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ISSUES IN SCHOOL LABOR RELATIONS

MARVIN J. GLINK*

The policy of the federal government and most state governments for more than a quarter of a century has been to encourage and protect the development of collective bargaining in private employment by laws such as the Wagner Act,1 the Taft-Hartley Act,2 and comparable state statutes. Only recently has a similar trend developed in the public sector. The reason for the new trend is that public employment today is one of the fastest growing sectors of our economy.3 The result of this explosive growth in public sector employees has been an increased concern with all matters affecting the relationship between public employees and their employers, including collective bargaining and the right to strike.

Each year, more and more public employees seek to influence the operation of public schools in Illinois. The attorney who represents school districts in such instances must acquire expertise in not only public sector labor relations law, but also the techniques of organized employee negotiations. These negotiations involve numerous complex issues. For example, there is the question as to whether a school board has a duty to "recognize" its employees in a formal bargaining unit or whether it has the right to refuse to recognize them. Other issues concern the scope of negotiations, the substance of the labor contract, and policies regarding grievance solving. Also, the negotiators must provide procedures for handling strikes and concerted slow downs. Furthermore, consideration must be given to the issues of federal and state intervention, discrimination and employment security.

In order to represent a school district successfully, the attorney must understand the ramifications of these and other questions. Thorough preparation is essential, as well as a complete understanding of

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various labor negotiation techniques. Above all, the attorney must secure the cooperation of an informed school board and administration. This article will provide an overview of these problems and the complex subjects with which an attorney involved in public school employee negotiations will be confronted.

PUBLIC V. PRIVATE EMPLOYMENT

An important difference between employment in the public and private sectors is that private employees have the right to strike, whereas in some states, such as Illinois, this right is not accorded to public employees. Additionally, private labor negotiations are influenced and regulated by various devices often not found in the public sector: the duty imposed on the parties to bargain in good faith; state and federal agencies that resolve issues of representation, and enforce and protect employee and management rights; mediation services; grievance procedures such as binding arbitration; the exclusion of supervisory, managerial and confidential employees from the bargaining unit; and exclusive majority representation chosen by the employees.

Another major difference between public and private labor forces is that decisions in the private sector are primarily motivated by economics, whereas public labor concerns are inevitably entangled in politics. Thus, decisions regarding wages, hours, and conditions of employment for public employees are more politically motivated than economic. This is partly due to the fact that public employee organizations have the political power to influence their members' voting choices. Such leverage often enables public employees to secure above average wages and benefits through negotiations.

Like other elected officials, school board members generally are concerned with re-election, and they recognize the vote potential of the public employee group. Employee organizations understand this political reality, and have gone to great lengths to maximize their influence over the votes of their members. Teacher organizations sometimes involve their members both in school board and municipal elections. However, in many instances, the bulk of the employees do not live within the public body that employs them. Often an attempt by these employees to politic in the election of the public body will fail since they are viewed as outsiders and non-taxpayers.

Elected board officials also must consider public attitudes and re-

4. See text accompanying notes 42-51 infra.
actions. For example, they must measure potential resistance to higher taxes, and whether public sympathies lie with the school board or the labor union. Another consideration is the extent and slant of news coverage, which subtly affects public and political pressures on the process of negotiations.

Such distinctions create unique problems in the public sector. Negotiators must consider the extent of minority employee organization rights, the length of time a bargaining contract can cover, and whether such an agreement can be made retroactive. Furthermore, school board representatives must determine the effect of budget deadlines on negotiations, and the relationship between teacher tenure laws and grievance solving. Finally, the school board must establish its policies regarding such issues as union security agreements and binding arbitration.

One other important distinction between public versus private employment is that the government has the capability of raising revenues in order to meet its contractual obligations. If revenues increase because of labor contracts and this results in higher taxes, there is greater probability that taxpayers will become involved in the labor negotiating process.

**FEDERAL AND STATE INVOLVEMENT**

In 1967, an Illinois advisory commission on labor-management policy for public employees recommended that “legislation defining state policy with regard to the rights and responsibilities of public employers and employees is imperative and in the public interest.” The commission stated that for more than thirty years, Congress, as a matter of national policy, has granted employees in private industry the right to organize and bargain collectively with their employers. The report emphasized the expansion of public employment and the fact that public employees have a real interest in their own economic well-being and the conditions under which they are employed. The commission recommended that legislative guidelines be adopted immediately and that public bodies conduct in-service training programs in employee relations and management procedures.

While the commission’s excellent efforts have not yet even resulted in legislation in Illinois, the battle continues to be fought each year in the legislature. As statistics emerge from those states with mandatory

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bargaining laws, the picture becomes clouded and the wisdom of legis-
lation becomes increasingly unclear.

One reason suggested for the needed state legislation is the grow-
ing intrusion by the federal government upon state sovereignty, includ-
ing the proposed establishment of a federal system for the control of
public employer-employee relations, and the expanded coverage of
such pervasive laws as the Fair Labor Standards Act6 and the Occupa-
tional Safety and Health Act.7

The passage of Title VII of the Civil Rights Act of 19648 has
sparked a profusion of decisions and complex administrative regula-
tions in areas previously free of governmental intervention.9 A school
board now finds it must provide certain procedural steps if it wishes to
discharge many of its non-civil service employees. Further, statutory
procedures employed in discharge cases, even under tenure laws, are
being challenged. In the area of employment, new guidelines which
seek to prevent discrimination present a board of education with many
new problems and obstacles. Given the propensities of our legislatures,
a board of education may face more governmental intervention in
forthcoming years.10

RECOGNITION

It is clear that public employees are entitled to organize and join
labor organizations;11 indeed, this right is protected under the Civil

55.
9. In 1972, the Civil Rights Act was amended to extend Title VII to state and local govern-
ment. In another expansion of Title VII provisions, new equal employment opportunity guide-
lines are now published by the Equal Employment Opportunity Coordinating Council.
10. However, the validity of such legislation has been dealt a serious blow by the recent
While this case specifically invalidates the 1974 amendments to the Fair Labor Standards Act, it
also raises serious constitutional questions concerning how far the federal government can intrude
into state and local matters.
11. Historically, a sovereign was prohibited from negotiating with its servant regarding any
aspect of employment. This prohibition was based upon the theory that such negotiations neces-
sarily would involve an unlawful governmental delegation of authority or a surrender of public
property, which would constitute discrimination against the public in favor of public employees
and their labor organizations.

