the public employer for approval. If the legislative body rejects any part of the submission, or while accepting the submission takes any action which would result in a modification in terms of the cost items submitted to it, either party may reopen negotiations on all or part of the entire agreement.[20]

The Connecticut State Employees Relation Act[21] requires the negotiators to reduce any agreement to writing and the public employer to request funds necessary to implement the written agreement within fourteen days of signing. The employer must also request legislative approval of any provision of the agreement which conflicts with a statute or any regulation such as those of the personnel board. If rejected by the legislature, the matter shall be returned to the parties for bargaining. Failure to submit the request for funds or approval of the contract provisions shall be considered a prohibited practice. The statute also prescribes time limits in which the legislature should act on the request.[22] The requirements to request funds in order to implement the agreement as well as provisions for further bargaining in the absence of legislative approval are obviously designed to prevent a public employer from failing to execute a contract's provisions.

The Vermont legislature and the Massachusetts Supreme Court have extended this concept by requiring a municipality to appropriate sufficient funds to either implement a written collective bargaining agreement or comply with a final and binding interest arbitration award. The Vermont Municipal Labor Relations Act[23] makes it an unfair labor practice for an employer "[t]o refuse to appropriate sufficient funds to implement a collective bargaining agreement."[24] The Massachusesetts Supreme Court interpreting the state's last and best offer arbitration act for police officers and fire fighters required a city to implement the award by appropriating sufficient funds.[25] The court in *Town of Arlington v. Board of Conciliation and Arbitration,*[26] held that the arbitration act makes arbitration awards final and binding on a legislative body. Under the statute the award must be satisfied by municipal appropriation. Therefore, the court required the town through its finance committee and town meeting to appropriate sufficient funds to implement the award of the arbitrators.

The obligation to bargain in the public sector ranges between collective negotiations resulting in signed and written agreements including requirements to request sufficient funds all the way to mere consultation. This duty to bargain or meet and confer established by statute in some states is enforced through the unfair labor practice procedures of appropriate state labor relations agencies. The mixture of statutory schemes clearly indicates that the public sector has not adopted the private sector bargaining model completely. There are several states which have not even enacted legislation allowing the public employer to recognize and bargain with representatives of its employees.

BARGAINING IN STATES WITHOUT PUBLIC SECTOR LABOR RELATIONS LEGISLATION

In most states which have not enacted any public sector labor relations legislation, public employers have been allowed to bargain collectively by court decision. However, the obligation is not defined by statute and, indeed, it cannot properly be characterized as an obligation. The public employers merely have a right to recognize and bargain with employee representatives. Accordingly, collective bargaining agreements in those circumstances have been held valid. In states without public sector labor relations statutes, bargaining can actually be shaped by the desires of the parties and may take the form of either collective negotiations, meet and confer or some variant of the two. Certainly, in these states there is no labor relations agency empowered to determine whether the obligation to bargain has been discharged in good faith.

Colorado is one of the states that has not enacted comprehensive public sector labor relations legislation. Its state supreme court has held that a school board's participation in collective bargaining is not *per se* an unlawful delegation of its statutory authority.[27] Although the court in an earlier decision held that a public employer cannot be compelled to arbitrate disputes arising from collective bargaining agreements,[28] the court noted that the school board and employee association had entered into voluntary negotiations, and that the public employer was not required to agree with proposals submitted by the employees. The ultimate decision regarding employment terms and conditions, therefore, remained exclusively with the board of education. The court held that such decision making cannot be abrogated or delegated, and in the absence of specific statutes allowing collective bargaining among

public employers and public employees, the school board could not be compelled to enter into collective bargaining. Further, even with voluntary bargaining, any agreement between the parties must not conflict with existing statutes concerning the governing of the state's school system. Thus, the Colorado court and others have held that public employers may engage in collective bargaining in the absence of a specific legislative grant to do so.[29]

Other states have held that a public employer cannot engage in collective bargaining with labor organizations in the absence of enabling legislation. The Virginia Supreme Court in *Commonwealth of Virginia v. County Board of Arlington County*[30] held that in the absence of the express statutory authority a local governing body could not recognize, negotiate or enter into binding collective bargaining contracts with a labor organization concerning the terms and conditions of employment. In this case a county board adopted employment relations policies providing for at least official recognition of labor organizations as the exclusive representatives of county employees, in the negotiation and execution of binding collective bargaining contracts. The county entered into a contract with a union. The contract was challenged by the Commonwealth which sought a declaratory judgment against the county board. The court held that no statute expressly or impliedly confers upon the county board the power to bargain collectively with labor organizations. Such legislative authority is necessary in Virginia. The court also noted the county board's collective bargaining policies seriously restricted the rights of individual empoyees to be heard by granting to labor unions a substantial voice in the board's ultimate right of decision in important matters affecting both the public employer-employee relationship and the public duties imposed by law upon the board.[31]

Although there may not be a statutory right to engage in collective bargaining, courts have held that public employees have a constitutional right to unionize, to petition, peacefully assemble and engage in free speech. However, there is no federal constitutional requirement that municipal governments engage in collective bargaining with the public employees.[32] Even though the employees may form and join a labor organization, there is absolutely no certainty that the employer will bargain, and there is no constitutional or statutory obligation to do so in the absence of appropriate legislation. Thus, public employees in a state such as Virginia may join labor organizations, but the employer has no authority to bargain or to recognize and bargain with the union.

Two states, Texas and North Carolina, have enacted a ban on collective bargaining in public employment.[33] It is against the public

policy of the State of Texas for public officials to enter into a collective bargaining contract or to recognize a labor organization, but the statute does allow public employees to present grievances concerning their wages, hours, conditions of work, individually, or through an organization that does not claim the right to strike.This provision is obviously designed to allow public employees to utilize their First Amendment rights to redress grievances. The statute also declares striking to be illegal and establishes penalties for any employee who strikes. Although Texas has banned public employment collective bargaining, a separate statute grants consultation or meet and confer rights to school teachers;[34] another statute provides collective bargaining rights for fire fighters and police officers and requires final and binding arbitration to resolve negotiation impasses.[35]

The provision of the North Carolina law prohibiting contracts between governmental units and labor organizations has been held constitutional because it is a valid expression of the state's public policy of prohibiting governmental units from entering into union contracts.[36] However, the statutory provision prohibiting public employees from joining unions was held to interfere with their constitutionally protected freedom of association.[37]

THE REGULATION OF NEGOTIATIONS IN STATES WITH PUBLIC SECTOR LABOR LEGISLATION

Time Limits for Commencement of Negotiations

Following the pattern established by the National Labor Relations Act's requirement of notice upon the parties and the Federal Mediation and Conciliation Service of the intent to terminate or modify an existing collective bargaining contract,[38] public sector jurisdictions have established notice provisions. However, the public sector notice provisions are generally longer than the 60 days required by the National Labor Relations Act and notice should be made prior to the last day on which a public employer may appropriate funds for the forthcoming fiscal year's operating budget. The Michigan Public Employment Relations Act[39] merely requires the parties to notify the Michigan Employment Relations Commission at least 60 days before the contract's expiration date of the status of negotiations. If the dispute has not been resolved 30 days after that notice, and a request for mediation has not been received, the commission shall appoint a mediator and subsequently appoint a fact-finder.

Other states require a request for bargaining to be made well in advance of the last day on which money can be appropriated. The

Rhode Island Policemen's Arbitration Act[40] requires a written request for collective bargaining concerning wages, rates of pay or any other matter requiring appropriation of money by any city or town to be delivered at least 120 days before the last day on which money can be appropriated by the city or town to cover the contract period which is the subject of the negotiations.[41] This 120-day notice provision has been strictly interpreted by the Rhode Island Supreme Court.[42] A police organization filing notice 119 days rather than 120 days before the last date on which appropriation of money could be made was held to have violated its statutory obligation to request bargaining. The notice was simply too late, and the town was not obligated to negotiate on monetary matters. The court interpreted the 120-day notice provisions to be mandatory.

The Kansas Public Employee Labor Relations Act[43] has notice provisions more explicit than Rhode Island's. A public employer is not obligated to initiate or begin meet and confer proceedings with any recognized employee organization for a period of 30 days before and 30 days after the budget submission date. The time limits of the Kansas and Rhode Island Acts are obviously designed to stimulate resolution of collective bargaining disputes in advance of the budget submission dates.

Failure to notify the public employer of a desire to modify the contract or request negotiations within a statutory time obviously may have dire consequences. In the private sector, it is not unusual for collective bargaining agreements to contain automatic renewal clauses that are invoked upon the failure of either party to notify the other of an intent to terminate or modify the collective bargaining contract.[44] Failure to give notice to terminate and modify a contract under such clauses, may lead to the automatic renewal of the contract.[45] At least one state in the public sector has attempted to prevent automatic renewal of contracts. The Washington Public Employees Collective Bargaining Law covering municipal employees makes invalid an agreement containing provisions for automatic renewal or extension of the collective bargaining contract.[46] The effect of this statute would be to force collective bargaining negotiations at contract expiration. Clearly, the contract could not be renewed automatically and without negotiations.

The Obligation to Furnish Information

The public employer generally has a duty to furnish relevant collective bargaining information concerning any subject matter

included in the scope of mandatory bargaining which the employee organization deems necessary for the collective bargaining negotiations. This obligation has been established by both statute and case law interpreting the duty to bargain in good faith. The Nevada Local Government Employee-Management Relations Act[47] makes it an unfair labor practice for either the employee organization or the employer to refuse to provide reasonable information concerning mandatory subjects of bargaining.[48] The Michigan Employment Relations Commission has held that the statutory duty to bargain in good faith requires a public employer to provide to the employee organization such information as audited financial statements, proposed budgets, job classifications and other data sufficient to allow the employee organization to bargain understandably, process grievances and prepare for forthcoming collective bargaining negotiations.[49] In *Saginaw Township Board of Education*, the commission rejected the school board's argument that it is entitled to evaluate each request for information. According to the commission, the duty to request and supply information is part and parcel of the fundamental duty to bargain and this duty is not an additional negotiable subject matter of the bargaining process. In a subsequent case, the commission held that the failure to provide relevant collective bargaining information in a timely fashion is an unfair labor practice.[50]

Under the Minnesota Public Employment Relations Act a public employer may be required to disclose to a union the questions and answers to a civil service promotional examination, provided the union refrains from disclosing this information to applicants who would take the examination in the future.[51] This requirement for disclosure of civil service information relating to a mandatory subject of bargaining is not affected by Civil Service Commission rules concerning the distribution of such information. A union which challenges the validity of civil service examinations used for promotions has a legitimate collective bargaining need, according to the Minnesota Supreme Court, to review the entire examination, including the question and answer key. The duty to disclose such information arises under the Minnesota statutory requirement that a public employer meet and negotiate with the exclusive representative of its public employees concerning terms and conditions of employment.[52] The terms and conditions of employment as defined in the Minnesota statute include hours of employment, compensation, including fringe benefits and the employer's personnel policies affecting the working conditions of employees.[53]

Bypassing the Collective Bargaining Representatives or "The End Run"

The duty to bargain in good faith as it has been defined above requires the parties to engage in collective bargaining negotiations with the intent of reducing any agreements to writing. The actual negotiations usually occur at the collective bargaining table where designated representatives of both parties discuss the appropriate subjects of bargaining. In an effort to confine the negotiations to only those persons who actually participate at the collective bargaining table, some jurisdictions have prevented or barred communications between persons other than the designated bargaining representative. The intent is to prevent the political "end run" so that neither party exercises whatever political or institutional advantages it may have in securing an agreement as to certain negotiation items where it otherwise might not have been able to do so at the bargaining table. The obvious public policy implication of such bans is to restrict the ability of either side to exercise its political power. For instance, a labor organization which endorsed the successful candidate for public office would be prevented under such statutes from directly communicating to the office holder its desires in collective bargaining.

Oregon is one of the states which has implemented a ban on the "end run." Its public employment bargaining statute[54] makes it an unfair labor practice for a public employer to:

> [C]ommunicate directly or indirectly with employees in the bargaining unit other than the designated bargaining representative during the period of negotiations regarding employment relations, except for matters relating to the performance of the work involved.[55]

The statute also forbids a public employee or a labor organization or its designated representative to:

> Communicate directly or indirectly during the period of negotiations with officials other than those designated to represent the employer regarding employment relations.[56]

Thus, the employer is prohibited from directly negotiating with the employees and undermining the exclusive bargaining rights of the labor organizations, and the public employee organization is prohibited from exercising whatever political power it may have with an elected official who sits on the legislative body responsible for ratifying the collective bargaining agreement.

Even though a bargaining representative in Oregon is barred from communicating directly or indirectly during the period of negotiations with officials other than those designated to represent either the employer or the union, the Oregon Open Meetings Law allows any person to attend all meetings of the governing body of a public employer. Such meetings shall be open and all persons shall be permitted to attend. In *Crowfoot Elementary School District No. 89 v. Public Employee Relations Board*[57] the Open Meetings Law has been interpreted to allow union representatives to attend school board meetings even though the union and school board were engaged in collective bargaining negotiations.[57] During a school board meeting, approximately 60 to 90 minutes was consumed by questions from the audience which consisted mostly of teachers and their families. The majority of these questions related to teachers' salaries which were the subject of the pending collective bargaining negotiations. The Oregon Court of Appeals specifically held that the unfair labor practice statute does not make a labor organization or its members guilty of an unfair labor practice by virtue of their attendance and/or their otherwise lawful participation in a meeting open to the public as required by Oregon law. Arguably, attendance at a school board meeting does not constitute collective bargaining.[58]

The problems presented by the *Crowfoot* case may be avoided by the solution offered in the Iowa Public Employment Relations Act which prohibits a public employee or any public employee organization from negotiating or attempting to negotiate directly with a member of the governing board of a public employer if the employer has appointed or authorized a bargaining representative for the purpose of collective bargaining, unless, of course, the member of the governing board is the designated bargaining representative.[59] The literal reading of this statute seems to allow communications at a public meeting as long as they are not actual negotiations.

Although the Supreme Court recognized in *City of Madison, Joint School District No. 8 v. WERC*[60] the right of individuals to make statements at public meetings of a school board, most public sector jurisdictions prohibit the public employer from circumventing the exclusive bargaining rights of a public employee organization by entering into individual contracts with employees. Any attempt by the employer to negotiate directly with employees is generally viewed as a means of undermining the bargaining representative's statutory rights to be the only negotiating representative for the purpose of achieving a collective bargaining contract. The Public Employment Relations Commission of Washington has held that the issuance of individual contracts to school teachers during the negotiating of a master teacher

collective bargaining contract, coupled with the district's submission of a last best offer to the employee negotiating team constitutes an illegal, unilateral action.[61]

Unilateral Change of Wages, Hours and Working Conditions During Bargaining

It is generally recognized under meet and confer and collective negotiation models that the obligation to bargain requires the employer to make no unilateral changes in existing wages, hours or working conditions until the parties have had an opportunity to bargain and reach an impasse. The unilateral grant of benefits during bargaining undermines the role of the exclusive bargaining representative.

The employer is not required to maintain the *status quo* forever. The obligation in the public sector, as well as that of the private sector, seems to require good faith bargaining up until the point that the parties are unable to agree on the critical issues.[62] Unilateral implementation is generally permitted for non-mandatory subjects of bargaining. In *West Hartford Education Association,* the Connecticut Supreme Court held that an employer may not unilaterally implement a particualr bargaining proposal which the parties have been unable to resolve even though they are negotiating about other topics. The court acknowledged that some bargaining may go on even though the parties are unable to agree on many topics. But, only if the deadlock on the critical issues demonstrates that there is no realistic possibility that further discussions would be fruitful in bringing the parties together generally on wages and other conditions of employment, can there be an impasse. The effect of such a ruling is to require the parties to bargain and resolve their differences prior to unilateral action.

