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ABSTRACT

This second chapter of "The Yearbook of School Law, 1986" summarizes and analyzes state and federal court decisions handed down in 1985 affecting collective bargaining between staff members and management representatives in public education. Among the topics examined are constitutional issues associated with distribution of union materials, union picketing, the implementation of fair share agreements, and jurisdiction over labor relations between parochial schools and lay teachers; union recognition, representation, and elections; the rights and obligations of bargaining representatives; and the scope of bargaining, and the handling of grievances and arbitration. The chapter also discusses cases establishing the authority for judicial review of decisions made by arbitrators and employment relations boards and for review of claims based on statutes apparently conflicting with employment relations laws; cases related to impasse and dispute resolution; cases related to strikes or other job actions; and other miscellaneous cases. The chapter introduction notes that cases dealing with contract management have come to the forefront this year, and that job security issues have become more dominant than salary or fringe benefit issues. The chapter concludes with the comments that the end of litigation on collective bargaining is nowhere in sight and that compromising at the local level seems wiser than litigation in light of the uncertainties in the field. (PGD)

BARGAINING

Charles L. Miller and Perry A. Zirkel

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INTRODUCTION

Last year's conclusion to the chapter on collective bargaining urged school districts to solve their labor conflicts in litigation "only if they desperately have to." Unfortunately, the number of cases in litigation during 1985 was undiminished. Through the years in which collective bargaining has been in public schools, a gradual shift in the areas of conflict has taken place. In the early years, most litigation dealt with salary and fringe benefits along with the scope of bargaining issues. As this year's cases reveal, the issues dealing with contract management, that is making the contract work during its life, have come to the forefront in a plethora of grievance/arbitration litigation. Job security issues also have taken the lead from the salary and fringe benefit conflicts. In the review that follows, an example of virtually every possible dispute that can arise in educational labor relations seems to be present. This variety serves as a reminder that each state's collective bargaining laws is slightly different. Reliance on a decision from a state other than your own may prove to be unwise without parallel legislative language and history.

CONSTITUTIONAL ISSUES

During 1985 a variety of issues involving either state or federal constitutional rights arose. The issues dealt with distribution of union materials, implementation of fair share agreements, legality of picketing and leafleting outside a board member's personal business, and jurisdiction over labor relations between parochial schools and their lay teachers. Even the thought to be well understood practice of bargaining representatives collecting "fair share" fees from nonmembers, as delineated by the United States Supreme Court in *Abood v. Detroit Board of Education*,[1] is still being challenged from new and creative avenues.

In a case arising in Texas, which does not have a collective bargaining statute, the Fifth Circuit Court of Appeals was asked to review a suit brought by a teacher organization alleging that school policies restricting its access to school property and prohibiting its use of school facilities during school hours violated its members' constitu-

1. 432 U.S 209 (1977).

tional rights.[2] Specifically, the employee organization cla[illegible] the school district policies violated the first and fourteenth [illegible]ment free speech, free association, and equal protection claus[illegible] the overbreadth and vagueness doctrines. The union argued th[illegible]e policies, as interpreted and implemented by school officials, [illegible]l to deny teachers their right to discuss association business ev[illegible]- ing nonclass time, such as the lunch hour. Union representative[illegible]· ther contended that school officials had routinely granted acces[illegible] school communications facilities to other commercial and civic organizations and that employee organizations were discriminatorily denied access. The school district counter argued that the schools are not a public forum and that reasonable alternative means of communications were available. Finally, the district contended that allowing employee organizations to use school facilities would disrupt the learning process.

The Fifth Circuit's review of the matter relied heavily upon the Supreme Court's decision in *Perry Education Association v. Perry Local Educators' Association.*[3] Under *Perry*, a right of access to public property, and the standard by which limitations upon such a right must be evaluated, differ depending upon the character of the property at issue. *Perry* delineates three types of public property for first amendment purposes: (1) public forums; (2) limited public forums; and (3) nonpublic forums. With regard to the communications instigated by outside representatives of the union who desired access to teachers and school communication facilities, the Fifth Circuit did not view the school district's selective visitation and mail policy as creating a public forum. However, with regard to the communications among the teachers employed by the district, the court pointed out that regulations of their expression must be drawn more narrowly than regulations on the speech of outside representatives.[4] The court held that policies which purport to deny teachers the right to discuss union business during nonclass time are unconstitutional. The restriction on the use of school media facilities by district teachers as it relates to "employee organizations" also was unconstitutional, inasmuch as no "material and substantial" disruption was shown.

By far the most litigation in the constitutional area arose over the implementation of fair share agreements. The 1977 Supreme Court

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2. Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985).

3. 460 U.S. 37 (1983).

4. *See, e.g.,* Country Hills Christian Church v. United States School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983).

decision in *Abood*[5] that such agreements do not constitute a *per se* violation of nonmembers rights has been applied to a case-by-case, state-by-state basis. For example, California's state's highest court decided that employees covered by a union shop or agency shop clause have a right under the first amendment to object to use of their money for political or ideological purposes which they oppose.[6] The court decided that the state statute which authorizes union shop or agency shop agreements does not on that account impinge upon protected rights of the association.

In another California case, a nonunion member challenged the withholding of a portion of his paycheck as a "service fee" and the use of that fee by the union for purposes not directly related to negotiations, contract administration, and grievance handling.[7] The state's intermediate appellate court ruled that (1) although the free rider test is the same for both public-sector and private-sector expenditures, results of the test will depend upon peculiarities of the duties of the exclusive representatives in the two sectors; (2) the union has the burden of proving how the employees' fees have been spent; (3) lobbying and electioneering on matters of employer-employee relations and school financing are activities reasonably employed to implement or effectuate the duties of a public school employee union; (4) where the union is chosen in its affiliated status to be the exclusive representative of the unit, assessment of dues and fees to defray all costs properly assessed against nonmembers is permitted, regardless of whether a local or national affiliate provided benefits and assessed dues and fees; and (5) the automatic deduction of service fees was proper.

In another application of *Abood*, the New Jersey Supreme Court decided that a statutory provision permitting the union to apply fees of nonunion public employees to certain lobbying expenditures was not facially invalid.[8] The court also ruled that the demand-and-return system mandated by statutory provision, which required labor unions to refund agency shop fees used for impermissible political purposes, was not unconstitutional on its face. The court concluded, however, that such a system was constitutional as applied only when the fee is used for objectives germane to collective negotiations or conditions of employment, because collection of nonmember fees for these purposes promotes governmental interest in achieving stability in labor relations.

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5. See *supra* note 1.
6. San Jose Teachers Ass'n v. Superior Court, 700 P.2d 1252. (Cal. 1985).
7. Cumero v. Public Employment Relations Bd., 213 Cal. Rptr. 326 (Cal. Ct. App. 1985).
8. Board of Educ. of Boonton v. Kramer, 494 A.2d 279 (N.J. 1985).

As a separate issue, the constitutionality of an injunction prohibiting picketing and leafleting outside the personal business offices of governing board members of a school district was challenged in California.[9] Specifically, the primary issue in this case was whether these concerted activities of school employees involved in a labor dispute with a school district constitute a corrupt practice or are otherwise unlawful and may, therefore, be restricted without infringing first amendment rights. The court reviewed the district's contention that the union activity is constitutionally unprotected because it undermines the integrity of the local legislative process as being irreconcilable with the jurisprudence of the first amendment, which teaches that the exposure of elected officials to public criticism enhances rather than defeats the integrity of representative government. The court disagreed, however, and concluded that the picketing and leafleting were not unlawful. The trial court's injunction against such activities was held to be unconstitutional.

Finally, in the constitutional area for 1985, the Second Circuit ruled that the duty of church-operated schools to bargain with labor unions pursuant to New York's collective bargaining statute does not violate the first amendment's religion clauses.[10] Focusing on the third prong of the tripartite test for establishment clause cases, the court found that New York's labor relation board's relationship with religious schools concerning mandatory subjects of bargaining, all of which are secular, does not create a degree of surveillance necessary to find excessive entanglement. Furthermore, the court ruled that the state labor relations board's jurisdiction over the dispute between the church-operated school and the lay teachers' union did not violate the free exercise clause where collective bargaining was not claimed to be contrary to the beliefs of the church. Even if the exercise of the state labor relations board's jurisdiction had an indirect and incidental effect on employment decisions in parochial schools relating to religious issues, the court concluded that this minimal intrusion was justified by the state's compelling interest in collective bargaining.