Following this line of reasoning, the Illinois Supreme Court in 1917 upheld the right of the
Chicago Board of Education to prohibit its teachers from joining a union. Fursman v. City of
Chicago, 278 Ill. 318, 116 N.E. 158 (1917). See also United States v. United Mine Workers of
America, 330 U.S. 258 (1947); Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741
(1946); Mugford v. Mayor of Baltimore, 185 Md. 266, 44 A.2d 745 (1946). Furthermore, Illinois is
one of the few states that has not adopted legislation giving municipal employees the right to
engage in collective bargaining.
Rights Act of 1871. More specifically, the United States Court of Appeals for the Eighth Circuit recently held that teachers and other school district employees are no different from other public employees, and have a constitutional right to join a union. The right of employees to organize is not restricted to unions whose membership is limited to public employees. One can assume that school district employees would join the movement toward some type of concerted organization.

The state of labor-management relations will strongly affect the potential for successful organization. But even where good relations exist between employers and employees, often labor will still want a written contract delineating all rights and duties of the parties. Like most workers, school teachers want greater involvement and leverage in the school board’s management decisions.

In 1945, Illinois Governor Dwight H. Green vetoed Senate Bill No. 427, which would have made it permissible for the state and its political subdivisions to bargain and enter into collective bargaining agreements. The governor was of the opinion that the matters embraced in the legislation were solely within the control and regulatory power of the Illinois General Assembly. Since 1945, a bill promoting public employee collective bargaining has been introduced at each Illinois legislative session except in 1959. The language of subsequent bills has remained practically the same. In all cases, the legislation would have required the state, public corporations, educational institutions and other bodies politic to enter into collective bargaining agreements with employees, through their representatives, respecting wages, hours, conditions of employment, and other benefits, as long as these agreements contained a stipulation prohibiting strikes or lockouts.

However, even without any statutory guidelines, Illinois has evolved a piecemeal approach to developing local government labor relations through attorney general opinions, court decisions, and local policies. The appellate court of Illinois effectively has avoided the state legislature’s reluctance to sanction collective bargaining in the public sector. The appellate court’s position directly opposes the earlier view that collective bargaining by public employees is illegal without prior legislative authority. (In 1934, Illinois Attorney General Otto Kerner, in an opinion (File No. 642), stated that a school board did not have the legal power to enter into a contract with a collective bargaining agent, and that “each contract with a teacher is a personal and separate matter and should be entered into with the individual teacher.”) In Chicago Div. of Ill. Educ. Ass’n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966), the court held that specific legislation is necessary only to prohibit, not to authorize, collective bargaining by public employees. The court stated that the board of education is the best judge of the most efficient method of arriving at the terms of employment and that the court is without authority to deny the board’s exercise of discretion in choosing the method. The court went on to state that a collective bargaining agreement does not necessarily result in an unlawful delegation of the board’s discretion to the collective bargaining agent. The court implied that it would only prohibit “the Board’s entry into any collective bargaining agreement which could result in any delegation of its statutory powers or duties.” Id. at 466, 222 N.E.2d at 248 (quoting defendant’s brief). Thus, the case effectively opened the door for units of local government to negotiate collective bargaining contracts should they so desire.

Finally, Governor Daniel Walker issued an executive order on November 6, 1973, granting state employees the right to engage in collective negotiations. However, that proclamation has no effect on employees hired by, and working for, a municipality or a school district.

14. In some respects, management must be neutral, especially during the process of organization. It may, however, attempt to propagandize for the status quo and it also may see that organizing is conducted in an honest manner which does not interfere with school district
While school employees can organize, the board may refuse to bargain with the labor organization. In Illinois, there is no statutory obligation imposed on a school board to recognize employee unions. Any school board that refuses to recognize and bargain with a union is aided by the fact that Illinois public employees have no constitutional or statutory right to strike or refuse to provide services to units of local government. While school employee organization appears inevitable, the school district should consider several matters before it decides to grant recognition to a union.

Most important is the bargaining unit; that is, the group of employees represented by the recognized bargaining agent and covered by the bargaining contract. The negotiating parties may determine the unit's definition in the bargaining process in any way they wish, and this becomes a critical clause in the contract. The provision outlining the perimeters of the bargaining unit should be sufficiently precise to allow easy determination of those covered and those excluded by the contract.\(^{15}\)

Generally, the employees are represented by the union or association, which accepts the duty to fairly represent all unit members, whether or not they are members of the union. With the exception of a few contract clauses that concern the exclusive rights of the union itself, all contract terms embrace all unit members, regardless of union membership or lack of it.

