

# TEACHER BARGAINING IN INDIANA: THE COURTS AND THE BOARD ON THE ROAD LESS TRAVELED

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## INTRODUCTION

Indiana has twenty years of experience with collective bargaining for certificated educational employees.<sup>1</sup> From its inception, the Indiana Certificated Educational Employee Bargaining Act (the Act) represented an experiment combining mandatory bargaining with mandatory discussion of certain bargaining subjects.<sup>2</sup> The Indiana Education Employment Relations Board (the Board) and the state courts have taken a unique direction in public employee bargaining. In some respects, the rules in Indiana depart from prevailing public and private traditions. This Article will survey and summarize the decisions of the Indiana courts interpreting the Act. In particular, the Article will examine amendments following the Act's initial adoption; review the decisions of Indiana courts on bargaining unit determinations, elections, the Board's remedial powers, and the structure of bargaining subjects under the Act; and examine how the Board and the courts have handled the specific areas of school calendar, teacher evaluation, teacher dismissal, school committees, and fair share fees under the Act. The Article will also examine how the courts have reviewed arbitration awards interpreting teacher collective bargaining agreements. This Article is not a comprehensive summary of the decisions of the Board; instead it attempts to examine how the Board has fared in the courts. Finally, it suggests alternate approaches to certain kinds of cases arising under the Act. Labor relations involves a dynamic relationship, exerting forces of its own on any statutory framework. The Indiana legislature chose to limit the scope of mandatory bargaining and expand those issues subject to mandatory discussion. However, the dynamics of the labor relationship often force the parties, the courts and the Board to obscure these statutory boundaries. It might be simpler for all to live with a broader scope of mandatory bargaining on wages, hours, and conditions

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1. Indiana Certificated Educational Employee Bargaining Act, IND. CODE § 20-7.5-1-1 to -1-14 (1993) (often referred to as CEEBA), Ind. Public Law No. 217, approved Apr. 24, 1973 [hereinafter the Act]. The Act establishes the Indiana Education Employment Relations Board, often referred to as IEERB [hereinafter the Board].

2. See Symposium, *A Year of Teacher Bargaining in Indiana*, 50 IND. L.J. 284 (1975) for a review of the basic structure of the Act. See also Note, *Determining the Scope of Bargaining Under the Indiana Education Employment Relations Act*, 49 IND. L.J. 460 (1973).

of employment than to reconcile the conflicting demands of negotiation, discussion, and managerial discretion.

## I. THE POWER AND JURISDICTION OF THE BOARD

### A. A Brief History

Indiana authorized collective bargaining for teachers in 1973.<sup>3</sup> The Board has jurisdiction only over certificated school employees.<sup>4</sup> As is true in most states, public employees in Indiana do not have the right to strike.<sup>5</sup> Indiana has a turbulent history with respect to collective bargaining for other public employees. The legislature adopted collective bargaining for municipal employees in 1975 through Public Law 254.<sup>6</sup> Governor Bowen vetoed a separate bill intended to extend collective bargaining rights to police officers and firefighters.<sup>7</sup> In 1977, the Indiana Supreme Court declared unconstitutional Indiana's collective bargaining statute for public employees.<sup>8</sup> The state

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3. See Barbara Doering, *Bargaining and Discussion: Is it a Happy Marriage?*, 50 IND. L.J. 284, nn.1-3 (1975) for references on the turbulent debate concerning teacher bargaining and unsuccessful prior attempts to pass a bargaining law.

4. IND. CODE § 20-7.5-1-2(f) (1993) defines "certificated employee" as a person whose contract with the school corporation requires he hold a license or permit.

5. See Edward P. Archer, *Labor Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 413 (1981) for an account of an illegal teacher strike in the Indianapolis Public Schools. See also Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REF. 313 (1993) (suggesting that public employees should have the right to strike). As an indication of the climate for public employee bargaining, Indiana courts have gone so far as to authorize a civil cause of action by property owners against individual striking fire fighters for damage that resulted when those fire fighters failed to report to a fire. *Boyle v. City of Anderson*, 497 N.E.2d 1073 (Ind. Ct. App. 1986). However, an elementary student has no cause of action against teachers for damages allegedly sustained when they participated in an illegal strike. *Coons v. Kaiser*, 567 N.E.2d 851 (Ind. Ct. App. 1991). See Barbara J. Fick, *Labor and Employment Law, 1991 Survey of Recent Developments in Indiana Law*, 25 IND. L. REV. 1311 (1992) for a more complete discussion.

6. Pub. L. No. 254, 1975 Ind. Acts 1354, originally codified at IND. CODE §§ 22-6-4-1 to -4-3 (1977) (repealed 1982).

7. Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess. (1975), vetoed Apr. 17, 1975; for a discussion on this legislation and its veto, see Edward L. Suntrup, *Enabling Legislation for Collective Action by Public Employees and the Veto of Indiana House Bill 1053*, 9 IND. L. REV. 994 (1976).

8. *Indiana Educ. Employment Relations Bd. v. Benton Community Sch. Corp.*, 365 N.E.2d 752 (Ind. 1977). In *Benton*, the court held that the statute precluded judicial review of the Board's bargaining unit determination and certification of an exclusive bargaining representative. The court observed that this Indiana law differed from the National Labor Relations Act (NLRA). 29 U.S.C. §§ 151-169 (1988). Under the NLRA, an employer could contest a bargaining unit determination by refusing to bargain, and thereby forcing the union to file an unfair labor practice charge. In the absence of a severability clause, the court struck down the entire bargaining law. No substitute was ever enacted. A court subsequently held that a school employer may condition bargaining with non-teaching school employees on employees' agreement to use bargaining

legislature has repeatedly considered and failed to authorize bargaining for state employees, notably in each of the last four legislative sessions.<sup>9</sup> Governor Evan Bayh established a separate Indiana Public Employee Relations Board (PERB) for state employees by executive order.<sup>10</sup> The PERB supervises the election process and certifies exclusive representatives among state employees in anticipation that the legislature will eventually adopt collective bargaining.<sup>11</sup> Until mandatory collective bargaining is adopted, the state has engaged in voluntary collective bargaining with exclusive representatives of state employees and concluded several collective bargaining agreements under the executive order.<sup>12</sup> Thus, the Indiana Education Employment Relations Board administers a teacher bargaining law, but at present has no jurisdiction over other categories of public employees.

The Act creates three categories into which it divides the traditional subjects of collective bargaining. Specifically, it renders some subjects bargainable, some discussable, and some matters of school board discretion.<sup>13</sup> While the Act has been amended a number of times since its passage, all but two of those amendments

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representatives who were either employees of the school system or were lawyers. *Michigan City Area Schools v. Siddall*, 427 N.E.2d 464 (Ind. Ct. App. 1981). The court reasoned that Public Law 254 was declared unconstitutional, and no substitute had been passed; thus, the employer was not obligated to engage in collective bargaining even with the majority representative of non-certificated employees. Since all bargaining was voluntary, the employer could condition that bargaining upon the employees' agreement to a specific category of representative. The court held it was not a First Amendment violation to attach a condition precedent to non-mandatory bargaining. See Edward P. Archer, *Labor Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 225, 228 (1983) for a more complete discussion.

9. See 1993 Indiana House Bill No. 1135, 1993 Indiana House Bill No. 1306, 1993 Indiana House Bill No. 1467, 1993 Indiana House Bill No. 1678, 1993 Indiana Senate Bill No. 106, and 1993 Indiana Senate Bill No. 217 for examples of such attempts during the 1993 legislative session.

10. Exec. Order No. 90-6 Establishing Procedures for Recognition of Employee Organizations Representing Employees of the Executive Branch, 13 Ind. Reg. 10 (July 1, 1990). See also Mitzi H. Martin & Todd M. Nierman, *Survey of Recent Developments in Indiana Employment Law*, 24 IND. L. REV. 951, 967 (1991).

11. 13 Ind. Reg. 10, 1925-1930 (July 1, 1990).

12. Copies of the first set of such collective bargaining agreements are available from the author, and on file with the *Indiana Law Review*.

13. For a more complete discussion, see *infra* Part III and accompanying notes.

are essentially technical.<sup>14</sup> The most substantive one<sup>15</sup> expands those subjects to be discussed.<sup>16</sup> It appears to limit the exercise of management's right to take most ordinary personnel actions by requiring that those actions be effectuated through procedures established by bargaining or discussion with the teacher union. The Board has adopted a series of regulations governing its administration of the Act.<sup>17</sup>

### *B. The Scope of Judicial Review for Board Decisions*

In general, the courts have applied the usual standards for review of an administrative agency to the Board's decisions.<sup>18</sup> Under Indiana's Administrative Adjudication Act,<sup>19</sup> courts will uphold a Board decision supported by substantial, reliable and probative evidence. The Board is charged with making determinations of fact. The courts will not review a Board decision by weighing conflicting evidence which appears in the record. If there is any substantial evidence to support the Board's finding, the courts will not disturb it.<sup>20</sup>

14. See Pub. L. No. 1, § 5, 1974 Ind. Acts 3; Pub. L. No. 93, § 1, 1974 Ind. Acts 342 (permitting persons on the teaching staff of a university who are knowledgeable in public administration or labor law to be appointed members of the Board so long as they are not actively engaged other than as a member with any labor or employee organization); Pub. L. No. 6, § 30, 1978 Ind. Acts 664; Pub. L. No. 11, § 104, 1981 Ind. Acts 260; Pub. L. No. 16, § 13, 1984 Ind. Acts 235; Pub. L. No. 7, § 93, 1987 Ind. Acts 440; Pub. L. No. 2, § 565, 1988 Ind. Acts 234; Pub. L. No. 1, § 38, 1989 Ind. Acts 24 (directing that the subsection authorizing teaching staff of a university to be members of the board be construed liberally to effectuate the intent of the General Assembly); Pub. L. No. 3, § 118, 1989 Ind. Acts 179 (changing definition of supervisors excluded from the bargaining unit so as to omit the language "[s]upervisors shall include, but not be limited to," presumably thereby restricting the definition of supervisor to those job titles listed in the statute, specifically superintendents, assistant superintendents, business managers and supervisors, directors with school corporation-wide responsibilities, principals and vice principals, and department heads who have responsibility for evaluating teachers).

15. Public Law 105, Section 5, 1992 Ind. Acts 2621.

16. The amendment changes what was previously selection, assignment or promotion of personnel to "hiring, promotion, demotion, transfer, assignment, and retention of certificated employees and changes to any of the requirements set forth in I.C. 20-6.1-4." In addition, it amends Section 6 by limiting a school corporation's management's rights. Specifically, where employers previously were authorized to establish policy, the statute now provides that they may "establish policy through procedures established in sections 4 and 5 of this chapter." IND. CODE § 20-7.5-1-6(b)(2) (1993). Sections 4 and 5 define the scope of bargaining and discussion respectively. In addition, where employers previously were authorized to hire, promote, demote, transfer, assign and retain employees, they now may do so only "through procedures established in sections 4 and 5 of this chapter." IND. CODE § 20-7.5-1-6(b)(3) (1993).

17. See IND. ADMIN. CODE tit. 560, §§ 2-1-1 to -1-9 (1992).

18. See generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 434-522 (1993); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 623-713 (1991).

19. IND. CODE §§ 4-21.5-5-1 to -5-16 (1993).

20. *Indiana Educ. Employment Relations Bd. v. Board of Sch. Trustees of Baugo Community Sch.*, 377 N.E.2d 414 (Ind. App. 1978) (upholding a Board decision finding that a teacher was dismissed for union activities contrary to the Act). There has been some debate

However, the courts will intervene if the Board exceeds its statutory authority; if the Board's decision violates constitutional principles; if it is made on unlawful procedure; or if it is arbitrary, capricious or an abuse of discretion.<sup>21</sup>

The courts have held that the Board has jurisdiction over any dispute arising under the Act whether or not it ultimately finds that the employer or exclusive employee representative committed an unfair labor practice.<sup>22</sup> Consequently, the Indiana Supreme Court held that the Board had jurisdiction to hear an unfair labor practice complaint regarding a school board's failure to pay annual step increases and salary raises associated with improvements in the employees academic credentials.<sup>23</sup> The court applied a standard analogous to "capable of repetition yet evading review."<sup>24</sup>

One peculiarity is Indiana's limit on the Board's final order power. In a series of four decisions from 1976 to 1979, the Indiana Court of Appeals held that the Board has no power to issue final orders of reinstatement when a non-tenured teacher has been fired for union activities in violation of Section 7(a) of the Act.<sup>25</sup> In *Worthington I*, the court found the Board's decision to fire three teachers for their union activities was supported by substantial evidence. In *Worthington II*, where the trial court affirmed the Board's order reinstating the

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regarding the meaning of "any substantial evidence." See Gregory J. Utken, *Administrative Law, Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 20, 24-25 (1978); Harold Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 40-41 (1980); and Richard J. Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295, 311 (1980). These commentators argue that it represents a one-sided review and is distinct from "substantial evidence on the record as a whole."

21. *Baugo Community Sch.*, 377 N.E.2d at 416.

22. *E.g.*, *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007, 1010 (Ind. Ct. App. 1983).

23. *Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n*, 456 N.E.2d 709 (Ind. 1983) (holding that the statutory requirement that school employers maintain the status quo pending resolution of a bargaining dispute means that the employer must implement previously agreed to salary increases under the hold over contract pursuant to IND. CODE § 20-7.5-1-12(e)). See Edward P. Archer, *1984 Survey of Recent Developments in Indiana Law- Labor Law*, 18 IND. L. REV. 291, 297-98 (1985) for a more complete discussion. See also *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007 (Ind. Ct. App. 1983).

24. *Mill Creek*, 456 N.E.2d at 712 ("The law in Indiana is well settled that although a specific issue may be moot, the fact that it recurs year after year and is of great public interest is sufficient to allow the issue to be considered on its merits.").