AUTHORITY TO BARGAIN

It would appear that the authority to bargain, where authorized by state statute, has become well established. This is the second year

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9. Pittsburg Unified School Dist. v. California School Employers Ass'n, 213 Cal. Rptr. 34 (Cal. Ct. App. 1985).

10 Catholic High School Ass'n v. Culvert, 753 F.2d 1161 (2d Cir. 1985).

in a row that no reported case dealing with public employees' rights to engage in collective bargaining with duly elected agents of the employers has been decided.

RECOGNITION AND REPRESENTATION ISSUES

Unit Determination

Supervisory, Managerial, and Confidential Employees. Missouri's highest court affirmed a lower court ruling that had upheld a State Board of Mediation decision that secretaries who were assigned to administrative offices of the school district and who occupied positions of trust with the superintendent and with the members of the board of education primarily responsible for developing the district's labor relations strategies were confidential employees and thus properly excludable from the bargaining unit.[11] Since principals and assistant principals were the sole representatives of the district with whom teachers and other school personnel had daily contact and were indispensable in effectuating labor relations policies of the district, their secretaries also were held to be confidential.

Illustrating the variety among states, however, Florida's intermediate appellate court held that school superintendents' secretaries were not excludable from a collective bargaining unit as confidential because the secretaries were neither involved in nor had access to confidential documents or information relating to any management policies in the field of labor relations, collective bargaining negotiations, or employee grievances.[12] Although the secretaries did have access to certain sensitive information, such as promotions, transfers, personnel files, complaints, and disciplinary actions, the court did not regard this information as providing an employee organization with any advantage at the bargaining table because these matters are not subject to collective bargaining in Florida.

Other Representation and Recognition Issues. The New Hampshire Supreme Court upheld that state's Public Employee Labor Relations Board's order that a school administrative unit negotiate with a bargaining unit made up of educational support person-

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11. Missouri NEA v. Missouri State Bd. of Mediation, 695 S.W.2d 894 (Mo. 1985).

12. School Bd. of Polk County v. Polk Educ. Ass'n, 480 So. 2d 1360 (Fla. Dist. Ct. App. 1985).

nel.[13] The court based its decision on technical-procedural grounds reasoning (1) that the labor board has broad subject matter jurisdiction to determine and certify bargaining units, and (2) that regardless whether it was wrong as a matter of law when the labor board defined member districts of the school administrative unit as one public employer for purposes of collective bargaining, such was not a jurisdictional issue, but rather an issue of law which should have been raised at the certification proceedings. When it was not raised at that time, or by the appellate procedure established by statute, the issue was waived.

A recurring question concerns the appropriateness of a bargaining unit that contains both professionals and paraprofessionals. The Minnesota Supreme Court determined that paraprofessionals hired under a federally funded remedial program must establish a separate bargaining unit and not be part of a teachers' bargaining unit.[14] The court considered the fact that these paraprofessionals were not required to be licensed, because they were not "teachers" as defined in provisions of Minnesota's Public Employment Labor Relations Act, regardless of their job function.

An Indiana court of appeal affirmed that state's Education Employment Relations Board (EERB) decision that a special services unit was a school corporation for purposes of collective bargaining.[15] The court ruled that this special services unit met the statutory definition of a "school corporation," which included a school for handicapped children established or maintained by two or more school corporations, even though the unit was comprised of two state hospitals in addition to six school corporations. The court also rejected the unit's procedural attack. First, in unit determination proceedings, although an agent of the EERB may direct an election, a representative is not certified until after the parties have an opportunity to object to the entire board. Therefore, no authority was improperly delegated to an agent of EERB. Second, the court found that the failure of an agency to make precise findings does not always prevent adequate review. Where an agency made alternate findings, but failed to make findings of the underlying facts and grounds for the decision, the error was harmless.

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13. *In re* SAU No. 21 Joint Bd. Negotiating Team, 489 A.2d 112 (N.H. 1985).

14. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527 (Minn. 1985).

15. Madison Area Educ. Special Serv. Unit v. Indiana Educ. Employment Relations Bd., 483 N.E.2d 783 (Ind. Ct. App. 1985).

Elections

A teachers' union in Louisiana filed suit to force the school board to prepare a referendum to determine whether the school board should recognize the teachers' union and bargain with it.[16] Reversing the election order of the Louisiana Court of Appeals, the state supreme court held that the school board lacked authority to call the referendum, but recognized the power of the state legislature to authorize parish or municipal wide referenda on issues of purely local interest, such as taxation for local purposes and alcoholic beverage control. Such local option laws have been traditionally upheld in Louisiana as lawful delegations of legislative power. Nevertheless, the court reasoned that the legislature's constitutional authority to call such a local election does not mean that a parish school board is clothed with a similar grant of power; a school board, with narrowly and specifically defined powers, lacks both statutory and constitutional authority to refer a decision to its electorate.

RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

Union Rights

Whether a union is entitled to have state or national representatives meet with local members during school hours was the only union rights issue judicially decided during 1985. For the most part, objections to bargaining representatives' right to represent members' interests in wages, hours, and conditions of employment in general rarely arise.

A school entity in Pennsylvania sent a letter to the recognized teachers' association stating that (1) association members are prohibited from conducting association business during normal school hours, and (2) the union field representatives are prohibited from entering the school buildings during the normal work day to engage in association activities.[17] An arbitrator upheld the association grievance against this policy, because a "past practice" of permitting union representatives to meet during their preparation or lunch periods existed

16. St. John the Baptist Parish Ass'n of Eucators v. Brown, 465 So. 2d 674 (La. 1985).

17. Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n, 489 A.2d 945 (Pa. Commw. Ct. 1985).

and had evolved into an employment condition incorporated into the contract. A state court acknowledged that the school entity had the rights, pursuant to the School Code, to limit the union's field representative from entering its buildings during normal working hours. Nevertheless, the court ruled that it would not supersede a provision in a collective bargaining agreement or, in this case, a past practice which has been implicitly incorporated therein, except where the conflict is explicit and definitive.[18] Therefore, the arbitrator's award was affirmed.

Union Security

The area of union security is one of utmost importance to state and national union representatives, although local union representatives may be more prone to put an immediate priority on the salary and fringe packages. The area of fair share or agency shop agreements, wherein nonmember employees are required to contribute funds to the union treasury already has been addressed under Constitutional Issues.

However, a variation of the dues deduction of nonmembers touches on the union security issue from a different angle. In a school district in Colorado, a provision of a collective bargaining agreement provided for automatic deduction of union dues from employees' paychecks and an opt-out provision that stated a procedure for exemption from the automatic deduction.[19] Nonunion members contended that the exercise of the revocation procedure required them to disclose their ideological preferences and is, thus, a violation of their freedom of association and expression rights. The court found that they did not have to reveal political or ideological affiliation other than union nonmembership in exercising the opt-out provision and were not subject to harassment by being required to appear in person at a site designated by the union to declare their status. The failure of the nonunion members to effectively allege the manner in which their associational rights were impaired by the opt-out provision distinguished this case from *N.A.A.C.P. v. Alabama*[20] which compelled disclosure of membership list. The allegations were, thus, insufficient to state a *prima facie* claim of a violation of their right of free association and expression.

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18. *In re* County of Erie Appeal, 455 A.2d 779 (Pa. Commw. Ct. 1983).

19. Opie v. Denver Classroom Teachers Ass'n, 701 P.2d 872 (Colo. Ct. App. 1985).

20. 357 U.S. 449 (1958).

Obligations of Exclusive Representatives

Along with the rights and security that the collective bargaining process can bring to a union, obligations also are required. In Alabama, a classified school employee brought action against her union, alleging that the union wrongfully refused her request for legal assistance when she was fired.[21] The trial court issued a summary judgment in favor of the union, finding no genuine issue of material fact, and concluded that the action was time barred by a federal statute of limitations. The Supreme Court of Alabama ruled that the statute of limitations could not in this case be the basis for the trial court's granting a summary judgment. The union filed an answer without an affirmative pleading of the statute of limitations, and then attempted to raise the defense in their summary judgment motion. According to Alabama case law,[22] this procedure was defective. The court also rejected the alternative basis for granting the summary judgment motion (i.e., that there was no genuine issue of material fact). The employee's failure to offer anything other than a base response to the union's claim that the employee had never requested legal assistance was fatal. In the absence of the plaintiff-employee offering any affidavits or other testimony to contradict the evidence of the defendant-union, the court explained that it had no alternative but to consider that evidence uncontroverted.