The breadth of the bargaining unit is limited by the desirability of a community of interest. That is, all unit members should be affected by, and concerned with, substantially similar conditions that give the members parallel interests. There is little problem here with respect to teachers. Most districts are also willing to consider, as within the teacher community, related occupations such as guidance counselors, reading consultants, librarians, psychologists, social workers and audio-visual personnel.\(^ {16}\)

Because of the different roles that employees perform in public service, multi-bargaining units are probably inevitable. Therefore, a school board's decision to grant recognition should be made con-

\(^{15}\) Operations. This latter responsibility generally requires supervising elections between competing locals and assuring employees that they will not be unfairly coerced during an organizing effort.

\(^{16}\) Both existing and potential administrative personnel should, of course, be excluded from the unit. The language to accomplish this is often controversial, as is the inclusion or exclusion of department chairpersons who have evaluative responsibilities.

\(^ {16}\) Most school districts also accept nurses in the teacher unit, although some exclude those who are not certified as teachers. It is desirable in most instances to exclude substitutes and teacher aides from this unit.
sciously and with the knowledge that there may be dual negotiations among school employees and that these negotiations are going to be time consuming. The available dollars will have to be allocated to the various bargaining units with the recognition that certain units are going to require benefits which cannot be given to all employees. This often leads to the situation where competing bargaining units attempt to outdo each other.\textsuperscript{17}

Other important considerations that affect the decision to recognize are the scope of bargaining, the exclusion of supervisory personnel,\textsuperscript{18} budget and statutory limitations, the enforcement of good faith bargaining, the right of the public to know details of the negotiations, the extent of the authority of the public negotiator, impasse procedures, strikes, and rights of individual employees.

**Scope of Bargaining**

The end result of the negotiating process is a written agreement between the parties. Before there is an initial contract, all of the rights to establish working conditions and operate the schools rest with the school board. The process of negotiation by its very nature erodes the complete authority of management. Therefore, it becomes important to determine at the outset what is negotiable. Put in its simplest terms, to what extent is the school board willing to give up its right to direct the work force in order to maintain détente with its employees?

Just as the school board has total discretion as to whether to participate at all in collective bargaining,\textsuperscript{19} the board may determine the scope of the negotiations. There is no statute that requires that any particular matters be submitted to the bargaining process. The more limited the contract scope, the easier it will be to negotiate terms, and the less restrictions will be placed on the board's authority and actions.

Furthermore, once the boundaries of negotiations are defined, there is no obligation to discuss issues beyond those perimeters. The board should not negotiate matters unrelated to the labor-management relationship, such as educational policy issues of curriculum and text-

\textsuperscript{17} In considering the bargaining unit to be organized and recognized, regional bargaining may be a feasible alternative. A number of school boards may want to negotiate as a unit where they perceive they have mutual problems.

\textsuperscript{18} In Norbeck v. Davenport Community School Dist., 545 F.2d 63, 68 (8th Cir. 1976), the court ruled that a principal and other supervisory personnel may be excluded from a bargaining unit.

\textsuperscript{19} See text accompanying notes 11-17 \textit{supra}. 
book selection—issues which are appropriately left to the realm of teachers.

Basically, there are three approaches to the question of scope. One is to remain silent on the subject and allow anything to be negotiated. The scope of the contract is thereby defined by the ultimate agreement. Another approach is to limit negotiations to salaries, fringe benefits, hours and working conditions. Obviously, such a definition allows much leeway as to the meaning of these terms and consequently the breadth of the defined negotiations. For example, a question that frequently arises is whether class size is a working condition. Generally, a union will attempt to include in the scope of bargaining matters concerning hiring, transfer, promotion, assignment, discipline and discharge of employees. The board should refuse to negotiate these matters, since they inhere in the board's management functions. A third approach to the scope of bargaining is to restrict negotiations to a fixed number of items, such as the union's right to use district buildings, dues checkoff, and transfer procedures. This avoids some of the questions raised above, but many of these specific terms still must be defined. The use of such specifics also tends to magnify the contractual expectations of the union on these points.

UNION SECURITY

The issue of union security evokes emotional arguments from both sides of the bargaining table. To the union, union security means the

20. Strong arguments can be made on both sides of this issue: On the one hand, the number of students to be taught can be said to have a significant impact upon teachers (at least in extreme situations), while on the other, the determination of the teacher/pupil ratio is perhaps the most fundamental policy determination, both financially and educationally, that is made by a board of education. In this sense the issue of class size ought to be reserved to the sole authority of the board. A Wisconsin court recently held that class size is not negotiable, for it is a policy determination. At the same time, the court said the impact of class size on teachers is negotiable. Beloit Educ. Ass'n v. Wisconsin Employment Relations Comm'n, 73 Wis. 2d 43, 64, 242 N.W.2d 231, 241 (1976). Thus, presumably, the board can set class size at any level it desires, but it might be compelled to negotiate, at least under the Wisconsin statute or under language equivalent thereto in a contract, what compensation or other adjustments have to be made when class size or student/teacher ratio reaches a certain level.

21. An emerging area of conflict as to "terms and conditions of employment" is whether teachers who have expertise in a particular area, such as athletics, can be required to supervise extracurricular activities.

22. This is to be distinguished from the necessity on occasion to negotiate procedures incident to these basic functions (aside from almost any aspect of hiring which may be said to be outside the reach of the agreement, since it deals with people before they become members of the bargaining unit). Thus, it is inappropriate to bargain the board's right to transfer an employee, but it may agree as part of a transfer procedure to prescribe a form of notice to the employee who is to be transferred and/or to allow a conference under certain circumstances. The distinction between procedure and substance is critical and should be maintained whenever possible.
enhancement of the union's financial position and bargaining strength. It appears that public sector unions will push in the next several years for a number of important concessions in the union security area.

