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

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## Commentary

LELAND B. CROSS, JR.\*

Without taking a position herself, Ms. Doering suggests that the difficulties experienced by some negotiators with the dual obligation arising from sections 3, 4, and 5 of the Indiana Teacher Bargaining Act<sup>1</sup> may lead some commentators to advocate amending the Act to provide for open scope bargaining or, at least, broadening the scope of bargaining over that presently provided.<sup>2</sup> Another commentator in this sympo-

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<sup>1</sup> The Indiana Education Employment Relations Act, 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]. Sections of the Act referred to are from the session law, Pub. L. No. 217, [1973] Ind. Acts 1080, as amended, Pub. L. No. 1, § 5, [1974] Ind. Acts 3.

<sup>2</sup> Doering, *Bargaining and Discussion—Is It a Happy Marriage?*, 50 IND. L.J. 284 (1975).

It is not unusual for state statutes on public employee collective bargaining to exclude specific matters from the category of mandatory subjects of collective bargaining. See, e.g., PA. STAT. ANN. tit. 43, § 1101.702 (Supp. 1974). For that matter, it is not unusual for state statutes on public employee collective bargaining to forbid public employers from bargaining collectively about certain listed subjects. See, e.g., HAWAII REV. STAT. § 89-9(d) (Supp. 1974). The state statute on public employee collective bargaining in Wisconsin provides both such restrictions. See WIS. STAT. ANN. §§ 119.90, 111.91 (2)(a)-(b) (Supp. 1974). Some state public employee collective bargaining statutes approach the matter by providing a statutory statement of management rights. For example, some provide that the public employer has the unconditional right to "maintain the efficiency of governmental operations," e.g., HAWAII REV. STAT. § 89-9(d) (Supp. 1973); KAN. STAT. ANN. § 75-4326(d) (Supp. 1974); N.H. REV. STAT. ANN. § 98-C:7 (Supp. 1974); NEV. REV. STAT. § 288.150(2)(c) (1973). Others provide that the public employer has no duty to bargain with respect to the "mission of the agency," e.g., VT. STAT. ANN. tit. 3, § 905(b) (1972); WIS. STAT. ANN. § 111.91(2)(a) (Supp. 1974). Still others provide that the public employer has no duty to bargain on matters of "inherent managerial policy." See, e.g., MINN. STAT. ANN. § 179.65(1) (Supp. 1974). Accordingly, the provisions of P.L. 217 which protect a school employer from deliberately or inadvertently bargaining away historic or statutory rights of management are somewhat typical of the protections set forth in comparable statutes of other states.

Notwithstanding the above, as these comments are written there are bills pending in the Indiana legislature which direct themselves to broadening the scope of bargaining under Public Law 217. Two of these are S.B. 349 (Teague) (broadening the definition of subjects of bargaining in section 4 to include salary, wages, hours "and all other terms and conditions of employment," with terms and conditions of employment defined to include fringe benefits; procedures for the promotion, demotion, transfer, assignment, retention of employees; school calendar; class size; pupil-teacher ratio; curriculum development and revision; preparation time; extracurricular activities; student supervision, discipline, and expulsion; and general working conditions; and striking out the specific enumeration of school employer responsibilities and authorities in section 6(b)); and H.B. 1432 (Harris) (broadening the definition of subjects of bargaining in section 4 to include salary, wages, hours, salary and wage related fringe benefits, and terms and conditions of employment; and narrowing the definition of subjects of discussion in sec-

sium, in fact, has taken that position.<sup>3</sup> Such a position does not seem warranted.

One of the bases of this position is the observation that procedural disputes took up an inordinate amount of time in the first year of experience under the Act.<sup>4</sup> Whether such procedural disputes did so is questionable. This may certainly have been the case in some instances; in these it may well be that the delays were due to an overabundance of caution by school boards and negotiators, the inexperience of negotiators, the vagaries of the new Act, or a combination of all of these. The problems of procedural resolution were undoubtedly compounded by at least one of the two prominent school employee organizations proposing a rather awesome "boilerplate" master contract<sup>5</sup> in almost all school districts where it negotiated. This proposal included section 4 "bargainables,"<sup>6</sup> section 5 "discussibles,"<sup>7</sup> section 6(b) management rights items, and even a few "illegals."<sup>8</sup>

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tion 5 to delete working conditions, selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations).

<sup>3</sup> See Darko, *Commentary*, 50 IND. L.J. 314, 324 (1975).