The union's duty of fair representation also arose in two Michigan cases. In one case, a teacher filed a grievance over compensatory time.[23] The union represented him through the first three steps of the grievance procedure. While the original grievance was pending, the teacher was reprimanded for failure to follow orders at work. The union again filed a grievance on behalf of the employee, but the grievant failed to appear for any further grievance proceedings. The union then discontinued representing the teacher. The teacher filed a charge against the union with the Equal Employment Opportunity Commission (EEOC), and a settlement with a nonadmissions clause was reached. The teacher then filed a complaint against the union alleging that it had breached its duty of fair representation. The court granted a motion for summary judgment in favor of the union on the ground that the teacher's claim was barred by a six-month period of

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21. Wallace v. Alabama Ass'n of Classified School Employees, 463 So. 2d 135 (Ala. 1985).

22. Bechtel v. Crown Petroleum Corp., 451 So. 2d 793 (Ala. 1984).

23. Ray v. Organization of School Adm'rs and Supervisors Local 28, 367 N.W.2d 438 (Mich. Ct. App. 1985).

limitations and that the filing of the EEOC charge did not toll the limitations period.

The other Michigan case involved a teacher who had been laid off and who later alleged that the union had breached its duty of fair representation.[24] The sole issue on appeal was whether the circuit court had jurisdiction over the case, or whether the state Employment Relations Commission had jurisdiction. The intermediate appellate court ruled that the state Employment Relations Commission had exclusive jurisdiction to decide the teacher's duty of fair representation claim as well as her concomitant claims against the school district and the union's executive director. The court did not view the concomitant claim that the employer had breached the collective bargaining agreement, thus raising common law rights as well as rights granted under the state's Public Employment Relations Act, as defeating the commission's exclusive jurisdiction.

SCOPE OF BARGAINING

Duty to Bargain

Very little activity occurred in the area of duty to bargain during 1985. In Rhode Island, the state's highest court ruled that a regional school district could neither alter nor evade valid contractual obligations by refusing to sign a bargaining agreement which the school committee had negotiated with the teachers' association and which incorporated the terms of an arbitration award containing provisions for a three-step pay raise.[25] The school committee argued that because the appropriating authority is a body distinct from the school committee, any contracts with the teachers or others are subject to the appropriating authority's financial meeting. They argued that the appropriating body has absolute authority in financial matters. The court relied on state statute to conclude that since school committees are authorized by law to enter into binding agreements, the community is bound to fund that agreement whether that authority is a city or town council, a financial town meeting, or a district financial meeting. To conclude otherwise, the court explained, would completely negate the statutory power of the school committee to bargain and to contract.

In Michigan, a school district automatically renewed an existing

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24. Profitt v. Wayne-Westland Community Schools, 364 N.W.2d 359 (Mich. Ct. App. 1985).

25. Exeter-West Greenwich Regional School Dist. v. Exeter-West Greenwich Teachers' Ass'n, 489 A.2d 1010 (R.I. 1985).

collective bargaining agreement and then refused to bargain due to an alleged lack of timely notice of nonrenewal by the union.[26] The old contract had a termination clause which contained the following language:

> This agreement and its provisions shall become effective August 21, 1980, and remain in full force and effect through August 20, 1982, and thereafter for successive two (2) years unless notice of termination is given in writing by either authorized party to the other thirty days prior to its normal date of renewal.

Thus, the contract provided that it would automatically renew for a two-year period unless written notice of contract termination was given by either party thirty days prior to August 20, 1982. On September 1, 1982, the union made its first contact. The appellate court ruled that since the union filed for negotiations forty-three days after it was required to do so, the contract was renewed under the same conditions and durations as it had previously been. The court reasoned that the union has an obligation to abide by the contract terms, just as the school district must.

Mandatory Topics of Bargaining

In most collective bargaining settings today, the issue of mandatory topics of bargaining is generally not in dispute. General guideposts have been established at the state level, and local dynamics have largely taken care of the rest. However, in an era of declining enrollments and resulting furloughs, the negotiability of layoff procedures is a priority issue. A Connecticut case is illustrative. The intermediate appellate court was asked to decide which bargaining representative—the administrative organization, the teacher organization, or both—had the right to negotiate a layoff procedure that will determine the circumstances under which displaced administrators may bump teacher bargaining unit members.[27] The court could not resolve the issue by merely applying the general rule that mandatory subjects between an employer and the bargaining representative for a particular unit are only those subjects which concern the conditions of employment of the employees in that bargaining unit, because here the subject in question does not impact only the members of a single

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26. Capac Bus Drivers Ass'n v. Capac Community Schools Bd. of Educ., 364 N.W.2d 739 (Mich. Ct. App. 1985).

27. Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 498 A.2d 102 (Conn. Ct. App. 1985).

bargaining unit. It is obvious that the conditions of employment of both the administrative unit and teacher unit members are affected by procedures that determine bumping rights for displaced administrators *vis a vis* members of the teacher unit. The court concluded that the legislature in Connecticut did not intend to require that cross-unit bumping questions can be resolved by ensnarling school boards and bargaining representatives in multilateral negotiations. The court applied the principle that the opportunity of a displaced administrator to bump into a teacher unit position constitutes a benefit, not a detriment, to a displaced administrator. The court then ruled that the layoff procedure was a mandatory subject for bargaining with the teacher unit only.

Prohibited Topics of Bargaining

No case was reported where proposals were ruled to be prohibited under state collective bargaining statutes. Precedents and practices apparently are absorbing any conflicts short of litigation. It may be that the parties with the maturity of experience have become more sophisticated in making their proposals meet the typical statutory criteria of hours, wages, and terms and conditions of employment.

Permissive Topics of Bargaining

The negotiability of reimbursement for unused sick leave and severance pay was raised in Iowa.[28] During the negotiations process, the association introduced proposals for reimbursement for unused sick leave and severance pay. The employer contended that it was not obligated to bargain on these items and filed a petition for expedited resolution of the matter with the Public Employment Relations Board. The board ruled that both proposals were permissive, not illegal or mandatory subjects of bargaining. Unlike the National Labor Relations Act, the Iowa statute specifically lists items considered mandatory. Interpreting this distinction as evidencing legislative intent, the Iowa appellate court concluded that the omission of these two items from the statutory listing made them permissive, rather than mandatory, subjects of bargaining.

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28. Professional Staff Ass'n of Area Educ. Agency 12 v. Public Employment Relations Bd., 373 N.W.2d 516 (Iowa Ct. App. 1985).

GRIEVABILITY AND ARBITRABILITY

The grievance arbitration process of collective bargaining has come to the forefront in the past few years as a way for both parties to clarify the intent of contractual language. Even where its intent was clear during the negotiations, some language has lain dormant for years past the point of the parties' clear memories or records. When disputes subsequently arise, the prevailing forum for resolving them is arbitration.

Many of the arbitration awards subject to judicial review in 1985 dealt with employee discipline and termination. In the early years of collective bargaining in the school, the arbitration process seemed to be used more to clarify salary and benefit issues than job security issues.

Presumption of Arbitrability

Although on balance the 1985 decisions continued the judicial presumption favoring arbitrability, the presumption was not effective in a few cases, which are included herein.

In New York, a school district decided, based on continuity of learning experience for a kindergarten class, to continue a teacher in her kindergarten teaching position rather than recall the most senior excessed elementary teacher in the middle of the term when the position became vacant.[29] The senior teacher filed a grievance, and the arbitrator upheld it based on the contract. New York's trial court vacated the arbitrator's award, ruling that the issue was nonarbitrable because it concerned school district responsibility to maintain adequate standards in the classroom. Pointing out that the contract specifically restricted the arbitrator with regard to any matter involving board discretion, and that prior New York court decisions established a public policy exemption for personnel assignments, the court ruled that an arbitrator may not infringe on such substantive issues without violating public policy.

In Massachusetts, a school committee failed to appoint a former junior high unit director or an elementary school principal to a position of assistant high school principal, instead appointing an individual with less seniority. A state intermediate appellate court ruled that the grievance filed on behalf of the two unsuccessful candidates

29. Three Village Teachers Ass'n v. Three Village Cent. School Dist., 494 N.Y.S.2d 644 (N.Y. Sup. Ct. 1985).

was only arbitrable under the collective bargaining agreement as to whether reasonable steps were taken to ensure consideration in good faith of their qualifications to fill the positions, but not as to whether the grievants should have been chosen for the position.[30] Viewing public policy like the above mentioned in New York, the Massachusetts court reasoned that the relative qualifications of the applicants is a decision for the school committee, not for the arbitrator, who may not intrude into the committee's exclusive domain.

