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Educational Reform and Its Labor Relations Impact From A Management Perspective

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Recently, several reports exploring the condition of American education have been published. Perhaps the most publicized of these reports is "A Nation at Risk: The Imperative for Educational Reform"[1] by the National Commission on Excellence in Education.[2] The Commission, created in August of 1981 by T. H. Bell, Secretary of Education, makes several findings regarding the current state of American education and several recommendations intended to improve the quality of American education. This article examines the labor law and labor relations implications of these recommendations from the view of a management representative.

I. The Recommendations

As stated by Commission Chairman David Pierpoint Gardner, the purpose of the Commission was "to help define the problems afflicting American education and to provide solutions, not search for scapegoats."[3] For purposes of this article the recommendations have been grouped and characterized as follows:

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[1] National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* [hereinafter referred to as "the Report"].

[2] National Commission on Excellence in Education [hereinafter referred to as "the Commission"].

[3] Letter from Chairman Gardner to Secretary Bell (April 26, 1983) (cover letter accompanying the Report).

1. Increase the number of hours students spend in school. The Commission recommended both a seven hour school day and 200 to 220 day school year.

2. Teacher salaries should be increased so that they are "professionally competitive" and "market-sensitive."

3. School districts should utilize a more comprehensive teacher evaluation system that includes peer review by master teachers. Teacher employment decisions, such as salary, promotion, tenure and retention decisions, should be tied to this evaluation system. Thus, "superior teachers can be rewarded, average ones encouraged, and poor ones either improved or terminated."

4. Student-teacher contact time should be increased. The Commission recommended increasing learning time through better classroom management, better organization of the school day, reduction of the burden on teachers for maintaining discipline and reduction of the administrative burdens on a teacher.

5. More homework should be assigned to high school students.

6. Instruction in study and work skills should begin in the early grades and continue throughout a student's schooling.

7. Utilize non-certified professionals to teach in subject areas where a sufficient number of trained teachers are temporarily unavailable.

8. Give teachers in areas where teacher shortages currently exist, such as mathematics and the sciences, a pay differential.

The most obvious labor relations implication is the role teachers' unions have in affecting the decision of school boards to make the changes recommended and in affecting the form any changes will take. In order to determine a school board's obligations to a union, the subject of negotiability and the obligation to bargain must be analyzed.

II. Negotiability: An Overview

The history of public sector bargaining is relatively brief in comparison to private sector bargaining under the National Labor Relations Act[4] and many states have used the NLRA as an example for a public sector collective bargaining statutory scheme.[5] Other states have diverged from the NLRA example and have adopted public sector labor legislation which

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[4] 29 U.S.C. §§ 151-169 (1976) [hereinafter referred to as "the NLRA" or "the Act"]. Whereas federal statutes have governed aspects of private sector labor law since 1935, the first state public sector collective bargaining statute was not passed until 1955. *See* Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience*, 1977 WIS. L. REV. 685, 702 n.59 (1977).

[5] *E.g.*, Michigan. Mich. Comp. Laws Ann. §§ 423.201-.216 (West Supp. 1983-84).

recognizes the different interests involved in public and private sector collective bargaining.[6] Because of the significant influence the NLRA has on state public sector labor law, the duty to bargain and the scope of collective bargaining under the NLRA will first be examined. Then, as an example of a state which has closely followed the NLRA in developing a public sector labor law scheme, the duty to bargain and scope of bargaining under Michigan's Public Employment Relations Act[7] will be examined. Finally, as an example of a state which has deviated from the NLRA example, the duty to bargain and scope of collective bargaining under Wisconsin's Municipal Employment Relations Act[8] will be examined.[9]

A. National Labor Relations Act

Under the NLRA, it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.[10] The Act defines the phrase "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . ."[11] As stated by the United States Supreme Court:

> Together, these provisions establish the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment," with "the representatives of his employees" designated or selected by the majority "in a unit appropriate for such employees." This obligation extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents.[12]

Scope of bargaining analysis deals with what subjects are encompassed by the phrase, "wages, hours, and other terms and conditions of employment." Subjects encompassed within this phrase are said to be negotiable or mandatory subjects of bargaining. The negotiability determination is critical in that parties have a duty to bargain in good faith only over mandatory negotiable subjects. In *Ford Motor Co. v. N.L.R.B.*,[13] the United States Supreme Court recognized that the role of determining the

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[6] *E.g.*, Wisconsin. Wis. Stat. §§ 111.70-.77 and 111.80-.97 (1981-82).

[7] Mich. Comp. Laws Ann. §§ 423.201-.216 (West Supp. 1983-84) [hereinafter referred to as "PERA"].

[8] Wis. Stat. §§ 111.70-.77 (1981-82) [hereinafter referred to as "MERA"].

[9] The duty to bargain and scope of bargaining for public employers will be determined by the relevant state statutes. This article uses Michigan and Wisconsin law as illustrative examples only.

[10] 29 U.S.C. § 158(a)(5) (1976).

[11] *Id.* at § 158(d).

[12] Allied Chemical and Alkali Workers v. Pittsburg Plate & Glass Co., 404 U.S. 157, 164 (1971).

[13] 441 U.S. 488 (1979).

negotiability of particular subjects lies with the National Labor Relations Board,[14] the federal agency created in 1935 to enforce the NLRA.[15]

In *N.L.R.B. v. Wooster Division of the Borg-Warner Corp.*,[16] the United States Supreme Court adopted the analysis utilized by the Board and lower courts to determine the negotiability of various subjects. Under *Borg-Warner*, three categories of subjects have evolved: mandatory subjects of bargaining, those subjects over which labor and management must bargain; permissive subjects of bargaining, those subjects over which labor and management may bargain; and illegal or prohibited subjects, those subjects over which labor and management cannot bargain. An employer's duty to bargain is limited to mandatory bargaining subjects. As to permissive subjects, the employer is free to bargain or not to bargain. However, even as to mandatory subjects of bargaining, the duty to bargain does not compel either party to agree to any proposal nor does it require either party to make any concessions. Each party satisfies its obligation under the Act if they "meet at reasonable times and confer in good faith" with respect to mandatory subjects of bargaining. Where each party satisfies its duty to bargain in good faith and a deadlock is reached, the parties are said to have reached impasse.[17]

The consequences of a determination of negotiability can be summarized as follows. An employer violates its duty to bargain in good faith when it takes unilateral action on a mandatory subject of bargaining prior to impasse.[18] After a bona fide impasse has been reached, an employer may take unilateral action on a mandatory subject of bargaining that is reasonably comprehended by its pre-impasse proposals.[19] If an employer's bad faith bargaining conduct contributes to the impasse,

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[14] National Labor Relations Board [hereinafter referred to as "the Board"].

