AN ANALYSIS OF JUDICIAL DECISIONS AND STATUTORY ENACTMENTS PERTAINING TO COLLECTIVE NEGOTIATIONS IN THE PUBLIC SCHOOL

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CHAPTER I

INTRODUCTION

Collective negotiations in education have played a critical role in the shaping and development of a new relationship between boards of education and teacher groups.[1] Critical to the structure of the interaction has been the emerging legal doctrine.[2] The aggressive thrust by instructional and non-instructional employees of public schools to work out arrangements with the traditional governing structure has been one of the most marked trends in education during the last decade.[3] The intensity of this thrust was exemplified by Riley Casey[4] when he commented:

> Evidenced by constant headlines and newspaper files and regardless of one's opinion of their appropriateness in education, collective negotiations between boards and unions are a fact of present life. They are not only here to stay but will grow measurably in the immediate future.

This intensified confrontation of the traditional authority structure by aspiring professional and non-professional employees of school

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[1]Wesley A. Wildman, The Law and Collective Negotiations in Education, A Report Prepared for the United States Department of Health, Education and Welfare (Chicago, 1968), p. 1.

[2]Ibid.

[3]Robert R. Hamilton and E. Edmond Reutter, Jr., The Law of Public Education (Mineola, 1970), p. 411.

[4]Riley E. Casey, "Legal Problems of Negotiations," American School Board Journal, CLV (November, 1969), p. 16.

districts leaves little doubt that the area of collective negotiations has taken on increased importance in our society.

As pressure increases for the bilateral determination of the conditions of employment in the public schools, a bewildering variety of statutory provisions, judicial decisions, attorney general's opinions, and administrative agencies has developed. Litigation in the area of collective negotiations is by no means confined to the last decade, yet in recent years the increase has been most indicative of the increase of confrontations. State statutory enactments have been forthcoming with an amazing number of complexities that may have implications beyond their original intent.

The rapidly evolving laws governing concerted activities of school employees has played both a vital cause and effect role with respect to collective negotiations.[5] The enactments of statutes and the modifications in legal doctrine as expressed through court decisions have often been the results of increased concern by school board organizations and teacher organizations. Furthermore, some of the more stringent statutes on organizational activities have been the result of legislative and court reaction to such concern. Thus, prerogatives long cherished by the boards of education in regard to conditions of employment are not likely to diminish without a struggle. The emerging legal doctrine as developed through legislative action, judicial interpretations of the statutues and legislation pertaining to the concerted activities of employees may have important implications.

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[5]Wildman, op. cit., p. 2.

It is a well established fact that education in the American scheme of government is essentially a matter of state policy. Any attempt by public school employees to modify or limit the state's authority through the promotion of bilateral arrangements will be challenged and litigation may result. The evolving legal relationships are of greatest consequence, not only for the continuation of state authority in educational matters but the continued operation of educational programs.

Purpose of the Study

This study will be especially concerned with emergent legal principles, judicial decisions, and state statutory development governing collective negotiations throughout the United States. Hopefully, a foundation can be established that will facilitate the gathering and dissemination of information by interested parties regarding the legal implications of collective negotiations.

It is hoped that the information presented in this study pertaining to the legal aspects of collective negotiations will enhance the comprehensiveness of the available literature. Too, it may serve to reduce some of the fragmentation now evident in the growing body of literature. Although this study is not intended to provide the interested persons with a handbook to be used as a definite and final authority, it is quite possible the study could be utilized as a guide for administrators, boards of education, and state legislators as they attempt to cope with the emerging legal aspects of collective negotiations.

Statement of the Problem

This study will attempt to locate, analyze, and present a summary of the litigation in the courts in the area of collective negotiations pertaining to instructional and non-instructional employees of the public schools. Reasoning of the courts will be examined for the purpose of determining what principles and rules of law have been developed by the courts. A second endeavor of this study is to locate, examine, analyze, and present the current status of statutory development in all states with labor relations acts applicable to public school employees.

Among the questions to be answered by the study are the following: What legal status do school employees have if the state statutes are silent in regard to collective negotiations? Are school employees considered public employees and if so, are public employee statutes applicable? What standards or judicial guidelines have been developed by the courts in regard to strikes by school district employees? May boards of education grant exclusive representation rights to one organization without specific statutorial permission? What is the legal doctrine governing the closed shop concept in school districts? What is the extent of the doctrine of illegal delegation of authority in collective negotiations? What seems to be the trend in state statutory development pertaining to administrative agencies for the purpose of arbitration? May boards of education, as a condition of employment, prevent an individual school district employee from actively participating in extra-legal organizations? What standards apply in case of a strike by school district employees if the statutes are silent? May teachers be dismissed for actively participating in union activities? What standards or judicial guidelines have been developed by the courts pertaining to

dues checkoff? Are boards of education required to negotiate without an enabling statutory provision? What is the legal doctrine governing the agency shop? What legal precedence has been established by the judicial system applicable to mass resignations, sanctions, political action, and picketing?

Method and Procedure

This study falls in the realm of historical research, involving the description, analysis, and review of statutory enactments and judicial decisions. The techniques employed in legal research as suggested by Price and Bitner,[6] Rezny and Remmlein,[7] and William Roalfe[8] will be employed.

Specifically, the procedures contemplated for effective legal research pertaining to judicial decisions would be as follows: (1) location of appropriate cases by use of the Century, Decennial and General Digests, (2) reading of cases by the utilization of the National Reporter System and (3) the use of Shepard's Citations to Cases to determine the current status.

Statutory law will be located by the use of State Codes, the Law Digest volume of the Martindale-Hubbill Law Directory, the Annual Survey of American Law, and the Current State Legislation which is prepared by the American Bar Association and published by Bobbs-Merrill. The status

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[6]Harry Bitner and Miles O. Price, Effective Legal Research (Englewood Cliffs, 1953).

[7]Madaline Kinter Remmlein and Arthur A. Rezny, A School Man in the Law Library (Danville, 1962).

[8]William R. Roalfe, ed., How to Find the Law (St. Paul, 1965).

of the statute will be determined by use of the Shepard's Citations to Statutes.

Scope and Limitation of the Study

The principal aspects of this study involve the litigation and statutory enactments pertaining to collective negotiations. State attorney general's opinions will be reviewed if deemed appropriate; however, all opinions will not be sought. Data in this research will be limited to judicial decisions and statutes appurtenant to instructional and non-instructional employees of school districts. Other cases and statutes will be reviewed only if deemed appropriate to the point of law.

This study will not be limited to a specific period of time due to the recent emergence of the subject. However, changes in state statutes that are dated beyond September, 1970, will not be reported. All states will be included in this study.

Definition of Terms

Abrogate - A judicial act that annuls or revokes a previously held doctrine.

Action - A proceeding in court by which one party prosecutes another for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offense.

Affirm - To make firm; to establish. To ratify or confirm the judgment of a lower court.

Appellant - The party who makes an appeal from one court to another.

Appellate court - A higher court which hears a case from a lower court on appeal.

Arbitration - A method of settling an employee-management dispute through recourse to an impartial third party whose decision is usually final and binding.

Case law - A body of law created by judicial proceedings.

Certiorari - An original writ or action whereby a cause is removed from an inferior to a superior court for trial. The term is most commonly used when requesting the U. S. Supreme Court to hear a case from the lower court.

Collective negotiations - A process by which employers negotiate with the duly chosen representatives of their employees concerning terms and conditions of employment, and on such other matters as the parties may agree or be required to negotiate.

Common law - Legal principles derived from usage and custom, or from court decisions affirming such usages and customs.

Concurring opinion - An opinion written by a judge who agrees with the majority of the courts as to the decision in a case, but has different reasons for arriving at that decision.

Defendant - The party against whom relief or recovery is sought in a court action.

Dictum - The expression by a judge of an opinion on a point of law not necessary to the decision on the case; dictum is not binding on other judges.

Dissenting opinion - An opinion disagreeing with that of the majority handed down by one or more members of the court.

Enjoin - To require a person or persons by writ of injunction from a court of equity, to perform, or to abstain or desist from some act.

Fact finding - The investigation of an employer-employee dispute by a board or panel. Reports are usually issued which describe the issues in the dispute and recommendations for their solution.

Injunction - A prohibitive writ issued by a court of equity forbidding the defendant to do some act he is threatening or forbidding him to continue doing some act.

Majority opinion - The statement of reasons for the view of the majority of the members in the bench in a decision in which some of them disagree.

Mediation - An attempt by a third party to bring together the parties in dispute.

Plaintiff - Person who brings on action.

Plenary - Complete power, usually applied to legislatures over matters within their entire jurisdiction.

Police power - The power of legislatures to pass laws regulating and restraining private rights and occupations for the general welfare and security.

Precedent - A decision considered as furnishing an example or authority for an identical or similar case afterward arising on a similar question of law.

Quasi-corporation - An organization with semi-corporate powers, it is created by the state with limited powers to act in the place of the state for a given local area.

Right - A power or privilege in one person against another.

Statute - Act passed by the legislature.

Ultra vires - Acts beyond the scope of authority.

CHAPTER II

BACKGROUND OF STUDY

The Legal Framework for School Law and Collective Negotiations

School law, in providing the legal foundation for the operation of the public school system, is derived from a combination of constitutional provisions, statutorial enactments, attorney general's opinions and case law. Gauerke[1] classifies the legal basis of public education as follows: (1) federal and state constitutional law, (2) statutorial law which includes acts of administrative bodies, and (3) judge made law or that law which relates to the decisions of the court. Thus, law applicable to the school is not legal precedent found in a single source such as a book; but, rather a whole body of rules from diversified sources.[2]

Collective negotiations law, as it seeks to regulate human activities, is enmeshed in and has become an inseparable part of common law, constitutional law, judge made law, criminal law, and statutorial law.[3] The shape of the legal framework in which collective negotiations

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[1]Warren E. Gauerke, School Law (New York, 1965), p. 14.

[2]Ibid., p. 11.

[3]Nicholas S. Falcone, Labor Law (New York, 1962), p. 1.

are conducted is triangular in configuration.[4] Common law arising from judicial decisions and interpretations, and jurisprudence consisting of the accumulation of action taken by various parties, represent the sides of the triangle.[5] However, common law derived from judicial decisions is of greater consequence during the early stages of the development of legal framework pertaining to a specific area. The base of this triangular configuration is one of statutory law as established by Congress and by individual state legislative bodies.[6] State legislation as exemplified through statutorial enactments is paramount in collective negotiations; thus, the base of the configuration is the legal foundation.

As to establishment of precedence for collective negotiations, the judicial decisions in other sectors of employment cannot be overlooked. Litigation and the ensuing precedent established in the public sector is often referred to in legislation involving school employees. Henceforth, the separation of school district employees from other public or private employees in regard to legal doctrine is difficult even though distinguishing characteristics exist.[7]

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[4]C. Wilson Randle, Collective Bargaining: Principles and Practices (Boston, 1951), p. 49.

[5]Ibid., p. 50.

[6]Ibid., p. 51.

[7]Jack H. Kleinmann, T. M. Stinnett, and Martha L. Ware, Professional Negotiation in Public Education (New York, 1966), p. 21.

The Sovereignty of the State and Delegation of Authority

Traditionally, the state or its agents have been responsible for the formulation and administration of policies governing the operations of the school. The power of legislature over education is plenary or complete except as limitations might be imposed by a state constitution or by the Constitution of the United States. Garber,[8] in commenting on state authority over school districts stated:

> . . . the state exercises its authority through the constitution by constitutional enactment, and through the legislature by legislative or statutory enactment. In the absence of any restrictions placed upon it by the constitution, the legislature may enact any law it sees fit concerning education--except it cannot divest itself of legislative power. Neither can it delegate legislative authority to another agency. It may create administrative bodies and charge them with the responsibility for maintaining schools; it may delegate this authority to already existing agencies such as cities, townships, and counties; or it may retain this authority itself. In any case its authority is supreme over schools and over any agencies it desires to make use of for administrative purposes.

Edwards,[9] in a similar vein, stated:

> In the absence of constitutional prohibitions, the end to be attained and the means to be employed are wholly subject to legislative determination. The legislature may determine the types of schools to be established throughout the state, the means of their support, the organs of their administration, the content of their curricula, and the qualifications of their teachers. Moreover, all their matters may be determined without regard to the wishes of the localities, for in education the state is the unit and there are no local rights except such as are safeguarded by the Constitution.

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[8]Lee O. Garber, Handbook of School Law (New London, 1954), p. 5.

[9]Newton Edwards, The Courts and the Public Schools (Chicago, 1955), p. 27.

Therefore, it seems obvious that the legislature has the unrestricted right to prescribe the policies, authorize the means of financing, determine the methods of instruction, and set conditions of employment in a unilateral manner.

The determination of the conditions of employment as advocated in collective negotiations is one of bilateral determination; thus, this doctrine of the sovereignty of the state is being challenged. Present trends in federal and state policy regarding collective negotiations indicate that the concept of "state sovereignty" is losing substantial support.[10] Furthermore, even if the concept is still accepted, it is being waived as a result of new statutorial enactments that permit extra-legal organizations and school boards to negotiate on conditions of employment.[11]

New state legislation permitting the local school board and the school employees to negotiate is being contested in the courts. Garber,[12] in commenting on why the laws are being contested, indicated:

> Where such laws are contested, the arguments are usually based on the general principle of law that legislatures may not delegate legislative authority and that local school boards cannot therefore be legally empowered to engage in collective bargaining.

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[10]Thomas P. Gilroy, Anthony V. Sinicropi, Franklin D. Stone, and Theodore R. Urich, Educators Guide to Collective Negotiations (Columbus, 1969), p. 11.

[11]Ibid.

[12]Lee O. Garber, "Board Authority Upheld in Collective Bargaining Case," Nations Schools, LXXIV (October, 1969), p. 96.

A recent case of point is American Federation of Teachers Local 1485 v. Yakima School District[13] in which the court rejected the principle of illegal delegation of authority. Commenting on the principle involved, the court stated:

> We have long recognized that the legislature may confer powers of local regulation, or administrative powers, on municipal corporations without violating the constitutional prohibition of improper delegation of legislative power. . . . We conclude that the legislature may properly grant board powers to municipal corporations, including school districts, without prescribing detailed standards and guidelines, so long as those powers relate to local purposes of administration.

One judicial interpretation is not sufficient to clarify the issue at point, yet it does point out that the concept of the "sovereignty of the state" and the principle of delegation of authority are undergoing judicial interpretation.

Legal Foundation of Individual Rights

The legal foundation of individual rights is firmly entrenched in the First and Fourteenth Amendments to the Constitution of the United States. The First Amendment forbids Congress to make any law abridging ". . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment to the Constitution forbids any state to:

> . . . make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

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[13]American Federation of Teachers Local 1485 v. Yakima School District, 447 P. (2d) 593 (Washington, 1965).

These rights have been unequivocally guaranteed and stated, yet the Constitution has not been treated as an immutable instrument stating timeless principles, but rather has been shaped and reshaped as new problems emerged and public attitudes changed.[14] Therefore, the extent of rights as expressed in the Constitution and interpreted through our judicial system is dependent on prevailing ideological and political forces even though adaptations are normally very slow.

Public school employees unquestionably have the same rights enjoyed by other citizens, yet, a certain measure of restraint must be exercised as constitutional rights are not unlimited.[15] This restraint is exemplified in the case of Adler v. Board of Education of City of New York[16] when the court expressed:

> It is clear that such persons (teachers) have the right under our law to assemble, speak, think, and believe as they will. It is equally clear that they have no right to work for the State in a school system of their own terms. They may work for the school system upon the reasonable terms laid down by proper authorities . . . If they do not choose to work on such terms, they are at the liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech and assembly? We think not.

An allegation that teachers are second class citizens may contain some rays of truth; nevertheless, teachers do exercise considerably more freedom than ever before. Increased collective negotiation activities will no doubt bring to the forefront renewed attempts at defining constitutional rights of school employees. Judicial interpretations of

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[14]Sanford Cohen, Labor Law (Columbus, 1964), p. 14.

[15]M. Chester Nolte, Guide to School Law (West Nyack, 1969), p. 42.

[16]Adler v. Board of Education of City of New York, 227 N.Y.S. (2d) 284 (New York, 1952).

individual rights resulting from litigation involving school employees may be of significant consequence not only for school employees but also for all individuals in our nation.

Teachers and Extra-legal Organizations

Historically, teachers have refused to participate in extra-legal organizations for the primary purpose of promoting economic gains. Teachers, like many other groups of professionals, have tended to subordinate questions of salaries and other economic issues to the consideration of professional status.[17] Therefore, teachers, unlike the non-professional workers in the private sector, have generally affiliated with professional organizations rather than labor unions. The development of two competing extra-legal organizations and the increased rivalry during the last decade has been one of the causative factors in increased concerted activities by teachers. Since the American Federation of Teachers and the National Education Association are often involved in litigation involving collective negotiations, a skeletal historical description of their development seems to be in order.

The Chicago Teachers Federation, formed in 1897, was the first example of an independent organization of teachers with distinguishing characteristics of a union.[18] Teacher unions did not become affiliated with organized labor until 1902 and by 1916 only twenty local unions had become A.F.L. affiliates. Membership in the American Federation of

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[17]Bernard Yabroff and Mary Lily David, "Collective Bargaining and Work Stoppages Involving Teachers," Monthly Labor Review, LXXVI (May, 1953), p. 475.

[18]Commission on Educational Reconstruction, Organizing the Teaching Profession (Glencoe, 1955), p. 20.

Teachers increased to 10,000 by 1919; however, it declined to 3,500 by 1927 as a result of increased pressure by boards of education to have teachers join the National Education Association.[19] Since 1927, membership in the A.F.T. has increased to approximately 150,000 resulting from consistent representation victories, increased union activity among public employees, and concern about security and arbitrary discharge.[20]

In 1857, the National Education Association, a professional society for administrators and teachers, was formed with an initial membership of forty-eight.[21] Though the organization's membership fluctuated considerably during the next thirty years, membership had increased to 9,115 members by 1887; by 1920 the membership was 52,800.[22] As of 1968, a membership in excess of one million was reported; however, signs of stabilization were evident due to the increased rivalry with the A.F.T.[23] While the National Education Association advocates professional growth and status, policies pursued since 1962, indicate an increased awareness of the need to concentrate on economic issues.[24]

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[19]Yabroff, op. cit.

[20]Edward B. Shils and Taylor Whittier, Teachers, Administrators, and Collective Bargaining (New York, 1968), p. 23.

[21]Yabroff, op. cit., p. 476.

[22]Ibid.

[23]Gilroy, op. cit., p. 61.

[24]Stinnett, op. cit., p. 12.

Early Collective Action and Judicial Hostility in the Private Sector

In the United States, the earliest record of collective action by labor was in 1636 as a group of fishermen in Maine were reported to have "fallen into mutiny" when their wages were withheld.[25] Certainly, this instance cannot be considered the beginning of any substantial movement for it was not until the mid-19th Century did anything appear in the labor movement that encompassed more than a local action. Although some evidence exists of earlier concerted activities, most authorities have identified the action by a group of printers in 1786 as the first strike.[26]

Judicially, the starting place in private industry is 1806, the date of the Philadelphia v. Cordwainer's case. The court ruling established the "conspiracy in restraint of trade" doctrine which was closely adhered to by the courts until 1842. This concept followed an old English law doctrine that any attempt to raise wages by workmen could be regarded as a conspiracy against the public.[27] The continued persistence of the courts in following this doctrine typifies the judicial hostility that existed in this nation towards labor during its early attempts at collective action.

In 1842, in Commonwealth v. Hunt,[28] the court ruled that collective action within itself was not a conspiracy. This court ruling was

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[25]Randle, op. cit., p. 5.

[26]Ibid., p. 8.

[27]Ibid., p. 10.

[28]Commonwealth v. Hunt, Am. Dec. 346 (4 Metc III) 1842.

considered a landmark in the development of the law of industrial relations as the identity between the conspiracy doctrine and the labor union was dissolved.[29] Use of the conspiracy doctrine by the judicial system did not come to a sudden end as a result of the court's ruling. Various activities of the union were still considered acts of conspiracy by the courts for several ensuing decades.

To complete this judicial review, omitting the legal dogma of state and federal statutory responses, four main developments need to be considered. These developments were: (1) use of injunctions in labor disputes, (2) the suit for damages against unions and union members, (3) the yellow dog contracts, and (4) the courts' interpretation of the Constitution.[30]

The use of the injunction was a most important innovation by the courts to prevent damage of property or business as a result of collective action. An injunction as interpreted by many courts was:

> . . . a proceeding whereby a person or management fearing injury to his property or business might obtain at once a restraining order to preserve the status quo until such time that the conflict has been resolved.[31]

Certainly, the use of the injunction favored management in any dispute and was the basis for labor's bitter resentment towards the judicial system of this nation. Secondly, the use of suit for damages against unions and union members by the courts proved to be ineffective due to

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[29]Fred Witney, Government and Collective Bargaining (Chicago, 1951), p. 33.

[30]Benjamin Aaron, Joseph Shister and Clyde W. Summers, Public Policy and Collective Bargaining (New York, 1962), p. 3.

[31]Alphus T. Mason, Organized Labor and the Law (Durham, 1925), p. 101.

the inadequacy of the funds against which the damages could be assessed.[32] The third area of development, the use of yellow dog contracts, was a major concern of legislation due to infringement upon individual rights. Basically, a yellow dog contract was an undertaking on the part of the employee that as a condition of employment he would not join or become involved in a labor organization.[33] The court's reaction to the use of yellow dog contracts was anti labor in context as the courts approved the legality of such arrangements.

The fourth and final development was of a more general nature as it deals with the interpretation of the Constitution by the courts. This development can be expressed in various ways, yet the main thrust was the court's possible over-concern with "property rights" as opposed to "human rights" in viewing the Constitution.[34]

The above mentioned developments reflect a judicial hostility that did thwart the effectiveness of unions. Federal statutorial response in the 1930's and 40's helped alleviate many of the problems but the judicial system was slow in reflecting the same societal acceptance of labor activity.

Legal Status of Collective Bargaining in the Private Sector

Collective bargaining in the private sector is essentially a power relationship and a process of power accommodation, whereby the avowed

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[32]Aaron, op. cit.

[33]Ibid., p. 4.

[34]Ibid.

theoretical purpose and practical implications have been to increase the employee's control over the decision making process.[35] With the passage of the National Labor Relations Act of 1935, the basic foundation pertaining to legal rights was provided for the now familiar collective bargaining process of the private sector.[36] Though modifications were forthcoming in the enactment of the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959, the collective bargaining process has remained constant.[37]

Essential to the collective bargaining process in the private sector are key elements provided for or supported by the federal legislation previously mentioned. Nolte[38] and Wildman[39] list similar sets of elements:

1. Employees may organize without influence or coercion from either management or labor.

2. Procedures for the determination of exclusive representation for each of the bargaining units are provided.

3. A union granted exclusive representation shall represent all the employees in the unit, whether or not they voted for the union.

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[35]Wesley A. Wildman, "The Law and Collective Negotiations in Education," Volume II of Collective Action by Public School Teachers (Chicago, 1968), p. 4.

[36]M. Chester Nolte, "Teachers Face Boards of Education Across the Bargaining Table Legally," School Board Journal, CL (June, 1965), p. 10.

[37]Kern Alexander, Ray Corns, and Walter McCann, Public School Law (St. Paul, 1969), p. 437.

[38]M. Chester Nolte, "Teachers Face Boards of Education Across the Bargaining Table Legally," School Board Journal, CL (June, 1965), p. 12.

[39]Wildman, op. cit., pp. 5-7.

4. Union shop is legalized, however, the individual states may enact "right to work" laws which forbid such an agreement.

5. Procedures have been established for dues checkoff.

6. The employer must meet and bargain in good faith. Furthermore, upon the termination of the bargaining, the union and employer must reduce the terms of the agreement to writing.

7. Disputes over contract interpretation or application may be resolved by a third person through binding arbitration.

8. Employees may legally strike in the event of an impasse or failure of the employer to meet contract terms. However, a strike may legally be enjoined in case of a national emergency.

9. Picketing for recognition purposes is severely limited by law although other forms of picketing are legal and without serious legal constraints.

It should be emphasized that the National Labor Relations Act, Taft-Hartley Act, and Landrum-Griffin Act specifically exclude public employees from the provisions set forth.[40]

Although it has been estimated by Nolte[41] that the bargaining process in the private sector is about thirty years ahead of similar accommodations in the public sector, the legal aspects are worth noting. If indeed an "adaptive" concept prevails, present legal doctrine in the private sector deserves close review due to possible implications.

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[40]M. Chester Nolte, "Teachers Face Boards of Education Across the Bargaining Table Legally," School Board Journal, CL (June, 1965), p. 11.

[41]Ibid., p. 10

The Emerging Legal Doctrine

. . . Some Studies

Much has been written in the general area of collective negotiations with the preponderance of the major contributions making at least a token attempt to cope with the emerging legal doctrine. Few attempts have been made to present in an analytical and exhaustive manner the judicial decisions and statutorial enactments in collective negotiations. Therefore, the review of literature presented in the following pages only encompasses the major contributions.

Lieberman,[42] while an assistant professor of education at the University of Oklahoma, in 1956 published a comprehensive analysis of the issues involved in teacher strikes. He made an attempt to give the term "strike" an operational definition and related some of the legal aspects involved in strikes. The author presented a thoughtful analysis of the "sovereignty of government" concept and implied that perhaps strikes, if removed from the political framework and treated as an employee-employer problem, would not be a threat to the "sovereignty" of the government. This particular publication has been considered one of the first major contributions in the area of collective negotiations.

Lieberman and Moskow,[43] through wide contact with organizations involved in collective negotiations, produced one of the most comprehensive books in the field. The authors confirmed the need to establish policies appropriate to the conditions that prevail in education as

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[42]Myron Lieberman, "Teacher Strikes: An Analysis of the Issues," Harvard Educational Review, XXVI (Winter, 1956).

[43]Myron Lieberman and Michael H. Moskow, Collective Negotiations for Teachers (Chicago, 1966).

opposed to complete adoption of successful policies in industry. A skeletal analysis of judicial decisions and federal statutorial response applicable to employee-employer relationships in private industry was presented. The legal status of the right to organize, selection and determination of bargaining units, and strikes were presented with supporting judicial decisions. The possibility of one organization for teachers was explored and the types of representation for bargaining purposes were discussed.

