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Collective Bargaining in the Public Schools: Discussion and Criticism of Some Recent Developments

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COLLECTIVE BARGAINING IN THE PUBLIC SCHOOLS:
DISCUSSION AND CRITICISM OF SOME RECENT DEVELOPMENTS

Statistics clearly indicate that in recent years Illinois school boards1 have been increasingly active in the collective bargaining field.2 While pressure from teacher organizations has undoubtedly been responsible for a great deal of the increased activity, it is likely that the boards have simply come to recognize the many advantages of collective bargaining. In addition to being the most effective means of matching employer requirements with employee needs, collective bargaining is also recognized as the best available way of assuring resolution of labor-management disputes by peaceful means, to the advantage of both labor and management, and, in the case of public employment, to the advantage of the public.3 Despite the positive attributes of collective bargaining and the increasing willingness of school boards to engage in it, however, there still is no statutory authority in Illinois allowing a public school board to bargain on a collective basis with its teachers.

The absence of statutory authority for collective bargaining raises serious questions concerning the legal enforceability of a collective bargaining agreement entered into by a school board. Specifically, a problem arises with respect to the permissible scope of such an agreement. In the past ten years Illinois courts have dealt extensively with these problems. The decisions, however, have often been vague and inconsistent, making it extremely difficult for negotiators to ascertain what they legally may do. The objective of this note is to suggest firm guidelines for the determination of the permissible scope of such collective bargaining agreements by analyzing recent court decisions and offering more concrete approaches where the court opinions are unclear or contradictory.4

1. A school board is "the governing body of any district created or operating under authority of this Act, including board of school directors and board of education." ILL. REV. STAT. ch. 122, § 1-3 (1973).

The school code divides districts into three classes: (1) those with less than 1,000 inhabitants; (2) those with 1,000 to 500,000 inhabitants; (3) those with more than 500,000 inhabitants. ILL. REV. STAT. ch. 122, §§ 10-1, 10-10, 34-2 (1973). The express statutory powers of class (1) and class (2) boards are the same. Most of the cases discussed in this article were decided on the basis of the provisions for classes (1) and (2). Cross-reference will be made to the separate provisions for class (3) where appropriate.

2. As of July 1974 the Illinois Education Association had local teacher organizations in 689 school districts and 286 of those locals had some form of collective bargaining agreement with their respective boards. At that time there were 1,051 school districts in Illinois. By March 1975 the number of locals with collective bargaining agreements had grown to 388. Conversation with Mr. Joseph Triolo, Chairman, Illinois Education Association Regional Council, Region 5, on March 24, 1975.


BACKGROUND OF THE PROBLEM

The primary obstacle to collective bargaining by public school boards has been a series of judicial decisions that a school board cannot delegate or limit by contract the discretionary powers conferred on it by legislation. In Chicago Division of the Illinois Education Association v. Board of Education, however, an Illinois Appellate Court held that an agreement of a school board to bargain with a teachers union was valid and not an unlawful limitation or delegation of board authority. The court's rationale was that the simple agreement of a board to discuss matters with a teachers' representative did not, of itself, restrain the will of the board.

Although clearly permitting teacher representatives and school boards to negotiate, the Chicago Division opinion provided no definite indication of what matters could properly be the subject of a contract resulting from those negotiations. Therefore the threshold problem in any collective bargaining endeavor is the determination of what areas are within the permissible scope of negotiations. Recent cases which have dealt with this problem fall into two distinct categories. One group deals with collective bargaining agreements which have attempted to delegate the decision-making authority of the school board to a third party, such as an arbitrator. Another group involves collective bargaining agreements which limit the school board's powers by requiring the board to exercise its authority in a certain prescribed manner. It is helpful, in any effort to define the permissible scope of collective bargaining agreements, to treat these areas separately.

THE DELEGATION CASES


7. Id. at 472, 222 N.E.2d at 251.

8. The court did require, however, that a collective bargaining agreement provide:

[That] the employee organization shall agree not to strike, not to picket in any manner which would tend to disrupt the operation of any public school... that the benefit of any and all decisions and conclusions the Board of Education may reach after having negotiated with the employee organization selected shall apply equally to all teachers and other educational personnel employed by the Board of Education; and that should negotiations fail to resolve differences, the decision of the Board of Education shall be final.