[15] *Ford Motor Co.*, 441 U.S. at 496-97. Thus, although "the judgment of the Board is subject to judicial review," if its "construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Id.* at 497. However, Board orders will not be enforced where "they had 'no reasonable basis in law,' either because the proper legal standard was not applied or the Board applied the correct standard but failed to give the plain language of the standard in its ordinary meaning." *Id.* (quoting *Allied Chemical and Alkali Workers*, 404 U.S. at 166). Board orders have also been reversed "where it was 'fundamentally inconsistent with the structure of the Act' and an attempt to usurp 'major policy decisions properly made by congress' " *Id.* (quoting American Ship Building Co. v. N.L.R.B., 380 U.S. 300, 318 (1965)). Also, Board orders have been reversed where the Court was "convinced that the Board was moving 'into a new area of regulation which Congress had not committed to it.' " *Id.* (quoting N.L.R.B. v. Insurance Agents, 361 U.S. 477, 499 (1960)).

[16] 356 U.S. 342 (1958).

[17] For discussion of impasse and its consequence, see *infra* text accompanying notes 107-116.

[18] N.L.R.B. v. Katz, 396 U.S. 736 (1962).

[19] Taft Broadcasting Co., 163 N.L.R.B. 55 (1967), *petition to review dismissed*, 395 F.2d 622 (8th Cir. 1967).

however, its unilateral action, even after impasse, constitutes a violation of its duty to bargain in good faith.[20]

A determination that a subject is a permissive subject of bargaining has the following consequences. A party may refuse to bargain over a permissive subject of bargaining. Bargaining to impasse over a permissive subject of bargaining is a violation of the duty to bargain in good faith because, in effect, it is a refusal to bargain over mandatory subjects of bargaining. Also, an employer does not violate the good faith bargaining requirement by unilaterally changing a permissive subject of bargaining after impasse has been reached and the contract has expired.[21] However, changing a permissive subject in an existing contract might constitute a breach of the collective bargaining agreement in which case the remedy lies in an arbitration or court action pursuant to 29 U.S.C. § 185.[22]

Both the Board and the courts have broadly interpreted the category "wages" to encompass most forms of compensation. Thus, mandatory subjects of bargaining include rates of pay,[23] piece rates and incentive wage plans,[24] overtime pay,[25] shift differentials,[26] paid holidays,[27] paid vacations[28] and severance pay.[29]

Hours of employment are also a mandatory subject of bargaining. The United States Supreme Court has interpreted the term "hours" as follows:

> The particular hours of the day and the particular days of the week during which employees may be required to work are subjects well within the realm of wages, hours, and other terms and conditions of employment about which employers and unions must bargain.[30]

Thus, parties must bargain over hours of work,[31] workdays,[32] overtime,[33] Sunday or holiday work,[34] and shift work.[35]

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[20] Hudson Chemical Co., 258 N.L.R.B. 132 (1980).

[21] *Allied Chemical and Alkali Workers*, 404 U.S. at 183-88.

[22] *Id.* at 176 n.17.

[23] Gray Line, Inc., 209 N.L.R.B. 88 (1974), *enforced in part and denied in part*, 512 F.2d 992 (D.C. Cir. 1975).

[24] C & S Industries, Inc., 158 N.L.R.B. 454 (1966).

[25] Braswell Motor Freight Lines, Inc., 141 N.L.R.B. 1154 (1963).

[26] Smith Cabinet Manufacturing Co., 147 N.L.R.B. 1506 (1964).

[27] Singer Manufacturing Co., 24 N.L.R.B. 444 (1940), *modified and enforced*, 119 F.2d 131 (7th Cir. 1941).

[28] Jimmy-Richard Co., 210 N.L.R.B. 802 (1974), *enforced*, 527 F.2d 803 (D.C. Cir. 1975).

[29] Adams Derry, Inc., 137 N.L.R.B. 815 (1962), *modified*, 332 F.2d 553 (8th Cir. 1963), *vacated*, 379 U.S. 644 (1965), *on remand*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[30] Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965).

[31] Gallencamp Stores Co. v. N.L.R.B., 402 F.2d 525 (9th Cir. 1968).

[32] *Id.*

[33] N.L.R.B. v. Boss Manufacturing Co., 118 F.2d 187 (7th Cir. 1941).

[34] *Id.*

[35] N.L.R.B. v. Laney and Duke Storage Warehouse Co., 269 F.2d 859 (5th Cir. 1966).

The Board and courts have held numerous subjects to be encompassed by the phrase "other terms and conditions of employment."[36] In general, all subjects which materially or significantly affect the terms and conditions of employment are mandatory subjects of bargaining. However, certain exceptions to this general rule have evolved. In *First National Maintenance Corp. v. N.L.R.B.*,[37] the Court set forth a balancing test regarding an employer's duty to bargain over certain business decisions.

First National Maintenance Corp., involved an employer who operated a commercial maintenance business. They would contract with clients to provide workers in return for reimbursement of labor costs and the payment of a management fee. The employer cancelled this contract with one of its customers due to a disagreement over the management fee. The employer failed to bargain over either the decision to cancel the contract or its impact on the employees' terms and conditions of employment.

The employer conceded to the Supreme Court that it had a duty to bargain over the impact of its decision to cancel the contract.[38] Thus, at issue was whether an economically motivated decision to shut down part or all of the business is a mandatory subject of bargaining. Under the facts of this case, the Court held the employer's decision to cancel the contract was not a mandatory subject of bargaining. In so holding, the court formulated the following balancing test:

> [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.[39]

The balancing test set forth in *First National Maintenance Corp.* closely followed the approach the Court took in *Fibreboard Corp. v. N.L.R.B.*,[40] particularly Justice Stewart's concurring opinion. *Fibreboard Corp.* involved the negotiability of an employer's decision to subcontract part of its operation. The Court held, under the facts involved, the decision to subcontract constituted a mandatory subject for bargaining even though the decision was not motivated by any anti-union animus. In a now often quoted passage, Justice Stewart commented on the scope of bargaining in his concurring opinion:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of

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[36] *See* C. MORRIS, THE DEVELOPING LABOR LAW 800-44 (2d ed. 1983).
[37] 452 U.S. 666 (1981).
[38] *Id.* at 677 n.15.
[39] *Id.* at 679.
[40] 379 U.S. 203 (1964).

> entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessary to terminate employment. If, as I think clear, the purpose of §8(d) is to describe the limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[41]

Although an employer may not have to bargain over a particular management decision because such decision lies at the "core of entrepreneurial control," if the effects or impact of that decision substantially affect the wages, hours, or other terms and conditions of the employment relationship, the employer must bargain over the impact its decision will have on the employees' conditions of employment. This decision-impact bargaining dichotomy was first developed by the Board[42] and has been adopted by the courts, including the United States Supreme Court. In *First National Maintenance Corp.*, the Court stated:

> There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as a part of the 'effects' bargaining mandated by §8(a)(5). And, under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time. . . .[43]

B. Public Sector Collective Bargaining Under Michigan's Public Employment Relations Act

The Michigan legislature modeled its Public Employment Relations Act[44] after the NLRA. Section 423.215 of the Michigan Compiled Laws defines the duty to bargain collectively:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, in the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The Michigan courts have recognized the similarities of the PERA and NLRA and consequently rely on federal case law interpreting the NLRA

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[41] *Id.* at 223 (Stewart, J., concurring).