<sup>4</sup> See Doering, *supra* note 2, at 290, 304. Darko cites to Ms. Doering's observation in his commentary, *supra* note 3, at 314. Neither author provides exact data to support the observation.

<sup>5</sup> Staff of the Indiana State Teachers Association, Proposed Master Contract Between the [ ] School Corporation and the [ ] Association (1974) (unpublished proposal on file with the INDIANA LAW JOURNAL). This proposal, with appendices, frequently ran over 51 pages in length.

<sup>6</sup> IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1974) lists the items over which the parties must bargain.

<sup>7</sup> IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1974) lists the items which are discussible.

<sup>8</sup> A common proposal was the following agency shop provision:

The Board shall deduct from the payroll of all certificated employees in the bargaining unit who are not members of the Association, a representation fee amounting to the dues of the association(s) and shall remit such fees to the Association. Nothing contained herein shall be construed as forcing or inducing anyone to become a member of any teacher organization.

Master Proposed Contract, *supra* note 5, at 7. Such a provision is not specifically authorized by the Act and is a violation of sections 7(a) and (b) which provide:

Sec. 7. Unfair Practices.

(a) It shall be an unfair practice for a school employer to:

(1) interfere with, restrain or coerce school employees in the exercise of the rights guaranteed in Section 6 of this chapter.

(2) dominate, interfere or assist in the formation or administration of any school employee organization or contribute financial or other support to it; provided, that subject to rules and regulations made by the governing body, a school employer may permit school employees to confer with the school employer or with any school employee organization during working hours without loss of time or pay;

(3) encourage or discourage membership in any school employee organization through discrimination in regard to hiring or tenure of employment or any term or condition of employment;

In response to this "boilerplate" proposal, some school board negotiating teams understandably tried first to negotiate an agenda of what the parties agreed was "bargainable" and a separate agenda of what was "discussible." Failing agreement on such an agenda, these teams proceeded by each making a unilateral determination on such questions. Some of these teams went even further and tried to establish separate teams to deal with each classification. These approaches may have been motivated by a team's fear that a "discussible" item could be legally

(5) refuse to bargain collectively or discuss with an exclusive representative as required by any provisions of this chapter;

(6) fail or refuse to comply with any provision of this chapter.

(b) It shall be an unfair practice for a school employee organization or its agents to:

(1) interfere with, restrain or coerce (a) school employees in the exercise of the rights guaranteed by this chapter, or (b) a school employer in the selection of its representatives for the purpose of bargaining collectively, discussing or adjusting grievances. This paragraph shall not impair the right of a school employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

(2) cause or attempt to cause a school employer to discriminate against an employee in violation of subsection (a) . . . .

IND. CODE §§ 20-7.5-1-7(a), (b) (1973), IND. ANN. STAT. §§ 28-4557(a), (b) (Supp. 1974).

The agency shop has been rejected in other states for a variety of reasons. A provision of the bargaining act which prohibits the employer from encouraging or discouraging membership in the union has been held to bar the employer's agreeing to implement an agency shop. *Smigel v. Southgate Community School Dist.*, 388 Mich. 531, 202 N.W.2d 305 (1972); *In re Farrigan v. Helsby*, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973). A provision in the bargaining act saving to employees the right to refrain from collective activities likewise can bar an agency shop agreement. *New Jersey Turnpike Employees' Union, Local 194, AFTE v. New Jersey Turnpike Auth.*, 64 N.J. 579, 319 A.2d 224 (1974), *aff'd*, 123 N.J. Super. 461, 303 A.2d 599 (1973). And if the agency shop is not listed expressly as a permissible item of bargaining in the state's bargaining act, it must be disallowed. *Pennsylvania Lab. Rel. Bd. v. Teamsters Union, Local 8*, Case No. PERA-C-1075-C (Pa. Lab. Rel. Bd., 1970) (unreported). Also, an agency shop agreement has been held to conflict with the state's civil service laws, in that failure to pay union dues or equivalent was not among the reasons given by law for dismissing an employee. *Foltz v. City of Dayton*, 22 Misc. 2d 384, 254 N.E.2d 395 (C.P. Montgomery County 1969), *aff'd*, 27 Ohio App. 2d 35, 56 Ohio Op. 2d 213, 272 N.E.2d 169 (1970); 35 Op. Ore. Att'y Gen. 824 (1971), reported in NEA NEGOTIATION RESEARCH DIGEST, Mar. 1972, at 12.

