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DETERMINING THE SCOPE OF BARGAINING UNDER THE INDIANA EDUCATION EMPLOYMENT RELATIONS ACT

With the recent passage of the Indiana Education Employment Relations Act,¹ Indiana has become the twenty-fifth state to require bargaining between teachers and school boards.² The Act, which continues the trend of legislative structuring of public employment labor relations, attempts to protect both the interests served by collective bargaining and the conflicting interests served by local control of education.

As in the private employment relationship, mandatory collective bargaining is often thought to be needed to equalize the employees' bargaining power in contract negotiations.³ Also, by providing a channel of communication it may serve to minimize the employees' need for recourse to strikes or other concerted activities⁴ as a tool for gaining concessions in employment relations.⁵ A legislative guarantee of bargaining rights, expressed in terms of a scope of bargaining over which the employer must bargain in good faith, can promote labor peace between employees and willing and perhaps recalcitrant employers alike.⁶

Public sector labor relations pose problems, however, to which the structure of private sector bargaining is not responsive.⁷ A second and

1. IND. CODE §§ 20-7.5-1-1 to -14 (1973), IND. ANN. STAT. §§ 28-4551 to -4564 (Supp. 1973) [hereinafter referred to as the Act]. Sections of the Act referred to in this note are from the session law, Pub. L. No. 217, [1973] Ind. Acts 1080.

2. BNA GOV'T EMPLOYEE REL. REP. [hereinafter cited as G.E.R.R.] 51:501-21 (Ref. File, 1973). Oregon subsequently became the 26th state to mandate bargaining, *id.* at 51:4611. California, Kansas and Nebraska require the parties to meet and confer rather than bargain, a system under which "the outcome of public employer-employee discussions depends more on management's determinations than on bilateral decisions by 'equals.'" ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 100 (1969) [hereinafter cited as LABOR-MANAGEMENT POLICIES]. Prior to the passage of the Act, collective bargaining was permitted in Indiana. Gary Teachers Union, Local 4, AFT v. School City, — Ind. App. —, 284 N.E.2d 108 (1972). However, it was not a matter of right. Indianapolis Educ. Ass'n v. Lewallen, 72 L.R.R.M. 2071 (7th Cir. 1969).

3. See § 1, NLRA, 29 U.S.C. § 151 (1970), *cf.* H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 13 (1971) [hereinafter cited as WELLINGTON & WINTER].

4. Besides the formal strike, examples of concerted disruptive activities include the slow-down and the "sick-in." See IND. CODE § 20-7.5-1-2(p) (1973), IND. ANN. STAT. § 28-4552(p) (Supp. 1973).

5. WELLINGTON & WINTER, *supra* note 3, at 13.

6. A middle position between mandatory bargaining and impermissible bargaining is mandatory "meet and confer" with bargaining permitted if the parties so agree. This approach is preferred by the Advisory Commission on Intergovernmental Relations. See LABOR-MANAGEMENT POLICIES, *supra* note 2, at 99.

7. [T]he social costs of collective bargaining in the private sector are principally economic and seem inherently limited by market forces. In the public

competing concern in the public sector is that collective bargaining decisions between employees and public administrators can overreach and restrict voters' determination of community affairs.⁸ To the extent that collective bargaining supplants the voters' control over governmental decisions, the ability of the community to influence its representatives is diluted.⁹ In an attempt to preserve the effectiveness of representative government, legislatures have withheld bargaining rights by reserving items over which management retains discretion.¹⁰

Indiana's bargaining act attempts to strike a compromise between these competing policies. To "alleviate various forms of strife and unrest,"¹¹ teachers and school boards are mandated to negotiate over certain "Subjects of Bargaining."¹² To preserve school board responsiveness to community interests, the scope of bargaining is restricted by a statutory reservation of management rights.¹³ Problems arise, however, because a

sector, however, the costs seem economic only in a very narrow sense and are on the whole political.

WELLINGTON & WINTER, *supra* note 3, at 14-15. See also notes 48-50 *infra* & text accompanying.

8. WELLINGTON & WINTER, *supra* note 3, at 139-40. It has traditionally been felt that governmental determinations of political priorities, particularly in budget allocations, should be responsive to the desires of the electorate as a whole, rather than to special interest groups such as labor unions. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQUESNE L. REV. 357, 363 (1972). As a result, statutory limitations upon bargaining rights have been included as a part of many public labor relations acts on the rationale that it does make a difference in the public sector how an employment decision is made. Doherty, *Public Employee Bargaining and the Conferral of Public Benefits*, 22 LAB. L.J. 485 (1971). "What may be at stake is further dilution of representative government." *Id.* at 491.

9. *Hearings on H.R. 12532, H.R. 7684, and H.R. 9324 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 474-75 (1972).

Placing school boards and teachers in parity may thus "skew the results of the "normal" American political process" by elevating one interest group over all others in the community. WELLINGTON & WINTER, *supra* note 3, at 25. The distortion is most obvious when unions possess the strike threat. *Id.* at 167. However, collective bargaining itself "(the strike apart) is a method of channeling and underscoring the demands of public employees that is not systematically available to other groups." *Id.* at 169.

Although introducing collective bargaining undoubtedly changes the relative power distribution among interest groups in the community, the conclusion of Wellington and Winter that such change is a "distortion" is a political value judgment open to challenge. See Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, in COLLECTIVE BARGAINING IN GOVERNMENT 274, 282 (J. Loewenberg & M. Moskow eds. 1972).

10. See G.E.R.R. 51:501-21 (Ref. File, 1973).

Absent statutory restrictions, the scope of bargaining in the public sector will be determined by the same factors as in the private sector, e.g., union strength in relation to that of the employer. Gerhart, *The Scope of Bargaining in Local Government Labor Negotiations*, 20 LAB. L.J. 545, 550 (1969).

11. IND. CODE § 20-7.5-1-1 (1973), IND. ANN. STAT. § 28-4551 (Supp. 1973).

12. IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1973). See also IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973).

13. IND. CODE § 20-7.5-1-6(b) (1973), IND. ANN. STAT. § 28-4556(b) (Supp. 1973).

disputed item may fall within the definitional ambit of both the bargaining rights clause and the management rights provision. The legislature has created problems for the Indiana Education Employment Relations Board¹⁴ and for the courts by failing to indicate how disputes falling within this area of overlap are to be resolved. This note will examine the bargaining provisions of the Act and will suggest an approach for Indiana boards and courts to take in resolving conflicts in this area.

PROBLEMS IN DEFINING THE SCOPE OF BARGAINING UNDER THE INDIANA ACT

Four interacting sections of the Indiana Education Employment Relations Act are applicable in defining the statutory scope of bargaining. Not only will each of these provisions need to be construed independently, but there must be some resolution of their apparently conflicting inter-relationship which results in some items appearing to be both bargainable and nonbargainable.

The Act limits the duty to bargain collectively in terms of the bargainable subject matter. Section 3 provides that "school employers and school employees shall have the obligation and the right to bargain collectively the items set forth in Section 4"¹⁵ The § 4 formulation, "salary, wages, hours, and salary and wage related fringe benefits,"¹⁶ constitutes the limits of the school board's duty to bargain; that is, it describes what is mandatorily bargainable, not what is permissibly bargainable. By mutual agreement, the negotiating parties *may* decide to bargain over the much wider scope of subjects listed in § 5 of the Act.¹⁷

Further, § 3 of the Act prohibits conflict between the negotiated contract and state or federal statutes. IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1973).