[42] *See generally* C. MORRIS, THE DEVELOPING LABOR LAW 821 (2d ed. 1983).

[43] *First National Maintenance Corp.*, 452 U.S. at 681-82.

[44] Mich. Comp. Laws Ann. §§ 423.201-.216 (West Supp. 1983-84) [hereinafter referred to as "the PERA"].

in applying the PERA. In *Detroit Police Officers Association v. City of Detroit*,[45] the Michigan Supreme Court stated:

> Although we cannot state with certainty, it is probably safe to assume that the Michigan Legislature intentionally adopted Section 15 PERA [Mich. Comp. Laws Ann. §423.215 (West Supp. 1983-84)] in the form that it did with the expectation that MERC [Michigan Employment Relations Commission] and the Michigan courts would rely on the legal precedence developed under NLRA, Section 8(d) to the extent that they apply to public sector bargaining.[46]

Relying on federal law, the court stated:

> The primary obligation placed upon the parties in the collective bargaining setting is to meet and confer in good faith. The exact meaning of the duty to bargain in good faith has not been rigidly defined in the case law. Rather, the courts look to the overall conduct of a party to determine if it has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement. The law does not mandate that the parties ultimately reach agreement, nor does it dictate the substance of the terms on which the parties must bargain. In essence the requirements of good faith bargaining is simply that the parties manifest such an attitude and conduct that will be conducive to reaching an agreement.[47]

In determining the negotiability of a subject, the Michigan Employment Relations Commission,[48] the state agency counterpart to the Board, and Michigan courts look to federal law to determine the scope of the phrase "wages, hours, and other terms and conditions of employment." In *Van Buren Public School District v. Wayne County Circuit Judge*,[49] the court was asked to determine whether a school district's decision to subcontract its school busing operation, at one time performed by bargaining unit members, was a mandatory subject of bargaining. The Michigan Court of Appeals found the United States Supreme Court decision in *Fibreboard Corp.*,[50] to be controlling. As in *Fibreboard Corp.*, the court in *Van Buren* found the decision to subcontract a mandatory subject of bargaining. First, the subject matter was within the literal meaning of the phrase "terms and conditions of employment." Second, the mandatory determination effectuated one of the primary purposes of the PERA, i.e., to "provide for the mediation of grievances." Finally, just as the Supreme Court in *Fibreboard Corp.* found the decision to subcontract did not lie at the "core of entrepreneurial control," the court in *Van Buren* found that requiring the school district to bargain

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[45] 391 Mich. 44, 214 N.W.2d 803 (1974).

[46] *Id.* at 53, 214 N.W.2d at 808.

[47] *Id.*

[48] Michigan Employment Relations Commission [hereinafter referred to as "MERC"].

[49] 61 Mich. App. 6, 232 N.W.2d 278 (1975).

[50] *See supra* text accompanying notes 40-41.

over the decision to subcontract the busing operation would not hamper the District in the management of its "business."[51]

Although relying on federal case law to determine negotiability, the Michigan courts have made clear that the phrase "wages, hours, and other terms and conditions of employment" must be more expansively construed than the NLRA counterpart due to the provision in the PERA forbidding public employees from striking.[52] According to the courts, this liberal construction is necessary to adequately protect public employees' rights.[53]

Recently, the Michigan Court of Appeals summarized the evolution of the mandatory subject of bargaining test in Michigan as follows: "Determination of what are mandatory subjects of bargaining is done on a case-by-case basis. The test generally applied is whether the matter has a significant impact upon wages, hours, or other conditions of employment, or settles an aspect of the employer-employee relationship."[54] In addition, Michigan also follows the decision-impact bargaining example of federal NLRA law.[55]

The difference between the approach taken by states, such as Michigan, which follow the federal private sector collective bargaining example and states, such as Wisconsin, which recognize differences between public and private sector collective bargaining, is highlighted by the Michigan courts' analysis in cases deciding negotiability in the education environment. In *Central Michigan University Faculty Association v. Central Michigan University*,[56] the court held that university faculty evaluation procedures were mandatory subjects of bargaining. In so doing, the court rejected the university's contention that the nature of public employment alters the scope of the collective bargaining obligation of an institution of higher education. The court did state: "[T]he scope of collective bargaining is limited only if the subject matter 'falls clearly within the educational sphere.' "[57] The court, however, narrowly construed this exception to negotiability and, in any event, this "educational policy" exception applies only to institutions of higher education, not primary and secondary school systems.[58]

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[51] 61 Mich. App. at 31, 232 N.W.2d at 290.

[52] Mich. Comp. Laws Ann. § 423.202 (West 1978).

[53] Detroit Police Officers Association v. City of Detroit, Police Department, 61 Mich. App. 487, 491, 233 N.W.2d 49, 51 (1975); *Van Buren*, 61 Mich. App. at 27, 232 N.W.2d at 288.

[54] City of Detroit v. Michigan Council 25, 118 Mich. App. 211, 215, 324 N.W.2d 578, 580 (1982).

[55] Local 1277, Metropolitan Council No. 23, AFSCME v. Center Line, 414 Mich. 642, 658-661, 327 N.W.2d 822 (1982). *See supra* text accompanying notes 42-43.

[56] 404 Mich. 268, 273 N.W.2d 21 (1978).

[57] *Id.* at 282, 273 N.W.2d at 27.

[58] The "educational sphere" exception did not develop out of a recognition of the public policy

Although appearing to recognize a limited "education sphere" exception to the scope of public sector collective bargaining, the Michigan Court of Appeals recently affirmed Michigan's adherence to federal private sector principles. In *West Ottawa Education Association v. West Ottawa Public Schools Board of Education*,[59] the court held a school district's decision to drop a dance class was a permissive subject of bargaining. In so holding, however, the court relied primarily upon the analysis set forth by the United States Supreme Court in *First National Maintenance Corp.*[60] "The board's decision to drop the dance class for economic reasons is analogous to the partial closing of a business."[61] The court did make reference to a Michigan Supreme Court decision[62] where the court "commented that matters of curriculum determination presumably are not mandatory subjects of bargaining."[63]

Although the court stated the decision was related to the district's right to determine curriculum, it implied the right to unilaterally drop the dance class was related more to the fact that curriculum decisions were reserved to the district in the collective bargaining agreement than the fact that curriculum decisions are non-negotiable as a matter of "education policy."[64] By not clearly stating that curriculum decisions, such as the decision to drop the dance class, are clearly within the sphere of "education policy" and thus a permissive subject of bargaining, the court demonstrated its continued tendency to adhere to private sector collective bargaining principles which tend to favor negotiability over non-negotiability.