9. Id. at 461, 222 N.E.2d at 246.
Association, a corporation organized to represent Rockford teachers in the negotiation of collective bargaining agreements. One provision of that agreement allowed for a grievance procedure and provided for submission to binding arbitration of any grievance that could not be satisfactorily resolved by the superintendent.

The board circulated among the teachers an announcement of the creation of an administrative position entitled Director of Personnel and Recruitment. The announcement included a resume of the duties of the position and invited applications from the teachers. Howard Getts, employed by the board as a guidance counselor, applied for the job along with several other faculty members. The board rejected all of the applications and never filled the position. Getts then filed a grievance alleging that the board's failure to appoint him to the position violated the collective bargaining agreement.

After the superintendent stated that he was unable to pass on the grievance, Getts and the Association demanded arbitration. The board, arguing that the dispute related to its non-delegable power to select employees, objected to the use of arbitration. The arbitrator, however, ruled the matter arbitrable. The board then took the matter to court and was successful in having the arbitrator's order vacated. Getts and the Association appealed.

The appellate court agreed with the board and quickly disposed of the case. Citing the rule of *Lindblad v. Board of Education* that a school board cannot delegate to another party those matters of discretion vested in the board by statute, the court determined that the issue involved was one that related to the duty of the board "[t]o appoint all teachers and fix the amount of their salaries." In holding the duty was one which could not be delegated, the court rejected Getts' argument that once the board had defined the duties and salary of the position there was no more discretion to be exercised. It noted that the individual qualifications of the applicants still had to be determined and emphasized that only the board, not an outside party, could do it. The court then affirmed the judgment of the trial court that the collective bargaining agreement was "to the extent it relates to arbitration of matters of selection or promotion of employees void and without force of law."

The *Rockford* rule of non-delegability of matters relating to the appointment of teachers was accepted in *Board of Education v. Johnson*. The

10. The agreement defined a grievance as a "claim by the Association or a staff member that there has been a violation, misinterpretation or misapplication of any provisions of the Agreement." *Id.* at 1092, 280 N.E.2d at 287.
11. The provision in question stated that all positions on the "administrative-supervisory level" would be filled according to certain procedures and "on the basis of qualifications for the vacant post . . . ." *Id.* at 1093, 280 N.E.2d at 287.
12. 221 Ill. 261, 77 N.E. 450 (1906).
Johnson court, however, went further and attempted to determine what matters could legitimately be considered proper subjects of binding arbitration provisions.

The Johnson case involved a grievance by two teachers concerning the board’s requirement that teachers write in the names of students on monthly attendance cards. The collective bargaining agreement between the board and the teachers association specified that teachers were not to be assigned duties principally clerical in nature. The grievance was submitted to the arbitration process where it was found arbitrable and a decision favorable to the teachers was rendered. The board argued that it could not be bound by the arbitration award since it could not submit to arbitration matters of discretion vested in it by the Illinois School Code.\textsuperscript{16}

In its opinion the court recognized the benefits of binding arbitration\textsuperscript{17} but also acknowledged the restrictions of the Lindblad rule that discretionary powers of school boards are non-delegable.\textsuperscript{18} It then held that “arbitration of certain ‘minor’ disputes pursuant to a collective bargaining agreement does not constitute a delegation by the board . . . .”\textsuperscript{19} Of course, this holding necessitated an effort to define what constituted a “minor” as opposed to a major dispute: “[W]e note that certain matters are specifically reserved to the board by the Illinois School Code and cannot, until such time as the legislature acts, be the subject of binding arbitration. Thus we believe that only those terms in collective bargaining agreements that are not in contravention of the Code are arbitrable.”\textsuperscript{20}

The court concluded by applying its rule to the particular grievance involved in the case. It stated that in its view the statutory requirement\textsuperscript{21} that teachers keep attendance registers furnished by the school directors did not require teachers to fill in the names of the students. Thus the matter of whether teachers or clerks were to fill in the names was “minor” and arbitrable.