Unilateral action generally takes the form of implementation of the employer's last offer at the bargaining table. This is generally done by the adoption of the budget for the forthcoming fiscal year. In *City of Saginaw,*[63] a trial examiner of the Michigan Employment Relations Commission held that a public employer may not unilaterally adopt its budget containing increases in wages and fringe benefits merely in an effort to evade its bargaining obligation. In this case the adoption of the budget, under the terms of the city charter, did not appear to make it impossible for the city council to negotiate further concerning economic items for the ensuing fiscal year. Nothing prevented the city from reallocating funds from one purpose or department to another. Therefore, further collective bargaining on wages and other economic items would be possible. The unilateral adoption of the budget was

coupled with the city's unwillingness to meet further relative to any issue involving the expenditures of funds. The trial examiner believed that this improperly foreclosed bargaining and constituted a violation of the duty to bargain in good faith. Any other conclusion would set a premium on the public employer's use of tactics designed to stall negotiations until the budget deadline and then avoid bargaining by adopting the budget. To allow a budget deadline to toll the obligation of the employer to seek agreement would undoubtedly frustrate bargaining in the public sector.[64]

Although the practical problems arising from unilateral action usually occur at or around the time the contract expires, there may be a requirement to refrain from unilateral action during the term of an existing contract where previously unrepresented employees are placed under the coverage of the contract.[65] An employer may not unilaterally extend the terms of the existing contract to job classifications added to the bargaining unit during the contract's term. The terms and conditions of the new bargaining unit members' employment must be negotiated between the parties.

The Use of Pressure Tactics During Negotiations and Impasse Resolution Procedures

As discussed in Chapter 15, public sector labor legislation and case law have created either a limited right to strike or an absolute ban on striking. In either case, the right to strike is proscribed during negotiations and impasse resolution. The Oregon law allows certain public employees to strike, but only after the mediation and fact-finding provisions of the law have been followed. Thus, until the parties have made a reasonable attempt to resolve their dispute using both mediation and fact-finding, the union may not strike.[66] A strike in Oregon may not occur until thirty days have elapsed after the publication of the fact-finder's findings of fact and recommendations and ten days' notice has been given by certified mail stating the reasons for and the intent to strike. Although the right to strike may be absolutely banned or limited until at least the fact-finding procedure has been exhausted, peaceful picketing for the purpose of advising citizens of a collective bargaining dispute and not for the purpose of interfering with ingress and egress to the public employer's facilities would probably be permitted.[67]

While the public employee organization may not strike pending mediation or fact-finding in Oregon, the employer's obligations to maintain the *status quo* even after an agreement expires was discussed by the Florida Public Employment Relations Commission in *Pinellas*

County Police Benevolent Association v. City of St. Petersburg[68] where the commission held that a public employer had a duty to maintain the *status quo* with regard to the expired collective bargaining contract. That duty requires that the employer maintain the terms and conditions of the expired contract in the same state as the terms existed on the expiration date. The use of impasse procedures in mediation and fact-finding is regarded as too vital to the ultimate resolution of the public sector collective bargaining dispute to allow unilateral action by either party.

The restraint on economic action while the parties are making serious attempts to resolve their differences through mediation or fact-finding must be viewed in conjunction with the obligation of either party to negotiate in good faith about a fact-finder's report. Clearly, the impasse resolution procedure is an extension of or aid to the negotiation process. The duty to bargain in good faith, therefore, applies. Although neither party is required to accept a fact-finder's report, there is an affirmative obligation to bargain in good faith about the substantive recommendations in the fact-finder's report.[69] In interpreting such an obligation of the duty to bargain in good faith the Michigan Employment Relations Commission held:

> Statutory fact finding may be invoked only after the parties have bargained and a general impasse has occurred. Although the duty to bargain does not mean that parties must engage in futile bargaining in the face of a genuine impasse, changed circumstances may develop, and therefore require compliance with the bargaining requirement....Even though there may be a strike, the duty to bargain may not necessarily be suspended....Just as a strike may create conditions in which the parties are more willing to make concessions to compromise the matters in dispute, the fact-finder's recommendations may enlighten or persuade them of the reasonableness or unreasonableness of their bargaining position. A fact-finder's report, thus, is the functional equivalent of a strike and may change the factual situation regarding the 'negotiation of an agreement, or any question arising thereunder'....It must be given the same serious consideration as the initial bargaining proposals. Therefore, there is an affirmative obligation to bargain in good faith about the substantive recommendations of the report of the statutory fact-finder.[70]

The extension of the duty to bargain in good faith about the substantive recommendations of the fact-finder's opinion has been codified by at least one state under its unfair labor practice procedure. In Massachusetts it is a prohibited practice for either the union or the employer not to participate in good faith in the mediation, fact-finding and interest arbitration proceedings.[71] In New York this duty has been imposed by a ruling of the labor relations agency.[72]

The consequences of applying unlawful pressure during collective bargaining negotiations may be either an unfair labor practice charge or the invalidation of the resulting collective bargaining contract. In *Municipal Housing Authority for the City of Yonkers. v. N.Y. State Public Employment Relations Board,*[73] the New York Supreme Court held that there was substantial evidence to support a finding of the Board that the employer committed an unfair labor practice in exerting improper economic pressure and not bargaining in good faith by unilaterally withholding an incremental wage increase during salary reopener negotiations for a new contract. In *St. Louis Teacher's Association v. Board of Education of City of St. Louis,*[74] the teacher's association sought a court order to validate a strike settlement and to obtain specific performance of the obligations made therein. The Missouri Supreme Court held that the strike settlement agreement was the result of an illegal strike by the teachers in defiance of public policy. For these reasons, the court held the strike settlement agreement was void and could not be enforced.

The Duty to Execute the Written Contract

Once the parties have agreed to the terms of a collective bargaining contract the contract must be executed and reduced to writing. The Michigan Public Employment Relations Act defines the duty to bargain in good faith as the negotiation of an agreement and "the execution of a written contract, ordinance or resolution incorporating any agreement reached if required by either party."[75] The duty to bargain is violated in Michigan when a party refuses to execute a written contract after full agreement has been reached.[76] The duty to execute a contract arises upon the request of either party. This assumes the validity of oral agreements if a writing is not requested. In *Sloan v. Warren City Civil Service Commission,*[77] the Michigan Appellate Court held that an oral extension of a written contract constituted an effective and valid contract. The oral extension did not violate the statute of frauds, because it extended the written contract for a one year period. The duty to execute the contract does not allow a city merely to

pass a resolution or an ordinance. A city resolution in Michigan stating that the collective bargaining agreeement will be effective is simply not enough, because the law requires the execution of a written contract.[78]

RESOLUTION OF SCOPE OF BARGAINING ISSUES

The duty to bargain in good faith focuses on certain issues relating to wages, hours and working conditions which are discussed in Chapter 10. The division of the subjects of bargaining into mandatory, prohibited and permissive, a model generally based on the private sector experience, is the key to determining whether the duty to bargain in good faith applies. For instance, the duty to bargain in good faith does not apply to a prohibited or permissive subject of bargaining under the private sector scheme, which has, to some extent, been followed in the public sector. Because of the integral relationship between the scope of bargaining issues and the duty to bargain, it is necessary to understand what collective bargaining subjects give rise to the duty to bargain in good faith. An employer's or a union's defense to an unfair labor practice charge alleging a breach of the duty to bargain in good faith may well be that the subject matter is not a required subject for purposes of collective bargaining. Accordingly, because the subject may not be within the mandatory scope of bargaining, a party may not have an obligation to bargain in good faith. Conversely, a party may charge another with improperly insisting upon bargaining about a subject which is not mandatory or within the mandatory scope of bargaining.

The collective bargaining process also includes not only the actual negotiations but impasse resolutions such as fact-finding and interest arbitration. The duty to bargain clearly applies to impasse resolution procedures. Accordingly, insisting upon an improper subject of bargaining for resolution by an interest arbitrator may be an unfair labor practice.[79]

The duty to bargain is, therefore, contingent upon an understanding of the mandatory subjects of bargaining. The conduct of the parties during the course of negotiations, impasse resolution and execution of the collective bargaining contract ultimately turns upon the particular subjects about which the parties have to bargain in good faith.

10

THE SCOPE OF BARGAINING IN THE PUBLIC SECTOR

*Arvid Anderson**

and

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The term "scope of bargaining"refers to the range of subjects appropriate for collective bargaining. Traditionally when speaking of the scope of bargaining, the concern is with those aspects of the employment relationship which are determined bilaterally or unilaterally by management.[1] What is bargainable in the public sector at the state and local level has been derived basically from that which is bargainable in the private sector; namely, wages, hours, and other terms and conditions of employment. In the public sector, strong differences of opinion exist between employers and unions over the question of what matters should be subject to the duty to bargain. Public employee unions are pressing hard to negotiate on a wide range of issues. Public management, on the other hand, fears an expansive scope of bargaining, for it implies bilateral determination of issues that traditionally have been subject to exclusive managerial control. In the private sector, the scope of bargaining has gradually been defined through decisions of the National Labor Relations Board and the

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to the point at which agreement or impasse is reached. The parties are not expressly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is, of course, unenforceable.

In public employment, however, the process of refinement and definition is still beginning.[2] Scope of bargaining in the public sector is a complex subject affecting not only the bargaining process for new contracts, but contract administration, including the scope of grievance arbitration and the enforceability of grievance arbitration awards as well as procedures for resolving impasses whether by strike, fact-finding or interest arbitration.

Most of this chapter will be devoted to detailing the legal framework of bargaining by referring to statutes or court decisions. However, any comprehensive examination of the practice of public sector bargaining must recognize that political and fiscal realities play a larger role in determining the actual scope of bargaining in a given case than a statute, court or labor board decision.

THE LEGACY OF THE PRIVATE SECTOR

In the private sector, the duty and scope of bargaining are defined in Section 8 (d) of the National Labor Relations Act:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employee to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession...

Interpreting this statutory language, the United States Supreme Court, in its landmark *Borg-Warner* decision,[3] established three categories of bargaining subjects: statutory, or mandatory, subjects about which the parties must bargain; non-statutory, or permissive, subjects about which the parties are legally prohibited from bargaining. Mandatory topics are those judged to be within the purview of "wages, hours, and other terms and conditions of employment." Significantly, a party may bargain on a mandatory subject to the point of impasse, Bargaining on permissive subjects is discretionary, and neither party must negotiate in

good faith to the point at which agreement or impasse is reached. The parties are not expressly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is, of course, unenforceable.

In the public sector, the NLRA language is often embodied in state laws to establish the outlines of the scope of bargaining. By 1978, twenty-nine states in their public sector legislation had adopted a definition of the duty to bargain which includes the same phrase, "wages, hours, and other terms and conditions of employment." Eleven states use the phrase, "wages, hours, and other conditions of employment." Thus, at least 40 of the state statutes have borrowed directly from the private sector national legislation in establishing the definition of the scope of bargaining. In addition, numerous local and municipal bargaining laws have incorporated the NLRA definition or language closely resembling that contained in Section 8 (d) of the NLRA.[4]

Despite the frequent similarity in language between private and public sector laws with respect to scope of bargaining, defining bargainable subjects has proved to be much more difficult in government than in private employment. First, public employee bargaining has often been viewed as an illegal delegation of managerial authority. The negotiations process has been resisted because in government, many managerial decisions traditionally are defined and shaped through political processes. Decisions about the extent and quality of government services, and the priorities to be established among them, often are affected by interest groups that influence these decisions through the political process.

OTHER SCOPE PROBLEMS

Interpreting this statutory language, the United States Supreme Court, in its landmark *Borg-Warner* decision,[3] established three categories of bargaining subjects: statutory, or mandatory, subjects about which the parties must bargain; non-statutory, or permissive, subjects about which the parties may bargain; and illegal subjects about which the parties are legally prohibited from bargaining. Mandatory topics are those judged to be within the purview of "wages, hours, and other terms and conditions of employment." Significantly, a party may bargain on a mandatory subject to the point of impasse. Bargaining on permissive subjects is discretionary, and neither party must negotiate in good faith

with civil service commissions, or whether public employee bargaining statutes empower local government executive officers to negotiate on these matters that are also terms and conditions of employment.

The scope of bargaining is also a controversial subject because of the demands of some employee groups to bargain on issues that public employers have traditionally considered to be the sole prerogative of management. The issue of bargainable subject matter and the important distinction between policy questions, on the one hand, and working conditions, on the other, are very crucial where professionals are concerned.

Professional employees frequently want to bargain on professional standards and to participate in making decisions that affect their work and clientele. They believe that their experience and training entitles them to have a voice in the determination of organizational policies.[5] Teacher spokespersons, for example, have stated that there should be no restrictions on negotiable subject matter. As one teacher advocate commented, "...school boards will be forced to share authority to determine educational policies [as] teachers exert a claim of special competence to participate in decision-making over educational programs and services."[6]

On the other hand, school boards insist that a teacher's authority rests with the local community — not with his or her profession - and that this role should not encroach upon managerial discretion. A former president of the National Association of School Boards expressed this point of view:

> Just as war is too important to be left to the generals, education is too important to be left to the educators...early Americans delegated this responsibility to boards of education, who for the most part are elected by all of the people in the school district, are directly responsible to them, and can be replaced by them... The school board which shares or gives up its statutory decision-making authority limits or gives up its ability to respond to the wishes of the citizens of the school district.[7]

DIRECT STATUTORY REGULATION

There have been various legislative responses to these developments and philosophical differences. A few states have adopted a broad scope of bargaining for professional employees. Alaska's teacher bargaining law, for instance, states that each school board, as

well as the state board of education in behalf of state-operated schools, "shall negotiate" with its certified staff "in good faith on matters pertaining to their employment and the fulfillment of their professional duties."[8] Similarly, the Kansas statute grants teachers' organizations the right "to participate in professional negotiations(s) with boards of education...for the purpose of establishing, maintaining, protecting, or improving terms and conditions of professional service."[9]

On the other hand, a more prevalent legislative pattern has been to define, sometimes very specifically, what subjects may be negotiated. Iowa has one of the most detailed and comprehensive statutes listing seventeen individual subjects:

> Sec. 9. Scope of Negotiations — The public employer and the employee organization shall meet at reasonable times, including meeting reasonably in advance of the public employer's budget-making process, to negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classification, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training and other matters mutually agreed upon. Negotiations shall also include terms authorizing dues checkoff for members of the employee organization and grievance procedures for resolving any questions arising under the agreement, which shall be embodied in a written agreement and signed by the parties. If an agreement provides for dues checkoff, a member's dues may be checked off only upon the member's written request and the member may terminate the dues checkoff at any time by giving thirty days' written notice. Such obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession.
>
> Nothing in this section shall diminish the authority and power of the merit employment department, board of regents' merit system, educational radio and television facility board's merit system, or any civil service commission established by constitutional provision, statute, charter or special act to recruit employees, prepare, conduct, and grade examinations, rate candidates in order of their relative

> scores for certification for appointment or promotion or for other matters of classification, reclassification or appeal rights in the classified service of the public employer served.
>
> The public employee retirement systems provided under chapters 97A, 97B, 410, and 411 of the Code shall be excluded from the scope of negotiations.[10]

In addition, the statute also authorizes negotiations over dues check-off and grievance procedures. Nevertheless, the statute expressly points out that the bargaining statute does not diminish the authority and power of various civil service and merit system boards and commissions established by constitutional provision, statute, charter or special act. The Iowa statute and a number of other states expressly exclude bargaining over pensions.

Some states expressly exclude policy-related issues from the scope of bargaining. Maine's law states that public employers of teachers "shall meet and consult but not negotiate with respect to educational policies..."[11] Even more restrictive is Montana's law, which excludes from the scope of bargaining "matters of curriculum, policy of operation, selection of teachers and other personnel, or physical plant..."[12] Another restrictive law is Pennsylvania's Public Employe Relations Act which states that public employers shall not be required to bargain over "matters of inherent managerial policy," including such areas as "functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure, and selection and direction of personnel." Public employers must, however, "meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon..."[13] All told, fifty-two of the state statutes contain qualifications expressly excluding particular subjects or bargaining.