Comprehensive legal research on judicial decisions and statutorial enactments pertaining to collective negotiations was completed by the National Education Association[44] in 1965. The lack of an exhaustive examination of the litigation prevents this legal research from being an appropriate guide for future research. The research reaffirmed that, from a legal viewpoint, ". . . it is difficult to separate public employees generally." One distinguishing characteristic of this legal analysis was the inclusion of attorney general's opinions.

Seitz[45] has completed salient research over a period of time; however, one of his earlier analyses published in the 1963 Yearbook of School Law, was paramount. The author analyzed the rights of public school teachers to engage in collective bargaining and concluded, at least by implication, that school districts may make the decision to bargain collectively whether encouraged by law or not. Several judicial

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[44]National Educaton Association, Professional Negotiation with School Boards. A Legal Analysis and Review (Washington, D. C.: NEA Research Division, 1965).

[45]Reynolds C. Seitz, "Rights of Public School Teachers to Engage in Collective Bargaining and Other Concerted Activities," 1963 Yearbook of School Law (Danville, 1963).

decisions pertaining to collective negotiations and their ensuing implications were reported; however, some of the implications drawn are no longer valid as a result of additional judicial rulings.

A report prepared for the U S. Office of Education by Wildman,[46] provides one of the most comprehensive discussions of the emerging legal doctrine in collective negotiations presently available. The author analyzed the legal rights of teachers pertaining to organizational membership, union activities, representation, written negotiation contracts, strikes, picketing, arbitration, and union security issues. Substantial numbers of cases were cited to support the conclusions reached in each of the areas previously mentioned. The in-depth discussion of union security issues presented by the author was most significant considering the date of the report. The second part of Wildman's report included an analysis of state statutory response relevant to the labor relations situation in regard to public employees.

Doherty and Oberer[47] discussed what "model or ideal" legislation covering negotiations might contain. Several threshold questions were used as the basis for discussion of the various legal aspects involved. One of the unique aspects of the study was the authors' thoughtful analysis of administrative agencies for arbitration purposes. Extensive statutory documentation and a limited number of court decisions were

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[46]Wesley A. Wildman, "The Law and Collective Negotiations in Education," Volume II of Collective Action by Public School Teachers (Chicago, 1968).

[47]Robert E. Doherty and Walter E. Oberer, Teachers, School Boards and Collective Bargaining: A Changing of the Guard (New York, 1967).

presented to substantiate the authors' response to various threshold questions.

Kleinman, Stinnett and Ware[48] devoted part of their book, Professional Negotiation in Public Education, to the legal status of negotiations and the ensuing implications. The authors presented a legal discussion of the teachers' rights in the areas of membership, non-membership, strikes, negotiation, representation, and mediation procedures. In discussing the need to understand and consider the law, the authors implied that negotiation procedures and processes could not be considered outside the context of the law. A comprehensive analysis of state statutory enactments as of 1965 was presented.

Additional legal research, on constitutional developments relevant to teachers' rights, has been recently completed by Chanin.[49] An extensive and well documented discussion of teachers' rights was presented in eight basic categories. Though the author's discussion of rights pertaining to organizational membership was the only category deemed applicable, the style and format utilized was worth noting. Chanin concludes that the constitutional protection afforded teachers is not static; he predicts that the courts will have no hesitancy in discarding doctrines that are incongruent with the needs of society. In his opinion, change is presently the mode, while the direction is towards increased protection of teachers' rights.

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[48]Jack H. Kleinmann, T. M. Stinnett, and Martha L. Ware, Professional Negotiation in Public Education (New York, 1966).

[49]Robert H. Chanin, Protecting Teacher Rights: A Summary of Constitutional Developments (Washington, D. C., 1970), p. 21.

A doctoral study by Bellone[50] in 1966, reported the judicial decisions, attorney generals' opinions, and statutory enactments relevant to the legal rights of public teachers in professional negotiations. Applicable cases, statutes and attorney generals' opinions were located and grouped by state into eight basic categories. The study was principally devoted to the public school; however, several cases involving public employees were reported. Bellone, in his recommendations, indicated that all states without appropriate legislation should enact laws which clearly define the legal rights of teachers in the professional negotiation process.

Summary

In the final analysis, it appears that the infinite body of law relevant to collective negotiations may be found in federal and state constitutional law, statutory law and judge made law. While the foundation of labor relations law may be found in statutory law, common law derived from judicial decisions is vital during the early development periods of an area. Too, jurisdictional differences will exist in a large number during these early stages.

Although the major contributions reviewed discussed the emerging legal doctrine, their selective treatment of the subject indicates a need for a comprehensive and analytical study of the litigation and statutorial development. Therefore, the following chapter deals with

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[50]Samuel C. Bellone, "The Legal Rights of Public School Teachers in Professional Negotiations," (unpub. Ed.D. dissertation, Colorado State College, 1966).

the judicial decisions relevant to collective negotiations in the public school. The subsequent chapter will be concerned with statutory enactments.

CHAPTER III

THE EMERGING LEGAL DOCTRINE AS A RESULT OF LITIGATION

It is the purpose of this chapter to consider the significance of judicial decisions in establishing legal precedence pertaining to collective negotiations in the public school. With respect to the litigation that will be reported, analyzed, and briefed on the ensuing pages, the overriding focal point will be one of establishment of legal doctrine. Specifically, this chapter will be primarily concerned with, and limited to, the judicial considerations involving: (1) right to organize and maintain membership, (2) union security issues, (3) right to dues checkoff, (4) right of representation, (5) right to negotiate and enter into contract, (6) right to strike, (7) right to participate in other concerted activities. Though these categories are not discrete as some overlapping occurs, they will allow analysis. Too, such a categorization scheme should contribute to the clarity of the presentation.

Judicial decisions pertaining to the constitutionality of specific statutes appurtenant to the negotiations phenomenon will not be reported in this chapter since Chapter IV will deal with statutes. Another purpose of this chapter is to clarify the "blurred" line between the public and private sectors in regard to certain relevant legal questions pertaining to collective negotiations.

Right to Organize and Maintain Membership

Governmental restraints on the right of teachers to organize and/or maintain membership in organizations traditionally have sought to achieve either of two objectives.[1] First is a desire to keep the teaching profession free of individuals who advocate or support "un-acceptable" political philosophies and; second, the desire to prevent or retard the development of unionism or a legal framework that may lead to the bilateral determination of policies.[2] Nevertheless, the judicial system has, over an extended period of time, gradually sought the protection of individual rights in such matters.

There is little doubt today that school employees have the right to organize and maintain membership in employee organizations, whether said membership involves a professional organizatin or union.[3] Individual rights, unequivocally guaranteed and stated in the First and Fourteenth Amendments to the Constitution of the United States, have not always received universal and affirmative response by the judicial system. Nonetheless, governmental and judicial attempts to prohibit public employees from organizing or maintaining membership in order to reduce the probability of being confronted with concerted activities seem to be on dubious constitutional grounds.

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[1]Robert H. Chanin, Protecting Teacher Rights: A Summary of Constitutional Developments (Washington, D. C., 1970), p. 21.

[2]Ibid.

[3]Jack H. Kleinmann, T. M. Stinnett, and Martha L. Ware, Professional Negotiation in Public Education (New York, 1966), p. 22.

Early Judicial Decisions

The earlier cases located concerning the right to organize reflected the courts' willingness to consider public and private employees as separate entities. For example, in 1917, the court in People ex rel. Fursam v. City of Chicago et al.,[4] upheld a board of education policy that prohibited teachers from maintaining membership in labor unions. The court stated that union membership was ". . . inimical to proper disciplines, prejudiced to the efficiency of the teaching force and detrimental to the welfare of schools." Insistence by the board of education upon non-membership in a labor union was considered a condition of employment, therefore no individual rights were abridged. As ". . . no person has the right to demand that he be employed as a teacher," the court reasoned that a condition of employment was within the jurisdiction prerogative of the board of education.

Facts somewhat similar to those in the Chicago case were reported in Seattle High School, Chapter No. 200 v. Sharples.[5] The board of directors at a legally convened meeting adopted the following resolution:

> That no person be employed hereafter, or continued in the employ of the district as a teacher while a member of the American Federation of Teachers, or any local thereof; and that before any election be considered binding, such teacher shall sign a declaration to the following effect:
>
> I hereby declare that I am not a member of the American Federation of Teachers, or any local thereof, and will not become a member during the term of the contract.

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[4]People ex rel. Fursam v. City of Chicago, 116 N.E. 158 (Illinois, 1917).

[5]Seattle High School, Chapter No. 200 v. Sharples, 293 Pac. 994 (Washington, 1930).

Although the plaintiffs contended that the enactment of the resolution would constitute an abridgement of constitutional rights, the court, in its majority opinion, upheld the board of directors' authority to impose a condition of employment. The court stated:

> The right of freedom of contract as it exists in this case to refuse for any reason or no reason at all to engage the professional services of any person is in no sense a denial of the constitutional rights of that person to follow his chosen profession.

The decision of the court, however, was not unanimous. One of the judges writing a dissenting opinion expressed a concern that the respondents, the board of directors, could in a discriminatory fashion abridge constitutionally guaranteed rights as deemed necessary. It was further contended that such a wide discretion of power should not be permitted.

A Judicial Departure

A landmark decision in 1951, Norwalk Teachers Association v. Board of Education of City of Norwalk,[6] provided the real impetus for collective negotiations in the public school. The plaintiff asked the court for a declaratory judgment pertaining to its respective rights, privileges, duties, and immunities. Ten questions ranging from the right to organize to the utilization of mediation agencies were submitted to the courts to act upon. The court, in addressing itself to the question involving the rights of teachers to organize as a labor union stated:

> In the absence of prohibitory statute or regulation, no good reason appears why public employees should not organize as a labor union . . . It means nothing more than that the

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[6]Norwalk Teachers Association v. Board of Education of City of Norwalk, 83 A. (2d) 482 (Connecticut, 1951).

> plaintiff may organize and bargain collectively for the pay and working conditions which it may be in the power of the board of education to grant.

The court further pointed out that the plaintiff, upon organization as a labor union, could not organize for all the purposes for which employees in private enterprise may unite. Although the court responded to other questions pertaining to collective negotiations which will be reported in their appropriate classifications, the significance of the court's ruling on the right to organize was very important. It reflected a definite departure from the earlier judicial considerations pertaining the right to organize and provided a basis of concern for individual rights that heretofore had not been expressed by the judicial system. The precedence established in this judicial decision cannot be over-emphasized, as this case appeared to be the focal point for the recognition of public employees constitutional rights.

A related line of cases, during the next few years involving municipal employees in organizational issues was located. Even though these cases did not involve school employees, a discussion of the legal questions involved and the subsequent decisions seem most relevant. For example, in 1958, the court enjoined city officials from requiring non-membership in a police union as a condition of employment.[7] The court's reasoning was somewhat congruent to that of the Norwalk case in that said condition of employment was held to be an abridgement upon constitutionally guaranteed rights. Further substantiation of the right of membership or non-membership appeared in the public sector in the

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[7]Potts et al., v. Hay, 318 S.W. (2d) 826 (Arkansas, 1958).

case of Levasseur v. Wheeldon,[8] a class action by city employees to enjoin the city, mayor, and city commissioners from placing into effect a resolution. The resolution sought to cause termination of union affiliation on the part of the city employees. The court, in reversing a lower court decision and affirming the class action by the city employees, concluded in part:

> The resolution sought to be annulled is clearly repugnant to and in conflict with the Constitution . . . and the right of citizens to assemble peaceably and organize for any proper purpose, to speak freely and to present their views to public officers has been preserved by the federal and state constitutions.

Several cases in the public sector similar to the two discussed have come before the bench and have been upheld on the basis of rights guaranteed in the Constitution.[9] However, in American Federation of State, County and Municipal Employees v. City of Muskegon[10] the Supreme Court of Michigan reversed a lower court decree for the plaintiffs in litigation involving a membership issue. The court held that a regulation prohibiting police officers from being members of any organization identified as a federation or labor union was not ". . . unreasonable or arbitrary and did not deprive officers of any constitutional rights." Although contrary to the heretofore mentioned cases, substantial support

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[8]Levasseur v. Wheeldon, 112 N.W. (2d) 898 (South Dakota, 1962).

[9]See, e.g., Los Angeles Metropolitan Transportation Authority v. Brotherhood of Railroad Trainman, 8 Cal. Rptr. 1 (California, 1960) and Belshaw v. City of Berkeley, 54 Cal. Rptr. 727 (California, 1966).

[10]American Federation of State, County, and Municipal Employees v. City of Muskegon, 120 N.W. (2d) 197 (Michigan, 1963).

on the basis of subsequent decisions was cited.[11] Thus, as amply illustrated, the courts did not concur with any degree of consistency as to what constituted an abridgement of individual rights.

Limitations on Constitutional Rights

It should be remembered that rights guaranteed in the Constitution are not unlimited. As was so aptly put in Satin Fraterntiy v. Board of Public Instruction for Dade County:[12]

> It is pertinent to state that none of our liberties are absolute; all of them may be limited when the common good or common decency requires . . . Freedom after all is not something turned footloose to run as it will like a thoroughbred in a bluegrass meadow.

Limitations do indeed exist and services essential to public safety and security seem to be paramount.[13]

The leading case that provided a judicial basis for not limiting the right of public employees is Keyshian v. Board of Regents.[14] Although a higher education ruling, the judicial reasoning needs to be noted for it marks another significant departure in the court's attitude towards membership issues. The Supreme Court, in its decision, repudiated in its totality the doctrine whereby ". . . public employment,

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[11]See, e.g., Carter v. Thompson, 180 S.E. 410, Fraternal Order of Police v. Lansing Board of Police and Fire Commissioners, 10 N.W. (2d) 310; Perez v. Board of Police Commissioners of the City of Los Angeles, 178 P. (2d) 537; Hayman v. City of Los Angeles, 62 P. (2d) 1047; and City of Detroit v. Division 26 of the Amalgamated Association of Street, Electric, Railway, and Motor Coach Employees of America, 51 N.W. (2d) 228.

[12]Satin Fraternity v. Board of Public Instruction for Dade County, 22 So. (2d) 892 (Florida, 1945).

[13]M. Chester Nolte, Guide to School Law (West Nyack, 1969), p. 212.

[14]Keyshian v. Board of Regents, 395 U.S. 589 (1967).

including academic employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." The court indicated that mere membership in a subversive organization without an indication of specific intent to further the unlawful aims of the organization was not justification for dismissal. The opinion further pointed out that merely joining an organization without contributing to its unlawful activities was not justification for the state to interfere with individual rights.

Further, repudiation of the doctrine of maintaining a distinction in constitutional status between private and public employees was forthcoming in Garrity v. New Jersey.[15] In this case the court in its majority opinion indicated that public employees cannot be ". . . regulated to a watered-down version of constitutional rights." Certainly, the judicial opinions expressed in these two Supreme Court cases represent a major change in judicial interpretation of rights possessed by public employees. As previously noted, the judicial system, although slow in recognizing public employee rights, made a substantial contribution in this direction as a result of these two 1967 cases.

Applicability of Civil Rights Act of 1871

There is a parallel and consistent line of cases directly related to the public schools which provides further substantiation of the rights of membership. In McLaughlin v. Tilendis,[16] two probationary teachers sought damages in the amount of one hundred thousand dollars

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[15]Garrity v. New Jersey, 385 U.S. 493 (1967).

[16]McLaughlin v. Tilendis, 398 F. (2d) 287 (1968).

from the superintendent and the board of education members on the basis that their contracts had not been renewed because of union membership. It was claimed by the plaintiffs that relief should be granted under the Civil Rights Act of 1871 (42 U.S.C. 1983) which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

With Judge Parsons presiding, the United States District Court of Illinois granted defendent's motion to dismiss complaint, holding that plaintiffs had no First Amendment rights to join or form a labor union thus the Civil Rights Act was not applicable. Plaintiffs appealed to the United States Court of Appeals whereby the Circuit judge reversed the lower court by indicating that a claim upon relief can be granted under the Civil Rights Act of 1871. The court stated in part:

> It is settled that teachers have the right of free association, and unjustified interference with teachers association freedom violates the due process clause of the Fourteenth Amendment.
>
> . . . Public employment may not be subjected to unreasonable conditions, and the assertion of First Amendment rights by the teachers will usually not warrant their dismissal.

In reference to the lower court's contention that overriding community interests are involved, the Appeal Court quoting in part from Elfbrandt v. Russell[17] asserted:

> Those who join an organization but do not share in its unlawful purposes and who do not participate in its unlawful activities, surely pose no threat either as citizens or public employees.

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[17]Elfbrandt v. Russell, 384 U.S. 11 (1966).

Thus, the court disposed of the case by reversing the District Court and the cause was remanded for trial.

A similar question arose in American Federation of State, County and Municipal Employees AFL-CIO v. Woodward.[18] The principal question raised pertained to whether public employees discharged because they joined a union have a right of action for damages and injunctive relief under the Civil Rights Act of 1871 against the public official who discharged them. The District Court for the District of Nebraska dismissed the complaint on the grounds that insufficient facts were available to constitute a claim. However, on appeal the lower court decision was reversed and it was held that the right to membership was protected by the First and Fourteenth Amendments and thus damages and injunctive relief under the Civil Rights Act of 1871 were appropriate. The case was then returned to the District Court for trial on its merits.

During the past two or three years, the courts and attorney generals, with the exception of Nevada Attorney General Opinion No. 494, were unanimous in holding that public employees have a right to join unions which cannot be abridged.[19] Although there are still cases on the books in a few states which declare right of a board of education to condition employment on non-membership in employee organizations,

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[18]American Federation of State, County and Municipal Employees AFL-CIO v. Woodward, 406 F. (2d) 137 (1969). Additional cases which have considered the applicability of the Civil Rights Act of 1871: Jones v. Hopper, 410 F. (2d) (1969), the Court of Appeals affirmed the District Court's ruling that insufficient evidence was available to indicate applicability, however, two dissenting opinions were reported and seem worthy of consideration; Indianapolis Education Association v. Lewallen, 71 LRRM 2898 (Indiana, 1969), litigation in the public school that substained the applicability of the Civil Rights Act of 1871.

[19]Research Division, National Education Association, Negotiation Research Digest, November, 1969, Volume III, p. 21.

these cases appear to be deadletter, even though not specifically overruled.[20] However, it is still propounded by a few that joining a union which espouses collective bargaining and ultimately the strike is not necessarily a right for public employees as guaranteed in the Constitution.[21]

Right to Engage in Union Activities

Closely related and not mutually exclusive of the legal questions involving membership issues were the judicial considerations pertaining to the right to engage in union activities. Although a limited number of cases were located, the legal issues involved seem to be significant. Certainly, one might argue that the right to organize and maintain membership means little unless one can actively participate in union activities.

The focal point of the litigation located pertains to the legality of terminating an instructional staff member's contract on the basis of his union activity. An overriding and most complex legal question was the determination of whether contracts were not being renewed due to incompetent teaching or union activity. For example, in Muskego-Norway Consolidated Schools Joint School District v. Wisconsin Employment Relations Board[22] a teacher contract was not renewed by the school district on the basis that the teacher was incompetent. Substantial

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[20]Wesley A. Wildman, The Law and Collective Bargaining in Education, A Report Prepared for the United States Department of Health, Education, and Welfare (Chicago, 1968), p. 8.

[21]Ibid.

[22]Muskego-Norway Consolidated Schools Joint School District v. Wisconsin Employment Relations Board, 151 N.W. (2d) 617 (Wisconsin, 1967).

documentation had been prepared by the administrative staff to support this claim. The teacher, an enthusiastic chairman of the teachers association welfare committee, claimed that his dismissal was the result of extensive union activity on his part. It seemed apparent that the teacher not only pursued with enthusiasm his responsibility as chairman but in a consistent manner caused several problems to come forth in the operations procedures of the school district.

As the administrative staff became highly disturbed over the militancy that seemed to spew forth as a result of the leadership of the teacher, recommendations were forthcoming to not renew the teacher's contract. The recommendation by the superintendent that the staff member be dismissed was based on "competency" as a teacher and no mention was made of the union activity. Thus, the teacher's contract was not renewed by the board of education.

The teacher brought this complaint before the Wisconsin Employment Relations Board (W.E.R.B.) and the W.E.R.B. ruled that:

> . . . the district offer the discharged teacher his former position without prejudice, pay the teacher any damages he may have suffered and to post notice to all teachers notifying them of actions taken and future policy to be observed by the district.

Members of the board of education asked the Circuit Court to review the findings of the W.E.R.B. as relief was sought. The Circuit Court set aside the W.E.R.B. ruling on the basis that the teacher's dismissal was not due to union activity but inadequacies as a teacher. The W.E.R.B., highly disturbed over the findings of the lower court, appealed.

The Supreme Court of Wisconsin, after reviewing all the evidence submitted, reversed the lower court's order to set aside the recommendations made by the W.E.R.B. Convinced that the reason for the teacher's

dismissal was that of union activity, the court said, in part, ". . . a school board may not terminate a teacher's contract because the teacher has been engaging in union activities."

The basic reason for non-congruency in the conclusions reached by the various judicial levels involved pertained to what constituted "substantial evidence" and/or valid reason for dismissal. Upon elimination of union activities as a valid reason, it becomes apparent that substantial evidence must be forthcoming for dismissal.

In the same vein was the case of a teacher in Wisconsin whose contract was not renewed on the basis that his performance had been inadequate.[23] The teacher claimed before the W.E.R.B. that his dismissal was due to his union activity and not his ability as a classroom teacher. Affirmative response in behalf of the board of education was recorded by the W.E.R.B., the Circuit Court when asked to review the findings of the W.E.R.B. and the Wisconsin Supreme Court. The Supreme Court in part stated:

> The appellants, Kenosha Teachers Union, possessed the burden of proof before the W.E.R.C. The appellants must establish that the union activity of Spaight was a motivating factor in the non-renewal of his contract by the clear and satisfactory preponderance of the evidence.
>
> . . . It is therefore, our determination that the findings of the W.E.R.C. are supported by substantial evidence when considering the entire record.

In neither the Kenosha nor Muskego-Norway case did the court uphold the legality of dismissal due to union activities. The guiding principle was whether "substantial" evidence existed in behalf of the individual's competencies. It seems clear that the term "substantial"

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[23] Kenosha Teachers Union Local 557 v. Wisconsin Employment Relations Commission, 158 N.W. (2d) 914 (Wisconsin, 1968).

may well take on a different emphasis when the individual has been involved in union activities. The court in the Muskego-Norway case, quoting with approval from an earlier case,[24] said:

> The issue before us is not of course whether or not there exists grounds for dismissal of these employees apart from union activities. The fact that the employer had ample reason for discharging them is of no moment. It was free to discharge them for any reason, good or bad, so long as it did not discharge them for union activities. And even though the discharge may have been based upon other reasons as well, if the employer were partly motivated by union activity, the discharges were in violation of the Act.

Thus, the timing aspect of board action seems most significant. As a trial judge may instruct the jury to disregard certain testimony by hostile witnesses due to the fact that said testimony may prejudice their decision, the board of education and its administrative officers must not let the union activities of a teacher or teachers prejudice their decision in regard to competency.

Further substantiation of the right to engage in union activities seems to be fruitless at this point as no litigation was located that contradicted the right of teachers to engage in union activities.[25]

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[24] N.L.R.B. v. Great Eastern Color Lithographic Corporation, 309 F. (2d) 352 (1962).

[25] Additional cases involving the right to engage in union activities include: Albaum v. Carey, 283 F. Supp. 3 (1968), a case involving the public school; Service Employees International Union AFL-CIO v. County of Butler, 306 F. Supp. 1080 (Pennsylvania, 1969), a case involving public service employees; Beauboeuf v. Delgado College, 303 F.S. 861 (1969), an action against a city college board of managers; Helsby v. Board of Education of Central School District No. 2, 301 N.Y.S. (2d) 383 (New York, 1969), a case pertaining to a tenured teacher and union activities; Yuen v. Board of Education of School District No. U-46, 222 N.E. (2d) 570 (Illinois, 1966), the court upheld the dismissal of a physical education teacher who absented himself from duties to attend a professional meeting, however dismissal was for misconduct; Roberts v. Lake Central School Corporation, 74 LRRM 2795 (Indiana, 1970), court ruled the dismissal of the president of teachers negotiation team for making remarks pertaining to the tactics of the administration was

Union Security Issues

In the private sector, a union security clause in a collective bargaining agreement requires all employees to become members of the union within a specified time and, furthermore, requires them to remain members during employment.[26] The typical "union shop" clause allows thirty days for a new employee to acquire membership affiliation with the union; however, a significant number of states have adopted "right to work" laws which make it illegal for collective negotiations to include a union shop clause.[27] Similarly, states that have enacted "right to work" laws applicable to public employees prohibit collective negotiation agreements that contain a union security clause.

Although union security clauses or agreements were not found to be in common practice in public employment, a number of cases pertaining to the legality of such agreements have come before the court for judicial consideration.[28] The first case in point involving public school teachers was Benson et al v. School District No. 1 of Silver Bow County

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unjustified; Russell v. Edgewood Independent School District, 406 S.W. (2d) 249 (Texas, 1966), the court held that a school superintendent in recommending the discharge of a teacher involved in union activities for incompetency was not subject to tort actions; Hanover Township Federation of Teachers v. Hanover Community School Corporation, 318 F. Supp. 757 (1970), federal district court did not have jurisdiction in a union activities case pertaining to applicability of Civil Rights Act of 1871; Knarr v. Board of School Trustees, 75 LRRM 2335 (Indiana, 1970), court ruled the dismissal of a teacher due to competency, although the teacher was actively engaged in union activities, was justified.

[26]Jack H. Kleinmann, T. J. Stinnett, and Martha L. Ware, Professional Negotiation in Public Education (New York, 1966), p. 28.

[27]Wildman, op. cit.