The most important forms of union security are maintenance of membership, union shop, closed shop, agency shop, and dues checkoff. Maintenance of membership, a provision often found in trade union contracts, requires that once an employee becomes a member of the union, he must continue his membership in the union as a condition of continued employment.

The union shop requires that employees be members of the union and that new employees join within a specified period, or be subject to discharge. This form of union security generally is recognized in the private sector. The closed shop requires that before an employer can hire someone for a position within the bargaining unit, the prospective employee must become a member of the union. The closed shop generally is illegal in both the private and public sectors, especially since the passage of the 1947 Taft-Hartley amendments. The agency shop requires that an employee who is not a dues-paying member of the union must pay to the union a fee, usually the equivalent of the dues. The validity of this arrangement has been held constitutional by the United States Supreme Court for both the private and public sectors, provided that the unions refund a portion of the dues or fees used for non-collective bargaining purposes.²³

The dues checkoff serves to provide the union with a substantial degree of financial stability. A contract usually provides that upon receipt of a written authorization from an employee, the employer will deduct the union dues and remit it to the union. The Illinois School Code makes dues checkoff mandatory upon written request by teachers.²⁴

**Grievance Solving**

*Grievance Procedure*

An inherent part of the bargaining agreement is the grievance pro-

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²³ The issue was settled in the public sector in the case of Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) in the same manner as the private sector. The Michigan Bargaining Statute authorized agency shops. It should be noted that the Court was sharply divided.

²⁴ ILL. REV. STAT. ch. 122, § 24-21.1 (1977) provides:

> The board shall, upon the written request of a teacher, withhold from the compensation of that teacher the membership dues of such teacher payable to any professional teachers' organization. Under such arrangement, an amount shall be withheld from each regular payroll period which is equal to the pro rata share of the annual membership dues and the board shall pay such withholding to the specified professional organization.
procedure, a mechanism usually provided by the agreement for resolving apparently irreconcilable differences of contract interpretation. Such a procedure is designed to resolve an impasse while minimizing expenses and ill feelings between the parties.

The grievance procedure must outline what constitutes a grievance. It should limit the definition to alleged violations of the agreement in order to restrict the scope of negotiations. Furthermore, the procedure should provide for an orderly sequence of steps from the administrator's initial decision to the final disposition, allowing enough time for requisite grievance meetings and preparation of appropriate responses. There are three basic methods for resolving an impasse: arbitration, mediation and fact finding. A more recent approach involves a referendum vote.

**Arbitration**

Generally, the ultimate step in the grievance procedure is arbitration, a method of settling employment disputes through recourse to an impartial third party whose findings may be either advisory or binding, depending upon the contract.\(^{25}\) In grievance arbitration, where the neutral party's impact is merely advisory, the arbitrator is used to interpret the contract and determine the intent of the parties, according to the contract language, history, and past practice. In binding arbitration, the impartial third party in effect construes the terms of the agreement.

In Illinois, even if the parties are willing to submit to arbitration, the question remains as to whether a school board may delegate its authority to a third party. Numerous cases have held that a public body has certain governmental powers, usually delegated by the legislature or the Illinois Constitution,\(^{26}\) and cannot delegate these powers to others, but must exercise them as a corporate body.\(^{27}\) Various Illinois courts have held that a board of education cannot delegate matters of discretion vested in it by statute to a third party.\(^{28}\)

However, by agreeing to negotiate a contract, the public body is

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25. The usual procedure found in contracts is for each party to the contract to appoint one person to an arbitration panel. The two parties then choose a third person and, if they cannot agree, some procedure is established for selecting a third person. Frequent use is made of the American Arbitration Association or the Federal Mediation Service. (The number of federal mediators available for this type of activity is extremely limited.)

26. There is an exception here for home rule municipalities.


not surrendering its decision-making authority, since the final decision as to the terms and conditions of employment still rests solely with the legislative body. In the case of *Board of Education v. Johnson*, an Illinois appellate court considered two issues that a union sought to have construed through binding arbitration. One issue concerned a school board’s decision to transfer a teacher and its refusal to assign her to an open class at the school at which she had previously taught. Secondly, certain teachers complained that they were required to do clerical work by writing students’ names on monthly attendance cards, contrary to the terms of an existing agreement between the union and the board of education. The union sought to have the disputes arbitrated, and subsequently an arbitrator rendered a decision favorable to the teachers. The board of education filed suit to nullify both arbitration actions and the trial court held that neither grievance was arbitrable. The Illinois appellate court reviewed the history of arbitration in Illinois, as well as decisions in other jurisdictions. The majority in *Johnson* did not believe that all disputes were proper subjects for binding arbitration. However, the court said that “arbitration of certain ‘minor’ disputes pursuant to a collective bargaining agreement does not constitute a delegation by the board, and we believe they should be submitted to binding arbitration in the event of impasse.”

The *Johnson* court concluded that “minor” disputes were those that did not contravene the school code or the Illinois Arbitration Act. Therefore, the court determined that the teacher assignment could not be arbitrated, but that the second grievance was a minor dispute that could have been submitted to arbitration. Thus, the court upheld the award of the arbitrator in that case.

Such cases as *Johnson* appear to revolve around what remedy the arbitrator can provide. Meanwhile, two recent appellate court cases involving the failure to arbitrate the dismissal of a non-tenured teacher have reiterated the rule that a school board cannot delegate its vested discretionary powers to another party even through a collective bargaining agreement.