Another way in which states limit the scope of bargaining is through statutory management rights clauses. In fact, thirty-six laws and regulations contain such clauses. The New York City Collective Bargaining Law (NYCCBL) is a good example:

> b. It is the right of the city, or any other public employer acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of

> governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classification; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employ on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.[14]

Applying the language of a comprehensive management rights clause in the context of the objectives of a collective bargaining statute is often difficult. Provisions reserving to the employer the right to "maintain the efficiency of government operations" or to "determine the mission of the agency" are not self-explanatory. As one commentator writes, "A public employer, for example, may claim that *anything* done by the agency before the advent of collective bargaining gives evidence of the 'mission of the agency' or was done to 'maintain the efficiency of government operations'."[15] These concerns notwithstanding, public sector bargaining laws containing management rights provisions and other express exclusions from negotiations reflect a widespread belief that certain policies are not properly determined through collective bargaining but rather should be resolved in a broader forum in which various interest groups may participate.

EFFECT OF CIVIL SERVICE LAWS AND PRE-EXISTING LEGISLATION

The enactment of public employee bargaining legislation and the *de facto* practice of collective bargaining in the absence of such legislation has often led to problems concerning the extent to which pre-existing statutes and civil service laws may take precedence over bargaining laws and negotiated contracts.

It appears that at least twenty laws either (1) exclude from Bargaining all of or various aspects of the civil service or merit system as established by existing state and local legislation or (2) safeguard the authority of the state or local civil service commission or personnel agency to perform its statutory functions.[16]

For example, several laws, including those of Connecticut, Iowa, and New Hampshire, provide that nothing in the bargaining statute shall impede the authority and power of the civil service commission or personnel agency to do such things as conduct and grade merit examinations and rate candidates in the order of their relative excellence for appointment, promotion, or reclassificaiton. Several additional statutes protect the civil service/merit system in other language.Bargaining legislation covering state employees in Maine and Vermont states that the statutory collective bargaining provisions shall not be construed to contravene the "spirit and intent of the merit system principles and personnel laws." The Hawaii law provides that the parties "shall not agree to any proposal which would be inconsistent collective bargaining provisions shall not be construed to contravene the "spirit and intent of the merit system principles and personnel laws." The Hawaii law provides that the parties "shall not agree to any proposal which would be inconsistent with merit principles..." The New Jersey Employer-Employee Relations Act provides that nothing in the section dealing with the right of employees to organize and negotiate shall be construed to deny any employee rights granted under civil service laws and regulations.

Some laws also provide that pre-existing statutes and civil service regulations will take precedence over conflicting terms of a collective agreement. The San Francisco ordinance covering city and county employees, for example, stipulates that provisions of the city charter, ordinances, and civil service rules and regulations shall supercede the bargaining ordinance. On the other hand, at least fifteen laws provide that the terms of a negotiated agreement will prevail over other statutes and regulations.[17]

Many public sector bargaining acts, however, contain no specific provisions governing conflicts between these acts and pre-existing legislation. This lack of legislative foresight has frequently led to litigation.[18] In Michigan, for example, state courts and the Michigan Employment Relations Commission have resolved several disputes concerning the conflict between civil service laws and the public Employment Relations Act. In the landmark case of *Civil Servie Commission v. Wayne County Board of Supervisors,*[19] the Michigan Supreme Court, noting the absence of any evidence of legislative intent, "guessed" at what the 1965 Legislature would have done had the conflict problem "come to its attention." The court held that those provisions of the civil service law covering mandatory subjects of bargaining are superceded *pro tanto* by the Michigan PERA.[20]

In contrast, the New Jersey Supreme Court, in *State of New Jersey v. State Supervisory Employees Association,*[21] held that a public

employer may only negotiate within the boundaries of its authority and, conversely, that a "...negotiated agreement with respect to matters beyond the lawful authority of the public employer is impermissible." Under the court's ruling, specific statutes, including the civil service laws, which expressly set particular terms and conditions of employment may not be contravened by a negotiated agreement. The court also stated in this decision that all statutes and validly adopted state and administrative regulations affecting public employees are, in effect, incorporated by reference into all collective negotiations agreements.

Unlike the private sector, public sector bargaining usually requires the action of a third party, the legislative body, or a different level of government to implement the agreement. Action by a legislative body or another level of government may be necessary to ratify a specific contract or to supply the funds to implement a particular agreement, if such funds have not previously been appropriated or authorized. Thirty-six laws condition implementations of agreements of legislative approval.[22]

New York's Taylor Law in §204-a.1 provides that each collective bargaining agreement shall contain the following proviso:

> It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefore, shall not become effective until the appropriate legislative body has given approval.

Legislative action at either the local or state level also may be necessary to provide the legal authority for agreement over a particular subject such as a modification of a civil service statute relating to hiring, promotions, transfers or a change in the education law.

Furthermore, the determination of scope of bargaining questions may depend upon the level of government at which bargaining on a particular subject matter is sought. For example, in New York City, the public employer's duty to bargain is dependent upon the issue involved.[23] If the subject concerns conditions of employment which must be uniform for all career and salary employees such as vacations, sick leave, holidays or a standard work week, then bargaining must be on a city-wide basis and then only with a union or group of unions that represents a majority of all career and salary employees i.e., non-uniformed and non-prevailing rate employees. The New York City Collective Bargaining Law provides that other matters

such as wages in New York City are negotiated on an individual bargaining unit basis. While the law authorizes individual bargaining, the reality of the fiscal crisis in New York City has resulted in a "voluntary" Coalition Economic Agreement in 1978, whereby virtually all New York City unions have accepted the same two year wage package of 4% a year.[24] There is some analogy between the practice of the city-wide and local unit bargaining and the private sector experience with national and local agreement.

COURT AND AGENCY DECISIONS

The law and practice of public sector bargaining is fluid with particular subjects being added or deleted from the scope of bargaining as a result of court and labor board decisions. New York State is a good example. Its highest court declared in 1972, in the landmark *Huntington* decision, that:

> [T]he validity of a provision found in a collective agreement negotiated by a public employer turns upon whether it constitutes a term or condition of employment. If it does, then, the public employer must negotiate as to such term or condition and, upon reaching an understanding, must incorporate it into the collective agreement unless some statutory provision circumscribes its power to do so...
> Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitely prohibits the public employer from making an agreement as to a particular term or condition of employment.[25]

Subsequently, the New York court, in a decision involving the enforceability of an agreement to arbitrate grievances and consequently the scope of bargaining, retreated from that broad view and held:

> [I]t is important to note that the expansive rule expressed in *Board of Educ. v. Associated Teachers of Huntington*,...that, 'in the absence of statutory provisions which prohibit collective bargaining as to a particular term or condition,' any subject matter in controversy between a board of education and its

> teachers is subject to arbitration under a broad arbitration clause, has been restated, and more accurately, in *Syracuse Teachers' Ass'n v. Board of Educ.....* In the *Syracuse* case, it was said that 'collective bargaining under the Taylor Law (Civil Service Law, §204, subd. 1) has broad scope with respect to the terms and conditions of employment, limited by plain and clear, rather than express, prohibitions in the statute or decisional law.' Yet even this is not the sum of it.
>
> Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may also restrict the freedom to arbitrate.[26]

However, the determination of what is public policy and therefore not subject to collective bargaining is far from clear. Such matters as class size, length of the school day, the school calendar, and extra-curricular assignments relate to wages, hours, and conditions of employment. Yet they are also matters closely connected with educational policy, traditionally considered to be within the authority of a school board. This potential overlap of management prerogatives with working conditions leads to some rather fine line-drawing by labor boards as they attempt to strike a proper balance between the authority of elected officials to run their agencies and the right of employees to negotiate on matters affecting terms and conditions of employment.[27]

The difficulty of striking this kind of balance is illustrated by the New York Public Employment Relations Board decision in the significant *West Irondequoit*[28] case, where the issue was class size. The hearing officer found that class size was a mandatory subject, since it was an "integral component of the working environment." The PERB, however, modified the order, determining that class size was a policy matter, in contrast with teaching workload, which is a negotiable condition of employment. PERB went on to hold, however, that the *impact* of a school board's decision regarding class size on teachers' working conditions was mandatorily bargainable. Both the Appellate Division and New York Court of Appeals affirmed PERB's decision.

In several other decisions, the N.Y. PERB has distinguished between a public employer's non-negotiable decision on a matter of policy and the impact of that decision on employees' working conditions, which is negotiable. In *City School District of the City of New Rochelle,*[29] for example, PERB concluded that "the decision to curtail services and eliminate jobs is not a mandatory subject of

negotiations, although the employer is obligated to negotiate on the impact of such decision on the terms and conditions of employment of the employees affected."

Other state agencies have also distinguished between a decision and its effect on conditions of employment. The New Jersey Public Employment Relations Commission, for instance, has held that decisions such as those relating to a public employer's table of organization,[30] kind of classroom teaching activity,[31] class size,[32] and qualifications for promotion[33] are not in themselves terms and conditions of employment, but rather go to the very foundation of the employer's managerial prerogatives. However, PERC has required negotiations between the parties regarding the implementation of these decisions to the extent that they affect working conditions. Therefore, promotions, at least within the unit, do affect employees' terms and conditions of employment and PERC has required negotiations regarding promotional procedures but not the actual qualifications for promotion.[34] Similarly, PERC has held that a school board must negotiate the impact, if any, of a decision to eliminate a writing conference and to replace it with a regular teaching class period.[35]

Although the duty to negotiate over the impact of a managerial decision involving a matter that is not a mandatory subject of bargaining is relatively clear, the nature of that duty is less clear. Ordinarily that duty does not prevent management from taking unilateral action in an area that is reserved to it, but management may have limited its discretion by contract. For example, the public employer may have entered into a job security clause barring layoffs during the term of the contract (e.g., *Bd. of Ed. Yonkers City School District v. Yonkers Federation of Teachers*).[37] In such cases, management is contractually limited from acting unilaterally. Where a unilateral action generates an impact on terms and conditions of employment, the ensuing demand to relieve the impact might also involve a non-mandatory subject of negotiation. [For example, in New York State class size is not a mandatory subject of negotiation by it has an impact on teacher workload which is a mandatory subject of negotiation. If, in order to relieve the impact, the teachers were to propose that the school use paraprofessionals, they would be raising another nonmandatory subject of negotiation. On the other hand, money to be paid to employees is invariably a mandatory subject of negotiation and an impact demand can usually be presented in terms of premium pay.]

THE NEGOTIATION OF SOCIAL POLICY ISSUES

As noted earlier in this chapter, the task of determining scope of bargaining questions in the public sector has become complicated

because some public employee organizations look upon bargaining as a means of effectuating social change. For example, teachers have sought the right to bargain over class size, curriculum, and matters related to school desegregation.

Welfare workers have sought bargaining over the level of benefits of welfare recipents. Nurses have sought bargaining over the number of duty stations. Interns and residents have sought bargaining over the standards of health services. Police and fire fighter organizations have been concerned about the number of persons assigned to patrol cars and fire trucks, both as a matter of safety and as a matter of effective delivery of emergency services.

The issues referred to involve public policy questions extending beyond the bargaining table. Economic and political realities as well as the constitutional right to petition government make it likely that such topics wil be discussed or even bargained; but generally there is no legal requirement for bargaining on broad public policy matters. It is in the area of public policy determination that the critics of public sector collective bargaining charge that bargaining has resulted in a distortion of our political process. Wellington and Winter have written:

> The issue is not a threshold one of whether professional public employees should participate in decisions about the nature of the services they provide. We take it as given that any properly run governmental agency should be interested in, and heavily reliant upon the judgment of its professional staff. The issue rather is the method of that participation... The point is that with respect to some subjects, collective bargaining may be too powerful a lever on municipal decision making, too effective a technique for changing or preventing the change of one small but important part of the 'current state of affairs.'[38]

The concern over the relationship of bargaining to the political process is in part responsible for the action of the New York State Legislature in conditioning impasse resolution in New York City upon the approval of the State Financial Control Board of all collective bargaining agreements to determine whether such bargaining complies with the City's fiscal plan, which in effect is a limitation on bargaining.[39]

In resolving the line between public policy considerations, which are outside of the scope of bargaining, and terms and conditions of employment, which are negotiable, state courts and labor agencies have devised a balancing test to be applied to particular subjects of

bargaining. The New York State PERB applied such a test to deal with the mandatory working condition issue of safety and the public policy question of manning. In the *Mount Vernon*[40] decision which concerned the number of persons to be assigned to fire trucks, the PERB held that a union demand to create a joint safety committee is a mandatory subject of bargaining. The PERB rejected the city's contention that the major thrust of the union's demand concerned manning, stating:

> Thus, while the assignment of personnel *per se* and, *arguendo,* transportation to a fire, may be characterized as primarily matters of manpower, this is not to say that in *individual* fact situations, safety aspects may not predominate.
>
> Significantly, even if the parties or an interest arbitration panel were to adopt the instant demand *in haec verba*, neither the committee nor the contract arbiitrator would thereby acquire *carte blanche* over manpower issues...
>
> Therefore, any award rendered by a contract arbitrator concerning assignment of fire fighters *per se*, or their transportation to or from a fire would have to be based upon safety and not manpower factors, lest the arbitrator exceed his authority and subject his award to vacatur.

But even that decision is not a precise formula. A case by case approach will determine the bargaining outcome.

Other states, including New Jersey, Kansas, Pennsylvania, Michigan, Wisconsin, and Maine, have by agency and court decisions evolved a balancing test for determining scope questions.[41] In Michigan, the decision of the Michigan Employment Relations Commission in *Westwood Community Schools,*[42] suggested a two-part balancing test for determining whether a subject falls within management prerogative or whether it is a term or condition of employment. The tests are: "(1) Is the subject of such vital concern to both labor and management that it is likely to lead to controversy and industrial conflict? And (2) is collective bargaining appropriate for resolving such issues?"

In reaching its decision, the Commission stated:

> A balancing approach to bargaining may be more suited to the realitites of the public sector than the dichotomized scheme—mandatory and non-mandatory — used in the private sector. [The private

> sector] scheme prohibits the use of economic weapons to compel agreement to discuss non-mandatory subjects of bargaining, but strikes are permissable once the point of impasse concerning mandatory subjects of bargaining is reached. Economic force is illegal in the public sector... In Michigan, in the public sector, economic battle is to be replaced by invocation of the impasse resolution procedures of mediation and fact finding.
>
> An expansion of the subjects about which the public employer ought to bargain, unlike the private sector, should not result in a corresponding increase in the use of economic force to resolve impasses. In the absence of legal public sector strikes, our only proper concern in the area of subjects of bargaining is whether the employer's management functions are being unduly restrained. All bargaining has some limiting effect on an employer.
>
> Therefore, we will not order bargaining in those cases where the subjects are demonstrably within the core of entrepreneurial control. Although such subjects may affect interests of employees, we do not believe that such interests outweigh the right to manage.[43]

The Commission's juxtaposition of the duty to bargain and the strike prohibition impliedly presents the interesting suggestion that the scope of bargaining in the public sector ought to be *broader* than in the private sector. The theory is that inasmuch as employees are statutorily prevented from striking to gain leverage at the bargaining table, there is no need to severely limit the subjects which may be negotiated. Of course, as Harry Edwards points out, the validity of the *Westwood* approach:

> [D]epends on not only the *existence,* but also the *effectiveness* of the strike proscription. In those states where strikes are legal, the *Westwood* test would seem inapplicable. In those states where strikes are illegal, but the proscription is not enforced, the application of the *Westwood* test would seem to give public unions an unfair advantage at the negotiating table, perhaps enabling them to coerce agreement on subjects that in the private sector would not be mandatory subjects of bargaining.[44]

The Pennsylvania Supreme Court, in *Pennsylvania Labor Relations Board v. State College Area Board of School Directors and AFSCME,*[43] also used a balancing approach when it held that public employers may not refuse to bargain on issues that might also touch upon managerial policies. The court left to the PLRB the task of determining which of the twenty-one items raised during the 1971 negotiations between the teachers and State College's school board may be bargained. It directed the PLRB, however, to balance the effect of a proposal on teachers against its impact on the school system.

