The Journal of Law and Education

Volume 2 | Issue 4 Article 12

10-1973

Limited Right to Strike Laws - Can They Work When Applied To Public Education?

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FROM THE PERSPECTIVE OF THE UNION ATTORNEY

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A. Preface

A strike in the private or public employment sector does not occur in a vacuum. It is inextricably intertwined with a generally complex collective bargaining relationship which for an infinite number of reasons has failed to properly function. Thus, in evaluating the propriety of a strike as an economic weapon, it is essential that due recognition be given to the numerous internal and external factors operating within and upon the collective bargaining relationship that spawned the work stoppage.

A strike by public school teachers appears upon first blush to involve the same or substantially similar factors as those found in a private sector work stoppage. Because of the superficial similarity there is a marked tendency among the public and even members of the legal profession to attempt to resolve the many difficult and complex issues involved in a teachers' strike by applying the traditional theories and methods which are carried over from the private sector. However, the Pennsylvania experience of the past three years bear witness to the fact that a teacher's limited right to strike is a truly unique labor relations phenomenon that simply does not lend itself to the time-tested solutions that are applied to an industrial dispute.

The reasons compelling the adoption of new approaches in resolving a public education work stoppage are numerous and complex, but can be roughly placed into three general categories.

Primarily, in sharp contrast to the private sector, the teachers' right to utilize the strike as a means of enforcing their collective bargaining demands is "limited." From a legal viewpoint this "limitation" means that the strike may continue until such time as it infringes upon the public interest or, in the language of the Pennsylvania statute, until it "... creates

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a clear and present danger or threat to the health, safety or welfare of the public." [1] In practical application, however, this limitation has meant that a lawful work stoppage of four days (or less) in duration can be instantly converted into an illegal strike with its participants being ordered back to work without a collective bargaining agreement under threat of heavy fines or lengthy incarceration.

Secondly, there is in Pennsylvania, as well as throughout the nation, a strong public policy favoring the uninterrupted continuity of public education. Thus, when a teachers' strike is commenced pursuant to an equally strong public policy of public employe collective bargaining an inevitable conflict between the two can and often will result.

Finally, the participants in a teachers' strike, the unresolved issues that precipitated it and the collective bargaining relationship in which it had its genesis are all vastly different and distinct from any seemingly-analogous counterpart in the private sector. The strikers are highly-educated and motivated professionals who are as much concerned with what and how they teach as they are for the economic benefits that can be thus derived. The school board views itself as the omniscient protector of the public interest rather than as an employer. It generally views any concession that it makes through negotiations as compromising the public good and thus resists the teachers' demands as an unwarranted intrusion into its heretofore unfettered discretion in the management of all aspects of the school district.

It is the purpose of this article to briefly examine and evaluate the viability of the concept of the "limited" right to strike in public education from the viewpoint and perspective of a union attorney. As stated above, it is the authors' belief that this discussion cannot be restricted to merely the strike itself as an independent entity, but rather must be made from a perspective that encompasses the unique collective bargaining relationship in teacher negotiations that precedes and eventually precipitates the work stoppage.

B. Pennsylvania has Two Equally Specific and Expressed Public Policies—the Education of Its Children and the Collective Bargaining Rights of Its Employes

1. *Education, the School Code and Public Policy*

The public policy of Pennsylvania has consistently recognized and emphasized the absolute necessity of fostering and advancing the public

[1] While the scope of this discussion is limited to a discussion of Pennsylvania statutory and case law, it has been the authors' experience that the policies and problems underlying the Pennsylvania law are with rare exception virtually identical and equally applicable throughout the nation.

education of its children. The judicial deference attributed to this policy is succinctly expressed in early case law as follows:

> The fundamental policy of our public school system is to obtain the best educational facilities for the children of the Commonwealth. To this end must be subordinated all personal and partisan consideration... All legislation must be construed as intending to favor the public interest; and when it conflicts with private interests, the public interest to be primarily served is the dominating one, not that of the individual.[2]

The primary responsibility for carrying into fruition this public policy has been constitutionally vested in the General Assembly which is to provide "... for the maintenance and support of a thorough and efficient system of public schools." [3] In order to implement this Constitutional mandate the General Assembly has enacted a comprehensive Public School Code[4] that designates the local school boards as its agent for providing the specified "... thorough and efficient system of public schools." [5]

Hundreds of school districts and local school boards are charged with the administration of the Public School Code in their area. The boards being creatures of statute possess only such powers as are specifically or by necessary implication granted to them.[6] However, the Pennsylvania courts have in the past consistently held that in exercising their delegated authority over policy matters, the school officials must be given broad discretionary power in order to ensure the best possible education for the children under their care. Thus any restriction in the exercise of their powers is to be strictly construed on the theory that their public interest in education as expressed in their policy decisions predominates over the interest of any individual or group of individuals.[7]

The broad and almost unfettered discretion which the courts have invested in the school board's administrative discretion has had a devastating impact on the development of the right of school teachers to play a meaningful role in determining the terms and conditions under which they are employed as well as on their now statutorily-guaranteed right to withhold their services in the absence of a collective bargaining agreement. Relying

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[2] Commonwealth v. Sunbury School Dist., 335 Pa. 6, 11–12 (1939); *see also,* Walker's Appeal, 332 Pa. 488, 491 (1938).