29. 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974) [hereinafter referred to as *Johnson*].
30. *Id.* at 491, 315 N.E.2d at 641.
31. ILL. REV. STAT. ch. 10, § 101 (1977) states:
   A written agreement to submit an existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract.
In 1976, the question of whether there could be any binding arbitration provisions in a bargaining contract finally reached the Illinois Supreme Court. *Board of Trustees v. Cook County Teachers Union, Local 1600*\(^3\) concerned the issue of whether an arbitrator may award teaching contracts to non-tenured junior college teachers whose contracts were not renewed without prior faculty evaluation and recommendation called for by the collective bargaining agreement. The court referred to an earlier decision, *Illinois Education Association Local District 218 v. Board of Education*,\(^3\)\(^4\) relating to the power of a board of education to dismiss probationary teachers, and said: "We adhere to our position there stated in *Illinois Education Association* that the Board’s duties in appointing teachers are nondelegable, and it follows therefrom that the arbitrator is without authority to award an employment contract as a remedy for the violation of a collective binding agreement."\(^3\)\(^5\)

The *Local 1600* court further stated that the matter of faculty promotions is a nondelegable power which cannot be required to be arbitrated,\(^3\)\(^6\) nor can promotions be subject to binding arbitration.\(^3\)\(^7\) However, in the final aspect of the case, involving the question of an arbitrator’s back pay award for summer school teachers, the defendant board did not raise the issue of nondelegability. The court stated that there was "[no] problem on this ground with the binding agreement to allocate extra teaching assignments in an equitable fashion, for the Board retains the authority to select extra courses and to offer rotational employment only to teachers it has determined to be qualified to teach the offered courses."\(^3\)\(^8\) The court then found the back pay awards lawful. Thus, the Illinois Supreme Court has approved a very limited form of binding arbitration.\(^3\)\(^9\)

33. 62 Ill. 2d 470, 343 N.E.2d 473 (1976) [hereinafter referred to as *Local 1600*]. The first issue discussed was whether an arbitrator may award teaching contracts to non-tenured junior college teachers whose contracts were not renewed without prior faculty evaluation and recommendation called for by the collective bargaining agreement. *Id.* at 473, 343 N.E.2d at 474.
34. 62 Ill. 2d 127, 340 N.E.2d 7 (1976).
35. *Id.* at 476, 343 N.E.2d at 476.
36. *Id.* at 477-78, 343 N.E.2d at 477.
37. *Id.* at 478-79, 343 N.E.2d at 477.
38. *Id.* at 478, 343 N.E.2d at 478.
39. The most recent case on this subject is *Board of Educ. v. Murphy*, 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978). At issue was whether the granting of a minimum number of sabbatical leaves was arbitrable. The court stated:

According to the majority of the Illinois Supreme Court in *Illinois Education Association Local Community High School District No. 218 v. Board of Education* (1975), 62 Ill. 2d 127, 340 N.E.2d 7, and in *Board of Trustees v. Cook County College Teachers’ Union Local 1600* (1976) 62 Ill. 2d 470, 343 N.E.2d 473, contractual provisions which limit or delegate discretionary functions which are specifically imposed upon the Board of Edu-
Mediation and Fact Finding

In addition to arbitration, an impasse may be resolved by mediation or fact finding. Mediation involves a third party who aids in the settlement of an employment dispute by offering advice, but not by making binding decisions, as is usually the case in arbitration. Frequently, a mediator confers with each party to a dispute without revealing how far the other is willing to go in compromising the dispute. Using his powers of persuasion, the mediator attempts to bring the parties to the point where they can reach agreement. Mediation can be effective if it is done by a competent, experienced and unbiased labor mediator. Unfortunately, there are too few such persons available.

Fact finding usually is conducted by individuals appointed to investigate and report the facts and clarify the issues, but who make no recommendations for settlement of the dispute. Fact finding has been used frequently in Illinois. Its success depends on the ability of the fact finder to elicit the facts clearly and specifically, and the imposition of a reasonable time limit upon his report.

One or two school districts in Illinois have experimented with a variant of fact finding called "last best offer," wherein the fact finder is precluded from compromising the parties' positions, but is compelled to choose between them. The theory is that this compels the parties to bargain much closer for fear of having the unreasonable position. The fact finder may choose one party's position on the basis of the entire contract, winner take all, or on an issue-by-issue basis. Experience with this variation has not proved favorable to date.

Finally, a new approach to resolving an impasse which appears to be gaining some acceptance, allows the voters the opportunity of solving the problem by a referendum vote. The City and County of San Francisco, California adopted this approach in an election in November 1976, and voted against union demands in a negotiation impasse.
Several other cities are experimenting with this approach.\textsuperscript{40}

**STRIKES AND RELATED ACTIVITIES**

Many employees who believe that they receive inadequate wages and benefits often will not accept a unilateral determination of compensation by their employers. In an effort to coerce employers to recognize their employee associations and submit to bargaining over employee wages and benefits, employees have increasingly resorted to the remedy of a labor strike.

Most states still prohibit a strike by public employees,\textsuperscript{41} but advocacy for legislative change has increased steadily. Even where the right to strike is recognized, some states have developed a distinction between essential services and those which do not threaten public health or safety. Where public employee strikes are prohibited, the weapon of strike nevertheless has been used often,\textsuperscript{42} but resulting settlements have been achieved at a cost of bitterness and frustration.

In Illinois, it is clear that a strike by a public employee is illegal. In the 1965 case of *Board of Education v. Redding*,\textsuperscript{43} the Illinois Supreme Court held that a strike of thirteen custodial employees of a community unit school district was illegal and that picketing should have been enjoined. The court stated:

> Although this is a case of first impression in a reviewing court of this jurisdiction, it is, so far as we can ascertain, the universal view that there is no inherent right in municipal employees to strike against their governmental employer, whether Federal, State, or a political subdivision thereof, and that a strike of municipal employees for any purpose is illegal.\textsuperscript{44}

The court also made clear that a state, without abridging the right

\textsuperscript{40} See Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, 37 A.L.R. 3d 1147 (1971).