Other indirect methods of limiting bargaining include requiring legislative approval of the negotiated agreement's provisions, *see, e.g.*, HAWAII REV. STAT. § 89-10(b) (Supp. 1973), and nullifying negotiated contracts that would require deficit spending, *see, e.g.*, IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1973).

14. This board was created by § 9 to administer the Act. IND. CODE § 20-7.5-1-9 (1973), IND. ANN. STAT. § 28-4559 (Supp. 1973).

15. IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1973). Furthermore, § 2(n) of the Act provides that

"bargain collectively" means 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

IND. CODE § 20-7.5-1-2(n) (1973), IND. ANN. STAT. § 28-4552(n) (Supp. 1973).

16. IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1973). The section further provides that "[a] contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances" *Id.* Such an item would appear to be only a permissive subject of bargaining if the word "may" also applies to the act of bargaining.

17. IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973). Permissive subjects of bargaining, which are also mandatory "subjects of discussion," include

For many Indiana school districts, however, the § 4 categorization of items subject to mandatory bargaining will not be all-inclusive. A separate grandfather clause, unique among state bargaining laws,¹⁸ preserves to school employee organizations the right to bargain over "any items included in the 1972-1973 agreements between any employer school corporation and the employee organization"¹⁹

While §§ 3, 4 and 5 make several items either mandatorily or permissibly bargainable, a competing provision concomitantly restricts the scope of bargaining. Sections 3 and 6(b) reserve to the school employer certain rights with which the negotiated contract may not "conflict."²⁰ Broadly

working conditions, other than those provided in section 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations

Id. These permissive subjects of bargaining help limit the § 4 mandatory subjects, "salary, wages, hours, and salary and wage related fringe benefits," IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1973), on the assumption that a given item cannot be both a permissive and a mandatory subject of bargaining. Yet it is unclear, for example, how the § 4 items can be other than "budget appropriations" under § 5.

18. See G.E.R.R. 51:501-21 (Ref. File, 1973).

19. IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973).

Both the structure and the wording of this proviso are problematical. Appended to a list of permissive subjects of bargaining, the grandfather clause appears to describe mandatory subjects in addition to those listed in § 4. However, the duty to bargain established in §§ 2(n) and 3, and the grounds for invoking the statutory impasse procedures, refer only to § 4 items. Presumably, the failure to indicate clearly that the § 5 grandfather clause bargaining rights are of equal stature with those of § 4 resulted from legislative oversight and can be remedied administratively.

A more serious problem is the meaning of "items." One summary of contract provisions negotiated prior to the passage of the Act counted 59 types of items. A. SMITH, INDIANA PUBLIC SCHOOLS: UNIONISM AND COLLECTIVE NEGOTIATIONS 26-29 (1971) [hereinafter cited as SMITH]. Interpreting the many contracts to determine bargainability will require an early determination on such questions as whether a previously negotiated class size of thirty means that class size in general is a bargainable "item," or only a class size of thirty.

Inclusion of the grandfather clause served to win the support of teachers' organizations for an otherwise narrow scope of bargaining. See Brickner, *The Status of Public Employee Bargaining*, 22 LAB. L.J. 492, 495 (1971).

20. Section 6(b) provides:

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

IND. CODE § 20-7.5-1-6(b) (1973), IND. ANN. STAT. § 28-4556(b) (Supp. 1973).

Section 3 provides:

worded, these management rights appear to include virtually every right already granted school corporations under the General School Powers Act.²¹

Several problems will inevitably arise in trying to interpret and harmonize these various provisions. Threshold questions will involve a determination of which items are definitionally embraced within the sections of the statute mandating or allowing bargaining. One inquiry in this area involves the interpretation of the phrase "salary and wage related fringe benefits" which are mandatory subjects of bargaining under § 4.²²

No contract may include provisions in conflict with . . . school employee rights as defined in section 7(a) [6(a)] of this chapter, or . . . school employer rights as defined in section 7(b) [6(b)] of this chapter.

IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1973). The wording appears to be unique among state bargaining laws.

Section 3 also forbids conflict with "any right or benefit established by federal or state law" *Id.* An unresolved issue is the degree of "conflict" which this section anticipates as permissible. For example, bargaining is specifically permitted over "student discipline," IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973), yet, in the same session that produced the bargaining act, the General Assembly enacted specific rules governing student discipline in the public schools. IND. CODE § 20-8.1-1-1 to -5-16 (1973), IND. ANN. STAT. § 28-5303 to -5390o (Supp. 1973). It would appear that if the statutory provisions and the bargaining proposals can both be effectuated in full together, there would be no "conflict."

21. IND. CODE § 20-5-1-1 to -6-7 (1971), IND. ANN. STAT. § 28-1701 to -1761 (1970). The Indiana General School Powers Act sets forth the specific and the general powers of school corporations and limitations to those powers. In other states, analogous provisions have been found to constitute an independent source of management prerogatives for purposes of limiting the scope of bargaining. *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 64 N.J. 17, — 311 A.2d 737, 743 (1973). *But see* *Board of Educ. v. Associated Teachers*, 30 N.Y.2d 122, 130, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23 (1972). The School Powers Act should not have this effect in Indiana. Prior to the enactment of the bargaining bill, the School Powers Act had been held to constitute the very source of authority for school boards to engage in collective negotiations. *Gary Teachers Union, Local 4, AFT v. School City*, — Ind. App. —, 284 N.E.2d 108 (1972); *accord*, *East Chicago Teachers Union, Local 511, AFT v. Board of Trustees*, — Ind. App. —, 287 N.E.2d 891 (1972). Further, the School Powers Act itself provides that "[t]he compensation, terms of employment and discharge of teachers shall, however, be subject to and governed by the laws relating to employment, contracting, compensation and discharge of teachers" IND. CODE § 20-5-2-2(7) (1971), IND. ANN. STAT. § 28-1710(7) (1970). If management rights include all powers granted under the School Powers Act, the effects on bargaining could be disastrous. *See* notes 33-44 *infra* & text accompanying.

22. IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1973).

Little assistance in interpreting these terms can be gained from other states' acts. What little there is may be drawn from a former Oregon bargaining statute, Law of July 2, 1971, ch. 755, § 3, [1971] Ore. Laws 2110, *amending* Law of May 13, 1965, ch. 390 § 2, [1965] Ore. Laws 795 (repealed 1973). This statute was the only other instance of a statutory scope of bargaining limited to primarily economic subjects. Bargainable items included "salaries and related economic policies affecting professional services, grievance procedures and compensation beyond the normal duties for which the teacher or administrator is employed." *Id.*

"Salary, wages [and] hours," the other items subject to mandatory bargaining under § 4, are relatively clear terms and there appears to be no reason to reject the common

Through the use of this phrase, the Indiana legislature sought to break away from precedents established under the National Labor Relations Act²³ and other state statutes²⁴ which make "terms and conditions of employment" subject to mandatory bargaining.²⁵ The phrase Indiana has adopted apparently encompasses something less than "terms and conditions of employment." Yet it must mean more than "salary, wages, [and] hours," the other items subject to mandatory bargaining under § 4.²⁶ The Indiana formulation could be interpreted broadly to mean any school budgetary item accruing to the teachers' benefit,²⁷ or it could be narrowly interpreted to mean only those items traditionally understood as fringe benefits which directly affect the actual income the teacher derives from his employment.²⁸

A second inquiry involves defining which kinds of "agreements" will qualify under the § 5 proviso²⁹ which makes items included in 1972-1973 agreements between school corporations and school employee organizations subject to mandatory bargaining even though they do not fall within the subjects enumerated in § 4.³⁰ Prior to 1973, collective negotiations in Indiana between school corporations and teachers often culminated in

sense meanings attached to the terms under federal decisions. See *West Hartford Educ. Ass'n v. DeCourcy*, 162 Conn. 566, 578-79, 295 A.2d 526, 533-34 (1972).

23. 29 U.S.C. §§ 151-68 (1970).

24. Among state statutes, the most common description of bargainable subject matter, "wages, hours, and other terms and conditions of employment," is drawn from § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1970). See *G.E.R.R. 51:501-21* (Ref. File, 1973). Indiana has intentionally avoided imitation. Section 1 of the Act, IND. CODE § 20-7.5-1-1 (1973), IND. ANN. STAT. § 28-4551 (Supp. 1973), provides:

Intent. The Indiana General Assembly hereby declares that:

(d) The relationship between school corporation employers and certified school employees is not comparable to the relation between private employers and employees

Id. See also *National Educ. Ass'n of Shawnee Mission v. Board of Educ.*, 212 Kan. 741, —, 512 P.2d 426, 433 (1973). Even were the statutory wording identical to that of the NLRA, private sector precedents would not necessarily apply, since "the underlying problems to which the federal law is a response are very different from those being considered here." *WELLINGTON & WINTER*, *supra* note 3, at 147.

25. Working conditions are, however, a permissive subject of bargaining under § 5 of the Act. IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973).

26. *Cf.* *West Hartford Educ. Ass'n v. DeCourcy*, 162 Conn. 566, 581, 295 A.2d 526, 535 (1972).

27. Address by James B. Capehart, Institute on Indiana Collective Bargaining for Teachers, Sept. 10, 1973, in *INDIANA CONTINUING LEGAL EDUCATION FORUM, THE INDIANA TEACHER'S COLLECTIVE BARGAINING INSTITUTE TRANSCRIPT* 31, 33 (1973) [hereinafter cited as *Capehart*].

28. Address by Alan T. Nolan, Institute on Indiana Collective Bargaining for Teachers, Sept. 10, 1973, in *id.* at 35, 36-37.

29. IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973).

30. An example of a 1972-73 master contract that should clearly qualify under § 5 is the Fort Wayne, Indiana, agreement reproduced in *NEGOTIATION RESEARCH DIGEST*, Feb. 1973, at 15.

agreements which were not master contracts.³¹ While many negotiated agreements contained all the formalities of contracts, others were oral, memorialized solely by notation in the minutes of the school board meetings.³² Since § 5 grants bargaining rights far in excess of those in § 4, the determination of eligibility under this provision needs administrative or judicial clarification.

In addition to the definitional problems of determining what items are subject to mandatory bargaining under § 4 and § 5 and what items are reserved to management discretion under § 6 (b),³³ there arises a second and more difficult set of problems under the Act. Many items may be definitionally covered both by the sections involving bargainability and by the sections which grant the management rights with which the contract may not "conflict."³⁴ Indeed, a broad interpretation of the rights reserved to the school employer under § 6(b) could include all items protected by §§ 4 and 5, so that *no* bargaining could take place.³⁵ For example, § 5, in permitting bargaining over "selection, assignment or pro-

31. SMITH, *supra* note 19, at 38. In only slightly more than half of the districts in which negotiations were practiced was any part of the final agreement committed to writing. *Id.*

32. Prior to 1972, in some 10% of all districts, negotiations resulted in master agreements; in 53%, negotiations led to agreements which were effectuated through school board adoption; in 33%, teachers made proposals but did not enter into formal negotiations; and in 4%, no negotiations were attempted. E. Bowes, *The Development and Utilization of a Classification System for Describing the Status of Teacher Group-School Board Negotiations in Indiana*, Sept. 1971, at 38 (unpublished dissertation in Indiana University Library). For purposes of the Act, it does not appear that "agreement" need be synonymous with "contract." See IND. CODE § 20-7.5-1-13 (1973), IND. ANN. STAT. § 28-4563 (Supp. 1973).

33. IND. CODE § 20-7.5-1-6(b) (1973), IND. ANN. STAT. § 28-4556(b) (Supp. 1973).

34. IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1973).

Definition of scope of negotiations and the setting forth of management rights or responsibilities relate to substantially the same basic issue but not from the same point of view. Theoretically, the scope of negotiation could be defined by affirmatively listing the issues which are negotiable with all other issues considered as not negotiable. But in the absence of uniformity in terminology and in definition, and with the infinite interrelationships involving legislation other than the [bargaining act], it is impossible to provide a detailed listing of all issues which are negotiable.

THE JOINT LEGISLATIVE COMMITTEE ON THE TAYLOR LAW, 1971-72 REPORT 33 (1972). The most common formulation of reserved management rights is that modeled after Exec. Order No. 11,491, 3 C.F.R. 262 (1973), 5 U.S.C. § 7301 (1970), *as amended*, Exec. Order No. 11,616, 36 Fed. Reg. 17319 (1971) [set forth at note 79 *infra*]. Indiana is the first state to include a statutory management rights clause in a bargaining act applicable solely to teachers.

35. J. SEIDMAN, PUBLIC SECTOR COLLECTIVE BARGAINING AND THE ADMINISTRATIVE PROCESS 7 (1972). An opposite approach would make management rights illusory. *National Educ. Ass'n of Shawnee Mission v. Board of Educ.*, 212 Kan. 741, —, 512 P.2d 426, 434-35 (1973). Without legal effect, the clause would then serve only a psychological purpose. DEP'T OF LABOR, SCOPE OF BARGAINING IN THE PUBLIC SECTOR — CONCEPTS AND PROBLEMS 15 (1972).

motion of personnel,"³⁶ conflicts with § 6(b)(3) which reserves to the school board the right to "hire, promote, demote, transfer, assign and retain employees."³⁷ Further, the school board's reserved right to "establish policy"³⁸ can be construed to include unilateral determination of wage levels and hours, which are mandatory subjects of bargaining under § 4.³⁹

Even where certain items appear bargainable under §§ 4 and 5, the presence of the management rights clause in § 6(b) can restrict bargaining in two ways. First, since the terms of the statute provide that the final contract may not abridge management rights,⁴⁰ the school board may be justified in refusing to bargain over such items. Thus, even if the disputed item is a mandatory subject of bargaining under §§ 4 or 5, the school board could not be charged with an unfair labor practice in refusing to bargain.⁴¹ Second, since the school board prerogatives are cast in terms of rights with which the master contract may not conflict,⁴² bargaining over such rights would be illegal.⁴³ Thus, even should the board agree to bargain over § 5 permissible items, the resulting contract could be challenged and set aside by a taxpayer suit charging that the school board lacks power to bargain over those items which are also definitionally within the reserved rights clause.⁴⁴