*Contra*, *Town of North Kingstown v. North Kingstown Teachers Ass'n*, 110 R.I. 698, 297 A.2d 342 (1972) (it would be inequitable for those who benefit from services of the teachers' organization not to pay for them). See also *Karchmar v. City of Worcester*, — Mass. —, 301 N.E.2d 570 (1973); *accord*, *Massachusetts Nurses Ass'n v. Lynn Hosp.*, — Mass. —, 306 A.2d 264 (1974).

As these comments are written there are bills pending in the Indiana legislature which direct themselves to legalizing the agency shop: e.g., S.E. 276 (Teague) (providing an amendment of section 4 which establishes a "fair-share agreement" as a subject of bargaining and defining same as an arrangement whereby a contract may contain a provision requiring employees in the bargaining unit to pay a proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members of the exclusive representative).

converted to a "bargainable" by the team inadvertently straying over the nebulous dividing line between section 4 and section 5. It may have been feared that were this to happen, the negotiating team might expose itself to a valid refusal-to-bargain unfair practice charge or, worse yet, might end up with a discussible item being resolved by a fact-finder under section 12(f) and section 13(c).<sup>9</sup> Regardless of motivation, these techniques were in many cases unreasonably time-consuming and even more unreasonably counterproductive.

These techniques were unnecessary. Experienced negotiators by and large formally noted the legal and practical problems involved, made a reservation-of-rights statement<sup>10</sup> and then negotiated in the broadest sense of the word concerning both classes of subjects. In so doing they proceeded much the same as experienced private sector negotiators have for years with "mandatory" and "permissive" subjects<sup>11</sup> with no reservation-of-rights statement and no significant procedural problems.

An interesting observation was made in this regard by the Aaron Committee whose 1968 report was the basis of a public employee ordinance for Los Angeles County.<sup>12</sup> The report stated:

Experience has shown, however, that disputes over the duty to negotiate are frequently more intractable than the substantive issues involved, and that agreement is more readily reached on the latter than on the former.<sup>13</sup>

<sup>9</sup> Section 12(f) provides:

Nothing shall prevent either party from requesting mediation or fact-finding at any time after such one hundred eighty (180) days on items which must be bargained collectively under Section 4 of this chapter, or prevent the parties acting together to request mediation or fact-finding on any items which must be bargained collectively under Section 4 of this chapter.

IND. CODE § 20-7.5-1-12(f) (1973), IND. ANN. STAT. § 28-4562(f) (Supp. 1974).

Section 13(c) provides:

The school employer and the exclusive representative may also at any time submit any issue in dispute to final and binding arbitration to an arbitrator appointed by the board. The award in any such arbitration shall constitute the final contract between the parties with respect to such issue.

IND. CODE § 20-7.5-1-13(c) (1973), IND. ANN. STAT. § 28-4563(c) (Supp. 1974).

<sup>10</sup> See Appendix *infra* at 337-38 for a reservation of rights statement used by several negotiators.

<sup>11</sup> The distinction between the two types of subjects is definitively explored in *Wooster Div. of Borg-Warner Corp.*, 113 NLRB 1288, 36 LRRM 1439 (1955), *enforced*, 236 F.2d 898 (6th Cir. 1956), *rev'd in part*, 356 U.S. 342, *remanded*, 259 F.2d 270 (6th Cir. 1958).

<sup>12</sup> B. Aaron, L. Bailer, & H. Block, *An Employee Relations Ordinance for Los Angeles County: Report and Recommendations of the Consultants' Committee*, July 25, 1968 (unpublished report on file with the INDIANA LAW JOURNAL) [hereinafter cited as L.A. Report]. The resulting ordinance appears in G.E.R.R. 51:1426-38 (Ref. File Feb. 18, 1974). For a discussion of this and other local government reports on public employee bargaining, see Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1969).

<sup>13</sup> L.A. Report, *supra* note 12, at 12.

Such procedural questions are normal notwithstanding the approach to scope of bargaining under the statute in question.<sup>14</sup> The position of this commentator is that the probability of occurrence of procedural disputes is not tied to any particular form of public employee statute nor to any particular concept of scope of bargaining. Such disputes are inherent in the process of collective bargaining concerning jealously guarded governmental rights in what may be a largely political arena. Moreover, statutory change by broadening the scope of bargaining will not solve the procedural problem and could very well lead to other problems to be hereinafter briefly noted.

Whatever inordinate amount of time was spent on procedural disputes was most likely the result of the negotiators' inexperience and their insecurity about the new Act. Hopefully, time has largely obviated both of these causative factors, and thus they now fail to provide a reason for the Indiana General Assembly to seriously consider a change in the scope of bargaining as provided in the Act.