\textsuperscript{41} Strikes or work stoppages by public officers or employees, both federal and state, are almost universally prohibited by statute or judicial decision. Certain state statutes have been held to grant the right to strike. The right of the sovereign to prohibit strikes or work stoppages was clearly recognized at common law. Generally, attacks against the anti-strike rule on constitutional grounds have been held to be without merit. Likewise, picketing, while an expression of free speech, if it is in support of an illegal objective, is generally subject to restraint.

\textsuperscript{42} For example, in 1974, through 382 strikes, 1,404,200 man days were lost with 160,349 union members in the public sector. Through the first nine months of 1975, 21 percent of striking American workers were government employees. In Illinois, from 1958 to 1974 there were 252 strikes, an average of 14.82 strikes per year, certainly well above the national average, on a state by state basis, of 1.18 strikes per year. Would these figures change if Illinois enacted a public bargaining law? Statistics seem to say emphatically no. For the same period, from 1958 to 1974, in every state except Indiana, passage of a public bargaining law has resulted in increased strike activity. Public Sector Bargaining and Strikes (2d ed. 1976).

\textsuperscript{43} 32 Ill. 2d 567, 207 N.E.2d 427 (1965) [hereinafter referred to as *Redding*].

\textsuperscript{44} Id. at 571, 207 N.E.2d at 430.
of free speech, could restrain picketing where such curtailment was necessary to protect the public interest and property rights, and where the picketing was for an unlawful purpose. The Redding decision immediately was heralded as settling the question of whether public employees have a right to strike and picket in support of such a strike. The decision, however, did not solve the problem. Illegal strikes followed, as well as new tactics, such as the withholding of services through slowdown and wholesale cases of illnesses.

In two subsequent decisions, Peters v. South Carolina Community Hospital and County of Peoria v. Benedict, the Illinois Supreme Court seemed to back down from its strong language in Redding. In those decisions, the court refused to declare strikes illegal and grant injunctions against them in a not-for-profit hospital and a county-owned nursing home.

In 1974, the Illinois Supreme Court clarified the confusion caused by those decisions. In City of Pana v. Crowe, the court reversed the decision of an appellate court that had reversed the granting of a temporary injunction and a permanent injunction by the trial court. The defendants were employees of the City of Pana and members of the American Federation of State, County and Municipal Employees. The defendants urged that the Illinois Anti-Injunction Act was applicable and therefore the injunctions were improper.

In reversing the appellate court, the Illinois Supreme Court stated that the history of the statute clearly indicated that it was not intended to apply to work stoppages by governmental employees. The court restated its position in Redding that a strike by governmental employees is unlawful, noting that "[t]he doctrine that public employees have no legal right to engage in a strike has been reiterated."}

45. 44 Ill. 2d 22, 253 N.E.2d 375 (1969) [hereinafter referred to as Peters]. The court in Peters held that a strike by employees for a not-for-profit hospital was not contrary to public policy and not subject to injunctive relief. The court, in seeking to distinguish Redding, stated that "it was the constitution that declared the public policy," id. at 27, 253 N.E.2d at 378, whereas in the Peters case there was no overriding expression of public policy. The Illinois Supreme Court held that the Illinois Anti-Injunction Act, ILL. REV. STAT. ch. 48, § 2a (1976) made no exceptions for hospitals. Id.

46. 47 Ill. 2d 166, 265 N.E.2d 141 (1970), cert. denied, 402 U.S. 929 (1971) [hereinafter referred to as Benedict]. The court in Benedict had to consider the applicability of the Anti-Injunction Act to a strike by employees of a county-owned and operated nursing home. The trial court's preliminary injunction was held to have been erroneously issued. Even though the court held the preliminary injunction erroneous, it nevertheless upheld the contempt order, noting that an injunction, while in force, would not be disregarded. Id. at 170, 265 N.E.2d at 143. Most of the court's opinion in the Benedict case deals with the contempt issue.

47. 57 Ill. 2d 547, 316 N.E.2d 513 (1974) [hereinafter referred to as Crowe].


49. 57 Ill. 2d at 550-51, 316 N.E.2d at 514-15 (citations omitted).
The court then acknowledged the *Benedict* and *Peters* decisions, noting that they involved strikes of employees of a not-for-profit community hospital and a nursing home and stated: "In our opinion neither the *Peters* case nor the *Benedict* case requires that we depart in this case from the longstanding rule that public employees have no right to strike and that a strike by them is unlawful and therefore not within the scope of the anti-injunction act."\(^5\)

In concluding its opinion, the court recognized that the Illinois General Assembly had acquiesced in the conclusions of the court in various decisions and had dealt with collective bargaining and arbitration in certain areas, such as firemen and Regional Transit Authority employees, but had refused to interfere with the conclusion that a strike of public employees was unlawful. Finally, the court stated that the situation in a strike of public sector employees differs sharply from private industry. It recognized that the functions provided by government were of such a nature that there could be no substitution of products as in the private sector.\(^5\)1 The court also recognized that strikes of public employees were apt to create emergencies affecting the health, safety and welfare of the public.\(^5\)2 Thus, the Illinois Supreme Court hopefully has come full circle in reinforcing its decision in *Redding*.

However, neither the *Redding* nor the *Crowe* decision has stopped teachers from striking. There are a number of options available to a school district in the event that teachers or other employees decide to strike. These include seeking an injunction, or, more drastically, seeking the discharge of the striking employees.