C. *The Duty to Bargain Under Wisconsin's Municipal Employment Relations Act*

In constrast to public sector negotiability in Michigan, the Wisconsin Legislature and courts have recognized differences between the employer-

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differences between a private sector employer and a school district. Rather, the exception is a judicial accommodation to the apparent conflict existing between the PERA and Article VIII, Section 5 of the Michigan Constitution which gives autonomy to state universities. Regents of the University of Michigan v. MERC, 389 Mich. 96, 204 N.W.2d 218 (1973).

[59] 126 Mich. App. 306, 337 N.W.2d 533 (1983).

[60] *See supra* text accompanying notes 37-41.

[61] *West Ottawa Education Association*, 126 Mich. App. at 323, 337 N.W.2d at 542.

[62] *Id.* at 314, 337 N.W.2d at 533 (citing Local 1277 Metropolitan Council No. 23, AFSCME v. Center Line, 414 Mich. 642, 327 N.W.2d 822 (1982).

[63] *West Ottawa Education Association*, 126 Mich. App. at 325, 337 N.W.2d at 543 (citing *Local 1277*, 414 Mich. at 662, 327 N.W.2d at 830).

[64] "The decision related to the board's right to determine cirriculum, a right which was exclusively retained by the school district in § 3.01 of the parties' master agreement. *Id.* at 326, 337 N.W.2d at 543.

employee relationship in the private sector and the public sector. The Wisconsin Legislature recognized this fact by placing management rights language and a statement recognizing the unique responsibility of a public employer in the statute. Section 111.70(1)(d) of the Wisconsin Statutes provides:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment . . . with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government in good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter.

The insertion of management rights language and the express recognition by the legislature of the unique responsibilities of a public employer have greatly influenced negotiability determinations by the Wisconsin Employment Relations Commission[65] and Wisconsin courts. In *Beloit Education Association v. WERC*,[66] the Wisconsin Supreme Court affirmed and approved the WERC's test for negotiability. A proposal "primarily related" to wages, hours and working conditions is a mandatory subject of bargaining on which both parties have a duty to bargain. A proposal that relates to educational policy and school management and operation is a permissive subject of bargaining. However, the impact of an educational policy decision which affects wages, hours and working conditions is mandatorily bargainable.[67]

In *Unified School District No. 1 of Racine County v. WERC*[68] the court highlighted the fundamental public policy differences between private and public employment. Like the NLRA case of *Fibreboard Corp.*[69] and the Michigan case of *Van Buren*,[70] *Racine County* involved a

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[65] Wisconsin Employment Relations Board [hereinafter referred to as "WERC"].

[66] 73 Wis.2d 43, 242 N.W.2d 231 (1976).

[67] *Id.* at 54.

[68] 81 Wis.2d 89, 259 N.W.2d 724 (1977).

[69] *See supra* text accompanying notes 40-41.

[70] *See supra* text accompanying notes 49-50.

decision by the District to subcontract.[71] In a prior case, the court had adopted the *Fibreboard Corp.* test in determinations of negotiability of subcontract decisions under Wisconsin's Employment Peace Act,[72] Wisconsin's private sector labor act.[73] The WERC argued the court should adopt the *Fibreboard* "change of direction" test for negotiability as had the Michigan Supreme Court in *Van Buren*; because the district's decision to subcontract its food service operation did not "change the basic direction" of the district's activities, the decision was a mandatory subject of bargaining.

Recognizing fundamental differences between collective bargaining in the public sector and in the private sector, the court rejected the "change of direction" test for public sector collective bargaining in Wisconsin. In so doing, the court gave importance to the legislature's inclusion in the definition of "collective bargaining" of management rights language[74] and the legislature's recognition of the unique concerns of a public employer.[75]

The court set forth two reasons why the legislature would distinguish between collective bargaining in the public sector and the private sector. First, whereas in the private sector, "union demands are usually checked by the forces of competition and other market pressures," in the public sector such limitations "are either nonexistent or very much weaker."[76] Second, whereas in the private sector, collective bargaining is "limited by the need to protect the 'core of entrepreneurial control,' particularly power over the deployment of captial," in the public sector, "the principal limit on the scope of collective bargaining is the concern for the integrity of political processes."[77] The court stated:

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[71] The case involved a decision to subcontract a food service program.

[72] Wis. Stat. §§ 111.01-.19 (1981-82).

[73] In Libby, McNeill & Libby v. WERC, 48 Wis.2d 272, 283, 284, 179 N.W.2d 805 (1970), the court stated: "[M]ost management decisions which change the direction of the corporate enterprise, involving a change in capital investment are not bargainable. . . . The test . . . is whether the decision was won which changed the basic direction of the company's activity."

[74] "The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions effects the wages, hours and conditions of employment of the employees." Wis. Stat. § 111.70(1)(d) (1981-82).

[75] "In creating this subchapter [the MERA] the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government in good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employees by the constitutions of this state and of the United States and by this subchapter." *Id.*

[76] *Racine County*, 81 Wis.2d at 98, 259 N.W.2d at 730 (quoting Hortonville Education Association v. Joint School District No. 1, 66 Wis.2d 469, 485, 225 N.W.2d 658 (1975), *rev'd on other grounds*, 426 U.S. 482 (1976)).

[77] *Id.* at 99, 259 N.W.2d at 730.

> In municipal employment relations the bargaining table is not the appropriate forum for the formulation or management of public policy. Where a decision is essentially concerned with public policy choices, no group should act as an exclusive representative; discussion should be open; and public policy should be shaped to the regular political process. Essential control over the management of the school district's affairs must be left with the school board, the body elected to be responsible for those affairs under state law.[78]

The court then reaffirmed the principal set forth in *Beloit Education Association*, stating:

> The question is whether particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people. This test can only be applied on a case-by-case basis, and is not susceptible to "broad and sweeping rules that are to apply across the "board to all situations. . . ."[79]

Applying this standard, the court found the decision to subcontract the food service program was a mandatory subject of bargaining. The approach set forth in *Beloit* and *Racine County* has been consistently reaffirmed by Wisconsin courts.[80]

III. Negotiability of the Commission's Recommendations

A. Commission's Recommendations Which Are Mandatory Subjects of Bargaining

Three of the Commission's recommendations easily fall within the category of mandatory subjects of bargaining. The recommendations calling for lengthening the work day to seven hours and lengthening the school year to 210 or 220 days are encompassed by the term "hours." Likewise, the proposal calling for increased teacher salaries and the proposal calling for a pay differential in shortage areas are encompassed by the term "wages."

Thus, if a district proposes to lengthen the work day and/or lengthen the school year, the parties must bargain in good faith over such proposals. If the district expects to reach voluntary agreement on these proposals, it will have to satisfy association members, most likely by increased wages or fringe benefits or improved working conditions.

Likewise, if an association proposes to increase teacher salaries so that they are "professionally competitive" and "market-sensitive," a district

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[78] *Id.* at 99-100, 259 N.W.2d at 730-31.

[79] *Id.* at 102, 259 N.W.2d at 731-32.

