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Collective bargaining for non-teaching public school employees in Ohio is today a reality and the absence of a collective bargaining statute[1] has not been a substantial impediment to its continuation.[2] Though collective bargaining for non-teaching public school employees in Ohio is still in its infancy,[3] enough "history" is available to explain why it began, how it presently functions, from both a legal and practical viewpoint, and the areas of concentration for the future. Because much of the "history" is undocumented, the reader is forewarned here that the source of this undocumented history is the author's experience as general counsel for the Ohio Association of Public School Employees through much of the growth period of collective bargaining for non-teaching personnel in Ohio.

For non-teaching personnel in Ohio, many of the traditional subjects of collective bargaining have already been legislated by statute. However, as will be shown hereafter, these statutes operate only as guiding principles or, in effect, enabling acts and, as with all legislative acts in this area, are incomplete. This is not the fault of the legislator, but is an inherent defect in legislation itself. Satisfactory working conditions cannot be legislated. No statute that must operate uniformly throughout the entire state[4] can accommodate the competing demands made by employees in the highly industrial-

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[1] Senate Bill No. 70, a public employee collective bargaining bill, was vetoed by the Governor in August, 1975. Interestingly, the same legislature passed and the Governor approved in November, 1975, a "Sunshine" law which specifically exempted from the open meeting requirement public bodies including school boards when they are engaged in "preparing for, conducting or reviewing negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment." OHIO REVISED CODE §121.22 (G) (4).

[2] *See,* Green, *Concerted Public Employee Activity in Absence of State Statutory Authorization: II,* 2 J. LAW & EDUC. 419.

[3] Infancy is not intended to indicate time of commencement but rather degree of sophistication.

[4] OHIO CONSTITUTION, article II, §26.

ized urban areas with the countervailing demands made by boards of education in the primarily agricultural rural areas. For example, the second leading cause of litigation concerning non-teaching personnel in this state involves statutory interpretation questions arising from the application of employee benefit statutes to special employment circumstances in different school districts.[5] Thus, not in spite of, but because of this inherent limitation in legislation, public employee organizations in Ohio have developed and will continue to grow.

Similarly, the rights, duties and obligations of the school boards and their non-teaching school employees cannot be refined by the General Assembly because in the field of public employment there are at least five competing special interest groups—boards of education and their associations, the public, teachers, students, and the non-teaching employees. Spin-offs from these groups, creating other special interest groups, are taxpayers, parents of school children, the P.T.A. and the businesses doing or desiring to do business with the board of education. Because of these diverse special interest groups, a consensus among them generally cannot be achieved and specific legislation is either not proposed, or if proposed, dies for lack of support. Realistically, the only practical solution is mutually agreed terms and conditions of employment. This can best be accomplished by collective bargaining between boards of education and the employee's representative.

As with any statutory body, most of the existing legislation defines its powers generally and the statutory body is permitted, and indeed required, to exercise its discretion in those areas in which the statute is silent. When the General Assembly enacted the broad enabling acts for boards of education, they contemplated that the interstices would be filled in as the board of education desired. With the growth of public employee organizations, the interstices are increasingly being filled in on the basis of bilateral negotiations between the public employer and its employees through their bargaining representative. This procedure has now been recognized and approved by the Ohio Supreme Court in *Dayton Classroom Teachers Association v. Dayton City Board of Education,* 41 Ohio St.2d 127, 323 N.E.2d 714 (1975).

The Present System Proves Inadequate

Boards of education possess only those powers which are expressly granted or necessarily implied from the expressed grant. They possess no inherent powers.[6] The powers granted to the board of education are broad. Boards of education in Ohio are mandated by statute to "provide for free education of youth of school age within the district under its jurisdiction."[7] To carry out that mandate, the General Assembly has vested in boards of education "the management and control of all the public schools of whatever name or

[5] No less than fourteen actions have been filed over the application of just the vacation and holiday statutes. See, R.C. §§3319.084 and 3319.087.

[6] Schwing v. McClure, 120 Ohio St. 335, 166 N.E. 230 (1929); Verberg v. Board of Education, 135 Ohio St. 246, 20 N.E. 2d 368 (1939).

[7] Ohio R.C. §3313.48.

character in its respective district."[8] Boards of education are the appointing authority and hire all employees.[9] To carry out the statutory mandate, they are empowered to contract and to be contracted with[10] and "to make such rules and regulations as are necessary for its government and the government of its employees."[11] Traditionally, boards of education have unilaterally established the wages, hours and working conditions for non-teaching employees because the statutes were and still are silent on these questions. REVISED CODE, Section 3319.086, sets the standard work week for non-teaching employees at forty hours but permits the board of education to establish a work week of less than forty hours. It is the rule rather than the exception that non-teaching employees work less than forty hours per week. This circumstance itself creates unique problems for non-teaching personnel.

For years, fringe benefits for non-teaching employees were non-existent. Only recently has the Ohio General Assembly provided such benefits for non-teaching employees. Thus, vacation leave[12] for non-teaching employees was required for the first time in 1959[13] and holiday pay[14] was first required in 1965.[15] Such minimums can be exceeded and vacation leave and paid holidays expanded by the board of education.[16] Other items which in the private sector are agreed to at the bargaining table are also declared by statute, i.e., sick leave[17] and leaves of absence.[18]

In 1959,[19] boards of education were first authorized but not required to purchase automobile liability insurance protecting their employees[20] and in 1965[21] boards of education were authorized but not required to "procure and pay all or part of the costs of group term life, hospitalization, surgical or major medical insurance or a combination of any of the foregoing types of insurance or coverage . . . covering the . . . non-teaching employees of the school

[8] OHIO R.C. §3313.47.

[9] OHIO R.C. §3313.18; §3319.04.