Analysis of the Delegation Cases

The Rockford and Johnson cases provide firm guidelines as to what matters may be made subject to binding arbitration by a collective bargaining agreement. If the matter is a minor one then it is arbitrable. The Johnson

\begin{itemize}
  \item 16. “Teachers shall keep daily registers showing the name, age and attendance of each pupil, the day of the week, month and year . . . . Such registers shall be furnished by the school directors . . . . No teacher shall be paid any part of the school funds unless he has accurately kept and returned such a register.” ILL. REV. STAT. ch. 122, § 24-18 (1973)
  \item 17. 21 Ill. App. 3d 482, 493, 315 N.E.2d 634, 642 (1974).
  \item 18. Id. at 492, 315 N.E.2d at 642.
  \item 19. Id. at 491, 315 N.E.2d at 641.
  \item 20. Id. at 492, 315 N.E.2d at 642. The court went on to hold that the initial determination of arbitrability should be left to the respective parties and the arbitrator, subject to the judicial review provisions of the Illinois Arbitration Act, ILL. REV. STAT. ch. 10, §§ 101 et. seq. (1973).
\end{itemize}
court held that a matter is minor if the school code does not specifically grant the board the power to deal with the matter or impose a duty on the board relating to the matter. In other words, if a term in a collective bargaining agreement relates only to the board's general power “to adopt and enforce all necessary rules for the management and government of the public schools of [the] district,”22 rather than to any specific statutory power or duty, 23 then the term is one that may properly be submitted to binding arbitration. Some of the powers and duties that are specifically set out in the school code as belonging to the board and which could not properly be made subject to a binding arbitration provision of a collective bargaining agreement are: the appointment of teachers and the fixing of their salaries;24 the determination of curriculum and selection of textbooks;25 the establishment of the length of the school year;26 the determination of the conditions under which teachers may be paid;27 the fixing of criteria for the employment of teachers;28 the determination of when a teacher should be dismissed;29 the assignment of pupils to schools;30 and the suspension and expulsion of pupils.31 Since the school code does not specifically grant school boards the power to prescribe the duties of teachers,32 under the Johnson rule a collective bargaining agreement may make any matter relating to the duties of teachers subject to binding arbitration. The only restriction would be that any agreement would have to take into account the fact that some teacher duties are expressly prescribed by statute.33

THE LIMITATION CASES

The principle that a school board may not limit its powers by contract was recently discussed in Classroom Teachers Association v. Board of Education.34 The plaintiff, Rita Miller, was a tenured teacher who was transferred, with no reduction in salary, from her position as a guidance

22. Id. § 10-20.5. Section 34-18 of the school code provides that boards of districts with over 500,000 inhabitants “shall exercise general supervision and management of the public education and the public school system of the city . . . .”
23. ILL. REV. STAT. ch. 122, §§ 10-20 through 10-20.24, 10-21 through 10-21.6, 10-22 through 10-22.43, and 10-23 through 10-23.9. The specific powers and duties of boards of districts with over 500,000 population are listed throughout Article 34 of the school code.
25. Id. § 10-20.8.
26. Id. § 10-20.12.
27. Id. § 10-20.15.
28. Id. § 10-21.1.
29. Id. § 10-22.4.
30. Id. § 10-22.5.
31. Id. § 10-22.6.
32. The situation would be different in districts with over 500,000 population since Section 34-16 of the school code gives the board the express power to prescribe the duties of its employees.
33. For example, it is provided by the school code that teachers shall maintain discipline. ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1973).
34. 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973).
counselor to that of a social studies teacher. She protested the transfer as being a violation of the collective bargaining agreement between the board and the teachers association. That agreement required the board, in the case of involuntary transfers, to follow a procedure of evaluation, notice, and review. It also mandated a hearing if requested by the teacher.\[^{35}\]

The court, holding the transfer obviously in violation of the collective bargaining agreement, stated the issue as whether the provisions of the agreement were in violation of the *Lindblad* rule that a school board cannot limit the discretionary powers given it by the legislature. Specifically, it was concerned with whether the agreement was an unlawful limitation of the board’s power to appoint teachers.\[^{36}\] In its consideration of the issues, the court distinguished the facts at hand from those in *Board of Education v. Rockford Education Association*.\[^{37}\] In contrast to Rockford, here there was no provision for binding arbitration, thus no delegation of the board’s decision-making authority.\[^{38}\] After making that distinction, the court stated: “The provisions do no more than establish certain procedures, consistent with ordinary concepts of fairness, which procedures the board agreed to follow. \textit{None of the procedures limit the power of the board to exercise its absolute discretion} unfettered by any consideration save fundamental fairness.”\[^{39}\]