[80] *See, e.g.*, Blackhawk Teacher's Federation Local 2308 v. WERC, 109 Wis.2d 415, 326 N.W.2d 247 (1982).

will have to bargain in good faith over such a proposal. Due to the fiscal constraints on district budgets, agreement over substantial salary increases appears troublesome. However, in order to voluntarily achieve many of the other recommendations of the Commission, districts will no doubt have to increase the salary scales of teachers or otherwise offer a *quid pro quo* for what some teachers will see as concessions to the district.

Also, a district would have to bargain in good faith over a proposal to give a pay differential to teachers in areas where a sufficient number of trained teachers are temporarily unavailable. Currently, such areas include mathematics and the sciences. Presently, the large majority of teachers' salaries are determined by years of experience and level of education; there are generally no individual salary adjustments related to merit or subjects taught. In order to achieve such a proposal, a district would have to justify the need for the pay differential to both the association and the public. In response, an association would most likely try to obtain some advantage for its members such as salary increases for all teachers or economic incentives for present teachers to become certified in the scarce subject areas and thus be qualified for the higher paying positions. However, in light of unions' historical propensity to protect and advocate for the rights of the majority, it is unlikely that an asssociation would have an immediate propensity to agree to such a proposal.

The negotiability of the remaining five recommendations is not as clear. Consequently, each recommendation will be analyzed under the principle of both Michigan and Wisconsin public sector collective bargaining law.

B. Negotiability of the Commission's Recommendations Under Michigan's PERA

Neither the Michigan courts nor MERC have directly determined the negotiability of any proposals related to the recommendations made by the Commission. The courts have continued to adhere closely to NLRA private sector collective bargaining principles with the caveat that Michigan courts take a more liberal approach than federal courts in determining negotiability of particular subjects since public employees are forbidden to strike under the PERA.[81] As the court of appeals recently stated:

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[81] *See supra* text accompanying notes 51-52.

> Any matter which has a material significant impact upon wages, hours or other conditions of employment or which settles an aspect of the relationship between employer and employee is a mandatory subject, except for management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security.[82]

1. Increase student-teacher contact time.

Although neither MERC nor a Michigan court has directly decided the negotiability of an increase in required student-teacher contact time, such a proposal may likely be found a mandatory subject of bargaining.[83] Even assuming that the length of the school day would remain the same, increased student contact time would increase a teacher's workload. Not only would the amount of daily preparation time available during the school day necessarily decrease, the actual preparation time needed to meet the increased student contact time requirement would arguably increase. This fact, in conjunction with Michigan's liberal view of "wages, hours and other terms and conditions of employment", could render a proposal regarding increased student contact time a mandatory subject of bargaining.

Thus, a district could not unilaterally implement a rule increasing the amount of required student contact time. Rather, before deciding to implement such a rule, the district would have to bargain in good faith regarding the rule with the association.

2. More homework should be assigned to high school students.

The negotiability of a rule providing that more homework must be assigned to high school students is not clear from an application of Michigan law. In favor of negotiability, it could be argued that the primary effect of such a provision would be to increase teacher work load, i.e., a teacher would have more homework to correct and grade. In favor of such a provision being a permissive subject of bargaining, it could be aruged that such a rule would have only a de minimis impact upon wages, hours or other conditions of employment and would have no effect at all upon employment security.

If found to be a mandatory subject of bargaining, a district could not unilaterally implement such a rule but rather would have to first bargain in good faith over the rule with the association. However, if found to be a permissive subject of bargaining, the district could unilaterally decide to implement such rule. Before actually implementing the rule the district

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[82] West Ottawa Education Associaiton v. West Ottawa Public Schools Board of Education, 126 Mich. App. 306, 322, 337 N.W.2d 533, 542 (1983).

would have to bargain in good faith with the association over the impact such a rule would have on the wages, hours and other conditions of employment of the teachers.[83]

3. Instruction in study and work skills should begin in the early grades and continue throughout a student's schooling.

Even under Michigan law, a rule requiring a greater emphasis in study and work skills would be a permissive subject of bargaining. The implementation of such a rule would have only a de minimis impact, if any at all, on the working conditions of a teacher. In addition, such a rule has no impact on a teacher's job security. Thus, a district could unilaterally decide to implement such a rule but would be required to bargain in good faith over the impact, if any, the rule would have on a teacher's working conditions.

4. School districts should utilize a more comprehensive teacher evaluation system.

The Commission recommended districts tie all teacher employment decisions, such as salary, promotion, tenure and retention decisions, to a more comprehensive teacher evaluation system. The Commission also recommended the evaluation process include reviews by fellow teachers. Under Michigan law, teacher evaluation procedures upon which employment decisions are made are a mandatory subject of bargaining. In *Central Michigan University Faculty Association v. Central Michigan University*,[84] the court stated regarding a university evaluation system: "[T]he procedures and criteria adopted affect the retention, tenure and promotion of faculty members. These are clearly matters within the employment sphere, crucial to the employer-employee relationship."[85]

Likewise, a proposal requiring peer review be incorporated into the evaluation process would also be a mandatory subject of bargaining. In *Central Michigan University Faculty Association*, the court held that the university committed an unfair labor practice by unilaterally adopting a teacher effectiveness program providing that faculty members would be evaluated by both students and other department faculty and that departmental recommendations regarding reappointment, promotion and tenure would be accompanied by evidence of teaching effectiveness. The

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[83] Although MERC has stated that it has never held teacher-work assignments or reassignments to be mandatory subjects of bargaining, this statement referred to classroom or school building assignments. Grass Lake Community Schools Board of Education, 1978 MERC Lab. Op. 1186, 1190.

[84] 404 Mich. 268, 273 N.W.2d 21 (1978).

[85] *Id.* at 282, 273 N.W.2d at 27.

court rejected the university's contention that the incorporation of student evaluations into the criteria for faculty promotion and retention was a matter of educational policy. Thus, the identity of the evaluators appears to be a mandatory subject of bargaining.

A related issue involves whether the teachers participating as evaluators would remain in the bargaining unit. One of the recommendations of the Commission is for districts to provide for three classes of teachers, culminating in a class of "master teachers." These master teachers would have some supervisory responsibility for the development of other teachers and thus, in some circumstances, could be excluded from the bargaining unit.

Neither the Michigan courts nor MERC have decided a case factually similar to the master teacher system recommended by the Commission. However, MERC has decided some cases which shed light on the bargaining unit question.

East China Township Schools,[86] involved a part-time teacher who also served as a part-time "Dean of Students." The individual had some administrative authority over the school building and students and had full control over most after school extra-curricular activities, including supervisory authority over any teachers or voluntees who helped out with such activities. Although the individual had no supervisory authority over teachers performing their regular teaching functions, MERC held the individual was a supervisor and thus excluded from the bargaining unit.

Although a non-teaching area case, *Dryden Community Schools and Dryden Bus Drivers Association*,[87] is also relevant to this issue. The case involved a bus driver who worked predominantly as a lead worker and served as the liaison between the administration and various bargaining unit employees. Holding this employee was not a supervisor, MERC stated: "The occasional use of independent judgment in direction given to others or as to tasks performed does not, necessarily, confirm supervisory status, but, more generally, reflects status as a senior or experienced employee."[88] This statement may be an indication of MERC's attitude towards the experienced employee who assumed a leadership role within the bargaining unit but does not necessarily have sufficient conflicts with fellow bargaining unit employees to be excluded from the unit.

