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# Commentary (Bargaining and Discussion-Is It a Happy Marriage?)

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## Commentary

RICHARD J. DARKO\*

The article *Bargaining and Discussion—Is It a Happy Marriage?*, by Barbara W. Doering,<sup>1</sup> presents an illuminating and accurate description of the bargaining and discussion activity which occurred during the first year of existence of Indiana's Act<sup>2</sup> establishing a system of collective bargaining and discussion for school employees. There can be no serious dispute with Ms. Doering's conclusion that "a great deal of time was spent in fruitless debate or maneuvering over the treatment of discussible items."<sup>3</sup> As she suggests, procedural disputes indeed consumed an inordinate amount of time. The bickering over procedures may well have impeded hard, constructive bargaining or discussion, call it what you will, in many school corporations. Clearly, the emphasis placed on resolution of procedural problems in many school corporations retarded the education of the nonprofessional negotiators themselves as to the requirements and methodology of the collective bargaining process.

The language of section 5 of the Act is that a school employer shall discuss and "may but shall not be required to bargain collectively" about certain specified items, as well as about "working conditions, other than those provided in Section 4 . . . ."<sup>4</sup> Thus, in private sector labor terminology, any section 5 item constitutes a permissive subject of bargaining since the employer may, but need not, bargain about a section 5 item.<sup>5</sup>

To a seasoned professional negotiator in the private sector, the nice legal distinction between a mandatory subject of bargaining and a permissive subject of bargaining is functionally a distinction without a difference. In the process of table bargaining, if one party is willing to make a concession on a mandatory subject of bargaining in return for concessions on a permissive subject of bargaining, there is no particular reason to differentiate between the legal characters of the items. After

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<sup>1</sup> 50 IND. L.J. 284 (1975), *supra*.

<sup>2</sup> IND. CODE §§ 20-7.5-1-1 to -14 (1973), IND. ANN. STAT. §§ 28-4551 to -4564 (Supp. 1974) [hereinafter referred to as P.L. 217 or the Act].

<sup>3</sup> Doering, *supra* note 1, at 304.

<sup>4</sup> IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1974).

<sup>5</sup> NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

all, the ambition of the parties at the table is to arrive at a contract acceptable to both parties, not to engage in protracted legal discussions on what is mandatory and what is permissive. However, the fact of functional identity between mandatory and permissive subjects at the bargaining table has been rejected, consciously or unconsciously, by many school employers, probably out of a transcendent concern for preserving the sanctity of the school board's decisionmaking process for items perceived to be matters of school policy.

The impasse procedures established by the Act are not available to resolve disagreements on matters which are being discussed rather than bargained.<sup>6</sup> However, since all discussible items are permissive subjects of bargaining, experienced mediators, whose aim is also to arrive at a contract rather than to belabor legal questions, generally explore the possibility of concessions on mandatory items in return for concessions on discussible or permissive items. If the mediator perceives that the employees place a very high priority on a section 5 item about which the employer has declined to bargain, the mediator may be expected to at least suggest to the employer the possibility of moving that high priority item from the realm of discussion to the realm of bargaining with a view toward settling the entire contract.<sup>7</sup> Consequently, the functional identity of mandatory and permissive subjects continues into the impasse procedure.

As mentioned by Ms. Doering, the obligation to discuss has been interpreted in several decisions to require mutual exchange of points of view in a meaningful way with a view towards reaching agreement.<sup>8</sup> Under these interpretations, a school employer does not meet its obligation to discuss merely by listening to the employees and then taking unilateral action. The statutory definition of "discuss"<sup>9</sup> refers to providing "meaningful input," and the *Tippecanoe* decision requires that each side, in fact, put something into the discussion process.<sup>10</sup>

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<sup>6</sup> See Doering, *supra* note 1, at 290 & n.37.

<sup>7</sup> Cf. Note, *Determining the Scope of Bargaining Under the Indiana Education Employment Relations Act*, 49 IND. L.J. 460, 480 (1974).

<sup>8</sup> *Bobbe June Blom v. Tippecanoe School Corp.*, [Unfair Practice] Case No. U-74-15-7865 (IEERB, July 5, 1974); *Robert Brothers & Board of School Trustees of the Delphi Community School Corp.*, [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974); [Consolidated cases] *Sarah Borgman & Board of School Trustees of the Baugo Community School Corp.*; *Sharon Poyser & Board of School Trustees of the Baugo Community School Corp.*, [Unfair Practice] Cause No. U-74-11-2260-12; *Donald Bacher & Board of Trustees of the Baugo Community School Corp.*, [Unfair Practice] Cause No. U-74-11-2260-11 (IEERB, Sept. 5, 1974) [hereinafter cited as *Baugo*].