[10] OHIO R.C. §3313.17.

[11] OHIO R.C. §3313.20.

[12] OHIO R.C. §3319.084.

[13] 128 OHIO LAWS 644.

[14] OHIO R.C. §3319.087.

[15] 131 OHIO LAWS 802.

[16] Ohio Association of Public School Employees, v. Board of Education of Wicklifte City School District, No. 54429 (unreported Lake County C.P., 1972); Ohio Association of Public School Employees, Chapter 221 v. Board of Education, No. 74CV-11-4280 (unreported, Franklin Co. C.P., 1976).

[17] OHIO R.C. §3319.141.

[18] OHIO R.C. §3319.13.

[19] 126 OHIO LAWS 73.

[20] OHIO R.C. §3313.201. Under R.C. §3327.01 boards of education are required to transport children residing more than two miles from school. Bus drivers are actually carrying out the board's duty. Nevertheless, school boards, in the absence of any impetus by its employees, were content to permit this legal exposure to the driver for damage suits to continue. Through bargaining the number of school districts which have yet to purchase liability insurance for its drivers has been reduced to 5%. Unfortunately, many school boards procure only minimal coverage. H.B. No. 607 has passed the General Assembly. It *mandates* coverage and sets minimum limits of $100,000/$300,000.

[21] 131 OHIO LAWS 769.

district."[22] These benefit statutes actually reflect a legislative recognition of the limitations of legislation. To account for the economic differences between the industrialized urban areas and the differing tax base of the school districts, the General Assembly has encouraged collective bargaining. These differences cannot be accommodated in a statute which is required by the Ohio Constitution to be of uniform operation throughout the state.[23]

Other significant aspects of the employment relationship between non-teaching employees and the boards of education are also expressly governed by statute. However, except where favorable to the school board, these statutes are of limited effectiveness in dealing with the labor-management problems which occur daily between the non-teaching employees and boards of education. For example, the length of a probationary period for a non-teaching employee in both city school districts and non-civil service school districts is unreasonably long. In the former, the probationary period shall not exceed one year.[24] In the latter, the non-teaching employee faces two probationary periods. Initial employment in a local, exempted village or joint vocational school district is on a one-year contract basis.[25] If renewed, employment is for a statutorily mandated two-year contract period, at the conclusion of which the employee may still be terminated without cause.[26]

Under REVISED CODE, Section 124.34, i.e., the civil service school districts, there are fifteen grounds for disciplinary action. Under REVISED CODE, Section 3319.081 (C), the non-civil service districts, there are twelve grounds for disciplinary action. Obviously these two sections generate the greatest amount of litigation involving non-teaching employees. It has been the author's experience that the vast majority of this litigation is spawned for basically two reasons. First, the statute provides no guidance to the public employer on the appropriateness of the use of discipline. Generally, the disciplinarian is unsophisticated in this area, or if he has some training, the school board overrules his better judgment. Secondly, the public employer, usually the school board, has failed to recognize this statutory defect and has failed or refused to fill in the missing parts with work discipline rules reflecting good common sense. Nowhere in either disciplinary statute is the word "reprimand" or any concept of progressive discipline even mentioned. Admittedly, the General Assembly could not predict each case in which progressive discipline should be imposed and the manner of its imposition. However, it is and was a simple enough matter to include in the disciplinary statutes a mandate that the principle of progressive discipline be employed by the public employer. Since the statute is silent on this question, the principle

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[22] OHIO R.C. §3313.202.

[23] *See,* N. 4.

[24] R.C. §124.27. The length of this probationary period can be negotiated, for the statute provides that probationary periods shall be "not less than 60 days nor more than one year." Where the Civil Service Commission has regulations covering non-teaching employees, consent of the Commission may be required.

[25] OHIO R.C. §3319.081 (A) and (B).

[26] OHIO R.C. §3319.081 (B).

of progressive discipline can and is collectively bargained with the school board.

A not insubstantial amount of disciplinary litigation occurs because of personality conflicts between the employee and the immediate supervisor. Unfortunately, the lack of any internal procedure for resolving the situation compounds the problem. Even when grievance provisions are included in the school board's rules and regulations[27] the resolution of the problem almost never includes a binding decision by an impartial decision maker.[28]

Disciplinary actions by boards of education in city school districts with respect to non-teaching personnel are appealable to the municipal civil service commission.[29] However, disciplinary actions taken by local and exempted village school boards are appealable to the courts of common pleas "of the county in which the school board is located."[30] While there may be some justification for the resolution of disciplinary problems between boards of education and non-teaching employees by the municipal civil service commission, there is absolutely no valid justification for the resolution of such problems by the courts *in the first instance*. This procedure is not only expensive, it is also time consuming. The time between the imposition of discipline and the resolution thereof can, depending on the court docket, be up to two years. In the interim, no immediate solution to the problem is provided and the parties become further polarized on the issue.

Without explicitly so stating, the common pleas courts are beginning to recognize that resolution of the employee-employer problems between the school board and its nonteaching employees should be resolved in the first instance before the school board itself. In the recent case of *In Re Appeal of Ivin Sergent,* Case No. 74-992 (Common Pleas Court, Montgomery County, Ohio, March 1, 1976), Slip Opinion, the Court stated:

> "While a board of education's authority may be primarily administrative . . . when it becomes involved in determining the rights of individuals it exercises judicial power. To the extent that it is performing a judicial function it must function in a judicial manner. This presupposes proper notice of the subject matter and the time and place of the hearing, and an opportunity to be heard—the basic requirements of due process of law before a person may be deprived of rights.
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> "This court therefore *holds* that . . . there must first have been a full hearing before the board of education. . . . The wisdom of this conclusion is self-evident: *the courts of Ohio are sufficiently burdened without being required to hear de novo a cause which should have been fully aired in the administrative—quasi-judicial—body before it comes into the courts on appeal.*[31] (Emphasis added.)