[3] PENN. CONST. art. 3, §14.

[4] PENN. STAT. ANN. 24 §2-211 (1971).

[5] PENN. STAT. ANN. 24 §2-211 (1971) provides that "[t]he several school districts in this Commonwealth shall be, and hereby are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of the act." *See also,* Barth v. School District of Philadelphia, 393 Pa. 557 (1958).

[6] Barth v. School District of Philadelphia, 393 Pa. 557 (1958); Chartiers Valley Joint Schools v. County of School Directors of Allegheny County, 418 Pa. 520 (1965).

[7] Smith v. School Dist. of Darby Township, 388 Pa. 301 (1957); Walker v. Scranton School Dist. 338 Pa. 104 (1940).

upon the broad statutory grant of managerial prerogative with respect to the administration of the School District,[8] the courts have consistently rejected any encroachment upon the absolute power possessed by the hundreds of school boards over their employes. Accordingly, in the past it has been held to be within the inherent managerial power of the School Board (1) to effect a general reduction of the salaries of all the teachers in the district;[9] (2) to assign teachers to perform uncompensated extra-curricular activity;[10] (3) to abolish an entire department within a school system resulting in the suspension of teachers;[11] and, (4) to unilaterally eliminate an average pupil load resulting in a reduction in the number of teachers employed.[12]

While the teacher's job security was at least superficially protected by a statutory tenure scheme,[13] no further provision was made prior to 1970 that would afford the teachers the right to organize and to bargain collectively with the school board regarding their wages, hours and other terms and conditions of their teaching jobs. Of course, prior to October, 1970, teacher strikes were specifically prohibited by law with severe penalties provided for its violation.

In short, under the guise of fostering the public policy requiring the maintenance of a "thorough and efficient" school system, the school boards were statutorily and judicially[14] vested with a paternalistic discretion to unilaterally determine the nature of the employment relationship on a take-it-or-leave-it basis.

2. *Collective Bargaining and the Limited Right to Strike*

The enactment of the *Public Employe Relations Act of 1970* (PERA)[15] constituted a dramatic reversal of policy from that previously prevailing in the public employment sector. The stated "public policy" of the Act is:

> [T]o promote orderly and constructive relationships between all public

[8] PENN. STAT. ANN. 24 §510 (1971) provides as follows: "The Board of School Districts in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of those school affairs and the conduct and deportment of all superintendents, teachers and other parties or employees during the time they are engaged in their duties to the District."

[9] Streibert v. York School Dist. Directors, 388 Pa. 301 (1957).

[10] Pease v. Mill Creek Township School Dist., 412 Pa. 378 (1963).

[11] Ehret v. Kavlpmont Borough School Dist., 333 Pa. 518 (1939).

[12] Miller v. Strorednour, 148 Pa. Super. 567 (1942).

[13] PENN. STAT. ANN. 24 §11-1121 *et seq.* (1971).

[14] The concept of absolute power in the school boards was vigorously affirmed in a recent decision, *State College Educ. Ass'n v. Pennsylvania L. R. Bd.* (Case No. 1162 Pa. Cmwlth 1972), 510 G.E.R.R. 3-1 *et seq.*, in which the court, relying heavily upon the School Code, held twenty-one items ranging from class size to payment for extra-curricular activities to be non-bargainable under §701 of the PERA.

[15] PENN. STAT. ANN. 43 §1101.101 *et seq.* (1971).

> employes and their employer subject, however, to the paramount right of the citizen of the Commonwealth to keep inviolate the guarantees of their health, safety and welfare.[16]

In order to implement that policy the Act granted public employes the right to organize[17] and to bargain collectively with their public employer regarding wages, hours and other terms and conditions of employment.[18]

The Act further provides that:

> Unresolved disputes between the public employer and its employes are injurious to the public and... adequate means must be established for minimizing them and providing for their resolution.[19]

The "adequate means" to be utilized is an elaborate mandatory bargaining process commencing with negotiations six months prior to the public employer's budget submission date, progressing to mediation and culminating in an advisory fact-finding process which may be initiated at the discretion of the Pennsylvania Labor Relations Board.[20]

If and when the procedures of negotiations, mediation and/or fact-finding were utilized and exhausted, the public employes may then exercise their statutory "limited" right to strike. To that end the PERA specifically provides that:

> If a strike by public employes occurs after the collective bargaining processes [of negotiations, mediation and/or fact-finding]... have been completely utilized and exhausted, it shall not be prohibited *unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.* In such cases the public employes shall initiate in the court of common pleas of the jurisdiction where such strike occurs an action for equitable relief instituting but not limited to appropriate injunctions..." (Emphasis supplied)[21]

In sharp contrast to work stoppages in the private sector a strike by public employes, more particularly a teachers' strike, may be declared unlawful and the strikers ordered to return to their positions even in the absence of a collective bargaining agreement.