<sup>9</sup> IND. CODE § 20-7.5-1-2(o) (1973), IND. ANN. STAT. § 28-4552(o) (Supp. 1974).

<sup>10</sup> *Bobbe June Blom v. Tippecanoe School Corp.*, [Unfair Practice] Case No. U-74-15-7865 (IEERB, July 5, 1974), at 12-13.

These decisions interpreting the discussion requirement as imposing on the employer obligations other than those of listening and then taking unilateral action were rendered near the end of the bargaining "season" under the Act; consequently, they have not yet been internalized by the negotiators.<sup>11</sup> Optimistically, one would hope that the employers' realization of the stringent requirements of the discussion process will temper their intransigence to bargain permissive subjects. Since the requirements of good faith discussion so closely approximate those of good faith bargaining, it would seem to be inadvisable for employers to continue wasting inordinate amounts of time determining whether a matter will be bargained or discussed.

Nonetheless, in view of the difficulties which have arisen under the present statutory language creating the dual obligation to bargain and to discuss, and in view of the impediments which this dual obligation has placed, whether necessarily or unnecessarily, in the way of the efficient resolution of school employees' real problems and concerns, the Indiana General Assembly would be well advised, during its 1975 session, to give strong consideration to eliminating the artificial distinctions currently existing between section 4 items and section 5 items.<sup>12</sup>

#### EMPLOYEE DISCHARGE CASES

Indiana's Act has been considered primarily from the viewpoint of systematizing and regulating the collective bargaining process for public school employees. Ms. Doering's article deals exclusively with the bargaining and discussion requirements of the Act, and it is fair to assume that these functions were foremost in the minds of the legislators when the Act was being considered by the Indiana General Assembly. However, IEERB decisions in unfair practice cases in which employees claim to have been discharged or otherwise discriminated against as a result of their exercise of rights protected by the Act may, in the long run, prove to be as important to both school employers and school employees as the obligation to bargain and discuss.

The unfair practice provisions of the Act are directly modeled on the unfair labor practice provisions of the National Labor Relations

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<sup>11</sup> The hearing examiner's recommendations in the *Tippicanoe* case were entered on July 5, 1974, and automatically became an order of the Indiana Education Employment Relations Board on July 25, 1974. The hearing examiner's recommendations in the *Delphi* case were entered on August 20, 1974; the recommendations in the *Baugo* case were entered on September 5, 1974. Both *Delphi* and *Baugo* are pending on appeal to the full Board.

<sup>12</sup> See Doering, *supra* note 1, at 309.

Act.<sup>13</sup> In several instances, the exact terminology of the federal statute has been used in the Indiana Act. Section 6 of the Indiana Act is analogous to section 7 of the federal act,<sup>14</sup> establishing rights of employees, while section 7(a) of the Indiana Act is directly modeled on section 8(a) of the federal act.<sup>15</sup>

During the Indiana Act's first year of existence 13 teachers were petitioners in unfair practice complaints; 11 charged that they were discharged in violation of the terms of the Act, while two claimed that their work assignments were changed in violation of the Act. Approximately nine separate proceedings were brought, in two of which there were multiple petitioners. The hearing examiners have entered recommendations in all but one of these proceedings. However, none of these unfair practice proceedings have yet been considered by the IEERB itself.

The hearing examiners have recommended remedial relief of some nature for a majority of the unfair practice petitioners. The examiners have recognized two separate bases for finding interference with protected rights in these cases. First, in several of the cases the hearing examiner has found traditional private sector type discrimination to have occurred as a result of the teachers' exercise of traditional private sector rights, now incorporated into the public sector through the Indiana Act. Among these traditional rights are the right to form, join or assist employee organizations; the right to participate in collective bargaining; and the right to engage in concerted activities for the purpose of improving working conditions.<sup>16</sup>

Second, and perhaps of more interest, the hearing examiners have held that three of the petitioners are entitled to relief because the school employer failed to meet its obligation to discuss their discharge or transfer and the circumstances giving rise to the discharge or transfer.<sup>17</sup> The school employers' refusal to discuss the teachers' circumstances has been held to constitute an unfair practice under section 7(a)(5), thus entitling the teacher to relief.<sup>18</sup>

As to the traditional discrimination charges, the hearing examiners

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<sup>13</sup> 29 U.S.C. §§ 151-68 (1970).