Similarly splitting an issue into arbitrable and nonarbitrable components, Massachusetts' highest court ruled that an arbitrator exceeded his powers in ordering a teacher's recall because such recall was analogous to an appointment decision and, therefore, fell within the exclusive domain of the school committee.[31] However, the court let stand the awarding of damages to the teacher for the district's failure to follow the recall provision of its collective bargaining agreement, reasoning that the award of damages did not force the school committee to surrender any of its management prerogatives.

Alaska's highest court allowed a nontenured teacher to submit his grievance, arising from the school district's alleged violation of nonretention procedures, to an arbitrator.[32] However, the court ruled, under state statute providing that nontenured teachers are subject to renewals for any cause, that the arbitrator may only recommend that the teacher be reinstated.

In two separate cases in New York, the issue of placing letters of reprimand or derogatory material in an employee's file was found arbitrable. One case resulted when a student died while participating in the school's football program. It was later found that the coaches had not made sure the students had been given the mandated physical examination prior to participation nor had they obtained parental consent for participation, as required by school policy.[33] The superintendent issued letters of reprimand and placed them in the employees' personnel files. The coaches' grievance was processed to the point of arbitration of the issue. The arbitration clause of this particular contract was as follows:

> Grievance shall mean any claimed violation, misinterpretation, or inequitable application of the existing agree-

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30. School Comm. of Peabody v. International Union of Elec., Radio and Mach. Workers Local 294, 475 N.E.2d 410 (Mass. App. Ct. 1985).

31. School Comm. of Holbrook v. Holbrook Educ. Ass'n, 481 N.E.2d 484 (Mass. 1985).

32. Jones v. Wrangell School Dist., 696 P.2d 677 (Alaska 1985).

33. Board of Educ. v. Yonkers Fed'n of Teachers, 488 N.Y.S.2d 731 (N.Y. App. Div. 1985).

> ment, laws, rules, procedures, regulations, administration orders, or work rules of the Board or a department thereof; provided however, that such terms should not include an action against disciplinary proceedings or any other matters which are otherwise reviewable pursuant to law, or any rule or regulation having the force and effect of law. The denial of tenure is in no way to be construed as a grievance.

The court had no problem concluding that based on the above language the letter of reprimand was arbitrable, at least to the point of leaving to the arbitrator the determination of whether these letters constituted discipline or merely evaluation.

The second New York case arose out of the failure of the employing board to remove certain memoranda claimed to be derogatory from the personnel files of a teacher and a guidance counselor.[34] The parties' collective bargaining agreement included the following provision: "No material derogatory to a teacher's character or personality will be placed in their [sic] confidential personal file. This section shall not be interpreted to preclude the filing of evaluation forms." The board maintained that the matter was not arbitrable, arguing that the arbitrator might make an award that could be in violation of public policy. The court rejected this argument as prematurely speculative, concluding that it did not justify judicial intervention in the arbitration process at this stage.

The state court used virtually identical reasoning in a separate case. The teacher in this case had been receiving his salary while out due to an injury sustained on the job. At the end of the year, the district ceased paying the salary in alleged violation of the collective bargaining agreement. The court ruled that the matter is arbitrable and that subsequently the district may file for review if it feels the arbitrator's action violates public policy.[35]

Other 1985 decisions similarly continued the tradition favoring arbitrability. In view of the provisions of a collective bargaining contract, a New York appellate court allowed a grievance arising out of a denial of a teacher's request for reassignment to proceed to arbitration. Like the preceding New York case, the court provided limits, pointing out that the award would be subject to appropriate judicial

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34. Board of Coop. Educ. Serv. v. BOCES II Teachers' Ass'n, 488 N.Y.S.2d 797 (N.Y. App. Div. 1985).

35. Copiague Union Free School Dist. v. Copiague Teachers' Ass'n, 492 N.Y.S.2d 429 (N.Y. App. Div. 1985).

action on a motion to confirm or vacate should it impinge upon nondelegable duties of the board.[36]

Somewhat similarly, a Maryland appellate court concluded that a grievance concerning classroom observations was arbitrable despite the public policy argument of the school district.[37] The court agreed with the local school district that state law forbids the bargaining away of educational policy, but added there is no prohibition that would preclude bargaining on matters dealing with implementation of that policy. Illustrating the general trend, the court cited the following language from a previous Maryland decision:

> We are persuaded that when the language of an arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, the legislative policy in favor of the enforcement of agreements to arbitrate dictates that ordinarily the question of substantive arbitrability initially should be left to the decision of the arbitrator Whether the party seeking arbitration is right or wrong is a question of contract application and interpretation for the arbitrator, not the court, and the court should not deprive the party seeking arbitration of the arbitrator's skilled judgment by attempting to resolve the ambiguity.[38]

In an aforementioned[39] Pennsylvania decision, a dispute as to whether a union field representative could meet with members of the union on school property during school hours was found to be arbitrable. The court considered the issue to concern an employment condition and, therefore, to be properly put before an arbitrator. The court cited precedent from the Pennsylvania Supreme Court, which declared that "Pennsylvania labor policy not only favors but requires the submission to arbitration of public employee grievances 'arising out of the interpretation of the provision of a collective bargaining agreement.' "[40]

Similarly, a Florida appellate court held that a claim that a school board violated its own policy and past practices by not providing teachers with notice of responsibility to verify prior experience so as to

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36. Dutchess County Bd. of Coop. Educ. Serv. v. Dutchess County Bd. of Coop. Educ. Serv. Faculty, 490 N.Y.S.2d 806 (N.Y. App. Div. 1985).

37. Howard County Bd. of Educ. v. Howard County Educ. Ass'n, 487 A.2d 1220 (Md. Ct. Spec. App. 1985).

38. Gold Coast Mall v. Larmar Corp., 468 A.2d 91 (Md. 1983).

39. See *supra* note 17 and accompanying text.

40. Board of Educ. of Philadelphia v. Federation of Teachers Local No. 3, 346 A.2d 35, 39 (Pa. 1975).

receive higher placement on the contract salary schedule, with the corresponding higher salary entitlement under the contract terms, fell within contractual provisions defining a grievance subject to arbitration as a dispute between employer and employee involving misinterpretation or application of the collective bargaining agreement.[41]

Employee dismissals continue to be frequently challenged in the arbitration forum, where arbitrability is often raised by the board as a threshold defense. In contrast to the aforementioned decisions that rejected or refused arbitrability, Iowa's Supreme Court distinguished termination at any time for just cause, which is statutorily excluded from the arbitration arena, from nonrenewal or RIF at the end of a school year, which was grieved in the case in question.[42] Thus, the court concluded that the teacher was entitled to enforce the arbitration clause in the collective bargaining agreement.

Who Determines?

The hierarchy in labor relations to make decisions as to the arbitrability of issues flows in ascending order from arbitrators to, where applicable, public employment relations boards, and finally to the court. As illustrated by the above cited language from a Maryland court, the judiciary tends to delegate and defer to arbitrators' decisions concerning arbitrability as well as concerning the merits.

Another example of this deference is found in an Oregon case dealing with arbitration for a teacher charged with improperly disciplining a student.[43] A state appeals court held that the substantive review by the Employment Relations Board of the merits of an arbitration award is appropriately limited to inquiry as to whether the award is repugnant to the law of that state and does not entail a broader scope of review. Furthermore, the court concluded that although the Employment Relations Board is authorized to decide whether an unfair practice has occurred, the board may not make a determination totally independent of the arbitrator as to whether the arbitrator has contractual authority to decide the issues.

Procedural Issues

Both parties in the bargaining arena are becoming more and

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41. Burt v. Duval County School Bd., 481 So. 2d 55 (Fla. Dist. Ct. App. 1985).
42. Waterloo Educ. Ass'n v. Waterloo Community School Dist., 372 N.W.2d 267 (Iowa 1985).
43. Beaverton Educ. Ass'n v. Washingtion County School Dist. No. 48, 708 P.2d 633 (Or. Ct. App. 1985).

more aware of the need to adhere to procedural requirements, including time lines. Nevertheless, arbitration tends to be less strict than administrative and judicial proceedings. The aforementioned presumption in favor of arbitrability is evident with regard to procedural, r t just substantive, arbitrability. The following two cases are illustrative.