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[27] OHIO R.C. §3313.20.

[28] Prior to the Supreme Court's decision in Dayton Classroom Teachers Assoc. v. Dayton Board of Education, *supra*, the boards of education defended successfully, in most instances, against binding grievance arbitration on the grounds it was unlawful.

[29] OHIO R.C. §124.34.

[30] OHIO R.C. §3319.081.

[31] *See also,* Pertuset v. Board of Education, 33 Ohio Misc. 161 (1972); *In Re* Appeal of Marcella Shank, Lucas Co. C.P. Case No. 75-1006 (1975).

Non-teaching employees employed by city school districts are, *by statute,* entitled to notice of the charges against them, an opportunity to present rebuttal evidence and to have a stenographic record made for purposes of appeal.[32]

Non-teaching employees are categorized, by statute, into three separate classes and each presents special bargaining problems. Employees of *city* school districts are employed pursuant to Chapter 124 and theoretically their selection, retention and termination are governed by the merit principle. Non-teaching employees employed by local, exempted village and joint vocational districts are employed by contract and their selection and movement through the system are not governed by any merit principle. Termination, to the extent that employees are entitled to a hearing for cause, is consistent with the merit principle. A third group of non-teaching employees, educational aides, are employed by contract in local, exempted village and joint vocational districts. Educational aides in city school districts do not have tenure by statute.

> "Educational aides employed by a board of education shall have all rights, benefits and legal protection available to other non-teaching employees in the school district, except that the provisions of Section 124.01 to 124.99 of the Revised Code [civil service laws] shall not apply to any person employed as an educational aide. . . ."[33]

Educational aide is defined by statute as "any nonteaching employee in a school district who directly assists a teacher . . . by performing duties" for which a teaching certificate is not required.[34] The state board of education is by statute required to issue educational aide permits and the qualifications for obtaining such permits are set by the state board of education regulations.[35] "Educational aides shall at all times while in the performance of their duties be under the supervision and direction of a teacher" and "may assist a teacher to whom assigned in the supervision of pupils, in assisting with instructional tasks and in the performance of duties which, in the judgment of the teacher to whom the aide is assigned, may be performed by a person not certificated."[36] At present there are 7,035 educational aides employed in the State of Ohio under a permit.[37]

Introduction of the concept of educational aides in the public schools arose in part from the continual negotiation by teacher organizations for additional assistance in the performance of their duties. However, after obtaining these educational aides the teacher organizations have not and do not attempt to organize them or protect their interests.

In the statutory scheme of selection, retention and termination of educational aides, restrictions outside the merit system and not within the control

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[32] Ohio R.C. §124.34.

[33] Ohio R.C. §3319.088, *See also,* Ohio Association of Public School Employees v. Board of Education, 28 Ohio St. 2d 58 (1971).

[34] Ohio R.C. §3319.088.

[35] *Id.*

[36] *Id.*

[37] Statistical data supplied by State Department of Education, State of Ohio.

of boards of education are causative factors for the inapplicability of the merit principle to their employment. For example, many educational aides are funded through federal antipoverty programs which contain geographical restrictions as well as educational and cultural requirements for their employment.

To summarize, non-teaching personnel employed by *city* school districts are theoretically selected, retained and terminated on the basis of the merit principle. Non-teaching personnel in *other* school districts are selected, retained and terminated in the discretion of the board of education. After three years of continuous employment, termination is theoretically required to be made on the basis of the merit principle, i.e., tenure is granted. Educational aides employed by *city* school districts are not selected, retained or terminated under the merit principle. Educational aides employed by *other* school districts are not selected or retained on the basis of the merit principle. After three years, termination is theoretically determined by the merit principle.

No Effective Policing Mechanism

Central to the theme of many articles written about public employee collective bargaining is the prevailing concept that the merit principle is at odds with collective bargaining in the public sector. It has been this author's experience that even in those city school districts which are theoretically guided by the merit principle, that conflict is more apparent than real. For the most part, the "merit and fitness" of applicants for positions with the board of education have not been given the slightest consideration in either their selection or retention.[38]

Article 15, Section 10, of the Ohio Constitution provides that appointments and promotions in the civil service shall be made "according to merit and fitness, to be ascertained as far as practicable, by competitive examinations." The General Assembly has passed laws regulating the employment of personnel in city school districts.[39] In spite of the existence of such laws, school boards and municipal civil service commissions generally do not offer any form of competitive examination for either entrance into or promotion within the civil service system.[40] As a result, non-teaching personnel in city school districts are employed without undergoing any competitive examination. Either Ohio boards of education are not concerned with the merit principle at the "entrance" and "retention" stages of employment or there has been and is a manifest disregard for it. Employee organizations in the public sector have no interest contrary to the school board's in the "selection" phase of employment.[41] Thus, this laxity cannot be attributed to opposition by organized

[38] It is acknowledged that the major city Civil Service Commissions do function in the selection and retention areas.

[39] OHIO R.C. §124.01.

[40] After the decision in the *Girard* case, Note 42, *infra*, the Ohio Association of Public School Employees furnished a list of 93 municipal civil service commissions which were inoperative with respect to schools to the State Personnel Board of Review. To date, no action has been taken by the State Personnel Board of Review in exercising its enforcement powers.

[41] Of course, individual members have these interests as citizens, taxpayers, and parents, and that may include selection based on merit rather than political affiliation.

public employee groups. At the "retention" stage, employee organizations may have a conflicting interest, i.e., seniority versus merit for advancement.