<sup>14</sup> Compare IND. CODE § 20-7.5-1-6 (1973), IND. ANN. STAT. § 28-4556 (Supp. 1974), with 29 U.S.C. § 157 (1970).

<sup>15</sup> Compare IND. CODE § 20-7.5-1-7(a) (1973), IND. ANN. STAT. § 28-4557(a) (Supp. 1974), with 29 U.S.C. § 158(a) (1970).

<sup>16</sup> IND. CODE § 20-7.5-1-7(a) (1973), IND. ANN. STAT. § 28-4557(a) (Supp. 1974).

<sup>17</sup> Robert Brothers & Board of School Trustees of the Delphi Community School Corp., [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974); and *Baugo*.

<sup>18</sup> See Doering, *supra* note 1, at 294-97.

have relied heavily upon private sector authorities, as would be expected in view of the close similarity of the statutory language. Various legal defenses asserted by employers, many of which have been dealt with in the private sector over a number of years, have been discussed by the hearing examiners.

One such defense customarily raised by public employers in Indiana is that the language of the statute<sup>19</sup> prohibits only discrimination undertaken for the purpose of encouraging or discouraging membership in employee organizations, and that specific proof of intent to encourage or discourage membership must be shown. This theory was rejected in *Whitbeck & School Town of Highland*<sup>20</sup> in which the hearing examiner held that discouragement of membership may be inferred from the nature of the discrimination, and that evidence of the actual discouragement of employees is not required once discrimination is found to exist.<sup>21</sup> In the *Highland* case, the hearing examiner also noted that although the required discrimination must be shown to have been motivated by anti-union animus, animus itself may be inferred if the conduct is "inherently destructive of important employee rights."<sup>22</sup>

In *Brothers & Delphi Community School Corporation*,<sup>23</sup> a different hearing examiner recognized that there would rarely be direct evidence that an employer has discharged an employee for protected activities, and consequently unlawful motivation of the employer had to be inferred from the circumstances surrounding the discharge. Evidence of illegal discrimination has been inferred from the employer's failure to give the employee notice of shortcomings which are relied upon as valid justification for the discharge determination.<sup>24</sup> In *Walton & Worthington-Jefferson Consolidated School Corporation*,<sup>25</sup> the hearing examiner inferred illegal discrimination from proof that a disproportionate number of association members were fired, that they were discharged without prior warning or reprimand, and that the explanations given for their discharge were evasive. The timing of a discharge in relation to the exercise of protected activities is also relevant to a showing of discrimination.<sup>26</sup>

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<sup>19</sup> IND. CODE § 20-7.5-1-7(a)(3) (1973), IND. ANN. STAT. § 28-4557(a)(3) (Supp. 1974).

<sup>20</sup> [Unfair Practice] Case No. U-74-30-4720 (IEERB, Sept. 20, 1974).

<sup>21</sup> Cf. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

<sup>22</sup> *Highland* at 16.

<sup>23</sup> Robert Brothers & Board of School Trustees of the Delphi Community School Corp., [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974).

<sup>24</sup> *Id.*

<sup>25</sup> [Unfair Practice] Case No. U-74-16-2980 (IEERB, Aug. 27, 1974).

<sup>26</sup> *Id.*

In the *Delphi* case, discussed above, the hearing examiner found anti-union animus to exist by reason of the conduct of the school employer during negotiations.<sup>27</sup> This showing of anti-union animus during the course of negotiations was relied upon to support a finding of discrimination in the discharge of the president and chief negotiator of the teachers' association.

By Indiana statute, nontenured teachers whose contracts are not renewed are entitled to "a written statement showing reason for such dismissal."<sup>28</sup> Thus, in every case in which a teacher alleges discharge for illegal reasons, the teacher bears the burden of showing that the reasons stated by the school employer are incomplete, or pretextual in nature. That burden has been met in several of the discharge cases through proof that the teacher was not, in fact, guilty of the offenses asserted by the employer, and frequently through the use of evaluation forms which many school corporations regularly complete for each of their teachers.<sup>29</sup>

In the *Baugo* case the hearing examiner, obviously weary of hearing evidence on teachers' classroom strengths and weaknesses, stated, "The IEERB should not have to hear such evidence and should not be asked to determine the competency of a teacher."<sup>30</sup> Admittedly, it is not the primary responsibility of the IEERB to determine whether or not teachers are competent; but in the standard situation in which the school employer asserts that the motivation for the discharge was the teacher's incompetence and the teacher asserts an illegal basis for the motivation, the hearing examiners will be required to make some determination on competency so as to be able to determine whether an illegal discharge has occurred.