Thus, the amount of discretion and final authority given to the master teacher will have a significant impact on the outcome of the unit clarification issue. Whether such discretion should be given to master teachers will depend on the individual circumstances of each case, in

[86] 1981 MERC Lab. Op. 579.
[87] 1982 MERC Lab. Op. 821.
[88] *Id.* at 830.

cluding whether the district is interested in exclusion of the particular individual from the existing bargaining unit.

5. Utilization of non-certified professionals to teach in areas where a sufficient number of trained teachers are temporarily unavailable.

The Commission recommended using non-certified professionals to teach in areas in which there is currently a shortage of trained teachers. These subject areas presently include the sciences and mathematics. Such a proposal raises several questions in addition to the negotiability issue. First, several states require teachers to be certified. Such laws would first have to be amended in order to implement the Commission's proposal.

The negotiability of such a proposal is not clear. Associations would argue that the hiring of non-certified professionals to teach in shortage areas is a subcontracting issue or analogous to subcontracting. The non-certified professionals would be filling jobs historically performed by members of the bargaining unit. In Michigan, the association would argue that under the prinicples set forth in *Van Buren*,[89] the decision to hire non-certified professionals to teach in shortage areas is a mandatory subject of bargaining.

Conversely, a district could unilaterally set minimum job requirements which differ from ordinary teacher positions and argue that a new position has been created. For example, a district could set a requirement that all applicants for the position of a physics teacher have at least eight years experience as a physicist in private industry. In Michigan, the district would argue that the decision to create the non-certified position does not have a material significant impact upon the wages, hours or other conditions of employment of association members; present association members are not being displaced, rather a new position with different qualifications than ordinary teacher positions has been created.

Another issue raised by the Commission's proposal to utilize non-certified professionals is the bargaining unit status of the non-certified professionals. Michigan examines such factors as similarity of wages, hours and working conditions, interchangeability or frequency of contact among the employees, common supervision and the presence or absence of a community of interest between the employees in determining the appropriateness of a bargaining unit in the school district setting. In *Grand Rapids Public Schools*,[90] teacher aides contended they should be included in the teacher's bargaining unit because many of them possessed teaching

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[89] *See supra* text accompanying notes 49-51.

[90] 1981 MERC Lab. Op. 972.

licenses and certifications and therefore shared a community of interest with full-time regular teachers. Finding that licensing and certification were not requirements for the position, MERC held that there was no community of interest between the teacher aides and teachers and thus dismissed the teacher aides' petition.

Applying the above factors to the Commission's proposal, it appears as though the non-certified professionals would be excluded from the teacher's bargaining unit. Presumably, non-certified professionals will be more interested in high pay and a flexible schedule to pursue other interests they may have in their field. Unlike regular teachers, their focus will not be on long term employment security.

C. *Negotiability under Wisconsin's Municipal Employment Relations Act*

Unlike Michigan, the Wisconsin courts and the WERC have specifically addressed the negotiability of several of the Commission's recommendations.

1. Increased student-teacher contact time.

In *Blackhawk Teachers' Federation v. WERC*,[91] the Wisconsin Court of Appeals affirmed a WERC ruling holding a provision relating to student contact time was a permissive subject of bargaining.[92] Applying the "primarily related to" test set forth by the Wisconsin Supreme Court in *Beloit Education Association*,[93] the WERC held the provision permissive because "it relates to education policy and is not primarily related to wages, hours and working condtions."[94] The court of appeals affirmed, stating: "The time spent in direct student contact affects the quality of education, which is a matter of education policy."[95]

Although the decision regarding student-teacher contact time is a permissive subject of bargaining, the impact upon the conditions of employment of teachers is most likely a mandatory subject of bargaining. Although the issue was not addressed in *Blackhawk Teachers' Federation*, the supreme court did hold in *Beloit Education Association*, that although the decision regarding class size is a permissive subject of bargaining, the impact of class size, as it affects wages, hours and conditions

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[91] 109 Wis.2d 415, 326 N.W.2d 247 (Ct. App. 1982).

[92] The proposal read as follows: "Student Contact Period—Fifty-three (53) minutes of instruction time devoted to instruction in the presence of the student." *Id.* at 430, 326 N.W.2d at 255.

[93] *See supra* text accompanying notes 66-67.

[94] *Blackhawk Teachers' Federation*, 109 Wis.2d at 430, 326 N.W.2d at 255.

[95] *Id.* at 431, 326 N.W.2d at 255. *See also* Milwaukee Board of School Directors, No. 20093-A (WERC February 28, 1983) (student contact time held to be permissive subject of bargaining).

of employment, is a mandatory subject of bargaining.[96] Similarly, the impact of student contact time on wages, hours and conditions of employment would also be a mandatory subject of bargaining.

Thus, a school district could unilaterally implement a change in student-teacher contact time policies. However, the district would have to bargain in good faith with the association over the impact of the new policy on the wages, hours and conditions of employment of teachers.

2. More homework should be assigned to high school students.

Although neither the Wisconsin courts nor the WERC have determined the negotiability of a proposal regarding homework assignments, such a proposal would most likely be held to be a permissive subject of bargaining. Under the Wisconsin test, it can be said that homework assignment is primarily related to education policy.

However, the volume of homework assignments also has an impact on the employment conditions of teachers; increased homework assignments will naturally increase the amount of time teachers must spend correcting and grading homework assignments. Thus, although the district may unilaterally adopt a rule regarding homework assignments, the district must bargain in good faith over the impact the implementation of the rule will have on wages, hours and conditions of employment of the teachers.

3. Instruction in study and work skills should begin in the early grades and continue throughout a student's schooling.

Curriculum matters are clearly within the scope of educational policy and thus are permissive subjects of bargaining. In *Beloit Education Association*, the Association claimed its proposal regarding a school reading program was intended to enhance and expand students' reading skills.[97] The court affirmed the WERC's holding that the proposal was primarily related to educational policy and thus a mandatory subject of bargaining. The court also affirmed the WERC's holding that the impact of the reading program, if established, upon the teacher's wages, hours and working conditions is a subject of mandatory bargaining.[98] Similarly, a

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[96] *Beloit Education Association*, 73 Wis.2d at 64, 242 N.W.2d at 241.

[97] The proposal stated: "The Board and the Association agree that each child shall have the opportunity to enhance and expand reading skills necessary to allow a child to reach his optimum reading expectancy level. Therefore, the Board agrees to assess the reading achievement and the native ability of each child annually. These figures shall be made available to the Association. The necessary staff, materials and programs shall be furnished for the child found to be one or more years below his optimum reading expectancy level, to remedy his reading deficit." *Id.* at 64 n.38, 242 N.W.2d at 241 n.38.