The controversy revolved around three sections in the Public Employe Relations Act: Sections 701, 702, and 703. Section 701 requires parties to negotiate on wages, hours, and terms and conditions of employment. The next two sections eliminate from bargaining "matters of inherent managerial policy" and anything in conflict with state law or municipal home rule charters. The court ruled that:

> [W]here an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy.
>
> It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.
>
> If it is determined that the matter is one of inherent managerial policy but does affect wages, hours, and terms and conditions of employment, the public employer shall be required to meet and discuss such subjects upon request.[45]

PROCEDURES

Seven statutes specifically provide a separate statutory procedure to resolve scope questions such as in New Jersey or New York City. New York State by procedural rules has established a procedure for resolving scope of bargaining questions. The Wisconsin statutes provide a procedure for a declaratory ruling in order to determine cope of bargaining questions. Other jurisdictions rely on the improper practice refusal to bargain provision as a vehicle for

determining whether or not a duty to bargain exists. The reason for establishing a separate procedure for resolving questions as to the statutory duty to bargain by means other than the unfair or improper practice route is that such proceedings carry an unnecessary pejorative connotation in most bargaining disputes. The reason for withholding such a procedure is that it may invite request for unnecessary or purely academic declaratory judgments.

As noted earlier, many public sector jurisdictions recognize and apply the mandatory/permissive distinction between negotiable subjects. The fact that a permissive subject of bargaining has been included in a collective bargaining agreement does not obligate the parties to renew those provisions in the next collective bargaining agreement. Nevertheless, if a status quo provision exists, as in the NYCCBL, then a permissive subject must be maintianed until a new agreement is negotiatied or the impasse resolved.[46] In most other jurisdictions, an employer is permitted to take unilateral action on a permissive subject of bargaining without any prior notice or bargaining with the union with respect to the subject.[47] Again it must be pointed out that an agreement on a permissive issue may have a profound effect on how a mandatory subject is resolved. Obviously prohibited subjects of bargaining cannot be included in any collective bargaining agreement.

In the private sector, if a permissive subject has been included in a collective agreement, it is enforceable through the grievance procedure. A sizeable number of public sector jurisdictions follow this same rule. For instance, the New York State Court of Appeals held that a school board was not required to bargain over class size, but having done so, it was bound by the terms of the agreement — which were subject to enforcement through grievance arbitration.[48]

Not all states, however, have adopted the private sector trichotomy of mandatory, permissive, and prohibited subjects. An important distinction between the public and the private sectors is that the private entrepeneur can do anything not denied it by law while a local government can only exercise those powers granted to it by statute. Thus, it is arguable that the duty to bargain and the authority to agree with a union derive from the same statute and are coextensive. All other matters are reserved by law to resolution by traditional political processes. However, the actual grant of power to a local government may be so broad that its authority to bargain encompasses virtually the entire scope of labor-management decisions. As the New York Court of Appeals in *Board of Education v. Associated Teachers of Huntington*[49] stated, "Public employers must...be presumed to possess the broad powers needed to negotiate with employees as to all terms and conditions of employment." On the other hand, in New Jersey, the

Supreme Court in the 1978 landmark *Ridgefield Park*[50] decision held that there are only mandatory and prohibited subjects of bargaining, the latter being defined as "non-negotiable matters of governmental policy." The New Jersey court rejected the value of private sector bargaining concepts stating, "Federal precedents covering the scope of collective bargaining in the private sector are of little value in determining the permissible scope of negotiability in public employment and labor relations in New Jersey." Moreover, the court went on to hold that "[t]o be arbitrable, a matter must qualify as one on which the parties may negotiate. A matter which is not legally negotiable in the first place cannot be arbitrable."

The *Ridgefield Park* decision has not only stimulated wide spread discussion but has encouraged some local employers in New Jersey to attempt to eliminate from their collective agreements permissive language previously negotiated. But even if they do not formally negotiate permissive provisions out of their contracts, they may, as a *legal* matter, refuse to enforce them. Whether or not *Ridgefield Park* will have a lasting influence on actual bargaining in New Jersey is being tested currently during the 1979 fiscal crisis, where unions are seeking bargaining rights and threatening strikes over layoffs such as that which was planned in Newark to meet severe budget reductions.

Again with reference to the political process, it must be recognized that even if the statute of a particular jurisdiction is very clear as to where the duty of bargaining lies and what the mandatory scope of bargaining is, the practice of bargaining may take place at the highest political level meaning the office of the mayor, governor or county executive. In those circumstances, it is certainly possible, if not likely, that a strict adherence to the legal limits of the scope of bargaining may not be observed either in the conduct of the bargaining or in the administration of the agreement.

Recently, the former New York City Commissioner of Sanitation observed in his budget request for the Department that he had not been able to institute several major managerial changes because union leaders did not deal at the departmental level, but were able to deal directly with City Hall.[51] That reality does not mean that a bad result necessarily follows. The point, for purposes of this chapter, is to illustrate the reality of where the decisions affecting terms and conditions of employment are being made as well as the legal standards for determining scope of bargaining questions.

CONCLUDING OBSERVATION

The necessity of considering the political and economic climate of bargaining as well as the statutory and legal framework of bargaining was pointed out by the late Professor George Taylor in one of his course outlines in collective bargaining:

> Labor-management relations are an aspect of the broader problem of making democracy work. Ours is a meeting of minds society, and not one that is based on the arbitrary imposition of rules and regulations. A basic concept is reflected in our industrial relations in the proposition that voluntary agreement between the parties of direct interest is the democratic way of establishing the terms and conditions of employment...In our kind of democracy, differences are to be resolved by agreement, or at least acquiescence in the accommodation which is worked out.[52]

Mr. Taylor, because of his strong committment to the ultimate supremacy of the legislative process for determining public sector employment policy, might shudder at this application of his private sector comments to public sector labor relations. Nevertheless, his oberservations also seem appropriate to the manner in which public sector collective bargaining has developed for political and economic forces do have a profound influence on the actual scope of bargaining and do prompt *de facto*, if not *de jure*, solutions to labor relations problems. Collective bargaining is one of the means of determining allocation of resources and the delivery of public services. It is understandable, therefore, that there have been pragmatic as well as legal decisions shaping the scope of collective negotiations.

11

MEDIATION AND FACT-FINDING

*Harold R. Newman**

There is a recurring phrase in labor relations to which tribute is paid at Labor Day Ceremonies throughout the country and at gatherings of those involved in the field. The phrase is "free collective bargaining". The meaning of the phrase is that the cornerstone of labor-management relations in the United States is voluntary settlement of contract terms as a result of bargaining between unions and employers. Inevitably, however, because the nature of collective bargaining is adversarial, there are situations in which the parties are unable to come to an agreement on their own and the intervention of an outside neutral is required. There is general acceptance that of all the techniques of intervention, mediation is the most desirable and most favored because, as the servant of the parties, the mediator is wedded to the concept of voluntary agreements and, thus, to "free collective bargaining". In the words of William Simkin:

> Inclusion of a mediator among the participants at a bargaining table does not alter the fundamental fact that it continues to be essentially a two party process. The intervention adds a new element. That is unavoidable. But the new element is a person whose function is to assist, not supplant, the parties and the process.[1]

**Chairman, New York State Public Employment Relations Board.*

MEDIATION

What is Mediation?

It has been pointed out that when asked for a definition of what a mediator does, the responses do little to provide a clear definition. For example:

> 'It is a question of style.' Sometimes, the reply is 'mediation is an art and not a science.' Both statements are true, but quite obviously they do not provide the questioner with a useful answer. The basic reason that mediation is always difficult to define is that the mediator works with almost no ground rules and in a rather unstructured situation. Furthermore, since the mediator must have the confidences of the parties and he almost never keeps any notes, we must heavily depend on anecdotal reporting of mediators' experiences for information.[2]

Since a mediator is a servant of the parties, his objective is to assist them in bringing about an agreement which is satisfactory to both. Inevitably, by the time the mediator has arrived on the scene, the parties have stated positions on each of the outstanding issues with much force and with wearisome repetition. The result is often that they have come to believe that these positions are moral and right and it is very difficult to disenchant them from these views.

Essentially, of course, it is the mediator's function to reconcile differences between two parties. In labor mediation, this demands a wide spectrum of knowledge and skill on the part of the mediator. Simkin[3] lists some of these qualities: demonstrated integrity and impartiality; basic knowledge of and belief in the collective bargaining process; sincerity, physical endurance and patience. Some mediation techniques in general use are discussed below. It is impossible, however, to write a script for the parties in any negotiation and the mediator will shape his activity on a case by case basis. Robins and Denenberg delineate the process well.[4]

> When a mediator enters a dispute the aim is to move the parties closer to each other through discussion of the issues, explanation of positions, examination of alternatives, persuasion and suggestion. part of the function is to convey offers and counter-offers. This process is not mere mechanical message-carrying. The mediator uses the opportunity to discuss the implication of the offer with the sending and receiving parties. The mediator evaluates: May the offer be

> expected to produce a change in the other side's position? If the mediator does not expect that it will produce such change, should he or she tell that to the offering party? Does the offer as formulated indicate increased emphasis in one area of the proposals and diminishing emphasis in another? Is the change in emphasis useful? How will the offer be viewed by the other side? Will it be seen as real progress which might be expected to step up momentum? Will it be a disappointment but valuable nevertheless in producing a more realistic look at possibilities?

The function of mediation, therefore, beyond the definition quoted above, is to assist the parties by being creative and innovative in finding areas of agreement and compromise to reach final resolution of the impasse. Walter Maggiolo, a mediator and trainer of mediators, has expressed four fundamental principles for effective mediation.[5]

1. Understanding and appreciation of the problems confronting the parties.
2. Imparting to the parties the fact that the mediator knows and appreciates their problems.
3. Creating doubts in their minds as to the validity of the positions they have assumed with respect to such problems.
4. Suggesting alternative approaches which may facilitate agreement.

In order to obtain a thorough understanding of the process of mediation, it is worthwhile to examine each of Mr. Maggiolo's principles.

Understanding and Appreciating the Problems of the Parties

In order for the mediator to have an understanding and appreciation of the problems confronting the parties, he must have two special qualities. First, he or she must be someone who thoroughly understands the nature of the collective bargaining process and has had substantial exposure to the theory and practice of labor negotiations. It is a very desirable quality that every mediator has spent time at bargaining tables. If this has not been the case with regard to actual participation as a negotiation team member, it is essential that at least he or she has been a frequent observer. The second quality flows from the first. The mediator must be able to appreciate the problems of the

parties in terms of their economic concerns as representatives of the employer and of the employees and, in the public sector, have an appreciation of the political concerns of the parties.

Reassuring the Parties That the Mediator Understands Their Problems

To be effective the mediator must hold the confidence of the parties. To gain this confidence, he must not only be knowledgeable and capable, but must also project an image of intelligence and skill. To do this, the mediator may hold a joint session with representatives of the union and management soon after arrival at the negotiations table. The mediator may have the negotiators state their positions on each of the outstanding issues and, by careful restatement of them and by questions asked for clarification, thus demonstrate thorough conversance with the matters in dispute.

Undermining Stubborness of the Parties

The importance of "creating doubts as to the validity of the positions". to use Mr. Maggiolo's phrase cannot be overemphasized. As stated, the parties inevitably come to believe that positions they have repeated over a long period of time are Holy Writ and the need to deflate these positions is essential if compromises are to be achieved.

Suggesting Solutions

The mediator's suggestion of alternative approaches for breaking deadlocks is the *sine qua non* of effective mediation.

Embodied in these four principles or techniques may be days or even weeks of exhausting effort on the part of the mediator. He or she must, therefore, to return to Mr. Simkin's list of necessary mediator characteristics, be possessed of considerable physical stamina, have a highly creative and innovative mind, and be a true believer in the process of collective bargaining.

Confidentiality in Mediation

In order for the mediator to perform effectively, the confidence of the parties must be maintained and the mediator must create the impression not only that he is a labor relations professional but also an individual of absolute integrity and impartiality. In order to protect the confidentiality of the mediator, some states provide by statute that

mediators shall not be required to give testimony in a court of law regarding matters which have been shared with them in confidence, except in the case of a criminal proceeding.[6] If for example, a mediator is told by union representatives that they are prepared to scale down wage demands in exchange for an improvement in life insurance and hospital coverage, the mediator will not articulate this fact to the other side without permission, but will use the information in beginning to fashion suggestions for a resolution of the issues in dispute. Because of the informality of the mediation process and its lack of ground rules, the mediator is free to have the parties together or apart; meetings are sometimes sought between the chief negotiators if they might be useful, or the parties may be kept at the table for long sessions or discussions cut off as the situation requires.

Mediator Strategies

A fascinating glimpse of the techniques of mediation is contained in a study by Kenneth Kressel.[7] With regard to timing, for example, Kressel points out that mediators sometime deliberately permit a confrontation between the parties when tempers are very high in order to provide a catharsis, while at other times a mediator may shuttle between the parties and avoid face to face meetings until the climate has improved.

The mediator must also be concerned with the pace of negotiations and will seek to accelerate or slow down discussions as the situation requires. Kressel points out,[8] for example, that if the pace is too slow, it may well lead to discouragement, fatique and frustration on the part of the negotiators, while on the other hand, an agreement which comes with great rapidity, may lead either to contract rejection or to oversight in language in the memorandum of agreement which can create problems when the memorandum becomes the basis for the written contract.

Preventive Mediation

Not all mediation takes place when parties have reached impasse. Preventive mediation is often utilized - particularly by the Federal Mediation and Conciliation Service. The techniques of preventive mediation include labor-management committees (discussion of mutual problems under a neutral chairman); pre-negotiations discussions on an informal basis to try to reduce the list of issues for hard bargaining; post-negotiations review in which the

negotiating committees meet with supervisory staff and with stewards to clarify language of agreements and reduce to writing mutual understandings; *ad hoc* committees to resolve problems which, despite their existence, should not preclude the signing of a contract agreement; utilization of the mediator as a consultant during the lifetime of the contract to handle any problems which may arise in the day-to-day relationship of the parties and training programs for supervisors and stewards.[9]

"Philosophy" of Mediation

There are no statutes governing public sector negotiations which preclude or forbid the utilization of mediation for the resolution of impasse. Rather, mediation is generally looked upon as the most favored device for the resolution of disputes in both the private and public sectors. It is, as its advocates frequently point out, an extension of the collective bargaining process because essentially it permits the parties to reach their own agreement, without either the recommendations of a fact-finder or the enforceable award of the arbitrator.

If it is understood that the mediator is concerned with obtaining an agreement acceptable to both parties, it follows that the mediator cannot and must not attempt to substitute his judgment for that of the parties with regard to the settlement of terms. If by illuminating certain areas for possible compromise which results in getting some of the issues resolved, the mediator has in effect fathered part of the agreement, he should never seek recognition for that parentage. The agreement is always that of the parties. In any event, the effort to determine 'equity' in agreements would require a totally omniscient neutral. Unfortunately, they do not exist.

Every negotiation situation, whether in the private or public sector, is different from all others. The experience and sophistication of the negotiators, the contract agenda, the political and economic pressures on the parties, the possibility of an effort by a competing union to seek to represent the employees involved, the threat of a strike, are among the factors which may influence the shape and substance of the bargaining and, therefore, of the mediator's role. No professional mediator comes to any dispute with preconceived ideas. He must first be prepared to listen.

FACT-FINDING

Genesis of "Fact-Finding"

The genesis of fact-finding as a labor dispute mechanism is somewhat complex. As a part of the Railway Labor Act (1926,

amended 1943), the President may appoint emergency fact-finding boards when other conciliation mechanisms available through the National Mediation Board fail. It is also worth noting that after the end of World War II and abolition of the National War Labor Board, fact-finding boards were set up to settle wage disputes in major industries. Although the fact-finding boards did help to set wage patterns for conversion to a peacetime from a wartime economy, their work frequently met with strong resistance from both employers and unions.[10] Union and management disliked the intervention of compulsory fact-finding and looked upon it as an unwarranted interference by the federal government into collective bargaining. Nevertheless, since the enactment of the Taft-Hartley Act in 1947, the President has emergency powers under Section 207 to establish boards of inquiry in strikes that may imperil the national health or safety. These boards are essentially fact-finding panels. These presidential powers, however, have rarely been invoked and fact-finding is certainly not in common use as an impasse resolution procedure in private sector labor relations in the United States.