The resolution of these and other problems under the Indiana Act requires a recognition of the competing interests which the legislature has sought to protect. If it were evident that the legislature intended to give ultimate priority to one set of interests, the problems would not be difficult to resolve. For example, the goal of promoting peace in school board-

36. IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973); see note 17 *supra*.

37. IND. CODE § 20-7.5-1-6(b)(3) (1973) IND. ANN. STAT. § 28-4556(b)(3) (Supp. 1973).

38. IND. CODE § 20-7.5-1-6(b)(2) (1973), IND. ANN. STAT. § 28-4556(b)(2) (Supp. 1973).

39. See *National Educ. Ass'n of Shawnee Mission v. Board of Educ.*, 212 Kan. 741, —, 512 P.2d 426, 435 (1973).

40. IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1973).

41. See IND. CODE § 20-7.5-1-7(a)(5) (1973), IND. ANN. STAT. § 28-4557(a)(5) (Supp. 1973).

42. IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1973).

43. See Howlett, *Scope of Collective Bargaining in Public Employment*, in *GOVERNMENT EMPLOYEES AND COLLECTIVE BARGAINING* 25, 28 (J. Ferguson & J. Najita eds. 1971).

44. The theory would be that the school board had acted beyond the scope of its authority as delegated by the legislature. See IND. CODE § 20-7.5-1-1(d)(iii) (1973), IND. ANN. STAT. § 28-4551(d)(iii) (Supp. 1973); see also, e.g., *Alexander v. Johnson*, 144 Ind. 82, 41 N.E. 811 (1895).

teacher employment relations⁴⁵ is best reached by construing the statutory grant of bargaining rights as broadly as possible, an approach urged in bargainability disputes under the National Labor Relations Act.⁴⁶ Under this approach, if a disputed item were at least arguably within the definitional ambit of the statutory scope of bargaining, then it would be mandatorily bargainable.⁴⁷ Conversely, a narrow interpretation of the scope of bargaining and a broad interpretation of rights reserved to management can best protect the rights of citizens acting through their school boards.⁴⁸ Local control of education, and "the opportunity it offers for [voter] participation in the decisionmaking process that determines how . . . local tax dollars will be spent,"⁴⁹ is abridged to the extent that school boards must first bargain with teachers over items of community concern.⁵⁰ Such an approach would also ensure that nonbudgetary questions of school policy which may also involve considerations of political priority are to be answered at the polls rather than at the bargaining table.⁵¹

45. The general statement of this purpose is contained in § 1(a) of the Act. IND. CODE § 20-7.5-1-1(a) (1973), IND. ANN. STAT. § 28-4551(a) (Supp. 1973). This legislative purpose is also evident in the separate grandfather clause proviso in § 5. IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973). Teachers who have already organized without the assistance of a statute may pose a greater threat to labor peace than would unorganized teachers. The § 5 proviso is the only indication in the Act, however, that Indiana had already enjoyed teacher bargaining before enactment of the bargaining bill. Capehart, *supra* note 27, at 31.

46. H. WELLINGTON, LABOR AND THE LEGAL PROCESS 81 (1968).

47. This result obtains where the bargaining statute contains no management rights clause, such as in New York's Public Employees' Fair Employment Act (Taylor Law). N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973). Under these circumstances the court will not readily find a limitation on these bargaining rights.

Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment.

Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 129, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23 (1972). Lower New York courts have recently abandoned this position in favor of a balancing approach. See West Irondequoit Teachers Ass'n v. Helsby, 42 App. Div. 2d 808, 346 N.Y.S.2d 418 (1973).

48. Cf. ME. REV. STAT. ANN. tit. 26, § 965(1)(c) (Supp. 1973), which permits no bargaining beyond the scope of mandatory subjects. This approach has received some favorable comment. WELLINGTON & WINTER, *supra* note 3, at 150.

49. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973).

50. Section 1 of the Act provides:

Intent. The Indiana General Assembly hereby declares that:

(d) . . . (iii) the Indiana General Assembly has delegated the discretion to carry out [the] 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 . . .

IND. CODE § 20-7.5-1-1(d) (iii) (1973), IND. ANN. STAT. § 28-4551(d) (iii) (Supp. 1973).

51. [T]he process of public policy formulation is frequently responsible for

By passing the bargaining act, the Indiana General Assembly has indicated that it deems it inadvisable for the political process to control all aspects of the teacher-school board employment relationship. Instead of making public employment relations the exclusive province of either collective bargaining or political control, it has sought to create a balance between these competing processes. The generous § 5 bargaining rights, both in the list of permissible subjects and in the grandfather clause, contemplate bargaining activity over a broad spectrum of matters. Conversely, the narrowly drawn § 4 rights and the broad reservation of management prerogatives serve to limit bargaining and thus maximize community control of education.

Thus, the Indiana Act, although it defines the area for collective bargaining and indicates the issues to be reserved for managerial discretion, fails to direct the appropriate method of resolution of disputes over items which appear to fall within both categories. The problem cannot be solved simply by reference to the statutory language.⁵² Judicial resolution of bargainability disputes requires interpretation of the statute in light of the interests the legislature has sought to protect.⁵³

APPROACHES TO RESOLVING CONFLICTS BETWEEN BARGAINING RIGHTS AND MANAGEMENT RIGHTS

Three different approaches have been developed by various public bodies to accommodate a positive grant of bargaining rights with a statutory reservation of management prerogatives where the statutory language would permit the interpretation that an item both is, and is not, bargainable. Although arising under textually diverse statutes, these decisions are here grouped according to the degree to which the reviewing

many of the working conditions specified for public employees The task of resolving questions of public policy is the task of government and should not be a burden borne by a labor-management relationship

Macy, *The Role of Bargaining in the Public Service*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 5, 11 (S. Zagoria ed. 1972) [hereinafter cited as Macy].

52. Succinctly put, "one man's managerial prerogative [is] another's working condition" Zagoria, *The Future of Collective Bargaining in Government*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 160, 174-75 (S. Zagoria ed. 1972).

53. Where the legislative intent is manifest by clear and unambiguous language, the obvious meaning of the statute may not be enlarged or restricted. *Knox R.E.M.C. v. Pub. Serv. Co.* (1966), 139 Ind.App. 547, 557, 213 N.E.2d 714 (transfer denied). However, where more than one construction is possible, the court may give a statute a practical application and construe it in such a way as to oppose prejudice to public interest. *State ex rel. Bynum v. LaPorte Superior Court No. 1* (1973), Ind., 291 N.E.2d 355.

Morgan Co. R.E.M.C. v. Indianapolis Power & Light Co., — Ind. App. —, —, 293 N.E.2d 237, 240 (1973). In this determination, "[t]he intention of the lawmakers constitutes the law." *Id.*

body is willing to recognize and balance the interests inherent in public sector bargaining.