[98] *Id.* at 64-65, 242 N.W.2d at 241.

proposal regarding increased emphasis on study and work skills would be a permissive subject of bargaining.

However, the impact of such a policy upon the teacher's wages, hours and working conditions is a mandatory subject of bargaining. Thus, a district has the right to make a decision, unencumbered by the collective bargaining process, to increase the emphasis on study and work skills. Prior to the implementation of such policy, the district would have to bargain in good faith with the Association regarding the impact such policy will have upon teacher's wages, hours and working conditions.

4. School districts should utilize a more comprehensive teacher evaluation system that includes peer review.

As stated by the court in *Beloit Education Association*, "[o]bviously the area of teacher evaluation relates to 'management and direction' as well as to 'wages, hours and conditions of employment.' "[99] In *Beloit Education Association*, the court determined the negotiability of several proposals relating to teacher evaluations. The WERC had held that the decisions as to who was to evaluate teacher performance and the type of assistance, if any, given to teachers with poor evaluations, were primarily related to educational policy and thus were permissive subjects of bargaining. As to other proposals regarding evaluation procedures,[100] the WERC found they were primarily related to wages, hours and conditions of employment and thus were mandatory subjects of bargaining. The court affirmed the WERC's holdings as to teacher evaluation systems in all respects. Although the court did not so state, the impact on teachers' wages, hours and conditions of employment of the proposals held to be permissive subjects of bargaining, would also be mandatory subjects of bargaining.

The Commission recommended that all teacher employment decisions, such as salary levels, promotion, tenure and retention decisions, should be tied to a more utilized and comprehensive teacher evaluation system. Thus, as stated by the Commission, "superior teachers can be rewarded, average ones encouraged, and poor ones either improved or terminated." As the court recognized in *Beloit Education Association*, the substance of and procedures followed in evaluations "go to the right of teachers to

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[99] *Id.* at 56, 242 N.W.2d at 237.

[100] The court summarized these proposals as follows: "(1) Orientation of new teachers as to evaluative procedures and techniques; (2) Length of observation and openness of observation; (3) Number and frequency of observatons; (4) Copies of observation reports and conferences regarding same, and teachers' objections to evaluations; and (5) Notification of complaints made by parents, students and others." *Id.* at 55 n.16, 242 N.W.2d at 237 n.16.

have notice and input into procedures that affect their job security."[101] Thus, before a district could even decide to implement a more comprehensive evaluation system to which salary, i.e., "merit pay," promotion and retention decisions were tied, a district would have to bargain in good faith with the Association over such policy decisions.

The Commission also recommends that evaluations include "peer review." The court made clear in *Beloit Education Association*, that the identity of the evaluators was primarily related to educational policy and thus was a permissive subject of bargaining. Thus, if an association proposal included teacher evaluations by co-teachers, the district would have no obligation to discuss such a proposal with the Association.

Regarding whether master teachers would be in the bargaining unit, Wisconsin's approach indicates they may be excluded from the bargaining unit under appropriate circumstances. The WERC recently summarized the factors they consider in determining whether supervisory status warrants exclusion from the bargaining unit. These factors include:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
2. The authority to direct and assign the work force.
3. The number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees.
4. The level of pay including an evaluation of whether the supervisor is paid for his or her skill or for his or her supervision of employees.
5. Whether the supervisor is primarily supervising an activity or is primarily supervising the employees.
6. Whether the supervisor is a working supervisor or whether he or she spends a substantial majority of his or her time only supervising employees.
7. The amount of independent judgment exercised in the supervision of employees.[102]

In a fact situation analogous to the master teacher role envisioned by the Commission, the WERC excluded Reading Instruction Resource Specialists from an existing bargaining unit based on their supervisory duties. In *Milwaukee Board of School Directors*,[103] the WERC found the specialists assisted the principal in evaluating teachers, had the power to effectively recommend changes in reading techniques, recommended transfer for teachers within the district, attended supervisory meetings

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[101] *Id.* at 56, 242 N.W.2d at 237.

[102] *See* City of New Berlin, No. 13173-B (WERC August 25, 1983).

[103] No. 13787 (WERC July 7, 1975).

where personnel policies of it school district were discussed and had day-to-day control over approximately twenty teachers. Based on these findings, the WERC excluded the specialists from the existing bargaining unit.

However, in *Handicapped Children's Education Board—Outagamie County*,[104] the WERC determined that a principal and assistant principal were not supervisors and thus not excluded from the bargaining unit. The WERC found these teachers carried full teaching loads, had only minor administrative duties and had no authority to recommend action relative to discipline, discharge or other action towards employees.

Thus, in Wisconsin, as in Michigan, the amount of discretion vested in master teachers and the weight given to the master teacher's recommendation will significantly affect the outcome of the unit clarification case. If the duties and powers of the master teacher are narrowly drawn, the chances of inclusion in the bargaining unit increase. Using master teachers in only an advisory role may keep them in their existing bargaining unit.

5. Utilization of non-certified professionals to teach in areas where a sufficient number of trained teachers are temporarily unavailable.

As in Michigan, the negotiability of the decision to hire non-certified professionals to teach in shortage areas is not clear. Associations would argue it is a subcontracting issue and thus under *Racine County*[105] such a decision is a mandatory subject of bargaining. School districts would argue that they merely created new positions with minimal requirements different from those of other teaching positions and thus need only bargain over the impact, if any, of such a decision on the wages, hours and other conditions of employment of the association members.

Regarding the bargaining unit status of the non-certified professionals, the approach of the Wisconsin courts and WERC may be similar to that used in *Arrowhead United Teachers Organization v. WERC*,[106] in which the Wisconsin Supreme Court held separate bargaining units for student interns and professional teachers were appropriate. The court relied on the substantial difference in community of interests between student interns and professional teachers. The teacher interns received less money, had fewer teaching assignments and did not have an expectation to be

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[104] No. 13390 (WERC February 27, 1975).
[105] *See supra* text accompanying notes 68-79.
[106] 116 Wis.2d 580, 342 N.W.2d 709 (1984).

hired as a regular teacher upon completion of their internship. Whereas the professional teachers were interested in career length employment security, the interns were more interested in maximizing opportunities for learning, training, practice and eventual hire in another district. Because of this difference in long-term goals, the court determined separate bargaining units were appropriate.

Similarly, the non-certified professional may be entitled to a separate bargaining unit but inclusion in existing units may not be appropriate. The Commission's proposal appears to be only a temporary measure; as soon as more teachers become available in the shortage areas, the use of the non-certified professionals would be discontinued. Thus, unlike regular teachers, the non-certified professionals' employment focus will not be on long-term job security. Rather, the non-certified professionals will be more interested in high pay and a flexible schedule to pursue other interests they may have in their field. Based on these differences, non-certified professionals may be excluded from the teachers' bargaining unit.

IV. When Deadlock Is Reached: Impasse

The question of negotiability arises again when the parties have completed the obligation to bargain in good faith, no agreement has been reached and they are at "impasse." At this point, the situation generally will become politically and emotionally troublesome if important issues are involved. Also, any available statutory impasse procedures will regulate the process.