[28]Kleinman, op. cit.

et al.[29] This case involved the legality of a clause the A.F.T. local had successfully negotiated with the board of education that discriminated against non-union members in regard to new benefits negotiated. Specifically, the clause stated:

> As a condition of employment all teachers employed by the Board shall become members and maintain membership in the unions as follows:
>
> (a) All members now employed by the Board, who are not now members of the Union, must become members of the Union on or before the 4th day of September, 1956, and shall maintain their membership in the Union in good standing as defined by the constitution and by-laws of the Union during the term of their employment.
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> (b) All teachers now employed by the Board, who are now members of the Union, shall maintain their membership in the Union in good standing as defined by the constitution and by-laws of the Union during the term of their employment.
>
> (c) All new teachers or former teachers employed by the Board shall become members of the Union within thirty (30) days after date of their employment and shall maintain their membership in good standing as defined in the constitution and by-laws of the Union during the term of their employment.
>
> The provisions of this Union Security Clause shall be adopted as a Board Rule and shall be a condition of all contracts issued to any teacher covered by this agreement.
>
> Any teacher who fails to sign a contract which includes the provisions of this Union Security Clause and who fails to comply with the provisions of this Union Security Clause shall be discharged on the written request of the Union, except that any such teacher who now has tenure under the laws of the State of Montana shall not be discharged but shall receive none of the benefits nor salary increases negotiated by the Union and shall be employed, without contract, from year to year on the same terms and conditions as such teacher was employed at during the year 1955-56.

Non-union teachers brought mandamus and declaratory judgment action against the school district, board of trustees, and union to obtain a judgment declaring that school districts could not discriminate against

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[29] Benson et al. v. School District No. 1 of Silver Bow County, 344 P. (2d) 117 (Montana, 1959).

non-union teachers and furthermore requested that the union security agreement be declared void. The Supreme Court of Montana in its opinion stated in part the following judicial viewpoint:

> It is not competent for the school trustees to require union membership as a condition to receiving the increased salary. So far as this case is concerned it is sufficient to say that the legislature has not given the school board authority to make the discrimination sought to be imposed here . . .
>
> . . . For the purposes of this case it is sufficient to say that the School Trustees have no authority or power to discriminate between the teachers employed by it as to the amount of salary paid to each because of their membership or lack of membership in a labor union. The School Trustees have no authority to invade that field. As well might be argued that the Board of School Trustees might provide that the increased salary shall not be allowed to those who do not affiliate with a certain lodge, service club, church, or political party.

Thus, the court held without extensive elaboration that the school board trustees had no authority or power to discriminate between union and non-union teachers as exemplified in the union security clause heretofore stated.

A second case, Magenheim v. Board of Education of the District of Riverview Gardens,[30] decided in 1961, provides a judicial ruling in contrast to the Benson court decision. The plaintiff, a teacher who was not re-employed for the ensuing school year, because of his refusal to join certain professional organization, brought suit against the board of education. The suit requested the court to: (1) order his reinstatement and (2) declare a provision in the 1955 and 1958 salary schedules to be void and beyond the board's authority to enact. The court refused to grant the plaintiff either of the two requests.

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[30]Magenheim v. Board of Education of the District of Riverview Gardens, 347 S.W. (2d) 409 (Missouri, 1961); Motion for rehearing or transfer to Supreme Court of Missouri denied July 11, 1961.

Worthy of special consideration was the salary schedule provision that the court refused to declare void. The provision stated:

> Each person on this salary shall join the professional organizations which include the community Teachers Association, the National Education Association, the Missouri State Teachers Association and the St. Louis Suburban Teachers Association. Failure to join such organizations precludes the benefits derived through the salary schedule and places such person outside the salary schedule.

Although the above provision, at least in effect, parallels the clause negotiated in the Benson case, the court held that the school board had the legal right to adopt the provision under the board's statutory provision that authorizes school boards ". . . to make all needful rules and regulations for the organization and government of the school district." Furthermore, the court, stressing the virtues of improving the quality of the educational program through membership in professional organizations, stated:

> In the teaching profession, as in all professions, membership in professional organizations tends to increase and improve the interest, knowledge, experience and overall professional competence. Membership in professional organizations is no guarantee of professional excellence, but active participation in such organizations, attendance at meetings where leaders give the members the benefit of their experience and where mutual problems and experiences and practices are discussed, are reasonably related to the development of higher professional atainments and qualifications. Such membership affords an opportunity for self improvement and self-development on the part of the individual member. It is the duty of every school board to obtain the services of the best qualified teachers, and it is not only within their power but it is their duty to adopt rules or regulations to elevate the standards of teachers and their educational standards within their district.

The court, in responding to the defendant's claim that precedence had been established in the Silver Bow case, reasoned that the nature of the organizations was not the same and thus precedence established was not applicable. Although distinguishing differences were apparent

between the two cases, the nature of the organization and its objectives seem to provide the basis for contrasting judicial opinions. Certainly, the legality of union security clauses in school districts cannot be determined by these two cases; however, they do provide some insight into judicial reasoning in the early 1960's.

Agency Shop Clauses

A recent development of significance has been the emergence of "agency shop" clauses in a limited number of collective negotiation agreements. The typical agency shop clause provides that while employees in the bargaining unit do not necessarily have to belong to the bargaining representative organization, all employees must at least pay a sum equal to the organization's dues or not be retained for the ensuing school year.[31] Although, the agency shop clause may not be construed to be identical to a union shop clause and/or compulsory membership provisions heretofore discussed, the distinguishing differences seem rather minute. Nevertheless, a close examination of the judicial decisions seems appropriate at this point due to the many constitutional objections that were raised in the litigation involving union shop agreements.

The first ruling of significance, although not a court decision, was a Michigan Labor Mediation Board (M.L.M.B.) decision in January, 1968.[32] It was held that a request for an "agency shop" clause was a

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[31]Wildman, op. cit., p. 12.

[32]Oakland County Sheriffs Department v. Metropolitan Council No. 23, AFSCME, AFL-CIO, Michigan Labor Mediation Board Case No. C66F63, (January 8, 1968), reported in 237 GERR, F-1.

mandatory subject for bargaining in public employment and the inclusion of such a clause in a contract between an employee organization and a public employer was legal in Michigan. Although recognizing the non-legal status of a union or closed shop clause, the M.L.M.B. accepted in principle the "agency shop" clause by stating in part:

> The prohibition, however, is the encouragement and discouragement of union membership. A union is required to represent all employees in the bargaining unit in good faith and without discrimination. Thus, union membership is discouraged if employees enjoy the fruits of the union vine without sharing the cultivation of the vineyard. Grapes may not be harvested until the ground has been prepared; the vines planted, trimmed and sprayed; the soil weeded and fertilized . . .
>
> A requirement that employees pay their share of the cost of negotiating and administrating a collective bargaining agreement neither discourages nor encourages membership in the labor organization selected by the majority of employees in the bargaining unit to represent them. It is not discriminatory, as the requirement that each employee pay his pro rata share of the costs applies alike to all employees in the bargaining unit, whether they are, or are not, members of the union.
>
> . . . an agency shop provision in a collective bargaining agreement is not prohibited by the public employment relations act . . .

One of the members of the three-man board in a vigorous dissent expressed the following:

> The idea of "publicness" has been lost in the majority opinion. . . . The safety and welfare of the people must be maintained--which does not allow for union security discharges where workers are in short supply or truly essential such as policemen, nurses, firemen, etc. Government services are not operated with a profit motive, but rather as economically and efficiently as possible--which is frustrated when the supply of workers is not available because of a desire not to join a union; unions being an industrial phenomenon some people seek to escape by working for the government. . . . It is a basic principle of public employment that the merit system was to cure the bad effects of the political "spoils" system--which evils may be continued under another "spoils" system. . . . There is no protection of minority rights in (the Michigan Act), as there are no unfair union practices,

> no secret ballots for union security, no provisos as to tender of dues, and no positive protection in a suit for fair representation . . .
>
> Freedom of association and the merit system is violated by saying, "You must support a union to work here," just the same as saying, "You must be Republican or a Catholic to work here." To uphold such a term of employment would be to say that a person can only properly perform the work if he supports the union, which is inane . . .

Consistent with the majority ruling, the Michigan Labor Mediation Board in a matter of fact finding between the Board of Education of the Schools in the City of Insker and Insker Federation of Teachers[33] recommended that a "Professional Responsibility Clause" be incorporated into a new negotiations agreement. The clause provided that any member of the bargaining unit who has not joined the union within 30 days after his employment or the execution of the agreement shall:

> . . . pay to the union a sum equal to the union dues and assessments established by the union for each school year and shall execute an authorization permitting the deductions of such sums.

Obviously, the "Professional Responsibility Clause" was no more or less than a typical agency shop clause even though no specific mention was made as to the possible discharge of a staff member in case of refusal to make payment. While these two Michigan Labor Mediation Board rulings were subject to appeal and additional interpretation, neither of the cases were reported in the courts.

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[33] Board of Education of the Schools of the City of Insker v. Insker Federation of Teachers Local 1068, American Federation of Teachers, AFL-CIO, Michigan Labor Mediation Board (September 23, 1968), reported in 263 GERR, F-1. See, e.g., Swartz Creek Board of Education v. Swartz Creek Teachers Association, Michigan Labor Mediation Board (September 9, 1968) reported in Negotiation Research Digest, March, 1969.

In addition to the foregoing M.L.R.B. rulings, a limited number of court cases were located that considered the legality of agency shop clauses. Smigel et al. v. Southgate Community School District et al. and Southgate Education Association[34] was the leading case reported that provided extensive judicial consideration relevant to the legal questions involved. The plaintiffs, teachers in the Southgate School District, brought a complaint with order to show cause why the defendants should not be restrained from enforcing the provisions of contract entered into by the parties in September, 1968. Of special concern to the plaintiffs was Article II of the agreement which read:

> All teachers as a condition of continued employment shall either:
>
> 1. Sign and deliver to the Board an assignment authorizing deduction of membership dues and assessments of the Association (including the National and Michigan Education Associations) and such authorization shall continue in effect from year to year unless revoked in writing between June 1 and September 1 of a given year. Such sums shall be deducted during the eight (8) consecutive pay periods commencing the 1st day of October from the salary of all teachers authorizing deductions and remitted within thirty (30) days to the Association. Teachers joining the Association at the beginning of the second semester and signing and delivering to the Board an assignment authorizing deduction of said membership dues, may have dues for that semester deducted from the six (6) consecutive pay periods commencing the 1st day of February, or

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[34]Smigel et al. v. Southgate Community School District et al. and Southgate Education Association, 180 N.W. (2d) 215 (Michigan, 1968). Additional cases which have considered the legal issues involved in agency shop clauses: Warczak v. Board of Education, Michigan Circuit Court, Wayne County, 73 LRRM 2237, (Michigan, 1970), agency shop clause did not violate constitutional guarantees of freedom of association and due process; City of Grand Rapids v. Local 1061 AFSCME, Michigan Circuit Court, Kent County, 72 LRRM 2257 (Michigan, 1969), court upheld a modification of the typical agency shop clause in that non-members had to contribute to scholarship fund; Nagy et al. v. City of Detroit, 71 LRRM 2363 (Michigan, 1969), agency shop clause in collective bargaining agreement was a proper subject for bargaining and within legal boundaries set forth.

2. Sign and deliver to the Board an assignment authorizing deduction of a representation fee equivalent to the dues and assessments of the Association (including the National and Michigan Education Associations). Such sums shall be deducted during the eight (8) consecutive pay periods commencing with 1st day of October from the salary of all teachers authorizing deductions and remitted within thirty (30) days to the Association. Teachers beginning their employment at the beginning of the second semester and signing and delivering to the Board an assignment authorizing deduction of said representation fees may have fees for that semester deducted from the six (6) consecutive pay periods commencing the 1st day of February.

   Any teacher who wishes to pay cash for this fee must pay the full amount to the Treasurer of the S.E.A. within thirty (30) days of the commencement of employment.

   In the event the representation fee shall not be paid, the Board upon receiving a signed statement from the Association indicating the teacher has failed to comply with this condition, shall immediately notify said teacher that his services shall be discontinued at the end of the current semester. The Board shall follow the dismissal procedure of the Michigan Tenure Act. The refusal of said teacher to contribute fairly to the costs of negotiation and administration of this and subsequent agreements is recognized as just and reasonable cause for termination of employment. However, if at the end of the semester, the teacher, or teachers, receiving the termination notice shall then be engaged in pursuing any legal remedies contesting the discharge under this provision before the Michigan Tenure Commission, or a court of competent jurisdiction, such teacher's service shall not be terminated until such time as such teacher or teachers have either obtained a final decision as to the validity or legality of such charge, or such teacher or teachers have ceased to pursue the legal remedies available to them by not making a timely appeal of any decision rendered in said manner by the Tenure Commission, or a court of competent jurisdiction.

The Circuit Court for the County of Wayne, Michigan, ruled that the agency shop provision did not violate statutory law in that it forces one to join a union and furthermore the claim pertaining to discrimination was without merit. The court summarized its ruling in these terms:

> . . . such provision in an agreement serves the purpose of allocating indiscriminately the cost of representation for collective bargaining among all those participating in the benefits received. Such a provision eliminates the free riders.

As to a "reasonable and just cause" necessary for discharge due to tenure laws, it was reasoned by the court that any action which would disturb the ". . . delicately balanced relationships between the bargaining parties" could result in less stability and harmony within the school system and therefore constituted reasonable grounds for dismissal under the Tenure Act.

The plaintiffs appealed to the Michigan Court of Appeals which considered the case on May 28, 1970. After careful consideration of the facts, the Court of Appeals reversed and remanded to the trial court for additional evidence concerning the relationship between ". . . payment of sum equal to amount of union dues and non-member participation share of cost of negotiating and administering the agreement." Although the Court of Appeals reversed the lower court's findings, the agency shop clause concept was not disputed nor rejected. The reversal was forthcoming due to possible discrimination as a result of fee assessment and thus it was decided additional information should be forthcoming.

To the same effect was a New Hampshire Supreme Court ruling that union security clauses may be included in public employment labor agreements and ". . . that union security is a reasonable requirement for the efficient and orderly administration."[35] This decision offered little in analysis of the issues; however, it does provide additional

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[35]Tremblay et al. v. Berlin Police Union et al., 237 A (2d) 668 (New Hampshire, 1968).

substantiation for the implementation of agency clauses in a different geographic region.

Many legislators may well decide and the courts accept in the years ahead that it could be in the best interest of the various government entities to adopt agency clauses in order to encourage responsibility and stability in labor relations.[36] Although the judicial decisions located were limited in number and confined to a narrow geographic area, it seems certain that union security agreements similar to the agency clause will be forthcoming in large numbers in the immediate future. The legality of all the relevant aspects of an agency clause has yet to meet the test of court interpretation. Certainly, one cannot ascertain with any degree of clarity what may result in future court rulings. In fact, to do so would provide the basis for unwarranted assumptions in the field of law.

Right to Dues Checkoff

One important aspect of organization security is the checkoff or payroll deduction of organization dues.[37] Usually considered as a contractual provision whereby the employer withholds dues from an employee's pay to be submitted at a later date to a designated organization or union, checkoff procedures have posed certain legal and practical problems.[38] Though some of these legal problems were discussed

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[36]Wildman, op. cit., p. 13.

[37]Myron Lieberman and Michael H. Moskow, Collective Negotiations for Teachers (Chicago, 1966), p. 99.

[38]Myron Lieberman, Education as a Profession (Englewood Cliffs, 1956), p. 368.

previously in relationship to union security issues, other litigation has been forthcoming relevant to dues checkoff.

In 1962, a school board resolution which permitted dues checkoff for one labor organization but not for a similar organization was challenged by the minority union.[39] Specifically, the board resolution stated:

> Monthly payroll deductions for dues to employee associations will not be considered unless a minimum of 50% of the employees eligible for membership in the specific organization applying for this privilege so indicate by a signed order that they desire such a service.

A petition for writ of mandate to compel the school district to deduct authorized amounts was filed by the appellants claiming that the resolution was arbitrary and discriminatory. The school district contended the resolution was reasonable as the burden on the accounting and clerical staff without such a provision ". . . could thereby be increased without forseeable limitation."

Though other considerations were discussed pertaining to the nature of the organizations involved, the central question the court had to consider was whether a school district, once it had exercised its discretion in granting dues checkoff to one organization, could refuse to grant the same privilege to a similar type of organization. The court ruled in behalf of the appellants, indicating that the resolution was ". . . unreasonable and arbitrary and not founded on reasonable and substantial basis."

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[39] Ranken et al. v. Comptom City School District et al., 24 Cal Rptr. 347 (California, 1962).

In 1963, one year after the Rankin case, a similar question arose in McLaughlin et al. v. Niagara Falls Board of Education et al.[40] The petitioners sought to have their dues in the Niagara Falls Federation of Teachers deducted from their wages by the Board of Education as state law had "authorized." Although the board of education permitted payroll deductions for hospitalization, life insurance and various community funds, it was decided by the board not to honor the teachers' request.

It was contended by the board that the word "authorized" as used in the state law was permissive and connoted discretion on the part of the board, whereas the teachers contended it was mandatory. The court, however, ruled that the word "authorized" was discretionary in connotation and thus the board was not required to make the requested deduction or any deductions. Said action, according to the court, would be within the realm of discretionary power possessed by the board of education.

In the State of Wisconsin, a school board involved in an exclusive representation dispute sought clarification of rights and privileges of the majority and minority or organizations before the Wisconsin Employment Relations Commission (W.E.R.C.).[41] Specifically, the school board asked for a ruling on: (1) can a minority union representative be denied the right to be heard at a public board of education meeting, (2) can exclusive checkoff privileges be granted to the majority union and (3) can exclusive access to a list of newly employed teachers be granted to the majority union. The W.E.R.C. ruled the latter two were

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[40]McLaughlin et al. v. Niagara Falls Board of Education et al., 237 N.Y.S. (2d) 761 (New York, 1963).

[41]Board of School Directors of the City of Milwaukee v. Wisconsin Employment Relations Commission, 168 N.W. (2d) 92 (Wisconsin, 1969).

permissible but a board of education could not deny the minority representative the right to be heard at a public meeting. The board immediately appealed the decision due to the possible consequences that might come forth. The Circuit Court reversed the W.E.R.C. ruling on all points and the W.E.R.C. appealed to the Supreme Court of Wisconsin.

The Supreme Court, however, upheld the lower court ruling stating in part:

> Those rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative.

On this basis, the Supreme Court contended that the "sole and complete purpose of exclusive checkoff is self-perpetuation and entrenchment" and exclusive access to a list of new teachers by the majority union was not ". . . rationally related to majority representative status." Furthermore, the minority union had no right to negotiate with the employer which could in fact exist if the minority representative were allowed to present proposals at a public meeting.

Despite the precedence established in the W.E.R.C. case just discussed, the United States District Court in June of 1970 upheld the right of a school district to deny "internal channels of communications and checkoff dues to the minority unions."[42] The court contended that the exclusive grant of privileges of the majority union would serve as a policy of insuring labor peace in public schools and permit the majority union to function better as a representative of all teachers. It was

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[42] American Federation of Teachers, Local 858 v. School District No. 1, 314 F. Supp. 1069 (Colorado, 1970).

further contended that such action by a board of education did not impair the minority union's right to organize teachers who were not members of the majority union and thus was not in violation of the Equal Protection Clause of the United States Constitution.

Although other cases[43] were located which may be considered germane to the legal issues involved, none of these cases could be cited as controlling. It appears the precedence established in the United States District Court's ruling in the American Federation of Teachers case must be cited as controlling until such time as a higher court has the opportunity to overrule this particular case or until other litigation comes forth contrasting the court's conclusions; the precedence established should stand.

Right of Representation

Beyond the right to organize, maintain membership in various organizations and participate in union activities, the legal rights

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[43]Additional cases which have considered the legal issues involved in dues checkoff provisions: Dade County Classroom Teachers Association Inc. v. Ryan, 225 So. (2d) 903 (Florida, 1969), it was ruled that the same privileges must be made available to all teachers or their collective bargaining agents and the board could at its discretion cancel privileges. Thus, exclusive privileges could not be granted to the majority union; California State Employees Association v. Regents of the University of California, 73 Cal. Rptr. 449 (California, 1968), the court ruled that employees of the University of California were not "state employees" within the statute empowering state employees direct deductions for the purpose of union dues. The Regents may permit deductions at their discretion; Mugford et al. v. Mayor and City Council of Baltimore et al., 44 A (2d) 745 (Maryland, 1946), court declared the city may not lawfully make payroll deductions for the purpose of paying union dues at the union's request. Said deductions would be lawful if the employees make the necessary request; Hagerman v. City of Dayton et al., 71 N.E. (2d) 246 (Ohio, 1947), a municipality may not lawfully adopt an ordinance granting the right of payroll deductions for the purpose of paying union dues.

pertaining to collective negotiations ". . . enter a thicket of some density."[44] This appears to be especially true in the area of rights relevant to representation though recently the large influx of statutorial enactments has greatly enhanced the clarity of representation rights. Nevertheless, a plethora of legal questions remain to be considered in states where statutes have not been enacted.

For example, one very important issue which must be considered in this context pertains to the legality of a school board's granting exclusive representation status to an employee organization in which all employees were not included. Wildman[45] asserts that a public employer may not grant exclusive representation without specific statutorial authorization since:

> . . . such grant would interfere with the employee citizen's right to petition his government and might constitute a discriminatory conferral of privileges to one organization not tendered to others.

Seitz,[46] in an early publication, submits that in absence of a statute authorizing exclusive representation the organization if recognized by the board of education may only negotiate in behalf of its members. It would appear that some mechanism must be implemented to allow for redress of grievances on an individual basis in order to avoid discrimination.

While the courts have not been asked to consider a large number of cases concerning representation rights, they have been reasonably

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[44]M. Chester Nolte, Guide to School Law (West Nyack, 1969), p. 24.

[45]Wildman, op. cit., p. 14.

[46]Reynolds C. Seitz, "Rights of Public School Teachers to Engage in Collective Bargaining and Other Concerted Activities," 1963 Yearbook of School Law (Danville, 1963), p. 213.

consistent in their findings. In Norwalk Teachers Association v. Board of Education of City of Norwalk[47] the court in responding to a question pertaining to the recognition of the plaintiff for the purpose of collective bargaining stated:

> The statutes and private acts give broad powers to the defendant with reference to educational matters and school management in Norwalk. If it chooses to negotiate with the plaintiff with regard to the employment, salaries, grievance procedure and working conditions of its members, there is no statute, public or private, which forbids such negotiations. It is a matter of common knowledge that this is the method pursued in most school systems large enough to support a teacher's association in some form. It would seem to make no difference theoretically whether the negotiations are with a committee of the whole association or with individuals or small related groups, so long as any agreement made with the committee is confined to members of the association.

Thus, a school board "if it chooses" may recognize and negotiate with a particular organization, although only the organizatin's members may be represented. Furthermore, legislation was not necessary for the board of education to recognize an exclusive representative.

Similarly in 1966, the Appellate Court of Illinois in Chicago Division of Illinois Education Association v. Board of Education[48] ruled that a board of education did not require legislative authority to enter into a collective agreement with a sole collective bargaining agency. Although similar to the Norwalk ruling, the court's finding implied that the board at its discretion could negotiate with an exclusive representative and, upon conclusion of the negotiations, the decision reached ". . . shall apply equally to all teachers and other educational

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[47]Norwalk Teachers Association v. Board of Education of City of Norwalk, 83A (2d) 482 (Connecticut, 1951).

[48]Chicago Division of the Illinois Education Association v. Board of Education of the City of Chicago, 222 N.E. (2d) 243 (Illinois, 1966).

personnel employed by the board." Furthermore, it was submitted that the board of education was the best judge of the procedure to be utilized and as long as such means were not "manifestly unreasonable" the matter was within the board's discretion. No mention was made of any provisions for individual petition although such a provision may have existed. Nevertheless, it seems reasonable to conclude that the court was of the opinion the board could at its discretion recognize an exclusive representative that would in fact represent the interest of all.

Whether the court intended to grant the board such broad discretionary power that individual teachers could be denied the right to petition was not clear. However, in light of recent decisions pertaining to constitutional rights of teachers the board's action without specific legislation would appear to be ultra vires.

As judicial decisions were not located that provided the majority of teachers in a school system the "right" to exclusive representation in states without statutorial provisions, one may ascertain that no such "right" exists.[49] However, based on a limited number of judicial

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[49]Additional cases which have considered the legal questions involved in representation issues: In re Investigation of Richfield Federation of Teachers, 115 N.W. (2d) 682 (Minnesota, 1962), the court ruled that the State Labor Conciliator was without jurisdiction to proceed with election to select representatives among teachers as he could intervene only in private industry; New Haven Federation of Teachers v. New Haven Board of Education, 237 A. (2d) 373 (Connecticut, 1967), the court ruled the passage of a statute pertaining to selection of representative did not nullify board of education's recognition of group as exclusive representative, although the election was held before the effective date of statute; American Federation of Teachers of Buffalo v. Board of Education of City of Buffalo, 287 N.Y.S. (2d) 756 (New York, 1967), the court upheld a representation election which was held a few days prior to the effective date of a statutory enactment. Furthermore, the court was of the opinion that there was nothing in the law of the state prior to the statutory enactment to prevent a public employer

decisions and attorney general opinions, boards of educations may recognize an exclusive bargaining agent without statutorial affirmation, but not to the exclusion of those not represented in the organization recognized.

While one may concede that some precedence has been established to remove the "thicket of density" surrounding representation rights, a clear and concise doctrine applicable to all states without statutorial provisions has not emerged. As Lieberman and Moskow[50] expressed:

> . . . the problems of recognition in education are as important as they are or were outside of public education . . . Indeed, if there is one conclusion that can be drawn from the current status of recognition in education, it is that recognition has been, is and will continue to be a major problem for many years to come.

Right to Negotiate and Enter into Contract

The right to negotiate and enter into contract, whether considered in the context of "meet and confer" or the more formal bilateral determination of conditions, has understandably met with resistance. Many government entities, including boards of education, have argued that without specific legislation they are not legally bound to enter into

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from voluntarily recognizing a representative organization. Cases in public employment which support the non-existence of the "right to representation:" Nutter et al. v. City of Santa Monica et al., 168 P. (2d) 741 (California, 1946), it was declared that a public body may not lawfully be compelled to recognize a labor union; Miami Water Works Local No. 654 v. City of Miami, 26 So. (2d) 194 (Florida, 1946), it was ruled by the Supreme Court of the State of Florida that the City of Miami cannot lawfully be compelled to recognize a labor union; Lipsett et al. v. Gillette et al., 187 N.E. (2d) 782 (New York, 1962), government entity could recognize exclusive representative, however, selection of bargaining unit must be fair and reasonable.