In creating the "clear and present danger or threat" standard as to when a public employes' strike may be enjoined, the General Assembly obviously intended that this nebulous standard be specific enough so as to permit employes to make an intelligent appraisal of their legal rights under the Act, and at the same time retain its flexibility in order that it could be

[16] PENN. STAT. ANN. 43.
[17] PENN. STAT. ANN. 43, §1101.101 (1971).
[18] PENN. STAT. ANN. 43, §§1101.701, 702, 703 (1971).
[19] PENN. STAT. ANN. 43, §1101.101 (1971).
[20] PENN. STAT. ANN. 43, §1101.801 et. seq. (1971).
[21] PENN. STAT. ANN. 43, §1101.103 (1971).

applied on an ad hoc basis. Unfortunately, the only two appellate cases dealing with the application of this criteria have produced seemingly inconsistent and confusing results.[22]

In *Armstrong School District v. Armstrong Education Association*,[23] a teachers' strike was initially enjoined under the illusive "clear and present danger or threat" standard on three general grounds: (1) it disrupted the routine procedures of the school district; (2) School Board directors were being harrassed by nonteachers' and (3) the school district was in danger of losing state subsidies because of the alleged inability of the school district to provide the state mandated 180 minimum days of instruction. In vacating the lower court's injunction as having been granted prematurely, the Commonwealth Court in a lucid and well-reasoned opinion established several basic principles that were to be applied in determining the extent to which the "clear and present danger" standard would limit or restrict the statutory right of public school teachers to strike.

The court held that while the disruption of routine procedures and the cessation of activities sponsored by the school district are unquestionably inconvenient for the school district, their parents and the public as a whole, these inconveniences were the inevitable consequences of the exercise of the statutorily-guaranteed right to strike. The General Assembly in establishing the right to strike obviously realized that such results would naturally flow from a work stoppage. Accordingly, the court concluded that:

> These problems are inherent in the very nature of any strike by school teachers. If we were to say that such inconveniences, which necessarily accompany any strike by school teachers from its very inception, are proper grounds for enjoining such a strike, we would in fact be nullifying the right to strike granted to school teachers by the legislature in Act No. 195.[24]

The court also held that the mere fact that a strike by public employees exacerbates previously-existing conditions in the community cannot be seized upon by the lower court as a basis for enjoining the peaceful acts of employees who are merely exercising their statutory right to strike. Therefore, teachers could not be penalized or held accountable for the violence and disruption visited upon a community by an independent third party over whose conduct they possess no control. Section 1003 of the PERA was never intended to be used as a substitute for a criminal code or to protect members of the community from the violent propensi-

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[22] Armstrong School Dist. v. Armstrong Educ. Ass'n, 5 Pa. Cmwlth 378, 385 (1972), Ross v. Philadelphia Federation of Teachers, 8 Pa. Cmwlth 204 (1973).

[23] 5 Pa. Cmwlth 378 (1972).

[24] *Id.* at 385.

ties of nonteachers. Indeed, as the court cogently noted: "There are other laws available to deal with such disorders." [25]

As to the possible loss of state subsidies because of the school district's inability to make up enough instructional days to meet the subsidy requirement the court held that this may create a "clear and present danger" within the meaning of §1003 and in so holding added:

> If a strike is to be enjoined on the basis that insufficient make-up time actually will exist, the strike must at the very least have reached the point where its continuation would make it either clearly impossible or *extremely difficult* for the District to make up enough instructional days to meet the subsidy requirement within the time available. (Emphasis Supplied)[26]

Moreover, if the existing school calendar must be rearranged to provide "available time," the effect of the rescheduling "is . . . merely an inconvenience inherent in the right of school teachers to strike, a right guaranteed them by law.[27]

Less than one year later in *Ross v. Philadelphia Federation of Teachers*,[28] the same court was presented with an opportunity to further refine the interpretive principles underlying the application of the statutory "clear and present danger or threat" standard which it had enunciated in *Armstrong*. However, rather than clarifying its original decision, a sharply-divided four to three court appears to have abandoned the well-reasoned logic of *Armstrong* in favor of a rationale which severely undermines, if not judicially repeals, the right of public school teachers in large metropolitan areas to engage in a "limited" strike.

In *Ross* the Court sustained an injunction granted by the Court of Common Pleas of Philadelphia County against a strike by Philadelphia teachers in January, 1973. The strike had been in progress less than two hours when hearings on the School Board's petition for injunctive relief commenced.[29] On the afternoon of January 11, 1973, less than 3½ days after the strike had commenced, the trial court declared that the strike constituted a "clear and present danger to the health, safety and welfare of the public" and immediately enjoined its continuance. The reasons indicated

[25] *Id.*

[26] *Id.* at 386.

[27] *Id.*

[28] 8 Pa. Cmwlth 204 (1973).

[29] The School Board had originally filed its petition for injunctive relief on Thursday, January 4, 1973—4 days *before* the strike was scheduled to commence. On January 5, 1973 the trial court sustained the Union's preliminary objections on the grounds that it was without jurisdiction to entertain the complaint until such time as a strike had actually "occurred" as provided in §1003 of the Act. However, instead of dismissing the complaint for lack of jurisdiction, the trial court relisted the matter for hearing on Monday, January 8, 1973, the day on which the strike was scheduled to commence.

by the court for granting the injunction fall into six general categories as follows:

(1) the educational and sociological background of a significant portion of the Philadelphia public school children is such that a four day disruption of their educational processes constituted a clear and present danger to their welfare;

(2) the likelihood of violence resulting from gang activity in Philadelphia is such that to release school children to the streets as a result of the strike constituted a clear and present danger to their safety;

(3) notwithstanding the fact that there had not been one reported incident of violence arising from the strike, the fact that the City of Philadelphia was incurring a cost of $130,000 a day in police overtime constituted a clear and present danger to the welfare of the public;

(4) parents at or near the poverty level may suffer a loss of income as a result of having to care for their children who would otherwise be in school;

(5) parochial school students will suffer at least partial educational breaks if the strike continues; and

(6) the "possible loss of school subsidy" which the school system may lose if the strike was permitted to extend for eight or eleven more instructional days.