There have been other arguments advanced for opening the scope of bargaining in the public sector. One of these is that opening the scope of bargaining brings the two parties to the table on a more "equal" basis. In support of this position, Professor Edwards has advanced the following general equality argument:

To promise the government employee equality at the bargaining table while at the same time excluding most items relating to wages, hours, and working conditions from the mandatory subjects of bargaining would make collective bargaining for the public sector an illusory gain indeed.<sup>15</sup>

Professor Edwards' argument at most only partially applies to the Indiana Act because section 4 presently makes the following items bargainable: "salary, wages, hours, and salary and wage related fringe benefits." In any event, the Act gives no indication that the legislature intended to bring the parties to the table as equals. It must be concluded that equality of the parties was not a goal sought by the Indiana legislature.

Yet another reason advanced for opening the scope of bargaining has been the illegality of strikes in the public sector. This has been

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<sup>14</sup> See Smith, *supra* note 12, at 906-08.

<sup>15</sup> Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 908 (1973). See also National Labor Relations Act § 1, 29 U.S.C. § 151 (1970). Cf. H. WELLINGTON & R. WINTER, JR., *THE UNIONS AND THE CITIES* 13 (1971) [hereinafter cited as WELLINGTON & WINTER].

urged as a rationale for giving the employee organization an offsetting legal advantage as a "balance." The Michigan Employment Relations Commission's decision in *Westwood Community Schools*<sup>16</sup> suggests an alarming approach in this regard:

A balancing approach to bargaining may be more suited to the realities of the public sector than the dichotomized scheme—mandatory and non-mandatory—used in the private sector. . . . [The private sector] scheme prohibits the use of economic weapons to compel agreement to discuss non-mandatory subjects of bargaining, but strikes are permissible once the point of impasse concerning mandatory subjects of bargaining is reached. Economic force is illegal in the public sector in Michigan. . . . [Here,] economic battle is to be replaced by invocation of the impasse resolution procedures of mediation and fact finding.

*An expansion of the subjects about which the public employer ought to bargain, unlike the private sector, should not result in a corresponding increase in the use of economic force to resolve impasses.* In the absence of legal public sector strikes, our only proper concern in the area of subjects of bargaining is whether the employer's management functions are being unduly restrained. All bargaining has some limiting effect on an employer.

Therefore, we will not order bargaining in those cases where the subjects are demonstrably within the core of entrepreneurial control. Although such subjects may affect interests of employees, we do not believe that such interests outweigh the right to manage.<sup>17</sup>

The Michigan commission thus suggests that the scope of bargaining in the public sector ought to be *broader* than it is in the private sector. It seems to be saying that because public employees are prohibited from striking they should have the right to put any subject they want on the bargaining table.<sup>18</sup> This approach is unsound. To allow such a broad scope of bargaining would make the agenda in negotiations unmanageable, would be contrary to the restrictions on delegation of discretion under section 1(d) of the Act,<sup>19</sup> and would be contrary to the section

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<sup>16</sup> *Westwood Community Schools & Westwood Educ. Ass'n, [Unfair Practice] Case No. C70 I-152 (Mich. Emp. Rel. Comm'n, June 3, 1971), 7 MERC Lab. Op. 313 (1972), reprinted in R. SMITH, H. EDWARDS & R. CLARK, JR., LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS 397 (1974).*

<sup>17</sup> 7 MERC Lab. Op. at 320-21; SMITH, EDWARDS & CLARK at 401-02.

<sup>18</sup> Plainly, it is illegal for any school employee, school employee organization, or an affiliate thereof to strike in Indiana. Strikes are prohibited by section 14 of the Act, IND. CODE § 20-7.5-1-14 (1973), IND. ANN. STAT. § 28-4564 (Supp. 1974).

<sup>19</sup> Section 1(d) provides:

The relationship between school corporation employers and certificated school employees is not comparable to the relation between private employers and employees among others for the following reasons: (i) a public school corporation

6(b) preservation of the prerogatives of school employers.<sup>20</sup> Moreover, as a practical matter, such a broad scope would severely frustrate bargaining and discussion by giving the school employees and school employee organizations *more* subjects they could *not* strike to obtain, thus proportionately minimizing the accomplishments the employee organization can legally achieve and increasing the probability of illegal strikes. The Michigan commission's suggestion of excluding from the scope of bargaining only subjects which "unduly" restrain management functions is patently argumentative and naive. For these reasons the *Westwood* approach to bargaining scope is wholly unacceptable.