A year later the *Classroom* rationale was expanded in *Davis v. Board of Education*.\[^{40}\] The *Davis* case involved the attempted dismissal of Henry Davis, a second year probationary teacher. As required by law,\[^{41}\] the board had given Davis notice of and reasons for the impending dismissal sixty days before the end of the school year.\[^{42}\] Despite the fact that all legal requirements had been fulfilled, Davis brought an action for a writ of mandamus on the

\[^{35}\] The pertinent part of the agreement stated:

\[\text{Involuntary change in employment status... shall be for just cause and preceded by 1. Faithful execution of the evaluation procedure and honoring all rights included in this agreement or applicable statutes. 2. Forwarding by registered mail of a written explanation for the action to the teacher. 3. A complete review of the teacher's files by the Superintendent or his designee with the teacher. At teacher's request a representative may be present. 4. If requested by the teacher, a hearing before the board. The teacher shall have the right to present evidence, to call witnesses, be represented. The board shall have the same rights.}\]

*Id.* at 225, 304 N.E.2d at 517.

\[^{36}\] *ILL. REV. STAT.* ch. 122, § 24-1 (1973).

\[^{37}\] 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972). See the third section of this article for a discussion of the *Rockford* case.

\[^{38}\] *Id.* at 228, 304 N.E.2d at 519.

\[^{39}\] 15 Ill. App. 3d 224, 228, 304 N.E.2d 516, 519 (1973) (emphasis added).


\[^{41}\] *ILL. REV. STAT.* ch. 122, § 24-11 (1973).

\[^{42}\] The reasons given for Davis' dismissal were that he (1) permitted students to remain in his classroom when they were supposed to attend other classes, (2) occasionally left his classes unsupervised, (3) failed to provide reasonable support to the administration and staff during a period of confrontation between the district and the students, thus encouraging student rebellion, (4) made an obscene gesture to a security officer, (5) was generally uncooperative and would not accept guidance and suggestions, (6) failed to maintain satisfactory working relationships with colleagues, and (7) was unwilling to fulfill responsibilities in the total school program. 23 Ill. App. 3d 649, 652, 320 N.E.2d 240, 242 (1974).
ground that he had been improperly dismissed. At trial Davis contended that the board, by virtue of the procedure utilized in dismissing him, had violated numerous provisions of the collective bargaining agreement between the board and the teachers association. Specifically, Davis asserted that he was never informed what methods of evaluation were being used to assess his performance; that he was not formally evaluated during the first semester of the year; that no copy of a formal evaluation was ever given to him; that no conference was ever had between him and the principal; and that no suggestions were ever made to him to improve the quality of his teaching. The primary contention of the board was that the agreement was not applicable to Davis' particular situation. The trial court, agreeing with Davis, found that the dismissal was improper since the board had not followed the applicable provisions of the collective bargaining agreement.

The board appealed, contending that even if it had violated the terms of the agreement, the dismissal was proper since a school board has no power to enter into an agreement which in effect contracts away its statutory authority to dismiss teachers for cause. The appellate court concurred with the trial court's ruling that the agreement was violated and was applicable to Davis and his situation. It then considered the question of whether the provisions of the agreement were beyond the contractual powers of the board. It held they were not and affirmed the judgment for Davis.

The Davis court relied heavily on the reasoning in Classroom:

As in Classroom, the collective bargaining agreement here provides that the defendant Board retains and reserves all rights, powers, authority, duties and responsibilities vested in it by statute provided that such will be exercised in conformity with the provisions of the contract. Therefore, in accord with Classroom, we conclude that the provisions contained in Appendix XXX of the collective agreement herein are not ultra vires of the contractual powers of the defendant Board, and that the provisions are binding and enforceable against it.

Davis, like Classroom, also emphasized the distinction from Rockford. Since there was no provision for binding arbitration, the court viewed the provisions

43. Appendix XXX,M of the collective bargaining agreement read, in pertinent part, as follows:

Discharge, demotion, or other involuntary change in the employment status of any teacher shall be preceded by (1) The faithful execution of the evaluation procedures for the evaluation of classroom teaching performance and the honoring of all teachers' rights included in this agreement and applicable statutes. (2) A conference with the teacher by the appropriate administrator prior to taking any action. (3) A written explanation for the action to the teacher. (4) A complete review of the teacher's personnel file with the teacher, and (5) There shall be a hearing before the Board if requested by any non-tenure teacher whose contract is not renewed.


