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ABSTRACT

Collective negotiations statutes are vague, and decisions on the subject by courts, commissions, and arbitrators are relatively sparse. The development of a definition of "management rights" agreeable to school administrators is not possible without (1) a clear understanding of the fundamental nature of the public school system; (2) an advocate's posture in presenting the case for public school "management rights"; and (3) a sophisticated plan for convincing the State legislature, the courts, the arbitrators, and sometimes even school boards of the inherent soundness of the position on "management rights." This paper discusses each of the above elements, looks at political and organizational factors affecting the formulation of "management rights," and discusses two court cases dealing with court interpretation of State statutes. Specifically, the courts in these cases are ruling on which items are negotiable and which items are "items of inherent managerial policy" and therefore not subject to collective bargaining. (Author/JF)

MANAGEMENT RIGHTS IN NEGOTIATIONS

By

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When we speak of "management rights in negotiatons" as applied to public education, we are effectively promoting the marriage of two imcompatible concepts. That is, we are taking the idea of "management rights" which has developed during the course of more than three decades under Federal and state laws governing business organizations in the private sector and applying it to a very unique organization in the public sector. As a practical matter, we are ignoring, or at the very least, de-emphasizing, the critical differences between the collective negotiations situation in private industry and public education. These differences should result in a different approach to defining "management rights" in public education than has developed over the years in the private sector.

The ultimate definition of "management rights" in public education is being determined by several agencies, including (1) the state legislatures, in their enactment of the basic public school collective negotiations laws; (2) the courts, in their role of interpreting collective negotiations statutes; (3) arbitrators and other third-party peacemakers brought onto the local scene by the disputing parties; and (4) the school board itself, in approving agreements which were collectively negotiated.

Since collective negotiations in public school districts is relatively new, it seems only natural to look to the private sector for guidance. The state legislatures, in addition, are the targets for a new, sophisticated lobbying approach on the part of the tough, aggressive leadership of state-wide teacher organizations. And the third-party peacemakers usually served their "arbitrator apprenticeships" settling disputes under the rules applicable to private business. Finally, a substantial portion of public sector employment is in the skill areas

which have identical counterparts in the private sector.

These factors tend to pressure the adolescent development of public education collective negotiations into the old mold established for the private sector of our economy. Today, school people are still in a position to influence the maturing process leading to the definition of the concept of "management rights" in public education. The collective negotiations statutes are still vague and the volumes of decisions on the subject by courts, commissions, and arbitrators are still relatively sparse. But, the development of a definition agreeable to school people engaged in the governance and administration of public education is not possible without (1) a clear understanding of the fundamental nature of the public school system; (2) an advocate's posture in presenting the case for public school "management rights"; and (3) a sophisticated plan for convincing the state legislature, the courts, the arbitrators, and sometimes even school boards of the inherent soundness of the position on "management rights."

Let us review each one of these elements. Then, let us review a couple of recent, significant cases. A position on "management rights" in public education must be formulated in light of certain realities about the public schools. There are at least five of these elements. Expressed in "rubric" form, they are:

1. <u>"Management" of the Public Schools is Government</u>. This fact is at the core of the case for a different, more expansive definition of "management rights" in the public sector than was ever conceived in the private sector. It is not recognized by persons weaned in the industrial-model approach who tend to equate "sophistication" in school district collective negotiations with the extent to which the industrial model has been copied.

If "management rights" are not preserved, then school employees become "super" citizens and their status of superiority over other citizens is directly proportional to the degree to which their employee organization has invaded the

area of management rights. It amounts to a real subversion of government to place an organization of public employees in a position effectively superior to the citizens they serve.

2. "Management" of the public schools is not vested exclusively in the local school board--rather, it is a function of government shared with other governmental agencies at the local, State, and National levels. The "master school board" of any state is the state legislature. It not only sets the basic educational policy of the state through its statutory enactments affecting education but also, by its control of state fiscal aid, determines educational priorities. Similarly, the Federal Government, through its dispensing of Federal monies and enforcement of Federal laws indirectly affecting public education, also exerts a great measure of control. These laws include the Fair Labor Standards Act, the Civil Rights Act, and, at the administrative level, the "Affirmative Action" programs. Finally, the counties and cities, through their audit or fiscal control over school district budgets exercise considerable influence on school operations.