Yet another argument for broadening the scope of public employee bargaining is that the collective bargaining process is therapeutic in nature and therefore should be designed to cover any problem arising in the bargaining relationship. Professor Edwards has observed in this regard:

This [the therapeutic] is a more satisfactory approach, in terms of achieving stable and harmonious labor relations, than to have the employer refuse to discuss an issue in the first instance because it is legally nonnegotiable.<sup>21</sup>

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is not operated for profit but to insure the citizens of the state rights guaranteed them by the Indiana State Constitution; (ii) the obligation to educate children and the methods by which such education is effected will change rapidly with increasing technology, the needs of an advancing civilization and requirements for substantial educational innovation; (iii) *the Indiana General Assembly has delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of school corporations, composed of citizens elected or appointed under applicable law, a delegation which these bodies may not and should not bargain away*; and (iv) public school corporations have different obligations with respect to certificated school employees under constitutional and statutory requirements than private employers have to their employees. IND. CODE § 20-7.5-1-1(d) (1973), IND. ANN. STAT. § 28-4551(d) (Supp. 1974) (emphasis added).

<sup>20</sup> 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. 1974).

<sup>21</sup> Edwards, *supra* note 15, at 916.

Professor Edwards' argument does not apply to the Act, since section 5 of the Act already makes discussible a broad range and long list of subjects which are not subjects of bargaining, including "working conditions, other than those provided in Section 4 . . . ." <sup>22</sup> It may be noted that the therapeutic approach is even broader than that suggested by the Michigan commission in the *Westwood* case because it has no limits at all. In any event, there is grave doubt that the approach suggested will provide the envisioned "therapy," for the reasons previously set forth in discussing the Michigan commission's decision in *Westwood*. The probability of such therapy is minimal, and the impact of such treatment on the rights of the public at large could be monumental for reasons which will be hereafter discussed.

The advocates of a broadened scope of bargaining or open scope bargaining rely <sup>23</sup> on the alleged successes of state labor boards or commissions to supply, on an ad hoc basis, definition and restrictions on the scope of the duty to bargain. This confidence in such boards is not wholly warranted. Ms. Doering notes that in 1974 in Indiana two fact-finders found preparation time to be discussible rather than bargainable, and two other fact-finders found preparation time to be bargainable and thus offered recommendations on the subject. <sup>24</sup> Ms. Doering

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<sup>22</sup> This list also includes "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 . . . ." IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1974).

<sup>23</sup> The line between nonnegotiable management rights and subjects over which certified employee organizations would have the right to negotiate under the recommended ordinance is not always clearly discernible. We do not think it would be wise to try to draw it, once and for all and for all subjects, in the ordinance. Rather, we recommend that in close and doubtful cases the [proposed enforcement] commission be empowered to draw the line on an *ad hoc* basis. L.A. Report, *supra* note 12, at 11-12. Along the same line, Professor Edwards states: Current developments in public sector labor laws indicate that we may expect to see a widening of the scope of bargaining in all states. The experience in Michigan furnishes ample evidence that public sector bargaining can be satisfactorily regulated under the private sector concept of the duty to bargain . . . . The case-by-case decision making approach on mandatory subjects is vastly superior to a rigid legislative limitation on scope of bargaining.

Edwards, *supra* note 15, at 916.

At the state level, the public employment relations boards and courts in several states, notably Michigan, New York, Wisconsin and Pennsylvania, have been in the forefront of the movement toward expanded public sector bargaining.

*Id.* at 918.

<sup>24</sup> It was held discussible in *Mississinewa Community Schools Corp. & Mississinewa Teachers Ass'n*, [Impasse Fact-Finding] Case No. F-74-4-2885 (IEERB, July 29, 1974); and *Prairie Heights Community School Corp. & Prairie Heights Educ. Ass'n*, [Impasse Fact-Finding] Case No. F-74-57-4515 (IEERB, Aug. 29, 1974). It was held bargainable in *New Prairie United School Corp. & New Prairie Classroom Teachers Ass'n*, [Impasse Fact-Finding] Case No. F-74-35-4805 (IEERB, Aug. 21, 1974); and *North Knox School*

notes that at its meeting on July 18, 1974, the IEERB issued a statement on this subject indicating that preparation time was discussible.<sup>25</sup> However, this statement was rescinded in favor of a case by case approach on August 13, 1974, after the two fact-finders who found preparation time to be discussible had relied on it.<sup>26</sup> The two fact-finders who found the subject bargainable apparently ignored the July 18 statement. This inconsistency suggests that the IEERB, its overworked staff, and its ad hoc employees do not have any extrasensory capacity in divining the ultimate legal nature of the subjects of the bargaining process. They undoubtedly would have been pleased to have express statutory guidance on the scope of bargaining provided by the Act, at least on the subject of preparation time.