Unfortunately, even courts have been reluctant to force boards of education and municipal civil service commissions to carry out their statutorily mandated duties in this regard. For example, an action in mandamus was brought challenging the failure of the Girard Civil Service Commission to promulgate rules and regulations governing the selection, retention and termination of non-teaching personnel employed by the Board of Education of the City of Girard. On April 28, 1975, the Eleventh District Court of Appeals held, in spite of specific findings of failure to comply with civil service entrance requirements, that the writ of mandamus would not be issued because relators (The Ohio Association of Public School Employees) had an adequate remedy at law.[42] The remedy described by the Court is:

> "If any such municipal civil service commission fails to prepare and submit such rules and regulations in pursuance of sections 124.01 to 124.64 of the Revised Code, the board [State Personnel Board of Review] shall forthwith make such rules." Revised Code, Section 124.40

The State Personnel Board of Review has never exercised the power recognized by the Court in the *Girard* case. Indeed, it is unfamiliar with the classification structure for non-teaching personnel and is also unfamiliar with the statutes under which school boards operate. From a practical point of view, it lacks the expertise in the area and the manpower for enforcement. The Ohio Supreme Court, in 45 Ohio St. 2d 295 (1976), reversed the lower court and held "[t]he other remedy of appeal to the State Personnel Board of Review . . . is clearly inadequate in this case."[43]

Our experience shows that a substantial number of the municipal civil service commissions throughout the State of Ohio have not promulgated such rules and regulations for non-teaching public school employees. They have, however, done so for municipal civil service employees. To a large extent, municipal civil service commissions are reluctant to become involved in the employment problems of both the employee and the board of education. Traditionally, municipal civil service commissions functioned primarily for the benefit of employees of the city and the common bond of municipality, municipal employee and municipal civil service commission may have created a meaningful working relationship. Boards of education and their employees are outsiders to the system. However, not all is the fault of the municipal civil service commission. Revised Code, Section 124.54, provides that:

> "Where municipal civil service commissions act for city school districts . . . the boards of education of such city school districts may, by resolution, appropriate

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[42] State *ex rel.* Ohio Association of Public School Employees, v. Civil Service Commission of Girard, Ohio, Case No. 2157, Eleventh Appellate District, 1975.

[43] Although the Court revitalized the merit principle in the "selection" phase of employment, one problem not addressed by the Court was whether the School Board is required to fund the civil service commission and the possible consequences when such commissions do not have the funds to operate.

> each year, to be paid into the treasury of such city, a sum sufficient to meet the portion of the board of education's cost of civil service administration . . . ."

Simply put, school boards are unwilling to pay for the cost of administration of the merit principle in city school districts.[44] This statutory authorization, which is not interpreted by school boards as a requirement, is the biggest single factor in the school board's and the civil service commission's failure to promulgate rules and regulations for selection, retention and termination of non-teaching personnel employed by the school boards.

Generally, municipal civil service commissions do adjudicate disciplinary matters within their jurisdiction. However, with minor exceptions, decisions made by municipal civil service commissions are generally made on the basis of what the members of the commission feel is right.[45] No qualifications are necessary to hold the position of member of a civil service commission and the three members are appointed by the mayor.[46] Thus, they generally possess no knowledge concerning public personnel practices, public finance, labor-management relations, or a legal background. From a lawyer's point of view, the principle of *stare decisis* is virtually non-existent. A limited amount of stabilization over the work relationship exists because disciplinary matters are resolved quickly, but consideration of the merit principle in such matters is only of minimal concern.

These failures of municipal civil service commissions can be corrected through collective bargaining. In the absence of rules and regulations governing selection, retention and termination of employees by the civil service commission, boards of education may select, retain and terminate employees according to agreements made at the bargaining table. A significant advantage to this approach, as opposed to the promulgation of rules and regulations by an unknowledgeable third party, is that the collective bargaining agreement can tailor specific rules for specific problems. For example, immediately following a decision of the Ohio Supreme Court in *Ohio Association of Public School Employees v. Columbus Board of Education,*[47] holding that educational aides in city school districts had no tenure protection or other civil service protection, OAPSE, as bargaining agent for the non-teaching employees in the Columbus schools, and the Columbus Board of Education negotiated comprehensive and detailed layoff procedures for aides which accommo-

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[44] Interestingly, the Ohio School Boards Association, the school boards' lobbying arm, is funded from school board general revenue funds. R.C. §3313.87.

[45] According to John F. Burton, Jr., in an article entitled *"Local Government Bargaining and Management Structure,"* TRENDS IN PUBLIC SECTOR LABOR RELATIONS, Vol. 1 (1972–73), at page 49:

> "One reason for the attack on the commissions is that often they are not autonomous agencies but agents of the employer. As Jerry Wurf, president of AFSCME, has stated: 'The role of the civil service commission is not regarded by the workers as that of a third, impartial party; to most of them, the commission is felt to represent the employer.' In varying degrees, most of the cities in our sample have civil service commissions dominated by management and this lends credence to Wurf's charge."

[46] OHIO R.C. §124.40.

[47] 28 Ohio St. 2d 58 (1971).

date the competing restrictions of seniority and funding sources (and related employment restrictions tied to funding sources). Moreover, that agreement provides for binding arbitration of grievances, including disciplinary action and recognizes the potential inadequacy of established civil service procedure by providing binding arbitration for all non-teaching employee disciplinary actions in the event the municipal civil service commission lacks or denies jurisdiction.

Examples

Apart from the problems with the civil service commissions, other experiences teach that the only workable solution to problems arising in the day-to-day work relationship of the non-certified personnel and the school boards is collective bargaining. The following examples are illustrative only.[48] In each example, the result was either a change in the work rule or an impetus to employees to organize and bargain the work rule involved. Needless to say, in each case greater solidarity among Association members was achieved.