It is absolutely essential that these limitations on the power of school boards be recognized, not only by school board members and administrators to preclude their violating one of the cardinal precepts of negotiations (i.e., never promise more than you can deliver) but also by the public to prevent an expectancy gap (i.e., the public expecting that you may do more than you really can).

3. In the employer-employee relations context, school boards must understand that they are part of "management." As elemental as this may sound, there are school board members who do not perceive of themselves as "managers." They are confused about their role in the employer-employee context and this is due to several factors, including:

a. School board members are, first and foremost, political leaders. Their principal self-image is that of a political problem solver. They

view the dynamic problems of employer-employee relations matters as being an attenuation of the political processes, which are solved by the characteristically open approach used in the political clime. Hence, they are willing to negotiate about anything at any time and virtually under any circumstances. Part of this is attributable to the expectations of their constituency, who also are confused about the public's role as the ultimate employer in public education.

b. Many school board members have had no real experience in "management." A political leader is elected by the People. They're usually put into office on the basis of their campaign effort, which may not have been slanted at the real issues of public education. Sometimes, they assume office with no particular knowledge about how a school district really operates; but, they are armed with massive confidence and a feeling that they have a mandate for action from the People.

c. School employees cloak their demands in terms of the goals of education rather than their own personal welfare. The rhetoric of "quality education" often can be boiled down to a good, old-fashioned wage increase demand. But, the smoke is often too thick to pierce for some school board members and some segments of the public.

d. The myth of "over-administration" turns the school board against its own active component of management. I believe that, far from having too many administrators, most school districts have too few. But, the "over-administered argument" is a constantly used shibboleth by teacher organizations and members of the public who simply don't comprehend how complex organizations such as

school districts are governed and administered. It is easy for school board members to get caught on the crest of a wave against their own administration, regardless of the fact that the wave was begun by teacher organizations whose personal interests are directly opposed to a strong, unified school administration.

e. A school board's disregard of central administration results in an increase in the power of the administrator associations. When the confidence of the school board in central administration weakens, it creates a power vacuum which often is filled by the local administrator association. When this happens, the ability of school board members to understand their role as managers vis-a-vis the teachers associations is further confounded because they are dealing with administrators as an organized unit and, the theory goes, why not deal with teachers in the same way?

f. The relationship between the chief advisor of the school board, the superintendent, and the negotiations adviser is a critical determinant of the extent to which management rights are protected, on the one hand, and the schools are operated in a changing society, on the other hand. A close relationship based on mutual trust and respect must exist between the superintendent and the negotiator, or the school board members, witnessing the mutual undercutting of these two by each other, will become even more confused about their role.

4. Even in the government context, management does not have to say "yes"--"negotiations" does not mean "capitulation." School boards are composed of solution-oriented people who, because they are directly answerable to the public, work in an aura of shifting priorities. The political forces at work in any school district employer-employee relations dispute pressure for quick solution, especially if a

strike is crippling school operation or a school bond or other finance measure election is just around the corner.

On the other hand, our whole social and economic system is changing. Education today is truly "big business" in the United States. John R. Ottina, U. S. Commissioner of Education, said:

> Education will be the principal occupation of 30 percent of the population . . .. In fact, education may be considered the nation's largest enterprise in terms of the number of people involved and the number of dollars expended. ($96.7 billion for education 59 million students in 1973.)

While education has expanded dramatically in our nation, the attitudes about "government workers" also have changed. As our economy has become more complex and the government has intruded more and more into the central operations of the economy, the picture of the "government worker" has clouded considerably. That is, today many persons not formally listed on the employment rolls of the government nevertheless are receiving substantial government payments for their services, or "indirect salaries," including virtually every employee engaged in the mammoth industry doing "defense work"; medical personnel receiving Federal and state subsidies; real estate people with their direct grants for low-cost housing, indirect grants in forms of lower interest rates and government loan insurance and government construction; agricultural workers receiving subsidies; printed media personnel with favorable mailing privileges; persons receiving the benefit of retirement, tax shelter, and income tax laws; employees working for public utilities and other governmentally regulated and protected monopolies; and on and on through an increasingly longer list.

The realization that they are providing a service which is growing in importance and stature in our nation, together with their observation of the relative worth of contributions to society in the many areas of our economy, have led public school employees to assert themselves through the collective negotiations

process which they see as a new, dynamic form of influencing political officers who govern public education at the state and local levels. And there is no question in the minds of public school employee organizations that vigorous collective bargaining gives maximum opportunity to public school employees to control their destiny in the negotiations process, especially in the face of rising inflation. This leads to aggressive posturing and action by teacher organizations and makes amicable solutions sometimes impossible. And this leads some school board members to conclude that negotiation leads either and only to strife or capitulation.