46. 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972). See discussion of the Rockford case in the third section of this article.
of the agreement as simply conditions precedent to the exercise of the board's discretionary power rather than as a limitation on that power. 47

Analysis of the Limitation Cases

Davis and Classroom can each be criticized because of the reasoning they employed to reach their conclusions that the agreements were valid and enforceable. The courts did not say that the provisions of the agreements constituted permissible limitations, but clearly held that the agreements did not impose any measurable limitations. 48 It is submitted here, however, that both agreements inflicted substantial limitations on the discretionary statutory authority of the respective school boards. While the courts come to what is probably a desirable result, the rationale employed does not support that result.

Section 10-22.4 of the Illinois School Code grants school boards the power to dismiss a teacher for any sufficient cause. 49 The only limitations on that power are those imposed by the Illinois Tenure Law. 50 In regard to the dismissal of a teacher completing his first year of teaching, the tenure law requires the board to give written notice of the impending dismissal at least sixty days prior to the end of the school year. 51 There is no mention of the need for either a written statement of reasons or a hearing before the board. There also is no requirement that any particular evaluation procedure be followed prior to the taking of action. In regard to the dismissal of a teacher completing a second year of teaching, the board is required to give “written notice of dismissal stating the specific reason therefore by registered mail . . . at least sixty days before the end . . .” of the school year. 52 There is again no mention of any right to a hearing or to have any particular evaluation procedures followed prior to the dismissal.

The Davis agreement obviously imposed many more limitations on the school board's power to dismiss teachers than are provided by the tenure statutes. While Davis was entitled by law only to sixty days notice and a statement of reasons, the agreement required that he be given a conference before any action was taken, a complete review of his personnel file, and the

49. ILL. REV. STAT. ch. 122, § 10-22.4 (1973). This section provides that a board has the power to “dismiss a teacher for incompetency, immorality or other sufficient cause and to dismiss any teacher, whenever, in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject however to the provisions of Section 24-10 to 24-15 inclusive. Marriage is not a cause of removal.” See also ILL. REV. STAT. ch. 122, §§ 34-84 and 34-85 (1973).
52. Id.
right to a hearing. But of particular importance here are the provisions of the agreement that obligated the school administration to follow a specific program of teacher evaluation. Violation of those evaluation procedures constituted the basis of the court's ruling that the dismissal of Davis was improper. Thus, even though the dismissal provisions of the tenure law do not require a board to follow any evaluation procedures, the Davis holding would permit a board to make the fulfillment of contractually-imposed evaluation requirements a prerequisite to the exercise of its dismissal power.

Upon analysis of the purpose of the tenure law, the limitation effects of an agreement such as the one in Davis become even more apparent. The courts have held that "the Teacher Tenure Law appears to be designed primarily for the protection of tenured teachers, evidencing an intent to give first year teachers the least amount of protection and the board the maximum amount of flexibility in dealing with such teachers as long as the notice requirement is fulfilled." The terms of the Davis agreement certainly contravened that intent.

Section 24-12 of the school code requires a board of education to follow detailed procedures before dismissing a tenured teacher. But Section 24-11 provides that "[c]ontactual continued service status shall not restrict the power of the board to transfer a teacher to a position which the teacher is qualified to fill . . . ." Thus none of the restrictions on dismissals apply to transfers. The agreement in Classroom, however, attempted to impose requirements of evaluation, notice, explanation, hearing, and just cause on the exercise by a school board of its power to transfer teachers. The result is a substantial limitation on the board's discretionary authority.

Both the Davis and Classroom courts, in deciding that the collective bargaining agreements did not constitute substantial limitations on the boards' powers, relied heavily on the distinction from the arbitration case of Board of