The alleged success of other states in regulating the scope of an expanded public employee duty to bargain on an ad hoc basis may be seriously doubted. Professor Edwards notes Pennsylvania as a state in the "forefront" in this regard.<sup>27</sup>

In *Pennsylvania Labor Relations Board v. State College Area School District*<sup>28</sup> the Pennsylvania Labor Relations Board had held 21 disputed subjects not bargainable because they fell within the statutory prohibition concerning the negotiation of "matters of inherent managerial policy."<sup>29</sup> A request for rehearing was filed before the Board in this case. Subsequently, two Board members were replaced and, upon rehearing, the Board reversed itself on five of the 21 subjects and noted that "in a different milieu or context, consistent with this opinion, certain of these [remaining] 16 specifications may be found to be bar-

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Corp. & North Knox Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-44-4315 (IEERB, Sept. 13, 1974).

<sup>25</sup> Minutes of the IEERB, July 18, 1974, at 2 (on file with the INDIANA LAW JOURNAL).

<sup>26</sup> *Id.*, Aug. 13, 1974; *Id.*, Nov. 31 & Dec. 12, 1974 (approving hearing examiner's dismissal of unfair labor practice charge in Huntington County Community School Corp. v. Huntington Community Classroom Teachers Ass'n, [Unfair Practice] Case No. U-74-34-3625 (IEERB, Sept. 23, 1974) and holding preparation time to be discussible as a working condition) (on file with the INDIANA LAW JOURNAL).

<sup>27</sup> See note 23 *supra*.

<sup>28</sup> 9 Pa. Cmwlth. 229, [State College Educ. Ass'n v. Pennsylvania Lab. Rel. Bd.] 306 A.2d 404 (1973). These subjects concerned: instructional materials; planning time; notice of assignments; desk and locker space; teachers' cafeteria; cocurricular duties; building assignments; covering for absent teachers; chaperoning athletic events; handling of supplies; availability of time for Association meetings; access to teachers' personnel files; restriction of teachers to school grounds; preparation time for special teachers; maximum class size; consultation rights over the school calendar; vacation closing time; scheduling of staff meetings; after-hours meetings with parents; class load; planning time for elementary teachers. *Id.* at 245-46, 306 A.2d at 413-14.

<sup>29</sup> PA. STAT. ANN. tit. 43, § 1101-701 (Supp. 1974).

gainable."<sup>30</sup> Both the association and the school board appealed this decision of the Board to a trial court. The trial court affirmed the Board as to the 16 subjects, holding them nonbargainable,<sup>31</sup> and reversed the Board as to the five subjects it had held bargainable on rehearing. The intermediate appellate court affirmed the trial court.<sup>32</sup> This decision was issued approximately 27 months after the filing of the initial unfair labor practice charges on February 26, 1971.

The Pennsylvania experience convincingly illustrates the proposition that statutory certainty with respect to scope of bargaining is far superior to the uncertainty and delay of ad hoc determination.

Finally, it must be observed that the dual obligation provided in the Act is responsive to the declared public policy set forth in the Act and is reasonable as a fair protection of the public at large. To the extent that the dual obligation operates as a restriction, preventing school board negotiators from bargaining away the delegated discretion of a school board, such restriction clearly responds to the policy statement of the Act in section 1(d)<sup>33</sup> and the reservation of management rights provision of section 6(b).<sup>34</sup> Accordingly, the dual obligation is functioning as intended by the Indiana legislature.

There is good reason for the restriction provided by the dual obligation. Collective bargaining in the public sector is not the same as collective bargaining in the private sector.<sup>35</sup> Indeed, it is quite different.

Professor Summers has analyzed these differences well.<sup>36</sup> They are as follows:

First, decisions as to terms and conditions of employment for public employees are governmental decisions made through the political process. . . .

Second, in public employment the employer is the public—in ultimate political terms, the voters to whom the public officials

<sup>30</sup> State College Area School Dist. & State College Educ. Ass'n, [Unfair Practice] Case No. PERA-C-929-C (Pa. Lab. Rel. Bd., June 26, 1972), excerpted in 464 G.E.R.R. B-2, B-3 (Current Rep. Aug. 7, 1972).