A school bus driver in New York was subjected to a disciplinary hearing under state statute and did not appeal that decision. He then sought arbitration claiming that he had been dismissed without just cause. The school board argued that his grievance was nonarbitrable on procedural grounds, claiming that his resort to statutory proceedings established a waiver. A state intermediate appellate court rejected this argument (1) where the collective bargaining agreement between the driver's union and the school district afforded both the statutory avenue of review and the alternative of arbitration of "just cause" grievances, and (2) where the school district had agreed to hold the grievance in abeyance until disposition of pending criminal charges against the driver and to permit the union to choose arbitration after disposition of the criminal charges.[44]

Similarly, Connecticut's highest court ruled that an arbitration panel which rendered a decision approximately six months after the final arbitration hearing was not untimely under a contractual provision that the arbitrator "shall be requested" to render the award as quickly as possible, but in no event more than thirty days from filing posthearing briefs, or sixty days after the final hearing, whichever come sooner.[45] The court technically interpreted the language as imposing no affirmative obligations on the arbitrator to act; rather, the time limit began to run upon request of one or both parties, and there was no evidence that such a request was ever made.

In contrast, consider the following examples from the administrative arena. In Massachusetts, a public school teacher and nonunion member brought a prohibited practice complaint before the state's Labor Relations Commission.[46] He claimed that the union's demand of an agency fee in an amount equal to full union membership dues was in excess of the fee allowed under the commission's regulation. The commission dismissed the complaint without a hearing for the reason that the employee had failed to file his complaint within the forty-five day period prescribed by regulation or to show good cause warranting a

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44. Granville Cent. School Dist. v. Granville Non-Instructional Employees Ass'n, 494 N.Y.S.2d 218 (N.Y. App. Div. 1985).

45. Board of Educ. of New Haven v. AFSCME Council 4, 487 A.2d 553 (Conn. 1985).

46. Lyons v. Labor Relations Comm'n, 476 N.E.2d 243 (Mass. App. Ct. 1985).

waiver of the forty-five day filing requirement. The court upheld the Labor Relations Commission's decision on timeliness, restating that there is nothing to suggest that forty-five days is too short a period to allow full assertion of a dissenting employee's rights.

Procedures tend to be similarly strict at the judicial level. For example, a Florida appeals court held that jurisdiction of an arbitrator to enter an award in favor of teachers in a salary dispute could not be challenged by the school board where it failed to comply with the ninety day rule set by statute for contesting awards and thus failed to comply with the very condition on which the right to relief was explicitly conditioned.[47]

However, equitable considerations sometimes provide some flexibility. For example, a Pennsylvania court held that a school district which improperly utilized service by regular mail, rather than deputized mail, for review of an arbitrator's award was entitled to have its petition reissued in order to effectuate proper service, even though the thirty day period within which to effect service had expired, where the school district did not seek to stall legal machinery by its action.[48]

Management Prerogatives as a Bar

Inasmuch as the inherent, and sometimes explicit, right of boards as employers to control their employees is a limit on the employees' statutory right of collective bargaining, as a counterweight to "conditions of employment," it should be no surprise that perceptions of what is inherent managerial prerogative differs between unions and employers.

The section on Presumption of Arbitrability reveals that the courts regard this doctrine as applicable, at least to some extent, to school district decisions relating to hiring and firing. In deciding whether an arbitrator's award impinged upon the board's nondelegable duties, for example, the aforementioned[49] analysis by New York's intermediate appellate court may be summarized in two parts:

> (1) The authority to assign and reassign teachers is essential to maintaining adequate standards in the classroom and is a nondelegable responsibility imposed upon the school superintendent subject to approval of the

47. Burt v. Duval County School Bd., 481 So. 2d 55 (Fla. Ct. App. 1985).

48. Big Beaver Falls Area School Dist. v. Big Beaver Falls Educ. Ass'n, 492 A.2d 87 (Pa. Commw. Ct. 1985).

49. See *supra* note 36 and accompanying text.

board of education. Public policy prevents a school district from bargaining away this responsibility. The arbitrator, therefore, had no power to direct the board to retain the grievant in his assignment as concert band director.

(2) The board, however, by agreement, may establish procedural rules regulating the right to reassign teachers, and the enforcement of these rules is a proper subject for arbitration.[50]

As a second example from the aforementioned[51] cases, Alaska's nonretention of a nontenured teacher is arbitrable, but the ultimate remedy available to the arbitrator in such a case must be subject to the management rights restrictions of state statute. An arbitrator might recommend that the school board exercise its discretion to reinstate an employee, but, the court concluded, the legislative edict is clear that a school district cannot negotiate away its authority to decide tenure, nonretention, reinstatement, or other matters concerning education policy or management prerogatives.

General

When conflicts arise between state statute and the grievance arbitration clauses of contracts, the question often occurs as to which forum is applicable. Finding that a school district's decision not to renew a teacher's contract was a mere pretext for retaliating against the exercise of her right to file a grievance under the Public Employment Labor Relations Act of Minnesota, the state's highest court decided that the district's action was not reviewable under statutory standards for probationary teachers but was a grievable matter.[52]

In addition to the New York decision summarized above,[53] and the Pennsylvania case summarized below,[54] another case from the former state illustrates that in some circumstances both forums may be applicable. In this other case, a union after pursuing a grievance through the first three levels of the contractually prescribed process proceeded to the last step which provided for advisory arbitration.[55]

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50. Sweet Home Cent. School Dist. v. Sweet Home Educ. Ass'n, 455 N.Y.S.2d 685 (N.Y. App. Div. 1979).

51. See *supra* note 32 and accompanying text.

52. Marshall County Cent. Educ. Ass'n v. Independent School Dist. No. 441, 363 N.W.2d 126 (Minn. 1985).

53. See *supra* note 44 and accompanying text.

54. See *infra* note 58 and accompanying text.

55. Hempstead Classroom Teachers Ass'n v. Board of Educ., 491 N.Y.S.2d 716 (N.Y. App. Div. 1985).

The school district rejected the arbitrator's recommendation, whereupon the union filed suit, seeking to recover damages inter alia, for breach of the collective bargaining agreement. The school district contended that the grievance procedure was the union's sole remedy. The state's intermediate appellate court found this contention to be without merit in the absence of clear language in the collective bargaining agreement which would bar the union from maintaining its action.

JUDICIAL REVIEW

Arbitration Awards and Employment Relations Board Rulings

Standard of Review. The courts continue to use the "essence" test and similar standards that generally defer to the awards of arbitrators. For example, a Pennsylvania court when asked to review an arbitration award dealing with teacher furloughs based on substantial decline in student enrollments held that the arbitrator's determination that the district's furloughing policy, printed on the back of the collective bargaining agreement, was to be considered part of the agreement, drew its essence from the agreement and, therefore, was not subject to judicial review.[56] This intermediate court referred to the following language from the state's highest court:

> To state the matter more precisely, where the task of an arbitrator . . . has been to determine the intention of the contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to be respected by the judiciary if the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention . . . .[57]

Similarly, a Connecticut court concluded that a mere claim of inconsistency between a collective bargaining agreement and an arbitration award will not trigger judicial examination of the merits of an arbitration award.[58] Rather, the court would review the award only to

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56. Wyoming Valley W. Educ. Ass'n v. Wyoming Valley W. School Dist., 500 A.2d 907 (Pa. Commw. Ct. 1985).

57. Leechburg Area School Dist. v. Dale, 424 A.2d 1309, 1312 (Pa. 1981).

58. Board of Educ. v. Local 818 AFSCME, 502 A.2d 426 (Conn. App. 1985).

determine whether it draws its essence from the collective bargaining agreement.

The standard for review of grievance settlements, as compared to arbitration awards, is another matter. This issue arose in a case of first impression in New Jersey.[59] In an earlier case that arose under the National Labor Relations Act (NLRA), the United States Supreme Court in *General Drivers, Warehousemen & Helpers v. Riss & Co.*[60] had rejected the argument that only arbitration awards, and not grievance settlements, were binding upon the parties and judicially enforceable.