The Public Sector

In the public sector, however, the fact-finding process is a common place and much favored tool in impasse resolution. There would appear to be two major reasons for this. In the first place, there is widespread acceptance of the idea that the public should have knowledge of public sector negotiations and agreements because of their impact on matters of public concern such as the government's budget and tax structure. In theory, an informed public will require parties to yield their positions.

In its report to the Governor of the State of New York, the Taylor Committee[11] stated:

> Fact-finding requires the parties to gather objective information and to present arguments with references to these data. An unsubstantiated or extreme demand from either party tends to lose its force and status in this form. The fact-finding report and recommendations provide a basis to inform and to crystallize thoughtful public opinion and news media comment. Such reports and recommendations have a special relevance when the public's business is involved. The public has a special right to be informed on the issues, contentions and merits of disputes involving public employees.

The Committee's report provided the blueprint for the Taylor Law under which more than one million employees bargain with their government employers in the public sector in New York State.

The widespread utilization of fact-finding in public sector statutes in the various states is also based in part upon the fact that government employers are not profit-making entities. Government executives do not usually resist having fact-finders examine the state of their fiscal health. The wages of public employees too, are a matter of public record. Therefore, one of the major reasons for the resistance to fact-finding in the private sector (outsiders looking at the company's books), does not exist in the public sector.

Understanding the Process

While fact-finding is often discussed as an impasse resolution procedure, there is frequently much misunderstanding as to its nature. It has been pointed out that fact-finding is a misnomer and that the neutral who is appointed fact-finder in a particular dispute discovers rather quickly upon his or her arrival at the negotiations scene that the parties are well acquainted with the facts.[12] The facts in a labor dispute can usually support either side. It can be demonstrated very often, for example, that public works employees in a city may be enjoying a wage scale near the top among employees in the same classification in other cities of similar size and tax base. At the same time, these employees may well be near the bottom in comparability with regard to fringe benefits such as life insurance, health coverage or vacations. Then, too, the choice of cities for the sample may be subject to dispute. The fact-finding process itself, therefore, is, as Professor Tim Bornstein of the University of Massachusetts has pointed out,[13] inexact and unpredictable.

> There is no universally accepted, scientific way to decide how much a municipality can afford, still less is there any exact way to decide how valuable employees' services are to the municipality. Therefore, a fact-finder can only bring his informed judgment to bear on the problem before him, based on his evaluation of the evidence introduced by the parties and his application of reasonable criteria.

How Fact-Finders Work

It will now be helpful to describe more precisely what fact-

finding is and how it is useful in bringing the parties to agreement. There has been much discussion over the years as to whether fact-finders should approach their task informally as do mediators or formally in the quasi-judicial atmosphere that characterizes most arbitration.[14] Regardless of whether the fact-finder looks upon himself as an adjudicator, or is willing during the fact-finding process to attempt mediation, he or she must at the outset make certain demands upon the parties. There will be an expectation to receive from them, by written submission and through the testimony of qualified witnesses, support for their positions on each of the issues in dispute. (Note, therefore, the similarity to the arbitration format. Hence, fact-finding is sometimes compared to advisory arbitration.) Thus, at the outset the parties may have been brought closer together because the need for preparation of argument and collection of data on each issue frequently compels advocates to remove from the table all but the essential agenda. This is certainly a useful function of a fact-finding and can be most appreciated by the public sector mediator who has been involved in disputes where there are numerous items in dispute.

Special Advantages In Public Sector Use

Fact-finding is frequently an effective conciliation tool in the public sector because, as has been pointed out, public sector bargaining has a strong political flavor. The fact that fact-finders' reports and recommendations are provided to the media and published brings pressure for reasonableness on the part of the parties. This was noted by the Taylor Committee.[15] Finally, since all agreements contain some items that are difficult for some of the parties to swallow, it is politically advantageous for the negotiators to point out to their respective constituencies that a highly qalified professional neutral made the recommendations. Thus, distinguished authorities in the field have stated:

> Fact-finding is an advisory procedure, and the impartiality of the fact-finder and public support of his conclusions hopefully influence the parties to accept the fact-finder's recommendations. Authorities may use a recommendation as a screen to give employees what they would be unwilling to defend publicly; or, employee leaders may use it as an excuse to accept an offer previously considered unpalatable to the membership.[16]

Voluntary Nature

It is important to remember that unlike an arbitrator whose award is enforceable in court, the fact-finder can only make recommendations which the parties are free to accept or reject. This may be one of the attractive features of the fact-finding process. The fact-finding report, while not serving as a blueprint for settlement, may provide the necessary guidelines for further discussion towards final agreement. The parties may also wish to utilize the fact-finding report and recommendations simply as a means of putting into writing what they themselves have essentially agreed to; the fact-finder will not fail to recognize his useful function in this regard, but unlike the mediator he must bear some responsibility for recommendations to which he signs his name. The fact-finder may decline to make recommendations that are found to be offensive even though they may help resolve the dispute.

With regard to flexibility, the proponents of a formal adjudicatory fact-finding hearing and those who urge that the fact-finder be willing to put on the mediator's cap whenever deemed to be useful, are probably both right.[17] Where the parties give the clear signal to the fact-finder as to whether there should be a continuation of the quasi-judicial role or to attempt mediation, one should expect that the fact-finder will carry out their wishes. It may well be quite often to the advantage of the parties to allow the fact-finder to attempt to mediate an agreement and thus preclude the writing of a report which in itself may become a matter of some contention. Byron Yaffe, a strong adherent of the idea of combining mediation with fact-finding, argues:

> Thus, the report and recommendations emanating from the process may not accurately reflect the accommodations and compromises which the parties would have had to make in free collective bargaining.
>
> Several factors inhibit the fact-finder's ability to ascertain all relevant facts which are necessary to formulate an acceptable and workable solution to a public employment dispute.[18]

Flexibility in Impasse Resolution Techniques

There are no magic formulas for the resolution of impasses, and intervention by the neutral agency should always permit the widest flexibility in providing the prescription for dispute settlement. Not every impasse lends itself to settlement by mediation or by fact-finding. Sometimes a combination of the two is needed. There are other varieties

of conciliation techniques which should be cited. The use of mediation combined with arbitration — mediation-arbitration in other words — giving the meditor the right to make an arbitrator's award on any issue in which he is unable to obtain agreement of the parties, is sometimes used. Finally, there is, of course, interest arbitration itself in which the contract terms are spelled out in an abitrator's award. This is generally looked upon as a radical measure and not to be utilized unless the parties are totally unable, through more conservative conciliation devices such as mediation and fact-finding, to accommodate each other's needs (See Chapter 12, Interest Arbitration).

FOOTNOTES

1. William E. Simkin, *Mediation and the Dynamics of Collective Bargaining* (Washington, D.C.: Bureau of National Affairs, 1971) p. 30.
2. Harold R. Newman, 'Using Neutrals to Help Settle Impasses," *Handbook of Faculty Bargaining,* Eds. G.W. Angell and E.P. Kelley and Associates (San Francisco: Jossey-Bass Publishers, 1977). pp. 330-331.
3. Simkin, *Mediation* p. 53.
4. Eva Robins with Tia Schneider Denenberg, *A Guide for Labor Mediators* (Honolulu: Industrial Relations Center, College of Business Administration, University of Hawaii, 1976) p. 51.
5. Walter A. Maggiolo, *Techniques of Mediation in Labor Disputes* (Dobbs Ferry, N.Y.: Oceana Publications, 1971) p. 12.
6. See New York Civil Service Law §205.4(b).
7. Kenneth Kressel, *Labor Mediation: An Exploratory Survey* (Albany, N.Y.: Association of Labor Mediation Agencies, 1972).
8. *Ibid.*, pp. 21-22.
9. An overview of preventive mediation techniques may be found in Charles L. Bowen, "Preventive Mediation," *Proceedings of the 1968 Annual Meeting* (Madison, Wisc.: Industrial Relations Research Association, 1969) pp. 160-164.
10. Cf. Florence Peterson, *Survey of Labor Economics* (New York: Harper Brothers, 1947) pp. 566-568; John T. Dunlop, "Fact Finding and Industrial Disputes," *Proceedings of the Academy of Political Science,* Vol. 22, No. 1 (1946).
11. *Governor's Committee on Public Employee Relations Final Report* (Albany, N.Y.: State of New York, March 31, 1966) p. 37.
12. Newman, *Using Neutrals,* p. 335.
13. Tim Bornstein, *Facts about Fact-Finding* (Washington, D.C.: Labor Management Relations Services,, 1971) p.8.
14. Cf. Byron Yaffe, "Fact-Finding and Public Education Negotiations Disputes," *Journal of Law and Education* (Vol. 3, April 1974); Robert Howlett, "Fact-Finding: Its Values and Limitations," *Proceedings of the Twenty-third Annual Meeting of the National Academy of Arbitrators* (Washington, D.C.: Bureau of National Affairs, 1970) pp. 175-182.

15. *Governor's Committee on Public Employee Relations,* p. 37.
16. M. Moskow, J. Loewenberg and E. Koziara, *Collective Bargaining in Public Employment* (New York: Random House, 1970) p. 199.
17. Jean T. McKelvey, "Fact-Finding in Public Employment Disputes: Promise or Illusion?" *Industrial and Labor Relations Review* (Vol. 22, July 1969); Byron Yaffe and Howard Goldblatt, *Fact-Finding in Public Employment in New York State: More Promise than Illusion* (Ithaca, N.Y.: New York State School of Industrial and Labor Relations at Cornell, 1971).
18. Byron Yaffe, "Fact-Finding in Public Education Disputes — Its Values and Limitations: A Neutral View," *Journal of Law and Education (Vol. 3, 1974).*

12

INTEREST ARBITRATION

*Charles M. Rehmus**

Public employees in American society, even those who have been granted collective bargaining rights, have nevertheless normally been prohibited from striking to resolve impasses that arise in the course of negotiations. Despite this fact, it is equally obvious that as collective bargaining has increased, it has been paralleled by a rise in the number of job actions and strikes undertaken by public employees when collective bargaining negotiations fail. As a consequence, our legislative bodies increasingly have turned to mandating binding interest arbitration as the alternative to the strike. By 1979, thirty states, three counties, six municipalities and the District of Columbia had provided for binding arbitration as the ultimate means or last resort to resolve disputes over the terms of new contracts for some or all of their public employees. In essence, binding arbitration requires that when an impasse is reached in negotiations, the parties are obligated to present the issues in dispute between them to a third party or board which renders a binding award on how these issues shall be resolved.

Most commonly such statutes are made applicable to employees whose continued service is deemed to be essential: policemen, fire fighters and prison guards. Occasionally the concept of essentiality has been defined somewhat more broadly and has included groups such as hospital employees, emergency communications and ambulance service personnel, and court employees within the purview of their statutes. Some states have included general municipal employees and teachers under their binding arbitration statutes. One state, Wisconsin, has recently amended an earlier statute covering only essential employees to

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include all public employees in the state — civil servants, county, municipal and educational employees alike — under its binding arbitration statute.

CONSTITUTIONALITY

It is obvious that a legislative grant of power to a neutral individual or board to set the salaries and fringe benefits of public employees, can directly affect the allocation of public funds (as between employee compensation and program or plant expenditures, for example). Less directly, a binding arbitration award which raises wages higher than public officials had previously been willing voluntarily to raise them may, in the long run, affect the level of taxes that citizens must pay. Both of these kinds of decisions, to some degree, transfer power from elected officials to neutral arbitrators. Hence, it is not surprising that the constitutionality of these statutes has been attacked on several grounds.

Primary among constitutional arguments is the contention that compulsory interest arbitration constitutes an illegal delegation of legislative authority to a non-elected person or board that is not responsible to the electorate. Appellate courts in five states have considered and rejected this illegal delegation argument, usually on the basis that the arbitrator is acting as a "public official" while performing this function. A similar but related challenge is that interest arbitration statutes are unconstitutional delegations of power because the arbitration body was not given sufficient statutory guidance or standards on which to base an award. In fact, state statutes have varied from listing no criteria at all to a detailed listing of up to a dozen factors arbitrators may take into account in making awards. Even when such detailed criteria are listed no state has attempted the even more difficult task of assigning what weight should be given each criterion. This argument of inadequate standards has been considered and rejected by appellate courts of five states. In Connecticut, however, that state's compulsory interest arbitration statute was found to be unconstitutional both because the arbitrators appointed were not "agents" of the state and because the statutory standards were considered too indefinite to safeguard the public against unreasonable arbitral decisions. This decision has been appealed to Connecticut's highest tribunal. Similarly, appellate courts in Colorado and Utah found binding arbitration statutes in those states constituted an unlawful delegation of power from local legislatures to arbitrators.

Compulsory interest arbitration statutes have also been constitutionally attacked on the ground that the statutes delegate the

power to tax to an arbitrator or board and thus violate the one-man, one-vote standard mandated by constitutional equal protection clauses. This contention has been rejected by state supreme courts in four states.

A final basis used to challenge interest arbitration is that the statute interferes with the constitutional and statutory home-rule powers of local governments. This argument was rejected by appellate courts in three states. The state's constitution had to be amended to meet this objection in Pennsylvania, however, and South Dakota's statute was found to violate the home-rule provisions of that state's constitution.

Thus, in general, interest arbitration statutes have been upheld against one or more of these multiple constitutional attacks by the highest state courts in Pennsylvania, Wyoming, Rhode Island, Nebraska, New Jersey, New York, Massachusetts, Washington, Michigan, Minnesota and Maine. In Pennsylvania, the constitution required amendment to achieve this end, and in Michigan the statute was amended to meet constitutional objections from some members of that state's supreme court. In five states, Colorado, Connecticut, South Dakota, Texas and Utah, compulsory arbitration statutes have been found to violate the state constitution, although the Texas and Connecticut decisions are not final.

After reviewing many of these statutes and the cases considering their constitutionality, it seems probable in most jurisdictions that if a legislature wants to enact a binding arbitration statute it can be properly drafted to meet the requirements of that state's constitution. This is particularly the case if arbitrators are publicly appointed and if the statute sets forth reasonably precise criteria for arbitral decision making and perhaps some standards for judicial review. Hence, the real test is whether binding arbitration satisfies essential needs of public employees and their managers at the same time giving appropriate regard to the public interest. If it does, means can be found for the process to survive. If arbitration comes not to be considered a sound alternative to the stirke, then the process should not and will not survive. In either event, the fundamental judgments regarding the legitimacy of such statutes are political rather than consitutional. It is to these latter considerations of effectiveness that the rest of this chapter is devoted.

ARBITRATION PROCEDURES

As stated earlier, the essential characteristic of binding interest arbitration is that when the parties reach an impasse in the course of

collective bargaining, they are obligated by law to present the issues in disputes between them to a third party or board which renders a binding award as to the disputed terms of their labor agreement. As will be seen in the sections that follow, the procedures and techniques under which such a decision making process takes place can be almost infinitely varied. Moreover, experience has demonstrated that seemingly minor variations in the statutorily prescribed procedures can have significant effects upon the way the procedure works and its ultimate result.

COMPOSITION OF ARBITRATION PANELS

One of the alternatives to be considered in establishing a binding arbitration procedure is whether the ultimate decision should be made by a single neutral individual, a board of neutrals, or by a board composed of partisan appointees and a neutral chairman. Costs are obviously minimized if a decision is made by a single neutral. In the case of interest arbitration, however, it is often argued that the greater complexity of the issues and the higher "stakes" involved suggest that a wiser decision might result from the cooperative effort of several minds. Occasionally, the parties have experimented with boards composed of three neutrals. The costs of such a procedure can be prohibitive, however, and experience has demonstrated that neutrals too can differ among themselves as to the appropriate resolution of the issues in dispute.

More commonly, therefore, the parties themselves or legislatures establishing such procedures have determined that an arbitration board should be composed of a neutral and one representative appointed by each party. The theory behind this is such that partisan appointees will often have greater expertise in the job duties that are involved, the managerial responsibilities and obligations of the employer, and what represents a reasonable compromise between different points of view. Thus the partisan board members can help to guide a less experienced neutral in the job-related nuances hidden beneath each of the parties' demands and proposals.