25. *Indiana Educ. Employment Relations Bd. v. Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp.*, 355 N.E.2d 269 (Ind. App. 1976) (*Worthington I*); *Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 375 N.E.2d 281 (Ind. App. 1978) (*Worthington II*); *Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 380 N.E.2d 93 (Ind. App. 1978) (*Worthington III*); *State ex rel. Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp. v. Knox Cir. Ct.*, 390 N.E.2d 232 (Ind. App. 1979) (*Worthington IV*). See Richard U. Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295 (1980) for a more complete discussion.

teachers, the Court of Appeals held that the Board itself had no authority to order reinstatement of teachers but that the trial court, using its inherent equitable powers, could fashion a remedy to cure whatever injustice had taken place. In *Worthington III*, the Court of Appeals determined that the Act grants no power to the Board to issue final orders of reinstatement for certified school employees with or without back pay, calling into question whether the Board has any final order power to remedy an unfair labor practice.<sup>26</sup> In *Worthington IV*, the School Board sought to require the trial court to hold a hearing on the question of reinstatement, so that it could prove the employees would have been fired notwithstanding their union activities. The Indiana Court of Appeals rejected the claim and limited any further hearing to the amount of back pay that might be due in addition to reinstatement.<sup>27</sup> Although the Board continues to issue orders to remedy unfair labor practice charges, the *Worthington* cases suggest that the Board has power only to issue interlocutory or temporary orders, but not the power to issue final orders of reinstatement.<sup>28</sup>

## II. BARGAINING UNITS AND ELECTIONS

The Act mandates bargaining between school employers and school employees. A school employee is defined as:

[A]ny full-time certificated person in the employment of the school employer. A school employee shall be considered full-time even though the employee does not work during school vacation periods, and accordingly works less than a full year. There shall be excluded from the meaning of school employee supervisors, confidential employees, employees performing security work and non-certificated employees.<sup>29</sup>

Supervisors, who are not considered employees under the Act, are defined in essentially the same fashion as provided in the National Labor Relations Act<sup>30</sup> as those with authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline school employees" or, "direct" them and "adjust their grievances," or "effectively recommend" either of these actions.<sup>31</sup> Courts have construed this term to exclude school employees who serve as athletic director, head football coach, and head basketball coach.<sup>32</sup> One court

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26. *Worthington III*, 380 N.E.2d at 95.

27. *Worthington IV*, 390 N.E.2d at 233-34. See Archer, *supra* note 5, at 421 for a more detailed discussion criticizing this result on the basis that it will lead to inconsistency in enforcement.

28. Commentators have criticized this result as inconsistent with the purpose of the Act, and anomalous in view of other labor laws. See Darko, *supra* note 25, at 307-11.

29. IND. CODE § 20-7.5-1-2(e) (1993).

30. 29 U.S.C. §§ 151-169 (1988).

31. IND. CODE § 20-7.5-1-2(h) (1993).

32. See, e.g., Lawrence Township Educ. Ass'n v. Indiana Educ. Employment Relations

required that the supervisory employee exercise authority over certificated school employees.<sup>33</sup> The problem with the court's rule is that it leads to somewhat unpredictable results: whether an employee falls within the bargaining unit may change from one year to the next, depending on precisely whom the school board hires to fill coaching positions.<sup>34</sup>

The better rule would be to examine whether the state or the school corporation requires those supervised to hold a teaching certificate. In *Maconaquah School Corp.*,<sup>35</sup> the school board refused to bargain for compensation for a summer pool director although he was licensed to teach and served as the head swimming coach and physical education teacher at the middle school. The court held that if the state or the local school corporation requires a certificate for a particular position, that position falls within the bargaining unit and the school board must bargain compensation.<sup>36</sup> Since the position of summer pool director did not require a license or permit, the court excluded it from the bargaining unit and reversed the decision of the Board.<sup>37</sup>

This rule would produce consistent and predictable results. It would not distort the language of the statute which defines a supervisor as one who acts in that capacity vis a vis "school employees."<sup>38</sup> This incorporates the definition of school employee as "any full time certificated person."<sup>39</sup> A "certificated employee" is defined as a person whose "contract with the school corporation requires that he hold a license or permit from the state board of education."<sup>40</sup> The Indiana Supreme Court had an opportunity to consider this issue, but declined to do so.<sup>41</sup>

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Bd., 536 N.E.2d 563 (Ind. Ct. App. 1989) (holding that the person occupying each of these positions may make effective recommendations concerning hiring, discharge, assignment, transfer and promotion of other coaches).

33. *Id.* at 564.

34. For another case excluding from the teacher bargaining unit as supervisors the head football coach, head basketball coach, and associate athletic director, see *Board of Sch. Trustees of Marion Community Sch. v. Marion Teachers Ass'n*, 530 N.E.2d 309 (Ind. Ct. App. 1988). The court acknowledged the Board's power to hear a bargaining unit clarification petition during the term of an existing contract. The court holds that the inclusion of supervisors within a teacher bargaining unit is an illegal subject of bargaining under the Act. *Id.* at 310-11.

35. *Board of Sch. of Trustees Maconaquah Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 497 N.E.2d 1084 (Ind. Ct. App. 1986).

36. *Id.* at 1087.

37. *Id.*

38. IND. CODE § 20-7.5-1-2(h) (1993).

39. IND. CODE § 20-7.5-1-2(e) (1993).

40. IND. CODE § 20-7.5-1-2(f) (1993) (emphasis added).

41. See *Board of Sch. Trustees of Sch. Town of Speedway v. Indiana Educ. Employment Relations Bd.*, 510 N.E.2d 162 (Ind. 1987) (Chief Justice Shepard, dissenting from denial of transfer); and *Board of Sch. Trustees of the Sch. Town of Speedway v. Indiana Educ. Employment Relations Bd.*, 498 N.E.2d 1006, 1007 (Ind. Ct. App. 1986) (holding that the positions of football statistician, guidance coordinator, and computer coordinator were excluded by a contract providing that the unit include personnel who have "no administrative or supervisory responsibili-

A 1989 statutory amendment presumably answered the narrow question of whether a head coach is excluded from the bargaining unit.<sup>42</sup> The amendment altered the definition of supervisors by deleting the language “[s]upervisors shall include, but not be limited to” and replacing it with “[t]he term includes.” The statute lists the specific job titles excluded as superintendents, assistant superintendents, business managers and supervisors, directors with school corporation-wide responsibilities, principals and vice principals, and department heads who have responsibility for evaluating teachers.<sup>43</sup> If courts apply the latin maxim of statutory construction *expressio unius exclusio alterius est*, they will include head football and basketball coaches in teacher bargaining units, while excluding the school-wide athletic director. However, the amendment does not address the problematic question of how to determine supervision.

The courts have upheld the Board's broad reading of the term “school employer” in the Act. A special services unit qualified although it provided special education services to six school corporations and two state hospitals.<sup>44</sup> In addition, a joint Indiana-Ohio school district formed to operate an elementary school at the border qualified as a school employer.<sup>45</sup> Similarly, the courts have held that the term “school employee organization” includes one local union that represents bargaining units from three different school corporations.<sup>46</sup>

The courts have deferred to the Board in its expertise as an administrative agency charged with conducting representation elections. In one case, the court refused to review a Board order directing a third runoff election between rival Association and Federation contenders.<sup>47</sup> The courts have reversed the Board where it attempted to direct an election without regard to an election contract that predated the Act.<sup>48</sup>

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ties,” and holding that school board had no obligation to file petition for unit determination as to these three positions).

42. Pub. L. No. 3, § 118, 1989 Ind. Acts 180.

43. IND. CODE § 20-7.5-1-2(h) (1993).

44. *Madison Area Educ. Special Serv. Unit v. Indiana Educ. Employment Relations Bd.*, 483 N.E.2d 1083 (Ind. Ct. App. 1985).

45. *Union County Sch. Corp. Bd. of Sch. Trustees v. Indiana Educ. Employment Relations Bd.*, 471 N.E.2d 1191 (Ind. Ct. App. 1984).

46. *Northwest Ind. Educ. Ass'n v. School City of Hobart*, 503 N.E.2d 920 (Ind. Ct. App. 1987) (the question of whether a multi-employer bargaining unit would be certified under the Act was not at issue).

47. *Scott County Fed'n of Teachers v. Scott County Sch. Dist.*, 496 N.E.2d 610 (Ind. Ct. App. 1986) (holding that an order directing a third election was not a final order for purposes of the State Administrative Adjudication Act and that a departure from exhaustion requirement was not warranted in the absence of irreparable harm). In *Scott*, the court was called on to resolve a conflict between a Board regulation providing for a runoff election between the two highest vote getters and a statutory requirement that the election ballot must include the choice “No Representative.” In two previous runoff elections among three choices (Association, Federation, and No Representative), no option received a majority of the votes. In the order contested here, the Board deleted the option “No Representative” from the ballot for the third runoff election.

48. *South Bend Fed'n of Teachers v. National Educ. Ass'n—South Bend*, 389 N.E.2d 23

The Board's regulations permit it to determine the appropriate bargaining unit in the absence of an agreement between the parties.<sup>49</sup> A majority of all the employees in the appropriate unit must vote in favor of representation; no school organization will be certified merely as the result of a majority vote of those present and voting.<sup>50</sup>

### III. THE SCOPE OF BARGAINING UNDER THE ACT

Indiana has a unique approach to the scope of teacher bargaining. Ordinarily, an employer and employee union will bargain over mandatory subjects of bargaining, characterized in the private sector as "rates of pay, wages, hours of employment, or other conditions of employment."<sup>51</sup> A mandatory subject of bargaining is one over which the employer must bargain or risk liability in an unfair labor practice proceeding.<sup>52</sup> Any agreement on a mandatory subject of bargaining may be reduced to contract language, and the subsequent contract will be enforceable. Permissive subjects of bargaining are those subjects over which an employer may choose to bargain but has no statutory obligation to do so.<sup>53</sup> An employer may refuse to even discuss a non-mandatory or permissive subject of bargaining and its refusal will not result in unfair labor practice liability. However, if the employer agrees to discuss a permissive subject and reaches agreement on a contract provision regarding that subject, the contract will be fully enforceable and a proper subject for grievance arbitration.<sup>54</sup> The final category is the illegal

(Ind. App. 1979) (holding that a Board order unconstitutionally impaired the contractual rights of the exclusive bargaining representative under an election agreement dating back to 1972). In *South Bend*, the court also held that a Board hearing examiner report may have res judicata effect, and may collaterally estop a future case on the same issue before the Board. The court did not require the NEA-South Bend to exhaust administrative remedies before the Board because the Association might suffer irreparable harm. See Harold Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 75 (1981) for a more complete discussion.

49. IND. CODE § 20-7.5-1-10(a)(2) (1993). This section also provides that the Board shall consider, but not be limited to considering "(i) efficient administration of school operations; (ii) the existence of a community of interest among school employees; (iii) the effects on the school corporation and school employees of fragmentation of units; and (iv) recommendations of the parties involved." A teacher bargaining unit that is less than a wall-to-wall school corporation unit is virtually unheard of. Thus, the statutory criteria appear to be superfluous. They have more application to a general public employee bargaining statute.

50. For the Board's regulations on election proceedings see IND. ADMIN. CODE tit. 560, § 2-1-1 to -6-9 (1992). The procedure is substantially the same as that provided in the NLRA and other public employee bargaining laws. H.T. EDWARDS ET AL., *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 160-253 (3d ed. 1985).

51. National Labor Relations Act, 29 U.S.C.A. § 159 (1988).

52. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1684-87 (1984) [hereinafter *Harvard Note*].

53. See generally 1 THE DEVELOPING LABOR LAW 851-954 (Patrick Hardin et al. eds., 3d ed. 1992).

54. *Harvard Note*, supra note 52, at 1685.

subject of bargaining. Either for reasons of public policy or based upon other law, certain subjects are removed entirely from the scope of allowable bargaining. If the parties agree to a contract provision incorporating an illegal subject of bargaining, a reviewing court may declare that provision void and unenforceable.<sup>55</sup>

Indiana does not follow this traditional pattern. Instead, it has established three categories: mandatory subjects of bargaining, mandatory subjects of discussion, and illegal subjects of bargaining. There is no purely permissive category of bargaining subjects. In general terms, section 4 of the Act specifies that "salary, wages, hours, and salary and wage-related fringe benefits" are mandatory subjects of bargaining.<sup>56</sup> The term "bargain collectively" is defined as "the performance of the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to negotiate in good faith with respect to items enumerated in section 4 of this chapter and to execute a written contract incorporating any agreement relating to such matters."<sup>57</sup> The duty to bargain does not require that either party agree to a proposal or make a concession. Moreover, it does not require that the parties ratify a contract, but contracts are binding only if properly ratified.<sup>58</sup>

Section 5 defines subjects of discussion as "[w]orking conditions, other than those provided in section 4 . . . [c]urriculum development and revision, [t]extbook selection, [t]eaching methods, [h]iring, promotion, demotion, transfer, assignment, and retention of certificated employees, and changes to any of the requirements set forth in I.C. 20-6.1-4, [s]tudent discipline, [e]xpulsion or supervision of students, [p]upil-teacher ratio, [c]lass size or budget appropriations."<sup>59</sup>

Section 6(b) describes the areas of management prerogative which are not bargainable:

School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to:

- (1) direct the work of its employees;
- (2) establish policy through procedures established in sections 4 and 5 of this chapter;

55. *Id.*

56. IND. CODE § 20-7.5-1-4 (1993).

57. IND. CODE § 20-7.5-1-2(n) (1993).

58. *Id.*

59. IND. CODE § 20-7.5-1-5(a) (1993) as amended by Ind. Pub. L. 105-1992 (effective July 1, 1992). Prior to this amendment, exclusive representatives could discuss "selection, assignment, or promotion of personnel" instead of "hiring, promotion, demotion, transfer, assignment, and retention of certificated employees."

- (3) hire, promote, demote, transfer, assign, and retain employees through procedures established in sections 4 and 5 of this chapter;
- (4) suspend or discharge its employees in accordance with applicable law through procedures established in sections 4 and 5 of this chapter;
- (5) maintain the efficiency of school operations;
- (6) relieve its employees from duties because of lack of work or other legitimate reason through procedures established in sections 4 and 5 of this chapter; and
- (7) take actions necessary to carry out the mission of the public schools as provided by law.<sup>60</sup>

While the substance of certain decisions is reserved to management, the procedures through which management effectuates the decisions are subject to either negotiation or discussion.

#### A. *The Grandfather Clause*

The line between subjects of bargaining and subjects of discussion is blurred by a provision in section 5 which grandfathers certain agreements between teachers and school corporations predating the Act: “[A]ny items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable.”<sup>61</sup> The courts have had an opportunity to consider the argument that this grandfather clause applies only to those topics of bargaining listed in section 5 as mandatory subjects of discussion.<sup>62</sup> In *Northwestern School Corp.*, the employer argued that the school calendar was not a mandatory subject of bargaining because it was a matter committed to school corporation discretion under section 6 of the Act.<sup>63</sup> It argued that the court should apply the *ejusdem generis* doctrine.<sup>64</sup> The court refused, and instead decided that the grandfather clause could apply to “any items,”<sup>65</sup> in accordance with the plain, ordinary meaning of the term.