<sup>31</sup> State College Area School Dist. v. Pennsylvania Lab. Rel. Bd. (C.P. Centre County, Pa., Nov. 7, 1972) (unreported).

<sup>32</sup> Pennsylvania Lab. Rel. Bd. v. State College Area School Dist., 9 Pa. Cmwlth. 229, [State College Educ. Ass'n v. Pennsylvania Lab. Rel. Bd.] 306 A.2d 404 (1973).

<sup>33</sup> IND. CODE § 20-7.5-1-1(d) (1973), IND. ANN. STAT. § 28-4551(d) (Supp. 1974). The language of this section is reproduced in full at note 19 *supra*.

<sup>34</sup> IND. CODE § 20-7.5-1-6(b) (1973), IND. ANN. STAT. § 28-4556(6) (Supp. 1974). The language of this section is reproduced at note 20 *supra*.

<sup>35</sup> WELLINGTON & WINTER, *supra* note 15, at 202. See also Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 U.C.L.A.L. REV. 867 (1972).

<sup>36</sup> Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

are responsible. The voters, however, consist largely of two overlapping groups whose interests differ: first, those who use the employees' services and, second, those who pay for those services through taxes. . . .

Third, the voters who share the employers' economic interests far outnumber those who share the employees' economic interest.

. . .

Fourth, the public employees, even without collective bargaining, can and normally do participate in determining the terms and conditions of employment. Many can vote and all can support candidates, organize pressure groups, and present arguments in the public forum.<sup>37</sup>

From the foregoing Professor Summers observes:

From these four characteristics of public employment there emerges more clearly the central significance of public employee bargaining. Introduction of collective bargaining into the public sector alters the governmental process, creating within that process special procedures for making decisions about the wages and working conditions the public will give its employees.<sup>38</sup>

There can be little argument with Summers' conclusion.

Now as at no other time in our history, voters are sensitive to special procedures for governmental decisions which in some way dilute or replace voters' right to participate, though indirectly, in those decisions. The citizens of this state are entitled to have that right of political participation. To the extent a school board and a school employee organization reach an agreement which becomes part of a legally enforceable contract in a process that is not systematically available to all citizens of the state, there has been a lessening of those citizens' right of determination of community affairs;<sup>39</sup> school employee collective bargaining has replaced or diluted the citizen's right of control over governmental decisions.<sup>40</sup> The task of resolving questions of public policy is the task of government and should not be undertaken by a collective bargaining relationship.<sup>41</sup>

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<sup>37</sup> *Id.* at 1159-60.

<sup>38</sup> *Id.* at 1160.

<sup>39</sup> WELLINGTON & WINTER, *supra* note 15, at 139-40; Note, *Determining the Scope of Bargaining Under the Indiana Education Employment Relations Act*, 49 IND. L.J. 460, 461 (1974).

Placing an agreement in a legally enforceable contract also means that a school board position is frozen in what may be an area where flexibility is required. Metzler, *The Need for Limitation upon the Scope of Negotiations in Public Education*, 1, 2 J. LAW & EDUC. 139, 147 (1973).

<sup>40</sup> WELLINGTON & WINTER, *supra* note 15, at 25; Note, *supra* note 39, at 461.

<sup>41</sup> Macy, *The Role of Bargaining in the Public Service*, in PUBLIC WORKERS AND

There can be little doubt that absent statutory restrictions, the scope of bargaining in the public sector will be determined by the same factors that have long been operative in the private sector, *e.g.*, the balance of strength or power between unions and employers.<sup>42</sup> This is a struggle the public must be protected from. This, among other reasons, is reason enough that the Indiana legislature has included the dual obligation under sections 3, 4 and 5 of the Act and the reservation of management rights under section 6(b).<sup>43</sup> Such limitation on the scope of bargaining should not be broadened or removed. Indiana has struck a reasonable and workable balance of interests between school employers, school employee organizations and its citizens. It should and must be maintained.

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#### APPENDIX

##### *Statement by the Hoosier City Consolidated Contract Team to the Hoosier City Education Association Contract Team*

In today's meeting and perhaps in following meetings, we will be principally concerned with asking questions and seeking clarification concerning the proposal which you submitted to us in the last meeting. We will not be involved in accepting or rejecting any specific matters.