Under some statutory procedures, the two partisan appointees may and sometimes do agree upon their own neutral chairman. Under other procedures, the neutral chairman is appointed by a government body, sometimes after the parties have had the opportunity to make peremptory strikes from a list of possible neutrals nominated to them. In any event, interest arbitration is most frequently undertaken by a panel, some members of which are appointed by the disputant parties themselves. The advantage of such a panel in terms of bringing expertise to the panels has been noted above. The disadvantage of such panels is

that if the partisan appointees are so identified with the disputing parties that they are unable to take even a quasi-neutral view of issues in dispute, the executive sessions of the arbitration board resemble little more than a replay of the original hearing of the issues. Moreover, if the law requires a majority vote of the board, the neutral may have to modify his own view of the appropriate solutions for the issues in order to gain the vote of one or the other of the partisan appointees to make up a majority. Under these circumstances, the neutral's view of the equitable solution has to be tempered by considerations of acceptability to partisan appointees. While such considerations are by no means wholly invalid or inappropriate, they often force different results from those of a single arbitrator.

CONVENTIONAL INTEREST ARBITRATION

Interest arbitration statutes were ordinarily enacted by state legislatures which had first experimented with mediation and fact-finding as the sole means of third party intervention in resolving collective bargaining impasses. While both of these devices have important uses, neither has proven to be a perfect means whereby all disputes are invariably resolved. Further, legislatures discovered that state laws forbidding strikes and providing draconian penalties for their violation proved to be ineffective and unenforceable. Strikes occurred even in those jurisdictions where more realistic penalties for violation, such as the temporary loss of dues check-off rights, were enacted. In short, most legislatures came to mandate binding interest arbitration only after other forms of dispute resolution and strike bans proved sometimes ineffective.

Under conventional arbitration statutes that were then commonly enacted, the parties presented their positions on each issue in dispute to the neutral individual or tri-partite panel selected or appointed to hear the dispute. The resulting award could follow one or the other party's position, but more commonly fell somewhere in between, wherever seemed to be equitable. Under conventional arbitration, mediated settlements are uncommon. The arbitration panel's function is deemed to be that of seeking the real position of each party, analyzing the factual and equitable arguments and the data underlying them that each party adduced in support of its position, and then rendering a final, binding and usually compromise award which specified the terms of the contract.

Proponents of such procedures contended that they would eliminate recourse to strikes which have a deleterious impact upon the

public interest. They argued that in today's society disputes between private citizens are not resolved by self-help but are necessarily adjudicated before neutral tribunals. Why should not labor and management, the proponents asked, be required to submit their disputes to similar bodies rather than resort to strikes which harm the public as much or more than the parties?

Opponents of the use of such procedures argued that they would be ineffective and that strikes would continue to occur if employees were dissatisfied with the terms of an award. Moreover, critics alleged that binding arbitration would have a "chilling" effect upon the bargaining process wherever either party anticipated that it might gain more in arbitration than it had been offered in negotiations. Finally, opponents charged that binding arbitration would eventually impose economic settlements far different from those which would have been generated in pure collective bargaining with or without strikes.

Each of these arguments will be examined in the sections which follow, based upon recent experience in the many states now experimenting with such procedures.

INCIDENCE OF STRIKES

The conventional wisdom is that binding arbitration is ineffective in its basic purpose because it will not eliminate strikes. The example of Montreal policemen who a decade ago struck in protest of a binding but unpopular award is often cited in support of this argument. Binding arbitration will probably not eliminate all strikes but the data suggest that it substantially reduces their frequency.

In Michigan, for example, no strikes by firefighters have taken place since that state enacted its arbitration statute. Several police strikes occurred after the enactment of compulsory arbitration in Michigan, but one of these occurred because of a city's refusal to implement an award and several others were over issues wholly unrelated to collective bargaining. In general, strikes by police and firefighters have almost been eliminated in those states — Pennsylvania, Minnesota, Michigan, Nevada, New York, and Wisconsin — that limited their original binding arbitration statutes to those groups of employees. One cannot be sure that the record will remain as favorable when arbitration statutes are extended to cover groups of public employees who do not deem their continued service to be as essential to the public. It is equally uncertain that the contemporary favorable record of binding arbitration in strike prevention will continue indefinitely as employees gain experience with arbitration and as, over time, they receive awards that they deem strongly unfavorable.

THE IMPACT UPON SETTLEMENTS

Another charge often levied against compulsory interest arbitration is that its results will inevitably skew market factors, imposing settlements far different from those which would be generated in pure collective bargaining, with or without strikes. The economic impact of interest arbitration, like that of collective bargaining itself, is a subject of great interest to practitioners and scholars of industrial relations. Measuring either is immensely difficult, however, since it is always hard to measure with any confidence what might have been if the law or circumstances had been different.

Such scholarly analysis of data as are available suggest that the resort to arbitration does not pay off in terms of unusually high wages or economic settlements. Arbitrated settlements appear at most to average one percent higher than negotiated settlements, hardly surprising if it is assumed that the union ordinarily makes a rational choice to go to arbitration when it feels it has a provable inequity on which to base its case. Studies comparing wages of police or firefighters in neighboring states — one with and its neighbor without a compulsory arbitration law — over periods of time as long as a half-dozen years show that wage levels for comparable groups of employees remain roughly the same whether or not impasses are subject to arbitration. Other studies of wages for groups of public employees covered by arbitration laws show that of many independent variables tested, the only statistically significant predictors of public safety wages were private sector wages and median family incomes in the same community. This result is only what one would expect under "free" collective bargaining and in no way suggests that the availability of arbitration tends to skew resultant wage rates.

If it is true that the use of arbitration does not significantly affect resultant wages, the question arises as to why the parties bother with it. Several possibilites suggest themselves but are not yet fully tested by research. One is that dependence upon or resort to arbitration is an essentially political rather than economic decision. These political factors may be particularly influential in the case of the largest cities which have a tendency, if arbitration is available, to use it in almost every round of negotiations.

Another possibility is that arbitration is used primarily by parties in two situations: The first where the wage is already relatively high and management is attempting to restrain further upward movement, and the second where the wage is relatively low and the union is attempting to catch up. Assuming rational arbitration awards, one would think that management would be more likely to win in the

first case and the union in the second. It is certainly true that wage dispersion has decreased in states where arbitration is available. In short, some may be winning in arbitration and some may not, but aggregate state-wide data would show no overall payoff from the resort to arbitration.

Finally, some critics of compulsory arbitration contend that the size of arbitration awards is not necessarily inappropriate for the particular group that resorts to arbitration, but the ultimate result may nevertheless be unreasonable in terms of the employer's overall ability to pay. These critics say that an arbitrator is required to focus upon equity for the particular group of employees whose dispute is brought before him. Even if the award provides such equity the arbitrator does not have before him the city's overall ability to pay, which includes considering the interest of unionized employees without the right to go to arbitration as well as unorganized groups of city employees. In short, the arbitrator's universe, it is argued, is necessarily less than fully complete. It is argued that only public administrators charged with responsibility for considering all public employees and the full range of public expenditures can make wholly equitable decisions in terms of all the competing interests involved.

No final answer is possible to this challenge. However, experienced arbitrators are conceded by the participants in the process often to be able to rule intelligently on very complex issues. A second response by proponents to this criticism concerning the accountability of arbitrators challenges the assumption underlying the criticisms. Is it true that public officials, whether elected or appointed, have invariably been more concerned with fiscal integrity than have arbitrators? Certainly many instances can be cited where elected officials have voluntarily granted collective bargaining settlements that have later been criticized as fiscally disastrous. Further, it is not unknown for legislative bodies to react to union pressure by voting fringe benefits for public employees unequaled in the private sector. In short, experience suggests that while arbitrators may not invariably be wise, they are not proven to be more often foolish than are public administrators and elected officials. It must be conceded that the consequences of collective bargaining and/or arbitration may produce unwise economic settlements; more often both are found to produce quite equitable results.

EFFECT ON COLLECTIVE BARGAINING

The major attack on binding arbitration made by its critics is that it will have a "chilling" effect upon the bargaining process. Binding

arbitration will inevitably undermine collective bargaining, it is argued, whenever either party anticipates that they might gain more from arbitration than from negotiation. Scholarly studies of the experience under various state laws both support and undermine this criticism.

It is certainly likely that more disputes will be taken to arbitration than would result in strikes in situations where strikes are legal or feasible. It is also true that far more public employee disputes are taken to arbitration than had previously resulted in illegal strikes. Finally, some recent studies suggest that even if resort to arbitration is not excessive in the early years of experience with a binding arbitration statute, the rate of use tends to increase over time.

On the other hand, proponents of arbitration as the alternative to strikes emphasize that in most states the rate of all disputes that potentially could be taken to arbitration compared with those that actually are, ranges in the vicinity of ten percent. This is argued to be an acceptable if not a necessarily desirable rate of use of the arbitration process. Moreover, proponents of arbitration emphasize that in many jurisdictions the percentage of all disputes initially submitted to arbitration which are ultimately settled without the need for a written binding award is high. They emphasize that interest arbitration evolves over time into less and less of a judicial proceeding and more and more a search by the parties and the arbitrator for mutual accommodation. Experience has demonstrated that responsible neutrals, through a process of interaction with their panel members and with the parties' representatives, do actually achieve a genuinely close understanding of the legitimate interests and expectations of both parties to the dispute. Hence, arbitrators are often able to mediate effectively or to set a framework within which the parties negotiate their own settlement.

As in so many other areas of public employment labor relations, experience is as yet limited and research far from final. Hence, it is not possible to say with certainty whether or to what extent arbitration chills collective bargaining. Most experienced participants would conclude that there is some, if minor, chilling effect, and differ as to whether the rate is acceptable. But because of the consensus that the passage of a compulsory arbitration law to some extent will increase the probability of an impasse occurring in collective bargaining negotiations, experiments with new forms of binding arbitration beyond the purely conventional are increasingly taking place. The commonest of these is to replace conventional arbitration — the system under which the arbitrator selects whatever award he feels is most equitable at or in between the parties' respective positions — with the requirement that the arbitrator select only one or the other of the parties' final offers.

FINAL-OFFER ARBITRATION

The theory which underlies final-offer arbitration is quite simple. If the arbitrator or panel was permitted to select only one or the other of the parties' final offers, with no power to make a choice anywhere in between, it was expected that the logic of the procedure would force negotiating parties to continue moving closer together in search of a position that would be most likely to receive neutral sympathy. Ultimately, so the argument went, they would come so close together that they would almost inevitably find their own settlement. In short, final-offer arbitration would obviate its own use thus eliminating the chilling effect of binding arbitration.

Experience has shown, however, that minor variations in final-offer arbitration statutes have fundamentally different affects on the parties' behavior and hence on whether the expected results will be achieved. Massachusetts and Wisconsin, and most recently Hawaii, have enacted a "pure" form of final-offer arbitration whereby each party must submit one final package incorporating all outstanding issues and the arbitrator or panel must select what is considered to be the most suitable package. This harsh or risky form of final-offer arbitration discourages resort to arbitration but does not eliminate it. One concern of critics is that when recourse to arbitration nevertheless ensues, arbitrators may be forced to choose not the best or most suitable package, but that which is least inequitable. Hence, injustice to a greater or lesser degree may result.

In Massachusetts and Iowa, fact-finding still precedes arbitration. In Iowa, the arbitrator is permitted to choose the earlier fact-finder's recommendation as a third alternative to either party's final offer. In Massachusetts, while arbitration panels must choose between final offers, they usually select the party's offer which is closer to the fact-finder's prior recommendations. Either procedure strengthens the force of fact-finding, but may lead to gamesmanship with its recommendations. Perhaps as a result, Massachusetts has recently agreed upon a state-wide Joint Labor-Management Committee with the special charge of avoiding resort to arbitration except in the most unusual circumstances.

Connecticut, Iowa, and Michigan adopt a variant of the final-offer concept allowing arbitrators or panels to consider each outstanding issue separately and select from one or the other of the parties' final positions on an issue-by-issue basis. This procedure involves considerably less risk to the parties than final offer by whole package in which the party that loses on a major issue may also lose on a whole series of lesser issues. Hence, it does not discourage resort to the

arbitration process to the extent that occurs under the Wisconsin whole package approach. Moreover, it allows an arbitrator more readily to balance between the parties' final offers on the various issues, creating an overall equitable package. Going even further, the Michigan statute limits final-offer arbitration to economic issues only, with non-economic issues still to be decided under conventional arbitration terms.

In yet another variation, in 1977, New Jersey adopted a statute that permits the parties in public safety disputes to choose any one of a number of specified terminal procedures to resolve impasses resulting after fact-finding. Final-offer arbitration is one of the choices available to the parties. If they are unable to mutually agree on a procedure, the New Jersey statute provides that final-offer arbitration by whole package shall be used to resolve economic issues and final-offer arbitration by issue shall be used to resolve non-economic issues.

Another crucial statutory variant revolves about when the parties must make their final offers and whether they are allowed to change them once made. In Wisconsin, for example, final offers must be certified in writing five days in advance of the hearing and may not be changed thereafter. In Michigan, at the other extreme, final offers need only be made "at or before the conclusion of the arbitration hearing," the duration of which is, of course, determined by the arbitration panel. Moreover, in Michigan the panel is allowed to hear evidence on the issues in dispute, make suggestions to the parties for their resolution, and then remand the dispute to the parties for up to three weeks of further negotiations before ultimate final offers need even be made. Such a procedure obviously is extremely flexible, permitting and even encouraging negotiations and changes of position all during and even subsequent to the arbitration hearing. Flexible procedures of this kind, clearly designed to encourage voluntary settlements prior to, during and even after the completion of the hearing, are obviously a hybrid of mediation and arbitration.

MEDIATION-ARBITRATION

Flexible final-offer procedures of the type described in the preceding section — final offer on an issue-by-issue basis, statutory permission for the parties to modify their final offers during the course of the arbitration proceeding itself, and the possibility of remand for further negotiations before the ultimate final offers must be made — almost inevitably result in a proceeding which is known as mediation-arbitration, often called simply "med-arb". Med-arb has been known for some years in the industrial relations field although its use has not

been frequent. Parties at an impasse in negotiations but in mutual agreement that a strike would be highly undesirable have occasionally selected a neutral in whom they have confidence — often one they have used for years as a grievance arbitrator — as their private mediator for the issues in dispute. The unusual fillip of med-arb is that if the mediator they have selected cannot resolve any particular issue or set of issues during mediation, that same individual will then have the power to issue a binding award as to how such issues will be settled.

After short reflection on such a process, it is reasonably obvious that the power given the individual who has been selected as mediator-arbitrator is great. When a suggestion is made to the parties during mediation as to how a particular issue could or should reasonably be settled, the parties are, of course, free to indicate that this idea is an unacceptable solution. It is equally clear that frequent resort to this kind of response is an exercise in futility. If the neutral feels that a particular solution is a fair one, the parties failure to accept it during mediation simply means that they are likely to be ordered to abide by it in later arbitration. Hence, the parties' more common reaction to the mediator's suggestions in med-arb is to agree reluctantly and press for a favorable decision in another area.

The virtue of med-arb is not that it is final; so, too, is arbitration. The virtue of med-arb is that it is an interactive process. Ordinary interest arbitration is normally a somewhat judicial procedure in which the neutral takes evidence and then drafts the parties' "agreement" in the loneliness of his own study. In med-arb the neutral customarily works out solutions in the presence of and with input from the parties. The parties are thus able to assure themselves that the neutral has considered all of their arguments before a final decision is made. For example, they can assure themselves that full weight has been given to the size of the existing fringe package when a particular wage settlement is proposed, and thus that *quid pro quos* are obtained for essential concessions extracted.