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60. IND. CODE § 20-7.5-1-6(b) (1993).

61. IND. CODE § 20-7.5-1-5(a) (1993).

62. *Northwestern Sch. Corp. of Henry County Bd. of Sch. Trustees v. Indiana Educ. Employment Relations Bd.*, 529 N.E.2d 847 (Ind. Ct. App. 1988), *trans. denied*, Jan. 9, 1989.

63. *Id.* at 852; *See Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007 (Ind. Ct. App. 1983) (holding that the school calendar is a matter of educational policy and is a non-negotiable, managerial decision).

64. Using this canon of statutory construction, a general term at the end of a more specific statutory list is construed to refer to only things of like kind or category in the specific list.

65. *Northwestern*, 529 N.E.2d at 851. However, citing *Eastbrook*, the court also determined that certain calendar items would not be negotiable in deference to the fact that “the calendar’s effect on students and other public interests outweighed the private interests of

Moreover, the court determined that for purposes of the grandfather clause, the word "agreement" did not necessarily mean a formal written contract. Instead, the court again used the plain language rule of statutory construction to hold that an agreement does not have to be in writing.<sup>66</sup> An exclusive representative need only prove a meeting of the minds of two parties and mutual intent regarding their respective rights and duties. The court held that under the law of contracts, the trier of fact must determine from all the circumstances whether an agreement came into being.<sup>67</sup>

This decision casts a considerable cloud over the geography of bargaining in Indiana. The question that it leaves open is whether an illegal subject of bargaining may become a mandatory subject of bargaining under the grandfather clause. For example, in *Eastbrook*, the court appeared to hold that the school calendar was an illegal subject of bargaining; it concluded that the school calendar falls exclusively within a school corporation's managerial prerogative under section 6(b), a prerogative that the school corporation may not bargain away under section 1(d)(iii) of the Act.<sup>68</sup> As the law now stands, the grandfather clause is not limited to subjects of discussion. Instead, it may grandfather bargaining subjects that would otherwise be entirely committed to school corporation discretion under section 6.<sup>69</sup> The Indiana Supreme Court has not given the lower courts any guidance in this area.

This reading essentially negates a portion of the language of section 3 of the Act: "No contract may include provisions in conflict with (a) any right or benefit established by federal or state law, . . . or (c) school employer rights as defined in section 6(b) of this chapter."<sup>70</sup> In addition, it ignores the declaration of legislative intent providing that "the Indiana General Assembly has delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of school corporations, composed of citizens elected or appointed under applicable law, a delegation which these bodies may not and should not bargain away."<sup>71</sup> One of the classic rules of statutory construction is that the court should read all the provisions of an act together and not read one so as to render meaningless or ineffective another.<sup>72</sup> Had the legislature intended the grandfather clause to apply to all subjects of bargaining, regardless

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teachers." *Id.* at 852.

66. *Id.* at 851.

67. *Id.*

68. *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007, 1012 (Ind. Ct. App. 1983).

69. *Cf. Board of School Trustees of the Gary Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 543 N.E.2d 662, 668 (Ind. Ct. App. 1989) (observing that grandfather clause applies only to those items which do not infringe on exclusive managerial prerogative of school board).

70. IND. CODE § 20-7.5-1-3 (1993).

71. IND. CODE § 20-7.5-1-1(d)(iii) (1993).

72. *E.g., Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981).

of whether they are discussable or matters of management prerogative, the logical place in the statute to put the grandfather clause would have been in section 3, not section 5 of the Act.

### B. Contracts that Create a Deficit

Another restriction on the scope of bargaining is Indiana's provision invalidating contracts that create a deficit.<sup>73</sup> The Act defines "deficit financing" as "expenditures in excess of money legally available to the employer."<sup>74</sup> One court had an opportunity to interpret this section and held that to carry its burden of proof, a school corporation had to demonstrate precisely where it implemented budget cuts.<sup>75</sup> A bald statement that the school corporation made all feasible budget cuts was inadequate. Teacher salaries are part of the general fund, which includes such items as equipment, maintenance, and extra-curricular activities. The school corporation had the burden of proving that the teachers' contracts themselves were the expense within the general fund which created the deficit.<sup>76</sup> The court rejected the exclusive representative's contention that the statute may not impair previously existing legal contracts after rights have vested, reasoning that the parties do not have an inviolable right to enter a multi-year contract, just as they have no right to enter into an illegal contract.<sup>77</sup>

Essentially, the Court of Appeals set up a procedure that is analogous to the private sector treatment of an employer's bankruptcy. Under the National Labor Relations Act, an employer may seek relief from collective bargaining agreements in bankruptcy if it proves that it is financially unable to bear the expense and the union refuses to modify the contract.<sup>78</sup> In other states, a school

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73. IND. CODE § 20-7.5-1-3 (1993), providing "[i]t shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent."

74. IND. CODE § 20-7.5-1-2(q) (1993).

75. *South Bend Community Sch. Corp. v. National Educ. Ass'n - South Bend*, 444 N.E.2d 348 (Ind. Ct. App. 1983) (citing with approval *Philadelphia Fed'n of Teachers v. Thomas*, 436 A.2d 1228 (Pa. Commw. Ct. 1981) (holding that Pennsylvania's statute requires school boards to operate with a balanced budget, and, therefore, a collective bargaining agreement that purported to have a two year term but caused a deficit in the second year represented a severable contract with each year subject to a condition precedent, that is, that the funding of the contract by independent legislative bodies, over which neither party had any actual control, would be forthcoming). See Edward P. Archer, *Labor Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 245, 252-53 (1984).

76. *South Bend*, 444 N.E.2d at 352.

77. *Id.* at 353.

78. *In re American Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984) (holding that the employer or debtor-in-possession must make specific proposals to modify the contract; must meet with the union at reasonable times to bargain in good faith; the union must have refused to accept the proposals without good cause; and the balance of the equities must clearly favor rejection of

district that enters into a collective bargaining agreement that covers more than one fiscal year assumes the obligation of seeking the funding to implement the contract. If there is a budget shortfall, the school employer must make up the missing funds through teacher layoffs, support staff layoffs, elimination of non-mandatory educational programs such as extra-curricular activities, or similar budget cuts.<sup>79</sup> On occasion, a school board will take the extreme step of closing school before the statutory minimum number of student school days, thereby forcing the state to take the school board to court.<sup>80</sup> A court order reopening school then justifies a new budget referendum. *South Bend* is the only significant decision interpreting this provision of the Act.<sup>81</sup>

### C. Contract Provisions in Conflict with State or Federal Law

Section 3 of the Act creates a final category of contract clause that may be voidable. It provides that "[n]o contract may include provisions in conflict with (a) any right or benefit established by federal or state law."<sup>82</sup> An early Indiana case, *Weest v. Board of School Commissioners of the City of Indianapolis*,<sup>83</sup> concerns a contract provision negotiated before the effective date of the Act. However, the court cites the Act in dicta and examines whether the contract provision in question actually conflicts with the Indiana General School Powers Act.<sup>84</sup> An individual teacher argued that her contribution of one of her statutorily guaranteed sick leave days to a sick leave bank for other teachers was contrary to state law. The bank would extend sick leave to teachers who had exhausted their own accumulation. The court rejected this argument and reconciled the sick bank provision with the statute. The court found no actual conflict because the Association would pay teachers who need one additional day after they have exhausted all their sick leave after the sick leave bank was empty.<sup>85</sup>

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the collective bargaining agreement). See generally 2 THE DEVELOPING LABOR LAW 1756-71 (Patrick Hardin et al. eds., 3d ed. 1992).

79. See generally Annotation, *Right to Dismiss Public School Teacher on Ground That Services Are No Longer Needed*, 100 A.L.R.2d 1141 (1989).

80. E.g., *Butt v. State*, 842 P.2d 1240 (Cal. 1992).

81. In *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 450 N.E.2d 1006 (Ind. Ct. App. 1983), the court deleted from its decision any reference to the question of deficit financing. The court had in dicta observed that it could not compel the school board to bargain with the Association for the purpose of reaching an agreement that might place the employer in a position of deficit financing.

82. IND. CODE § 20-7.5-1-3 (1993).

83. 320 N.E.2d 748 (Ind. App. 1974).

84. IND. CODE § 20-5-1 to -5-6 (1993).

85. *But see Gary Teachers Union v. School City of Gary*, 332 N.E.2d 256 (Ind. App. 1975) (collective bargaining may not reduce statutory minimum period for achieving tenure) and commentary criticizing this decision in Edward P. Archer, *Labor Law, Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 257, 265 (1976). One may reconcile the *Gary* and *Weest* decisions. The courts will accommodate bargaining to existing statutes whether these protect

Similarly, in school calendar cases, the courts have attempted to reconcile statutory provisions with collective bargaining.<sup>86</sup> A statute on a subject which is also bargainable or discussable does not automatically preclude bargaining or discussion. Instead, the parties' final contract is voidable if it reduces a minimum guaranteed statutory benefit or is contrary to some obligation or authority committed to school corporation discretion.

#### *D. The Scope of Bargaining and Impasse Procedures*

The last general issue on the scope of bargaining that courts have considered is procedural: how do the parties resolve a dispute over whether an item is mandatory in the context of dispute resolution procedures such as mediation and fact finding? In *Blackford County School v. Indiana Education Employment Relations Board*,<sup>87</sup> the court held that a party could insist on a non-mandatory subject of bargaining to fact finding. A party may present evidence to the fact finder regarding a disputed subject of bargaining for a determination of whether the issue is mandatory or discussable under the Act.<sup>88</sup> If the fact finder rules on a non-mandatory or discussable subject, a court may overturn the fact finder's award.<sup>89</sup> In addition, the school corporation may file an unfair labor practice against the exclusive representative after the fact finding. The court and the Board appear to rely on the consensual nature of fact finding and mediation to protect a school corporation's prerogatives under the Act. As a practical matter, a fact finder's report is not binding if rejected in a timely fashion.<sup>90</sup> Thus, the school employer is at little risk from an award on a discussable subject. The

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teachers or other interest groups, such as school boards or the public. The tenure law balances competing interests, and protects teachers as well as school districts and the public. Allowing parties to bargain over the tenure period would deprive the public of the benefit of observing a teacher's performance over an extended period of time.

86. See *infra* notes 108-32 and accompanying text.

87. *Blackford County Sch. v. Indiana Educ. Employment Relations Bd.*, 519 N.E.2d 169 (Ind. Ct. App. 1988).

88. *Id.* at 174.

89. *Cf. North Miami Community Corp. v. North Miami Educ. Ass'n*, 500 N.E.2d 1288 (1986) (unpublished decision holding parties may agree to binding fact finding over discussable subjects).

90. In *Blackford*, the employer argued that it incurred significant costs presenting evidence on such items. This is not irreparable harm. However, the remedy available at the Board after a fact finder's report has been issued does not seem adequate to prevent the recurrence of the conduct. Typically, the Board could order that party to cease and desist from the unfair labor practice. It is an open question whether the Board may order a party to pay money damages. Moreover, even if the Board were to order money damages, it is not clear this would provide an adequate deterrent. Lastly, the Board's regulations provide that a party may obtain review of a fact finding report only by filing a request within two days after receipt of the report. The request may be oral or in writing and must state the nature of the objection. The Board may nevertheless refuse to review the fact finder's report or make additional findings and recommendations. The Board is obligated to act within ten days of receipt of the fact finder's report. IND. ADMIN. CODE tit. 560, § 2-4-6 (1992).

general practice at the bargaining table appears to be open scope bargaining under a reservation of the right to exclude the subject at a later time.<sup>91</sup>

However, this practical approach seems to conflict with the language of the Act. The Act provides: "A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate, or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters . . . ."<sup>92</sup> In *Blackford*, the school corporation argued that presenting evidence to a fact finder regarding a disputed subject of bargaining violated this provision of the Act. The court disagreed and ruled that, while the fact finder may not render an award on a prohibited subject, she had the power and jurisdiction to hear evidence on a prohibited subject under the liberal rules of evidence for informal administrative proceedings.<sup>93</sup>

The court tacitly approves of delegating to fact finders the duty to determine the scope of bargaining. The Board has directed fact finders to accept documents, hear arguments, and consider briefs concerning whether or not the fact finder has jurisdiction on the items on dispute. The Board will direct the fact finder to make an initial determination on whether subjects of bargaining which would otherwise be discussable are grandfathered as bargainable under the Act's grandfather clause. However, the Act uses unusual language in excluding discussable items from impasse procedures. The employer "shall not be required to bargain collectively . . . or be subject to or enter into impasse procedures"<sup>94</sup> on the subjects. The plain language of the Act appears to bar *any* consideration by the fact finder of a non-mandatory or discussable subject. In *Blackford*, the Board did offer the parties a bifurcated hearing before the fact finder, first on discussable subjects, then on the merits.<sup>95</sup> The parties rejected it. Another alternative would be an expedited hearing before a different Board agent on the scope of bargaining. The Board has rejected this alternative. However, if Indiana adopts binding interest arbitration, this issue may warrant reexamination. In other states, courts have enjoined impasse resolution procedures over non-mandatory subjects of bargaining.<sup>96</sup> In the private sector, the NLRB has held

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91. This assertion is based on anecdotal evidence gathered in discussions with representatives of the Board and experienced mediators on the Board's ad hoc panel of mediators and fact finders.

92. IND. CODE § 20-7.5-1-5(a) (1993).

93. *Blackford County Sch. v. Indiana Educ. Employment Relations Bd.*, 519 N.E.2d 169, 174 (Ind. Ct. App. 1988).