In an unbroken line of subsequent private sector cases, the lower federal courts have held that grievance settlements are entitled to the same degree of judicial deference customarily accorded arbitration awards.[61] The Supreme Court and lower federal courts recognize that the policy of the NLRA is to favor final adjustment of disputes by whatever means the parties choose. Importing this precedent into its public sector statutory scheme, the New Jersey's intermediate appellate court held that the scope of judicial review of a grievance settlement decision is limited to determining whether the interpretation of the contractual language is reasonably debatable.

The standard for judicial review of public employee labor board decisions varies according to the state and the circumstance. For example, in a decision summarized in a previous section,[62] a Michigan appeals court held that a claim of breach of duty of fair representation was within the exclusive jurisdiction of the state's Employment Relations Commission. In the court's view, the fact that the unfair labor charge involves an underlying breach of contract claim provides no reason to abandon this exclusive-jurisdiction principle. On the other hand, in another Michigan case, the Employment Relations Commission had ruled that involvement in union activities was the reason that a bus driver was dismissed. thus violating the public sector collective bargaining statute in that state. Using a substantial evidence standard, the state court of appeals reversed the commission decision, finding insufficient proof in the record that the school district knew of the bus driver's union activities prior to dismissing her.[63] The asump-

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59. Stigliano v. St. Rose High School, 487 A.2d 1260 (N.J. Super. Ct. App. Div. 1985).

60. 372 U.S. 517 (1963).

61. *See, e.g.*, United Mine Workers v. Barnes & Tucker Co., 561 F.2d 1093 (3d Cir. 1977).

62. See *supra* note 24 and accompanying text.

63. Byrnes v. Mecosta-Osceola Intermediate School Dist., 367 N.W.2d 831 (Mich. Ct. App. 1985).

tion that everyone must have known about it was not sufficient evidence. In partial contrast, in Washington a claim of breach of a collective bargaining agreement that the Public Employment Relations Commission failed to mediate did not prohibit or preclude judicial review of contractual rights.[64] The intermediate appellate court cited precedent for four tests to determine whether an administrative agency functions in a judicial capacity or in an administrative capacity: (1) whether the court could have been charged in the first instance with the responsibility of making the decision; (2) whether the function of the agency is one that courts historically have performed; (3) whether the agency performs judicial functions of inquiry, investigation, declaration, and enforcement of liabilities as they stand on present or past facts and under existing laws; and (4) whether the agency's action is comparable to the ordinary business of courts. Applying these tests, the court concluded that the resolution of factual and legal disputes arising pursuant to a collective bargaining contract is clearly a judicial function and, therefore, the review is *de novo*.

Propriety of Awards. In addition to the court decisions summarized under Standard of Review, several other cases fill out a varigated judicial picture of the propriety of arbitration awards.

In a Pennsylvania case that has since been limited by a statute which requires a choice of forum, a state court upheld an arbitrator's award in a teacher termination case, notwithstanding the arguable preemption coverage of the state's tenure legislation, which provides for a hearing before the state's secretary of education.[65] The aforementioned[66] deferential "essence" standard contributed to the court's conclusion.

In two New York cases, the propriety of arbitration awards involving work load of an athletic director and disciplinary action taken against a teacher were reviewed, respectively. In the athletic director's case, the arbitrator used a sophisticated mathematical formula to award the teachers' association a sum of one-third of the athletic director's salary for one and one-half years.[67] The state intermediate appellate court upheld the award as properly within the arbitrator's power. In the other New York case, an intermediate appellate court regarded it not to be against public policy to permit the arbitrator to review an

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64. Yaw v. Walla Walla School Dist., 696 P.2d 1250 (Wash. Ct. App. 1985).

65. Wilson Area Educ. Ass'n v. Wilson Area School Dist., 494 A.2d 506 (Pa. Commw. Ct. 1985).

66. See *supra* note 57.

67. Merrins v. Honeoye Teachers' Ass'n, 485 N.Y.S.2d 894 (N.Y. App. Div. 1985).

act of disciplining a teacher while a disciplinary hearing was being conducted at the same time, even if the arbitration resulted in a determination contrary to that reached in the disciplinary hearing.[68]

Pennsylvania's courts upheld arbitration awards concerning hiring and furloughs. In the first case, a state court upheld an arbitrator's determination that (1) a full-time substitute teacher, although not referenced in the recognition clause of the collective bargaining agreement, was nevertheless entitled to pursue the grievance procedure available to members of the bargaining unit when she was paid in accordance with the same salary schedule and over the same time, performed the same work under the same conditions at the same location, worked the same hours, and received the same employment benefits as other professional employees; and (2) a provision of the bargaining agreement requiring the school district to select a bargaining unit member over a nonbargaining unit member was violated when the school district without expressing a reason hired a teacher with no prior teaching experience over the grievant, who was a full-time substitute teacher with experience. The arbitrator's award, directing the school district to offer the substitute teacher the first available part-time or full-time regular teaching position for which she was certified, was deemed proper.[69] In the other Pennsylvania case, the court upheld an arbitrator's determination that transfer of bargaining unit work and subsequent furloughs of employees of the state school and hospitals violated the collective bargaining agreement between the union and the Department of Welfare. The court concluded that the award drew its essence from the agreement where, although the agreement contained no specific prohibition against contracting out the bargaining unit's work, its recognition clause together with its salary and seniority sections provided job protection.[70]

Similarly, a Maryland appellate court upheld an arbitration award that determined that a school board violated the collective bargaining agreement by paying its driver education teachers, who were organized into a supposedly separate school, lower pay rates than the salary schedule.[71] The board had created this "separate educational component" after the state legislature made the driver education pro-

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68. Board of Educ. v. Auburn Teachers Ass'n, 496 N.Y.S.2d 132 (N.Y. App. Div. 1985).

69. Wayne Highlands Educ. Ass'n v. Wayne Highlands School Dist., 498 A.2d 1375 (Pa. Commw. Ct. 1985).

70. Commonwealth v. State Schools and Hosp. Fed'n of Teachers, Local 1830, 488 A.2d 404 (Pa. Commw. Ct. 1985).

71. Prince George's County Educ. Ass'n v. Board of Educ. of Prince George's County, 486 A.2d 228 (Md. Ct. Spec. App. 1985).

gram optional. Finding that the driver education school utilized the board's materials, classrooms, and laboratories; that the board's insurance covered employees of the driver education school; that the board hired and paid the coordinator and teachers; and that the board retained financial control, the arbitrator determined that the driver education school was not a separate entity from the board. The court upheld the arbitrator's determination.

In Illinois, the intermediate appellate court upheld an arbitrator's determination that a local school board breached its contract with its aides by reducing their hours per day by one. The court found that the issue must be resolved by the language of the agreement, which here was clearly dispositive, rather than by the board's perceived financial crisis, which may be imaginary or real.[72]

In one of the few 1985 decisions that vacated or reversed an arbitrator's award,[73] a Michigan appeals court held that (1) the arbitrator exceeded his authority in ordering a remedy in the absence of a grievance, since the contract did not authorize the filing of prospective claims; (2) the formula used by the school district to determine the size of the work force was not a proper subject for arbitration under the agreement; and (3) the court did not exceed the limited scope of judicial review afforded to labor arbitration disputes.[74] In Ohio after a school district refused to implement an award dealing with the placement of three nurses on a degree salary schedule, a trial court of that state ordered all nurses, including nondegree nurses, to be placed on the degree schedule. The Supreme Court of Ohio upheld the award as not modified but rather confirmed, even though the nondegree nurses were not included in the original arbitration award.[75]

Statute-based Claims

Interpretation of Collective Bargaining Legislation. In Iowa, the state education association asked the court to review the validity of a declaratory ruling by the state's Public Employment Relations Board concerning the applicability of the impasse procedures of the Public Employment Relations Act to certain hypothetical situations which might be presented to fact finders or interest arbitrators under

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72. Bogguess v. Board of Educ. of Rock Island School Dist. No. 41, 479 N.E.2d 1100 (Ill. App. Ct. 1985).

73. For others see *supra* "Presumption of Arbitrability" section.

74. Lansing School Dist. v. Lansing Schools Educ. Ass'n, 370 N.W.2d 11 (Mich. Ct. App. 1985).

75. Warren Educ. Ass'n v. Warren City Bd. of Educ., 480 N.E. 2d 456 (Ohio 1985).

the act. The court answered the hypothetical questions as follows:

(1) The fact finder may not recommend that there be no contractual provision on an unresolved mandatory topic for negotiations for which both parties had stated a position.