The nature of med-arb has elements of coercion. The parties, as suggested above, are not very free to reject suggestions made to them during the mediation phase. In fact, resort to the arbitration stage of the med-arb process ordinarily occurs only when the parties wish to be ordered to do that to which they have already agreed. Hence, an asset of med-arb is not its finality but that the parties retain a sense of direct participation in the result of the arbitration process to a greater extent than under any other binding impasse procedure. Whether med-arb is agreed to between the parties themselves, or whether it comes as the serendipitous result of flexible statutory final-offer arbitration procedures, it is deemed by many to be a constructive alternative to

strikes or to conventional interest arbitration. Certainly, if the public interest is seen to lie both in avoiding all strikes and simultaneously in maximum participation by the parties in making their own agreement, then med-arb is a worthwhile procedures in crucial public sector negotiation. As a consequence of experience in states like Michigan, where two-thirds of the disputes submitted to arbitration are settled before or during the course of the arbitraiton proceeding by means of the med-arb process without need for a written award, several other states have now deliberately made med-arb a part of their statutory arbitration procedures.

SUMMARY AND CONCLUSIONS

Despite the theoretical and practical arguments made by opponents, the number of states which have adopted arbitration as the final step in statutory impasse procedures has increased in recent years. Now more than half of the states use it for some or all public employment disputes. Arbitration is believed to be less costly to the public than strikes. So far as the parties are concerned, the dollar cost of arbitration is generally more of a deterrant to unions than management, but it is not a major barrier to the use of arbitration except for very small bargaining units where the per capita cost of an arbitraiton can be extremely high.

Arbitration certainly chills to some degree the parties' incentives to reach their own negotiated settlements. Studies suggest that the chilling effect reaches ten percent of negotiations which, rather than being settled by the parties, will be taken to arbitration where such an alternative is possible. It is equally apparent, however, that in most cases the desire of union and management negotiators to reach their own settlements is sufficiently strong to prevent most parties constantly from referring their unsettled problems to arbitration. The parties are understandably hesitant to transfer their decision making power to an outsider if they can avoid doing so. This strongly held preference for self-determination has in every jurisdiction thus far prevented arbitration substantially from undermining the collective bargaining process.

Arbitration also changes the balance of power in collective bargaining. It tends to raise the wages of workers in rural areas relative to those in metropolitan areas. It raises the wages of those with little economic power vis-a-vis more essential and thus more powerful public employee groups. It is not at all clear, however, that arbitration raises wages in pattern-setting large cities over what they would have been in the absence of an arbitration statute. Most studies suggest that the

militancy of powerful public sector unions as well as the market factors that inevitably affect public sector negotiations are far more determinative of wage rates in such key negotiations than is arbitration.

Non-compliance with arbitration awards is rare. As yet, however, the nation has had neither sufficient time nor experience with what might happen in the case of employees who have become extremely resentful of a procession of awards believed to be unfair. Thus, the relatively unblemished record of arbitration in maintaining industrial peace may conceivably become tarnished in time.

Industrial relations systems change constantly as they adjust to advances in technology as well as to a variety of economic, social, and political factors. So, too, impasse procedures that are effective and deemed to be socially useful may have a life span of little more than a decade or two. Today in the public sector, interest arbitration is emerging in many jurisdictions as a politically acceptable means of resolving impasses. Yet jurisdictions are already modifying their arbitration procedures — toward med-arb, toward final-offer selection which includes the right of the panel to select a previous fact-finder's award as a third choice, and toward allowing the parties to select their impasse procedure from among a number of choices.

The newest wrinkle in interest arbitration, suggested in the theoretical literature but as yet nowhere adopted, is a kind of "blind man's bluff" or closed-offer arbitration. Such a procedure would force the neutral to choose between two final offers, totally with information about the parties' previous progress in negotiations. Hence, the parties could make final offers higher or lower than each had indicated they were willing to make as a basis for settlement in previous negotiations, taking the chance that they could win more in arbitration than they would have been willing to accept or give voluntarily. It is suggested that the risks of such a procedure for both parties, to say nothing of the risks for the arbitrator, would force the parties to settle their own disputes. As noted previously, no jurisdiction has yet adopted such a "blind" arbitration procedure. But given the rapid and continuous experimenting that is taking place in this field, it is unlikely that it will be long before some jurisdicton does so.

In conclusion, it seems clear that the willingness of the public to impose arbitration procedures on frequently reluctant public managements and increasingly acquiescent unions depends largely upon legislative evaluation of how the public views the strike alternative, a kind of Benthamite pleasure-pain calculus. If the result of that calculation is for arbitration, the precise form to be adopted again is a matter of the parties' and the legislature's values. If they wish to emphasize the deterrent effect of arbitration, inflexible, draconian and

risk-filled procedures best fit their ends. If they wish to avoid strikes yet emphasize a maximum number of agreed-upon settlements, more flexible procedures including med-arb would be the choice. In any case, further statutory expermentation in both directions appears inevitable.

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HIGHER EDUCATION

*James P. Begin**

HISTORY AND EXTENT

One by-product of the public sector bargaining movement which developed in the early sixties has been the extension of collective bargaining to faculty in institutions of higher education. The first two-year institution was unionized in the mid-sixties in Michigan. With the unionization of the U.S. Merchant Marine Academy in 1967 by the American Federation of Teachers (AFT), the bargaining movement was extended into four-year institutions. When the giant City University of New York system was organized soon thereafter, it was clear that collective bargaining had come to higher education in an important way.

While faculty in institutions of higher education have not organized as rapidly as teachers in elementary and secondary schools, a definite trend toward unionization has emerged, particularly in two-year institutions and former teacher's colleges. Figure 1 details the year-by-year growth. At the end of 1978 about one fifth of all institutions were unionized. These unionized institutions employed just over one quarter of the faculty in higher education. About a quarter of the two-year institutions, 12 percent of the four-year institutions, and less than 5 percent of the private institutions have been unionized. By comparison, over a nine-year period (1965-73), it has been estimated that at least 70 percent of the elementary and secondary school teachers were organized.[1]

A recent federal court decision may have an important impact on the future growth of faculty bargaining, particularly in the private sector. A three-judge panel of the U.S. Court of Appeals for the Second Circuit overruled a position that the National Labor Relations Board had held since 1971 that faculty are employees for the purpose of collective bargaining.[2] The court agreed with the administration at Yeshiva University that faculty are managerial employees. Since the Yeshiva faculty governance procedures, the committees and senates

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FACULTY UNION ACTIVITY IN HIGHER EDUCATION

Figure 1

Year	New Institutions Each Year	Total Institutions
1966	1	23
1967	14	37
1968	33	70
1969	68	138
1970	39	177
1971	68	245
1972	40	285
1973	25	310
1974	27	337
1975	61	398
1976	53	450[a]
1977	30	480
1978	26	506[a]

Source: Joseph W. Garbarino, "Faculty Union Activity in Higher Education — 1974," *Industrial Relations,* Vol. 14, No. 1 (Feb., 1975), pp. 110-11; Joseph W. Garbarino and John Lawler, "Faculty Union Activity in Higher Education — 1976," *Industrial Relations,* Vol. 16, No. 1 (Feb., 1977), pp. 105-06; "Faculty Union Activity in Higher Education — 1977," *Industrial Relations,* Vol. 17, No. 1 (Feb., 1978), pp. 117-18; and "Faculty Union Activity in Higher Education — 1978," *Research Report 79-1,* Institute of Business and Economic Research, University of California (1979).

[a]One bargaining unit was decertified in 1976 and one in 1978.

are similar to those found at many institutions, the impact of this decision on the future growth of faculty unionism could be substantial unless the decision is appealed and overturned.

DETERMINANTS OF FACULTY BARGAINING

While public employee bargaining legislation and the subsequent growth of public employee unionism were important stimuli to the growth of faculty unionism, changes in the structure and

function of public institutions of higher education, including the development of statewide coordinating agencies, were also important antecedents. The low rate of unionization of private institutions, despite the fact that unions in the private sector had enjoyed the protections of federal labor relations statutes, reinforces this point. As a body, the private institutions were spared the massive growth and reorganization faced by public colleges and universities. Relationships of teacher's colleges and two-year colleges to the elementary and secondary schools and the unions which organized those teachers were instrumental in bringing unionization to those institutions.[3]

The organizations competing for faculty bargaining units are the AFT, the National Education Association (NEA) and the American Association of University Professors (AAUP). The AFT and the NEA have historically derived their memberships primarily from elementary and high shcools, while the AAUP has always operated only in the higher education context. The AFT and NEA have dominated the unionization of two-year colleges, former teacher's colleges and multi-institutional state systems. The AAUP has organized primarily individual, four-year institutions in both the public and private sectors.

While the competition among the AAUP, AFT and NEA has been identified as an impetus to bargaining relationships at some colleges and universities where none might otherwise have developed, generally the faculty bargaining movement, when compared to the school teacher bargaining movement, has not been marked by substantial competition. To date the AAUP has not responded strongly at the national level to the AFT or NEA competition. This less agressive stance by the national organization most acceptable to large numbers of faculty might account, in part, for the slower rate of unionization of faculty, particularly in private institutions whose educational missions have not brought the faculty into frequent contact with the AFT or NEA.

The collective bargaining systems evolving in higher education have unique aspects which reflect the organizational characteristics of colleges and universities. At many institutions, a range of governing mechanisms have evolved to provide faculty with input into policy development and administration. Additionally, students have taken an interest in the conduct and results of collective bargaining. The remainder of this chapter will detail (1) the accommodations which are evolving between faculty bargaining and traditional self-governance procedures and (2) the role of students in faculty bargaining activities and the impact of bargaining on students.

COLLECTIVE BARGAINING AND GOVERNANCE

This section will first discuss the impact of bargaining legislation on traditional governance. A discussion of the impact of the negotiating process and the grievance process on governance will follow.

Governance and the Law

Traditional governance mechanisms can be affected by the interpretation of bargaining statutes in the courts or administrative agencies in two ways: (1) through the alteration of the *structure* of the governance mechanisms or, (2) through findings, on a *case-by-case* basis that individual issues previously dealt with by traditional governance procedures are subject to mandatory negotiations. In the first instance, the external bodies might determine that the traditional procedures are subject to alteration through mandatory negotiations, or that the traditional procedures should cease to exist because they have been employer-dominated and thus represent an unlawful interference with the bargaining process. A study of eighteen major higher education decisions of the courts and administrative agencies concerning negotiable terms and conditions of employment provides insights into these issues.[4]

It is evident at this point that the courts and the administrative agencies do not consider traditional governance procedures to be employer-dominated bodies. Only one case has been decided which deals directly with this issue. A decision of the Michigan Employment Relations Commission indicated that Michigan State University, by establishing departmental advisory committees, had not interfered with statutory employee bargaining rights.[5] Another case was initiated at Pennsylvania State University by an NEA affiliate but the charge was dropped before the case was decided. Both cases emanated from representation campaigns, apparently as part of the campaign strategy of the faculty unions filing the charges.

A ruling by the NLRB that the senate at the Northeastern University was not a labor organization suggests the conclusion that it was also not an employer-dominated company union unless it attempted to interfere with the mandatory bargaining responsibilities of a union.[6]

The risk of alienating faculty supportive of traditional governance procedures probably accounts in part for the few direct challenges to the jurisdictions of senates by unions. As an example, a decertification campaign at Central Michigan University was believed partly to be based on the union's competitive relationship with the senate on some issues.

While there are few cases dealing directly with the treatment of senates or councils as employer unions, it probably can be implied from the cases which deal directly with the negotiability of governance procedures that the boards or commissions do not perceive that the existence of traditional governance mechanisms, per se, represents an attempt by the employer to undermine the collective bargaining process. Comments by the New Jersey Public Employment Relations Commission in a case between the American Association of University Professors and Rutgers University are typical of other cases dealing with this issue. The Commission did not argue for the complete elimination of traditional governance by any means:

> As viewed by the Commission,...there is no reason why the systems of collegiality and collective negotiations may not function harmoniously. Neither system need impose upon the other, with one exception: terms and conditions of employment including grievances. The University is free to continue to delegate to collegial entities whatever managerial functions it chooses, subject, of course, to applicable law. The Act is among the laws applicable to the University as a public employer, and therefore collective negotiations under the Act would only mandate a change in the collegial system if that system were to operate so as to alter the University's obligation to deal exclusively with the AAUP with regard to the grievances and terms and conditions of employment of unit employees. Beyond that, both systems are free to operate without necessarily interfering with one another.[7]

The analysis of neutral agency decisions on scope of negotiation issues also produces a conclusion that most governance structures are not subject to mandatory negotiations. Public and private administrative agencies alike have agreed that procedures providing for faculty participation in policy-development and policy-application activities are not mandatorily negotiable except to the extent that the procedures have an impact on terms and conditions of employment. The rationale is that the employer has the right to determine how it wants to organize itself for making or applying policy. University administrations have delegated and can continue to delegate mangerial functions to faculty through a variety of mechanisms, but it remains the prerogative of the administrations to permit or not permit this type of

delegation. Thus, the administrative agencies have found the following issues to be permissive and not mandatory areas for negotiations: governance procedures in general; 1966 AAUP statement on governance of colleges and universities; union, faculty or student participation in tenure and promotion committees; faculty participation in administration search committees, or administrator evaluation; union appearances at governing board meetings or faculty participation on boards.

An analysis of the available cases with respect to specific, substantive issues indicates that the agencies are restricting the mandatory scope of negotiations to clear terms and conditions of employment. Curriculum issues, budget matters, physical facilities, course offerings, teaching materials, qualifications and responsibilities of administrators, tenure quotas, tenure criteria, academic calendar, studies on faculty evaluation, professional development programs, work location, methods of teaching and testing, and student advising programs have been found to be permissive issues. The impact of policy changes in these areas on terms and conditions of employment issues have been found to be mandatory subjects of negotiations.

So far, the agencies and courts have dealt with some of the more complex issues only in general terms, and it will take a number of decisions before the line of demarcation between mandatory and permissive issues is more clearly drawn. For example, union, faculty, or student participation in promotion and tenure committees and the criteria to be used by the committees generally have been found to be permissive areas. But the application of the "impact" test may find many aspects of the procedures to be mandatorily negotiable. As an example, the New Jersey Public Employment Relations Commission in the Rutgers decision found the scope of tenure (e.g., by campus or university-wide) to be a negotiable issue.

The same observation could be made about the issue of the academic calendar. Issues such as the time that classes start in September and the time they stop in the spring, or whether a semester or trimester system should be used, have been found to be permissive subjects of negotiations. But the impact of the calendar on such things as workload, vacations, holidays, and compensation are likely to be mandatory issues unless restricted by statute.

A major implication of the division of issues into mandatory and permissive categories is that faculty jurisdiction on given issues becomes scattered. If the administration wants to seek faculty input on, for example, a major overhaul of the faculty evaluation system, it would have to balance between the senate on one hand for the permissive areas and the bargaining agent on the other for mandatory issues of

negotiations. Over time, the administration may find it easier to deal solely with the bargaining agent. Interestingly, the preservation of the traditional modes of governance is essentially in the hands of the administration, except where faculty support to protect traditional governance emerges. The campaign at Central Michigan University to decertify the union indicates that that opposition may arise in some instances.

In the long run, the gradual expansion of collective bargaining into areas previously dealt with by senates may undermine faculty interest in the senates. In some New Jersey institutions, for example, faculty and union interest in the senates appears to have waned as the bargaining process has become the focal point for those issues most important to faculty.[8] To date, this has occurred primarily at institutions where the prebargaining governance procedures were not well established.

A limit on union intrusion into traditional governance occurs when statutory boundaries are placed on the scope of negotiations. Attempts in Wisconsin and Montana to limit the scope of faculty bargaining by statute failed, but a recent California statute providing access to bargaining for employees in the University of California, the Hastings College of Law and the California State University system excluded the following wide range of issues from negotiations:

3. Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing orders of the regents or the directors.
4. Procedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate, the procedures to be used for the evaluation of the members of the academic senate, and the procedures for processing grievances of members of the academic senate. The exclusive representative of members of the academic senate shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this paragraph. If the academic senate determines that any matter in this paragraph should be within the scope of representation or if any matter in this paragraph is withdrawn from the responsibility of the academic senate, the matter shall be within the scope representation or if any matter in this paragraph is withdrawn from the responsibility of the academic senate, the matter shall be within the scope of representation.[9]

But statutory limitations otherwise have been slow to develop. Since widespread statutory limitations on the scope of negotiations are not likely to develop due to union opposition, the authority of traditional governance mechanisms will be diminished (1) by case-by-case administrative decisions which will fractionate faculty authority between collective bargaining and other governance mechanisms on certain issues, and (2) as will be discussed below, by the gradual expansion of negotiations into permissive areas as dictated by the conditions of particular bargaining relationships. Expansion into permissive areas has been forestalled, however, in at least one state. The New Jersey Supreme Court in a recent decision ruled that the legislative intent of the bargaining statute did not expressly allow a "permissive" category of bargaining items.[10] Accordingly, all issues are either mandatory or illegal, with the formerly classified permissive issues now presumably falling into the illegal classification.