[50]Myron Lieberman and Michael H. Moskow, Collective Negotiations for Teachers (Chicago, 1966), p. 99.

any type of formal or collective arrangement with their employees.[51] Furthermore, any written agreement resulting from negotiations must be considered as an extra-legal document which is not binding on either party.[52] Legal basis for these arguments may be found entrenched in the principle of illegal delegation of authority.

Although this principle was derived from the ancient concept of "sovereignty," whereby the king can do no wrong, it has been a potent force in forestalling negotiations in the public sector. Boards of education have consistently used this common law principle of illegal delegation of authority to avoid confrontation with their employees. While conceding the fact that the doctrine has been gradually relaxed in recent years and no doubt will diminish as an effective block to collective negotiations,[53] the diminishing aspects of the doctrine have not been recognized by the courts in a consistent manner.

The public school teachers in their efforts to obtain their rights to negotiate and sign a written agreement in absence of a legislative mandate, have claimed that said rights are secured ". . . by the freedom of assembly and association and by the cognate right of petitioning their government for a redress of grievances."[54] Petitioning the government for a redress of grievances; however, can hardly be construed as a legal basis for bilateral determination of working conditions, yet one

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[51]Robert E. Doherty, "The Law and Collective Bargaining for Teachers," Teachers College Record, LXVIII (October, 1966), p. 2.

[52]Ibid.

[53]Wildman, op. cit., p. 15.

[54]Robert E. Doherty and Walter E. Oberer, Teachers, School Boards and Collective Bargaining: A Changing of the Guard (New York, 1967), p. 51.

might ascertain that a "meet and confer" arrangement would be within the legal boundaries normally recognized. Certainly, in the absence of state legislation which specifically authorizes a school board to negotiate and enter into a written agreement, the judicial view is not clear.[55]

Part of the difficulty in ascertaining the courts' view in a manner conducive to clarity arises as a result of the courts' interpretation of whether the right to negotiate and enter into a contract promotes or substantiates the right to strike. Kleinmann, Stinnett, and Ware[56] state:

> This issue, the right of public employees to strike, should not be so closely connected to the right to negotiate. But since it has been in private employment, there is a tendency to assume that any public employment group seeking negotiation rights is also seeking the right to strike. Of course, this is not necessarily so.

Another author supports this same position by stating:

> A large body of law, both statutory and judicial, has given the term collective bargaining a legal meaning which inescapably ties the strike into the process. No matter how much sheep's clothing we wrap around the wolf, the fangs are still present under the masquerade.[57]

Although the issues to the writer appear to be distinct and mutually exclusive, the courts in their judicial rulings have not always considered them as such. Subsequently, in the ensuing judicial analysis the interrelationship of the right to negotiate and the right to strike as perceived by the courts must be considered.

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[55]Kleinmann, op. cit., p. 38.

[56]Ibid.

[57]Arthur F. Corey, "Strikes or Sanctions," National Education Journal, LI (October, 1962), p. 13.

Almost all the court cases located involved some issue other than the right to negotiate and sign an agreement. One of the first cases that provided substantial judicial consideration for the right to negotiate without legislative mandate was the heretofore mentioned Norwalk[58] case in 1951. As already noted, the plaintiffs requested a declaratory judgment in respect to ten specific questions. One such question, "Is collective bargaining to establish salaries and working conditions permissable between the plaintiff and the defendant?" received a qualified "yes" from the court. The qualification of the "yes" response was based on the premise that the court's response would not be construed as authority to negotiate a contract which involved the surrender of board authority or ultra vires. However, it is important to note that the court in its judicial considerations did not imply that the board of education had to negotiate, only that it was permissible. The authority to negotiate according to the court "is and remains in the board." No mention was made of the plaintiff's rights in the absence of a statutorial enactment, thus one could conclude, on the basis of this case, that the right to negotiate was at the board's discretion.

The case of Chicago Division of Illinois Education Association v. Board of Education,[59] although previously mentioned in regard to representation rights, provides additional substantiation for boards of education to enter into a collective bargaining agreement without legislative authority. The court ruled that the board could enter into a

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[58]Norwalk Teachers Association v. Board of Education of City of Norwalk, 83 A. (2d) 842 (Connecticut, 1951).

[59]Chicago Division of the Illinois Education Association v. Board of Education of City of Chicago, 222 N.E. (2d) 243.

collective bargaining agreement and furthermore such an agreement ". . . is not against public policy." In no way did the court imply that the board of education had to enter into an agreement only that it could without authorization from the legislature. Such action was not construed as an illegal delegation of authority on the part of the board of education.

However, in School Committee of City of Pawtucket v. Pawtucket Teachers Alliance Local No. 930,[60] the court reached a different conclusion. The governing school committee maintained that the "right" to bargain collectively must be established by statute and since no law was in existence, they were within their legal rights to ignore requests from the teachers organization to bargain. Although this seemed to be a reasonable position on the part of the committee, the Pawtucket Teachers Alliance sought judicial relief from the school committee's position. Judge Weisberger of the Rhode Island Superior Court ruled that the teachers union was entitled to judicial relief against the school committee if the committee did not bargain in good faith. He stated in part:

> . . . in respect to the rights of a public employee to bargain and negotiate with the State or agency of the State which is his employer, we have very little positive guidance. We have no statute on the question. We have no ancient principles of law, except those which would be adverse to that right, and of those there are many. But as the Court views the statutory pronouncements which have taken place in the last thirty years, the Court is of the opinion that these statutory pronouncements of policy by our legislature or legislatures cannot be compartmented into a neat package and said to have no effect in an area in which these statutes do not by their very terms apply. It seems to the Court that by these

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[60] School Committee of City of Pawtucket v. Pawtucket Teachers Alliance Local No. 930, American Federation of Teachers, AFL-CIO, et al., 60 LRRM 2314.

> general statements of principle, by these general enunciations of policy, designed . . . to preserve industrial peace, to promote harmony between employer and employee, in this enunciation after enunciation of policy in this respect, that these principles are perhaps more broadly applicable than in the narrow context in which the act applied, consistent with other over-riding public policy which may have presented the legislature from making certain acts applicable to certain situations. It seems to the Court that, without question, the Rhode Island Labor Relations Act does not apply to public employees; that certain of the benefits conferred by the Rhode Island Labor Relations Act cannot and should not be applied to public employees unless and until the legislature sees fit in its wisdom to make either all or a portion so applicable. However, the enunciation of principle is not made in a controlled vacuum. Those things which the legislature states to be desirable ends, those statements of intent and purpose do form the public policy of the state and, to the extent consistent with other policy of which the Court is quite aware, those principles should be made applicable.

This ruling, although not widely acclaimed, did strike at several basic assumptions made by governing boards and may have been the necessary impetus for the enactment of a statute pertaining to public employee rights a short time later in the State of Rhode Island. In effect, Judge Weisberger's ruling forced a governing board to negotiate in good faith without statutorial consent. The implications seem clear as they pertain to this case, yet other courts and legal authorities have not recognized the precedence established and the implications that were forthcoming as a result of his ruling. Thus, even though a significant departure from previous rulings, the case was of little significance in subsequent rulings.

A similar line of cases was located that established precedence whereby, in absence of a statute, public school teachers have no authority to engage in collective negotiations.[61] Basic reasons submitted by

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[61]See e.g., Levasseur v. Wheeldon, 112 N.W. (2d) 898 (South Dakota, 1962), it was ruled that in absence of statute pertaining to public employment, there is no right to engage in collective bargaining;

the court were: (1) no basis in the common law, (2) possible illegal delegation of authority, and (3) lack of any abridgement of rights. Furthermore, a significant number of cases pertaining to the public employees exclusive of teachers were located that provided precedence for subsequent rulings in the public school.[62]

The emergence of a legal doctrine that can be readily grasped and applied was not forthcoming as to the right to bargain. Undoubtedly, boards of education have the power and authority to set educational and personnel policies.[63] Within this power, the board can establish

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Philadelphia Teachers Association v. Labrum, 203 A. (2d) 34 (Pennsylvania, 1964), no authority exists for public employees and employers to negotiate in absence of specific statute.

[62]Cases in the public sector that substantiate the right to negotiate in absence of an applicable statute: Lipsett v. Gillette, 187 N.W. (2d) 782 (New York, 1962); Local 266, International Brotherhood of Electrical Workers, AFL v. Salt River Project Agricultural Improvement and Power District, 275 P. (2d) 393 (Arizona, 1954); International Brotherhood of Electrical Workers, Local Union Number 611, AFL-CIO v. Town of Farmington, 405 P. (2d) 233 (New Mexico, 1965). Cases in the public sector that substantiate the illegality of the right to negotiate in absence of an applicable statute: Dade County v. Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, 157 So. (2d) 176 (Florida, 1963); Fellows v. LaTronica 377 P. (2d) 547 (Colorado, 1962); International Longshoremen's Association, AFL-CIO v. Georgia Ports Authority, 124 S.E. (2d) 733 (Georgia, 1962); City of Springfield v. Clouse et al., 206 S.W. (2d) 539 (Missouri, 1947); International Union of Operating Engineers, Local Union Number 321 AFL-CIO v. Water Works Board of the City of Birmingham, 163 So. (2d) 619 (Alabama, 1964); Nutter et al. v. City of Santa Monica et al., 168 P. (2d) 741 (California, 1946); State v. Brotherhood of Railroad Trainmen et al., 232 P. (2d) 857 (California, 1961; Mugford et al. v. Mayor and City Council of Baltimore et al., 44 A. (2d) 745 (Maryland, 1946; Belware River and Bay Authority v. International Organization of Masters, Mates, and Pilots, 211 A. (2d) 789 (New Jersey, 1965); International Brotherhood of Electrical Workers Local Union 976 v. Grand River Dam Authority, 292 P. (2d) 1018 (Oklahoma, 1956); Weakley County Municipal Electrical System v. Vick, 309 S.W. (2d) 792 (Tennessee, 1957).

[63]Reynolds C. Seitz, "Rights of Public School Teachers to Engage in Collective Bargaining and Other Concerted Activities," 1963 Yearbook of School Law (Danville, 1963), p. 214.

procedures or the mechanics that would enhance educational and personnel policies which might include provision for input on the part of the employees. This could be construed to be collective bargaining. Nonetheless, in the absence of legislation, it seems unlikely that the court would force a board of education to negotiate although at least one case was located whereby the court's decision was in contrast to this statement. As long as the board's involvement is one of voluntary participation and remains at the board's discretion, collective negotiation agreements appear to be legal. Little evidence was located to support the "right" of teachers to negotiate without specific legislation granting such right.

Right to Strike

Unlike the rights of teachers in areas previously discussed, the universal judicial view without exception maintains that teachers do not have the right to strike.[64] Thus, teachers have refrained from using the term "strike" to describe their work stoppages, preferring instead to stress the protest nature of their action and attempt to avoid the general legal prohibition against such action.[65] Use of such terms as sanctions, professional protest, and sick leave protest have been preferred but in effect may be construed as a form of work stoppage.[66] Beyond the matter of terminology, the courts have consistently perceived

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[64]Edmond Reutter, Jr. and Robert R. Hamilton, The Law of Public Education (New York, 1970), p. 412.

[65]Ronald W. Glass, "Work Stoppages and Teachers: History and Prospect," Monthly Labor Review, XC (August, 1967), p. 43.

[66]Ibid.

any group action that negatively affects the orderly operation of the educational program as a strike.

In the private sector, where the bargaining process must be considered essentially a power relationship and a process of power accommodation,[67] the strike is not only legal but considered the power concomitant of the relationship.[68] Thus, the real nub of the teacher collective negotiations problem is that no mechanism has come forth within the legal bounds presently set forth which will permit the resolution of impasse situations.[69]

Although teacher strikes have occurred in significant number, very few of these conflicts have reached the courts. As stated in the American Law Reports (2d):[70]

> Although there have been many strikes by public employees, very few of them have reached the courts, or at least very few have been reported. Usually, temporary restraining orders are granted by the courts, the strikers' demands are met and the strike settled. However, in every case that has been reported, the right of public employees to strike is emphatically denied.

In view of the fact that legislatures[71] and the judicial system have consistently opposed strikes in the public sector, a discussion of some

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[67]Wildman, op. cit., p. 4.

[68]Kleinmann, op. cit., p. 32.

[69]Robert E. Doherty and Walter E. Oberer, Teachers, School Boards and Collective Bargaining: A Changing of the Guard (New York, 1967), p. 96.

[70]Robert T. Kimbrough (ed.), American Law Reports Annotated Second Series, XXXI (Rochester, 1963), p. 1159.

[71]See e.g., Statutory response in Chapter IV of this document. The States of Hawaii, Pennsylvania, and Vermont enacted legislation in 1970 that permits strikes by public employees under certain conditions.

of the basic reasons for denying public employees the right to strike seems pertinent to the litigation that will be discussed on the ensuing pages. Public officials have long taken positions that there is no right to strike. Perhaps the most profound statement in this regard was President Roosevelt's[72] comments in a letter to the National Federation of Federal Employees which asserted:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into public service . . . Administrative officials and employees are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personal matters.
>
> Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of government activities. This obligation is paramount. Since their own services have to do with the functioning of the government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable.

Lieberman[73] wrote that the major reasons for legal limitations were:

1. The services provided by government are essential. These services must not be disrupted under any circumstances.
2. The government represents all the people. Public employees who strike are really rebelling against the will of the people, as expressed in legislation and in the actions of public administrators.
3. A strike is a challenge to public authority and as such cannot be tolerated if anarchy is to be avoided.

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[72]Letter, President Franklin D. Roosevelt to Luther C. Steward, president of the National Federation of Federal Employees, August 16, 1937, cited by Charles S. Rhyne, Labor Unions and Municipal Employee Law (Washington, D.C.: National Institute of Municipal Law Officers, 1946), pp. 436-437.

[73]Myron Lieberman, "Teacher Strikes: An Analysis of the Issues," Harvard Educational Review, XXVI (Winter, 1956), p. 55.

4. The government cannot afford to lose a strike. The authority and prestige of government would disappear if groups of public employees should win strikes against the government.
5. Strikes by government employees are unnecessary.
6. Strikes by government employees are ineffectual and tend to worsen instead of improve the position of the strikers.

These reasons, if valid, certainly provide a sound basis for the continued non-legal status of the strike in the public sector. However, many of those who favor the legalization of the strike feel that a distinction should be made between those public employees who perform essential services and those who perform non-essential services.[74] They argue that no justifiable reasons exist as to why employees in the public sector performing non-essential duties should not be afforded the same rights as those in the private sector.[75] Whether teachers perform essential or non-essential duties which if interrupted would bring forth dire consequences is debatable; however, the courts have not been willing to concede any such distinguishing differences.

The traditional view prohibiting strikes by teachers is normally justified on the basis of sovereignty of the state.[76] Although this concept has been discussed at some length previously, additional comments pertaining to the legality of strikes seem justified. The courts have consistently ruled that an illegal delegation of authority exists when a board of education has been coerced to take action on a non-

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[74]John Bloedorn, "The Strike and the Public Sector," Labor Law Journal, Volume XX (March, 1969), p. 155.

[75]Ibid.

[76]Robert E. Doherty and Walter E. Oberer, Teachers, School Boards and Collective Bargaining: A Changing of the Guard (New York, 1967), p. 97.

voluntary basis. Doherty,[77] in commenting on the concept of sovereignty stated:

> It may be contended with considerable force that the mere execution of a collective bargaining contract by a school board, even though the contract be for a fixed term, does not constitute an unlawful delegation of the board's authority under law, but, on the contrary, is merely one way for the board to exercise its authority. . . . It is quite another matter, however, to take the next step and declare that it also is lawful for teachers to coerce the school board by striking, to enter the kind of contract the teachers desire. Here, the school board cannot be said to be exercising its discretion via the collective agreement, since it is, to the extent of the coercion, not a free agent.

Ramifications of this can be found in the precedence establishing case of Norwalk Teachers Association v. Board of Education of City of Norwalk.[78] One of the ten questions asked by the plaintiff in this declaratory judgment was, "May the plaintiff engage in concerted action such as a strike, work stoppage, or collective refusal to enter upon duties?" Said the court:

> In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare. The answer to the question is "No."

Although the court did recognize the right to negotiate, it is evident by the above statement the court was unwilling to allow the public

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[77]Ibid.

[78]Norwalk Teachers Association v. Board of Education of City of Norwalk, 83 A. (2d) 482 (Connecticut, 1951).

sector any kind of mechanism which could be utilized as a power commitment.

In 1957 the Supreme Court of New Hampshire was asked to rule on the correctness of a lower court decision whereby it had been decided that public school teachers did not have the right to strike against the city and, furthermore, that the strike was subject to injunction.[79] The strike was conducted in a peaceful manner without picket lines, violence, damage or any disturbance; however, the primary reason for the strike was to obtain salary increases. The court, after extensive review of the arguments set forth by the parties involved and a review of the precedent heretofore established, drew the following conclusions:

1. A strike by employees while under contract of employment for a stated term is illegal.

2. The basis for public policy against strikes by public employees is doctrine that governmental functions may not be impeded.

3. Any change in the public policy that governmental functions may not be impeded by strikes of public employees is for the Legislature and not for the courts.

4. Collective action of school teachers in refusing to work for city in order to obtain salary increases even though executed in a reasonable manner was illegal and properly enjoined.

5. Such action by the court did not impose on any individual an obligation to work against his will.

In addition to these conclusions, the court in its dicta indicated that the legislature could provide by statute the right of teachers to

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[79] City of Manchester v. Manchester Teachers Guild et al., 131 A. (2d) 59 (New Hampshire, 1957).

enforce their collective bargaining by arbitration or strike. Certainly, this cannot be construed as an advocation of the right to strike but it does point out the court's concern for the peculiar status of the public employee.

Consistent with these holdings on the illegal status of the strike, the court in City of Pawtucket v. Pawtucket Teachers Alliance[80] ruled that teachers did not have the right to strike and that the strike could be halted by an injunction. In this case, the respondents, upon failure to negotiate a new contract with the defendants, failed to report en masse a short time later. Plaintiffs claimed ". . . that if the strike was not restrained substantial and irreparable injury would be sustained by the students enrolled in the public schools." It was further contended that the superintendent of schools and the school committee would be unable to carry out their statutory duties if a court order was not issued to enjoin the teachers from striking.

Although the respondents submitted extensive documentation, part of which suggested that the denial of teachers to strike was an infringement upon the constitutional rights of teachers to assemble, the court was of the opinion that teachers did not have the right to strike.

In the same vein is the case of Pinellas County Classroom Teachers v. Board of Public Instruction of Pinellas County.[81] The teachers prior to the beginning of the school term sent a written communication to the governing body that until ". . . such things as salaries and general

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[80]City of Pawtucket et al. v. Pawtucket Teachers' Alliance Local 930 et al., 141 A. (2d) 624 (Rhode Island, 1958).

[81]Pinellas County Classroom Teachers Association v. Board of Public Instruction of Pinellas County, 214 So. (2d) 34 (Florida, 1968).

working conditions could be agreed and incorporated in their respective contracts" they would not begin performance of their services. Contracts had been signed by the instructional staff prior to this written communication.

The governing board immediately sought and obtained a temporary injunction to prohibit the strike. Two weeks later the temporary injunction was made permanent and the teachers appealed to the Supreme Court of Florida. The Supreme Court reviewed the precedent established on strikes and concluded that ". . . a strike against the government is one which all authorities agree cannot be tolerated in the absence of expressed consent by the government." The court further contended that the "involuntary servitude" claim by the plaintiffs was without substance and precedence. Said the court:

> We are not here confronted by an arbitrary mandate to compel performance of personal service against the will of the employee. These people were simply told they had contracted with the government and that they could, if they wished, terminate the contract legally or illegally, and suffer the results thereof. They could not, however, strike against the government and retain the benefits of their contract positions.

A similar question arose in the later summer of 1967.[82] The teachers in the school district of the City of Holland, Ottawa, and Allegan Counties of Michigan did not resume their teaching duties on the day set by the board of education. Thus, the school district sought an injunction. A hearing was held and the trial court issued a temporary injunction. The association appealed and, upon the lower appellate

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[82] School District for the City of Holland, Ottawa and Allegan Counties v. Holland Education Association, 152 N.W. (2d) 572 (Michigan, 1967).

court's decision to affirm the injunction, appealed the case to the Supreme Court of Michigan.

It was contended by the teachers that the injunction violated their constitutional rights of freedom of speech and assembly and freedom from involuntary servitude. Furthermore, the injunction was not justified as the board failed to indicate ". . . proper showing of violence, irreparable injury or breach of peace." Although the court denied the teachers' claim pertaining to the abridgement of constitutional rights, the court in a precedent setting ruling relevant to temporary injunctions said, in part:

> We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that ipso facto such a showing justified injunctive relief. We so hold because it is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace. . .
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> We indicated earlier that we deal with a meager record. No testimony was taken on the hearing upon the application for the temporary injunction. Simply put, the only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open, staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction. We are mindful of the exemplary conduct of the teachers when the writ, valid on its face, was issued. We are mindful, too, that the appellee district has cooperated by the maintenance of the previous year's schedule of payments to the teachers as was conceded in oral argument.
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> We recognize that great discretion is allowed the trial chancellor in the granting or withholding of injunctive relief. We do not, in ordinary circumstances, substitute our judgment for his. We hold, however, that there was a lack of proof which would support the issuance of a temporary Injunction.[83]

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[83]School District for the City of Holland, Ottawa and Allegan Counties v. Holland Education Association, 157 N.W. (2d) 206 (Michigan, 1968).

Thus, the temporary injunction was dissolved and the case remanded to the circuit court for further proceedings. It was suggested by the Supreme Court that:

> . . . the proceedings inquire into whether as charged by the defendants, the plaintiffs school district has refused to bargain in good faith, whether an injunction should be issued at all.

The significance of this ruling cannot be over emphasized as it established the "principal of equity" in the issuance of an injunction by suggesting that future courts determine whether the plaintiff school district refused to bargain in good faith prior to a strike or the imposition of an injunction against the strike.[84]

Affirmation of this precedent setting 1968 ruling occurred with a high court's reversal of an anti-strike injunction issued by the circuit court in Crestwood School District v. Crestwood Education Association.[85] A complaint was filed by the plaintiff in the Wayne County Circuit Court seeking injunctive relief against the striking teachers on grounds pertaining to their status as public employees who had not reported to work. Defendants claimed that the district had refused to submit the issue of the mediation and had not proved it would suffer "irreparable damages." The circuit court, however, "permanently restrained" and enjoined the association ". . . from encouraging, inducing, or persuading teachers to strike under any guise whatsoever . . ." The Supreme Court of Michigan reversed the circuit court order and remanded the case

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[84]Research Division, National Education Association, Negotiation Research Digest (December, 1969), Volume III, p. 4.

[85]Crestwood School District v. Crestwood Education Association et al., 170 N.W. (2d) 840 (Michigan, 1969).

to the circuit court for ". . . further proceedings consistent with the result ordered in the Holland case."

Within five days of the decision made in the Crestwood case, the Supreme Court of Indiana was asked to rule on a lower court decision whereby the striking teachers were found to be in contempt of court for violating a restraining order.[86] The restraining order directed the members of the federation to refrain from picketing and striking against the school district.

The injunction had been issued without notice one day after the teachers failed to perform their teaching responsibilities. The injunctoin was ignored by the teachers, and the contempt action followed four days later. It was contended by the federation that the state anti-injunction statute or "Little Norris-La Guardia Act," was applicable to the employees in the private sector. After due consideration of other cases and rulings set forth, the court upheld the lower court's decision. The court stated in part:

> We do not agree with the appellant that this act is applicable to disputes concerning public employees. The overwhelming weight of authority in the United States is that government employees may not engage in strike for any purpose.

In a vigorous and extensive dissenting opinion, it was expressed:

> It is true that a strike by public employees may result in some amount of disruption of the agency for which they work. In the absence of legislation dealing with this subject, we believe that it is a judicial function to determine whether the amount of the disruption of the service is so great that it warrants overriding the legitimate interests of the employees in having effective means to insure good faith bargaining by the employer. This is a minimum requirement before a court can declare a strike by public employees illegal.

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[86] Anderson Federation of Teachers, Local 519 v. School City of Anderson, 251 N.E. (2d) 15 (Indiana, 1969).

It was further contended by Chief Justice DeBruler in his dissenting opinion that:

> . . . it is a very unwise policy to allow a trial court to enjoin a peaceful strike, in the absence of any way to insure that the underlying dispute will be discussed and settled amicably.

The Chief Justice cited extensively the court's ruling in the Holland case and subsequent procedures.

A petition for rehearing and petition for leave to file amicus curiae was heard before the Supreme Court of Indiana in January of 1970.[87] The Supreme Court held that ". . . intervention would not be permitted where parties seeking to intervene as amicus curiae sought to raise new issue." Final disposition of the case remains uncertain as an appeal has been filed in the Supreme Court of the United States.

Although other cases pertaining to the legality of the strike in the public schools[88] and the public sector[89] have been litigated, the

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[87]Anderson Federation of Teachers, Local 519 v. School City of Anderson, 254 N.E. (2d) 329 (Indiana, 1970), U. S. Appeal Pending.

[88]Additional public school cases which have considered the legal issues involved in the right to strike: Manchester Education Association v. Superior Court, 257 A. (2d) 233 (New Hampshire, 1969), the court denied a writ of prohibition vacating and staying enforcement of a temporary injunction order issued by a lower court enjoining the teachers from supporting or engaging in a strike; Board of Education of Martin Ferry City School District v. Ohio Education Association, 235 N.E. (2d) 538 (Ohio, 1967), the court held that teachers had no right to strike; City of New York v. DeLury et al., 243 N.E. (2d) 128 (New York, 1968), the court held the right to strike by teachers for an illegal objective is enjoinable at instance of aggrieved party; Newmaker v. Regents of the University of California et al., 325 P. (2d) 558 (California, 1958), it was held by the court that where a strike against a public entity is unlawful, the strike terminates the employment relationship; Legman v. School District City of Scranton, 263 A. (2d) 370 (Pennsylvania, 1970), the court ruled that a board of education may increase the salaries of teachers who had participated in strike; School Committee of the City of Pawtucket v. Pawtucket Teachers Alliance, 221 A. (2d) 806 (Rhode Island, 1966), restraining order issued by the court

judicial system has been consistent in its rulings. Nonetheless, a limited number of cracks have appeared in the traditional judicial view pertaining to public employee strikes.[90] One rather obvious crack, among the several discovered, was the Holland case ruling on temporary injunctions which has already been discussed. Although, these portents of change appeared in the court's dicta as opposed to specific court decisions that deviated from the traditional view, they cannot be overlooked.[91]

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enjoining a strike or collective work-stoppage though ambiguous was legal.