(2) The arbitrator may do so only if it is a possible resolution of the dispute, and not if it is left unaddressed or unsettled.[76]

In Connecticut, the state association of boards of education and some local governmental units filed suit seeking declaratory judgment concerning the constitutionality of the state's final-offer interest arbitration statute for teacher-based bargaining impasses. The state's supreme court ruled that they lacked standing to challenge the statute where they had not alleged any injury to themselves nor had they sufficiently alleged that their members had any legally protected interest that the statute had invaded.[77]

The New Jersey Supreme Court upheld the statutory right of local boards of education to lay off teachers whenever "advisable because of reduction in the number of pupils."[78] The court found this statutory right to preempt the teachers' statute-based tenure and collective bargaining rights. However, the court concluded that the teachers' interest in procedurally fair notice of layoff could be balanced, through arbitration, with the employer's interest in fiscal management. A lower court had awarded a full-year's pay and benefits to the teacher because of untimely notice, but the high court modified the award to cover just the time of late notice, which was sixty-one days.

Interrelationship with Other Laws. The Supreme Court of New Jersey held that the statutory provision granting tenure to all New Jersey public school janitors, unless appointed for fixed terms, applied to custodial employees despite the district's practice of always giving them annual appointments fixed at twelve months.[79] The court concluded that the mere existence of a statute or regulation relating to a given term or condition of employment does not automatically preclude negotiations on the subject. When statute or regulation mandates a minimum level of right to benefits for public employees, but does not bar public employers from choosing to afford them greater

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76. Iowa State Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 793 (Iowa 1985).

77. Connecticut Ass'n of Boards of Educ. v. Shedd, 499 A.2d 797 (Conn. 1985).

78. Old Bridge Bd. of Educ. v. Old Bridge Educ. Ass'n, 489 A.2d 159 (N.J. 1985).

79. Wright v. Board of Educ., 491 A.2d 644 (N.J. 1985).

protection, proposals by employees to obtain greater protection in a negotiated agreement are mandatorily negotiable and contractual provisions affording employees rights or benefits in excess of that required by statute or regulation are valid and enforceable. In another statutory relationship case, a lower New Jersey court held that construction of an employment contract adopted by a high school faculty counsel and director as providing separate procedures for dismissal of teachers and the decision not to renew employment contracts was fair and reasonable since it granted more rights than state statute required.[80]

The issue in two Pennsylvania cases dealt with teacher dismissal. In one case, already mentioned,[81] the teacher had not elected to pursue the statutory remedy of a hearing for termination of tenure; the court thereby ruled that he was not precluded from seeking grievance arbitration under a collective bargaining agreement of the same issue. The teacher could choose to follow this latter path since a provision in the collective bargaining agreement between the school district and the education association encompassed the issue of employee dismissal within the term "job security." A subsequently enacted Pennsylvania statute required tenured teachers to either resort to the previous precedent or to utilize the statutory hearing procedure. An intervening dismissal was undertaken within this time period during which the new law was retroactive. The teacher tried to get "two bites of the apple" by asking for both a tenure hearing and arbitration. The court upheld the decision that the arbitration choice was sufficient, leaving the teacher without the right to have a tenure hearing.[82]

A Massachusetts appellate court held that a teacher who had been released from his job due to external constraints and who otherwise met criteria for eligibility for superannuation benefits did not lose entitlement to benefits on the grounds that, because of the recall provision of the collective bargaining agreement, employment would not be deemed to have ended until the conclusion of the "involuntary leave of absence."[83] This case exemplifies a well-understood principle —" that mere characterization of a feature of a collective bargain . . . will not save the provision if in substance it defeats a declared legislative purpose."[84]

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80. See *supra* note 59 and accompanying text.
81. See *supra* note 65 and accompanying text.
82. Scotchlas v. Board of School Directors, 496 A.2d 916 (Pa. Commw. Ct. 1985).
83. Martell v. Teacher's Retirement Bd., 479 N.E.2d 191 (Mass. App. Ct. 1985).
84. Watertown Firefighters Local 1347 v. Watertown, 383 N.E.2d 251 (Mass. 1984).

On a claim that a school custodian's discharge was an unfair practice in New Hampshire, the state's highest court held that the plaintiff-union carried a burden of proof to show that retaliation for labor activities was at least a minimal degree of motivation for discharge.[85] In Connecticut, a conflict between the state's collective bargaining and teacher tenure statutes arose over cross-unit furlough procedures. The state's intermediate appellate court decided that any layoff procedure provision in a teacher-unit collective bargaining agreement that violates the requirement that all criteria determining bargaining rights of displaced administrators *vis-ă-vis* teacher unit members must also be capable of application to teacher unit members and must in fact be applicable to teacher unit members is void and unenforceable.[86] In other words, it would be an illegal subject of bargaining since it conflicts with the state tenure statute.

Finally, in a previously cited case,[87] an appellate court in Oregon found no conflict between the provisions of the fair dismissal law and the arbitration provisions in a school district bargaining agreement. That state's courts have held consistently that there is no conflict between the statutory responsibilities of a school district over renewal of a probationary teacher's contract and provisions in the district's collective bargaining agreement for the arbitration of renewal-related matters, including evaluations.

IMPASSE AND DISPUTE RESOLUTION

Fact Finding and Arbitration

Very little litigation concerning fact finding has been reported in recent years. Perhaps the gravity of litigation is gradually adding to the tendency of mediators to not request fact finding for fear it reflects on their abilities to solve the issues.

In a case that clarified a Pennsylvania statute, the court confirmed that appointment of a fact finding panel, if agreement is not reached within twenty days after mediation has commenced, is not required. The court went on to define the twenty days of mediation to be twenty calendar days after the mediator has actually been present and some mediation has occurred.[88]

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85. *In re* White Mountains Educ. Ass'n, 486 A.2d 283 (N.H. 1984).

86. Connecticut Educ. Ass'n v. State Bd. of Labor Relations, 498 A.2d 102 (Conn. Ct. App. 1985).

87. See *supra* note 43 and accompanying text.

88. Peters Township School Dist. v. Peters Township Federation of Teachers, 501 A.2d 327 (Pa. Commw. Ct. 1985).

Rights arbitration was summarized in the previous section of this chapter. The other interest arbitration decisions also were described earlier.[89]

Rights on Expiration of Contracts

Questions arising during the hiatus period of the expiration of a contract and the signing of a new contract are still being asked of the courts. The school district is usually required to maintain the status quo during this hiatus period, and any change negatively or positively may be challenged by the unions.

In Montana, for example, a school district refused to pay step salaries under an expired collective bargaining contract pending agreement of a new contract. All teachers remained on the same step as the previous year. The union maintained that the failure to advance teachers on the salary schedule that was contained in the expired collective bargaining agreement constituted a unilateral change in wages. The court evaded the issue by declaring that since a new contract with retroactive pay provisions had been signed, the issue was moot.[90] A similar question arose in New York after a school board froze each teacher's salary during negotiations of a new contract at the amount being paid at the time the previous contract expired. The state's intermediate appellate court held that the salary schedule contained in the expired contract was one of the terms of that contract which was required to be extended during negotiations. Therefore, each teacher was to be paid during the negotiation period pursuant to the schedule according to that teacher's longevity and educational qualification status as it existed at the beginning of the new pay period.[91] The appeal was denied.[92]

In Pennsylvania, a school district during the extension of the terms of an expired collective bargaining agreement changed insurance carriers. Unemployment compensation claims were filed after the board's action, since the employees walked out after the change of carrier. The court held that the school district engaged in a lockout by its alteration of insurance carrier during the negotiating period following expiration of the old collective bargaining agreement and that,

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89. See *supra* notes 76-77 and accompanying text.

90. School Dist. No. 4 v. Board of Personnel Appeals, 692 P.2d 1261 (Mont. 1985).

91. Cobleskill Cent. School Dist. v. Newman, 481 N.Y.S.2d 795 (N.Y. App. Div. 1984).

92. Cobleskill Cent. School Dist. v. Newman, 489 N.Y.S.2d 903 (N.Y. 1985).

therefore, the teachers were entitled to unemployment compensation.[93]

CONCERTED ACTIVITY

Strikes and Other Job Actions

In Pennsylvania there exists under statute a limited right to strike. It is, consequently, not surprising that Pennsylvania had three strike-related court decisions during 1985. In one district, the teachers struck and the board attempted to have the court order the teachers back to work. The issue was whether the impasse procedures had been exhausted, which is a prerequisite for a legal strike under the statute. In the aforementioned decision,[94] the court ruled that when the mediator became physically present for mediation, the twenty day period for mediation began and ran for the next twenty calendar days. Thus, since the twenty days of mediation did not mean twenty mediation sessions, the union's strike was legal.