94. IND. CODE § 20-7.5-1-5(a) (1993).

95. Telephone Interview with Donald Russell, Executive Director, IEERB (Mar. 1994).

96. *E.g.*, *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 72 CCH Lab. Cases p. 53119 (N.J. Super. 1973), and *see generally* James D. Lawlor, Annotation, *Validity and Construction of Statutes or Ordinances Providing for Arbitration of Labor Disputes Involving Public Employees*, 68 A.L.R.3d 885 (1976).

that it is an unfair labor practice to insist to impasse upon a nonmandatory subject.<sup>97</sup>

#### IV. SCHOOL CALENDAR

In Indiana teacher bargaining, the most litigated bargaining subject is the school calendar.<sup>98</sup> The Act's language creates the problem by providing in Section 4 that teacher hours are a mandatory subject of bargaining, while Section 5 makes working conditions other than those listed in Section 4 mandatory subjects of discussion but does not specifically refer to the student school day or the student or teacher school year. In addition, Section 6 gives school employers the responsibility and authority to manage the schools to the full extent authorized by law but does not refer to the student school year, student school day, or school calendar. Instead, it gives the school employers the right to "establish policy,"<sup>99</sup> and to "take actions necessary to carry out the mission of the public schools as provided by law"<sup>100</sup> through "procedures established in sections 4 and 5 of this chapter."<sup>101</sup>

Thus, in the early days of the Act, teachers contended that the school calendar and school year represented teacher hours and were mandatory subjects of bargaining. On the other hand, school corporations contended that they were matters of school or educational policy and not bargainable. They also cited the intention of the Indiana General Assembly<sup>102</sup> and section 3 of the Act which provided that "[n]o contract may include provisions in conflict with (a) any right or benefit established by federal or state law."<sup>103</sup> As is the case with most states, Indiana statutorily defines the minimum mandatory school term as nine months.<sup>104</sup> The student instructional day is defined as a minimum of five hours of instructional time in grades one through six and six hours of instructional time in grades seven through twelve.<sup>105</sup> In addition, the school corporation must conduct at least 180 student instructional days.<sup>106</sup> Indiana also requires that the

97. *E.g.*, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) and *see generally* HARDIN, *supra* note 53, at 604-07.

98. Indiana is not alone in this. *See* Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242, 306-09 (1978).

99. IND. CODE §§ 20-7.5-1-6(b)(2) & -6(b)(7) (1993).

100. IND. CODE § 20-7.5-1-6(b)(7) (1993).

101. IND. CODE § 20-7.5-1-6(b)(2), (3), (4), (6) (1993).

102. The preamble to the Act provides that the legislature "delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of the school corporations, composed of citizens elected or appointed under applicable law, and a delegation which these bodies may not and should not bargain away." IND. CODE § 20-7.5-1-1(d)(iii) (1993).

103. IND. CODE § 20-7.5-1-3 (1993).

104. IND. CODE § 20-10.1-2-2 (1993).

105. IND. CODE § 20-10.1-2-1(b) (1993).

106. IND. CODE § 20-10.1-2-1(c) (1993). If the school corporation fails to conduct the

school corporation include the school term in each individual teacher contract.<sup>107</sup>

None of these provisions dictates the precise date upon which school must start or end. Moreover, before the Act's passage there was broad variation in practice across the state on whether the school corporation and teacher exclusive representative discussed or bargained school calendar. Predictably, the tangle of statutes and the grandfather clause gave rise to a series of disputes when teachers sought to bargain both pay and work schedules in response to school closings in weather emergencies. The earliest reported case involved the Monroe County Community School Corporation.<sup>108</sup> It arose when the corporation unilaterally delayed the starting date of school after negotiating the collective bargaining agreement and then prorated teachers' salaries based upon the reduced number of work days in the calendar year. Teachers brought suit to recover the lost pay and prevailed. The school board counterclaimed for alleged overpayments from previous school years where teachers had worked more than 180 school days and been paid accordingly. The court denied the counterclaim. It did not address the unfair labor practice question arising out of the unilateral change in the calendar.

That issue was squarely presented in *Eastbrook Community Schools Corp. v. Indiana Education Employment Relations Board*.<sup>109</sup> In *Eastbrook*, the Board had concluded that the school corporation committed an unfair labor practice when it refused to bargain over the school calendar. The school corporation's provision ensuring that teachers would not be required to work in excess of 177 days was inconsistent with the individual teacher contracts wherein teachers agreed to teach for 180 days within the 1978-79 school year. The Association demanded to bargain and the Board held that the number of teacher days, make up days, and the pay for such days are all mandatory bargainable items under Section 4 of the Act.<sup>110</sup>

On appeal, the court held that the provision's language did not change the total number of teacher hours or work days. It also held the school corporation had no duty to bargain over the scheduling of days because the subject falls

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requisite number of student instructional days, it will lose its state funding by a proportional amount. IND. CODE § 20-10.1-2-1(d) (1993).

107. IND. CODE § 20-6.1-4-3 (1993). The contract must contain the "(A) the beginning date of the school term as determined annually by the school corporation; (B) the number of days in the school term as determined annually by the school corporation; (C) the total salary to be paid during the school year; and (D) the number of salary payments to be made during the school year."

108. *Monroe County Community Sch. Corp. v. Frohlinger*, 434 N.E.2d 93 (Ind. Ct. App. 1982).

109. 446 N.E.2d 1007 (Ind. Ct. App. 1983). See Janet L. Land, *Teacher Collective Bargaining*, 19 IND. L. REV. 235 (1986), and Archer, *supra* note 75, at 251-52 for additional discussion.

110. *Eastbrook*, 446 N.E.2d at 1007.

exclusively within a school corporation's managerial prerogative under Section 6(b)<sup>111</sup> and Section 1(d)(iii)<sup>112</sup> prohibits the school corporation from bargaining this away. The court construed the statute prescribing contents of an individual teacher contract as granting to a school board the discretion and authority to determine the beginning date of the school term and, for those days beyond the statutory minimum, to determine the number of days in the school term. The minimum number of school days was neither discussable nor negotiable.<sup>113</sup> The court implied the power to determine the ending date of school from the school corporation's exclusive authority to decide both the actual number of days and the starting date of school. Although the court concluded that the disputed clause did not have a direct and substantial impact upon "salary, wages, hours and salary and wage related benefits," it acknowledged that it did have an impact on "working conditions" and, thus, would be subject to mandatory discussion.<sup>114</sup>

The court considered an employer's duty to discuss the school calendar in *Union County School Corporation Board of School Trustees v. Indiana Education Employment Relations Board*.<sup>115</sup> The school corporation had a practice of paying teachers extra compensation and issuing supplemental contracts for make up days. In 1976-77, the school corporation closed school for eighteen days due to inclement weather and paid teachers for each of these days plus three make up days. During the 1977-78 school year, it closed school for nineteen days, required teachers to make up seven of these days, but paid them no extra compensation. The Association did not then demand either to bargain the change in past practice or to discuss it. Moreover, the court never directly addressed the issue of whether this failure to demand bargaining or discussion represented a waiver.

In December of the 1978-79 school year, the school board adopted a policy that one elementary school would remain open as long as Ohio school buses were running. This meant that teachers at this school (operated jointly with an Ohio school corporation) worked six days during which the rest of the Union County Schools were closed. The Association filed an unfair labor practice complaint alleging that the school corporation unilaterally changed pay procedures for make up days. The Board held that the school corporation had failed to bargain or discuss the scheduling of make up days and its school closing plan. The Board ordered it to cease and desist and to pay teachers supplemental wages.<sup>116</sup>

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111. IND. CODE § 20-7.5-1-6(b) (1993).

112. IND. CODE § 20-7.5-1-1(d)(iii) (1993).

113. *Eastbrook*, 446 N.E.2d at 1012.

114. *Id.* at 1013-14.

115. 471 N.E.2d 1191 (Ind. Ct. App. 1984).

116. *Id.* at 1195.

Citing *Eastbrook*, the court held that scheduling make up days which do not affect the total number of hours or days that teachers teach is a subject within the managerial prerogative of the school board under Section 6(b) of the Act.<sup>117</sup> Since teachers contracted to teach 182 days, and scheduling did not affect the number of days or hours but only the timing of these days, there was no violation of the duty to bargain in good faith. On the past practice concerning supplemental contracts and additional wages for make up days, the court held there was no unilateral change in a mandatory subject of bargaining. The court did not distinguish between payment under a past practice and scheduling. It dismissed the past practice charge on the theory that scheduling the school calendar is an illegal subject of bargaining.<sup>118</sup>

Another way to handle the school calendar issue is to distinguish between the managerial prerogative to reschedule emergency days and its impact upon wages and conditions of employment.<sup>119</sup> Where teachers have agreed upon an annual salary in exchange for a specific number of school days, as long as rescheduling does not affect the total number of school days worked, there is no impact on wages or bargainable conditions of employment. However, a distinct analytical question is presented where the employer has conferred an economic benefit by past practice. A past practice of paying wages is independently a mandatory subject of bargaining. This is true even where the employer voluntarily instituted the past practice and was not obligated to pay the funds.<sup>120</sup> The court did not distinguish between the initial obligation to pay as a matter of law and the creation of a past practice.<sup>121</sup>

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117. *Id.* at 1196-97.

118. "Relevant to our decision that school officials *are not allowed to bargain away* their duty to determine the school calendar is the following . . . . If the Union Elementary School Employers' past practice of paying Union Elementary teachers extra for make up days is allowed to make this a mandatory bargainable subject, it may greatly inhibit the Joint Board in its scheduling of the school calendar. This could adversely affect the other non-teaching interests referred to in the *Eastbrook* opinion. Consequently we hold that the school Employers' past practice of paying the teachers extra did not elevate the subject of make up days to mandatory bargainable status." *Id.* at 1197-98 (emphasis added).

119. *See generally* Tussey, *supra* note 98, at 306-09.

120. The traditional example from the private sector is the Christmas ham or turkey. An employer has no obligation under wage and hour laws to provide employees either with a Christmas bonus or with some tangible benefit in lieu of a cash bonus during the holidays. However, once an employer voluntarily undertakes to confer this benefit and does so as a matter of established and consistent past practice, the employer may not alter the practice without bargaining. *See* HARDIN, *supra* note 53, at 864-67.

121. The outcome on a traditional analysis would not necessarily change. Specifically, the court fails to address the question of waiver. Under traditional doctrine, upon receiving notice that an employer has changed or intends to change a past practice, the exclusive bargaining representative has a legal obligation to demand bargaining. Its failure to make a timely specific demand to bargain may later estop the union from complaining about the change in practice. *See* HARDIN, *supra* note 53, at 708-10. In *Union*, it appears that the employer failed to or refused to pay additional compensation during the 1977-78 school year. The union did not make a timely

More peculiar is how the court then handled the duty to discuss under Section 5 of the Act. The court agreed with the Board that scheduling make up days and the school closing plan represented working conditions which were mandatory subjects of discussion. Relying on the statutory definition of "discuss" as "the performance of the mutual obligation of the school corporation through its superintendent and the exclusive representative to meet at reasonable times,"<sup>122</sup> the court held that the employer had an obligation to initiate discussion in 1977-78 when it changed its past practice of paying supplemental wages. The court appeared to impose the obligation to initiate on the party who has the most information. Because the employer was aware of the change in pay, it had the duty to initiate discussion. Since discussion is analogous to bargaining, one would expect the duty to arise only in response to a request.<sup>123</sup> The court also concluded that the Association, *not* the school corporation, had the duty to initiate discussion on the school closing plan for the 1978-79 school year, since teachers were aware that the past practice had been changed. The court concluded, "[a]ny other rule, such as one requiring school boards to discuss, prior to adoption, any policy affecting 'working conditions' is manifestly unworkable in a school situation."<sup>124</sup> This shifting duty to initiate discussion is equally unworkable.

In 1987, the Indiana Legislature amended the school closing statute presumably in response to the school calendar litigation.<sup>125</sup> In two cases,

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demand to bargain, and in fact did not protest until April 1979, ten months after the school corporation had changed its past practice of paying supplemental wages. In the absence of any evidence that the parties were discussing this dispute on a continuous basis, the usual outcome would be a holding that the union had waived its right to bargain.

122. IND. CODE § 20-7.5-1-2(o) (1993).

123. The court could have used the more traditional notions of notice and waiver. Specifically, instead of placing the burden to initiate discussion on employers because the employer had the information regarding the change in paying supplemental wages, under the traditional approach a court would look to whether the teacher union as exclusive representative was on notice that the employer had changed its practice. For example, if individual teachers did not receive supplemental wages in 1977-78, but the union was not made aware of this change in past practice, there is no waiver, and the union may demand bargaining and, by analogy, discussion when it becomes aware of the change. In terms of imputing knowledge or notice of the change, courts or labor agencies will examine whether an individual teacher who did not receive pay was, for example, an officer in the union or a union steward.

124. *Id.* at 1199. For a decision regarding the Association's request for discussion, see Tippecanoe Educ. Ass'n & Board of Sch. Trustees of the Tippecanoe Sch. Corp., 1990 Ind. Ed. Emp. Rel. Bd. Ann. Rep. 69 (1990).

125. Ind. Pub. L. 390-1987, § 7, amending IND. CODE § 20-6.1-5-9(a). The statute as amended provides "If during the term of the teacher's contract: (1) the school is closed by the order of the: (A) school corporation; or (B) health authorities; or (2) school cannot be conducted through no fault of the teacher; the teacher shall receive regular payments during that time. However, whenever a canceled student instructional day (as defined in IC 20-10.1-2-1) is rescheduled to comply with IC 20-10.1-2-1, each teacher and (notwithstanding IC 20-9.1-3-5) each school bus driver shall work on that rescheduled day without additional compensation."

teacher associations contended that the previous school closing statute actually required school corporations to pay teachers additional compensation for rescheduled days. In *Halley v. Board of School Trustees of the Blackford County School Corp.*,<sup>126</sup> the court rejected this argument holding that if the legislature had intended teachers to receive additional compensation, it could have included such a provision in the statute.<sup>127</sup> The amendment now makes additional compensation for rescheduled school days an illegal subject of bargaining.<sup>128</sup>

There are two cases in which courts have considered the question of school calendar in connection with the grandfather clause.<sup>129</sup> The courts have concluded that the following subjects may be rendered mandatory subjects of bargaining by virtue of the statutory grandfather clause:

- a. The initial reporting dates for teachers;
- b. The dates when no students attended but teachers reported for work;
- c. The length of the grading periods;
- d. The dates when students would be in school for one-half day but teachers would attend for a full day (the portion when teachers, but not students, are present must be bargained); and,
- e. The existence and scheduling of Teacher Days (to the extent they are not also student days).<sup>130</sup>

In *Highland*, the following subjects also were grandfathered: (1) the total number of instructional days in the school year; (2) the total number of teacher work days; (3) the length of grading periods at various academic levels of six weeks

126. 531 N.E.2d 1182 (Ind. Ct. App. 1988).