53. The United States Supreme Court has held that refusal to give a non-tenured teacher a hearing when his contract is not going to be renewed is not a violation of federal due process rights. Bd. of Regents of State Colleges v. Roth. 408 U.S. 564 (1972). See also Shirck v. Thomas, 486 F.2d 691 (7th Cir. 1973).
54. See note 43 supra for the provisions of the Davis agreement.
55. The Davis agreement would place an even greater limitation on the dismissal provisions of Article 34 of the Illinois School Code. Section 34-84 provides that during a probationary period of three years a teacher may be dismissed for any reason upon the recommendation accompanied by written reasons of the superintendent. Section 34-85 says that "[n]o teacher or principal appointed by the board of education shall (after serving the probationary period of three years specified in Section 34-84) be removed except for cause . . . ."
57. ILL. REV. STAT. ch. 122, § 24-12 (1973). This section requires the following procedures to be observed before a tenured teacher can be dismissed: (1) advance notice of any remediable faults; (2) written notice of charges sixty days prior to proposed date of dismissal; (3) notice of the right to a bill of particulars; (4) notice of the right to a hearing before the board; (5) majority vote of all members of the board. See also ILL. REV. STAT. ch. 122, § 34-85 (1973).
58. See note 35 supra for the provisions of the Classroom agreement.
Education v. Rockford Education Association. Such a distinction might have been legitimate in Classroom, but not in Davis since the holding of Board of Education v. Johnson, decided four months before Davis by the same Appellate District, made that distinction meaningless.

In Johnson the court held that certain "minor" disputes are arbitrable. While the court recognized that matters specifically reserved to the authority of the board by the school code cannot be subjected to binding arbitration, it ruled that terms in collective bargaining agreements not in contravention of the code are arbitrable. The Davis court clearly ruled that the terms of its agreement were not in contravention of the school code. Thus, following the reasoning in Johnson, they would be arbitrable. The conclusion of Davis that the agreement was permissible because it did not involve binding arbitration is illogical.

It is apparent that Davis and Classroom do not provide any firm guidelines as to what subject matter is within the permissible scope of collective bargaining contracts. It is possible, however, to develop a rationale to reach the result found in Classroom and Davis, while also providing understandable criteria whereby school boards and teachers associations can readily determine the scope of negotiability of any given item.

A Suggested Approach to the Limitation Problem

The major fault of the Davis and Classroom approach is that it attempts to say something is not a limitation when in fact it is. A better approach would be for the courts to propound a rationale which supports the view that some limitations on a school board's powers are acceptable while others are not. Such a rationale can be developed. It consists principally of abandoning the general rule that a school board cannot limit its powers by contract and the imposition of a less ambiguous restriction on the power of school boards to enter into collective bargaining agreements. The following material will examine this rationale in detail.

The Invalidity of the Nonlimitation Rule

In order to develop the above rationale it is essential to first explore the origins and evolution of the rule that a school board cannot limit its powers by contract. Originally the rule stated simply that the powers held by a legislatively-created body could not be delegated to any other parties. It was

59. 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972). See the third section of this article for a discussion of the Rockford case.
60. 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974). See the third section of this article for a discussion of the Johnson case.
61. Id. at 492, 315 N.E.2d at 642.
63. Chicago v. Trotter, 136 Ill. 430, 26 N.E. 359 (1891); East St. Louis v. Wehrung, 50 Ill. 28 (1869).
not until the decision in *Lindblad v. Board of Education* that the rule was expanded to prohibit any limitation of powers.

*Lindblad* dealt with a contract executed between a school board and the Illinois state board of education which set up a system allowing students at a state university to practice teaching in the board’s public schools. The contract provided that some of the student teachers were to be selected by a joint action of the public school superintendent and the state university officials; others were to be selected entirely by the university authorities. The supervising teachers, who were employed by the public school board, were to be selected by the concurrent action of the public school board and the state board of education. The contract was attacked by a taxpayer on the grounds that it was beyond the power of the board because “the board of education of Normal school district [had] thereby surrendered or delegated, in whole or in part, certain discretionary powers vested in it . . . .”

The court agreed with the plaintiff. It observed that the Normal school board was given by legislative enactment the discretionary powers to conduct and manage the schools, including the power to employ and dismiss teachers. The court recited the general rule that such discretionary powers could not be delegated to another. It enlarged the restriction on delegation, however, by holding that the fact that the Normal school board could only employ certain teachers with the approval of the state board was, “if not a delegation of authority . . . at least a limitation which the public school board [had] no right to place upon its own powers.” Thus the doctrine that a school board cannot limit its discretionary powers by contract was formalized.

The question raised by the *Lindblad* expression of a non-limitation rule is whether such an articulation has *stare decisis* effect. The *Classroom* and *Davis* courts both accepted the statement as if it did have such effect. But a strong argument can be made that the *Lindblad* declaration of non-limitation was simply dictum. The facts of the case involved a clear delegation of authority. The school board had given the state board the discretionary authority to determine the qualifications of teachers for the Normal school system, an action which clearly involved much more than a simple limitation of powers. Thus the statement concerning non-limitation was not essential to holding the contract invalid.