The Conclusive Priority Approach

Under the conclusive priority approach, either the management rights provisions or the bargaining rights provisions of a bargaining statute are given conclusive priority as a matter of law. When there is a dispute over whether an item is subject to collective bargaining, the sole inquiry is whether the item is included definitionally under the controlling provision, notwithstanding the fact that it might also fit within the conflicting provision.

This approach was applied in *Pennsylvania Labor Relations Board v. State College Area School District*⁵⁴ in which teachers sought to bargain over such matters as teacher preparation time, chaperoning of athletic events and class size. Conceding that these items might be included under the mandatory bargaining provisions,⁵⁵ the court looked further to determine whether the disputed items were also matters of "inherent managerial policy," over which, by statute, the schools were not required to bargain.⁵⁶ The court found the items to be definitionally within both the bargaining rights and the management rights provisions.⁵⁷ To resolve the conflict, the court ruled that

*the controlling provision . . . is that under [the management rights provision] a public employer is not required to bargain on any policy matter notwithstanding the effect or impact that it may have on wages, hours, and terms and conditions of employment.*⁵⁸

Although the statute could arguably be read in a manner supporting the court's statement, it could as easily be interpreted as meaning that only matters which are *predominantly* policy matters need not be bargained upon. However, the court chose to read the management rights provision in its broadest possible sense and, without any policy analysis whatsoever,

54. 9 Pa. Cmwlth. 229, [State College Educ. Ass'n v. Pennsylvania Lab. Rel. Bd.] 306 A.2d 404 (1973).

55. PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1973) ("wages, hours and other terms and conditions of employment . . .").

56. Public employers shall not be required to bargain over matters of inherent managerial policy Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon

Id.

57. 9 Pa. Cmwlth. at 243, 306 A.2d at 412.

58. *Id.* at 238, 306 A.2d at 410 (emphasis in original).

deemed it to be "controlling."⁵⁹ The court thus concluded that "[a]ny item of wages, hours, and other items [*sic*] and conditions of employment, if affected by a policy determination, is not a bargainable item."⁶⁰

Using the same approach, an opposite result was reached in *West Hartford Education Association v. DeCourcy*⁶¹ where the disputed items were class size and teacher load. Again, these items arguably could be defined both as "conditions of employment" which were subject to mandatory bargaining, and as matters of educational policy which were reserved to managerial discretion. The court appeared to recognize the problem of accommodating competing protected interests, explaining,

[t]his problem would be simplified greatly if the phrase "conditions of employment" and its purported antithesis, educational policy, denoted two definite and distinct areas. Unfortunately, this is not the case. Many educational policy decisions make an impact on a teacher's conditions of employment and the converse is equally true. There is no unwavering line separating the two categories. It is clear, nevertheless, that the legislature denoted an area which was appropriate for teacher-school board bargaining and an area in which such a process would be undesirable.⁶²

Noting the importance of allowing school boards to determine educational policy unilaterally, the court concluded that the reservation of management rights "appears to have a special kind of vitality in the public sector."⁶³ Looking to the disputed items, the court found that "[t]here can be no doubt that policy questions are involved in these matters"⁶⁴

Notwithstanding these assertions, the court ruled the items to be bargainable.⁶⁵ The "basic question" was deemed to be not whether the items affected policy, but whether the items *could* be considered statutory subjects of bargaining.⁶⁶ Applying traditional private sector criteria, the court found that the items would be amenable to the bargaining process.⁶⁷

59. Note 56 *supra* contains the statutory language in question.

60. 9 Pa. Cmwlth. at 244, 306 A.2d at 413 (emphasis added).

61. 162 Conn. 566, 295 A.2d 526 (1972).

62. *Id.* at 581, 295 A.2d at 534-35.

63. *Id.* at 583, 295 A.2d at 535.

64. *Id.* at 585, 295 A.2d at 536.

65. *Id.* at 586, 295 A.2d at 537.

66. *Id.* at 585, 295 A.2d at 537. The statutory scope of bargaining is "salaries and other conditions of employment" CONN. GEN. STAT. ANN. § 10-153d (Supp. 1973).

67. The court first found that "industrial experience" was relevant in determining the bargainability of a disputed item, citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). Of 96 master contracts negotiated in Connecticut, 61 had class

In effect, the finding that the disputed item was a condition of employment was conclusive as to its bargainability, regardless of the impact that bargaining might have on school board and community.

In neither *State College* nor *West Hartford* can the grounds for decision withstand analysis. In neither case was a reason given for choosing the favored provision.⁶⁸ A rule of law that one provision rather than the other is "controlling" within the area of overlap tends to ignore the problem rather than to solve it, and thereby does injustice to the interests the legislature had sought to protect. A determination of bargainability should be made on a case by case basis, balancing the competing interests protected by the statute as they are applicable to the item in dispute. Where two items fall under both the bargaining rights and the management rights provisions, a policy analysis which results in one provision controlling for one item should not necessarily be dispositive for the other.

The Dispositive Criterion Approach

The dispositive criterion approach differs from the conclusive priority approach in two ways. First, it employs a two-tier analysis in that the court first determines whether a disputed item arguably falls under both the bargaining and the management rights provisions. Second, within the area of overlap the court then resolves the question of bargainability by recourse to a set of specific, judicially created criteria. In con-

size stipulations and 41 provided for teacher load. 162 Conn. at 584-86, 295 A.2d at 535-37. Further, the court stated,

[c]lass size and teacher load chiefly define the amount of work expected of a teacher, a traditional indicator of whether an item is a "condition of employment."

Id. at 585-86, 295 A.2d at 537.

68. The court in *State College* was apparently fearful that unrestricted bargaining would subvert the educational process, 9 Pa. Cmwlth. at 242, 306 A.2d at 412, and may have succeeded in fully emasculating the bargaining process. *See id.* at 248, 306 A.2d at 415 (Kramer, J., dissenting). For example, conceding that "hours" would be bargainable, the court explained that the decision to have teachers be present at additional after-school meetings with parents was nonbargainable since the item was a matter of policy. *Id.* at 243, 306 A.2d at 412. Defining hours to mean "the starting time; the ending time," the court nevertheless held that a proposal that "school will officially close at noon of the last day of classes for Thanksgiving, Christmas, Spring and Summer vacation" was nonbargainable since it was "within the scope of matters of inherent managerial policy specifically in the area of functions and programs of the public employer" *Id.* at 246, 306 A.2d at 414. The uselessness of this approach has been recognized by the Kansas Supreme Court.

It does little good, we think, to speak of negotiability in terms of "policy" versus something which is not "policy." Salaries are a matter of policy, and so are vacation and sick leaves.

National Educ. Ass'n of Shawnee Mission v. Board of Educ., 212 Kan. 741, —, 512 P.2d 426, 435 (1973).

trast, the conclusive priority approach does not require determining whether an item can fall within both of the conflicting provisions. Once it is determined that the item can be included under the "controlling" provision, the issue is decided.⁶⁹ The dispositive criterion approach, by recognizing an area of overlap, forces the court at least to attempt an accommodation of interests of the school boards and the teachers within the area of ambiguity. In contrast, the conclusive priority approach allows the court to ignore the legitimacy of one group of interests.