The second case in Pennsylvania dealt with the rescheduling of work days after a strike had ended. The state's collective bargaining law disentitles public employees from pay for the period engaged in a strike. Nevertheless, the court found that an arbitrator's award of eight days' additional pay to teachers was proper since the school year was rescheduled to consist of 172 instructional days, and the award was concerned with the failure to provide for 180 days of public instruction as required by agreement and state statute, rather than with pay for the period during which the association was on strike.[95]

In the third Pennsylvania case, the question of when a work stoppage is a strike or a lockout was addressed. In this instance, the school district changed its insurance carrier while an extension of a contract was in existence. As stated above,[96] the court found that the school district had engaged in a lockout by its alteration of insurance carrier during the negotiations period. The "status quo" thereby had been breached by the school district.

Other reported decisions arose under state statutes that prohibit teacher strikes. In a previously described case,[97] Rhode Island's Su-

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93. Grandinetti v. Commonwealth Unemployment Compensation Bd. of Review, 486 A.2d 1040 (Pa. Commw. Ct. 1985).

94. See *supra* note 88 and accompanying text.

95. Upper Bucks County Area Vocational-Technical School Joint Comm. v. Upper Bucks County Vocational-Technical Educ. Ass'n, 497 A.2d 943 (Pa. Commw. Ct. 1985).

96. See *supra* note 93 and accompanying text.

97. See *supra* note 25 and accompanying text.

preme Court determined that a strike by a teachers' association in response to the school committee's reduction of the salary scale was illegal. In rejecting the teacher association's argument that the no-strike prohibition unfairly discriminated against public employees, the court waxed eloquent:

> The state has a compelling interest that one of its most precious assets—its youth—have the opportunity to drink at the fountain of knowledge so that they may be nurtured and develop into the responsible citizen of tomorrow. No one has the right to turn off the fountain's spigot and keep it in a closed position. Likewise, the equal protection afforded by the fourteenth amendment does not guarantee perfect equality. There is a difference between a private employee and a public employee, such as a teacher who plays such an important part in enabling the state to discharge its constitutional responsibility. The need of preventing governmental paralysis justifies the "no strike" distinction we have drawn between the public employee and his counterpart who works for the private sector within our labor force.[98]

Based on a Massachusetts law prohibiting strikes by teachers, when a school superintendent learned from reliable sources that the union planned a job action involving a "sick out," he wrote the following to the union's president: (1) that he would ask the Massachusetts Labor Relations Commission for an investigation of any work stoppage; (2) that he would require a physician's statement from any employee absent from school; (3) that he would pay no compensation "for any day missed, in appropriate cases"; and (4) that he would take other appropriate disciplinary action. When ninety-five of the 400 classroom teachers called in sick, the Labor Relations Commission supported the requiring of physicians' excuses. The court affirmed the decision.[99]

In another previously mentioned case,[100] a California court held that a job action of picketing and leafleting outside the private business offices of two members of the school board did not constitute an unlawful economic boycott or a corrupt practice, nor did it unlawfully create conflict on the part of the board members between private business interest and public duty. Therefore, the court concluded, an in-

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98. School Comm. of Westerly v. Westerly Teachers Ass'n, 299 A.2d 441 (R.I. 1973).

99. See *infra* note 108 and accompanying test.

100. See *supra* note 9 and accompanying text.

junction against such picketing and leafleting violated the employee's first amendment rights.

MISCELLANEOUS DECISIONS

Most of the cases reviewed in this chapter have parts that could be considered miscellaneous. However, each case has been reviewed in terms of its major potential impact(s) on the collective bargaining process. One case in New York presented an issue that did not seem to have a major impact in the previous sections of this chapter. Grievance arbitration was conducted pursuant to the grievance procedure contained in a collective bargaining agreement between the parties. The school district then petitioned to vacate the arbitration award on the grounds that the arbitrator was not impartial because he failed to disclose that he was employed by the New York State United Teachers. The appellate court ruled against vacating the award finding that the arbitrator's biographical data card which was submitted to both parties prior to the selection of the arbitrator was sufficiently informative.[101]

The question a New Jersey court was asked to answer was whether a multi-tiered salary schedule of a collective bargaining agreement that results in the payment of a lesser salary to older employees is in violation of that state's age discrimination statutes.[102] In sex discrimination cases based on New Jersey's legislation, the test for a *prima facie* showing is the same as used in federal cases arising under title VII of the Civil Rights Act of 1964.[103] Because the provisions of the Age Discrimination in Employment Act (ADEA) were modeled after title VII, those standards apply to ADEA cases.[104] Under title VII, the United States Supreme Court has recognized two separate theories of relief: disparate treatment and disparate impact. The court cited precedent which expressed disparate treatment as follows:

> The employer treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

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101. Canajoharie Cent. School Dist. v. Canajoharie United School Employees, 485 N.Y.S.2d 866 (N.Y. App. Div. 1985).

102. Giammario v. Trenton Bd. of Educ., 497 A.2d 199 (N.J. Super. Ct. App. Div. 1985).

103. Peper v. Princeton Univ. Bd.of Trustees, 389 A.2d 456 (N.J. 1978).

104. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).

In contrast, claims of disparate impact address employment practices that are facially neutral but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive is not required under disparate impact theory.[105]

In this New Jersey case, the lack of discriminatory motive had been stipulated; consequently, only disparate impact was at issue. The state's highest court reasoned that although monetary consideration cannot normally justify policies which by way of impact discriminate on the basis of age, the rule must be different with respect to labor negotiations, an exercise in which fiscal effect is a primary factor. Compromises will often be in the area of retroactivity which will by definition relate to seniority, a quality with a high correlation to age. Regarding the provision of new benefits on a prospective-only basis as being a rational and usual compromise, the court ruled that in the absence of intentional discrimination, a facially neutral provision in a labor contract that impacts adversely on an older age group in an incidental manner does not violate the ADEA.

In a decision by a Florida intermediate appellate court, it was ruled that the Master Teacher Program, which confers a grant/award on selected superior teachers, is not in violation of the state's collective bargaining law.[106] The court concluded that this payment is not "wages" as defined by the collective bargaining law inasmuch as the legislature, not the employer-school district, was making the award.

The issue of whether parental leave should be awarded to a pregnant school teacher revealed a conflict between a school board decision and the statutory jurisdiction of the Public Employee Labor Relations Board in New Hampshire.[107] The local board ruled against the leave request, but the labor relations board ruled in favor of the request even though the grievance procedure had no provision for arbitration or appeal. The court had no problem in allowing the decision of the labor relations board to stand. The court found that absent a provision for binding arbitration in the grievance procedure and absent language in the contract indicating that the decision in the grievance procedure is final, the state labor relations board has jurisdiction as a matter of law to interpret the contract.

Similarly deferring to the appellate state agency, a Massachusetts appeals court upheld the determination of the state's labor relations

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105. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

106. United Teachers of Dade FEA/United, AFT Local 1974 v. Dade County School Bd., 472 So. 2d 1269 (Fla. Dist. Ct. App. 1985).

107. *In re* Hooksett School Dist., 489 A.2d 146 (N.H. 1985).

commission that a school committee had acted reasonably when it required a physician's certificate from absentee teachers who had been informed three months earlier that the physician's excuse might be required if a "sick out" occurred.[108]

CONCLUSION

It is once again obvious that the end of litigation concerning educational collective bargaining issues is no where in sight. Collective bargaining is a dynamic, fluid, and constantly changing process. New questions arise. The multilevel appellate process, the variety and fluidity of state statutes, and the shifting boundaries with arbitrators, labor boards, and the federal sources of labor law also contribute to the unending stream of litigation for this chapter. It would certainly appear that the only way litigation concerning the bargaining process in education can be limited is for both sides to talk about the issues more frequently, sympathetically, and effectively. Compromise at the parties' level is preferable to court imposed "solutions," which rarely seem satisfying and noncompounding. The local level is the primary place to make and solve labor relations problems.

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108. School Comm. of Leominster v. Labor Relations Comm'n, 486 N.E.2d 756 (Mass. App. Ct. 1985).