An injunction can be sought by a school district to restrain its employees from any illegal activity, including picketing.\(^5\)3 If the employees deliberately violate a court injunction, then contempt proceedings may follow with the possibility of fines and imprisonment.\(^5\)4 Even where a preliminary injunction against a strike was wrongfully granted by a trial court, fines for criminal contempt have been upheld.\(^5\)5 The

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50. *Id.* at 552, 316 N.E.2d at 515.
51. *Id.* at 553, 316 N.E.2d at 516.
52. *Id.*
53. In Board of Educ. v. Parkhill, 50 Ill. App. 3d 60, 365 N.E.2d 195 (1977), the trial court granted a temporary restraining order against picketing and a school strike, but subsequently refused to grant a permanent injunction and dismissed the temporary order. The appellate court reversed and held that the picketing was for recognition, not for informational purposes, and, where it was disruptive and interfered with and impeded governmental functioning, it should have been enjoined. *Id.* at 63, 365 N.E.2d at 197.
55. In Board of Trustees v. Cook County College Teachers Union Local 1600, 42 Ill. App. 3d
only alternative available to the employee who refuses to obey a court-ordered injunction, short of possible fine or imprisonment, is to resign his employment.

When confronted by a school district seeking an injunction, a trial court may at times attempt to influence the labor process by acting as a super mediator or arbitrator. However, one Illinois court recently indicated that trial courts should avoid such meddling in the labor process.56 The extent of the trial court's involvement should be to maintain the status quo at the time the injunction is issued.57

A school board also can seek to discharge striking employees.58 In previous instances, Illinois courts have approved the dismissal of striking public employees.59 However, any action of dismissal must be characterized by equal treatment toward the striking employees. For example, in Olshock v. Village of Skokie,60 the United States Court of Appeals for the Seventh Circuit affirmed a district court ruling that the discharge of certain striking policemen was in violation of their constitutional rights. The court's opinion clearly recognizes that such strikes are illegal in Illinois. The problem as seen by the majority of the court was the way in which the proceedings were handled before the Fire and

1056, 356 N.E.2d 1089 (1976), the court upheld fines for criminal contempt (although some of the fines were reduced) even though the court found that the temporary restraining order should not have been entered without notice or an adequate explanation of why notice was not given. The trial court also failed to properly set down a hearing for a preliminary injunction and improperly renewed the restraining order a few hours after it had expired by its own terms. Id. at 1063, 356 N.E.2d at 1094. The appellate court also pointed out that the law does not favor granting injunctive orders without notice sufficient to afford the defendant an opportunity to show it should not issue. Id. at 1061, 356 N.E.2d at 1093. However, notwithstanding these errors by the trial judge, the injunction must be obeyed until it is set aside, and these errors are not subject to attack in a contempt proceeding. Id. at 1063, 356 N.E.2d at 1094.

56. In Harper College Faculty Senate v. Board of Trustees, 51 Ill. App. 3d 443, 366 N.E.2d 999 (1977), the union secured three injunctive orders where negotiations had stalled. The first two orders restrained the board from communicating directly with the faculty or accepting individual faculty contracts. The third order required the board to negotiate several hours a day, seven days a week until the current agreement expired. The appellate court summarily reversed all three orders. The court held that the trial court was "without jurisdiction or authority to force the parties to bargain at all, much less on a forced basis such as the one here." Id. at 446, 366 N.E.2d at 1002.

57. Board of Educ. v. Springfield Educ. Ass'n, 47 Ill. App. 3d 193, 361 N.E.2d 697 (1977). The trial court granted a temporary restraining order enjoining a strike after the expiration of a contract but found that the contract constituted the status quo between the parties. The board of education was restrained from maintaining a previously imposed salary freeze. The Appellate Court for the Fourth District affirmed, emphasizing that the trial court has an obligation to impose the status quo. Id. at 196, 361 N.E.2d at 700.


60. 541 F.2d 1254 (7th Cir. 1976).
Police Commission.\textsuperscript{61} The court allowed back pay, less deductions for a proportionate share of the damages to the village by the strikers.

While equal treatment must be accorded to the strikers, due process may not be necessary unless state law requires it. In Illinois, the Teachers Tenure Act\textsuperscript{62} must be followed. In \textit{Lake Michigan College Federation of Teachers v. Lake Michigan Community College},\textsuperscript{63} striking teachers were dismissed for violating a Michigan statute prohibiting public employees from striking.\textsuperscript{64} The court ruled that the requirements of due process as set down in \textit{Board of Regents v. Roth}\textsuperscript{65} were not triggered because striking teachers had neither a liberty nor a property interest. The court indicated that due process safeguards would only be required "if the discharge of a teacher foreclosed future employment opportunities that otherwise would be open to him or if the grounds for the discharge tend to discredit the teacher's honesty or integrity or to damage his standing in the community."\textsuperscript{66}

In addition to seeking the discharge of striking employees, the board of education should give serious consideration to terminating any existing agreements and withdrawing recognition of the exclusive bargaining agency, even where a contract may have expired by its own terms. The board of education also should consider the possibility of a damage action against the union and the employees. Obviously, a strike will cause a large amount of additional expense, and Olshock seems to suggest that these damages are recoverable.\textsuperscript{67} Indeed, various contract and tort theories are available for consideration. Finally, it may be practical in a strike situation for a school board to consider posting notices on school property to prohibit striking employees from entering upon it. By so doing, the board may be able to institute criminal trespass actions if strikers ignore the warnings.\textsuperscript{68}

\textsuperscript{61} As the court said: "The only discernable pattern of treatment of the 54 police officers who were disciplined is that the 34 who were discharged appeared with an attorney and the 20 who were suspended appeared without an attorney." \textit{Id.} at 1258.