Illegal discrimination has been found not only in cases in which the teachers were engaged in protected activity on their own behalf, but also in cases in which the teacher, as an officer of the local teachers' association, has attempted to assist a fellow teacher in dealing with the

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<sup>27</sup> Robert Brothers & Board of School Trustees of the Delphi Community School Corp., [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974). The employer had withheld pertinent information from the employee negotiating team for an unreasonable period of time.

<sup>28</sup> IND. CODE § 20-6-13-1 (1971), IND. ANN. STAT. § 28-4317 (1970 Repl.). However, the reasons given may be general in nature. *Tilton v. Southwest School Corp.*, — Ind. App. —, 281 N.E.2d 117 (1972).

<sup>29</sup> Steven Walton & Board of School Trustees of the Worthington-Jefferson Consol. School Corp., [Unfair Practice] Case No. U-74-16-2980 (IEERB, Aug. 27, 1974); Linda Whitbeck & Board of School Trustees of the School Town of Highland, [Unfair Practice] Case No. U-74-30-4720 (IEERB, Sept. 20, 1974); and *Baugo*.

<sup>30</sup> *Baugo* at 13.

school employer.<sup>31</sup>

As in the private sector, it is frequently the case that not one reason, but several, have motivated the employer's decision to discharge. Some of the motivating reasons may be valid (such as incompetency) while others are illegal (organization membership). The problem of determining whether the employee is entitled to relief when only some of the employer's reasons are illegal has been the subject of a substantial body of federal authority, some of which is inconsistent semantically if not in practice. The phraseology of the standards or tests developed by the federal judiciary varies widely.<sup>32</sup>

The issue has not caused great difficulty for the Indiana hearing examiners. Relying upon federal precedent, they have consistently held that the discharge of an employee need not be motivated solely by anti-union discrimination in order to constitute an unfair labor practice. In the *Worthington-Jefferson* case, the hearing examiner stated that

[t]he existence of some justifiable grounds for discharge of an employee is no defense to a charge of discriminatory discharge when the justifiable grounds are accompanied by the employer's motive to discharge for union activity.<sup>33</sup>

Similarly, in *Whitbeck & School Town of Highland*, the hearing examiner recognized that even if there were valid reasons for the discharge other than the organizational activities of the teacher, that fact could not be allowed to negate the operation of sections 6 and 7(a) of the Act. The hearing examiner there adopted a "but-for" test.<sup>34</sup> The rule that the existence of some valid grounds for discharge concurrent with other illegal grounds need not preclude relief has been adopted by

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<sup>31</sup> *Baugo*, and Robert Brothers & Board of School Trustees of the Delphi Community School Corp., [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974).

<sup>32</sup> *E.g.*, NLRB v. Neuhoff Brothers Packers, Inc., 398 F.2d 640 (5th Cir. 1968); NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir. 1967). In *Whitfield*, the court noted that "[a] company can have dominant motives, mixed motives, equal motives, concurrent motives, and bewildering combinations of these," *id.* at 582, but held that all that need be shown to demonstrate entitlement to relief is that the employee would not have been fired but for the anti-union animus of the employer, despite what other shortcomings the employee may have suffered. *Id.*

<sup>33</sup> *Steven Walton & Board of School Trustees of the Worthington-Jefferson Consol. School Corp.*, [Unfair Practice] Case No. U-74-16-2980 (IEERB, Aug. 27, 1974), at 19.