[89]Additional public sector cases which have considered the legal issues involved in the right to strike: City of Rockford v. International Association of Firefighters Local No. 413, 240 N.E. (2d) 705 (Illinois, 1968), court ruled the city was entitled to temporary injunction to enjoin strike even though firemen performed services on a partial basis; East Bay Municipal Employees Union v. County of Alameda et al., 83 Cal. Rptr. 503 (California, 1970), the court ruled that the striking employees of a municipality were entitled to former status upon settlement of dispute. Furthermore, it was not within the municipality's authority to assess penalities beyond that provided by law; City of Evanston v. Buick et al., 421 F. (2d) 595 (1970), the court ruled that striking city employees did not have the right to strike and involuntary servitude claim was not applicable in this instance to constitutionally guaranteed rights provided in the Thirteenth Amendment; Almond et al. v. County of Sacramento, 80 Cal. Rptr. 518 (California, 1969), the court ruled that in absence of an authorizing statute a public employee has no right either to bargain collectively or to strike; Local 266, International Brotherhood of Electrical Workers v. Salt River Project Agricultural Improvement and Power District, 275 P. (2d) 393 (Arizona, 1954), the Supreme Court held that the power district can legally enter into collective bargaining agreements with its employees and that they may strike to enforce terms of the agreement. Private ownership as opposed to public was the deciding point in this case.

[90]Jack H. Kleinman, T. W. Stinnett, and Martha L. Ware, Professional Negotiation in Public Education (New York, 1966), p. 34.

[91]Ibid.

The first case to this point was Board of Education of City of Minneapolis v. Public School Employees Union.[92] This case involved an attempt by the board to restrain and enjoin school custodians from participating in a strike. A temporary restraining order was issued and after an extensive hearing, the court discharged and vacated the temporary restraining order thus denying the board relief. Of special interest was the court's language pertaining to the traditional view on the legality of public employees to strike. The court commented as follows:

> . . . the right to strike is rooted in the freedom of man, and he may not be denied the right except by clear, unequivocal language embodied in a constitution, statute, ordinance, rule or contract.

The plaintiffs appealed the case to the Supreme Court of Minnesota which affirmed the lower court's decision and furthermore indicated that janitors were not ". . . officials charged with duties related to public safety." The implications of this statement although applicable to a specific anti-injunction statute cannot be overlooked as the court seemed to indicate that non-instructional staff members were not essential to the operations of the educational program.

Although the precedence established in this case was overruled in 1966 by the Supreme Court of Minnesota in Minneapolis Federation of Teachers v. Obermeyer,[93] the dicta of the courts in this 1951 litigation seems pertinent in analyzing the right to strike.

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[92]Board of Education of City of Minneapolis v. Public School Employees Union Local 63, 45 N.W. (2d) 797 (Minnesota, 1951).

[93]Minneapolis Federation of Teachers Local 59 v. Obermeyer, 147 N.W. (2d) 358 (Minnesota, 1966).

In a 1957 ruling previously discussed, the court in upholding an injunction prohibiting a teachers' organization from striking had this to say:

> In the light of the increase in public employment, the disparity existing in many cases in the salary of public employees as compared to similar positions in private employment, and the enactment in recent years of legislation guaranteeing the right of private employees to bargain collectively and to strike, it may seem anomalous and unfair to some that government should deny these same rights to its employees working in similar employment. However any modification in the common law doctrine that the sovereignty of the state should not be hampered by strikes by public employees involved a change in public policy. It has been the consistent opinion of this court that such a change is for the legislature to determine rather than being within the province of this court.[94]

Though the court upheld a restraining order in the form of an injunction, it did recognize that the legislature could bring forth a change in public policy.

The last case the writer identified as relevant to a possible break in the traditional judicial view on strikes was the 1965 case of Board of Education of Community Unit School District v. Redding et al.[95] The Supreme Court of Illinois was asked to determine the correctness of a lower court's ruling whereby the custodians of the district were not enjoined from striking. The Supreme Court reversed the ruling; however, the judicial reasoning set forth by the lower court for not enjoining the strikes seems paramount.

The basis for the lower court's ruling focused upon the following: (1) plaintiff had failed to show irreparable injury, (2) lack of

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[94]City of Manchester v. Manchester Teachers Guild et al., 131 A. (2d) 59 (New Hampshire, 1957).

[95]Board of Education of Community Unit School District v. Redding et al., 207 N.E. 427 (Illinois, 1965).

substantial evidence that strike interfered with the operations of the school, and (3) picketing was a valid exercise of constitutional rights. Thus, this lower court ruling clearly expressed that non-instructional employees cannot be enjoined from striking unless irreparable injury and interference with the educational program can be substantiated to the satisfaction of the court.

Although these cases highlighted some of the court's dicta which were contrary to the traditional judicial view on strikes, they should not be construed to be precedent setting with the exception of the Holland case.

Right to Participate in Other Concerted Activities

As the right to strike has been denied to teachers, other means have been sought to exert pressures on local boards of education.[96] Some of the pressure tactics reported in the literature were (1) mass resignations, (2) state and local political action, (3) sanctions, (4) picketing, (5) en masse sick leave, and (6) refusal to participate in extra curricular activities.[97] Of these, the writer was able to locate judicial decisions pertaining to the first four in the National Reporter System. Thus, only litigation pertaining to mass resignations, political action, sanctions, and picketing will be reported.

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[96]M. Chester Nolte, Guide to School Law (West Nyack, 1969), p. 222.

[97]Myron Lieberman and Michael H. Moskow, Collective Negotiations for Teachers (Chicago, 1966), pp. 311-312.

Mass Resignations

This concerted activity may be construed as a tactic whereby the individual teachers submit resignations to a teacher organization to be used as the organization deems necessary.[98] Similarly, teachers may on an individual basis submit their resignations en masse directly to the board of education. Such was the situation that developed in Lee County, Florida, in 1968, which was the prelude to a class suit reported in National Education Association v. Lee County Board of Public Instruction.[99]

In early 1968, an educational crisis developed throughout the State of Florida due to the failure of the governor to act in a positive manner towards specific legislation which would have alleviated a school financial crisis. As a form of protest, approximately four hundred Lee County teachers submitted their resignations. The resignations were accepted. However, thirty days later (due to the enactment of an appropriations bill) the teachers requested permission to return to their teaching assignments. The board of education initially rejected their request; but, after extensive mediation by private citizens they agreed to reinstate the teachers upon payment of a $100.00 fine per teacher to the board of education.

Several teachers, the National Education Association, and the Florida Education Association filed a class suit contesting the imposition of the fines and asked for judgment reinstating with lost pay those

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[98]Nolte, loc. cit.

[99]National Education Association v. Lee County Board of Public Instruction, 229 F. Supp. 834 (Florida, 1969).

teachers who refused to pay the fine. Plaintiffs contended that the fine was imposed without legislative authority and constituted a breach of due process. Defendants claimed that the imposition of the fine was not ultra vires.

Contrary to the arguments of the board, the court ruled the board's act as ultra vires and without provision for due process. The court ordered the school board to return the payments made and to reinstate those teachers who had refused to pay the fine.

In 1967, the case of Board of Education of the City of New York v. Shanker et al.[100] was heard before the Supreme Court of New York County. Although this case involved contempt proceedings against a teachers union and their officers for violations pertaining to a court issued injunction, the court considered the legal status of resignations. Defendants contended the purported 40,000 teachers did not strike but in fact had resigned. None of the 40,000 resignations had been individually executed or transmitted to the board of education. Instead, the resignations were sent to the union to be used as deemed necessary. The court without extensive elaboration, ruled the resignations constituted a strike. Said the court:

> Defendants, in contending that a strike is not the same as the so-called resignations are urging a distinction without a difference; the argument is specious and sham and is rejected.

Thus, no distinguishing differences exist between en masse resignations and a strike if the resignations were not individually executed and

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[100] Board of Education of City of New York v. Shanker et al., 283 N.Y.S. (2d) 548 (New York, 1967).

delivered to the board. Furthermore, said resignations would be effective only at the end of the contract period.

State and Local Political Action

As to the use of state and local political action as a means to exert pressure to effect changes in an education system, the courts generally favor this method since it is congruent with the democratic concepts of orderly and lawful change.[101] However, it appears that certain constraints exist relative to the extent and nature of the political activities that may be pursued by the teachers. For example, in 1960, a large group of teachers of the New York City Schools resolved to absent themselves en masse in order to confer and petition state legislators on matters germane to retirement and working conditions.[102]

Aware of the possible consequences of an absence en masse, the teachers decided to seek a declaratory judgment from the court on the legality of their resolved action prior to implementation of the plan. It was contended by the teachers that the absence en masse was necessary to present a petition of grievances. The right to petition was constitutionally guaranteed. Specific mention was made of the First Amendment whereby Congress ". . . shall make no law . . . prohibiting the free exercise thereof . . . the right to the people peaceably to assemble and to petition the government for redress of grievances." Though the courts considered the arguments submitted by the plaintiffs, it did not concur in its declaratory judgment. The court concluded that an en

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[101] Nolte, op. cit., p. 224.

[102] Pruzan et al. v. Board of Education of the City of New York, 209 N.Y.S. (2d) 966 (New York, 1960).

masse absence would of necessity be construed as a strike and furthermore such action by the court did not ". . . unconstitutionally deprive teachers of rights pertaining to free speech, assembly and the right to petition the legislature." Nevertheless, a limited number of absences was deemed appropriate when the court in part stated:

> Surely it cannot be held that the absence of a limited number of employees for a limited time in setting forth the views of the greater number they represent would interfere with the full and faithful performance of the duties of the limited number of absentees.

Of a different vein, but nonetheless germane, was the court's ruling in Pickering v. Board of Education.[103] The plaintiff was a teacher in Illinois who sent a letter to a local newspaper for publication, charging that the board had misinformed the public about a proposed school bond issue. The letter also revealed an alleged threat by the superintendent to dismiss any of the teachers that did not support the bond issue. After the letter was published, the board conducted a hearing and decided the letter was ". . . detrimental to the efficient operation and administration of the school district" and subsequently cause for dismissal of the plaintiff.

Arguing that his dismissal violated the First and Fourteenth Amendment, the defendant brought suit against the board. The lower court rejected the plaintiff's claim; however, the United States Supreme Court reversed the decisions. The Supreme Court indicated a school board could circumscribe a teacher's right to publicize his views

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[103] Pickering v. Board of Education, 391 U.S. 563 (1968). See, e.g., Belshaw v. City of Berkeley, 54 Cal. Rptr. 727 (California, 1966), the court held that a letter written by a fireman and published in a newspaper was nothing more than an exercise of his constitutionally protected right of free speech and in the absence of a showing that his conduct impared the public service, he could not be punished.

only if it was able to show cause for confidentiality; or to demonstrate that the employee's working relationship with his superiors would be affected. Although this case does not pertain to political action by a group of teachers, the court's reasoning appears to be applicable.

For example, in Los Angeles Teachers Union v. Los Angeles City Board of Education,[104] the California Supreme Court enjoined the enforcement of a school board regulation prohibiting teachers from circulating a petition on school premises during their duty-free lunch periods. The petition was in opposition to cut backs in funds for higher education and supported an increase in funds for public education.

The school board prior to the court action agreed to allow the teachers to meet in school facilities after school hours to obtain signatures for the petition, however, the members of the union felt that this was insufficient. A request was submitted by the plaintiffs to obtain signatures in the lunch and faculty areas, however, it was denied. Thus, the plaintiffs submitted a petition calling for the court to issue a writ of mandate to enjoin the board from enforcing the prohibition of obtaining signatures as requested. The lower court denied the writ but when appealed the lower court's decision was reversed by the Supreme Court.

The court ruled that the school board had not provided sufficient evidence to demonstrate that the circulation of the petition on school premises during duty free periods would cause ". . . substantial disruption of or material interference with school activities."

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[104] Los Angeles Teachers Union v. Los Angeles City Board of Education, 455 P. (2d) 827 (California, 1969).

Furthermore, ". . . tolerance of the unrest instrinic to the expression of controversial ideals is constitutionally required even in the schools." Therefore to justify a restraint on the political activities of the teachers, the governing officials must demonstrate that the restraint is necessary to prevent the impairment or disruption of the educational program.

One of the most recent cases in the area of political action involves the legality of the right of teachers to make public statements pertaining to the competency of the administrators and school board members.[105] In this case the teachers' association sent telegrams to the superintendent, high school principals, and the members of the board of education demanding their resignations ". . . for full and sufficient reasons known to you." Upon public announcement of these reasons, the board of education sought to enjoin the teachers association from making public statements and for judgment requiring that grievance procedures be used.

The court held that a contract which included a grievance procedure between the board of education and the teachers' association did not entitle the board to compel use of grievance procedures with respect to the association's public statements. It was further contended by the court that in the event the complaint was not dismissed by the court no preliminary injunction was feasible. To enjoin speech pending trial, concluded the court, may be placed in the same context as prior

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[105] Board of Education, Union Free School District No. 27 v. West Hempstead Chapter Branch II of the New York State Teachers Association, 311 N.Y.S. (2d) 708 (New York, 1970). See, e.g., Tempedino v. Dumpson 301 N.Y.S. (2d) 967 (New York, 1969), the court reinstated social workers who had written a letter critical of department procedures.

restraint ". . . which has long been recognized as unpermissible with but the narrowest of exceptions."

Sanctions

Another means of exerting pressure on school boards by teacher organization has been the use of "sanctions." Although "sanctions" run across a broad spectrum of activities,[106] they have been defined by the National Education Association as:

> . . . censure, suspension or expulsion of a member, severance of relationship with an affiliated association or other agency controlling the welfare of the schools: bringing into play forces that will enable the community to help the board or agency to realize its responsibility or the application of one or more steps in the withholding of services.[107]

Authorized for use in 1962 by the National Education Association,[108] sanctions have been utilized extensively by teacher organizations for nearly a decade. Two court decisions of recent vintage were located by the writer which were considered applicable and germane to the legal issues involved in sanctions.

In February, 1967, a dispute arose between the secretary of a school board and the local teachers association in Union Beach, New Jersey, concerning the mailing of certain information to patrons of the school district prior to the resubmission of a budget to the voters.[109]

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[106]Kern Alexander, Ray Corns, and Walter McCann, Public School Law (St. Paul, 1969), p. 485.

[107]National Commission on Professional Rights and Responsibilities, Guidelines for Professional Sanctions (Washington: N.E.A., 1963), p. 9.

[108]Alexander, loc. cit.

[109]Board of Education, Borough of Union Beach v. New Jersey Education Association et al., 233 A. (2d) 84 (New Jersey, 1967).

On March 14, 1967, the board at a legally convened meeting decided not to offer a contract to the president of the Union Beach Teachers Association (U.B.T.A.) and two other teachers who held responsible positions in the local teachers organizations. Upon notification of the board's action at this meeting, the U.B.T.A. held a special meeting at which a lengthy resolution was adopted listing seventeen grievances.

On April 4, the president of the U.B.T.A. presented the grievances and the resignation of thirty-six of the forty-seven teachers to be effective on June 3rd, about two weeks prior to the end of the school term. The board called upon the teachers to withdraw their resignations; however, thirty-one of the teachers refused to heed to the board's request. Sanctions were invoked against the school district by the U.B.T.A., N.J.E.A. and the N.E.A. a short time later.

The school board sought a declaratory judgment to enjoin the action by the local, state, and national organizations and furthermore asked for a mandatory judgment requiring the associations to take immediate steps to withdraw their actions. The court issued the injunction and held the actions taken by the teachers association constituted a coercive activity designed for the purpose of compelling the school board to meet their demands.

The court rejected the arguments submitted by the various associatoins claiming a constitutional right for their actions, saying that:

> We are not dealing with freedom of speech but rather with expression and threating action to accomplish a purpose proscribed by the public policy of the State of New Jersey.

It was further contended by the court that the injunction issued was legal as "irreparable injury" would have been suffered by the board had a preliminary injunction not been issued.

Defendants appealed to the Appellate Division and the case was certified to the Supreme Court of New Jersey.[110] The Supreme Court after considering a significant number of arguments affirmed the lower court ruling. Though several points of law were forthcoming in the court ruling, the following should suffice in adding clarity to the legality of sanctions:

1. Whether actions of teachers and associations constitute a strike, substance of situation and not its shape must control. A strike is a sanction and a severe sanction may be construed as a strike.

2. To use freedom of speech as an instrument to achieve an unlawful end is not a right within the context of the First Amendment.

3. Although individuals and associations may seek to exert pressure on a public entity to gain certain needs, they may not take action that disables the public entity from acting at all.

4. Obstructing a public body from access to the necessary manpower sources which may eventually lead to the interruption of services may be construed as a strike.

The second case deemed appurtenant to the legal questions focusing on the use of sanctions was Wahpeton Public School District v. North Dakota Education Association.[111] In this case the Supreme Court of North Dakota was asked to judge a lower court's ruling which restrained the North Dakota Education Association from invoking sanctions against the Wahpeton Public School District. Facts relevant to the case were

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[110]Board of Education, Borough of Union Beach v. New Jersey Education Association et al., 247 A. (2d) 867 (New Jersey, 1968).

[111]Wahpeton Public School District No. 37 v. North Dakota Education Association, 166 N.W. (2d) 389 (North Dakota, 1969).

as follows. In 1969, the Wahpeton School District due to financial difficulty submitted a proposal to the district voters for additional taxing authority. The voters rejected the proposal and the board of education eliminated several teaching positions to assure fiscal responsibility. A demand was made by the North Dakota Education Association (N.D.E.A.) that the positions be restored and other means be utilized to raise the funds necessary for funding the positions. Furthermore, ". . . sanctions would be imposed if matters were not settled to the satisfaction of the teachers."

Subsequently, both parties agreed to meet to discuss the problem at hand; however, prior to the scheduled meeting, the board of education sought and obtained a temporary restraining order to enjoin the N.D.E.A. from invoking sanctions. Similarily, the N.D.E.A. sought and obtained a temporary restraining order to prevent the school district from offering employment contracts to any teacher until such time that the injunction against the N.D.E.A. was lifted. At a subsequent court hearing the restraining order against the board was lifted; however, the restraining order against the teachers was to remain in effect for two weeks.

Though the N.D.E.A. and the school board reached a settlement, the N.D.E.A. appealed in order to have the Supreme Court of North Dakota establish legal precedence in the area of sanctions. However, the court asserted the matter was moot due to the prior settlement of differences between parties. Also the court refused to consider the extent that school districts could interfere with the rights of an association.

Picketing

Lastly, no discussion of the right of teachers to exert pressure on a particular governmental entity can avoid the consideration of the right to picket. Though the legal doctrine pertaining to picketing by public employees ". . . is in a relatively nascent stage,"[112] several judicial decisions were located that considered the legal issues involved. As might be expected, claims of freedom of speech, of assembly, and petition have often been raised to substantiate public employees' rights in the area of picketing.[113] Furthermore, most of the litigation concerning the legal issues involved in picketing also considered legal questions on the right to strike. Therefore, some of the cases that will be reported on the ensuing pages have heretofore been reported.

In Board of Education of Community Unified School District v. Redding,[114] the Supreme Court of Illinois was asked to rule on the legality of a picket line established by thirteen striking custodians. Although the lower court did not enjoin the custodians from picketing on the basis that peaceful picketing was a form of free speech, the Supreme Court in reversing the lower court decision said:

> While picketing has an ingredient of communication, the cases make it clear that it cannot be dogmatically equated with constitutionally protected freedom of speech, and that

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[112]Wesley A. Wildman, "The Law and Collective Negotiations in Education," Volume II of Collective Action by Public School Teachers (Chicago, 1968), p. 8.

[113]Edmond Reutter, Jr. and Robert R. Hamilton, The Law of Public Education (New York, 1970), p. 412.

[114]Board of Education of Community Unit School District v. Redding et al., 207 N.E. (2d) 427 (Illinois, 1965).

> picketing is more than free speech because picket lines are designed to exert, and do exert, influences which produce actions and consequences different from other modes of communication.

Quoting Justice Frankfurter's statement in an earlier case to substantiate the distinguishing characteristics between speech and picketing, the Supreme Court reported:

> It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seems to effectuate gives grounds for its disallowance . . . A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual.[115]

Although the Supreme Court recognized the specific situation must control its decision, picketing may be restrained where such curtailment was necessary to protect the non-interruption of an educational program.

Consistent with these holdings was the court's decision in Board of Education of the Martins Ferry City School District v. Ohio Education Association.[116] In this case, the court upheld and modified a lower court restraining order which was sought by the board after the teachers of the school district went on strike. Of special interest was the judicial reasoning discounting the right to picket as an expression of speech as contended by the defendants. The court in quoting from Ohio Jurisprudence stated:

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[115]Hughes v. Superior Court State of California, 339 U.S. 469 (1950). See, e.g., City of West Frankfort v. United Association of Journeyman and Apprentices, 202 N.E. (2d) 649, the court decision was contrary to the Hughes ruling, however, the picketing was in the court's opinion directed to or in the furtherance of an unlawful purpose. It was construed as informational picketing.

[116]Board of Education of the Martins Ferry City School District v. Ohio Education Association et al., 235 N.E. (2d) 538 (Ohio, 1967).

> . . . there is no violation of constitutional rights in the restraint of picketing employed solely to induce a breach of contract or to aid or bring about a secondary boycott. Picketing accompanied by false statements or misrepresentation is not protected by the constitutional guaranty of freedom of speech. Picketing carried on with force, violence, and intimidation may be enjoined not withstanding the freedom of speech guaranty.[117]

Though the court modified the lower court's restraining order due to its scope and vagueness, the teachers were restrained from picketing. The court contended that picketing could not be employed by teachers to induce a breach of contract.

Other cases were located and directly applicable to picketing by the public school employees[118] and other employees in the public sector,[119] however, only two cases offered legal precedence contrary to the heretofore established trend. In 1968, the Supreme Court of

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[117] 10 Ohio Jurisprudence (2d) 546, Section 474.

[118] See, e.g., City of Pawtucket et al. v. Pawtucket Teachers Alliance, 141 A. (2d) 624 (Rhode Island, 1958), the court ruled that picketing to support an unlawful act could be enjoined. Anderson Federation of Teachers v. School City of Anderson, 254 N.E. (2d) 329 (Indiana, 1970), the court adjudged teachers union in contempt of court when the teachers refused to refrain from picketing; Board of Education of Kankakee School District v. Kankakee Federation of Teachers, 264 N.E. (2d) 18 (Illinois, 1970), teachers were restrained from picketing and furthermore held in contempt when certain officers and members failed to stop; and State v. Heath, 177 N.W. (2d) 751 (North Dakota, 1970), the court ruled that picketing even though it is peaceful, without violence and disorder, may be enjoined if it is used to support or foster a strike.

[119] See, e.g., City of Rockford v. Local No. 412 International Association of Firefighters, 240 N.E. (2d) 705 (Illinois, 1968), the court concluded that picketing does not of itself contain an inherent threat to public safety and, absent proof that picketing actually interfered with governmental functions, cannot be enjoined; State Board of Regents v. United Packing House Food and Allied Workers, 175 N.W. (2d) 110 (Iowa, 1970), the court ruled that non-academic personnel in a university who operated the physical plant of a state university had the right to picket for informational purposes if picketing did not interfere with or impede the operation of the university.

California reversed a lower court decision relevant to an injunction issued against striking social workers.[120] The basis for the reversal was one of broadness and scope or, as the court indicated, "unconstitutionally overboard." The injunction in part prohibited:

> . . . picketing or causing picketing, or causing, participating in or inducing others to participate in any demonstration or demonstrations on any grounds or street or sidewalk adjoining grounds owned or possessed by the county . . .

It was contended by the court that the order ". . . improperly restricts the exercise of the First Amendment freedoms . . ."

In Peters v. South Community Hospital,[121] the Supreme Court of Illinois reversed an Appellate Court ruling which enjoined hospital employees from picketing. The Supreme Court held that public policy does not prohibit employees of a hospital from peacefully picketing and furthermore the Anti-Injunction Act in Illinois was applicable. Thus, no restraining order or injunction could be granted.

While conceding that a limited number of cases and dissenting opinions[122] were located which enhanced the right of public employees to picket, one may not cite these instances as controlling. It appears that picketing, whether peaceful or not, may be enjoined by the courts

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[120] In re Colin Berry et al., 436 P. (2d) 273 (California, 1968).

[121] Peters v. South Chicago Community Hospital et al., 253 N.E. (2d) 375 (Illinois, 1969).

[122] See, e.g., In re Colin Berry et al., 436 P. (2d) 273 (California, 1968); Board of Education v. Redding, 207 N.E. (2d) 247 (Illinois, 1965), lower court did not enjoin school custodians from picketing, however, the ruling was reversed; Anderson Federation of Teachers, Local 519 v. School City of Anderson, 251 N.E. (2d) 15 (Indiana, 1969), dissenting opinion of Justice De Bruler; Peters v. South Chicago Community Hospital et al., 253 N.E. (2d) 374 (Illinois, 1969), Supreme Court ruled that public policy does not prohibit employees of hospital from picketing.

if it interrupts a vital process or is construed as a means of coercing a governing board to meet demands. Sufficient legal precedence has been established to indicate that the right to picket may not be construed synonymous with the right to freedom of speech.

Summary

In view of the length of the foregoing discussion of litigation pertaining to collective negotiations in the public school, it seems appropriate to reflect upon some of the generalizations implied. Although the writer has indicated the more significant ramifications of the cases cited, the primary purpose has been to report the law as it has developed. Admittedly, the issues discussed and the selection of cases presented to substantiate the legal precedence, have been arbitrarily selected.

The general topics of the chapter included: (1) the right to organize and maintain membership, (2) union security issues, (3) right to dues checkoff, (4) right of representation, (5) right to negotiate and sign a written contract, (6) right to strike and the right to participate in other concerted activities. Though case authority was occasionally in conflict between jurisdictions and a significant number of cases have not been specifically overruled, a legal doctrine applicable to each of the foregoing classifications seems to be emerging.