The dispositive criterion approach was utilized in *National Education Association of Shawnee Mission v. Board of Education*⁷⁰ where the Kansas Supreme Court was faced with the question of whether class size, curriculum, selection of materials and several other matters were "terms and conditions of professional service," in which case they would be subjects of negotiation,⁷¹ or items requiring a school board "policy" determination, which were not negotiable under the statute.⁷² After determining that the items in dispute were arguably within both categories,⁷³ the court formulated a dispositive criterion, stating that

[t]he key, as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole.⁷⁴

69. See text accompanying note 66 *supra*.

70. 212 Kan. 741, 512 P.2d 426 (1973).

71. KAN. STAT. ANN. § 72-5414 (1972).

72. 212 Kan. at —, 512 P.2d at 433.

73. See *id.* at —, 512 P.2d at 435.

74. *Id.*

The Kansas text builds upon an approach previously developed by the Nebraska courts. In *School Dist. of Seward Educ. Ass'n v. School Dist.*, 188 Neb. 772, 199 N.W.2d 752 (1972), the Nebraska court held that "conditions of employment can be interpreted to include only those matters directly affecting the teacher's welfare." *Id.* at 784, 199 N.W.2d at 759. The Kansas approach is superior in that a separate inquiry is made into the effect of the item on school operations as a whole. This approach is better in that there would be little risk of harm to the public interest in permitting bargaining over items which, while of only arguable importance to teachers, have no constraining effect on school board discretion.

A rough approximation of this approach was used in *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.*, — S.D. —, 215 N.W.2d 837 (1974), where teachers sought to bargain over items such as class size and teacher aides as "conditions of employment." *Id.* at —, 215 N.W.2d at 838. Seeking to balance the legitimate interest in school board discretion against the statutory guarantee of bargaining rights, the court interpreted the statute to include only "conditions of employment which materially affect rates of pay, wages, hours of employment and working conditions" *Id.* at —, 215 N.W.2d at 841 (emphasis added). The items were ruled nonbargainable. *Id.* The problem with this approach is that the court offers no guidelines for the determination of "materiality." Compare the conclusory majority holding, "[i]n our opinion, the items . . . are not material . . . ," *id.* at —, 215 N.W.2d at 841, with the dissent's analysis, *id.* at —, 215 N.W.2d at 843-44 (Doyle, J., dissenting).

This approach suffers two drawbacks. First, the criterion used may not resolve the issue in dispute because items affecting the well-being of the individual teacher can also affect the school as a whole.⁷⁵ A more serious question is whether the utilization of this test actually accomplishes the legislative purposes. By emphasizing the "well-being of the individual teacher," the rule may include too little by excluding bargaining on items that affect the teacher professionally rather than personally, although the statute literally attempts to give teachers some control over "terms and conditions of professional service."⁷⁶ In addition, the rule may make many things bargainable which should not be because of the school board's need to retain a flexible approach. If one of the legislative purposes in granting bargaining rights is to avoid labor unrest, then the inquiry should consider how important the disputed item would be in the bargaining context. While the impact of the item on the well-being of the teacher is perhaps one factor in this inquiry, it ought not be the sole criterion. Similarly, if the legislative intent in securing management rights is to protect areas of political interest from incursion at the bargaining table, then the inquiry also should consider the degree to which the disputed item is, in fact, a matter of potential community concern. No specific set of criteria is likely to be applicable in every dispute.

Despite its drawbacks, the Kansas approach presents a promising first step towards a sounder test of bargainability. The Kansas court has recognized that the area of overlap has resulted from the legislative decision not to choose between the competing processes of collective bargaining and community control. To its credit, the Kansas court has responded to this legislative indecision by articulating a test that does not choose between bargaining rights and management rights, but rather seeks to balance the two. The Kansas decision can be faulted only for the criterion it uses in finding the balance. A more desirable approach would not limit the court to applying only one or a few specific tests, but would entail a more extensive consideration of all relevant criteria which are responsive to the underlying interests the bargaining statute seeks to protect.

The Interest Balancing Approach

A third approach, which attempts to balance the interests sought to be legally protected, has been developed by the Federal Labor Relations

75. Vacations, for example, are such an item.

76. KAN. STAT. ANN. § 72-5414 (1972).

Council (FLRC). In interpreting Executive Order Number 11,491⁷⁷ which grants bargaining rights to federal employees, the FLRC is faced with accommodating a broad list of bargainable subjects⁷⁸ with a lengthy reservation of management rights.⁷⁹ If it is determined that a disputed item definitionally falls within both the bargaining rights and the management rights provisions, the Council makes an extensive inquiry to determine whether, and to what extent, a decision of bargainability or non-bargainability would affect the conflicting interests the Executive Order seeks to protect. To resolve the conflict, the FLRC balances the degree of abridgement to one group of protected interests against the degree to which other protected interests would be furthered.

This approach was first developed in *Local 2219, IBEW & Department of the Army Corps of Engineers, Little Rock District*.⁸⁰ There, the FLRC, after determining that work scheduling, the item in dispute, was an arguably bargainable item,⁸¹ inquired further into the benefits of bargaining. The agency had presented no evidence of actual detriment that would be caused by bargaining over this item. Instead, it based its case solely on a definitional argument, urging that work scheduling involved matters of efficiency, economy and cost which were specifically reserved for determination by the employer under the Executive Order.

The Council rejected this argument, holding:

In general, agency determinations as to negotiability made

77. 3 C.F.R. 262 (1973), 5 U.S.C. § 7301 (1970), as amended, Exec. Order No. 11,616, 36 Fed. Reg. 17319 (1971) [hereinafter referred to as the Executive Order].

78. Exec. Order No. 11,491, § 11(a), 3 C.F.R. 268 (1973), 5 U.S.C. § 7301 (1970).

79. *Id.* §§ 11(b), 12(b), 3 C.F.R. 268, 269 (1973), 5 U.S.C. § 7301 (1970). Section 12(b) provides that

management officials of the agency retain the right, in accordance with applicable laws and regulations—

(1) to direct employees of the agency;

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

(3) to relieve employees from duties because of lack of work or for other legitimate reasons;

(4) to maintain the efficiency of the Government operations entrusted to them;

(5) to determine the methods, means, and personnel by which such operations are to be conducted; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency

Id. § 12(b), 3 C.F.R. 269 (1973), 5 U.S.C. § 7301 (1970).

Section 6(b) of the Indiana Act, IND. CODE § 20-7.5-1-6(b) (1973), IND. ANN. STAT. § 28-4556(b) (Supp. 1973) is modeled after this section. See note 20 *supra*.

80. FLRC Case No. 71A-46 (Nov. 20, 1972), G.E.R.R. 21:7023 (Ref. File, 1972).

81. *Id.* at 21:7024.

82. *Id.*

in relation to the concept of efficiency and economy in [the management rights section] of the Order and similar language in the statutes require consideration and balancing of all the factors involved, including the well-being of the employees rather than an arbitrary determination based only on the anticipation of increased costs We believe that where otherwise negotiable proposals are involved the management right in section 12 (b) (4) may not properly be invoked to deny negotiations unless there is a substantial demonstration by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits.⁸³

Thus when an item is arguably bargainable, the FLRC will demand evidence on both the benefits of permitting bargaining, and injury to the agency's mission and effectiveness.