In sustaining on appeal the injunction against the four day teachers' strike, the Commonwealth Court rejected out of hand the argument that the social and economic conditions for which the injunction was granted had existed for many years prior to the enactment of the PERA, and thus were obviously considered by the legislature as not being sufficient cause to deny metropolitan area teachers the right to strike. In an obvious attempt to distinguish its earlier *Armstrong* decision in which an injunction against a twelve day strike was vacated because it had been premature, the court said:

> Although the lower court (as well as this Court in *Armstrong*) focused its attention on the meaning of "clear and present danger", the alternative criterion for judicial action cannot be ignored—the creation of a "threat to the public health, safety or welfare."
>
> The same factors discussed above which contribute to the 'public' effect of the strike are equally significant in contributing to the existence of a threat to the health, safety or welfare of the public. The lower court reasonably found the possibility of increased gang activity, that the existence of the strike required substantial increse in costs of police protection to public property and posed the possibility of loss of state aid to the school district. To these conditions significant impacts upon the school population, as reasonably found to exist by the lower court, must be added. Having already lost some fifteen instructional days in September, 1972, the pupils of the system, particularly the substantial number of those who are underachievers, were faced with an unknown number of additional days of in-

> structional idleness which may or may not be made up later in the year—a position which is far from clear in this case—is but to recognize the importance of a minimum number of instructional days to meet minimum educational standards and to equally recognize that a lesser number is a very real threat to the health and welfare of at least the school population segment of the public. Nor should we overlook the high school seniors intending to further their education, who are indeed threatened in a real sense with respect to qualifying for college entrance.[30]

In conclusion, the court specifically denied the Union's charge that it was "laying down a special rule for Philadelphia" which would result in the discriminatory exclusion of metropolitan school teachers from the rights granted by the PERA. It is obvious to the authors, however, that the factual foundations upon which the *Ross* opinion is based can only arise in large metropolitan areas, which have long been plagued with severe economic and social problems. Since all of the factors which the court relied upon pre-existed the strike and will, unfortunately, continue to exist for decades, it would appear that a logical extension of the *Ross* decision will permit a school board to obtain injunctive relief in a metropolitan area even before a teachers strike has commenced.

C. The 1973 Philadelphia Teachers' Strike

On January 8, 1973 the Philadelphia Federation of Teachers commenced what eventually became one of the longest and largest strikes by public school teachers in our nation's history. The strike, which terminated on February 28 with the negotiation of a new four year collective bargaining agreement, precipitated numerous inquiries, including one by the Pennsylvania General Assembly, into whether the "limited right to strike" was, in fact, a feasible concept in public education. While the authors have reserved their discussion of the continuing viability of the "limited" right to strike in public education for a later section of this paper, a brief discussion of the causes and impact of the Philadelphia strike is appropriate.

As was discussed briefly above, the Philadelphia teachers' strike, as with any work stoppage in either the private or public sector, did not occur in a vacuum. While one is hesitant to characterize the strike as being inevitable, a brief review of its factual background seemingly compels that conclusion.

Throughout the year of negotiations that preceded the strike, the Federation had been the only party to submit detailed proposals to the "give and take" of collective bargaining. For their part the School Board's negotiators contented themselves with flatly rejecting the federations offers and refusing to submit counter proposals of their own. Finally, less than a

[30] Ross v. Philadelphia Federation of Teachers, 8 Pa. Cmwlth 204 (1973).

month before the contract was to expire, the School Board submitted *for the first time* a list of counterproposals, the substance of which was to delete over fourteen million dollars of existing benefits by, among other things, eliminating payments to the Union's health and welfare fund, increasing class size, layoff of two hundred teachers and increasing the length of the school day.

Before the Union had a reasonable opportunity to intelligently analyze these dramatic counterproposals and suggest possible alternatives to them at the bargaining table, the Board announced that it would unilaterally implement these proposals at the commencement of the 1972 school year, and if the teachers wished to work, they would do so under these new conditions. Rather than capitulating to the School Board's high-handed tactics, the teachers refused to report to work until the terms of the now-expired 1970–72 agreement were reinstated. After several weeks the Board recognized the folly of its position, returned to the status quo and the parties resumed negotiating under a Memorandum of Understanding that would expire on December 31, 1972.

Having discovered to its chagrin that the teachers would not accept a new contract that deleted hard-won benefits, the School Board then seemingly convinced itself that the Union would certainly accept the *same* conditions for the following two years that had prevailed for the past two years. Thus the Board commenced a carefully-orchestrated publicity campaign in the news media in an attempt to convince the public, the Union and perhaps even itself that any increase in contract-related costs would unquestionably thrust the School District into bankruptcy. Additionally the Board also attempted to drive an ideological wedge between the Union's leadership and membership by announcing that the majority of the truly-"dedicated" teachers would reject the unreasonable bargaining position of the Union's leadership and remain at work without a contract upon the expiration of the Memorandum of Understanding.