127. *Id.* at 1185. The court harmonized the school closing law with IND. CODE § 20-6.1-4-3, which prescribes the contents of individual teacher contracts, but does not require a definite ending date for the school year. *Id.* at 1186.

128. *Id.* at 1187. As the court observed, "The amendment foreclosed that option." See also *Springs Valley Teachers Ass'n v. Board of Sch. Trustees of Springs Valley Community Sch.*, No. 47A01-8911-CV-473 (filed May 29, 1990, marked "not for publication"). In *Springs Valley*, the court rejected a demand for extra pay when teachers made up a day after snow cancellation, although the make up day was not a student instructional day. Teachers argued that the 1987 amendment emphasized that made up *instructional* days must be served without additional compensation. Using negative implication, teachers argued that school corporations must compensate them for days made up for purposes other than instruction. The court rejected the argument, citing *Halley*, and reasoning that the question of paid or make up days was entirely a matter of contract; the collective bargaining agreement in question did not require an extra day's pay for the additional availability occasioned by a snow cancellation day.

129. *Northwestern Sch. Corp. of Henry County Bd. of Sch. Trustees v. Indiana Educ. Employment Relations Bd.*, 529 N.E.2d 847 (Ind. Ct. App. 1988); *Indiana Educ. Employment Relations Bd. v. Highland Classroom Teachers Ass'n*, 546 N.E.2d 101 (Ind. Ct. App. 1989).

130. *Northwestern Sch. Corp.*, 529 N.E.2d at 852-53.

or nine weeks; (4) the dates when grades are due; (5) the date and use of the last day of teacher attendance.<sup>131</sup>

Relying on *Eastbrook*, the courts held that certain subjects are illegal subjects of bargaining with respect to the calendar and cannot be grandfathered: (1) the date of the first day of school; (2) the use of the days in which students would be in school for one-half day but teachers would attend for a full day (the portion when students are present); (3) the starting and ending dates of Christmas break and spring break; (4) the scheduling of holiday breaks or recesses; (5) the closing of schools for ISTA Conference on Instruction; (6) the date of the last day of student attendance; (7) the date of Band Day; (8) the existence of teacher days to the extent they are also student days; (9) school enrollment for half-days.<sup>132</sup>

The IEERB decisions affirmed by the Court of Appeals in *Highland* and *Northwestern* appear inconsistent with respect to the treatment of half days. However, the *Highland* and *Northwestern* cases are reconcilable. Both decisions require that determining the dates of half days be left to the managerial power of the school board. *Northwestern* merely requires the school board negotiate the use and date of the portion of the half-day when the students are not present, and *Highland* only requires negotiation as to the portion of the day when students are not present.

## V. TEACHER EVALUATION

The courts twice have had occasion to determine whether teacher evaluation procedures represent mandatory subjects of bargaining or discussion.<sup>133</sup> In *Evansville-Vanderburgh*, the court upheld the Board's ruling that evaluation represents a mandatory subject of discussion under Section 5, reasoning that it falls within the plain and ordinary meaning of the phrase "working conditions."<sup>134</sup> Since there was a total failure to discuss the plan, the court held that the presence of good or bad faith was irrelevant.<sup>135</sup> The school corporation had committed an unfair labor practice.<sup>136</sup> There is considerable debate in other states over whether to treat evaluation as mandatory. Some states treat evaluation procedures as mandatory but treat evaluation criteria as permissive.<sup>137</sup>

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131. *Highland*, 546 N.E.2d at 103.

132. *Id.*; *Northwestern*, 529 N.E.2d at 852.

133. Board of Sch. Trustees of the Gary Community Sch. Corp. v. Indiana Educ. Employment Relations Bd., 543 N.E.2d 662 (Ind. Ct. App. 1989); and *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 392 N.E.2d 810 (Ind. App. 1979), *aff'd*, 405 N.E.2d 895 (Ind. 1980).

134. *Id.* at 813-14.

135. *Id.* at 814.

136. See Archer, *supra* note 5, at 423 for a more complete discussion. For a more detailed discussion of the committee issue, see *infra* notes 179-216 and accompanying text.

137. See Joan Payne, *What Public Employee Relations Boards and the Courts are*

In *Board of School Trustees of the Gary Community School Corp. v. Indiana Education Employment Relations Board*, the school corporation unilaterally implemented a new teacher evaluation procedure which required that instructional supervisors make written evaluations of teachers. Teachers demanded to bargain about the change, alleging that the policy was grandfathered under Section 5 of the Act as a mandatory subject of bargaining.<sup>138</sup> The question of supervisors producing written evaluations of teachers had a long history in Gary, having been the subject of disputes in 1967 and in 1971. As a result, the court concluded that the union had proven that the local conditions and practices clause represented an agreement within the meaning of Section 5's grandfather clause.<sup>139</sup> The court rejected the school corporation's argument under Section 6(b) that this construction effectively prevents it from using new curricular and teaching techniques and, thus, denies it the authority to effectively administer the schools. While the court agreed that the grandfather clause only applies to those items which do not infringe upon the school board's exclusive managerial power, it concluded that the teacher evaluation plan represented a working condition.<sup>140</sup>

## VI. TEACHER DISMISSAL

There are two primary issues the courts have considered in connection with teacher dismissal. One concerns the relationship between the teacher tenure law and contractual provisions including grievance procedures. The other concerns the appropriate role of the exclusive employee representative when the school corporation notifies a teacher of potential non-renewal or termination of their contract. In general, the courts have held that tenure laws prevail over collective bargaining agreements. In addition, courts have tightly constrained the role of the exclusive employee representative and, perhaps, inappropriately so. Recent statutory amendments address both issues.

### A. *Collective Bargaining Agreements and the Tenure Laws*

In *Gary Teachers Union v. The School City of Gary*,<sup>141</sup> the court held that the Teacher Tenure Act (now Teacher Contracts Act)<sup>142</sup> prohibits awarding tenured

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*Deciding*, 13 REV. OF PUB. PERSONNEL ADMIN. Summer, at 58, 67 (1993). The article also collects the recent literature on the scope of bargaining in the public sector.

138. *Board of Sch. Trustees of the Gary Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 543 N.E.2d 662, 663 (Ind. Ct. App. 1989). The collective bargaining agreement contained a local conditions and practice clause which purported to obligate the employer to retain any fact written board and personnel policy covering a local working condition.

139. *Id.* at 666-67.

140. *Id.* at 668 (citing *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 405 N.E.2d 895, 898-99 (Ind. 1980)).

141. 332 N.E.2d 256 (Ind. 1975).

142. IND. CODE § 20-6.1-4-1 to -4-16 (1993).

status to a teacher before he or she meets the statutory requirements.<sup>143</sup> A collective bargaining agreement between the school corporation and teachers union which purported to grant tenure to teachers after three years instead of the statutory five years was "void as contrary to law."<sup>144</sup> The events took place before the effective date of the Act. However, a number of other courts have concluded that the Act is subordinate to the teacher tenure law on issues of teacher dismissal.<sup>145</sup> By virtue of the tenure law, the court held in *Worthington I* that, under the Act, the Board had the power to determine whether a school corporation had infringed upon the right to form, join and assist in a school employee organization, but no power to order reinstatement of non-tenured teachers who are non-renewed by the school corporation.<sup>146</sup>

In *Jay School Corp. v. Cheeseman*,<sup>147</sup> the court held that a school corporation had the right to assign and transfer teachers under Section 6(b)(3), but that right was subordinate to a teacher's right to a position under the tenure law.<sup>148</sup> The court relied on a teacher's statutory right to return after a leave of absence in the absence of any termination of that teacher's contract.<sup>149</sup> In *Board of Trustees of Hamilton Heights School Corp. v. Landry*,<sup>150</sup> the court held that a school corporation had authority to suspend, refuse to pay, and fine a permanent teacher for two days for removing glossaries from the back of 146 science text books.

Whether teacher dismissals could be submitted to binding grievance arbitration was an issue squarely presented in *Michigan City Education Ass'n v. Board of School Trustees of the Michigan City Area Schools*,<sup>151</sup> where the school corporation canceled a semi-permanent teacher's indefinite teaching contract after an arbitrator issued an award ordering reinstatement with back pay and full benefits. The Court of Appeals held that a teacher discharge may not be the subject of binding arbitration under a collective bargaining agreement because the policy considerations in the Act place undeniable limitations on the scope of bargaining.<sup>152</sup> Citing Section 3 of the Act, the court reasoned that no collective bargaining agreement may include provisions in conflict with the

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143. *Gary*, 332 N.E.2d at 260. It is common for courts to view public sector bargaining as limited by preexisting civil service or tenure laws. See Deborah Tussey, Annotation, *supra* note 98, at 260-66.

144. *Id.* at 258.

145. It was in part this reliance on the Tenure Act that occasioned the need for four separate decisions in the *Worthington-Jefferson* dispute. See *Worthington I*, *Worthington II*, *Worthington III*, and *Worthington IV*, discussed *supra* note 25.

146. *Indiana Educ. Employment Relations Bd., v. Board of Trustees of Worthington-Jefferson Consol. Sch. Corp.*, 355 N.E.2d 269, 274 (Ind. App. 1976).

147. 540 N.E.2d 1248 (Ind. Ct. App. 1989).

148. *Id.* at 1250.

149. *Id.* (citing IND. CODE § 20-6.1-6-1(a) (1984)).

150. 560 N.E.2d 102, 107 (Ind. Ct. App. 1990).

151. 577 N.E.2d 1004 (Ind. Ct. App. 1991).

152. *Id.* at 1006.

school employers' rights as defined in Section 6(b), which gives employers the right to manage the schools including the right to "suspend or discharge its employees in accordance with applicable law."<sup>153</sup>

Following the decision in *Michigan City*, the Act was amended to provide in Section 6(b)(6) that a school corporation may release employees for legitimate reasons "through procedures established in sections 4 and 5 of this chapter."<sup>154</sup> This amendment would appear to permit school employers and exclusive school employee representatives to negotiate procedures for the cancellation of teacher contracts, including procedures that supplement those found in the statute.<sup>155</sup> In addition, the Teacher Contracts Act now expressly authorizes binding arbitration regarding teacher dismissals, and states that it "does not prohibit a school employer and an exclusive representative from collectively bargaining contracts that alter the requirements of IC 20-6.1-4-10, 10.5, 11, 12, 14 and IC 20-6.1-5-15."<sup>156</sup> The quoted sections address the grounds and procedures for dismissing or suspending teachers, but not the number of years of service necessary to achieve tenure. Thus, it is an open issue whether the result in *Michigan City* would be different were the issue relitigated.

#### B. *The Role of the Exclusive Employee Representative*

In *Indiana Education Employment Relations Board v. Board of School Trustees of Delphi Community School Corp.*,<sup>157</sup> the court considered a mixed motive discharge: a school employer allegedly did not renew a teacher's contract because of his role as President/Chief Spokesperson of the exclusive employee representative and because of his activities on behalf of another teacher. After the principal asked him to resign, a second non-tenured teacher went to the Association President, a non-tenured teacher, for assistance. The two consulted with the State Teachers Association and determined that no formal grievance procedure was available. The second teacher continued to discuss the resignation request with the school principal. Moreover, the superintendent apparently had informed the second teacher not to fight the resignation request, or he might never get another teaching job.<sup>158</sup> The Association President, in a misguided attempt to help, informed students that the teacher's job was in jeopardy and asked them to tell their parents. He also contacted parents directly and asked them to call school board members. This conduct provoked a strong response from the school principal, who for the first time issued a negative evaluation of

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153. *Id.* at 1007 (citing with approval *Anderson Fed'n of Teachers v. Alexander*, 416 N.E.2d 1327 (Ind. Ct. App. 1981) (holding that school corporations' sole authority for hiring and firing teachers could not be restricted by collective bargaining)).

154. Ind. Pub. L. No. 105, 1992 Ind. Acts 2622 (effective July 1, 1992).

155. IND. CODE § 20-6.1-4-11 (1993).

156. Ind. Pub. L. No. 105-1992 § 3, 1992 Ind. Acts 2618 (effective July 1, 1992).

157. 368 N.E.2d 1163 (Ind. App. 1977).

158. *Id.* at 1165.

the Association President and recommended his non-renewal. The school board subsequently voted not to renew the Association President's contract.

The Board held that this constituted a violation of the Act because it represented retaliation for concerted activity protected under Section 6(a).<sup>159</sup> In refusing to enforce the Board order of reinstatement, the court reasoned that the Act did not protect the Association President's conduct. The court did not apply the traditional standards used to consider mixed motive discharges in the private sector. There were three possible motives for dismissal. First, his very role as union President could serve as a basis for anti-union animus; as Chief Spokesman in negotiations, he had been persistent in seeking information that he felt was necessary for meaningful collective bargaining. Second, he represented a teacher in an informal grievance to obtain a change in recommendation concerning that teacher's non-renewal. Third, in pursuing that grievance, he contacted students and parents, and inappropriately involved them in a personnel dispute. Most courts would agree that this third category of conduct is not protected by a bargaining law. However, in the private sector, representing a coworker with an informal grievance *would* be protected.<sup>160</sup>

It is precisely the latter conduct that the court found to be unprotected in *Delphi*.<sup>161</sup> The court held that the Act allows school employees to engage in activities individually or in concert for purposes of furthering their rights under the Act but does not confer upon an individual a right to use the exclusive representative to address an individual grievance.<sup>162</sup> It only permits an employee to use the exclusive representative to further the best interests of all members of the bargaining unit. The court reasoned that any other construction of the Act would render meaningless language in section 2(o) which defines the term "discuss."<sup>163</sup> The court's decision turns on a conclusion that the non-renewed teacher did not "petition" his school employer for any redress of personal grievances.<sup>164</sup> The court unduly limited the term "petition" to a written formal request addressed to at least the superintendent of schools or higher authority.<sup>165</sup> However, it makes no formal finding on this point.<sup>166</sup>

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159. *Id.* at 1164.

160. *See* HARDIN, *supra* note 53, at 150-51 and cases cited therein.

161. *Delphi*, 368 N.E.2d at 1168.

162. *Id.*

163. IND. CODE §. 20-7.5-1-2(o) (1993). Specifically, the Act provides: "Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of the employee's grievances either individually or through the exclusive representative."

164. *Delphi*, 368 N.E.2d at 1168.