\textsuperscript{62} ILL. REV. STAT. ch. 122, § 24-11 (1977).

\textsuperscript{63} 518 F.2d 1091 (6th Cir. 1975).

\textsuperscript{64} MICH. STAT. ANN. § 423.202 (1976).

\textsuperscript{65} 408 U.S. 564 (1972).

\textsuperscript{66} 518 F.2d at 1096.

\textsuperscript{67} \textit{See} the Seventh Circuit's decision at 541 F.2d at 1260.

\textsuperscript{68} ILL. REV. STAT. ch. 38, § 21-3 (1977) provides:

(a) Whoever enters upon the land or any part thereof of another, after receiving, immediately prior to such entry, notice from the owner or occupant that such entry is forbidden, or remains upon the land of another after receiving notice from the owner or occupant to depart, commits a Class C misdemeanor.

ILL. REV. STAT. ch. 38, § 21-5 (1977) provides:

(a) Whoever enters upon land supported in whole or in part with State funds, or Federal funds administered or granted through State agencies or any building on such
THE NEGOTIATING PROCESS

The selection of the negotiating team is extremely important. The team should include someone from top management, as well as a department chairman.69 Inclusion of a pro-management foreman might be helpful in bargaining with non-certified personnel. The school attorney is usually on the team and is often the chief negotiator because of his experience in such matters. On the other hand, board of education members should not be negotiators. They should be kept one step removed from the bargaining table so that they may maintain their perspective in considering the proposed contract in its entirety after preliminary dialogue between the parties.

Complete and careful preparation is, of course, essential to the success of the school district's negotiations. Management must be adequately informed about such issues as cost/benefit relationships and employee attitudes toward working conditions and board policies. Before negotiations begin, the attorney for the school district should review the present contract,70 and confer with department supervisors in order to determine the contract's effectiveness and weaknesses. Also helpful would be a review of current grievances and employer-employee problems. Further, the attorney should examine the school district's fiscal abilities, current wage schedules in private employment, and recent arbitration decisions on the present contract.

Most important, the attorney should meet with the district administration and board of education to define the scope of authority of the negotiating team. He must ensure the administration's support by including them in the negotiating process as much as possible—by educating them in the process of negotiations and keeping them fully informed.

Various preliminary matters should be considered before the initi-

69. As an example, the negotiating team might include the school district superintendent or someone from his office, or an assistant superintendent or business manager, a principal and perhaps a department chairman.

70. If it is contemplated that a re-negotiation of a present contract is in order, consider that the community might be required to pay its employees pursuant to an expired contract. One Illinois appellate court case recently so held, where a board of education sought an injunction to prevent a work stoppage. The board was prohibited from imposing a salary freeze, as this would not preserve the "status quo." See Board of Educ. v. Springfield Educ. Ass'n, 47 Ill. App. 3d 193, 198, 361 N.E.2d 697, 701 (1977).
ation of bargaining sessions. These include the scope of authority of the chief negotiator vis-a-vis the other members of the bargaining team; the times, places, and agendas of meetings; and the roles and involvement of the press and the public.71

In negotiating an agreement, the school district team should accept union proposals for study and future response.72 Some time then can be devoted to a review of the proposals. Management can request that the union rationalize and explain each of its proposals. In succeeding sessions, management can decide either to deal strictly with the union proposals or to present its own proposals. Often, presenting proposals from management will help to clarify problem areas and introduce a spirit of cooperative problem-solving to the negotiations. The management negotiating team likewise should be prepared to explain and support their proposals. After the proposals are fully understood, then the probing, questioning, debating and real bargaining begin.73

CONCLUSION

What is the forecast for future school employee contract negotiations? At the 1978 Labor Management Relations Conference in Washington, D.C., the prediction was for tough negotiations emphasizing wages and job security. Labor will have difficulty securing wage increases beyond cost of living boosts. Public employers will be more hardnosed and attempt to limit the cost of expensive benefits. Unions will renew their efforts to organize and secure state legislation favoring collective bargaining and the right to strike. Some unions will press for the right to strike, while others will emphasize grievance binding arbitration.74

The idea of relating benefits to increased worker productivity has

71. Experimental opening of these sessions to the public and the press has not been successful. The nature of the process of negotiations requires open and frank discussion and not playing to the press. Indeed, negotiations have proven to be most successful where publicity on the progress is severely limited. Sometimes, where the union membership is large, the union team will seek permission to disseminate progress to their membership, but this too should be restricted as much as possible.

72. It is important at this stage to establish a ground rule that all union proposals must be made first and must be complete when submitted. Negotiations can never come to an end if new proposals can be placed on the table at any time during negotiations. The reason for requiring the union proposal first is that management, before negotiating, possesses all of the powers and authority. Union proposals must, of necessity, take some of those powers away.

73. It is recommended that each session should be recorded by general notes or minutes.

74. See LMRS Newsletter (February 1978). Jerry Wurf, President of AFSCME, is quoted extensively in the new publication, NLC - SPEER, National League of Cities (January 1978). Wurf admits that the productivity and accountability among some public employees is not satisfactory, but he blames public managers who don't manage properly.
been gaining support in the last several years. This author believes that
the issue of productivity, its management and implementation, will be
one of the major thrusts by public employers during the next several
years. Methods will have to be developed that will provide more gov-
ernmental services at reduced cost. The taxpayers are crying out for
this type of response from all levels of government, and in particular at
the local level, including the schools. A well-informed board of educa-
tion, educated in the field of labor relations, will greatly aid in achiev-
ing this desirable result.