In early 1971, a bus driver reported to the principal that a particular student was a continual behavior problem on the school bus. The principal suspended the student from the bus for ten days. On the day following suspension, that student defiantly attempted to board the bus. At the bus stop, the driver permitted the other students to board, but did not permit entrance by the suspended student. The student attempted to push the bus driver aside. Without violence, the bus driver physically prevented entrance by the suspended student, moved him aside, and told him that he was under orders not to permit the student to ride the school bus. Shortly thereafter, the boy's parents filed criminal assault and battery charges against the bus driver. Attorneys provided under the bus driver's personal liability[49] insurance policy represented him at the criminal hearing which was dismissed. Unknown to both counsel and the bus driver at that time, the school board and the student's parents agreed that in return for dropping the criminal charges against the bus driver, the school board would terminate the bus driver. With the threat of appeal and the real reason for the employee's termination about to be publicly exposed, the termination charges were reduced to a nine-day suspension and the bus driver returned to work. Not publicly disclosed was the fact that the bus driver was paid during the nine-day suspension period.

Legislation in this area provides no meaningful guidance to the bus driver. Revised Code, Section 3319.41, permits non-certificated school employees and school bus drivers, when acting within the scope of their employment, to use "such amount of force and restraint as is reasonable and necessary to quell a

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[48] If the example does not contain a citation, the case is undocumented. The author's recollection of the facts is the only basis for the statement of the case.

[49] A personal liability insurance policy is provided each member from membership dues by the Ohio Association of Public School Employees. The Ohio Education Association has a similar plan.

disturbance threatening physical injury to others, to obtain possession of weapons and other dangerous objects upon the person or within the control of the pupil, for the purpose of self-defense, or for the protection of persons or property." Nothing in that statute authorizes the school bus driver to use "force and restraint" to enforce the rulings of the school superintendent. If the bus driver carries out those rulings, he is subject to civil and criminal suits against him. If he does not carry out the superintendent's orders, he is subject to disciplinary action for insubordination or neglect of duty.

Under Revised Code, Section 4511.76, the Ohio Departments of Education and Highway Safety are required to adopt and enforce regulations for the operation of all school buses. Regarding pupil behavior, Rule EDb-919-06, permits the bus driver to regulate "conversations." How this is to be done is not explained. That rule also states "the school bus driver shall be in charge of the bus at all times and shall be responsible for order." Again, no direction is given as to how and by what means order is to be achieved. Shamefully in this instance, the school board reneged on its obligation to support the bus driver and instead disciplined him for doing what the statute, the regulation and the school board ordered him to do.

Obviously such matters cannot be governed by legislation. It is equally as obvious that those rules and regulations suffer from the same inherent defects. School boards, however, could provide such guidance under their authority to make rules and regulations for the government of their employees.[50] Predictably, it has not been done and the only effective method of establishing a workable and acceptable procedure is in the collective bargaining agreement. Interestingly, the interests of both the school board and its bus driver in resolving this problem were or should have been identical.

In some instances, the supervisor's failure to resolve or alleviate problems with the non-teaching employees is compounded by outside influence. In the case of *In Re Appeal of Robert A. Russell,*[51] a bus driver was terminated for failing to drive his bus as directed by the Transportation Supervisor. At the hearing, it was disclosed that the school board had ordered the Transportation Supervisor, and he in turn ordered the bus driver, to alter the bus route because one parent complained that her daughter arrived home too late. The difference in arrival time was twenty minutes. The evidence also disclosed that the mother complained over the years but "no action was taken upon . . . [her] complaints until January, 1972, shortly after the advent of two newly elected members of the Board of Education." Neither the school board nor the Transportation Supervisor had independent authority to change the bus route without the approval of the Coordinator of School Transportation.[52]

In its opinion, the Court found that the altered route created a safety hazard. The hazard was created by stopping the bus on the uphill in icy weather, as opposed to stopping the bus on the downhill side of the hill in icy

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[50] Ohio R.C. §3313.20.

[51] Case No. 72-131, Fourth Appellate District (1973), unreported.

[52] ". . . it would appear, under the statute [R.C. §3327.011] that even the local board is without authority to alter routing set by the coordinator. . . ." At p. 3.

weather, as the route was originally mapped out. The difference was recognized by the bus driver who refused to carry out the order. Unfortunately, neither the Transportation Supervisor nor the school board even bothered to consider the safety factor. The Court ordered reinstatement of the employee because the charge of insubordination cannot be sustained when the order is unreasonable or unlawful.

In the first example, legislative and administrative guidance was lacking and the employee was disciplined for using his best judgment in carrying out the orders of the school board. In the latter case, a statute specifically governing this working condition was violated by both the Supervisor and the Board of Education. The employee was disciplined for refusing to violate the statute.

In the Gallion City School District, a bus driver was terminated because she could not keep order on the school bus. Over an extended period of time, she continually brought to the attention of the Transportation Supervisor her problems in maintaining order and discipline on the school bus. Just as consistently, the Transportation Supervisor refused to resolve the problem. Among others, the following incidents happened on her bus. First, while she was driving the bus a student let a wasp loose in her face. Second, the students carved words in the seats of the school bus. Third, on another occasion, a student pointed a sharp pencil in her face while she was driving the school bus. Rather than deal with disciplinary problems like these, the school board terminated the bus driver for failure to keep order on the bus. She was reinstated.

Imagine yourself having 66 to 88[53] students confined on a school bus for periods up to one hour with nothing to keep their attention. Add to that spring weather, the threat of civil and criminal lawsuits for assault and battery, the lack of any statutory or administrative support for keeping order on the bus and just a few rowdy students. Conclude that thought with a "deal" between the school board and the parents of such student to terminate your employment. Your awareness should also include a realization that a teacher, when dealing with such students, maintains discipline by face-to-face contact with a student. By contrast, a bus driver, while driving the bus, always has his or her back to the students.