A rationale for the *Lindblad* rule was enunciated in *Stroh v. Casner*:

"The law contemplates that these discretionary powers shall be exercised by

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64. 221 Ill. 261, 77 N.E. 450 (1906).
65. *Id.* at 267, 77 N.E. 450 (1906).
66. The school board here had received such power by virtue of the legislative act incorporating the town of Normal. *Id.*
67. Chicago v. Trotter, 136 Ill. 430, 26 N.E. 359 (1891); East St. Louis v. Wehrung, 50 Ill. 28 (1869).
68. *Id.* at 272, 77 N.E. at 453 (emphasis added).
69. 201 Ill. App. 281 (1916).
those who have been chosen by the people as members of these respective boards, and the people have a right to have those powers exercised by those only in whom they have so placed their confidence, and not by such persons and others jointly. These discretionary powers cannot be delegated." This rationale certainly seems to be aimed more at the idea of turning authority over to third persons than to limiting one's discretion to act. It would suggest that while a board cannot bind itself to follow the dictates of any other party, there is nothing to prevent it from dictating to itself.

Arguably there is no sound basis for holding that a board cannot limit its statutory authority. The courts are free to reject the doctrine and hold that a school board is not precluded from entering a contract with a teachers association simply because that contract in some way limits the power of the board.

*The Development of a New Rule*

Once the doctrine of non-limitation is discredited, the question arises as to what restrictions should be placed on the ability of a collective bargaining agreement to limit the discretionary powers of a school board, since the entire operation of a school system should not be made to depend on the provisions of a collective bargaining agreement. Initially a court could hold that the enforceable terms of a collective bargaining agreement should relate only to matters within the employment relationship and not to matters of educational policy. Naturally any matter concerning a school board's statutory authority to appoint and dismiss teachers directly involves the employment relationship. To further define what falls within the employment relationship, the court could utilize the reasoning in *Board of Education v. Johnson* and rule that any matter not specifically reserved to the board by the school code may be a proper subject for a collective bargaining agreement. Such a rule would not only prevent matters of educational policy from being dictated by the terms of a collective bargaining agreement, but would also make it possible for negotiators to readily determine whether any given item may legally be included in an agreement.

*The Extent of the Board's Authority and the Resulting Scope of Collective Bargaining Agreements*

The final question concerns the power of the school board itself to deal with matters of employment. The rule developed here would allow school

70. *Id.* at 286.


Such an approach is similar to the provisions of the National Labor Relations Act which stipulate that an employer must negotiate with the representative of his employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. §§ 158(a)(5), 159(a) (1970).


73. *Id.* §§ 10-22.4, 34-84, and 34-85.

74. 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974). See discussion of *Johnson* case in third section of this article.
boards to enter into binding collective bargaining agreements dealing with matters of teacher employment and dismissal. But any negotiation must take into account the extent of a board's powers, for obviously the statutory powers of a board cannot be legally expanded by a collective bargaining agreement. The case of *Richards v. Board of Education* is on point.

In *Richards* the plaintiff teacher had attacked the adoption by the defendant school board of a salary schedule in which advancement was dependant on a teacher's acquisition of additional college hours as well as longevity. The plaintiff contended that the school board was without statutory authority to adopt such a salary schedule. The court, in considering that contention, proceeded to examine the school code. It found the school code provided "... that school boards shall appoint teachers and fix the amount of their salaries 'subject to the limitation set forth in this Act.'" After listing the various limitations spelled out in the code, the court concluded that the action of the board in adopting a salary schedule based on professional growth was a proper exercise of the board's power to appoint teachers and fix salaries. The following excerpt from the opinion summarizes the court's reasoning: "From the language the legislature has employed, it is clear that a school board has discretionary control over the salaries of its teachers, subject only to any limits expressly fixed by the school code and to constitutional prohibitions against actions that are arbitrary, discriminatory and unreasonable, or based upon an improper classification."