5. There is a unifying force at work in public education which makes it unique among all other enterprises. Depite their differences, school people at all levels strive to unify the field in its outward view towards the public wherever possible. This spirit is often frustrated and stultified, but it is a force which works at the level of the individual teacher at the individual school site. And it is often misinterpreted to mean that most teachers are being dragged unwillingly into positions taken by their representative organization. It is this fact that often gives rise to false hopes among school board members and administrators and sometimes reflects most unfavorably upon school district negotiators who do more work with teacher organizational representatives at the negotiating table than they do trading philosophical viewpoints in an atmosphere of brotherly love with individual teachers at schools.

The single, most important issue in preserving management rights is the bargaining requirement imposed upon school boards by statute or by themselves through inept interpretation of what they must bargain about. In essence, the crucial element involves a definition of the "scope of bargaining."

The "scope of bargaining" in collective negotiations leading to a binding, written, bilateral collective bargaining agreement must be precisely stated. The term "working conditions" must be specifically defined in the law itself and not

left to untimely and haphazard formulation by the Courts or loose development by an appointive State-wide commission. Otherwise, unlike private industry, virtually the entire sphere of governance and administration of the public schools will be done through the collective bargaining process. For example, the term "working conditions" was defined on August 30, 1973, by the President of the San Diego Teachers Association as going

> . . . far beyond the traditional areas of salaries, fringe benefits, and other ordinary working conditions. To us, it also means the size of classes; the range of pupil needs within a class; the availability of supplies, textbooks, libraries; the support services of counselors, nurses, and others; the physical environment of improperly lighted and heated classrooms. To us, it means the efficient use of resources: people; money; time.

Any collective negotiations law also should provide ways by which teacher organizations may have a voice in the development of local public educational policy <u>outside</u> of the collective bargaining type agreement. This provision would answer the demand that teachers' considerable professional expertise be utilized by school boards but would channel teacher organizational input separate and apart from the collective negotiations process and thus would leave the establishment of "management" policy (i.e., public governance and administration) where it belongs--in the hands of elected school boards and their appointed administrators.

As I mentioned earlier, there is a paucity of Court cases on the subject of "management rights" in public school collective negotiations. Two recent cases, one arising in New Jersey and the other in Pennsylvania, provide a comprehensive review of school board-administrator "management rights" through a comprehensive discussion of the "scope of bargaining" contemplated by state statute. While they specifically interpret the school district collective negotiations laws of New Jersey and Pennsylvania, there is considerable analysis of the uniqueness of public education and, therefore, the cases could be persuasive in virtually every state.

The first case is Dunellen Board of Education v. Dunellen Education Association decided by the New Jersey Supreme Court on November 20, 1973. The dispute involved the validity of the calling in of an arbitrator to conduct a grievance procedure hearing after the superintendent and the school board had rejected the grievance. The subject of the grievance was the consolidation by the school board of the chairmanships of the Social Studies Department and the English Department into a newly created Humanities chairmanship and the appointment of the English Department chairman as the new chairman of the Humanities Department. No question of an actual job loss or demotion was involved because the chairman of the Social Studies Department had resigned earlier. The consolidation was done, according to the school board, for "educational reasons." Incidentally, it would also have removed for the future the necessity of paying a second department chairman a $530 additive payment, except that the abolished department chairmanship was reestablished the following year.

After settling some jurisdictional questions involving the New Jersey Commissioner of Education and the New Jersey Public Employment Relations Commission and deciding that, even though the abolished department chairmanship was reestablished, the case was not moot, the Court turned to the real issue on "management rights," and said:

> Nowhere in the Act did the Legislature define the phrase "terms and conditions" nor did it specify what subjects were negotiable and what subjects were outside the sphere of negotiation. . . . it did expressly provide that no provisions in the act shall "annul or modify any statute or statutes of this State. N.J.S.A. 34: 13A-8.1.