Before asking such questions and seeking such clarification, we would like to make a rather formal statement concerning that proposal and all of the meetings which we will have in which we discuss and

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PUBLIC UNIONS 5, 11 (S. Zagoria ed. 1972); Project, *Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A.L. REV. 887, 1011-19 (1972); Goldstein, Book Review, 22 BUFF. L. REV. 603, 604 (1973):

In terms of public education, collective bargaining must be viewed as a method of educational decision-making, with teachers viewed as a group competing for educational decision-making power with such other groups as administrators, school boards, community leaders, parents, students, legislatures and, indeed, courts.

See also Summers, *supra* note 36, at 1195: "Two-sided bargaining on such issues misrepresents both the range of views and the alignment of interests which should be considered in making the decision."

In response, it has been argued that the teachers, as professionals, should have a greater voice in these decisions so as to insulate governmental decisionmaking from the unenlightened public, and to assure that professional judgments will prevail over public choice. Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017 (1969). Such an argument is seriously defective on its face. See Goldstein, *supra*. Even if such professional judgment were crucial, collective bargaining is an extremely inadequate system for delivering it.

<sup>42</sup> See Note, *supra* note 39, at 461 n.10. See also Gerhart, *The Scope of Bargaining in Local Government Labor Negotiations*, 20 LAB. L.J. 545, 550 (1969).

<sup>43</sup> Cf. Note, *supra* note 39, at 461.

bargain collectively concerning that proposal and any further proposals which the Association or the Hoosier City Consolidated School Corporation will make.

As you are aware, under Public Law 217, there are essentially three (3) different categories of subject which may come up during negotiations.

Under Section 4 of P.L. 217, there are subjects of bargaining. These subjects are salary, wages, hours, and salary and wage related fringe benefits. With regard to such subjects, a school corporation must bargain collectively.

Under Section 5 of P.L. 217, there are subjects of discussion. Such subjects include working conditions; 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, as well as all other matters which are not subjects of bargaining. With regard to such subjects, a school corporation must discuss them upon request, but it is not required to and need not bargain collectively, negotiate or enter into a written contract or be subject to or enter impasse procedures concerning same unless it expressly agrees to do so.

Under Section 6(b) of P.L. 217, school employers have the responsibility and authority to manage and direct on behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity includes, but is not limited to, the right of the 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.

Even if a school employer wished to negotiate concerning these subjects covered by Section 6(b), it is prohibited by law from doing so.

In short, there are three basic categories:

1. *Subjects of bargaining*—matters a school corporation must

- bargain collectively about,
2. *Subjects of discussion*—matters a school corporation may discuss, but are not required to bargain collectively about, and
  3. *School corporation responsibilities and authorities*—matters which the law prohibits a school corporation from bargaining about or making bargainable.

We are aware that there are some rather subtle differences between bargaining collectively and discussing. We are also aware that in certain respects the responsibilities and authorities of the school employer are intertwined with both subjects of bargaining and subjects of discussion. Accordingly, it may not always be easy to distinguish between bargainable matters, discussable matters and matters involving the responsibility and authority of the school corporation.

It is our position that we will bargain collectively concerning the subjects of bargaining. It is also our position that we will discuss, upon request, those matters which are subjects of discussion, and we will not agree to make such matters bargainable unless we expressly and unequivocally advise you of our intention to do so. We recognize that much in the area of discussable subject matter has been covered in the past by the Personnel Policy Advisory Committee, and we hope that this will continue. It is also our position that we will in no way contract away, amend, modify or in any way limit the responsibility and authority of the school corporation to manage and direct the operations and activities of the school corporation.

We are also aware that while both of the respective contract teams are authorized to meet, bargain collectively and discuss the statutorily authorized subject matters, any agreements reached are expressly subject under Section 2(n) of P.L. 217 to final approval and ratification by the School Board and the Association.

We recognize that it will be most difficult and time-consuming to hang name tags on every single matter we discuss in these meetings. For this reason, we do not intend to hang name tags on every single matter we discuss in these meetings. However, we want you to be aware of the fact that we recognize the legal distinctions between these different categories and the resulting difference in the parties' obligations and rights with respect to such categories. We also want you to be aware of the fact that because such matters may be talked about at this table, for whatever reason, does not mean that we will to any degree and in

any way waive our rights to recognize the legal distinctions between these different categories.

It is our intent to harmoniously and expeditiously resolve the issues that are between us. It is also our intent to retain all of our legal rights and recognize our legal duties as provided under law, as well as to recognize and respect all of the Association's legal rights as provided under law.