165. Edward P. Archer, *Labor Law, Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 212, 217 (1979).

166. The term "petition" is defined in BALLANTINE'S LAW DICTIONARY, 944 (3d ed. 1969) as "[a] formal request in writing addressed to one in a position of authority or to a body, such as a municipal council, usually signed by a number of persons. An application. The name given in some jurisdictions to the pleading by which the plaintiff in a civil action, whether in law or

In the private sector, it has long been the rule that an employer may not discharge or discipline an employee for filing or processing a grievance, whether pursuant to a formal contractual procedure or informally in the absence of such a procedure.<sup>167</sup> The NLRB and the federal courts developed the test in *Wright Line* to determine whether the filing of grievances or other protected activity motivated the employer's discipline.<sup>168</sup> Under *Wright Line*, the burden of proof is on the employee to establish that protected conduct was one of the factors motivating the employer's decision to discipline.<sup>169</sup> The burden of proof then shifts to the employer who must prove that it would have taken the same action regardless of the employee's protected activity.<sup>170</sup> The court in *Delphi* does not use this shifting burden of proof to analyze the three potential motives for dismissal. Instead, it lumps protected conduct (representation of another teacher) together with other unprotected conduct (contacting students and parents on that teacher's behalf). The court could have reached the same conclusion by citing the latter inappropriate conduct as justifying the employer's action regardless of the protected activity. This narrower rationale would have better recognized the importance of the exclusive representative's role in informal grievance processing.

The *Delphi* decision was followed five years later in *Indiana Education Employment Relations Board v. Carroll Consolidated School Corporation, Board of School Trustees*.<sup>171</sup> The Association requested discussion with the school corporation over an individual teacher's non-renewal. The school corporation replied that it was not obligated to discuss non-renewal, but it would do so if the teacher executed a "waiver of stigma," apparently designed to safeguard the school corporation from any liability for damage to the teacher's reputation. The teacher refused to execute the waiver; the school corporation subsequently

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equity, sets forth his cause of action and invokes the jurisdiction of the court. [citation omitted] In some jurisdictions, the pleading by the plaintiff in a special proceeding. The pleading which seeks condemnation of property in a proceeding in eminent domain." It is doubtful what the legislature had this technical meaning of the term in mind when it drafted this section of the Act. More likely, the legislature intended that the word be given its plain meaning. An alternative definition from WEBSTER'S COLLEGIATE DICTIONARY, 721 (3d ed. 1931) is "[a] formal written request, esp. one addressed to a sovereign or political superior," or the more common use of the term "[a]ny formal asking or begging; a prayer; supplication; esp., a solemn request; . . . [t]hat which is asked . . . ." Clearly, if the teacher was engaged in ongoing discussion with both the principal and to some extent with the Superintendent of schools, he had indicated his desire to retain his job. This would certainly qualify under the ordinary understanding of request or entreaty.

167. See HARDIN, *supra* note 53, at 150-51 and cases cited therein.

168. *Wright Line, Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforcement granted*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The Supreme Court endorsed this test in *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983).

169. *Id.* at 11.

170. *Id.*

171. 439 N.E.2d 737 (Ind. Ct. App. 1982), *reh'g denied*, Oct. 26, 1982.

refused to discuss her non-renewal. The Board held that the school corporation had committed an unfair labor practice.

The court set aside the Board's order, even though the Board had merely recommended, not ordered, reinstatement. It held that the Act creates no obligation for a school corporation to discuss individual personnel actions before action is taken, reasoning there is ample provision in the law for grievance procedures through which parties may subsequently discuss contested personnel actions.<sup>172</sup> The Association's argument that it had requested discussion on behalf of all teachers in the bargaining unit was rejected for fear it would allow the Association to bootstrap from an individual grievance to a discussion under the Act of almost any issue. However, nowhere does the court find that a grievance procedure existed in *Carroll*.<sup>173</sup> It found only the statutory right for a teacher who has been non-renewed to appear after the fact before a school corporation's governing body and present evidence and argument with assistance of a representative.<sup>174</sup>

Although *Carroll* and *Delphi* generally are cited for the same proposition, the cases present two separate issues. *Delphi* addresses a mixed motive discharge. The analytically separate issue presented directly in *Carroll* and indirectly in *Delphi* concerns the right to a union representative. In the private sector, these are referred to as *Weingarten* rights.<sup>175</sup> Most courts that have considered the issue under public employee bargaining laws have recognized a right to a representative.<sup>176</sup> An employee may insist upon union representation at an investigatory interview conducted by the employer which the employee reasonably believes might result in disciplinary action against her.<sup>177</sup> This is protected concerted activity. To discipline an employee for refusing to cooperate in the interview without a union representative is an unfair labor practice.<sup>178</sup> The modern *Weingarten* rule also guarantees union representation at a non-investigatory interview if there is a reasonable basis to believe disciplinary action will result.<sup>179</sup> No union representative is required if the purpose of the interview is merely to inform an employee of disciplinary action that is already final.<sup>180</sup>

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172. *Id.* at 739.

173. See Archer, *supra* note 75, at 249-51 for a more complete discussion.

174. IND. CODE § 20-6.1-4-14 (1993). However, the court acknowledged that the amendment creating the right to a conference was not in effect at the time of the events in the *Carroll* case.

175. These rights are spelled out in *N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251 (1975) and in *International Ladies Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

176. See Larry D. Scheafer, Annotation, *What Constitutes Unfair Labor Practice Under State Public Employee Relations Acts*, 9 A.L.R. 5th 20, 73-74 (1981).

177. *Weingarten*, 420 U.S. at 267.

178. See generally HARDIN, *supra* note 53, at 151-58.

179. *Certified Grocers of California, Ltd.*, 227 N.L.R.B. 1211 (1977).

180. See, e.g., *Baton Rouge Water Works Co.*, 246 N.L.R.B. 995 (1979).

Thus, it is consistent with *Weingarten* for a school board to refuse a union representative at a meeting called simply to inform a teacher of its vote not to renew. Arguably, *Weingarten* rights would not attach to a meeting between the superintendent and the teacher in which the superintendent merely informs the teacher of his or her *final* decision to recommend non-renewal. However, the meetings that took place in *Delphi* occurred after a request for the teacher's resignation; the employer was attempting to convince the employee to forfeit employment voluntarily. This is distinct from informing the employee of a decision to discipline. In discussions regarding resignation, the private sector model would probably grant *Weingarten* rights to the employee. Clearly discipline was threatened, but it was not a *fait accompli*.

Both *Delphi* and *Carroll* concerned the duty to discuss under the Act. The court relied heavily on a *reductio ad absurdum* argument that if it recognized a duty to discuss an individual grievance regarding non-renewal, it would open the door to enforcing discussion over each and every individual personnel decision.<sup>181</sup> Clearly, this is unworkable. However, the right to a union representative is not that broad—it reaches only cases where discipline is contemplated—and stems from general language in labor relations laws recognizing employees' rights to form, join and assist unions. It is a rule recognizing the unique vulnerability of an employee who faces possible discipline. The court did not need to reach Section 5 and the scope of the duty to discuss. It could have relied on traditional bargaining law language in Section 6(a). There is an appropriate role for the exclusive employee representative to play in processing informal grievances and in assisting employees who face discipline. *Delphi* and *Carroll* fail to recognize this role.

In a legislative end-run around this result, teacher lobbyists obtained passage of an amendment that probably overrules *Delphi* and *Carroll* and provides that a school employer shall discuss “[h]iring, promotion, demotion, transfer, assignment, and retention of certificated employees, and changes to any of the requirements set forth in I.C. 20-6.1-4.”<sup>182</sup> The open question is whether courts will construe this language to require discussion of individual teacher cases or only of conditions which affect the bargaining unit as a whole. This is an area where a broader scope of mandatory bargaining would probably ease administration of the Act.

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181. *Indiana Educ. Employment Relations Bd. v. Board of Sch. Trustees of Delphi Community Sch. Corp.*, 368 N.E.2d 1163, 1168 (Ind. App. 1977); *Indiana Educ. Employment Relations Bd. v. Carroll Consol. Sch. Corp.*, 439 N.E.2d 737, 740 (Ind. Ct. App. 1982), *reh'g denied*, Oct. 26, 1982.

182. IND. CODE § 20-7.5-1-5 (1993) (emphasis added) as amended by Ind. Pub. L. 105-1992.

## VII. SCHOOL COMMITTEES

A final area where the Board and the courts have interacted concerns the procedures through which the exclusive representative may discuss mandatory subjects of discussion under Section 5 with the school corporation. In a trio of cases, the Indiana courts have held that a school employer may establish a committee to gather information and collect data on any subject, including subjects that are bargainable or discussable.<sup>183</sup> However, where that committee serves as the sole instrumentality for formulating a proposal to the school board, the school corporation cannot exclude the exclusive representative from the committee.<sup>184</sup> Most commonly, these cases concern curriculum, a mandatory subject of discussion in Indiana, but a nonmandatory subject of bargaining in most states.<sup>185</sup>

In *Evansville-Vanderburgh I*,<sup>186</sup> the Court of Appeals concluded that the school corporation violated Section 7(a)(1) of the Act when it unilaterally appointed the members of an evaluation committee formed to study and draft a new teacher evaluation plan. By selecting the evaluation committee without consultation, the court reasoned that the school corporation risked interfering with or restraining school employees in their exercise of rights guaranteed in the Act.<sup>187</sup> The Court of Appeals concluded that, since employees have the right to act in concert for the purpose of establishing or improving discussable matters, the Association has the right to select the members of a committee which performs a critical function in establishing policy concerning a discussable matter.<sup>188</sup> According to the court, the committee entirely displaced the school corporation's Section 5 obligation to discuss evaluation procedures.

The Indiana Supreme Court adopted in most respects the decision of the Court of Appeals but issued independent instructions on this last point of contention. In *Evansville-Vanderburgh II*, the court concluded that both the duty to discuss and the right to confer are part of the Act and must be given effect in accordance with the usual rules of statutory construction which direct that, if possible, all provisions of a statute be given effect.<sup>189</sup> The court held that nothing in the statute would prohibit employers from conferring with any persons they wish in order to gather and receive information.<sup>190</sup> Employers have the

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183. *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 395 N.E.2d 291 (Ind. App. 1979) (*Evansville-Vanderburgh I*); *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 405 N.E.2d 895 (Ind. 1980) (*Evansville-Vanderburgh II*); *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 464 N.E.2d 1315 (Ind. Ct. App. 1984) (*Evansville-Vanderburgh III*). For the case in its earliest incarnation, see *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 392 N.E.2d 810 (Ind. App. 1979).

184. *Evansville-Vanderburgh II*, 405 N.E.2d at 902.

185. See Deborah Tussey, Annotation, *supra* note 98, at 301-04.

186. 395 N.E.2d 291 (Ind. App. 1979).

187. *Id.* at 297.

188. *Id.* at 296-97.

189. *Evansville-Vanderburgh II*, 405 N.E.2d at 901.

190. *Id.*

responsibility and the power to create committees to assist them in gathering and receiving information. These committees may be composed of any concerned parents, students, teachers, experts, consultants or others.<sup>191</sup> The committees may even be composed entirely of school employees who are not members of the exclusive representative, but only if their purpose is to gather and receive information which is "a partial input into the final formulation of policy."<sup>192</sup> The court further provided: "[T]he exclusive representative cannot be excluded from such a committee when such committee is the sole instrumentality in the drafting and proposal of a discussable matter as was true in the instant case."<sup>193</sup>

The decision in *Evansville-Vanderburgh* has given rise to a substantial amount of unfair labor practice litigation in several school systems.<sup>194</sup> In one case currently on appeal, the Association, citing *Evansville-Vanderburgh*, asserted its exclusive right to appoint all school employees to an elementary computer curriculum committee.<sup>195</sup> The school corporation, referring to past practice, appointed the members of the committee without the approval or consent of the Association. At the time of the hearing on the unfair labor practice, there was no final report or recommendation for change in the computer curriculum and the matter had not yet been discussed at a corporation-wide discussion committee meeting.

Nevertheless, the Board hearing examiner held that the school corporation had committed an unfair labor practice by refusing to give the Association the exclusive right to designate, select, and effectively recommend appointment of all the school employees that serve on the committee.<sup>196</sup> She ordered the corporation to cease and desist, reasoning that the computer curriculum committee in effect served as the sole instrumentality drafting a proposal on a

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191. *Id.*

192. *Id.*

193. *Id.* The Supreme Court's decision did not end the dispute in *Evansville-Vanderburgh*, as is documented in *Evansville-Vanderburgh III*, 464 N.E.2d 1315 (Ind. Ct. App. 1984) (where the court holds that the Association must exhaust its administrative remedies before the Board to challenge alleged school board refusals to permit Association input in the selection of committee members).

194. *See, e.g.*, Highland Classroom Teachers Ass'n and Board of Sch. Trustees of Highland, Case No. U-91-12-4720, *aff'd on appeal*, in Board of Sch. Trustees of Highland v. Highland Classroom Teachers Ass'n, Cause No. 45D01-9204-MI-433 (filed Jan. 13, 1993); Highland Classroom Teachers Ass'n and Highland, Case No. U-92-17-4720 (hearing examiner's report dated Feb. 3, 1993); and Highland Classroom Teachers Ass'n and Board of Sch. Trustees of Highland, Case No. U-92-24-4720 (hearing examiner's report dated Feb. 3, 1993). *See also* Marion Teachers Ass'n and Board of Sch. Trustees of Marion Community Sch. Corp., Case Nos. U-91-16-2865, U-91-16-2865, U-89-13-2865.

195. Board of Sch. Trustees of Highland v. Highland Classroom Teachers Ass'n, Cause No. 45A03-9304-CV-144 (filed Nov. 15, 1993).

196. Highland Classroom Teachers Ass'n and Board of Sch. Trustees of Highland, Case No. U-91-12-4270.

mandatory subject of discussion. On appeal, the Court of Appeals for the Third Circuit affirmed the Board's decision, but construed it to require that the exclusive representative appoint some of the teacher members of the Committee.<sup>197</sup>

The Board has held that the exclusive representative has the *exclusive* right to designate or select *all* school employees for such committees.<sup>198</sup> When a committee serves as the sole instrumentality for discussion, the Board reasons that the exclusive representative retains the traditional right to designate who will represent it in collective bargaining activities, including discussion. Since discussion actually occurs in committee, parties essentially have delegated their statutory duty to the committee members to discuss in accordance with Section 5 of the Act.