The Court said:

> Surely the Legislature, in adopting the very general terms of L.1968, c. 303, did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies or that the State educational authorities would

or could abdicate their management responsibilities for the State educational policies. . . . On the other hand it did contemplate that to the extent that it could fairly be accomplished without any significant interference with management's educational responsibilities, the local boards of education would have the statutory responsibility of negotiating in good faith with representatives of their employees with respect to those matters which intimately and directly affect the work and welfare of their employees.

On this issue, the Court remarked:

> The lines between the negotiable and the non-negotiable will often be shadowy and the legislative reference to "terms and conditions of employment" without further definition hardly furnishes any dispositive guideline.

The Court then quoted a Nebraska Supreme Court decision of 1972 in this way:

> . . . "generally, teacher organizations have given the term 'conditions of employment' an extremely broad meaning, while boards of education have tried to restrict the term to preserve their management prerogatives and policy-making powers." The court noted further that while there were many nebulous areas, "boards should not be required to enter negotiations on matters which are predominantly matters of educational policy, management prerogatives or statutory duties of the board of education." Illustratively, the court expressed the view that matters such as the following would fall exclusively within management's prerogatives and would not be the subject of compulsory negotiation: "The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employer." 199 N.W. 2d at 759. See Dupon and Tobin, "Teacher Negotiations in the Seventies," 12 Wm. & Mary L. Rev. 711, 712n 3 (1971).

The New Jersey Supreme Court held that:

> In any event, the determination to consolidate was predominantly a matter of educational policy which had no effect, or at most only remote and incidental effect, on the "terms and conditions of employment" contemplated by N.J.S.A. 34:13A-5.3. So far as our educational laws are concerned, it is entirely clear that the Board had the statutory responsibility for such educational determinations. N.J.S.A. 18A:11-1; N.J.S.A. 18A:16-1 . . ..

Therefore, the Court concluded that:

> . . . the Dunellen Board could not legally have agreed to submit to binding arbitration, the soundness or validity of its determination that it would be educationally desirable to consolidate the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship.

But the Court could not help sermonizing a bit, when it said:

> The holding that the consolidation was predominantly a matter of educational policy not mandatorily negotiable does not indicate that the Board would not have been well advised to have voluntarily discussed it in timely fashion with the representatives of the teachers. Peaceful relations between the school administration and its teachers is an ever present goal and though the teachers may not be permitted to take over the educational policies entrusted by the statutes to the Board they, as trained professionals, may have much to contribute towards the Board's adoption of sound and suitable educational policies. Before the passage of New Jersey's Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.) it was recognized that public employees had the right to be heard through their representatives on their proposals and grievances. The act significantly broadened that right and, with the goal of peaceful labor relations in mind, created fields of mandatory negotiation. It would seem evident that, when dealing in fields with which the teachers are significantly concerned though outside the fields of mandatory negotiation, the end of peaceful labor relations will generally be furthered by some measure of timely voluntary discussion between the school administration and the representatives of its teachers even though the ultimate decisions are to be made by the Board in the exercise of its exclusive educational prerogatives.

The second case is Pennsylvania Labor Relations Board v. State College Area School District decided by the Pennsylvania Appellate Court on June 6, 1973. In this case, the school board refused to bargain with the State College Education Association on 21 items submitted for negotiation by the teachers on the grounds that the 21 subjects were "items of inherent managerial policy and, therefore, were not subject to collective bargaining because of (provisions of Pennsylvania law governing school board-teacher negotiations."

The Court reviewed three statutes relevant to the dispute. One statute

said that no collective bargaining agreement could be in violation of, inconsistent or in conflict with any state statute or municipal home rule charter provision. The other two statutes declared in general terms which subjects are negotiable between school boards and teachers, and which are not. Matters subject to bargaining are:

> . . . wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The other statute defined matters not subject to bargaining as:

> . . . matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. 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 upon request by public employee representatives.

The Court then analyzed the legislative history of collective bargaining in Pennsylvania and concluded that:

> . . . school boards have traditionally been given by the Legislature, under constitutional mandates, broad inherent managerial powers to operate the public schools and to determine policy relative thereto. If Act 195 represents a departure from the traditional principle of our public schools' being operated and managed by school boards, it would be a sharp departure not to be presumed but the result of clear legislative declaration. A statute is never presumed to deprive the state of any prerogative of right unless the intention to do so is clearly manifest, either by express terms or necessary implications. Hoffman v. Pittsburgh, 365 Pa. 386, 75 A. 2d 649 (1950).