<sup>34</sup> *Linda Whitbeck & Board of School Trustees of the School Town of Highland*, [Unfair Practice] Case No. U-74-30-4720 (IEERB, Sept. 20, 1974), at 17. The same standard as to the degree of discriminatory motivation which must be shown was adopted in *Larry Poyser & Board of School Trustees of the Concord Community School Corp.*, [Unfair Practice] Cause No. U-74-10-2270 (IEERB, Sept. 5, 1974); in *Robert Brothers & Board of School Trustees of the Delphi Community School Corp.*, [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974); and in *Baugo*.

courts and administrative agencies interpreting the public sector collective bargaining acts of other jurisdictions.<sup>35</sup>

Many of the school employers in unfair practice cases brought to date have argued that the IEERB lacks the authority or jurisdiction to order a school employer to reinstate a teacher, even upon a finding that the teacher was discharged in violation of the provisions of the Act. Unlike the federal statute<sup>36</sup> and several other states' public sector acts, the Indiana Act does not specifically authorize the IEERB to order reinstatement upon the finding of illegal discharge.

Section 11(b) of the Act, however, authorizes the IEERB to enter such orders "as it deems necessary in carrying out the intent of this chapter,"<sup>37</sup> and section 9(d)(9) authorizes the IEERB to adopt rules and regulations to effectuate this provision.<sup>38</sup> Pursuant to its rulemaking power, the IEERB has adopted Rule 320.1 under which the hearing examiner is required to recommend "such affirmative action by the respondent as will effectuate the policies of the Act."<sup>39</sup>

Despite the absence of express statutory authorization, the hearing examiners have not been reluctant to recommend an order of reinstatement when appropriate. In both *Brothers v. Delphi Community School Corporation*<sup>40</sup> and *Whitbeck v. School Town of Highland*,<sup>41</sup> the hearing examiners ordered reinstatement upon an analysis that once a discharge in violation of the provisions of the Act is found, reinstatement is the only remedy which will effectuate the provisions of the Act.<sup>42</sup>

The only reluctance to utilize reinstatement as a remedy was expressed in the *Worthington-Jefferson* case.<sup>43</sup> There the hearing examiner stated that he might have reservations about ordering reinstatement.

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<sup>35</sup> *Kenosha Teachers Union Local 557 v. Wisconsin Employment Rel. Comm'n*, 39 Wis. 2d 196, 158 N.W.2d 914 (1968); *Muskego-Norway Consol. Schools Joint School Dist. No. 9 v. Wisconsin Employment Rel. Bd.*, 35 Wis. 2d 540, 151 N.W.2d 617 (1967); *In re Summerfield School Dist. & Summerfield Educ. Ass'n*, [Unfair Practice] Case No. C-68-D37 (Mich. Employment Rel. Comm'n), 314 G.E.R.R. F-1 (Current Rep. 1969).

<sup>36</sup> National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970).

<sup>37</sup> IND. CODE § 20-7.5-1-11(b) (1973), IND. ANN. STAT. § 28-4561(b) (Supp. 1974).

<sup>38</sup> IND. CODE § 20-7.5-1-9(d)(9) (1973), IND. ANN. STAT. § 28-4559(d)(9) (Supp. 1974).

<sup>39</sup> IEERB Rules & Regs. 320.1, reprinted in 555 G.E.R.R. E-1, E-7 (Current Rep. May 20, 1974).

<sup>40</sup> *Robert Brothers & Board of School Trustees of the Delphi Community School Corp.*, [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974).

<sup>41</sup> *Linda Whitbeck & Board of School Trustees of the School Town of Highland*, [Unfair Practice] Case No. U-74-30-4720 (IEERB, Sept. 20, 1974).

<sup>42</sup> Reinstatement was also ordered in the *Worthington-Jefferson* and *Baugo* cases, discussed *supra* at notes 22-27.

<sup>43</sup> *Steven Walton & Board of School Trustees of the Worthington-Jefferson Consol. School Corp.*, [Unfair Practice] Case No. U-74-16-2980 (IEERB, Aug. 27, 1974).

ment if it were shown that only one of the reasons for termination was the employee's exercise of protected activity, but that other valid reasons existed, including incompetence. Although he did not find those other valid reasons for termination in the *Worthington-Jefferson* case, he suggested that where they did exist the remedy should perhaps stop short of reinstatement.

Thus, the recommendations of the hearing examiners on traditional discrimination cases have been consistent with the federal authorities and decisions from other states in the public sector. These recommendations have yet to be considered by the full Indiana Education Employment Relations Board; however, the Board can be expected to continue the development under the Act of strong and efficient protections against unfair practices.