It can be argued that if the board has the authority to fix salaries in any manner not inconsistent with express statutory provisions, then it should be able to determine other conditions of employment in the same manner. The key to the argument lies in the language of the statute. It states that the board shall have the power to "appoint all teachers and fix their salaries subject to the limitations set forth in this Act." The power of appointment would logically include the power to determine conditions of appointment other than salary. The same reasoning would apply to the power of the board to dismiss teachers since Section 10-22.4 of the school code states that a board has the power to dismiss for sufficient cause subject only to the restrictions of the

75. 21 Ill. 2d 104, 171 N.E.2d 37 (1960).
76. ILL. REV. STAT. ch. 122, § 24-1 (1973). Section 34-16 differs somewhat in that it provides that "[t]he board shall, subject to the limitations in this Article, prescribe . . . the duties, compensation and terms of employment of its employees . . . ."
77. Express restrictions on school board powers regarding the determination of salaries are set out in the Illinois School Code in Sections 24-2 (teachers must be paid for legal school holidays), 24-3 (teachers must be paid for attendance at teachers' institutes held under the direction of the county superintendent), 24-6 (at least ten days paid sick leave must be granted to full time employees each year), 24-6.1 (sabbaticals must not be granted for a period of more than one year or more often than once every six years), 24-7 (no discrimination in salary shall be made on the basis of sex), and 24-8 (teachers must be paid certain minimum salaries). Article 34 does not specify the restrictions of Article 24, thus one would assume that those boards would have greater latitude in the determination of salaries.
78. 21 Ill. 2d 104, 109, 171 N.E.2d 37, 41 (1960) (emphasis added).
tenure law. Since a school board, under the raionale developed here, may limit its powers, the permissible scope of a collective bargaining agreement would extend to all conditions of employment restricted only by the type of guidelines set out in Richards.

Conclusion

The need for clearly-defined guidelines establishing the permissible scope of collective bargaining agreements is evident. The most desirable way to arrive at such guidelines is by legislation. But until the General Assembly acts, the courts must provide the criteria necessary for school boards to determine what provisions they may legally incorporate into a collective bargaining agreement.

The courts have provided concrete guidelines for determining whether a collective bargaining agreement can provide for arbitration in a given area. As long as the arbitration provision does not delegate any powers specifically reserved to the board by the school code, or contravene any other express provision of the code, it is permissible. Such a rule allows for arbitration of most matters relating to the duties of teachers.

Unfortunately, the cases do not offer any workable guidelines for ascertaining to what extent a collective bargaining agreement may limit the discretionary powers of a school board when arbitration is not involved. The Classroom and Davis cases indicated that limitations going to matters of fundamental fairness may be included in such agreements. The rationale they offered, however, does not support the holdings. Therefore, the Classroom and Davis decisions offer no guidance as to the permissible scope of collective bargaining agreements.

This article's position is that it is possible to develop a rationale that will support the holding in Davis and Classroom and also provide reasonably firm guidelines for resolving questions of the permissible scope of collective bargaining agreements generally. The key to that rationale is the fact that there is no solid basis in precedent for the rule that a school board may not

80. Id. §§ 24-11 through 24-15.
81. The school code sets out express restrictions on the board's power to appoint teachers and determine employment conditions in Sections 24-4 (color, race, nationality or religion cannot be considered as a qualification or disqualification), 24-5 (evidence of physical fitness must be shown by teacher as a condition of employment), 24-9 (teachers must receive a duty-free lunch period of at least thirty minutes), and 34-84 (appointments and promotions shall be made for merit only).

Some of the restrictions on the board's power to dismiss are set out in Sections 10-22.4 (teachers may be removed only for cause), 24-11 (after two years of probationary service a teacher must be placed on tenure or a third year probation, and after a third probationary year must either be placed on tenure or dismissed; a teacher may be dismissed only after proper notice), 24-12 (a tenured teacher must be given a hearing if he requests it), and, for districts with over 500,000 population, 34-85 (tenured teachers may be dismissed only for cause, with proper notice, and after a hearing).
legally limit its discretionary powers. The courts are perfectly free to reject
the non-limitation doctrine. Once such a rejection is made, the task remaining
for the courts' determination is what restrictions should, as a matter of public
policy, be placed on a school board's authority to limit its discretionary
powers through a collective bargaining agreement. The suggestion here is that
the scope of collective bargaining agreements should be restricted to matters
involving the employment relationship. Thus the rule would be that a
collective bargaining agreement can include provisions for conditions of
employment and dismissal, subject, of course, to constitutional and express
statutory restrictions.

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