The School Board's position at the bargaining table was consistent with publicly-announced policy. Adamantly resisting the Union's numerous counterproposals in a position reminiscent of the long-discredited Boulwaristic theory of collective bargaining, the School Board insisted that the Union accept its contract terms or none at all.

Finally after four additional months of completely fruitless negotiations, the Federation, pursuant to an almost unanimous mandate from its membership, commenced the strike on January 8, 1973. On January 11, a Philadelphia court enjoined its continuance on the basis that it constituted a "clear and present danger or threat to the health, safety or welfare of the public." Notwithstanding the injunction, the subsequent imposition of severe prison sentences and heavy fines on the Union's officers and the mass arrests and imprisonment of hundreds of teachers and sympathizers, the

strike continued. On February 28, 1973 the parties reached what all agreed to be the terms of a fair and reasonable four-year contract, and on March 1, 1973 the Union teachers returned to work.

In retrospect it is clear that the School Board's ill-fated attempt to dominate the employment relationship placed it on a direct collision course with its employees. In believing that it could dictate rather than negotiate the terms of a collective bargaining agreement, the School Board grossly underestimated the determination of its employees to meaningfully participate by collective bargaining in the determination of their own employment future. For the Union to have accepted the School Board's actions preceding the strike would have reduced the collective bargaining process to little more than a sham, and precluded the employes from ever attempting to collectively negotiate as co-equals again. Forced with these alternatives, the Union's course of action was clear and the resultant confrontation was unfortunately inevitable.

There can be no question that the strike had an immediate impact on every segment of Philadelphia society. This fact alone does not, of course, indicate that the strike was contrary to the policies of the PERA. Indeed, if the strike did not have an impact it would have been a futile and useless gesture. Thus, in evaluating whether it was inimical to the public interest, one must consider the extent and duration of the strike.

The segment of Philadelphia society most immediately and severely effected by the strike was, of course, the Philadelphia school children. While the School Board made a futile attempt to maintain the education process throughout the duration of the work stoppage, it is readily admitted by all concerned that those who worked during the strike were little more than babysitters, and that no meaningful education was achieved during that period. However, immediately subsequent to the teachers' return to work, the Union and the School District in an unprecedented spirit of cooperation joined together in a determined effort to provide the students with maximum educational exposure during the remaining months of the school year. For example, the School Board offered special programs for high school students during the summer months in order to supplement the program offered during the regular school year.

Preliminary reports indicate that the greatest majority of teachers were able to complete their full syllabi, notwithstanding the period of the strike. In short, while there unquestionably will be isolated and lingering effects of the strike on the children, all available evidence at this point seems to indicate that the quality of education offered to the Philadelphia school children was not significantly hampered or diminished by the strike.

A natural and anticipated effect of any strike, whether it be in the private or public sector, is an antipathy between the strikers, non-strikers and employer. The authors would be less than candid if they did not admit that

a bitterness did arise between the parties during the strike. To a large degree this ill-feeling was fueled and fed by the vitriolic attacks in the news media upon the striking teachers and their leadership by School Board and other public officials who characterized the Union's leadership as being "greedy blackmailers who held a gun to the head of the city". On the other hand the teachers who returned to work were in the opinion of these officials "dedicated professionals who were more concerned with the education of the children than with their own well being." In point of fact, nothing could have been further from the truth.

One of the provisions of the new four year collective bargaining agreement was a broad "no-reprisal" clause that bound both parties to exercise their best good faith efforts to return as soon as possible to a period of normalcy. In view of this contract provision, and, more importantly, recognizing that the education of the children must be placed ahead of partisan sentiment regarding the strike, the Union and the School Board have appointed a joint committee that is charged with the responsibility of resolving any disputes that may arise among or between School District employees as a result of the strike. While some vestages of the strike-related bitterness do remain, it is fair to say that due to this joint effort these remaining sentiments have not spilled over into the classrooms or in any manner effected the quality of education offered to the Philadelphia school children.

Finally, during the strike the news media made much of a distinct minority of parents who openly and vocally opposed the continuance of the strike. In numerous news photographs that were prominently placed on the first page of the local newspapers, teachers and parents were depicted as being in bitter verbal combat on almost a daily basis. In reality, the vast majority of parents throughout the Philadelphia School District either actively supported the striking teachers or assumed a neutral position. Indeed, it was noted by numerous sources that the expected public hue and cry which the School Board had attempted to generate through its publicity campaign never materialized, and that for the most part they apparently accepted the teachers' actions as being justified under the circumstances. While there may, at the present time, be isolated cases of continued parental antipathy to the striking teachers, the authors are unaware of any continuing sentiments of that nature among Philadelphia parents within any generally recognized parental organization or group.

Finally, the primary question to be asked is whether the Philadelphia teachers' strike was ultimately beneficial to any of the parties concerned or served any useful function. The answer to this is resoundingly in the affirmative. As a result of the work stoppage the employment relationship between the School Board and the Union has significantly increased in depth and maturity. While the School Board continues in certain instances

to deal with the Union in a condescending and paternalistic fashion, it has for the most part recognized that the pre-strike Paternalistic attitude that it exhibited toward the employment relationship cannot and will not succeed. Additionally, in that the issues over which the Federation struck were primarily related to the quality of education provided by the teachers, rather than mundane matters of dollars and cents, the School Board has now recognized that teachers do have deep and abiding concern for the welfare of the children and has made several alterations in its personnel policies to accommodate that concern.