*Tidewater Virginia Federal Employees Metal Trades Council & Naval Public Works Center, Norfolk, Virginia*⁸⁴ is an example of this balancing approach. The union, seeking to bargain over the contracting out of work, showed that this item had been included in previous contracts between the parties and in contracts with other agencies, and that the item was generally considered bargainable in the private sector.⁸⁵ The agency argued that it was important to retain agency discretion because

the Federal Government utilizes its purchasing power, including the contracting out of work, to achieve desirable social goals, e.g., to help establish minimum wage floors, to promote private sector equal employment opportunity, to stimulate the economy, and to create employment opportunities for veterans⁸⁶

The agency was able to point to specific policy decisions of its parent agency in support of its contention that the contracting out of work necessarily involved matters relating to the mission of the agency which, if bargained over, would seriously compromise the agency's effectiveness.⁸⁷ Adopting the same balancing approach it had announced in the *Little*

83. *Id.* at 21:7025.

In a recent case of first impression, a federal district court has ruled that the FLRC *must* make a particularized cost-benefit inquiry in determining the negotiability of terms of employment. *Nat'l Broiler Council v. FLRC*, Civil No. 147-74-A (E.D.Va., filed Apr. 24, 1974), 553 G.E.R.R. E-1 (Current Rep. May 6, 1974).

84. FLRC Case No. 71A-56 (June 29, 1973), G.E.R.R. 21:7093 (Ref. File, 1973).

85. *Id.* at 21:7096.

86. *Id.*

87. *Id.*

Rock decision, the FLRC ruled the item nonbargainable.⁸⁸

The FLRC approach commends itself as a sound method of resolving bargainability disputes. By inquiring into the degree to which bargaining would hinder the mission of the agency and into the benefits bargaining would confer, the FLRC has properly related the facts surrounding a bargaining dispute to the policies the Executive Order sought to protect. The criteria the FLRC applies in balancing the utility of bargaining are derived from the Executive Order itself and yield results consistent with the balance the Executive Order has sought to strike, an achievement the first two approaches will not always accomplish.

ADOPTING A BALANCING APPROACH UNDER THE INDIANA ACT

Bargainability disputes arising under the Indiana Act are susceptible to resolution through a balancing approach similar to that developed by the FLRC. The Act evinces an express legislative intent to protect the opposing and competing processes of bargaining and school board discretion. The Act is to further "the development of harmonious and cooperative relationships between school corporations and their certificated employees,"⁸⁹ yet is to preserve the legislative delegation of

discretion to carry out [the] 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 away⁹⁰

To further these competing policies, the legislature has attempted to define areas in which bargaining is to be appropriate and areas in which, unless the parties agree to bargain, school board discretion should be protected. This decision inevitably requires a compromise. As one commentator has stated:

If a school board adopts the traditional methods of bargaining as to all those negotiable items, then the community which it represents will be shut out from almost all important decisions. Yet to the extent that school boards dilute the bargaining process by involving the community in matters which importantly affect teachers' working conditions and which state law requires a

88. *Id.* at 21:7097.

89. IND. CODE § 20-7.5-1-1(a) (1973), IND. ANN. STAT. § 28-4551(a) (Supp. 1973).

90. IND. CODE § 20-7.5-1-1(d) (iii) (1973), IND. ANN. STAT. § 28-4551(d) (iii) (Supp. 1973).

board to bargain over, there will be an unsatisfactory relationship between school board and teachers union.⁹¹

This legislatively-intended compromise can be effectuated by a decisionmaking approach which recognizes and attempts to balance the explicit interests the statute seeks to protect. Assuming that a disputed item is arguably bargainable, a satisfactory balance can be struck by weighing the impact of permitting bargaining on the school board-community relationship against the impact of not permitting bargaining on the harmony of the school board-teacher relationship.⁹²

These questions should not be decided in the abstract. Only a factual inquiry can determine how the legislatively protected interests would in fact be abridged or furthered by a decision of bargainability.^{92a} The benefit or injury of permitting bargaining is a factual assertion, the proof of which should fall upon the party seeking the benefit of the ruling. Class size, for example, may rank low as a matter of educational policy. Yet, because of its impact on school finances, "one can legitimately be anxious about the distortion, built into educational policy decisions, that may result

91. Livingston, *Collective Bargaining and the School Board*, in PUBLIC WORKERS AND PUBLIC UNIONS 63, 70 (S. Zagoria ed. 1972).

Where school boards draw the line, or where the line is drawn for them by state agencies charged with administering collective bargaining statutes, will have a vital effect on the relative influence on decision making of teacher unions as against the influence of taxpayers, parents, and other community groups.

Id.

92. An example of a bargaining situation in which the balancing approach would be most useful is the issue of year-round schooling, only recently recognized by statute. IND. CODE § 21-1-1-62.5 (1973), IND. ANN. STAT. § 28-216a (Supp. 1973). A change from the traditional nine month to a twelve month calendar would clearly affect "hours," a mandatorily bargainable subject. However, a twelve month school year may also be needed to "maintain the efficiency of school operations," or may involve matters of "policy" reserved for management discretion. If the matter is bargainable, important community interests will be shut out from the decisionmaking process; if the subject is nonbargainable, the teacher-school board relationship will be distorted by the omission of a key item that helps determine the amount of work a teacher is expected to undertake.

Under a balancing approach, the initial determination to go to a twelve month school year would probably be declared nonbargainable, since the political aspects of that decision predominate. On the other hand, secondary decisions, such as how the twelve month plan is to be implemented, may be bargainable to the extent they do not undermine the initial determination to change to year-round schooling.

92a. See *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.*, — S.D. —, 215 N.W.2d 837 (1974). All justices agreed that the dividing line between bargainable and nonbargainable subjects was how "materially" the disputed items affected wages, hours, or other conditions of employment. *Id.* at —, 215 N.W.2d at 841. The majority then found none of the items to be material, *id.*, yet the dissent found sufficient materiality in all. *Id.* at —, 215 N.W.2d at 844 (Doyle, J., dissenting). The difficulty is that "materiality" is a factual relationship, not a metaphysical attribute. Justice Wollman properly notes that absent "empirical evidence, I am reluctant to engage in speculation or assumption about the nature and extent of the effect [the items] may have on a teacher's hours of employment." *Id.* at —, 215 N.W.2d at 843 n.* (Wollman, J., concurring specially).

from determining class size through collective bargaining."⁹³ Such an impairment of school board flexibility, if proved, should then be weighed against the impairment to teacher-school board relations that the removal of that item from the bargaining table would occasion. Where teachers bargain over the other factors that determine compensation for the amount of work performed, such as salary, length of workday and days in the year; then removing class size from the context of bargaining distorts the bargaining process.