Litigation concerning membership issues no doubt will diminish. There are few, if any, reasons to assert that teachers may not join and maintain membership in a professional or union organization. Substantial legal precedence has been established to reflect an abridgement of rights guaranteed in the Constitution if an individual teacher is denied

the right to maintain membership. Furthermore, the dismissal of a teacher for actively participating in union activities has not been upheld by the court.

Though most legal writers were in agreement in the early 60's that a closed shop or union shop arrangement would not be upheld by the courts, recent court rulings on agency shop clauses provide a basis for a form of the closed shop. While conceding that the court rulings were from a limited geographical area, one could predict that the agency shop arrangement may be legalized in other areas. However, additional court decisions in other areas need to be forthcoming before a clear pattern can emerge on the legality of the agency shop.

The matter of dues checkoff, though essential to the effectiveness of an organization, remains unclear at this point without an enabling statute. It appears that sufficient legal precedence has been established in most jurisdictional areas to allow boards of education at their discretion to deduct dues. Whether this can be done on a discriminatory basis remains questionable; however, based on a recent federal court ruling, the majority union may be granted exclusive rights to dues checkoff.

Little evidence was located to substantiate the right of teachers to negotiate and have representation without enabling legislation. Though judicial decisions were located whereby boards of education could negotiate and recognize a representative at their discretion, other decisions question the legality of such practice due to the common law principle of "illegal delegation of authority." It seems certain that without an enabling statute, boards of education may not be forced to participate in negotiations.

Without question, the judicial view is that teachers do not have the right to strike without legislation to that effect. Mass resignations and sanctions though different in some respects were consistently delcared illegal if they interrupted the educational program. Sufficient legal precedence was located to deny school employees the right to picket if it was in support of an unlawful action. The courts were very consistent in ruling that picketing could not be construed as a form of speech guaranteed protected by the First Amendment.

Finally, collective negotiations in the public school may be considered only in its infancy with a complete legal doctrine yet to emerge. Additional judicial decisions and statutory enactments should add clarity in the near future, however, the law is not static and legal doctrines not congruent with societal needs will be in a constant state of flux.

CHAPTER IV

STATUTORY ENACTMENTS REGARDING NEGOTIATIONS

Introduction

The purpose of this chapter is to consider the main provisions of statutory enactments relevant to collective negotiations in the public school. An attempt will be made to report, summarize and analyze only those comprehensive "state labor relations acts" germane to the collective negotiations process. More specifically, this chapter will provide a framework for the comparison, analysis, and comprehension of legislature enactments concerning: (1) guarantee of rights pertaining to membership, organization and union activities, (2) type of negotiations permitted, (3) employees covered, (4) scope of bargaining, (5) type and length of representation, (6) unfair labor practices, (7) strikes and other concerted activities, and (8) procedures for resolving impasses.

Judicial decisions relevant to the interpretation and constitutionality of state statutes located may be found in Appendix A. It should be noted, however, that, due to the lack of litigation in some jurisdictions, the opinions forthcoming from the Attorney General's office relevant to state interpretation must suffice. Therefore, Attorney General opinions will be reported when they contribute to the clarity of a particular statutory provision.

An Overview of Statutory Enactments

Commencing with the legislation enacted by Wisconsin in 1959, state governments have been giving increasing attention to collective negotiation rights of employees in the public school. Although the majority of the "state labor relations acts" applicable to school employees have been enacted during the last five years, a total of twenty-four states have passed legislation since 1959 in an attempt to recognize the right of school employees and to regularize the negotiation process. As illustrated in Table I, twelve of the twenty-four states have attempted to establish the rules governing the employer-employee relationship during the last two years.

Though some states have enacted legislation to include school employees with other employees in the public sector, the majority of the states have provided separate statutory coverage for school employees. As exemplified in Table II, fifteen of the states have considered the uniqueness of the public school employee, while only nine of the states have treated school employees in the same fashion as other public sector employees. Whether a trend has developed to enact separate legislation for school employees is not apparent for, during the last two years, the states of Hawaii, Maine, Nevada, Pennsylvania, and South Dakota have included school employees with other public employees, while the states of Alaska, Delaware, Florida, Kansas, Maryland, North Dakota, and Vermont have enacted separate legislation.

TABLE I

STATES ENACTING STATUTES APPLICABLE TO SCHOOL EMPLOYEES BY YEAR OF ENACTMENT

1959	1965	1966	1967
Wisconsin	California Connecticut Massachusetts Michigan Oregon Washington	Rhode Island	Minnesota Nebraska New York

1968	1969	1970
New Jersey	Delaware Florida Maine Maryland Nevada North Dakota Vermont	Alaska Hawaii Kansas Pennsylvania South Dakota

TABLE II

STATUTORY SCHEMA FOR SCHOOL EMPLOYEES
IN TWENTY-FOUR STATES

State	Year of Enactment	School Employees Are Specifically Included Among Other Public Employees	School Employees Are Under Separate Statutory Provision
Alaska	1970		X
California	1965		X
Connecticut	1965		X
Delaware	1969		X
Florida	1969		X
Hawaii	1970	X	
Kansas	1970		X
Maine	1969	X	
Maryland	1969		X
Massachusetts	1965	X	
Michigan	1965		X
Minnesota	1967		X
Nebraska	1967		X
Nevada	1969	X	
New Jersey	1968	X	
New York	1967	X	
North Dakota	1969		X
Oregon	1965		X
Pennsylvania	1970	X	
Rhode Island	1966		X
South Dakota	1970	X	
Vermont	1969		X
Washington	1965		X
Wisconsin	1959	X	

State Statutory Response Pertaining to the Right of Membership and Participation in Organization Activities

As indicated in the previous chapter, the right of school employees to organize, maintain membership and participate in union activities is now generally conceded. The state statutes examined, though varied in comprehensiveness, generally complement the rights of individuals guaranteed by the Constitution. As shown in Table III, twenty-one of the twenty-four states identified as having "labor relations acts" applicable to school employees, specifically state one or more of these rights. Though the statutes of Alaska, Oregon, and Washington do not clearly grant these rights, it cannot be ascertained that these rights are not afforded school employees; it can only be said that such rights are not specifically indicated in the statutes reported.

While the statutory schemes pertaining to organizational membership and activities are varied, they can be divided into four categories. First, the most commonly employed scheme grants school employees the right to form organizations, join, and participate in lawful activities or to choose to refrain from any or all of the foregoing activities.[1] A second group of states have employed a scheme which grants school employees the right to form and join any organization or refuse to join any organization; however, the right to participate in lawful activities

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[1]Ten states have employed a statutory scheme of this type: California, Kansas, Maine, Maryland, Michigan, Nebraska, New Jersey, North Dakota, Pennsylvania, and Wisconsin.

TABLE III

COMPARISON OF STATUTORY PROVISIONS RELEVANT TO ORGANIZATIONAL MEMBERSHIP

State	Code Citation	Organizational Membership Provision
Alaska	Alaska Statutes, Chapter 18, Sections 14.20.550-14.20.610	Not specifically indicated.
California	West Annotated California Code: Education Code, Section 13082	Public school employees shall have the right to form, join, and participate in the activities of the employee organization. Public employees also have the right to refuse to join an organization.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10-153a	Members of the teaching profession shall have the right to join or refuse to join any organization for professional or economic improvement.
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Section 4003	Public school employees have the right to join any organization for their professional or economic improvement, but membership in any specific organization shall not be required as a condition of employment.
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Section 233.4	Teachers shall have the right to organize.
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Section 89.3	Employees have the right of self organization and the right to form, join, or assist any employee organization for the purpose of bargaining. May engage in

TABLE III (Continued)

State	Code Citation	Organizational Membership Provision
Hawaii (Continued)		lawful concerted activities and or refrain from any or all of the activities except of making such payment of service fees to an exclusive representative.
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Section 72-5414	Professional employees shall have the right to form, join, or assist professional employee organizations or refrain from any or all of the foregoing activities.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Section 963	Public employees may join, form and participate in the activities of organizations of their own choosing or refrain from any or all of the foregoing activities.
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160a	Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing. Employees shall also have the right to refuse to join or participate.
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Sections 178D and 178L	Employees of the Commonwealth or any political subdivision shall have the right to form and join vocational or labor organizations. Any employee shall also have the right to refrain from any or all of the foregoing activities. An agency service fee may be assessed to offset the cost of collective bargaining.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Section 423.209	Public employees shall have the right to organize together or form, join, or assist in labor organizations and to engage in lawful concerted activities. Employees shall have the right to refrain from any or all of the foregoing activities.

TABLE III (Continued)

State	Code Citation	Organizational Membership Provision
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Section 125.21	Teachers shall have the right to form and join teacher organizations, and shall have the right not to form or join such organizations.
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Section 79-1288	Certificated public school employees shall have the right to form, join, and participate in the activities of the organization as well as refrain from any or all of the foregoing activities.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Section 288.140	Local government employees shall have the right to join any employee organization of their choice or refrain from joining any employee organization.
New Jersey	New Jersey Statutes Annotated, Title 34, Chapter 13A, Section 34-13A-5	Public employees shall have the right to form, join, and assist any employee organization or refrain from any such activities.
New York	Consolidated Laws of New York: Civil Service Law, Article 14, Section 202	Public employees shall have the right to form, join, and participate in, or refrain from forming, joining or participating in any employee organization of their own choosing.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38.1-07	Teachers or administrators shall have the right to form, join, and participate in the activities of representative organizations of their choosing or refrain from any of the foregoing activities.
Oregon	Oregon Revised Statutes, Chapter 342, Sections 342.450-342.470	Not specifically indicated.

TABLE III (Continued)

State	Code Citation	Organizational Membership Provision
Pennsylvania	Purdon's Legislative Service Pamphlet Number 3, Act 195, L. 1970, Section 401	Public employees shall have the right to organize, form, join or assist in employee organizations or to engage in lawful concerted activities. Public employees shall have the right to refrain from any of the foregoing activities.
Rhode Island	General Laws of Rhode Island, 1956, Title 28, Chapter 9.3, Section 28-9.3-2	Certificated public school teachers shall have the right to organize.
South Dakota	South Dakota Compiled Laws, (1970 Supp.), Chapter 3-18, Section 3-18-2	Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations.
Vermont	Vermont Statutes Annotated, (1970 Supp.), Title 16, Chapter 57, Section 1982	Teachers shall have the right to or not to join, assist, or participate in any teacher's organization of their choosing.
Washington	Revised Code of Washington, Chapter 23A.72, Sections 28A.72.010 -- 28A.72.090	Not specifically indicated.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.70 (2)	Employees shall have the right of self organization, to be affiliated with a labor organization and participate in activities pertaining to the negotiation process. Employees shall also have the right to refrain from any and all such activities.

is not included.[2] A third statutory scheme employed by a few states simply grants the right to form or join an organization.[3]

Finally, two states have enacted a statutory scheme that grants school employees the right to form, join, and participate in organizational activities or refrain from any or all of the activities; however, a reasonable service fee may be assessed, regardless of membership status, to offset the cost involved in the bargaining process.[4] For example, the Hawaii[5] agency clause states:

> The employer shall, upon receiving from an exclusive representative a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement and computed on a pro rata basis among all employees within its appropriate bargaining unit, deduct from the payroll of every employee in the appropriate bargaining unit the amount of service fees and remit the amount to the exclusive representative.

Similarly, the Massachusetts statute which was amended in 1970 to include a service fee, states in part that ". . . such an agency fee shall be proportionally commensurate with the cost of collective bargaining and contract administration."[6] Furthermore, the Massachusetts law expressly prohibits a service fee be required as a condition of

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[2]Seven states have employed a statutory scheme of this type: Connecticut, Delaware, Minnesota, Nevada, New York, South Dakota, and Vermont.

[3]The states of Florida and Rhode Island have employed a statutory scheme of this type.

[4]The states of Hawaii and Massachusetts have employed a statutory scheme of this type.

[5]Revised Laws of Hawaii, Title 6, Chapter 89, Section 89.3.

[6]Annotated Laws of Massachusetts, Chapter 149, Section 178L.

employment unless the majority of the employees in a bargaining unit approve its implementation.

It is important to note that both states enacted legislation in 1970 to effect the implementation of the agency clause. Whether other states will follow suit cannot be ascertained; however, it does appear that legislators may well be confronted with this issue in the conceivable future.

Type of Collective Negotiations

Once a state has authorized school employees to organize and participate in lawful concerted activities, a decision relative to the type of collective negotiations to be employed should be forthcoming. Without question, the specific statutory language employed germane to the type of negotiations allowed is related to the strength of ensuing negotiations. Doherty[7] states:

> . . . If the statute gives a right to teachers to bargain collectively with their school employer over conditions of their employment, the corollary of this right is a duty on the part of the employer to so bargain. The content of this duty is best expressed as a good faith effort to reach agreement. If the content of the duty is more strongly expressed--e.g. a reasonable effort to reach agreement--there is an infringement upon the freedom of the bargaining. If the content of the duty is less strongly expressed--e.g. merely to "meet and confer"--there is no protection against sham bargaining.

As shown in Table IV, all of the twenty-four state statutes examined have employed specific statutory language to govern the type of negotiations between concerned parties. For the most part, the concept

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[7]Robert E. Doherty and Walter E. Oberer, Teachers, School Boards and Collective Bargaining: A Changing of the Guard (New York, 1967), p. 85.

TABLE IV

COMPARISON OF STATUTORY PROVISIONS PERTAINING TO
TYPE OF COLLECTIVE NEGOTIATIONS

State	Code Citation	Type of Collective Negotiations
Alaska	Alaska Statutes, Chapter 18, Section 14.20.550	Shall negotiate in good faith.
California	West Annotated California Code: Education Code, Section 13085	Shall meet and confer.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10-153d	Shall negotiate in good faith.
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Section 4008	Shall negotiate in good faith.
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Section 233.4	Shall negotiate professionally.
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Section 89.9	Shall confer and negotiate in good faith.
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Section 72-5413	Shall meet, confer, consult, and discuss in good faith.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Section 965	Shall confer and negotiate in good faith.

TABLE IV (Continued)

State	Code Citation	Type of Collective Negotiations
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160 b	Shall confer and negotiate in good faith.
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Section 178F	Shall confer in good faith.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Section 423.215	Shall meet, confer and negotiate in good faith.
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Section 125.23	Shall meet and confer.
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Section 79-1290	May meet and confer at the board's discretion.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Section 288.150	Shall negotiate.
New Jersey	New Jersey Statutes Annotated, Title 34, Chapter 13A, Section 34-13A-7	Shall negotiate in good faith.
New York	Consolidated Laws of New York: Civil Service Law, Article 14, Section 200	Shall negotiate.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38.1-12	Shall meet and negotiate in good faith.

TABLE IV (Continued)

State	Code Citation	Type of Collective Negotiations
Oregon	Oregon Revised Statutes, Chapter 342, Section 342.460	Shall confer, consult and discuss in good faith.
Pennsylvania	Purdon's Legislative Service Pamphlet Number 3, Act 195, L. 1970, Sections 701 and 704	Shall meet and confer in good faith, however, public employees shall only meet and discuss with first level supervisors.
Rhode Island	General Laws of Rhode Island, 1956, Title 28, Chapter 9.3, Section 28-9.3-4	Shall meet and confer in good faith.
South Dakota	South Dakota Compiled Laws, (1970 Supp.), Chapter 3-18, Section 3-18-2	Shall meet and negotiate.
Vermont	Vermont Statutes Annotated, (1970 Supp.), Title 16, Chapter 57, Section 2001	Shall meet and negotiate in good faith.
Washington	Revised Code of Washington, Chapter 23 A.72, Section 28A72.030	Shall meet, confer, and negotiate.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.70 (2)	Shall confer and negotiate.

of "good faith" has been expressed; however, the states of California, Minnesota, and Nebraska have employed statutory language in which the duty to negotiate is not strongly asserted. The California and Minnesota statutes merely indicate that school employees are authorized to meet and confer with the board of education. In the state of Nebraska, school employees may only meet and confer at the board's discretion.

Apart from the states previously mentioned, the states of Florida, Kansas, Massachusetts, Oregon, Rhode Island, Washington, and Wisconsin appear to have employed language insufficient to impose a duty to bargain. Kansas, Massachusetts, Oregon, and Rhode Island avoid the term negotiate, yet consultation in good faith is expressed. The Washington[8] statute provides:

> . . . Representatives of an employee organization . . . shall have the right after using established administrative channels, to meet, confer, and negotiate with the board of directors of the school district or a committee thereof to communicate the considered professional judgment of the certificated staff prior to the final adoption by the board of proposed school policies . . .

While the Washington statute acknowledges the right of teachers to meet, confer, and negotiate, no duty to negotiate in good faith is expressed, thus the right to bargain collectively has been weakened. Similarly, the states of Florida and Wisconsin have failed to employ language pertaining to good faith bargaining; nevertheless, the term negotiate has been included.

Though the other fourteen states have implemented statutory language to effect good faith negotiations, some variations exist. Of

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[8]Revised Code of Washington, Chapter 23A.72, Section 28A72.030.

special interest is the Pennsylvania statute which delineates the type of negotiations to be employed by level of employees. A meet and confer in good faith duty is imposed on the employer with all employees except first line supervisors while the employer is required only to meet and discuss with first line supervisors.

School Employees Covered

As illustrated in Table V, all of the twenty-four states have specifically indicated the extent of employee coverage. Although the statutory schemes are vastly different in many respects, one primary dichotomy seems to exist. This dichotomy is between those states which include all school employees and those which include only professional or certificated employees. Eleven states have enacted legislation which covers all school employees,[9] while thirteen states have passed legislation to cover only certificated employees.[10]

A particular problem with regard to the extent of employee coverage occurs when legislators attempt to consider the status of various levels of administrative personnel. Though the majority of the states specifically exclude the chief administrator, several of the states have failed to indicate whether the chief administrator has been excluded from coverage. Several states have not only excluded the chief administrator, but also the assistant superintendent and/or other

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[9]The states which have responded in this fashion are: California, Hawaii, Maine, Massachusetts, Michigan, Nevada, New Jersey, New York, Pennsylvania, South Dakota, and Wisconsin.

[10]The states which have responded in this fashion are: Alaska, Connecticut, Delaware, Florida, Kansas, Maryland, Minnesota, Nebraska, North Dakota, Oregon, Rhode Island, Vermont, and Washington.

TABLE V

COMPARISON OF STATUTORY PROVISIONS PERTAINING TO SCHOOL EMPLOYEES COVERED

State	Code Citation	School Employees Covered
Alaska	Alaska Statutes, Chapter 18, Section 14.20.560	All certificated employees in a school district except the superintendent.
California	West Annotated California Code: Education Code, Section 13081	All school employees except those persons elected by popular vote or appointed by the governor of the state.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10-153b	All certified employees in a school district except the superintendent of schools, assistant superintendents, temporary substitutes, and professional employees who act for the board of education in negotiations, or are directly responsible to the board of education for personnel relations or budget preparation.
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Section 4001	All certificated non-administrative employees of a school district except supervisory and staff personnel.
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Section 233.3	All counselors, librarians, classroom teachers, and other employees of the public schools having in whole or in part classroom teaching duties, in counties with population of not less than 390,000 nor more than 450,000.
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Section 89.6	All school employees except those persons elected by popular vote, part time employees working less than twenty hours per week, temporary employees of three

TABLE V (Continued)

State	Code Citation	School Employees Covered
Hawaii (Continued)		months duration or less, and any top level administrative personnel concerned with confidential matters affecting employee-employer relations.
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Section 72.5413	All professional employees employed by a board of education in a position which requires a certificate issued by the state board of education or employed in a professional educational capacity by a board of education.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Section 962	All school employees except the superintendent, assistant superintendent, and other employees employed for less than six months.
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160 a	All certificated professional persons except the superintendent of schools and persons designated by the public school employer to act in a negotiating capacity.
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Section 178F	All school employees except those persons whose participation or activity in the management of employee organizations would be incompatible with his official duty.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Section 423.202	All school employees.

TABLE V (Continued)

State	Code Citation	School Employees Covered
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Section 125.20	All certificated persons except the superintendent.
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Section 79-1287	All certificated employees in Class III, Class IV, and Class V school districts.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Section 288.050	All school employees.
New Jersey	New Jersey Statutes Annotated, Title 34, Chapter 13A, Section 34-13A-3	All school employees except the superintendent of schools or other chief administrator of the school district.
New York	Consolidated Laws of New York: Civil Service Law, Title 14, Section 201	All school employees except the chief executive officer.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38.1-02	All certificated school employees.
Oregon	Oregon Revised Statutes, Chapter 342, Section 342.450	All certificated school employees below the rank of superintendent.
Pennsylvania	Purdon's Legislative Service Pamphlet Number 3, Act 195, L.1970, Section 301	All school employees except those persons considered as confidential and/or management level employees.

TABLE V (Continued)

State	Code Citation	School Employees Covered
Rhode Island	General Laws of Rhode Island, 1956, Title 28, Chapter 9.3, Section 28-9.3-2	All certified teaching personnel except the superintendent, assistant superintendent, principals, and assistant principals.
South Dakota	South Dakota Compiled Laws, (1970 Supp.), Chapter 3-18, Section 3-18-1	All school employees.
Vermont	Vermont Statutes Annotated, (1970 Supp.), Title 16, Chapter 57, Section 1982	All certificated employees except the superintendent and the assistant superintendent.
Washington	Revised Code of Washington, Chapter 28 A.72, Section 28.A. 72.020	All certificated employees except the chief administrative officer.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.7 (1).	All school employees.

administrative personnel at the managerial level. The state statutes of Connecticut, Delaware, Florida, Oregon, Pennsylvania, and Rhode Island exclude all supervisory and administrative personnel.

Of special interest are the statutory enactments of Florida and Nebraska. Both states restrict the applicability of the provisions implemented on the basis of county size or size of school district. In Florida, certificated employees in counties with population of not less than 390,000 nor more than 450,000 are covered by the provisions of the statutory enactment, while in Nebraska only certificated employees in Class III, Class IV, and Class V school districts are covered.

Finally it should be noted that statutory schemes in which school employees are specifically included among other employees in the public sector, have extended coverage to include all school employees. As illustrated in Table VI, eleven states have extended coverage to include all school employees. Only the states of California and Michigan, among those who have enacted separate legislation for school personnel, have included non-instructional staff members.

Scope of Bargaining

The scope of bargaining in most of the statutes, is defined to cover wages, hours, working conditions, and other terms and conditions of employment. For example in Table VII, a comparison of the scope of bargaining in the twenty-four state statutes, reveals a diversified employment of statutory language to demarcate the negotiable issues.

Two types of reservations with regard to the scope of bargaining are to be found in the state statutes. First, the states of Maine and Minnesota have specifically excluded educational policies as negotiable

TABLE VI

COMPARISON OF STATE STATUTES PERTAINING TO INSTRUCTIONAL EMPLOYEES COVERED

State	Statute Extends Coverage to Non-instructional Personnel	Statutory Scheme Specifically Includes School Employees Among Other Public Sector Employees
California	X	
Hawaii	X	X
Maine	X	X
Massachusetts	X	X
Michigan	X	
Nevada	X	X
New Jersey	X	X
New York	X	X
Pennsylvania	X	X
South Dakota	X	X
Wisconsin	X	X

items, although the Maine statute indicates that teachers and public employers shall meet and consult with regard to educational policies. Second, the state of Hawaii has excluded classification of employees, retirement benefits, salary range, and the number of steps in each salary range from the areas to be considered in negotiation. For the most part, however, the states have not attempted to define the terms employed.

Type and Length of Representation

Little disagreement is evident as to whether the type of representation scheme should be exclusive or proportional. As shown in Table VIII, twenty-two of the states have enacted legislation calling

TABLE VII

COMPARISON OF STATUTORY PROVISIONS PERTAINING TO SCOPE OF BARGAINING

State	Code Citation	Scope of Bargaining
Alaska	Alaska Statutes, Chapter 18, Section 14.20.550	All matters relating to terms of employment and fulfillment of their professional duties.
California	West Annotated California Code: Education Code, Section 13085	All matters relating to employment conditions and employer-employee relations, and in addition shall meet and confer with representatives of certificated employees with regard to educational objectives, determination of the content of courses and curricula, selection of text books and other aspects of the instructional program.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10-153d	All matters relating to salaries and other conditions of employment.
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Section 4006	All matters relating to salaries, employee benefits and working conditions.
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Section 233.4	All matters relating to salaries, hours, wages, rate of benefits and other terms of employment, curriculum, student discipline, and personnel policies. All other items that affect rights and responsibilities of teachers shall be negotiated.

TABLE VII (Continued)

State	Code Citation	Scope of Bargaining
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Section 89.9	All matters relating to wages, hours and other terms and conditions of employment, except the classification and reclassification of positions, retirement benefits and salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step shall be negotiable.
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Section 72-5413	All matters covering terms and conditions of professional services.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Sections 965 and 967	All matters relating to wages, hours, working conditions and contract grievance arbitration shall be negotiable. Teachers and public employers shall meet and consult, but not negotiate with respect to educational policies.
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160 b	All matters relating to salaries, wages, hours and other working conditions.
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Section 178 D	All matters relating to salaries and other conditions of employment.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Section 423.215	All matters relating to wages, hours, and other terms and conditions of employment.

TABLE VII (Continued)

State	Code Citation	Scope of Bargaining
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Section 125.23	All matters relating to conditions of professional service. Professional service means economic aspects relating to terms of employment, but does not mean educational policies of the district.
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Section 79-1289	All matters pertaining to employee relations.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Section 288.150	All matters relating to wages, hours, and conditions of employment.
New Jersey	New Jersey Statute Annotated, Title 34, Chapter 13 A, Section 34-13A-7	All matters relating to the terms and conditions of employment.
New York	Consolidated Laws of New York: Civil Service Law, Article 14, Section 203	All matters relating to the terms and conditions of employment and the administration of grievances arising thereunder.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38.1-12.	All matters relating to the terms and conditions of employment, questions arising out of an interpretation of an existent agreement, and the formulation of an agreement which may contain a provision for binding arbitration.
Oregon	Oregon Revised Statutes, Chapter 342, Section 342.460	All matters relating to salaries and related economic policies affecting professional services.