The importance of this decision for other public jurisdictions, however, is that the court went on to say that it might not be constitutionally possible for the legislature to establish a permissive category. The basis for this position was that to permit negotiations over issues involving management rights might undermine public control of government.

> A private employer may bargain away as much or as little of its managerial control as it likes. However, the very foundation of representative democracy would be endangered if decisions on significant matters of government policy were left to the process of collective negotiation, where citizen participation is precluded. This Court would be most reluctant to sanction collective agreement on matters which are essentially managerial in nature, because the true managers are the people. Our democratic system demands that governmental bodies retain their accountability to the citizenry.[11]

The court then proceded to caution the Legislature:

> The Legislature is of course free to exercise its judgment in determining whether or not a permissive category of negotiation is sound policy. We wish merely to point out that careful consideration of the limits which our democratic system places on the delegation of government powers is called for before any such action is taken.[12]

It will be interesting to see if any courts in other states follow this argument. If so, the scope of negotiations could be substantially limited.

Governance and Negotiations

It was postulated that eventually collective bargaining would contribute to the decline of traditional governance mechanisms through the gradual erosion of governance authority as the faculty bargaining contract grew thicker. But this hypothesis itself assumed that prebargaining faculty participation was more universally established than was the case. In fact, most unionized institutions did not have strong traditions of faculty participation. Even in the important area of personnel decisions, Garbarino interpreted the AAUP survey data as indicating that "faculty dominance in personnel decisions does not apply to large absolute numbers of institutions."[13]

Other evidence suports a conclusion that the prebargaining state of governance in unionized institutions was not extensive. Gershenfeld and Mortimer found that prebargaining governance at the state colleges and two-year colleges in Pennsylvania was only recently established and rarely influential.[14] A similar pattern exists for the same types of institutions in New Jersey. Mortimer and Richardson's study of six institutions in Massachusetts and Pennsylvania[15] produced similar findings. Kemerer and Baldridge's survey of unionized institutions produced the finding that about 65 percent of the senates had been established in the last decade.[16]

In this context, then, it is not surprising to find that collective bargaining has often proved useful in building faculty authority rather than in undermining its traditional base. At this point, the diversity of collective bargaining-governance relationships is the most prevalent characteristic of collective bargaining. Indeed, one author has said, "there is probably evidence or an incident to illustrate whatever case one wants to make about the relationships between senates and/or faculty governing structures and collective bargaining."[17] But, despite the current instability and diversity, the expectation that traditional governance and bargaining would be competitive at the cost of traditional procedures has not been fulfilled. What is most often found, instead, at least to date, is a new governance form which integrates both collective bargaining and traditional governance and which seems to enhance faculty power.

In earlier works, both Garbarino[18] and Begin[19] reported that the dominant pattern of union/senate relationships was one of cooperation rather than competition or cooptation. The result has been that few examples of a union model in which the union represents *all* interests of the faculty have developed to date. A review of the literature does not produce a conclusion that there has been a widespread dismantling of senates, although there are instances in which this has occurred.

However, in four New Jersey two-year colleges where governance bodies discontinued operation, governance mechanisms were later revived.

The trend in collective bargaining-governance interaction seems to be in the direction of the greater contractual delineation of faculty authority, including traditional governance mechanisms. Some institutions like Rider College and Fairleigh Dickinson University in New Jersey have incorporated in their contracts complete governance procedures which provide for broad faculty participation. Many other agreements provide for the formation of joint administration/faculty committees to handle various issues.[20]

While traditional governance procedures have not been negotiated out of existence, the slow expansion of negotiatons into permissive areas of managerial authority (often delegated to faculty for recommendations through traditional governance) may undermine traditional governance over the long haul. To date, the authority of traditional governance mechanisms has diminished primarily in the areas of faculty economic benefits and personnel policies. Curriculum issues, budget matters, physical facilities, student issues and administrator selection are rarely found in faculty agreements.

The limited evidence available indicates that the diversity of union/senate accommodations which has been developing is a product of a number of factors, including the extent of governance before bargaining, the responsiveness of traditional mechanisms to problems, the attitudes of the administration, faculty and union concerning the function of the senate, the nature of the bargaining relationship, the existence of union competition, the type of bargaining agent and the bargaining structure.[21]

Governance and Grievance Resolution

The processing of grievances under a bargaining relationship could have at least two effects on collegial relationships and procedures: (1) the formalization and centralization of grievance and personnel policies under bargaining could undermine collegial procedures and thus collegial authority, and (2) collegial relationships could be threatened by the often adversary nature of grievance processing. The onset of faculty negotiations has clearly produced more systematic grievance procedures. While few, if any, institutions had external arbitration in the prebargaining period, faculty unions and administrators have broadly accepted the concept of arbitration. Even at an early stage of the faculty bargaining movement, 75 percent of the four-year contracts and 83 percent of the two-year contracts contained

binding or advisory arbitration provisions.[22] But, an examination of the issues which can be grieved indicates that the parties in higher education have shaped the scope of grievable issues to reflect pre-bargaining practices. Usually omitted from the definition of a grievance in faculty contracts are substantive matters of academic judgment; only procedural violations, such as improper compliance with evaluation procedures, may be grieved or arbitrated through the negotiated procedures.[23] Two-year institutions do not follow this pattern as closely as four-year institutions.

The limitation of personnel grievances to procedural questions, after the historical pattern of the national AAUP, developed primarily because the parties did not feel that the usual just cause model was as relevant in a context in which (1) the union members were participants in personnel decisions because of their professional knowledge of individual qualifications, or (2) decisions not to reappoint an individual where made on the basis of one's failure to achieve a minimum level of excellence and not on an individual's ability to meet minimum job requirements.

Only one study reviewed the important question of whether limitations on the scope of the grievance procedure have sacrificed individual due process for the protection of academic judgments. At Rutgers University it was found that due process was achieved even in the absence of external review; the president was the final step.[24] However, there is growing evidence that the parties at a number of institutions are developing procedures which either substitute internal due process for external review of academic judgement (for example, Temple University, the University of Hawaii, Rutgers University, and CUNY provide internal committees), or open up arbitration to some or all academic judgment issues, often by developing special arbitration to procedures (for example, Oakland University provides a form of tripartite arbitration and the University of Rhode Island provides for arbitration of all issues).

To date, the policies most subject to rationalization through the grievance process have been those involving personnel actions such as reappointment, promotion and tenure. At most four-year institutions, even those with broader contracts, faculty personnel actions have produced the bulk of the grievances. In two-year institutions other grievance issues appear frequently and sometimes dominate, in large measure because the contracts are much thicker.[25]

Most studies of the impact of grievance procedures discuss postbargaining grievance or arbitration rates and decisions. Thus, an impact on prebargaining policies can only be inferred from the types of issues grieved. If the experience at Rutgers University is any indication,

however, the systematizing effect are substantial, in fact, the most important deriving from collective bargaining. Decisions in the grievance process either have produced a number of faculty personnel policy changes, particularly in respect to hiring practices and evaluation procedures, or have led to a more uniform application of existing policies.[26] In the New Jersey state colleges policy changes have also derived from the grievances since the bargaining agent (AFT) has grieved most of the provisions in the contract.[27]

While it has been commonly believed that the rationalizing effects of the grievance process would have a negative impact on collegial authority and institutional quality, there is not sufficient empirical literature on this question to provide firm conclusions. At Rutgers University an examination of the number of faculty returned to departments because of favorable grievance decisions where the departmental faculty had previously rejected them indicated that it was extremely difficult to overcome negative peer reviews in the grievance process. Thus, there was little diminution of the existing qualtiy of Rutgers faculty due to the grievance process.[28] No study was found which examined prebargaining and postbargaining promotion and tenure rejection rates controlled for the effects of affirmative action and the market, so that the hypothesis concerning the tendency of faculty automatically to recommend promotions to colleagues under pressures of external review of the grievance process could be tested. Brown and Stone did find, however, that there were no differences in the promotion rates between the 37 unionized four-year institutions they studied and national rates.[29]

Kemerer and Baldridge offered the opinion that: "The major negative consequence of faculty unionism may be a protectionist, job-security orientation that could thwart personnel policies so that incompetency is protected and seniority, not merit, becomes the main decision-making criterion."[30] But would not reactions to severe economic conditions produce the same types of employee adaptations, union or not? The relative contributions to due process by negotiated grievance procedures, market forces and affirmative action were considered in a study of Rutgers University. While it was found at Rutgers and other institutions that most of the grievances were generated by non-bargaining forces and may have occurred with or without bargaining, the negotiated grievance process provided a more efficient internal accommodation to affirmative action complaints and grievances arising from institutional responses to market forces. Policy responses to problems were also quicker.[31]

By providing for the systematic review of faculty complaints, faculty grievance procedures make faculty peer recommendations

subject to greater scrutiny, but it is not clear that this, per se, diminishes faculty authority. Most researchers agree with the conclusion that "the effect of grievance arbitration awards on college and university governance to date has been neither uniform nor substantial."[32] Other authors, in fact, concluded that the more equitable decisions deriving from the rationalized personnel process have probably reinforced faculty authority.[33]

The development of internal procedures ending in arbitration has reduced reliance on the national offices of the AAUP for external review of complaints at unionized institutions. Local chapters at many unionized institutions where AAUP is the bargaining agent no longer call on the national AAUP for help to any great degree, and the administrations of many campuses unionized by AFT or NEA affiliates have refused to deal with AAUP, primarily because it would complicate relations with the established agent. Accordingly, faculty at unionized institutions have lost the resources previously provided by the national AAUP for protecting academic freedom. In return they have gained more extensive local protections. In essence, the policing of faculty rights has been decentralized under bargaining to the institutional level.

Little of the literature on faculty grievance resolution focuses on the potential negative impact of the grievance process on institutional relationships. A study of Rutgers University concluded that while overall faculty-administration relationships did not appear to be severely altered due to the relatively small number of cases (seventy over five years), the confrontation among peers created by grievances was often bitter since two-thirds of the grievances involved some level of negative peer review. The result has been a growing polarization among those directly involved in the process: the grievants, the AAUP counselors and negotiators, faculty in the affected department and the various levels of administration. Difficulties in recruiting and retaining grievance counsellors for the AAUP was partially a product of the adversary nature of the process. The time required to process cases was another factor.[34]

In sum, while it appears that grievance procedures have the potential for creating or reinforcing adversary relationships, it cannot be concluded at this time that collegial governance authority is being undermined by negotiated grievance procedures. Indeed, the regularization of policies and procedures deriving from grievance processing is probably putting faculty authority on a firmer base.

COLLECTIVE BARGAINING AND STUDENTS

At one time the issue of student participation in negotiations generated a lot of discussion as indicated by the extensive literature

which developed on the subject.[35] Students were striving for participation on the basis that the faculty bargaining agents and administrations would be making decisions having a major impact on their academic lives. (Interestingly, however, students have not sought much participation in negotiations with nonfaculty units even though these negotiations could also conceivably affect their lives, for example, dorm services or tuition levels). Unions and administrations discouraged such participation since they perceived it would have an unfavorable impact on the negotiating process, although in some instances the parties encouraged participation hoping that it would bring them some strategic advantage in negotiations.

But after over a decade of faculty negotiations, student participation has not become generalized. It is virtually non-existent in two-year colleges except in strike situations, and systematic student participation in faculty negotiations has occurred at a minority of the unionized four-year institutions. Occasional student participation, for example, during strikes, has been the most frequent mode.

The form of systematic student participation in negotiations has included periodic updates of student leaders on negotiations progress, student review of and reaction to bargaining demands and full student participation at the bargaining table.

The students' role when they actually sit at the bargaining table has also varied. One study found that:

> Depending on the situation, students have been silent observers or vocal participants, restricted to written commentary or allowed to speak freely during negotiations, limited to proposals already under consideration or permitted to initiate their own agenda items, been independent third parties or part of the management bargaining team. We know of no instance where students have been seated with the faculty bargaining team, nor are we aware of any cases of genuine trilateral bargaining.[36]

In at least five states (California, Florida, Maine, Montana, Oregon), statutes mandate student participation at the bargaining table, sometimes as members of the management bargaining team. And, as noted, in practice, students often align themselves with the management position.

In addition to the types of regular participation noted above, students also participate as situations arouse their interest, particularly when strikes are imminent or actually occur. Indeed, it is during strike

situations that students seem to have some effect on the process and outcome of negotiations. A study of two New Jersey strikes, for example, concluded that the students do have significant potential for bringing about faculty-administration accommodations, both due to the possible effect of the strike on enrollements and to student activities during the strike to pressure the parties to settle.[37] The study also pointed out the differential impact of strikes between public and private institutions. The greater dependency of private budgets on tuition revenue and the availability of cheaper public education substitutes make the private administrator more sensitive to the loss of students during a strike.

By and large, except for strike situations, student participation in bargaining (or any kind of governance), is not a rapidly growing social movement. One major reason is that it has been difficult to identify any negative effects of unionization on student interests. One study concluded that: 'In the absence of longitudinal studies of particular institutions, it is difficult to assess collective bargaining's actual impact on students and student interest, but somewhat easier to identify areas of potential impact."[38]

One study of the impact of bargaining on tuition levels found no such relationship. State funding and declining enrollments, however, did have an effect.[39] In addition, while many administrations have claimed that reallocations have been made from other budgetary accounts to faculty salary accounts, the absence of systematic empirical inquiry into this area also precludes meaningful generalizations. In short, a negative effect of negotiations on students has not been established and this probably accounts for the failure of a national movement to materialize. The threat of student participation, however, may have led the parties to make concessions to increased student participation in governance to head off a student role in negotiations. But as reported by Mortimer and Richardson, students have placed little priority on using new procedures providing for their participation.[40]

The relatively small number of student issues to appear in negotiations has probably also had an effect. In fact, issues of interest to students, including student participation in governance, have been found to be permissive subjects of negotiations.

There is also little evidence to indicate that student participation has had negative influences on the bargaining process or authority distribution. Most parties to negotiations where student participation has occurred have not concluded that the students had a negative influence on the bargaining process. In fact, some have indicated that students have contributed helpful suggestions to the negotiations

process. It would be difficult to conclude from these experiences that student participation in negotiations has undermined the authority of faculty or administrations.[41]

SUMMARY

Faculty bargaining in this country is underway, but it is still substantially a minority movement with expansion proceeding slowly. Any conclusions, therefore, must be considered within this context. This review of two unique aspects of higher education bargaining (governance and student participation) does indicate that predictions about the negative consequences of bargaining in respect to these issues have generally not been fulfilled.

Faculty bargaining has not meant the end of traditional governance structures. Instead, a range of informal and formal accommodations between traditional governance and bargaining is developing. The negotiated grievance procedures have important effects on departments or schools, the base of much faculty authority, but the regularization of practices and improved due process buttress faculty authority in the view of some authors. These are important conclusions, particularly if it can be assumed that the institutions organized first have been among those with the greatest governance problems.

Similarly, student participation in bargaining has been neither extensive nor disruptive. Like student participation in governance generally, student interest has been difficult to sustain unless there has been visible issue, a crisis.

A major conclusion of this review, which will not be surprising to students of collective bargaining, is that the bargaining process in higher education is a reactive process shaping itself in relation to underlying environmental and organizational factors. Therefore, it is not surprising to find that higher education bargaining has accommodated traditional governance and student concerns within its framework by shaping procedural and substantive outcomes unique to higher education.