D. The Limited Right to Strike in Public Education—Some Observations and Conclusions

The "limited right to strike", based upon an individual's legal and indeed inherent right to withhold one's services in the absence of the contractual bond, exists even in the public sector in the absence of immediate and real danger to the good of the commonweal. However, the most compelling argument in favor of a statutory right to strike for public school educators is found in the realities of labor relations and negotiations. Experience has demonstrated time and time again that collective bargaining without the existence of a right to enforce demands by a legal strike is from the perspective of the employee reduced to little more than "collective begging."

It is to be recognized that, as the Philadelphia School Board has demonstrated on several occasions, the employer in the public sector retains the right to "lock out" its employees in order to pressure them into accepting the public employer's bargaining position. For that same employer to now argue that the employes should not have the same right is not only intellectually dishonest but inherently unfair. If the collective bargaining process is to work in the fashion intended by the General Assembly, the parties must meet at the bargaining table as coequals. The mere existence of the legal right of a public employer to withhold his or her services provides this essential equality.

Compulsory binding arbitration is not a *meaningful* alternative or substitute for the right to strike. The very essence of collective bargaining is and indeed always has been, that by intelligent discussion and intensive, good-faith negotiations the two parties will reach a mutually agreeable contract. Rarely, if ever, is either party completely satisfied with all of the terms of the negotiated agreement. However, because it is the produce of their labor, they abide by it. If the parties, however, knew in advance that the content of the final agreement would not be structured by themselves through negotiations but by a third party, the incentive for meaningful negotiation and eventual compromise is seriously undermined and possibly destroyed.

Finally, the elimination of the statutory right to strike, as some of its more extreme opponents advocate, does not mean that strikes will be eliminated. Employes in the private or public sector have demonstrated on innumerable occasions that they will risk dismissal, fines and even imprisonment in order to secure a fair and just resolution of their dispute. This conclusion was concurred in by the Chairman of the Pennsylvania Labor Relations Board, Raymond L. Scheib, when he recently testified before the Special Legislative Committee to Review the Public Employee Relations Act, as follows:

> Whether or not the Commonwealth recognizes the right of public employes to strike—strikes cannot be legislated out of existence.[31]

The issue then is not whether public school teachers should be permitted to strike. Rather, the real issue is how the necessity for the exercise of the right to strike can best be avoided, and, failing that, how the impact of the strike on the strong public policy favoring education can best be mitigated. There have been numerous suggestions from a variety of sources concerning the future of the limited right to strike in public education. The authors humbly submit the following changes as being worthy of some thought.

1. Expanding the Scope of Collective Bargaining in Public Education.

The most obvious means of avoiding the interruption to public education caused by a teachers' strike is to eliminate the need for resorting to the use of the strike in the first instance. The express policy of the PERA envisions that this result may best be achieved "... by requiring public employers to negotiate and bargain with employe organizations representing public employees ..." While the policy of substituting good-faith bargaining for utilization of the strike is theoretically sound, its practical application to the realities of public education collective bargaining has been beset with several major problems since the passage of the Act of 1970.

The greatest majority of strikes by public school teachers since 1970 have been caused not by irreconcilable disputes over economic items, but rather by failure to reach agreement on items relating to the quality of the teaching methods that have heretofore been under the exclusive control of the local school boards. This is directly attributable to the fact that the teacher is a highly-educated and highly-motivated professional employe whose concern for the quality of the education offered to his students equals his concern for the economic factors of his employment. Therefore, the scope of the subjects which he desires to submit to collective bargaining extend

[31] Statement of Raymond L. Scheib, Chairman of the Pennsylvania Labor Relations Board to the Special Legislative Committee to Review the Public Employee Relations Act, p. 11. Mr. Scheib also pointed out that in 1972 there were "illegal" teachers' strikes in 15 states.

beyond those relating to mere economic items to include those conditions of his employment that directly affect his ability to intellectually reach the students under his care.

The trend over the past three years in public education collective bargaining has, unfortunately, been for the school boards to adamantly resist a broadening of the scope of bargainable topics on the grounds that it is an unwarranted intrusion into the absolute administrative discretion vested in the boards by the School Code. Instead of attempting to conduct *meaningful* negotiations with the teachers on issues relating to educational quality, the school boards have chosen to attempt to narrowly define the scope of permissible bargaining by equating all non-economic items as being non-negotiable. By narrowing the areas of discussion at the bargaining table, an unnecessary polarization on the remaining topics occurs as does a consequent proportionate increase in the likelihood of a strike over those topics.

This frustration of the collective bargaining process was recently given added impetus by the Commonwealth Court's decision in *State College Education Association v. Pennsylvania Labor Relations Board,*[32] wherein the court held twenty-one items of major concern to teachers to be matters of "inherent managerial prerogative" about which a school board need not bargain. By withdrawing all but the most basic of employment issues from the collective bargaining process, the *State College* decision has to a large extent returned the parties to the pre-PERA days when collective bargaining in public education was little more than an academic concept.

It is essential that the school boards, the courts, and, if necessary, the legislature, recognize that the "terms and conditions" of employment of a professional educator encompass those elements of his employment such as class size and preparation time that immediately and directly affect his proficiency in the classroom.