In Toledo, a significant part of the transportation of school children on buses is done by the Toledo Area Regional Transit Authority. Discipline problems on buses transporting students became so serious that the bus drivers refused to continue transportation of those students until the school board took action to remedy the discipline problem. In the City of Princeton, the motivating force for the recognition strike by bus drivers was their desire to enter into bilateral negotiations to resolve discipline problems on school buses. In a Toledo suburb, a playground aide was terminated because of her inability to control the students. The case is now on appeal but, at present,

[53] One of the major problems in this area is the pressure placed by the Transportation Supervisor on the driver to transport more students on each vehicle than is permitted by law in order to save money. This only increases the disciplinary problem.

there are *two* playground aides doing the same job she did. In Coshocton, it was the school board's order that overtime could not be worked without prior approval. On the day before graduation, the gymnasium had to be prepared for commencement exercises. The custodian could not perform his normal job duties and prepare the gymnasium at the same time. He received no authorization to work overtime and did not do so. The gymnasium was not properly prepared and the custodian was terminated.

A school bus driver in Parma was terminated for misconduct, neglect of duty, nonfeasance and malfeasance because, after an accident, he allegedly did not notify the police or his supervisor and with the damaged bus transported the students on his normal run. In the month previous to the accident, the bus driver was honored for his driving record over the past seven years. In his testimony before the municipal civil service commission, he stated that an oncoming automobile forced him to the right side of the road which had extremely bumpy pavement and the bus began to vibrate and go out of control. Before the accident, he had previously notified his supervisor of the condition. Prior to the hearing, the bus driver attempted to obtain from the Assistant Supervisor of Transportation any information concerning the repairs made to the front end of the bus. He was advised by the Assistant Supervisor that he was ordered not to provide him with such information. Predictably, the repair sheet showed that indeed repairs were made to the steering, etc. The employee was reinstated after a twenty-day suspension.

Until forced to, boards of education have refused to recognize the problems encountered by non-certified personnel. Control and discipline problems faced by many non-teaching personnel are as great as, if not greater than, those faced by the teacher because the situations in which non-teaching personnel encounter these students are conducive to disciplinary problems. Compounding the problem for the noncertified staff is the fact that they are not required to and, in fact, are not trained to deal with this aberrant behavior. Teachers, on the other hand, are. Enforcement of discipline by a teacher is a concomitant part of the instructional process. By contrast, non-teaching personnel are employed to perform a specific function, a function which does not contemplate dealing with or resolving disciplinary problems.

Present Approach

Incomplete statutes, the absence of any meaningful guidance in the rules and regulations promulgated by the statutorily designated authority, third party influence on school boards, the statutory distinction between civil service school districts and non-civil service school districts, the manifest disregard for the merit principle by school boards and the inability of municipal civil service commissions and courts to adequately resolve employer-employee problems predict only one comprehensive solution—the necessity of collective bargaining between school boards and the bargaining representative for non-teaching employees.

There are 617 city, local and exempted village school districts in the State of Ohio. The best statistics available at this time show that in approximately

500 of those districts collective bargaining for non-teaching employees is a reality. Of those 500, the Ohio Association of Public School Employees bargains actively in 480 districts. In approximately 200 of those districts, there are comprehensive collective bargaining agreements. In the remaining 20 districts, AFSCME and the International Brotherhood of Fireman and Oilers conduct collective bargaining with Fireman and Oilers union representatives limited to custodial and maintenance personnel.[54] The legal framework within which collective bargaining for non-teaching employees is conducted arises not from statute but from judicial precedent.

One of the major objections to collective bargaining in the public sector is accommodation between the merit principle and the master contract. In most states, this accommodation is mandated by statute. If bargaining is undertaken in Ohio, this accommodation, as well as a reconciliation with other statutes, is mandated by *Dayton Classroom Teachers Association v. Dayton Board of Education*, 41 Ohio St. 2d 127, 323 N.E. 2d 714 (1975), which, in paragraphs 1 and 2 of the syllabus, holds:

> "A board of education is vested with discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees, so long as such agreement does not conflict with or purport to abrogate the duties and responsibilities imposed upon the board of education by law.
> "A binding grievance arbitration clause contained in such agreement must be honored by the board of education where (1) the grievance involves the application or interpretation of a valid term of the agreement, and (2) the arbitrator is specifically prohibited from making any decision which is inconsistent with the terms of the agreement or contrary to law."

In civil service city school districts, it is the function of municipal civil service commissions to administer the merit principle in the selection, retention and termination phases of employment. Since this is not a duty or responsibility "imposed upon the board of education by law" these can be collectively bargained with the board. As heretofore explained, municipal civil service commissions have failed or refused to promulgate rules and regulations governing the selection, retention and termination of non-teaching public school employees. In the absence of such rules, and consistent with the *Dayton Teachers* case, each of these areas are within the scope of bargaining for non-teaching public school employees. "Selection" is of no real concern to public employee organizations and, practically speaking, generally will not be made an item within the scope of negotiations. By contrast, "retention" (movement through the system) will almost always be inserted into the scope of negotiations by the public employee organization. "Termination" is regulated by law and to that extent is excluded from the scope of negotiations. However, the disciplinary statute only specifies the grounds for discipline and not when it is to be applied or the manner of its application. To that extent, the "termination" stage of employment is subject to collective bargaining. For non-teaching employees in non-civil service school districts

[54] Statistical data supplied by Research Department, Ohio School Boards Association.

and for educational aides employed by city school districts the result will be the same.[55]

The *Dayton Teachers* case has not changed the scope of negotiations from prior practice and, in some respects, public employee organizations in Ohio are in a better position than employee organizations in states which have collective bargaining statutes. Fairly stated, the scope of negotiations between school boards and public employee organizations can be defined as excluding subjects of collective bargaining for which there is no statutory authorization in the board (and this will be continually tested in litigation by the Association), and as further excluding those subjects which are specifically governed by statute (i.e., unemployment compensation, workmen's compensation and retirement benefits), and finally, as excluding bargaining on selection, retention and termination but only to the extent that a specific and mandatory statute or rule exists and is operative. If not excluded under the above definition, it is subject to negotiation.