The committee decision implicates a number of issues. In the private sector, the NLRB and the courts have distinguished among four independent concepts: 1) the duty to meet at reasonable times;<sup>199</sup> 2) the duty to confer in good faith;<sup>200</sup> 3) the duty to furnish information;<sup>201</sup> and 4) the right to select a bargaining representative.<sup>202</sup> All these concepts seem to be combined, and perhaps unnecessarily so, in the Board's committee rule.

First, the Act contains within it a duty to meet at reasonable times. It is contained both in the definition of what it means to "bargain collectively"<sup>203</sup> and also in the definition of the term "discuss."<sup>204</sup> This language is similar to that of the National Labor Relations Act, which provides in section 8 that to bargain collectively is "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."<sup>205</sup> Commentators have observed that the NLRA does not require any particular frequency within which the parties must meet, nor does it define the term "reasonable."<sup>206</sup> The parties must meet without unreasonable delay, and an employer may not insist upon bargaining by mail or insist that the proposals be put in writing.<sup>207</sup> Moreover, a party cannot defend a charge of

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197. Board of Sch. Trustees of Highland v. Highland Classroom Teachers Ass'n, Cause No. 45A03-9304-CV-144 (filed Nov. 15, 1993, at 9).

198. Early commentary on *Evansville-Vanderburgh I and II* forecast this possible interpretation, but rightly criticized and rejected it as one the legislature could not reasonably have intended. See Archer, *supra* note 5, at 426.

199. See generally HARDIN, *supra* note 53, at 592-93, 603-04, 632-35.

200. *Id.* at 593-94, 608-50.

201. *Id.* at 650-85.

202. *Id.* at 934-35, 941-42.

203. IND. CODE § 20-7.5-1-2(n) (1993).

204. IND. CODE § 20-7.5-1-2(o) (1993).

205. 29 U.S.C. § 158 (d) (1988).

206. See HARDIN, *supra* note 53, at 592-93, 603-04.

207. *Id.* at 603 nn.120-21, and cases cited therein.

failure to meet at reasonable times by arguing the busy schedule of its representative or negotiator.<sup>208</sup> In other words, the NLRB will look at all the facts and circumstances of the case to give meaning to the phrase "reasonable times." Generally, it will *not* direct the parties to meet in a specific time or place. This is precisely what the committee decision does. The committee decision not only dispenses with any inquiry into the reasonableness of the corporation-wide discussion committee, it also dictates the framework for discussion.

Second, the private sector model would independently examine the duty to "confer in good faith."<sup>209</sup> To determine whether there has been a refusal to confer, the NLRB will examine the "subjective condition of 'good faith'" as well as the requirement that the parties "confer."<sup>210</sup> The NLRB has described the duty to confer as requiring that the parties do so "with the view of reaching an agreement if possible."<sup>211</sup> Similarly, the obligation to confer in good faith has been defined as one requiring that bargaining take place "with a *bona fide* intent to reach an agreement."<sup>212</sup> This requires sincere negotiations with an intent to settle differences and arrive at an arrangement and is inferred from all the facts and circumstances of the bargaining relationship, including conduct at or away from the bargaining table. The Board has adopted very similar standards in the definition of the term "discuss" under the Act.<sup>213</sup> In the committee decision, the Board has made a conceptual leap that it is no longer possible to discuss a proposal after a committee has formulated it. The Board has imported into the Act the view that input can only be meaningful when it is given as part of the process of formulating the proposal.

In the private sector, input is considered meaningful if given before implementation of a change on a mandatory subject of bargaining. This usually means that it is given *in response to* a concrete proposal. However, bargaining is not required where it is futile. Bargaining may be futile after management has implemented a new policy.<sup>214</sup> In addition, the duty to bargain arises upon a request, that is, a demand to bargain made by the union to the employer. If the union fails to make a timely demand for bargaining, it may waive its rights.<sup>215</sup>

208. *Id.* at 604 n.122 and cases cited therein.

209. 29 U.S.C. § 158(d) (1988).

210. *See* HARDIN, *supra* note 53, at 604.

211. *Id.* at 592 (citing NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 637 (4th Cir. 1940)).

212. *Id.* at 593 n.42.

213. That term is defined as the duty "to meet at reasonable times to discuss, to provide meaningful input, to exchange points of view, with respect to items enumerated in section 5 of this chapter. This obligation shall not, however, require either party to enter into a contract, to agree to a proposal, or to require the making of a concession." IND. CODE § 20-7.5-1-2(o) (1993).

214. *See* HARDIN, *supra* note 53, at 699-700, 708-10.

215. *Id.* at 708.

The Board decision concludes as a matter of law that such discussion would be futile where a committee is charged with a particularly complex and involved task requiring multiple steps to implement.

An alternative reasonable decision would be to give the parties the benefit of the doubt, permit them to engage in discussion at a system-wide discussion committee that receives a concrete proposal for change in the curriculum, and then determine, in light of all the facts and circumstances, whether the parties have met their duty to confer in good faith. One could argue that discussion itself is unnecessary until a concrete proposal for change exists.

An intellectually distinct issue also present in the committee cases *sub rosa* is the question whether the exclusive representative can have adequate information upon which to base meaningful discussion if it does not appoint all the teacher representatives on the committee that formulates the proposal. The exclusive representative has an interest in knowing what alternative proposals were considered and rejected by the committee so that it might be better equipped to engage in meaningful discussion at a corporation-wide discussion committee. However, the Board need not adopt its present committee decision to meet this concern. The Board could give the exclusive representative the right to designate one school employee member to a committee consisting of members otherwise designated by the school employer. The designee could keep minutes and confer with the leadership regarding the progress of the committee.<sup>216</sup> Although curriculum committees have no power to adopt a new curriculum, they do receive some delegation of authority. By analogy, the exclusive representative has a right to information about the discussions of the committee. This alternative model would permit an exclusive representative to designate a member of a committee that is engaged in work on a discussable subject as part of the representative's right to information for meaningful bargaining or discussion but would preserve the duty to discuss the subject until there is in fact a concrete proposal. It would then be more efficient and cost effective to engage in the statute's required discussion within the framework of a school corporation-wide committee that meets on some regular basis. This alternative model has the advantage of retaining for the school employer the statutory right of "conferring with any citizen, taxpayer, student, school employee, or other person considering the operation of the schools and the school corporation."<sup>217</sup> However, in the absence of a corporation-wide

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216. It does not require much of a stretch to adopt such a rule, for there is some recognition in Indiana that when a governing body of a public agency appoints a committee to perform public business, the Indiana Public Meetings and Records Law may apply. For example, Indiana defines the term "governing body" of a public agency to include "a board, commission, authority, council, committee, body, or other entity" that "takes official action on public business" or "any committee appointed directly by the governing body or its presiding officer to which authority to "take official action upon public business has been delegated." IND. CODE § 5-14-1.5-2(b) (1993).

217. IND. CODE § 20-7.5-1-2(o) (1993).

discussion committee, the exclusive representative would still be entitled to meaningful discussion within the curriculum committee.

One final point concerns the Board's rationale for adopting the committee decision. Specifically, the Board relies in large measure upon a party's right to select its own representatives in collective bargaining. The rule is well established in the private sector that the identity of a party's bargaining spokesperson or representative is considered a non-mandatory subject of bargaining, and insistence to the point of impasse on a particular bargaining party will represent an unfair labor practice.<sup>218</sup> The Board reasons that the duty to discuss is an exclusive duty.<sup>219</sup> However, one could argue that the Act's duty to discuss is not exclusive. The Act confers on the school employer the right to consider the interests and concerns of parents, students, and other members of the public education community; thus it anticipates that a school corporation will discuss Section 5 subjects not only with the exclusive representative, but also with others. This is quite different from the duty to bargain, a duty which is exclusive by definition: it is a violation of the duty to bargain for an employer to bargain directly with employees.<sup>220</sup>

To illustrate how different the Act is in its treatment of the term "discuss," the Indiana Supreme Court held that an employer may compose a committee entirely of school employees who are not members of the exclusive representative organization, as long as the committee is gathering or receiving information which is only a partial input into the final formulation of policy.<sup>221</sup> Thus, the Indiana Supreme Court recognizes that the duty to discuss is not an exclusive one. Selecting committee members based on their nonmembership in the exclusive employee representative would probably be considered unlawful discrimination based upon union affiliation under Section 8(a)(3) of the NLRA. The Board's committee decision in effect renders the duty to discuss exclusive by using the intellectual framework of a party's right to select its representative to mandate that the exclusive representative select all those persons with whom the employer may discuss a Section 5 subject in a sole instrumentality committee.

In sum, there are a number of distinct labor relations doctrines that the courts and the Board have elided in the committee cases. This is another area where a broader scope of mandatory bargaining in place of the narrow scope of bargaining and broad scope of discussion would probably produce simpler administration. The courts will reexamine the issue in the near future: it requires clarification.

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218. See HARDIN, *supra* note 53, at 604-07, 935-36.

219. IND. CODE § 20-7.5-1-5 (1993) provides that a school employer shall discuss Section 5 subjects with the exclusive representative.

220. *Id.* at 601-02.

221. *Evansville-Vanderburgh II*, 405 N.E.2d 895, 902 (Ind. 1980).

## VIII. UNION SECURITY AND FAIR SHARE FEES

Indiana follows the mainstream federal court rulings regarding the nature and extent of permissible representation fees. However, its approach to union security is somewhat different as to mechanics. Indiana does not allow an agency fee as a condition of employment but permits a negotiated agreement, enforceable as a debt in state court, that teachers pay such a fee.

The Act makes no provision for agency service fees.<sup>222</sup> In *Anderson Federation of Teachers v. Alexander*,<sup>223</sup> the court held that an agency shop agreement was unlawful under the Act. The court reasoned that making payment of an agency service fee a "condition of employment" meant that teachers who refused to pay the fee would be dismissed from employment on a ground not provided in the Indiana Teacher Tenure Act.<sup>224</sup> Since the Tenure Act provides the exclusive procedure for dismissing teachers, it would conflict with Sections 6(b) and 3 of the Act to permit bargaining over agency service fee.<sup>225</sup>

In *Fort Wayne Education Ass'n, Inc. v. Goetz*,<sup>226</sup> the court authorized a modified form of union security. The employer and exclusive representative may agree that teachers are obligated to pay a representation fee *without* making it a condition of employment; the court validated the action of the Association in proceeding to small claims court to collect from teachers who failed to voluntarily authorize a payroll deduction or to make the payment.<sup>227</sup> The court found that teachers were not obligated to pay for the amount used for political activities, which avoids any possible First Amendment problems.<sup>228</sup> The Association had put together an internal rebate procedure so that a non-member could petition for a rebate of improperly expended funds. The court observed that since there were internal remedies available to the non-member employees, there was no violation of their constitutional rights.<sup>229</sup>

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222. The term "agency service fee" refers to a collective bargaining agreement clause that requires employees to pay to an exclusive representative a fee in exchange for representation services. There are a number of possible variations of the union security clause, including a maintenance of membership clause (which requires an employee who has joined a union to remain a member for the duration of the collective bargaining agreement), or a union shop clause (which is one that requires an employee to actually become a member of the union as a condition of employment). These latter two provisions violate the First Amendment rights of public employees and therefore are not seen in the public sector. However, the agency shop provision is fairly common, and also goes by the name "fair share fee." See generally HARDIN, *supra* note 53, at 1489-1566.

223. 416 N.E.2d 1327, 1333 (Ind. Ct. App. 1981).

224. *Id.* at 1329; IND. CODE § 20-6.1-4-10 to -4-14 (1993).

225. The court did not say whether it was necessary for teachers to authorize deduction of the fee from their wages.

226. 443 N.E.2d 364 (Ind. Ct. App. 1982), *reh'g denied*, Feb. 3, 1983.

227. *Id.* at 373.

228. *Id.*

229. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); and *Brotherhood of Ry. &*

In *Abels v. Monroe County Education Ass'n*,<sup>230</sup> the court held that a representation fee should be calculated by subtracting the cost of political, ideological, organizing, and legal expenses unrelated to collective bargaining from the amount of dues members are required to pay. The court specifically upheld charges to individual teachers for services provided by the state and national affiliates of the local association.<sup>231</sup>

In *New Prairie Classroom Teachers Ass'n v. Stewart*,<sup>232</sup> the Association again filed small claims actions against teachers who failed to pay the representation fee. The court upheld judgments against each individual non-paying teacher, but held that the bargaining representative has the burden of proving the proportion of its funds that it expends for political or ideological purposes.<sup>233</sup> It cited with approval the Supreme Court's decision in *Abood*, concluding that in the public sector, related budgetary and appropriation decisions form an integral part of the bargaining process<sup>234</sup> and, thus, the bargaining representative may collect fees for such lobbying activities.

The court next rejected as inadequate a rebate procedure that allowed the temporary use for political purposes of non-member representation fees.<sup>235</sup> Following the United States Supreme Court, the court held that even this temporary use of involuntary fees represented a violation of teachers' First Amendment right of freedom of association.<sup>236</sup> The rebate procedure was a stringent one; only by complying with its precise terms could a teacher recover money wrongfully collected.<sup>237</sup> The court concluded that although the payroll deductions were not a condition of employment, the payment itself was mandatory which meant that the Association was in fact extracting an involun-

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Steamship Clerks v. Allen, 373 U.S. 113 (1963).

230. 489 N.E.2d 533, 539 (Ind. Ct. App. 1986), *cert. denied*, 480 U.S. 905 (1987).

231. *See also* *New Prairie Classroom Teachers Ass'n v. Stewart*, 487 N.E.2d 1324 (Ind. Ct. App. 1986), *cert. denied*, 480 U.S. 917 (1987) (approving charges for the services of lawyers, expert negotiators, economists, and research staff employed by the state and national affiliates of the local, and expenditures by the state and national affiliates for lobbying governmental agencies other than the school corporation).

232. *Id.*

233. *Id.* at 1328.

234. *Id.* at 1329. *See supra* note 229.

235. *Fort Wayne Educ. Ass'n v. Aldrich*, 527 N.E.2d 201 (Ind. Ct. App. 1988), *trans. granted*, 585 N.E.2d 6 (1992).

236. *Id.* at 206-08 (citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and *Ellis v. Brotherhood of Ry. Workers*, 466 U.S. 435 (1984)).