A collective bargaining process that is totally unresponsive to the needs of its participants cannot realistically be expected to produce a "harmonious" relationship by which a strike will be avoided.

2. *The Standards Governing The Limitations Of The Right To Strike Must Be Clarified And Applied Equally In Order To Make That Right Workable.*

It is absolutely essential to the intelligent exercise of any right or privilege guaranteed by law that the actual boundaries and limitations placed upon that right be ascertainable. Teachers are statutorily granted a right to strike until such time as the strike ". . . creates a clear and present danger or threat to the health, safety or welfare of the public." The clear intent

[32] No. 1162 (Pa. Cmwlth, filed June 6, 1973).

of the legislature in placing this illusive limitation upon the right to strike was that its judicial application on an ad hoc basis would eventually result in the creation of a body of law delineating the boundaries placed on that right. While the wisdom of this intent is unassailable, its practical application over the past three years has proven difficult and has left the public school teacher in a state of confusion as to the extent of their "limited" right to strike.

This confusion has resulted primarily from the Commonwealth Court's attempts in its conflicting *Armstrong and Ross* decisions[33] to accommodate the competing rights of the public to uninterrupted education and the teachers' right to engage in a limited work stoppage. It is the authors' opinion that the *Armstrong* decision was a reasonable and realistic approach to the critical criteria that should be applied in determining the legality or illegality of a work stoppage in the public education sector.

While the public's right to have its children receive their education in a continuous, uninterrupted manner is unquestionably a desirable goal, this right as with the teacher's right to strike, is subject to limitations. Thus *Armstrong* correctly recognized that the public school code only requires that a school district provide 180 days or 990 hours of instruction time each school year in order to fulfill its constitutional mandate.[34] A "clear and present danger or threat" to the public and to the students does not arise until a strike by teachers has "... reached the point where its continuation would make it either greatly impossible or extremely difficult for the District to make up enough instructional days ..." to fulfill the state mandated of 180 days of instruction.[35] The two competing policies of public education and collective bargaining with the limited right to strike must be balanced in order that neither is destroyed. This balance was successfully struck in *Armstrong* when it recognized that the public must accept the inevitable inconveniences of a teachers' strike, including the interruption of the education of its children for a period of time, if that right is to have any meaning. On the other hand, when the continuation of that strike does actually threaten irreparable damage to the public good, the interest of the public must prevail.

The well-reasoned guidelines enunciated in *Armstrong* have, unfortunately, been seriously undermined and possibly destroyed, by the court's subsequent decision in *Ross*. A right to strike for four days (or less) is not a right at all, but merely an illusion. All of the sociological and educational conditions cited by the lower court in *Ross* as the basis of its decision were in existence not only long before the strike commenced, but even more

[33] Armstrong School Dist. v. Armstrong Educ. Ass'n, 5 Pa. Cmwlth 378 (1972); Ross v. Philadelphia Federation of Teachers, 8 Pa. Cmwlth 204 (1973).

[34] Armstrong School Dist. v. Armstrong Educ. Ass'n, 5 Pa. Cmwlth 378, 386 (1972).

[35] *Id.*

importantly, long before the *Public Employe Relations Act of 1970* was enacted.[36] It strains credulity to assert that when the General Assembly granted public employes the right to strike in §1003 of the PERA, it was not aware of the innumerable social evils and failings that prevailed in the largest metropolitan area in the Commonwealth. It would be equally naive to assume that after the protracted and bitter debate which preceded the passage of §1003 the General Assembly had not carefully considered the impact which a teachers' strike would have on a school district such as Philadelphia which was already beset with innumerable social and economic problems. If it were the intent of the legislature to permit all public school teachers except those in Philadelphia to strike, it would have been an easy matter to so provide in the PERA. However, the legislature did not so provide; but specifically and intentionally made the right to strike applicable to all public employes covered by the PERA, regardless of their location. In light of this unmistakable legislative intent, it is the authors' opinion that the court's decision in *Ross* that effectively engrafts just such an exception for urban teachers is inherently discriminatory and incorrect.

A strike in the public education sector should be limited if it actually threatens to irreparably injure the public. However, the rights of the public are not absolute and must be accommodated to those of the teacher to engage in a limited strike.

3. The Collective Bargaining Process Specified in the Act and Designed to Avoid the Necessity of a Strike are Unrealistic and Unworkable.

In labor relations it is a fact of life that with rare exception collective bargaining contracts are negotiated hours, or days, prior to the expiration date of the existing contract. Whether "crisis bargaining" and around-the-clock negotiations are the most effective means to resolve disputes is not important for the purposes of this article. It is important, however, that they are the processes which either or both parties commonly utilize to negotiate a contract. If mandatory collective bargaining procedures are to be effective they should be directed toward assisting the parties at a point in time when such assistance is actually needed rather than requiring the parties to engage in superficial surface bargaining merely to comply with the law.

The PERA provides that a union may strike only after it has completely utilized and exhausted a mandatory collective bargaining process. This process is structured in such a manner that in the case of the Philadelphia

[36] It is significant to note that the statistics relied upon by the court with regard to the economic conditions of the students' families were derived from the 1960 census. Moreover, the study relied upon the court as the basis of its finding dealing with the low level educational achievement of Philadelphia students was prepared by the Fels Institute in 1964.

teachers it spanned 11 months. In theory this long period of time appears to be reasonable, but in practice it results in superficial surface bargaining which achieves little if anything. The lack of progress over such a long period of time tends to discourage meaningful negotiations and only serves to prolong antagonisms which inevitably result from a particularly long period of difficult negotiations.