For example, some of the areas to be bargained in the future include personal liability insurance for nonteaching public school employees, group legal service plans, staffing patterns for employees (classifying the position, not the person), accommodation of bargaining agreements with voluntary or ordered racial balance policies for students and staff, layoff policies including bumping and transfer rights,[56] subcontracting and, of course, the traditional subjects of wages, hours and working conditions.

The issue of subcontracting has increasingly become an issue at the bargaining table and in the future will continue to do so. The areas affected generally concern the school cafeteria, pupil bus transportation and janitorial services. Except to say that negotiations will be conducted on the issue of subcontracting, it is beyond the scope of this paper to explain the basis of our position.

"To date, no court has held or found that a board of education is under a common law duty to bargain. On the contrary, the duty to bargain has been held to be purely statutory and within the exclusive province of the legislature to grant or regulate."[57] Since 1973, nothing has changed this. School boards are still under no obligation to bargain in good faith. However, in approximately 200 school districts bargaining in good faith does exist. In the highly industrialized urban areas good faith bargaining by the school board is a community expectation. In other areas, the school board must be convinced that negotiating with a single representative on behalf of all employees creates stability in the work force because the board is unable to satisfy the competing demands of various groups of employees.

[55] Ohio Association of Public School Employees v. Board of Education, *supra*.

[56] For example, 16 pages of the agreement between the Ohio Association of Public School Employees and the Columbus City Board of Education concern the issues of layoff, bumping and transfer. While this provision may be more extensive than is generally provided in the private sector, the unique conditions under which public employees are funded and the merit principle implemented necessitates such a lengthy agreement. Prior to agreement, these policies were unilaterally determined by the board of education.

[57] *See*, N. 2.

Once the Association gets to the bargaining table with a school board, the first and most important item to be negotiated is a procedural agreement. The procedural agreement, in essence, is a mutally agreed to labor relations law enforceable in court. By procedural agreement is meant an agreement concerning the scope of negotiations and an obligation to negotiate in good faith for the contract being negotiated *and* a present promise by the board of education to negotiate in good faith, within the scope as set by the present agreement, for the ensuing contract period. In this manner, the Association has in part been able to overcome the lack of any statutorily mandated obligation to bargain in good faith over wages, hours and working conditions. With the procedural agreement and the effect of the *Dayton Teachers* case, which recognizes the authority of the school board to enter into such agreements and the binding effect thereof, collective bargaining, in the absence of express statutory authorization therefor, is a working reality in the public sector in Ohio.

In the past five years it is estimated that there have been approximately 40 non-teaching employee strikes in the State of Ohio. Thirty-two of them involved the Ohio Association of Public School Employees.[58] Of those 32, 25 involved one issue—recognition. Most of the recognition strikes concluded with recognition of the Association as the authorized bargaining agent; however, the following case is an exception.

In 1971, the Princeton City School District bus drivers attempted to gain recognition for bargaining purposes. The motivating force was the lack of support by the board of education in the enforcement of discipline on the school bus. In the Princeton City School District, busing of students was substantial. The areas bused included two economically above-average neighborhoods, one predominantly black neighborhood, and one low-income white area. Because of ethnic and economic differences, the community was not unified. Thus, it was impossible for the employees to gather community support when the board of education refused recognition. Sixty of the bus drivers struck (other non-certified employees did not) and school buses did not operate from January 19, 1971, until the early spring months when the board was able to find replacements. During the interim, parents transported their own children to school. Using the Ferguson Act,[59] the board of education terminated each of the bus drivers on strike. To this date they have not been rehired and the case is now pending on motion for writ of certiorari in the United States Supreme Court.

A comment on the breadth of the bargaining unit must be preceded by an understanding of the organizational history of the non-teaching public school employees. To the extent that they were organized for bargaining purposes, organization occurred only in the urban areas and the bargaining unit generally consisted of only custodial and maintenance employees. AFSCME, responsible for the initial organization, merely extended their local organiza-

[58] Data Supplied by the Membership Services Department of the Ohio Association of Public School Employees.

[59] Ohio R.C. §4117.01 *et seq.*

tion of blue collar municipal workers into the school area. In the late 60's and early 70's, the Ohio Association of Public School Employees began extensive organizational efforts for bargaining purposes and succeeded in acquiring representative status for the vast majority of the remaining unorganized non-teaching employees. The bargaining units were composed of all non-supervisory, non-teaching personnel.[60]

In Ohio, where mandatory recognition of an employee representative is not an obligation of the school board, the board's position on the breadth of the bargaining unit carries considerable influence. While this issue is within the scope of negotiations between the parties, when challenges are made to the bargaining representative's majority status, the school board's position on this matter is generally influential. In *Wilkerson v. Board of Education,*[61] AFSCME, the bargaining representative of the non-teaching employees, had an existing contract with the Struthers Board of Education which refused to negotiate with OAPSE. The Association filed a petition asking the Board to conduct an election, because it had in excess of 50% of the work force as members. Acknowledging that "the law does not compel a public body to recognize and deal with a labor union," the trial court found that if the board of education intends to negotiate a labor contract "equity requires that both of the organizations be treated fairly with no discrimination in favor of either." The Court ruled that to permit the signing of a contract with AFSCME which only binds it members and to deny a contract to OAPSE would be discriminatory. Recognizing the Board's desire for one bargaining agent and exercising its equity powers, the Court concluded that negotiating two contracts with two competing unions was "most unsatisfactory" and had a potential unsettling effect on the board's function of education. Therefore, the Court ordered an election which was subsequently won by OAPSE.