The Court then asked:

> What then is encompassed by the phrase "matters of inherent managerial policy"? Section 702 itself provides

the initial interpretive guides when it states that this phrase "shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel."

Pointing out that the statutory list is NOT all inclusive, the Court quoted approvingly from the Pennsylvania Labor Board's decision below in this way:

> "Broad discretionary powers have been given school authorities to enable them in exercising their policy-making function to ensure a thorough, efficient, effective and better education for the children of this Commonwealth and any erosion of these powers should be strictly constructed on the basis that the public interest is paramount. It has been long recognized that school officials are trustees of the powers vested in them and cannot divest themselves of the powers which have been conferred upon them for a public purpose....
>
> "Policy matters are thought of as rules of conduct and to the extent they affect (influence, impinge, encroach, bear upon, or concern) wages, hours and terms and conditions of employment as well as their impact (used metaphorically to mean the result, effect or consequence) thereon become mandatory meet and discuss items by the public employer upon request of the public employee representative."
>
> Matters of "inherent managerial policy" over which public employers are not obligated to bargain are such matters that belong to the public employer as a natural prerogative or essential element of the right (1) to manage the affairs of its business, operation or activity and (2) to make decisions that determine the policy and direction that the business, operation or activity shall pursue.

The Court said this about some particularly difficult words:

> The words "other items and conditions of employment" are no doubt susceptible to varying interpretations. At one extreme they could be considered to apply to any subject which is insisted upon as a prerequisite for continued employment. At the other extreme they could be so narrowly interpreted as to have little or no consequence. We believe they refer to such things as the various physical conditions of one's working surroundings; what quantity and quality of work is required during one's work period; what safety practices prevail at and near the job site; what sick and hospital benefits are available and what vacation benefits are available; what retirement benefits will be provided and how eligibility will be determined.

Because they were in the scope of "inherent managerial policy," the Court found the following 21 items were NOT negotiable:

1. The availability of proper and adequate classroom instructional printed material;

2. The provision for time during the school day for team planning of required innovative programs;

3. The timely notice of teaching assignment for the coming year;

4. Providing separate desks and lockable drawer space for each teacher in the district;

5. Providing cafeteria for teachers in the senior high school;

6. Eliminating the requirement that teachers perform nonteaching duties such as but not limited to hall duty, bus duty, lunch duty, study hall, and parking lot duties;

7. Eliminating the requirement that teachers teach or supervise two consecutive periods in two different buildings;

8. Eliminating the requirement that teachers substitute for other teachers during planning periods and teaching in noncertificated subject areas;

9. Eliminating the requirement that teachers chaperone athletic activities;

10. Eliminating the requirement that teachers unpack, store, check or otherwise handle supplies.

11. Providing that there shall be one night each week free for Association meetings;

12. Providing that a teacher will, without prior notice, have free access to his personnel file;

13. Permitting a teacher to leave the building any time during the school day unless he has a teaching assignment;

14. Providing special teachers with preparation time equal to that provided for other staff members;

15. Provision for maximum class sizes;

16. Provision that the Association will be consulted in determining the school calendar;

17. Provision that school will officially close at noon of the last day of classes for Thanksgiving, Christmas, Spring and summer vacation;

18. Provision that at least one-half of the time requested for staff meetings be held during the school day;

. . . .

20. A provision that the present Tuesday afternoon conference with parents be abolished and teachers hold conferences with parents by appointment at a mutually convenient time;

21. Provision that secondary teachers not be required to teach more than 25 periods per week and have at least one planning period per day; and

22. A provision that elementary teachers shall have one period or fifteen minutes per day for planning purposes.

A footnote to a companion decision concurring in part and dissenting in part indicated that

> . . . public employers are of course free to so bargain but are not required to do so.

This fact points up the problem that if a school board actually bargains on a particular issue, it will later be hardpressed (and, to say the least, embarrased) to claim that the issue is within its "inherent managerial policy" and, therefore, agreements reached or attempted are not valid.

While these two cases interpreted specific statutes, they did (a) present the development of the history of governmental employer-employee relations in the two states in a format which could be adapted to virtually every other state, and (b) amplify certain concepts on management rights in negotiations which could be used in articulating a position on the scope of bargaining in other states. Finally, the approach the court took in its general analysis may be emulated by the courts of other states. As for educational negotiators, generally, the articulation of a "score of bargaining" position will become more important as school district employee organizations seek more influence over the operation of the schools.

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