The Indiana statute provides for the development of a factual record in scope of bargaining disputes from which the impact on protected interests can be measured and balanced.⁹⁴ By utilizing factfinding proceedings, the parties can develop a record in support of their assertions that inclusion or exclusion of the disputed item would adversely affect their positions. Specifically, the Indiana Act directs the factfinder to consider

- (1) past memoranda of agreements and/or contracts between the parties;
- (2) comparisons of wages and hours of the employees involved, with wages of other employees . . . ;
- (3) the public interest;

93. WELLINGTON & WINTER, *supra* note 3, at 138.

94. Section 12(b) of the Act, IND. CODE § 20-7.5-1-12(b) (1973), IND. ANN. STAT. § 28-4562(b) (Supp. 1973) provides that the board shall appoint a mediator if either party declares an impasse either in the scope of the items which are to be bargained collectively or on the substance of any item to be bargained collectively.

Id. Failure to reach agreement within the statutory timetable automatically invokes fact-finding under § 12(d) of the Act. IND. CODE § 20-7.5-1-12(d) (1973), IND. ANN. STAT. § 28-4562(d) (Supp. 1973). Factfinding may be requested earlier, under § 12(f), IND. CODE § 20-7.5-1-12(f) (1973), IND. ANN. STAT. § 28-4562(f) (Supp. 1973), as to items listed in § 4 of the Act, and, presumably, as to items protected by the § 5 grandfather clause.

An alternate approach for bringing bargainability disputes before the Indiana Education Employment Relations Board would be for either party to file directly with the board an unfair labor practices complaint, pursuant to § 11(b) of the Act, IND. CODE § 20-7.5-1-11(b) (1973), IND. ANN. STAT. § 28-4561(b) (Supp. 1973), for refusal to bargain, under § 7(a) (5) or § 7(b) (3) of the Act, IND. CODE §§ 20-7.5-1-7(a) (5), (b) (3) (1973), IND. ANN. STAT. §§ 28-4557(a) (5), (b) (3) (Supp. 1973). However, this approach bypasses the formal factfinding procedure required of impasse resolution and is thus less likely to result in a satisfactory evidentiary record upon which the decision can be based.

Experience in New York City can provide a rationale for refusing to entertain an unfair labor practices charge that is in essence a bargainability dispute. It was felt that a refusal to bargain in good faith was not the same as refusing to bargain when, in good faith, the employer doubted that the item was bargainable. If this rationale were to be applied, parties desiring a resolution of a bargainability dispute may resort to impasse procedures as the preferable route. Anderson, *The Structure of Public Sector Bargaining*, in PUBLIC WORKERS AND PUBLIC UNIONS 37, 47 (S. Zagoria ed. 1972).

(4) the financial impact upon the school corporation . . .⁹⁵

The first two factors clearly give evidence of the probable effect exclusion of the item would have upon the bargaining relationship.⁹⁶ Where the parties have in the past developed a successful bargaining relationship by including the disputed item, then such past practices are indicative that harmonious relations can be continued by retaining the item.⁹⁷ The second item, comparison with industry practice, further aids in deciding whether the item can profitably be included in the bargaining relationship.

If an employment condition in a school district is currently out of line with the practices of most school districts, its exclusion from bargaining may promote teacher unrest. Evidence of the importance the teachers may attach to this item can be drawn from their willingness to trade off possible gains in other bargainable areas for concessions regarding this particular item.⁹⁸ On the other hand, if a given employment condition is currently comparable to conditions in other school districts, its exclusion from bargaining has less likelihood of precipitating substantial teacher unrest.

The factfinder is further directed to inquire into the "public interest." This phrase is certainly broad enough to include inquiry into the community's interest in the disputed item, the degree to which inclusion of the item in a master contract would freeze school board positions in an area that demands flexibility,⁹⁹ and the degree to which the disputed item affects competing groups in the community, such as schoolchildren, parents, voters and taxpayers.¹⁰⁰ A finding that there is substantial public interest in the item, or that school boards need to remain flexible, or that the item affects diverse community groups whose interests the school board must reconcile, will favor exclusion of that item from the scope of

95. IND. CODE § 20-7.5-1-13(b) (1973), IND. ANN. STAT. § 28-4563(b) (Supp. 1973).

96. Such factors are relevant to the same criteria in private sector questions of bargainability. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

97. This policy is greatly strengthened by the § 5 grandfather clause. IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1973). See text accompanying note 19 *supra*.

98. See Comment, *Maine's Public Labor Law*, 24 ME. L. REV. 73, 86 (1972) [hereinafter cited as Comment].

99. Metzler, *The Need for Limitation upon the Scope of Negotiations in Public Education*, 1, 2 J. LAW & EDUC. 139, 147 (1973).

100. The exercise of unilateral government decisionmaking achieves a balance among competing interest groups in the community.

While government leaders do have defined authority to act as management, the nature of their action is strongly affected by the need to weigh and balance divergent interests of major groups among the citizens they represent.

Macy, *supra* note 51, at 11.

bargaining.¹⁰¹ Upon such evidence, the factfinder may make an educated determination of which interest, or balance, should prevail.

Utilization of a balancing approach based on extensive factfinding has its drawbacks. It does not lend itself to situations in which a speedy decision is needed. In addition, it may result in different scopes of bargaining in different school districts.¹⁰² Nonuniformity is a necessary result since individual school boards and teacher groups may, at certain times, face exigencies and employment conditions peculiar to their district. A fair disposition of bargainability disputes requires the factfinder to take these circumstances into consideration.

However, the benefit of using a balancing approach is that within the area of statutory ambiguity, the legislature's accommodation of bargaining with school board discretion is faithfully maintained.¹⁰³ Such an approach would go far towards minimizing labor unrest, for it would directly inquire into those factors that drive bargaining to impasse. Likewise, it would go far towards preserving school board powers in those areas in which the boards need those powers to serve and respond to the public effectively. Unable to draw a precise line between what should be deemed bargainable and nonbargainable items and unwilling to formulate a clear rule that would always favor one provision over the other, the legislature has created problems of ambiguity which courts and boards must resolve by applying the statutory accommodation of interests to diverse fact situations. An approach that applies criteria consistent with the legislative balance will ensure that Indiana's experiment in public sector labor relations will develop along the lines the legislature intended.

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101. This approach would give full weight to the rationale of reserving management rights. But preserving management rights is not the only operative policy.

The role of limitations on the scope of bargaining in the public sector is that of a device for insuring that governmental functions will be carried out in a manner responsive to the public will The need to protect the public interest should be balanced against a policy of subjecting to negotiation the widest range of issues possible.

[The nonbargainable] areas should be limited, in an attempt to enhance the bargaining process, to those subjects upon which official judgment and discretion are necessary to insure responsiveness to the public will.

Comment, *supra* note 98, at 86-87 (footnotes omitted).

102. Such a result is inevitable in Indiana even without the balancing test since under § 5 the mandatory scope of bargaining will vary from district to district according to the terms of the master contracts negotiated in 1972-73. See text accompanying notes 18-19 & 29-32 *supra*.

103. Cf. Comment, *supra* note 98, at 88 n.105.

The legislature should establish a general rule requiring the balancing of the interest of public employees against the interest of the public in issues arising during collective bargaining and, in accordance with this rule, allow the Public Employees Labor Relations Board to decide upon specific nonbargainable issues.

Id.