In the unreported decision of *Frederich v. Board of Education,*[62] another majority representative conflict between AFSCME and OAPSE occurred. Ruling that non-teaching public school employees have the right "to the selection of a bargaining representative without interference from the employer" and that "this right exists even independently of labor relations acts," the Court in the exercise of its equity powers ordered that an election be held "to determine the majority representative." As part of its order, the Court set forth 32 separate procedures to be followed in conducting the election, all of which were in recognition of the Board's stated position in open court. The election was subsequently won by OAPSE. To alleviate problems such as those encountered in the two cases discussed, challenge procedures for determining majority bargaining representatives should be set forth in the procedural agreement.

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[60] During that period the Ohio Association of Public School Employees grew from 14,000 in 1966 to approximately 30,000 present members. In 1969, the Association removed the "no strike" clause from its constitution and in 1971, after a dues increase, staff was hired, trained and placed in the field for assistance at the bargaining table.

[61] Case No. 73CI-805 (Mahoning County C.P., 1973); *Affirmed* 74CA-47 (1974).

[62] Case No. 75CIV-303 (Columbiana County C.P., 1975). The case is presently pending on appeal.

From the employee's point of view, the interests of non-teaching public school employees are most effectively represented by one organization composed of all non-supervisory non-teaching employees. In economic negotiations, school districts bargain from a position of fixed income and limited resources, and this limitation has, in recent years, been scrutinized as part of the taxpayers' revolt. The increasing demands of teachers, who are also organized as a unified group, create pressures which must be met with equal force. While some internal conflicts between specific segments of the non-teaching employee work force do occasionally surface, these are minimal when compared to the decrease in bargaining strength. As the *Princeton* case shows, classification strikes are generally ineffective. School boards generally prefer a single unit of all non-supervisory, non-teaching personnel. Based upon our experience to date, nothing has occurred which would indicate that a change from a unit of all non-supervisory, non-teaching personnel should be considered.

Procedural agreements generally contain an impasse resolution procedure and such agreements are operative and binding for a determinate period beyond the termination of the contract itself. Where procedural agreements contain an obligation to bargain in good faith during this period, if agreement is not reached a fact-finding process will commence and end with a recommendation for settlement. These recommendations form the basis for further discussions and if agreement is not reached, the employees have only two remedies—community pressure or strike.

Sometimes use of community pressure by the employees is described as the "end run." The "end run" argument is founded upon the premise that both sides at the bargaining table stand on an equal footing and both are obligated to bargain in good faith. In Ohio, neither is a statutory or common law obligation. The school board may meet and confer but remain recalcitrant and obstinate in its positions and proposals—take it or leave it. Good faith and equal footing are absent. Concededly, the employees are not obligated to bargain in good faith, but it is always the employees who seek to insert the obligation to bargain in good faith into the procedural agreement, *not the school board.*

Unequal footing of the employees must be conceded by the school board. The Ferguson Act, Ohio's anti-strike law, clearly disspells any equality. In addition, the school board has available to it the anti-strike weapon of injunction.[63] What can the public employee representative do when the school board remains intransigent? If community support cannot be culled and if the employees cannot strike without losing their jobs, collective bargaining becomes "collective begging."

In the continued absence of legislation in this area, part of the problem can be resolved by the courts, as was fairly done in the *Dayton Teachers* case. Anti-strike injunctions are issued by courts of equity and the ancient common law maxim of "He who seeks equity must do equity" is as applicable today as it was when first developed as part of England's common law. The maxim

[63] Goldberg v. Cincinnati, 26 Ohio St.2d 228, 271 N.E.2d 284 (1971).

can, as part of today's evolving common law, be incorporated into the area of public employee labor law. Hence, when a school board seeks the "automatic" issuance of an injunction to end a strike, the court may compensate for the unequal footing by imposing upon the school board an obligation to bargain in good faith as part of its order compelling the employees to return to work. If the school board refuses to bargain in good faith, its members can be cited for contempt. In those instances where procedural agreements contain obligations to bargain in good faith, the court, after a finding of lack of good faith, should deny the motion for temporary restraining order or preliminary injunction, until such time as good faith is shown by the school board, after which the motion may again be renewed.

While not expressly so stating, our experience to date indicates that courts when faced with a procedural agreement containing an obligation to bargain in good faith and an understanding of the "equities" involved are generally reluctant to issue the restraining order or preliminary injunction. In fact, on some occasions, they attempt to mediate these disputes (sometimes to the disdain of the school boards) rather than immediately issue the order.

Once at the bargaining table, an argument often encountered is that because members of the school board are accountable to the public for their actions and public employee union officials are not, that such officials or organizations should not be permitted to become a "joint manager" with the school boards in determining public policy. Apart from the nebulous phrase "public policy" the premise given is not accurately stated. Not all policies negotiated at the bargaining table directly affect the public. In fact, many of these policies are "working conditions." To this extent, the school board should be accountable to its employees and the employee organization is entitled to jointly steer the course of the ship. Agreements affecting "working conditions" are not "public policies."

Our experience shows that until pressured school boards hide behind purported limitations of power whether by their own interpretation or those of others, all done in an excuse to avoid collective bargaining. The result is that school boards are unduly restricting their own power. Therefore, public employee organizations find themselves in the incongruous position of attempting to expand the school board's powers to secure effective means to bargain and expanded contract terms.