TABLE VII (Continued)

State	Code Citation	Scope of Bargaining
Pennsylvania	Purdon's Legislative Service Pamphlet Number 3, Act 195, L. 1970, Section 701	All matters relating to wages, hours and other terms and conditions of employment.
Rhode Island	General Laws of Rhode Island, 1956, Title 28, Chapter 9.3, Section 28-9.3-1	All matters relating to hours, salary, working conditions and other terms of professional employment.
South Dakota	South Dakota Compiled Laws, (1970 Supp.), Chapter 3-18, Section 3-18-2	All matters relating to grievance procedures and conditions of employment.
Vermont	Vermont Statutes Annotated, (1970 Supp.), Title 16, Chapter 57, Section 1980	All matters relating to terms and conditions of their professional service and other matters.
Washington	Revised Code of Washington, Chapter 23A.72, Section 28A. 72.030	All matters relating to, but not limited to, curriculum, textbook selections, inservice training, student teaching programs, personnel hiring and assignment practices, leaves of absence, salaries, salary schedules, and non-instructional duties.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.70 (2)	All matters relating to wages, hours, and conditions of employment.

TABLE VIII

COMPARISON OF STATUTORY PROVISIONS PERTAINING TO REPRESENTATION

State	Code Citation	Type of Representation Scheme	Length of Recognition Status
Alaska	Alaska Statutes, Chapter 18, Section 14.20.560	Exclusive	One year or a term agreed upon by the two parties, unless a majority of certified staff members vote to request the termination of recongition.
California	West Annotated California Code: Education Code, Section 13085	Proportional	One year.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10-153b	Exclusive	One year or the length of the contract, unless at least twenty per cent of the employees in the unit file a petition for a new election. Only one election per year may be authorized.
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Section 4006	Exclusive	Two years.
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Section 233.5	Exclusive	Until recognition of such professional association is withdrawn by a vote of the majority of the teachers represented or the board.

TABLE VIII (Continued)

State	Code Citation	Type of Representation Scheme	Length of Recognition Status
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Section 89.7	Exclusive	One year.
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Section 72-5415	Exclusive	Minimum of one year.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Section 967	Exclusive	Minimum of one year.
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160f	Exclusive	Minimum of two years.
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Section 178 F (4)	Exclusive	Minimum of one year.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Section 423.214	Exclusive	One year.
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Section 125.22	Proportional	One year.

TABLE VIII (Continued)

State	Code Citation	Type of Representation Scheme	Length of Recognition Status
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Section 78-1290	Exclusive	One year.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Section 288.160	Exclusive	Until such time the representative ceases to be supported by a majority of the employees, or the board of education determines the representative organization has violated certain statutory requirements.
New Jersey	New Jersey Statutes Annotated, Title 34, Chapter 13A, Section 34-13A-7	Exclusive	One year.
New York	Consolidated Laws of New York: Civil Service Law, Article 14, Section 208	Exclusive	Minimum of two budget submission dates less 120 days.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38.1-11	Exclusive	One year from the date of selection.
Oregon	Oregon Revised Statutes, Chapter 342, Section 342.460	Exclusive	One year.

TABLE VIII (Continued)

State	Code Citation	Type of Representation Scheme	Length of Recognition Status
Pennsylvania	Purdon's Legislative Service Pamphlet No. 3, Act 195,L. 1970, Section 605	Exclusive	No election shall be conducted in any unit within which an election was held in the preceeding twelve months, nor during the term of an agreement providing said agreement does not exceed three years.
Rhode Island	General Laws of Rhode Island, 1956, Title 28, Chapter 9.3, Section 28-9.3-7	Exclusive	Until such time that recognition is withdrawn, or changed by a vote of the certified public teachers after a duly conducted election. Elections shall not be held more often than once each twelve months.
South Dakota	South Dakota Compiled Laws, (1970 Supp.), Chapter 3-18, Section 3-18-5	Exclusive	Minimum of one year unless it appears to the labor commissioner that sufficient reason exists.
Vermont	Vermont Statutes Annotated, (1970 Supp.), Title 16, Chapter 57, Section 1992	Exclusive	For the remainder of the fiscal year in which recognition is granted for an additional period of twelve months after final adoption of the budget and thereafter until a petition for election has been filed.

TABLE VIII (Continued)

State	Code Citation	Type of Representation Scheme	Length of Recognition Status
Washington	Revised Code of Washington, Chapter 28A.72, Section 28A.72.030	Exclusive	Not specifically mentioned.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.70(4)	Exclusive	Until such time as a petition has been filed with the W.E.R.C. requesting an election.

for exclusive representation, while only the states of California and Minnesota have adopted a proportional representation scheme or modification thereof.

Under proportional representation schemes, negotiating councils or committees are established with each employee organization afforded membership according to some predetermined formula. For example, the California[11] statute provides:

> The negotiating council shall have not more than nine or less than five members and shall be composed of representatives of those employee organizations who are entitled to representation on the negotiating council. An employee organization representing certificated employees shall be entitled to appoint such number of members of the negotiating council as bears as nearly as practicable the same ratio to the total number of members of the negotiating council as the number of members of the employee organization bears to the total number of certificated employees of the public school employer who are members of employee organizations representing certificated employees.

Similarly, the Minnesota[12] statute states:

> When more than one teacher organization has as members teachers employed in the district, the board shall grant recognition to a committee of five teachers selected by these organizations on a proportionate basis determined by membership. Each teacher organization shall be entitled to appoint such number to the council which bears, as nearly as practicable, the same ratio as the total membership of the appointing organization bears to the combined membership of teacher organizations to be represented on the council.

It is significant to note that the California and Minnesota statutes do not provide for the bilateral determination of employment conditions though both states have granted employees the right to meet and confer. Whether a proportional representation scheme complements

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[11] West Annotated California Code: Education Code, Section 13085.

[12] Minnesota Statutes Annotated (1970 Supp.), Chapter 125, Section 125.22.

a meet and confer type of negotiation is difficult to ascertain; yet, two of three states have adopted proportional schemes.

As to the length of representation status afforded the exclusive representative or negotiating council, a number of statutory schemes have been implemented. An examination of Table VIII reveals that the majority of the states have adopted statutory schemes which permit the exclusive representative to retain recognition for at least one year. The state statutes of Delaware, Maryland and New York specify a period of two years, while the state statutes of Alaska, Connecticut, Florida, Nevada, Rhode Island, South Dakota and Wisconsin provide a method whereby recognition status can be terminated under given conditions. Only the Washington statute fails to specifically mention the length of recognition of the representative.

Unfair Labor Practices

In order to prohibit, in the private sector, management and union practices that would impede or interfere with the collective bargaining process, the federal government established provisions within the Wagner and Taft-Hartley Acts to prohibit unfair labor practices.[13] Though numerous activities are considered as unfair labor practices, the most pertinent, for present purposes, is the practice of coercion, discrimination, interference, and restraint of employees in the exercise of their rights.

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[13]Joel Seidman, "State Legislation on Collective Bargaining by Public Employees," Labor Law Journal, XXII (January, 1971), p. 17.

As illustrated in Table IX, thirteen[14] of the twenty-four state statutes include language relevant to unfair labor practices. Of the thirteen state statutes, nine[15] have followed the present federal policy of prohibiting unfair labor practices both by management and employee organizations. Four states (Connecticut, Michigan, Rhode Island, and Washington) have followed the Wagner Act policy of prohibiting unfair practices by management only.

With regard to means of enforcement, the states of Hawaii, Maine, Massachusetts, Michigan, New York, Pennsylvania, Rhode Island and Wisconsin have incorporated the same type of mechanism, usually "cease and desist" orders by a central authority, to insure the prevention or continuation of unfair labor practices. As to the states of California, Connecticut, Maryland, Vermont, and Washington, no means of enforcement were expressly stated.

Finally it should be noted that six of the eight state statutes with provisions for the enforcement of unfair labor practices include other public sector employees. Only the states of Michigan and Rhode Island have enacted legislation specifically for school employees in which a means of enforcement is provided to ensure the prevention of unfair labor practices.

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[14]The thirteen states with unfair labor practices provisions are: California, Connecticut, Hawaii, Maine, Maryland, Massachusetts, Michigan, New York, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.

[15]The nine states which prohibit unfair labor practices by management and employee organizations are: California, Hawaii, Maine, Maryland, Massachusetts, New York, Pennsylvania, Vermont, and Wisconsin.

TABLE IX

COMPARISON OF STATUTORY PROVISIONS PERTAINING
TO UNFAIR LABOR PRACTICES

State	Code Citation	Provision Regarding Unfair Labor Practice
Alaska	Aslaska Statutes, Chapter 18, Sections 14.20.550-14.20.610	Not included.
California	West Annotated California Code: Education Code, Section 13086	Public school employers and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of exercise of their rights. No provision for enforcement included.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10-153d	The regional board of education, and its representatives, agents and superintendents shall not interfere, restrain or coerce employees in derogation of their rights. No provision for enforcement included.
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Sections 4001-4011	Not included.
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Section 233.2-233.15	Not included.
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Sections 89.13 -- 89.14	It shall be a prohibited practice for a public employer or an employee organization to interfere, restrain, or cause any employee in the exercise of any right guaranteed. Provision for enforcement included.

TABLE IX (Continued)

State	Code Citation	Provision Regarding Unfair Labor Practice
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Sections 72-5413-72-5425	Not included.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Section 964	It shall be a prohibited practice for public employers, their representative and public employee organizations to interfere with, restrain, or coerce employees in the exercise of their rights. Provision for enforcement included.
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160j	Public school employers and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public school employees because of the exercise of their rights. No provision for enforcement included.
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Section 178L	Employers and employee organizations are prohibited from interfering with, restraining or coercing employees in the exercise of their rights. Provision for enforcement included.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Section 423.210	It shall be unlawful for a public employer or an officer or agent of the public employer to interfere with, restrain, or coerce public employees in the exercise of their rights. Provision for enforcement included.
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Sections 125.19-125.27	Not included.

TABLE IX (Continued)

State	Code Citation	Provision Regarding Unfair Labor Practice
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Sections 79-1287-79-1296	Not included.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Sections 288.030 - 288.260	Not included.
New Jersey	New Jersey Statutes Annotated, Title 34, Chapter 13A, Sections 34-13-A-1 -- 34-13-A-11	Not included.
New York	Consolidated Laws of New York: Civil Service Law, Article 14, Section 209	It shall be unlawful for a public employer or employee organization to interfere with, restrain or coerce public employees in the exercise of the rights heretofore granted. Provision for enforcement included.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38 1-01-38 1-15	Not included.
Oregon	Oregon Revised Statutes, Chapter 342, Sections 342.450-342.470	Not included.
Pennsylvania	Purdon's Legislative Service Pamphlet Number 3, Act 195 L. 1970, Sections 1201 and 1301	Public employers and employee organizations are prohibited from interfering, restraining or coercing employees in the exercise of their rights. Provision for enforcement included.

TABLE IX (Continued)

State	Code Citation	Provision Regarding Unfair Labor Practice
Rhode Island	General Laws of Rhode Island 1956, Title 28, Chapter 9.3, Section 28-9.3-6	School committees are prohibited from interfering, restraining or coercing employees in the exercise of their rights. Provision for enforcement included.
South Dakota	South Dakota Compiled Laws, (1970 Supp.), Chapter 3-18, Sections 3-18-1 -- 3-18-17	Not included.
Vermont	Vermont Statutes Annotated, (1970 Supp.), Title 16, Chapter 57, Section 1982	The school board, employees of the school board, and employee organizations are prohibited from interfering, restraining, coercing, or discriminating in any way against or for any teacher in the exercise of their rights. No provision for enforcement included.
Washington	Revised Code of Washington, Chapter 28A.72, Section 28A.72.070	Boards of directors of school districts or any administrative officer thereof shall not discriminate against certificated employees due to the exercise of their rights. No provision for enforcement provided.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.70(3)	Employers and employee individually or in concert with others are prohibited from coercing, intimidating or interfering with municipal employees in the enjoyment of their legal rights. Provision for enforcement provided.

Strikes and Other Concerted Activities

Although private sector employees are afforded the right to strike and participate in other concerted activities, state legislatures have overwhelmingly refused to grant public employees similar rights. As illustrated in Table X, sixteen of the twenty-four states have incorporated provisions concerning the strike and/or other concerted activities while eight states do not have expressly stated provisions. It should be noted, however, that due to common law principles and legal precedence established by court litigation, public employees in the eight states previously mentioned do not have the right to strike.

In all sixteen states, except Hawaii, Pennsylvania, and Vermont, the statutory language employed prohibits strikes and/or other concerted activities which may interrupt the educational programs. In Hawaii, Pennsylvania, and Vermont, the right to strike is afforded school employees under certain circumstances. The Hawaii[16] statute, enacted in 1970, sets forth the following provisions:

> Strikes, rights and prohibitions. (a) Participation in a strike shall be unlawful for any employee who (1) is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the board, or (2) is included in an appropriate bargaining unit for which process for resolution of a dispute is by referral to final and binding arbitration.
>
> It shall be unlawful for an employee, who is not prohibited from striking under paragraph (a) and who is in the appropriate bargaining unit involved in an impasse, to participate in a strike after (1) the requirements of section -11 relating to the resolution of disputes have been complied with in good faith, (2) the proceedings for the prevention of any prohibited practices have been established, (3) sixty days have elapsed since the fact-finding board has made public its

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[16] Revised Laws of Hawaii, Title 6, Chapter 89, Section 89.12.

TABLE X

COMPARISON OF STATUTORY PROVISIONS PERTAINING
TO STRIKES AND OTHER CONCERTED ACTIVITIES

State	Code Citation	Strikes and Other Concerted Activities
Alaska	Alaska Statutes, Chapter 18, Sections 14.20.550 - 14.20.610	Not included.
California	West Annotated California Code: Education Code, Sections 13080-13088	Not included.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10 - 153e	No certified professional employee shall engage in any strike or concerted refusal to render services. The Superior Court for any county in which said board of education is located may issue a temporary injunction. The employee may file a motion to dissolve the injunction and a hearing upon the motion must be held within three days.
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Section 4011	It shall be unlawful for any public school employee to engage in any tactic which circumvents any provision of his teaching contract. If any employee organization designated as exclusive representative shall violate the provisions set forth, its designation as exclusive representative shall be revoked for a period of two years and payroll deductions for that organization's dues shall not be deducted for a period of one year.

TABLE X (Continued)

State	Code Citation	Strikes and Other Concerted Activities
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Section 4012	Teachers shall have no right to strike or engage in any work stoppage.
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Section 89.12	Public employees may strike after certain procedures have elapsed. If any employee organization declares a strike before all procedural steps have been completed, an injunction may be issued to enjoin the concerted action.
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Section 72-5411	Professional employees may not strike.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Section 964	May not engage in a work stoppage, slowdown, strike or the blacklisting of any public employer for the purpose of preventing it from filling employee vacancies. Violations may be enjoined by a temporary injunction. Proof of irreparable injury is not required.
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160 1	Employee organizations shall be prohibited from calling or directing a strike. If an organization designated as exclusive representative participates in a strike, its exclusive designation shall be revoked for two years and payroll deductions will not be made for one year.

TABLE X (Continued)

State	Code Citation	Strikes and Other Concerted Activities
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Section 178 M	It shall be unlawful for any employee to engage in, induce, or encourage any strike, work stoppage, slowdown, or withholding of service by such employees.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Sections 423.202 and 423.206	It shall be unlawful for any employee to wilfully absent himself from his position or abstain in whole or in part from the full, faithful, and proper performance of his duties.
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Sections 125.19 - 125.27	Not included.
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Sections 79-1287-1296	Not included.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Section 288.250	It shall be unlawful for any employee to interrupt the operations of the school, participate in a work stoppage or slowdown and be absent from work on any pretext or excuse such as illness which is not founded in fact. The court may assess a fine of not more than $50,000 against each organization for each day of violation, $1,000 per day against any officer of any organization and dismiss or suspend any employee.
New Jersey	New Jersey Statutes Annotated, Title 34, Chapter 13A, Sections 34-13A-1 -- 34-13A-11	Not included.

TABLE X (Continued)

State	Code Citation	Strikes and Other Concerted Activities
New York	Consolidated Laws of New York: Civil Service Law, Article 14, Sections 210 and 211; New York Judiciary Law, Sections 750 and 751	No public employee or employee organization shall engage in a strike. Injunctive relief may be sought and granted. A fine may be assessed in the amount equal to twice the daily rate of pay for each day an employee participated in a strike. Organizations may be assessed a fine in accordance to the ability of the organization to pay. Loss of recognition status may be imposed as a penalty.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38.1-04	No teacher, administrator or representative organization shall engage in a strike. Employees may be denied the full amount of their wages during the period of such violation.
Oregon	Oregon Revised Statutes, Chapter 342, Sections 342.450 - 342.470	Not included.
Pennsylvania	Purdon's Legislative Service Pamphlet Number 3, Act 195, L. 1970, Sections 1001-1006	Public employees may strike after certain procedures have elapsed. No employee shall be entitled to pay or compensation from the public employer for the period engaged in a strike. Injunctive relief may be sought and granted if certain conditions prevail.
Rhode Island	General Laws of Rhode Island, 1956, Title 28, Chapter 9.3, Sections 28-9.3-1 -- 28-9.3-16	Not included.

TABLE X (Continued)

State	Code Citation	Strikes and Other Concerted Activities
South Dakota	South Dakota Compiled Laws, (Supp. 1970), Chapter 3-18, Sections 3-18-10 -- 3-18-14	No public employee shall strike. Any employee or employees who knowingly incite, agitate, influence, coerce or urge an employee to strike shall be punished by a fine not to exceed one thousand dollars or imprisonment not to exceed one year or both. An organization involved in a strike may be fined up to fifty thousand dollars. Injunctive relief may be sought and granted.
Vermont	Vermont Statutes Annotated, (Supp. 1970), Title 16, Chapter 57, Section 2010	Injunctive relief may be granted after the court has held a hearing to determine that a specific act or acts pose a clear and present danger.
Washington	Revised Code of Washington, Chapter 23 A.72, Sections 28A.72.010 - 28A.72.070	Not included.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.70 (4)	Strikes are expressly prohibited. Injunctive relief may be sought and granted. Fines or suits for damage against strikes may be imposed.

> findings and any recommendation, (4) the exclusive representative has given a ten-day notice of intent to strike to the board and to the employer.
>
> Where the strike occurring, or is about to occur, endangers the public health or safety, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger.

Thus, the Hawaii statute, while prohibiting a strike that ". . . endangers the public health or safety," permits the members of an appropriate bargaining unit to strike sixty days after the recommendation of fact finders are made public, provided ten days notice of the strike is given.

The Pennsylvania statute, also adopted in 1970, prohibits strikes by certain municipal employees, but school employees may strike after mediation and fact finding procedures have been exhausted, provided ". . . there is no clear and present danger and no threat to public health, safety, or welfare."[17] Similarly, though legal authorities are not in total agreement, the State of Vermont has enacted legislation to allow strikes under certain conditions. The Vermont[18] statute states:

> No restraining order on temporary or permanent injunction shall be granted in any case brought with respect to any action taken by a representative organization or an official thereof or by a school board or representative thereof in connection with or relating to pending or future negotiations, except on the basis of findings of fact made by a court of competent jurisdiction after due hearing prior to the issuance of the restraining order on injunction that the commencement or continuance of the action poses a clear and present danger to a sound program of school education which in light of all

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[17] Purdon's Legislative Service Pamphlet Number 3, Act 195, L. 1970, Section 1003.

[18] Vermont Statutes Annotated (Supp. 1970), Title 16, Chapter 57, Section 2010.

> relevant circumstances it is in the best public interest to prevent. Any restraining order or injunction passed by a court as herein provided shall prohibit only a specific act or acts expressly determined in the findings of fact to pose a clear and present danger.

Therefore, in the State of Vermont, teachers may participate in any act or acts that do not ". . . pose a clear and present danger" to the educational program.

While the terms "health," "welfare," "danger," and "safety" seem relatively easy to define, it is difficult to determine their operational meaning until such time that the courts have ruled. It would appear that a broad interpretation by the court would in fact not permit any employees to strike, as all public functions are assumed to promote the advancement of public welfare and safety.

Apart from these problems of interpretation, some of the states have failed to provide any kind of sanctions if employees participate in unlawful concerted activities. As shown in Table XI, all of the states except Florida, Kansas, Massachusetts, and Michigan have incorporated some type of sanction. The states of Connecticut, Hawaii, Maine, Pennsylvania, and Vermont may enjoin a strike by the use of a court injunction; however, the states of Delaware, Maryland, Nevada, New York, North Dakota, South Dakota, and Wisconsin may impose specific penalties on employee organizations, officers, and/or employees that participate in unlawful concerted activities.

Finally it should be noted that still other jurisdictions have dealt with or are presently considering the right of public employees to strike. For example, the state of Montana has enacted legislation which allows nurses in the public sector to strike, provided that thirty days advance notice is given to the employer and no other strike is in

TABLE XI

COMPARISON OF STATE STATUTES PERTAINING TO STRIKES AND SANCTIONS IMPOSED

State	Statute Includes Anti-Strike Provision	Statute Provides for an Injunction Procedure	Statute Includes A Specified Sanction for the Violation of the Anti-Strike Provision
Connecticut	X	X	
Delaware	X		X
Florida	X		
Hawaii	X	X	
Kansas	X		
Maine	X	X	
Maryland	X		X
Massachusetts	X		
Michigan	X		
Nevada	X		X
New York	X		X
North Dakota	X		X
Pennsylvania	X	X	
South Dakota	X		X
Vermont	X	X	
Wisconsin	X		X

effect at a health care facility within a radius of 150 miles.[19] Furthermore, state task forces, created to study labor relations in the public sector, have recently submitted recommendations to allow strikes under certain conditions.[20]

Impasse Resolution Procedures

Although the strike and similar concerted activities have traditionally been denied school employees as a means to effect a settlement on issues, other alternative courses to the resolution of an impasse have been employed. Such mechanisms as mediation, fact-finding, and voluntary arbitration have been the most commonly utilized; however, compulsory arbitration has received some attention recently. As exemplified in Table XII, only the states of California and Kansas fail to provide some mechanism to resolve impasses. Though the other twenty-two states have adopted procedures, no one statutory scheme has been promulgated.

The states of Hawaii, Maine, and Rhode Island have authorized compulsory arbitration to effect settlement on certain issues, while the other eighteen states do not permit compulsory arbitration or insist that both parties mutually agree upon the procedures prior to compulsory arbitration. Apart from these three states, the normal procedure is one of mediation and fact-finding with either or both parties able to initiate such proceedings after certain pre-conditions have been met.

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[19] Seidman, op. cit., p. 19.

[20] Ibid.

TABLE XII

COMPARISON OF STATUTORY PROVISIONS FOR RESOLVING AN IMPASSE

State	Code Citation	Provisions for Resolving an Impasse
Alaska	Alaska Statutes, Chapter 18, Section 14.20.570	Within ten days after negotiations have terminated in a stalemate, each party shall choose two mediation board members. The four members shall meet and select a fifth member who shall serve as chairman. Recommendations shall be submitted to both parties and the Commissioner of Education within thirty days. Recommendations are not binding on either party.
California	West Annotated California Code: Education Code, Sections 13080-13088	Not included.
Connecticut	Connecticut General Statutes Annotated, Title 10, Section 10-153f	If any town or regional board of education reach an impasse in negotiations the issues may be submitted to the Secretary of the State Board of Education for mediation. If either party rejects the recommendations of the Secretary of the State Board of Education, the Secretary may order the parties to appear for the purpose of arbitration. Each party shall select an arbitrator who will designate the third member of the panel. Within fifteen days after formation, recommendations pertaining to the disposition of the issues must be reported. Recommendations are not binding on either party.

TABLE XII (Continued)

State	Code Citation	Provisions for Resolving an Impasse
Delaware	Delaware Code Annotated, Title 14, Chapter 40, Section 4010	Either the board of education or the exclusive representative when confronted with an impasse, may request mediation by any method mutually agreed upon. In the absence of such an agreement and within 10 days, a mediator shall be selected by mutual agreement; however, if a mediator cannot be agreed upon each of the parties involved shall select one mediator and in turn a third shall be selected. Within twenty-one days, the committee will issue a report setting forth recommendations. Recommendations are not binding.
Florida	Florida Statutes Annotated, Title 15, Chapter 59, Sections 233.7 - 233.9	All unresolved issues may be submitted to an arbitration board consisting of three members. Each party shall select and name one arbitrator. The two arbitrators shall select the third and if they fail to reach agreement, the American Arbitration Association shall select the third member. Within twenty days after the conclusion of hearings held, a report must be submitted. Recommendations are not binding.
Hawaii	Revised Laws of Hawaii, (1970 Supp.), Title 6, Chapter 89, Section 89.11	Public employer and the exclusive representative may set forth a procedure which would culminate in a final and binding agreement in the event of an impasse. In the absence of such a procedure, the Hawaii Public Employment Board, on the request of either party may intervene. Mediation and fact finding shall precede arbitration; however, the arbitration procedures must be mutually agreed upon. Recommendations submitted by the arbitration committee are binding.

TABLE XII (Continued)

State	Code Citation	Provisions for Resolving an Impasse
Kansas	Kansas Statutes Annotated, (1970 Supp.), Chapter 72, Sections 72-5413 - 72-5428	Not specifically mentioned.
Maine	Maine Revised Statutes, Title 26, Chapter 9-A, Section 965	Mediation procedures may be utilized if both parties jointly agree; however, if the parties with or without the aid of a mediator are unable to resolve the impasse, they may call upon the Maine Board of Arbitration for fact finding services. If the parties do not agree to fact finding procedures and are unable to resolve their differences, either party may request the initiation of arbitration proceedings. Each party shall select one member of the arbitration panel and the two members selected will select the third member. Recommendations pertaining to salaries, pensions, and insurance shall be advisory; however, other recommendations shall be binding.
Maryland	Annotated Code of Maryland, Article 77, Chapter 14.5, Section 160i	If upon the request of either party the state superintendent determines that an impasse has been reached, the advice of the State Board of Education may be requested if both parties consent. In the absence of such consent, a panel shall be named consisting of three members. Each party shall select one member and the two members shall select the third. All recommendations are advisory.