Obviously, none of these recommendations have, as yet, been submitted to judicial review, although such review can be expected. The Indiana Administrative Adjudication Act<sup>44</sup> applies to decisions of the IEERB.<sup>45</sup> Review would be initiated either by the losing party under section 14 of the Review Act, or by the IEERB, which can bring a proceeding for enforcement of its order under section 27 of that act. In either case, the judicial review would be limited to the record developed by the IEERB, and a *de novo* hearing would not be authorized.

As Ms. Doering notes in her article,<sup>46</sup> the hearing examiners in the *Delphi* and *Baugo* cases found traditional discrimination in retribution for the teachers' exercise of protected rights. But in both cases they went further than this, basing their decisions upon a finding of an unfair practice by the school employer under section 7(a)(5) of the Act. In the *Delphi* case, the hearing examiner found that the employer had refused to discuss Brothers' termination, and in the *Baugo* case, the hearing examiner found that the employer had refused to discuss the circumstances of Poyser's discharge and Borgman's reassignment to a different school.

With respect to Poyser, the hearing examiner concluded that an unfair practice under section 7(a)(5) had been committed by the employer's refusal to discuss the teacher's "contract renewal, teaching methods, and student discipline."<sup>47</sup> Alleged shortcomings as to teaching methods and student discipline were two of the reasons advanced by the employer as legitimate motivations for the discharge.

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<sup>44</sup> IND. ANN. STAT. §§ 4-22-1-1 to -30 (Code ed. 1974).

<sup>45</sup> Doering, *supra* note 1, at 292 n.44.

<sup>46</sup> *Id.* at 294-97.

<sup>47</sup> *Baugo* at 15.

In both cases, the hearing examiner, acting to restore "the status quo ante as nearly as possible,"<sup>48</sup> recommended reinstatement as the appropriate remedy for a refusal to discuss a discharge. In *Baugo* the hearing examiner stated that "[w]hen handed a fait accompli, the teacher[s'] right to discuss is destroyed unless the decision is reversed and discussion is permitted before it is made again."<sup>49</sup>

This right of an employee organization to discuss the discharge or reassignment of members of the bargaining unit before the action is taken may well prove to be one of the most valuable statutory rights provided to teachers by the Act. It will ensure that discharge decisions are made only after a bilateral presentation of all the facts, not merely upon the facts as unilaterally perceived by the employer. As the hearing examiner stated in *Baugo*, "It seems to be little enough to ask that personnel decisions be based upon input from those affected by them."<sup>50</sup>

Because of the stringent requirements of the discussion obligation, as noted in the *Tippecanoe* decision,<sup>51</sup> and because of employer reluctance to even receive input in areas such as teacher nonrenewal, an area which school employers have traditionally perceived to be solely within their exclusive discretion, school employers can be expected to react most unfavorably to the *Delphi* and *Baugo* decisions. Yet, as Ms. Doering suggests, section 5 does not distinguish between individual cases and general policies. Neither does the Act set a specific timetable for discussion as it does for bargaining.<sup>52</sup>

#### CONCLUSION

The existence of hard bargaining on equal terms, as contemplated by the Act, obviously depends to a considerable extent upon the concurrent existence of strong protections for teachers against unfair practices, including discriminatory discharges or discharges without the discussion required by the Act. If teachers were to have only minimal protections against employer retribution for their having engaged in protected activity, such as collective bargaining, they could not be expected to vigorously pursue their rights established by the Act. At the present time, it appears that the IEERB is developing a system of teacher protections under sections 6 and 7 of the Act which will insulate

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<sup>48</sup> *Id.* at 14.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Bobbe June Blom v. Tippecanoe School Corp.*, [Unfair Practice] Case No. U-74-15-7865 (IEERB, July 5, 1974).

<sup>52</sup> See section 12 of the Act, IND. CODE § 20-7.5-1-12 (1973), IND. ANN. STAT. § 28-4562 (Supp. 1974).

teachers from vindictive, discriminatory, or retributive discharges or transfers.<sup>58</sup>

Because of the inordinate waste of time on the issue whether matters fall under section 4 or section 5 of the Act, the General Assembly should give serious consideration to unfettering the bargaining process by moving most working conditions from the area of permissive subjects of bargaining to that of mandatory subjects of bargaining.

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<sup>58</sup> Thus, for example, in *Baugo* the complainant Sarah Borgman, who had been transferred from one school district to another, was a tenured teacher. Consequently, it would have been exceedingly difficult for the employer simply to discharge her. A transfer was probably the strongest act of retribution available to the employer under these circumstances.