There is some merit to the theory that when a mediator participates in a dispute from its inception, he can be of help to the parties to resolve their differences. In reality, however, the lengthy period of mandatory negotiations preceding the expiration of the contract results in the mediator wearing out his welcome, thereby reducing his role to nothing more than that of being a messenger for the parties. The services of a mediator should be available to the parties throughout the negotiations, but those services should not be mandatory until the key issues have been clarified and "crisis bargaining" has begun. In this way the potentially invaluable services of a qualified mediator in the resolution of a labor dispute are not wasted during the initial period of superficial surface bargaining. He should actively enter the negotiations at a point where he can effectively present a new and fresh perspective, thereby increasing his own stature with the parties.

Likewise, an impartial fact-finder can significantly contribute to the resolution of the collective bargaining dispute, or at a minimum he can bring the parties closer to a resolution of their differences. In order to be effective, however, a fact-finder should not be imposed upon the parties, but instead he should be mutually selected by them by utilizing the same procedure in selecting an impartial arbitrator. An impartial selection procedure is important because it will avoid, as in the Philadelphia teachers' strike, the accusation that the appointed fact finder was biased against the union and that his selection was suspect.

The function of a fact-finder is to find facts and not to arbitrate disputes. Therefore, the process should be initiated at a reasonable length of time prior to the expiration of the agreement. The findings and recommendations of a fact-finder at a date prior to the expiration of a contract will enable the parties to re-evaluate their collective bargaining positions. Under the present system the fact finding process is generally not initiated until after a strike has occurred or the negotiations have reached the crisis state and the threat of a strike is imminent. Under such circumstances the assistance of an impartial fact-finder is simply "too little and too late."

The Philadelphia teachers' recent experience with the fact-finding process is a classic case in point. After negotiations had been in progress from October, 1971, *after* a three week strike in September, 1972 and only *after* the respective positions of the parties had become solidified, the Pennsyl-

vania Labor Relations Board appointed a fact-finder who was unacceptable to the Union. The Union's objections concerning the appointed fact-finder were summarily dismissed. Lengthy fact-finding hearings were then held and less than three weeks before the expiration of the Memorandum of Understanding, under which the teachers had ended their strike in September, the fact-finder issued his report. At this point negotiations had already reached the crisis stage and the parties had polarized their positions.

The union was convinced that the fact-finder was biased against it. Therefore, it rejected the fact finding report as being suspect and as being unacceptable. A bitter eight week strike followed. Its length was partly due to the fact that the School Board was saving almost one million dollars a day in not having to pay teachers' salaries. The long strike was eventually settled through the efforts of the United States Assistant Secretary of Labor, William J. Usery, Jr., who entered the negotiations as a mediator in the last week of the strike.

D. CONCLUSION

The right of public employes to collectively bargain with a limited right to strike has been statutorily guaranteed in Pennsylvania for little more than three years. During that short period of time literally hundreds of thousands of public employes throughout the Commonwealth have for the first time entered into collective bargaining agreements with their employes. The greatest majority of these contracts were secured without resorting to strike or even the threat of a strike. Therefore, the PERA has been, on the whole, a complete and total success. As Raymond L. Scheib, Chairman of the Pennsylvania Labor Relations Board, stated in an address before the Special Legislative Committee to review the Public Employe Relation Act on May 17, 1973:

> We feel, as administrators of the Act, that it should be given a chance. We are certainly aware of the many criticisms of the Act from you, our legislators, from the press, from public employers and from labor organizations. However, we feel that the Act's goal—good public employer-employe relations for Pennsylvania—will be realized. We do not think that this is the time for substantive changes in the Pennsylvania Public Employe Relations Act.

In evaluating the limited right to strike in public education it is unfortunate that one has a natural tendency to place undue emphasis upon the small number of instances in which the teachers have resorted to a strike in order to obtain a fair and equitable collective bargaining agreement. Many of these strikes were caused by sheer inexperience of the parties who for the first time in their employment relationship were sitting down at a

bargaining table. If they have now learned from their experience and/or mistakes, it is reasonable to assume that their bargaining relationship has improved and that there is little likelihood of another strike.

In a few cases the public school teacher was deliberately provoked into a strike by unfair labor practices of an employer. One such case was the Philadelphia teachers strike where the Philadelphia School Board misjudged the determination of the Union. The Board unilaterally withdrew 14 million dollars of existing benefits from the teachers' contract and demanded that the teachers commence the school year under such conditions. When the teachers then struck, the attitude of the School Board was expressed by its president when he stated that "the strike will be settled when they become hungry". This was adding insult to injury. In attempting to dominate the collective bargaining relationship, the School Board made meaningful collective bargaining impossible.

It is a truism that strikes do *not* beget strikes. To the contrary a strike is usually a deterrent to another strike the next time around because neither party enjoys the thought of again putting the gloves on.

The limited right to strike for teachers is absolutely essential to meaningful collective bargaining. Meaningful collective bargaining in the field of education cannot be achieved without the existence of such a right. Teachers strikes are not inevitable and can be avoided by men of good will who sincerely desire to achieve an orderly and constructive relationship which is envisioned by the PERA.