237. *Id.* at 206. For a more complete discussion, see Terry A. Bethel, *Labor and Employment Law, Recent Employment Law Decisions of the Seventh Circuit and the Indiana Courts*, 26 IND. L. REV. 1065, 1073-75 (1993).

tary loan during the current year.<sup>238</sup>

The Indiana Supreme Court resolved a conflict between the courts of appeals over proof of chargeable expenses in *Fort Wayne Education Ass'n v. Aldrich*.<sup>239</sup> The Court adopted the Second District's opinion in *Albro v. Indianapolis Education Ass'n*.<sup>240</sup> As a result, the exclusive representative has the burden of proving chargeable, as well as nonchargeable expenses.<sup>241</sup>

### IX. REVIEW OF ARBITRATION AWARDS

Indiana courts have reviewed the substance of arbitration awards and have intervened to safeguard the statutory prerogatives of school corporations by finding arbitration awards encroaching upon Section 6(b) rights void as against public policy. This is true regardless of whether the objecting party files a timely motion to vacate or to modify the award ninety days after its issuance under the Uniform Arbitration Act.<sup>242</sup>

Indiana has adopted a version of the Uniform Arbitration Act.<sup>243</sup> A written agreement to arbitrate is valid and enforceable unless it can be revoked on the same grounds as any other contract.<sup>244</sup> The method for appointing the arbitrators must be determined by the terms of the arbitration agreement, if specified therein, or the court, in the absence of such an agreement, may appoint an arbitrator.<sup>245</sup> The Uniform Arbitration Act provides that the arbitration award must be in writing and signed by all the arbitrators concurring therein.<sup>246</sup> Parties to the arbitration may apply to modify or correct the award,<sup>247</sup> to confirm the award,<sup>248</sup> or to vacate the award.<sup>249</sup> Under Indiana law, the trial

238. The court reaffirmed *Fort Wayne* in *Ake v. National Educ. Ass'n-South Bend*, 531 N.E.2d 1178 (Ind. Ct. App. 1988). The court rejected an argument that teachers' failure to give notice under the State Tort Claims Act invalidated their lawsuit protesting an inadequate rebate procedure. The court reaffirmed that the rebate procedure improperly collected fair share fees for use for political purposes with which non-member teachers disagreed.

239. 594 N.E.2d 781 (Ind. 1992).

240. 585 N.E.2d 666 (Ind. Ct. App. 1992).

241. *Id.* at 669. The Indiana Supreme Court remanded *Fort Wayne Educ. Ass'n v. Aldrich* for further proceedings in accordance with its opinion. *Aldrich*, 594 N.E.2d 781.

242. On whether a school board may arbitrate a permanent teacher's dismissal, see also *Board of Sch. Comm'r of Indianapolis v. Haynes*, Case No. 49A02-9012-CV-756 (filed Sept. 26, 1991, marked "not for publication").

243. IND. CODE §§ 34-4-2-1 to -2-22 (1993).

244. IND. CODE § 34-4-2-1 (1993).

245. IND. CODE § 34-4-2-4 (1993).

246. IND. CODE § 34-4-2-9 (1993).

247. IND. CODE § 34-4-2-10 (1993).

248. IND. CODE § 34-4-2-12 (1993).

249. IND. CODE § 34-4-2-13 (1993). "[T]he court shall vacate an award where: (1) the award was procured by corruption or fraud; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers and the award cannot be corrected without effecting the merits of the decision upon the controversy submitted; (4) the arbitrators refused to

court must order the parties to proceed with arbitration upon a showing that there is an agreement to arbitrate between the parties, but the court also may stay an arbitration where there is no agreement to arbitrate.<sup>250</sup> Implicit is the rule that the court rather than the arbitrator makes the final determination on whether there is in fact an agreement to arbitrate.

In *DeKalb County Eastern Community School District v. DeKalb County Eastern Education Ass'n*,<sup>251</sup> the court applied the private sector standard for determining arbitrability. A number of school boards formed a special education cooperative to be administered by the DeKalb Board of Education. The cooperative contract provided that teachers would bring grievances to their own local school board. However, the cooperative contract also provided that the DeKalb Board was responsible for contractual obligations to teachers. Teachers filed a grievance under the grievance procedure of the DeKalb collective bargaining agreement. These teachers were not employed specifically by nor did they teach in DeKalb. The court held that there was no basis for the trial court to have concluded that the agreement to arbitrate in question was "susceptible of an interpretation that cover[ed] the grievances for the special ed co-op teachers."<sup>252</sup>

The phrase "susceptible of an interpretation" evokes the *Steel Workers Trilogy* of the United States Supreme Court.<sup>253</sup> Under the *Trilogy*, "[u]nless the parties expressly provide that the arbitrator is to determine arbitrability, that determination rests with the courts."<sup>254</sup> However, the court need only determine whether the claim on its face is governed by the contract. Even if the court believes that the grievance is frivolous or baseless, doubts should be resolved in favor of arbitration. The key language is that the court must be able to say with positive assurance that the arbitration clause is not "susceptible to an interpretation that covers the dispute."<sup>255</sup> After the arbitrator has issued an award, the award is presumed legitimate so long as it draws its essence from the

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postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 6 of this chapter, as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section 3 of this chapter and the party did not participate in the arbitration hearing without raising the objection."

250. IND. CODE § 34-4-2-3 (1993).

251. 513 N.E.2d 189 (Ind. Ct. App. 1987).

252. *Id.* at 193.

253. The *Steel Workers Trilogy* consists of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

254. FRANK ELKOURI AND EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 27 (4th ed. 1985).

255. *Id.*

collective bargaining agreement. The court should not review the merits of grievances.<sup>256</sup>

Although the Uniform Arbitration Act itself does not define the terms "arbitrator" or "arbitration award," a court has held that a school principal's disposition of a teacher grievance at an interim step in the grievance procedure did not represent an arbitration award under the Uniform Arbitration Act. In *Prairie Heights Education v. Board of School Trustees of Prairie Heights Community School Corp.*,<sup>257</sup> special education teachers who belonged to a special education cooperative including DeKalb disputed the manner in which their salary was calculated when they were reassigned from one member of the cooperative to another. School principals handled the teachers' grievance and agreed to restore the pay without interest. After the school superintendent rescinded that decision, the teachers filed a complaint requesting that the court enforce the principals' grievance settlement under the Uniform Arbitration Act. The court held that the principals had no authority to fix or set salaries and compensation for teachers and rejected the argument that the grievance settlement was an arbitration award under the Uniform Arbitration Act.<sup>258</sup>

The Indiana Court of Appeals has upheld an arbitrator's power to decide whether additional responsibilities for a specific position are subject to the posting and negotiation rights under a collective bargaining agreement on *Eastbrook Community School Corp. v. Eastbrook Education Ass'n*,<sup>259</sup> the school corporation argued that it had a statutory power to assign duties to specific positions such as the head basketball coach, that these duties were administrative and not subject to the collective bargaining agreement.<sup>260</sup> The Association filed a grievance, arguing that the school corporation's failure to post and fill certain positions in accordance with a procedure contained in the contract represented a breach of contract. There was a past practice of negotiating both the duties and pay scales for extra-curricular jobs. The arbitrator ordered that jobs be posted and filled in accordance with the contract. The school corporation moved to vacate the award, arguing that the arbitrator had essentially made

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256. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).  
See generally HARDIN, *supra* note 53, at 955-67.

257. 585 N.E.2d 289 (Ind. Ct. App. 1992).

258. *Id.* at 293. An alternative way to analyze this case would be to treat it as an example of repudiation of a grievance settlement, which is a refusal to bargain in good faith under traditional labor law principles. However, in order for the rules on repudiation grievance settlements to apply, the teachers must show that the principals' decision represented such a settlement. Ordinarily, the mere issuance of a disposition at an interim step of the grievance procedure is not enough. The contract itself must provide that, in the absence of any appeal, interim disposition becomes a final and binding settlement of the grievance. In this instance, the case indicates that the principals' decision did not have that effect, but was instead rescinded by the superintendent, presumably in a timely fashion.

259. 566 N.E.2d 63 (Ind. Ct. App. 1990).

260. *Id.* at 65.

a bargaining unit determination outside the scope of his jurisdiction because the duties attached to the positions in question were supervisory and administrative. The court rejected this argument and reasoned that the dispute centered on whether the vacancies were certified positions within the meaning of the contracts. Since the parties were free to agree by contract that such questions would be arbitrated, the court would not interfere.<sup>261</sup> The court also rejected the argument that the arbitrator exceeded his authority and essentially amended the agreement. The court noted that an arbitrator's award is void and subject to collateral attack if the arbitrator awards a form of relief upon which public policy does not permit the parties voluntarily to agree.<sup>262</sup> However, that was not the case in *Eastbrook*. The arbitrator did not determine the makeup of the bargaining unit, but merely defined the term "certified" for purposes of the contract's posting provisions.<sup>263</sup>

Most cases involve arbitration awards that are overturned because the arbitrator exceeded the scope of his or her authority or issued an award that was void as against public policy. In *School City of East Chicago v. East Chicago Federation of Teachers*,<sup>264</sup> the court held that an arbitration award was void as against public policy because it contained an order that the employer pay punitive damages. The court paid lip service to the prevailing rule that arbitrators are not generally bound by principles of substantive law since the parties bargain for a common sense solution.<sup>265</sup> However, the court reasoned that it could intervene when public policy demanded.<sup>266</sup> Moreover, since the Indiana legislature expressly declared that there were four grounds upon which the relationship between school corporations and teachers associations were not comparable to the private sector, the court held it was not bound by federal policy on the finality of arbitration awards. Instead, where an arbitrator has not followed the law, a reviewing Indiana court may: (1) disregard the error as within the authority of the arbitrator; (2) use the error to vacate or modify the award; or (3) render the award void as being beyond the arbitrator's jurisdiction.<sup>267</sup> The latter was the case in *East Chicago*. The arbitrator had no power to award punitive damages and this remedy rendered the arbitration award void.<sup>268</sup>

In *Gary Teachers Union, American Federation of Teachers v. Gary Community School Corporation of Indiana*,<sup>269</sup> the arbitrator attempted to

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261. *Id.* (citing *School City of E. Chicago v. East Chicago Fed'n of Teachers*, 422 N.E.2d 656 (Ind. Ct. App. 1981)).

262. *Id.* at 66.

263. *Id.*

264. 422 N.E.2d 656, 663 (Ind. Ct. App. 1981).

265. *Id.* at 662.

266. *Id.*

267. *Id.*

268. *Id.* at 663. See Archer, *supra* note 8, at 233 for a more complete discussion.

269. 512 N.E.2d 205 (Ind. Ct. App. 1987).

exercise authority under the contract "to fashion an appropriate remedy."<sup>270</sup> The court again vacated the arbitration award, holding that the contract was void as against public policy as defined by the Act because it was beyond the arbitrator's scope of authority.<sup>271</sup> The arbitrator had awarded punitive damages in the amount of 10% of wages.

In *Tippecanoe Education Ass'n v. Board of School Trustees of Tippecanoe School Corp.*,<sup>272</sup> the court vacated an arbitration award where the arbitrator had determined that a teacher's transfer was not for the general welfare of the school corporation. The court held that the arbitrator had usurped a function delegated to the local school corporation under section 6(b) of the Act which provides that only the school corporation can determine the general welfare for the school district.<sup>273</sup> The arbitrator interpreted contract language which provided that "the Board reserves the right to make involuntary transfers for the general welfare of the corporation."<sup>274</sup> According to the court, the award violated public policy as codified in the Act which essentially prohibits a school board from delegating to an arbitrator the authority to decide such a dispute if it conflicts with the responsibility entrusted to the school board in its sole discretion under the statute. However, the Court agreed that a school board and teacher association could, under section 5 of the Act, mutually agree to bargain procedures and criteria relative to decisions such as the hiring and transfer of teachers, and a school board may bind itself to observe these procedures by express contractual provisions.<sup>275</sup>

An arbitrator was found to have no authority to prioritize building needs and seniority or length of service in transfer or reassignment decisions in *Fort Wayne Education Ass'n v. Board of School Trustees of Fort Wayne Community Schools*.<sup>276</sup> The arbitrator denied the grievance of a teacher who complained another teacher had benefitted from favoritism, reasoning that there had been no violation of the contract and that, in considerations of transfer and reassignment, building needs outweigh seniority or length of service. The court modified the award by deleting the language on building needs and seniority because such issues were rendered moot by the arbitrator's determination that no prohibited reassignment had occurred. In *Michigan City Education Ass'n v. Board of School Trustees of the Michigan City Area Schools*,<sup>277</sup> the court held that a school corporation may bind itself to grievance arbitration and may bargain over procedures and standards for dismissing teachers, but it may not delegate to an

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270. *Id.* at 206.

271. *Id.* at 207.

272. 429 N.E.2d 967, 975 (Ind. Ct. App. 1981). See Archer, *supra* note 8, at 237 for a more detailed discussion.

273. *Tippecanoe*, 429 N.E.2d at 973.

274. *Id.* at 969.

275. *Id.* at 974-75.

276. 569 N.E.2d 672 (Ind. Ct. App. 1991).

277. 577 N.E.2d 1004 (Ind. Ct. App. 1991).

arbitrator the power to rule on teacher dismissals.<sup>278</sup> However, in *Southwest Parke Education Ass'n v. Southwest Parke Community School Trustees Corp.*, the trial court had remanded a teacher dismissal case to the arbitrator for a determination of whether the school board discriminated against the teacher for union activities.<sup>279</sup>

## X. CONCLUSION

By adopting a dual obligation to bargain and to discuss, Indiana set the courts and the Board on a less traveled road to woods where it is sometimes harder to see the broader forest of labor relations policy for the specific statutory trees of the Act. The courts and the Board have departed from traditional models for labor relations in certain areas, largely in an attempt to reconcile competing statutory commands regarding the duty to bargain, the duty to discuss, and the duty to maintain managerial prerogative. All collective bargaining laws balance the interests of the parties. Where to draw the line between respective parties' rights and obligations merits continuing re-examination. Now that Indiana has had twenty years of experience with teacher bargaining, it may be time to consider whether the current narrow scope of mandatory bargaining and broad scope of mandatory discussion represent the best balance. Many districts continue to bargain over subjects that would otherwise be discussable, or even matters of management prerogative, because of the grandfather clause. A broader scope of bargaining, combined with a brighter line as to managerial prerogative, might enhance labor relations and serve the public interest.

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278. See also *Anderson Fed'n of Teachers v. Alexander*, 416 N.E.2d 1327 (Ind. Ct. App. 1981).

279. 427 N.E.2d 1140 (Ind. Ct. App. 1981), *reh'g denied*, 429 N.E.2d 675 (1981).