TABLE XII (Continued)

State	Code Citation	Provisions for Resolving an Impasse
Massachusetts	Annotated Laws of Massachusetts, Chapter 149, Section 178J	Either or both parties may petition the State Board of Conciliation and Arbitration to initiate fact finding, if a dispute exists between the parties concerned. The Board of Conciliation and Arbitration shall submit to the parties involved a panel of three qualified disinterested persons in which the parties shall select one for fact finding. If the parties involved are unable to select one member, the fact finder shall be appointed by the Board of Conciliation and Arbitration. Recommendations are not binding.
Michigan	Michigan Compiled Laws Annotated, Chapter 423, Section 423.207	Either or both parties may request the intervention of the Labor Mediation Board in the event of an impasse. Recommendations are not binding.
Minnesota	Minnesota Statutes Annotated, (1970 Supp.), Chapter 125, Section 125.25	An adjustment panel may be established at the request of either party to consider the issues involved. Each of the parties involved shall select one member and the two selected shall select the third member. If the two members appointed by the parties involved are unable to agree upon the third member, the senior or presiding judge of the district court shall appoint the third member. Recommendations are not binding.
Nebraska	Revised Statutes of Nebraska, (1969 Supp.), Chapter 79, Section 79-1293.	If the parties are unable to agree on any such matters, the dispute may be submitted to a fact finding board composed of three members. Each of the involved parties shall select one member and the two members selected shall appoint the third member. If they fail to appoint the third member, the State

TABLE XII (Continued)

State	Code of Citation	Provisions for Resolving an Impasse
Nebraska (Continued)		Department of Education shall submit a list of five persons from which one must be selected. Recommendations are not binding.
Nevada	Nevada Revised Statutes, Title 23, Chapter 288, Section 288.190	If the parties involved are unable to agree on a final contract, unresolved issues may be submitted to the Employees Management Relations Board. The board shall appoint a competent impartial person to act as mediator. If the mediator is unsuccessful, the parties shall submit the issues to a fact finding panel consisting of three members. Each of the parties shall select one member and the two members shall select the third. If they fail to select the third member, the Board shall make the selection. Recommendations are not binding.
New Jersey	New Jersey Statutes Annotated, Title 34, Chapter 13A, Sections 34-13A-6 and 34-13A-7	The Division of Public Employment Relations shall upon the request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse. If a voluntary resolution of the impasse fails, the Division of Public Employment Relations may invoke fact finding with recommendations. If the dispute remains unresolved, the matter may be submitted to an arbitration panel consisting of three people. Each party shall select one member and the two selected members shall appoint the third member. Recommendations are not binding.

TABLE XII (Continued)

State	Code Citation	Provisions for Resolving an Impasse
New York	Consolidated Laws of New York: Civil Service Law, Article 14, Section 209	Unresolved issues may be submitted to impartial arbitration; however, in the absence or failure of such procedures the Public Employment Relations Board at the request of either party or upon its own motion, may provide assistance. Assistance shall consist of mediation, fact finding, and voluntary arbitration and upon failure of all the foregoing processes, the dispute shall be considered by the appropriate legislative body to take such action as it deems to be in the best interest of all concerned. All of the recommendations forthcoming from mediation, fact finding, and arbitration are not binding.
North Dakota	North Dakota Century Code, (1969 Supp.), Chapter 15, Section 38.1-13	An impasse may be resolved by the mutual selection of one or more mediators to act in an advisory capacity. If mediation fails or is not attempted either party may request the intervention of the state fact finding commission for the purpose of submitting recommendations. Recommendations are not binding.
Oregon	Oregon Revised Statutes, Chapter 342, Section 243.470.	An impasse may be resolved by either of the parties requesting the appointment of consultants. The panel shall consist of one member appointed by each of the parties and one member chosen by the other two members. Recommendations are not binding.
Pennsylvania	Purdon's Legislative Service Pamphlet Number 3, Act 195, L. 1970, Sections 801 and 802.	The parties involved may voluntarily submit to mediation but if no agreement is reached, the matter may be submitted to a fact finding panel which may consist of one or three members. The Pennsylvania

TABLE XII (Continued)

State	Code Citation	Provisions for Resolving an Impasse
Pennsylvania (Continued)		Labor Relations Board at its discretion shall appoint the fact finding panel; however, if mutually agreed upon, the impasse may be resolved by the use of voluntary binding arbitration. All recommendations are advisory unless both parties agree to binding arbitration.
Rhode Island	General Laws of Rhode Island 1956, Title 28, Chapter 9.3, Sections 28-9.3-9 -- 28-9.3-12	Either party may request mediation and conciliation upon any and all unresolved issues by the state department of education. If mediation fails or is not requested, all unresolved issues may be submitted to arbitration. Each party shall select a member of the arbitration panel and the two shall appoint the third member. Recommendations are binding on all matters not involving the expenditure of money. Recommendations involving the expenditures of money shall be advisory until such time the state agency responsible for budget approval reviews the recommendations set forth.
South Dakota	South Dakota Compiled Laws, (1970 Supp.), Chapter 3-18, Section 3-18-8	Either party may request the commissioner of labor to intervene in case of an impasse; however, any procedures mutually agreed upon by both parties may be utilized to facilitate a settlement. Recommendations are not binding.
Vermont	Vermont Statutes Annotated, (Supp. 1970), Title 16, Chapter 57, Sections 2006 - 2008	Parties may jointly agree upon the services and person of a mediator and if they are unable to reach agreement on the selection of the mediator, the American Arbitration Association may be called upon. If

TABLE XII (Continued)

State	Code Citation	Provisions for Resolving an Impasse
Vermont (Continued)		mediation fails, either party may request that the issues be submitted to a fact finding committee. The committee shall be composed of three members. Each party shall select one member of the panel and the two shall appoint the third. Recommendations are not binding.
Washington	Revised Code of Washington, Chapter 23A.72, Section 28A. 72.060	Either party may request the assistance and advice of a committee composed of educators and school directors appointed by the state superintendent in the event of an impasse. Recommendations shall not be binding.
Wisconsin	Wisconsin Statutes Annotated, Title 13, Chapter 111, Section 111.70 (4)	Either party may request a mediator from the Wisconsin Employment Relations Commission. Fact finding may be requested if either party refuses to meet and negotiate in good faith. Recommendations shall not be binding.

Concluding Remarks

As public employees, teachers have been excluded from federal legislation regulating the collective bargaining process in the private sector. Thus, the extent, if indeed any, in which governing entities are required to participate in collective negotiations is a matter for state legislation and not federal. Therefore, the primary purpose of this chapter has been to report the "state labor relations acts" relevant to collective negotiations in the public school.

While there has been a substantial increase in the legislation adopted by the states, there is no reason to believe that the volume of state legislation will diminish in the years ahead. It is unlikely therefore, that ad hoc conditions, though certainly prevalent in many states, will continue to exist. In fact, school employees will undoubtedly continue to pursue the same bargaining rights afforded private sector employees, except where clear priorities can be established pertaining to societal needs.

In the final analysis, it seems clear that state legislatures will continue to adopt new legislation or amend existing legislation to regularize the negotiations process. Although the statutory schemes employed will no doubt vary due to local constraints and attitudes, it appears that new legislation and amendments will move steadily in the direction of existing federal legislation. However, as Justice Holmes stressed, there is wisdom in allowing states to make social experiments that reflect community desires ". . . in the insulated chambers afforded

by the several states;"[21] hence, it would appear appropriate for the federal government to permit the states to regulate the collective negotiations process.

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[21] Truax v. Corrigan, 257 U.S. 312 (1921).

CHAPTER V

SUMMARY AND RECOMMENDATIONS

Introduction

It is a well established fact that education in the American scheme of government is essentially a matter of state policy. Though public schools are largely administered in a unilateral fashion at the local level, the recent emergence of collective negotiations involving school personnel has provided an impetus for the bilateral determination of policies. Too, a legal doctrine, whether it be precedence established by court litigation or the enactment of statutory provisions, has come forth. Indeed, the convergence of this research pertains to the legal doctrine governing the unique relationship between local government entities and school personnel.

In many respects, collective negotiations involving school personnel have emerged during the last decade. It is evident, however, that the legal doctrine governing this new relationship has not clearly emerged in all jurisdictions; the law has been in a constant state of flux. Whether a perceptible legal doctrine will emerge in all jurisdictions is difficult to ascertain; yet, the impetus for a more formalized interaction between the public school employee and employer has brought forth an applicable doctrine in several jurisdictions. Therefore, this study has attempted to gather, and bring together in an organized form, the information on case and statutory law which defines this doctrine.

Summary

The foregoing chapters pertaining to litigation and statutory enactments can be summarized in an abbreviated form by reporting some of the generalizations implied from the litigation reviewed and noting the main provisions of statutory enactments employed. However, three limitations must be noted. First, differences among jurisdictions were found in large number, whereby the courts, though responding to the same legal questions, ruled differently. Second, many issues have not been litigated in all jurisdictions, thus one should approach cautiously the application of generalizations. Finally, only the comprehensive labor relations acts were reported and not all statutes that could conceivably be relevant to collective negotiations in the public school. Therefore, within these limitations, the following summation concerning the legal aspects of collective negotiations in the public school is presented.

1. The right to organize and maintain membership in organizations is now generally conceded whether said membership involves a professional organization or labor union. It would appear that such rights are afforded by the First and Fourteenth Amendments to the Constitution and may not be abridged.

2. In most instances, public employees dismissed because they maintained membership in an organization, may seek damages and injunctive relief under the Civil Rights Act of 1871 against the official who dismissed them.

3. School authorities may not terminate a teacher's contract on the basis of participation in union activities. In fact, it appears that "substantial" evidence relative to incompetencies must exist before

the governing entities may dismiss an employee active in union activities.

4. Compulsory membership in employee organizations is prohibited; however, the courts, in all reported cases, upheld the legality of imposing a service fee to help defray the cost of representation incurred during the negotiations process. Furthermore, it appears that in certain jurisdictions an employee's refusal to pay the service fee is "just and reasonable cause" under state tenure laws for dismissal.

5. In the presence of legislation authorizing dues checkoff, said authorization usually connotes discretion on the part of the board, as opposed to a mandate.

6. In the absence of specific statutory authority, dues checkoff becomes a matter of board discretion; yet, arbitrary and discriminatory procedures may not be implemented once the school board has exercised its discretionary power.

7. There is some evidence that the court will permit a board of education the right to afford exclusive privileges to the majority union.

8. In the absence of specific statutory authority, a school board may establish procedures to recognize and negotiate with an organization as long as such procedures are not manifestly unreasonable.

9. Without supportive legislation, the majority of the teachers in a school system do not have the "right" of exclusive representation.

10. The "right" of teachers to negotiate without supportive legislation cannot be substantiated.

11. School personnel may not legally participate in concerted activities that impede the operations of the educational program in the absence of enabling legislation.

12. In most instances, the court will enjoin any unlawful action of school personnel in which irreparable injury may be sustained to the educational process.

13. There is some evidence that the courts are becoming more concerned with the "principal of equity" before the issuance of an injunction.

14. Local school authorities may not assess fines for an unlawful act as such action is deemed ultra vires.

15. The courts, in all reported cases, have ruled that no distinguishing differences exist between en masse resignation and a strike if the resignations were not effective at the end of the contract period.

16. Teachers may not absent themselves en masse to present a petition of grievance or exert political pressure if such action impedes the operations of the educational program.

17. Local school authorities may not circumscribe a teacher's right to publicize his views unless cause can be shown for confidentiality and/or it can be proved that the employee's working relationship with his supervisors would be effected.

18. In determining the legality of actions of teachers and associates to exert pressure on local governing authorities, the courts will consider the substance of the situation and not its shape. Thus, concerted activities such as sanctions, picketing, and en masse

resignations will be considered in the same legal context as strikes if such action impedes the operations of the educational program.

19. It appears that picketing, whether peaceful or not, may be enjoined by the courts if it interrupts a critical process or is construed as a means of coercing a governing board to meet demands.

20. Twenty-four states were identified as having comprehensive labor relations acts pertaining to collective negotiations in the public school.

21. Fifteen of the states have provided separate statutory coverage for school employees, while nine of the states have included school employees with other public sector employees.

22. Twenty-one of the state statutes specifically provide for one or more of the following: (1) right to participate in lawful concerted activities, (2) right to maintain membership, (3) right to refrain from any or all of the above activities, and (4) assessment of service fee regardless of membership status to offset representation costs.

23. Though all of the twenty-four states have employed specific statutory language to govern the type of negotiations, only fourteen states have imposed an obligation to negotiate in good faith. Two states have authorized school employees to meet and confer with the board of education, while one state allows school employees to meet and confer at the board's discretion. Seven of the twenty-four states appear to have employed statutory language insufficient to impose a duty to negotiate.

24. Eleven states have enacted legislation which covers all school employees, while twelve states have passed legislation to cover only certificated employees.

25. Though all of the states employed statutory language to demarcate the negotiable issues, most of the states confine the scope of bargaining to wages, hours, working conditions, and other terms and conditions of employment. Only two types of reservations were found with regard to the scope of bargaining. First, two states specifically excluded educational policies as negotiable items. Second, one state excluded classification of employees, retirement benefits, salary range, and the number of steps in each salary range from the areas to be considered in negotiations.

26. Twenty-two of the states have enacted legislation calling for exclusive representation, while only two states have adopted a proportional representational scheme.

27. Twenty-three of the states specifically mention the length of recognition of the representative. Thirteen of the states permit the exclusive representative to retain recognition for at least one year. Three states specify a period of two years, while seven states employ a scheme whereby recognition status is continuous in nature, until terminated under given conditions.

28. Thirteen of the state statutes include language relevant to unfair labor practices. Nine of the thirteen prohibit unfair labor practices by both management and employee organizations. Four of the states have prohibited unfair labor practices by management only.

29. Eight of the thirteen states with provisions relevant to unfair labor practices have incorporated a means of enforcement to insure the prevention of unfair labor practices, while five states have not provided a means for enforcement.

30. Sixteen of the states have provisions concerning the strike and/or concerted activities while eight states do not have expressly stated provisions. Thirteen of the sixteen states expressly prohibit the strike, while three states appear to have employed statutory language permitting strikes under given conditions. Seven of the sixteen states specify penalties that will be imposed, while five states merely indicate a strike may be halted by a court injunction. Four states have failed to mention any provisions for enforcement or penalties to be imposed in case of participation in unlawful concerted activities.

31. Twenty-two of the states have provided one or more mechanisms to resolve impasse conditions. Such mechanisms are usually mediation, fact finding, and voluntary arbitration. Only three of the twenty-two states have authorized compulsory arbitration to effect settlement on certain issues.

It should be remembered that certain limitations were mentioned prior to the foregoing summary comments. Any generalization of these comments should be done sparingly and with great care.

Recommendations

Though many dilemmas appear to exist with due regard to public interest, legislators, school board members, administrators, teachers, and the courts have begun to effectuate a structure for collective negotiations in the public school. Experiences in the private sector should prove to be invaluable in promulgating a legal framework; yet, it is contended that any legislation enacted must be fully cognizant of the distinguishing differences between the public and private sectors. Indeed, to ignore such differences could prove to be

detrimental to the effectiveness of the actual goals and purposes of educational institutions in this nation.

Nonetheless, on the basis of litigation and statutory enactments reported and analyzed, the following recommendations seem to be in order. Though these recommendations are subjective in nature and may be contrary to basic beliefs cherished by many authorities, the writer is of the opinion that they have merit.

First, there is a need for comprehensive state legislation concerning the collective negotiation rights of public school employees. Though it was not the intent of this research to propose a "model" statute, certain comments relative to an appropriate statutory scheme are hereby suggested:

1. Such legislation should provide for the uniqueness of the employer-employee relationship in the public school. Whether this can be done by the enactment of single legislation to include all public employees is debatable; it appears that a large number of rigidities appear when all public employees are included.

2. School employees should be afforded the right of self-organization and the right to participate in lawful concerted activities. Furthermore, employees should have the right to refrain from any or all of the foregoing activities.

3. An obligation to meet, confer, and negotiate in good faith should be imposed on both parties. Such an obligation would reduce "sham" bargaining and provide a basis for the resolution of issues.

4. Rigidities in bargaining unit determination should be avoided, as the opportunity for local option should exist whenever feasible.

5. Exclusive representation rights should be afforded the majority of the school employees in a bargaining unit; however, exclusive privileges such as dues-checkoff and internal channels of communications should not be granted the majority representative.

6. All representation elections should be conducted by secret ballot to avoid possible reprisal, discrimination, and intimidation.

7. Specific statutory language should be employed to cover all school employees; however, the superintendent and other board of education confidential employees should be considered in light of their responsibilities to the board.

8. The scope of bargaining should be defined in broad terms to permit elasticity in the spectrum of issues to be negotiated.

9. The right of exclusive representation should be extended for at least one year. Furthermore, an "election bar" should be incorporated whereby exclusive representation may continue beyond one year unless at least 20% of the members of the bargaining unit petition for an election. No more than one election per year should be permitted.

10. Specific statutory language should be employed to prevent both the employer and the employee from committing unfair labor practices. An appropriate means for enforcement should be provided.

11. Specific provisions should be incorporated into a statute to provide direction relative to an impasse. Specifically, the following are suggested: (1) mediation should be undertaken at the local level with either party able to invoke mediation, (2) fact finding procedures should be implemented if mediation fails and the results made public, and (3) compulsory arbitration with the recommendations not binding.

All of the above procedures should be placed on a well-defined time schedule in light of annual budget deadlines.

12. The strike should be considered lawful for school employees provided: (1) school employees have participated in good faith in all attempts to resolve the impasse, (2) disputed matters are not beyond the local board's control, (3) state retains authority to evoke a sixty to ninety day injunction period designed to intensify efforts to resolve the issues, (4) public health and safety are not jeopardized in the narrowest of interpretation, and (5) sufficient notice of intent to strike is given prior to the strike.

Second, when considering problems relevant to collective negotiations, local school authorities should be fully cognizant of the appurtenant judicial decisions, statutes, and attorney general opinions. Such an understanding will allow for the clear delineation of rights and responsibilities of the parties involved in negotiations.

Third, local school authorities should not continue to reply upon rapidly diminishing principles of law such as sovereignty and illegal delegation of authority; instead, a spirit commensurate with the intent of collective negotiations should prevail. Thus, the mutuality of concern which boards and their professional employees hold in certain matters should be maximized if educational procedures are to be enhanced.

It should be emphasized once again that the law is not static. Already there has been a marked change in judicial decisions and legislative enactments relative to collective negotiations. Whether this will continue is difficult to ascertain; yet, it appears that school employees will continue to pursue collective negotiation rights commensurate with those afforded to private sector employees.

Future Research

Future research in the area considered in this study could and should take many forms. Although this study could be replicated in the next two years, it is suggested that future legal research in collective negotiations be concerned with a legal spectrum not as broad as was explored in this study. Specifically, the following research seems worthy of consideration within the next two or three years.

1. Legal research should be undertaken to analyze the judicial decisions and all attorney general opinions pertaining to collective negotiations. Emphasis should be placed on union security issues, bargaining unit determinations, representative elections, injunctions, strikes, and contempt proceedings.

2. Legal research should be undertaken to analyze the state statutory enactments pertaining to collective negotiations. Attorney general opinions and judicial decisions relevant to the statutes located should be reported and analyzed. Furthermore, all applicable statutes should be analyzed, including peripheral but applicable laws relative to the private sector.

3. Legal research should be undertaken to analyze the decisions of various state labor relations commissions such as the Wisconsin Employment Relations Commission and the Michigan Labor Relations Board.

In summary, possibilities for legal research in all areas of collective negotiations seem limitless. Although some studies have been completed, the number of judicial decisions and statutory enactments has been increasing rapidly. It would appear that legal research in collective negotiations is one of the most neglected, yet fruitful areas of research in education today. Therefore, such research seems

essential to the understanding of the evolving legal relationships. Indeed, it is imperative that additional research be undertaken to investigate the subsequent implications of judicial decisions, statutory enactments and peripheral legal aspects. Though research of this kind would not be a panacea for resolving all the issues in collective negotiations, it could be an integral part of providing a structure for interaction, which may conceivably enhance the welfare of public educators in this nation.

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TABLE XIII

SELECTED JUDICIAL DECISIONS RELEVANT
TO STATE STATUTORY ENACTMENTS

State	Year	Case Citation	Decision by the Court
Alaska			
California	1969	California Federation of Teachers v. Oxnard Elementary School District, 77 Cal. Rptr. 497	The Winton Act was not invalid on the ground that it was discriminatory in its creation and use of a negotiating council.
	1969	Ward v. Freemont Unified School District, 80 Cal. Rptr. 815	The board of education must be in full compliance with statutory prescribed procedures involving the dismissal of a teacher.
	1970	California School Employees Association v. Personnel Commission of the Pajaro Valley Unified School District, 85 Cal. Rptr. 246	The education code sections, providing for representation by employee organization and defining scope of representation, do not purport to control civil procedure sections requiring prosecution of actions in name of real party.
Connecticut	1967	New Haven Federation of Teachers v. New Haven Board of Education 237 A (2d) 373	Designation of teachers exclusive bargaining representative was not valid where procedures adopted by the board of education, prior to the effective date of statute were not unreasonable.
	1968	West Hartford Education Association v. West Hartford Board of Education, 241 A (2d) 780	The court held that a former school board member could not qualify as an impartial member of a three member arbitration board.

TABLE XIII (Continued)

State	Year	Case Citation	Decision by the Court
Connecticut (Continued)	1969	Board of Education of the City of Waterbury v. Quinn, 258 A (2d) 476	It was ruled that the city comptroller did not have to pay increased salaries to teachers, although an agreement was negotiated and executed by board of education and teachers' association pursuant to statute. Statute grants only the right of authorized representatives to negotiate with the board of education.
Delaware			
Florida	1969	Dade County Classroom Teachers v. Rubin, 217 So. (2d) 293	Statute proscribing participation in strikes as illegal was considered valid.
Hawaii			
Kansas			
Maine			
Maryland			
Massachusetts	1968	City Manager of Medford v. State Labor Rel. Commission, 233 N.E. (2d) 310	The court upheld the State Labor Relations Commission's decision that an appropriate bargaining unit included all firefighters except the chief.

TABLE XIII (Continued)

State	Year	Case Citation	Decision by the Court
Massachusetts (Continued)	1970	Massachusetts Bay Transportation Authority v. Labor Relations Commission, 254 N.E. (2d) 404	The court held that the Massachusetts Bay Transit Authority was a political subdivision of the Commonwealth, and is not within the jurisdiction of the Labor Relations Commission.
	1970	Worchester Industrial Technical Institute Instructors Association v. Labor Relations Commission, 256 N.E. (2d) 287	It was held that absent showing of extraordinary circumstances, teachers associations must first exhaust other available remedies prior to judicial review of Labor Relations Commission decision.
Michigan	1965	United Skilled Maintenance Trades Employees v. Board of Education of the City of Pontiac, 134 N.W. (2d) 736	The court held that the collective bargaining agent which made no prior claim of bad faith pertaining to bargaining, could not request the court to issue an order requiring the board of education to bargain collectively.
	1969	Board of Control of Eastern Michigan University v. Labor Mediation Board, 171 N.W. (2d) 471	The court held that the Board of Control of Eastern Michigan University is a public employer and its non-teaching employees are "public" employees within the meaning of the statute.
	1969	City of Escanaba v. Michigan Labor Mediation Board, 172 N.W. (2d) 836	The court held that police officers could properly join labor organizations which included in membership persons who were neither policemen nor public employees.

TABLE XIII (Continued)

State	Year	Case Citation	Decision by the Court
Michigan (Continued)	1970	School District of the City of Dearborn v. Labor Mediation Board, 177 N.W. (2d) 196	The court ruled that public employees engaged in executive or supervisory positions are not prohibited from organizing, but may not be included in bargaining unit containing non-supervisory employees.
	1970	Hillsdale Community Schools v. Michigan Labor Mediation Board, 179 N.W. (2d) 661	The court upheld a M.L.M.B. decision that principals, coordinators, head librarians, and physical education directors, although supervisory personnel constituted a proper collective bargaining unit.
Minnesota	1967	Morey v. School Board of Austin Public Schools, 148 N.W. (2d) 370	The court held that the school board could not terminate teachers' contracts upon evidence that did not have probative value.
Nebraska			
Nevada			
New Jersey	1969	County of Gloucester, Board of Chosen Freeholders v. Public Employment Relations Commission, 257 A (2d) 712	The court reversed a Public Employment Relations Commission decision declaring that county corrections officers were not policemen, within a statute precluding policemen from joining an employee organization that admits to membership non-policemen.
	1969	Burlington County v. Cooper, 267 A (2d) 533	The court ruled that the Public Employment Relations Commission does not have the authority to hear and decide on fair labor practice charge.

TABLE XIII (Continued)

State	Year	Case Citation	Decision by the Court
New Jersey (Continued)	1970	Association of New Jersey State College Faculties v. Board of Higher Education, 270 A (2d) 744	The court held that the Governor, rather than the State Board of Higher Education, was the public employer authorized to bargain with association of college faculty members.
New York	1967	American Federation of Teachers at Buffalo v. Board of Education of City of Buffalo, 287 N.Y.S. (2d) 756	The court held that an election to determine which of two organizations should be exclusive representative of public school teachers was valid, although the election was held before effective date of statute.
	1968	City of New York v. DeLury, 295 N.Y.S. (2d) 901	The court upheld the constitutionality of the statutory prohibition against strikes by public employees.
	1969	Helsby v. Board of Education of City School District of Poughkeepsie, 304 N.Y.S. (2d) 236	The court ruled that the Public Employment Relations Board had no power or jurisdiction concerning summer school teachers' association.
North Dakota			
Oregon			
Pennsylvania			
Rhode Island	1967	Warren Education Association v. Lapan, 235 A (2d) 866	The court ruled that the word "may" is connotative of permissiveness.

TABLE XIII (Continued)

State	Year	Case Citation	Decision by the Court
South Dakota			
Vermont			
Washington	1965	American Federation of Teachers, Yakima Local 1485 v. Yakima School District, 447 P (2d) 593	The court upheld the constitutionality of the act providing for organizations of certificated employees.
Wisconsin	1967	City of Madison v. Wisconsin Employment Relations Board, 155 N.W. (2d) 78	The court ruled that the statute did not impose a duty on a school board to collectively bargain, as the ultimate responsibility for decision is solely that of the school board.
	1967	Muskego-Norway Consolidated School v. Wisconsin Employment Relations Board, 151 N.W. (2d) 617	The court held that teachers cannot be required to attend conventions of professional employee organizations under threat of loss of pay, but teachers who do not attend such conventions can be required to work for the school.

VITA

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