The issue of whether the parties are at impasse may, itself, be in dispute. In some states, Wisconsin for example, an investigator meets with the parties and officially resolves the question of whether impasse exists before further statutory impasse procedures are begun. Where this service is not provided, impasse is a question of fact to be resolved by litigation. The general test used by the N.L.R.B. to determine whether impasse exists is:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impass in bargaining existed.[107]

Where an employer reasonably believes impasse has been reached in negotiations, that employer may generally implement its final offer to the union. For example, if the employer's final offer was to expand the work

[107] Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967).

day to eight and one-half hours and the union rejected this proposal and an impasse resulted, the employer would ordinarily be free to require an eight and one-half hour day. However, implementing any more or any less than an eight and one-half hour day may result in a violation of the duty to bargain in good faith.[108]

Where the parties are negotiating a new contract, various statutory impasse provisions will impact on the process. The number and types of statutory procedures available to the parties are complex and varied. For the purpose of this article, we will deal with three main types of statutes: those which contain no mandatory procedures after impasse is reached; those which contain statutory impasse procedures resulting in a determination by a third party which is advisory only; and finally, those statutes which contain statutory impasse procedures resulting in an award binding upon the parties. The reader should consult the state statutes involved for specific guidance.

A. No Statutory Impasse Procedures

Assuming the parties are negotiating a new collective bargaining agreement and the prior collective bargaining agreement has already expired, a district may choose not to avail itself of the general rule allowing immediate implementation after impasse. This is true even where state statutes grant bargaining rights to teachers but contain no provision for statutory impasse procedures. Unilateral implementation of the employer's final offer on important issues such as evaluation systems or a longer work year may cause teachers to pursue a number of alternatives open to challenge the employer's decision.

For example, an unfair labor practice charge for violation of the duty to bargain in good faith may result. This charge may be grounded on allegations that impasse had not been reached or on factual situations which may have arisen during negotiations. A state court action grounded on an individual teacher contract, a tenure statute or a civil service statute may be available to the Association or its members. Where not prohibited by law, employees could begin some form of job action ranging from a work slowdown to a full-blown strike. This occurred under Michigan's PERA, resulting in years of litigation for both parties even though PERA prohibits strikes by teachers.[109] Depending on the relative economic strength of the employees and the employer, this may be a very effective tool.

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[108] Atlas Tack Corp., 226 N.L.R.B. 222 (1976).

[109] *See* Rockwell v. Board of Education, School District of Crestwood, 393 Mich. 616, 227 N.W.2d 736 (1975).

Possibly the most common alternative available to unions to block an employer's attempt to unilaterally implement its final offer where statutory impasse procedures do not exist is resort to political pressure on individual school board members. Commonly referred to as the "end run," unions will try to motivate members of the community and the teachers themselves to telephone, write, and discuss with school board members the wisdom of the union's position.[110] It is not uncommon for an employer to succumb to a well planned effort on this front by an articulate employee group.

B. Advisory Arbitration

Some state statutes grant bargaining rights to teachers and contain an impasse procedure referred to as fact finding or advisory arbitration. Here, the negotiability analysis becomes critical because differing treatment is given mandatory and permissive subjects of bargaining. The Iowa Public Employment Relations Act[111] is illustrative, although binding arbitration after advisory factfinding is available. The Iowa PERA precludes the parties from bringing a permissive subject of bargaining to factfinding. Therefore, where the Iowa Public Employment Relations Board[112] determines a proposal on student discipline is a permissive subject of bargaining,[113] the employer is free, under these statutory impasse procedures, to unilaterally implement its final offer on that issue. The union has no recourse under the statutory impasse procedures, but still has available the unfair labor practice, illegal strike, and end-run alternatives discussed above.

Where a proposal is considered mandatory, the employer must follow the statutory factfinding procedures to their completion prior to implementation. This will generally involve a hearing before a factfinder where the district must rationalize why it needs the changes it seeks. Factfinders and arbitrators rely heavily on:

> [c]omparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.[114]

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[110] Some state statutes prohibit direct negotiation between employees and elected leaders. *See, e.g.*, Iowa Code Ann. § 20.17(9) (West 1978).

[111] Iowa Code Ann. §§ 20.1-.30. (West Supp. 1983-84) [hereinafter referred to as the Iowa "PERA"].

[112] Iowa Public Employment Relations Board [hereinafter referred to as "PERB"].

[113] Bettendorf-Dubuque Community School District, PERB Nos. 598 and 602 (1976).

[114] Wis. Stat. § 111.70(4)(cm)7.d. (1982-83).

This heavy emphasis on the "comparables" results in a resistance by neutrals to rapid change. Where neighboring employers have not implemented a longer work day or work year, for example, it is doubtful a factfinder will award these changes without some other offsetting factor such as extreme need for such changes. Whether the Commission's recommendations will serve as evidence of need remains to be seen.

The narrow exception to this reluctance to rapid change is where the remainder of an employer's final offer to the factfinder is so much more reasonable than the union's final offer that the requested change becomes palatable. To fall within this exception, the employer may have to improve its final offer with substantial salary and benefit increases to get the factfinder to grant some of the changes suggested by the Commission. Even with an attractive final offer, neither party will be able to predict with any certainty the outcome of the factfinding process.

Should the factfinder issue an award in the employer's favor, the district would be in a position to unilaterally implement that recommendation unless binding arbitration is available after completion of the factfinding process. Even so, the employees would have a number of alternatives available to them to block this implementation. First, they might challenge the factfinder's decision based on improprieties in the factfinding process such as fraud or failure to consider the required statutory factors in rendering a decision. The employees may also consider some form of legal or illegal job action. The final avenue available to employees is the use of political influence to encourage the employer not to implement the factfinder's recommendations.

Should the factfinder choose the employees' position, the employer may choose to overlook the recommendation and, subsequently, unilaterally implement its last offer.

The availability of advisory arbitration or factfinding will not have a great impact upon unilateral implementation of permissive subjects of bargaining. Implementation of mandatory subjects of bargaining, however, will be delayed by operation of the statutory process. While the end result of this advisory process will have some impact on implementation, the intrusion into the employer's decision-making power is not as great as where binding arbitration exists.

C. Binding Arbitration

Binding arbitration takes different forms. The arbitrator may have the option to choose either parties' final offer on a total package basis or on a issue-by-issue basis. Alternatively, some states allow arbitrators to develop their own compromise between the offers of the parties.

While the type of binding arbitration available to the parties will dic-

tate specific strategies in each case, some generalizations about binding arbitration can be made for the purposes of this article. The parties submit a "final offer" to a single arbitrator or a panel of arbitrators. A hearing is held, and both sides present their case in an adversarial fashion. Briefs may be filed and the arbitrator will issue a decision based on various statutory factors. The types of factors considered by arbitrators can be illustrated by reference to Wisconsin's binding arbitration statutory language:

> Factors considered. In making any decision under the aribtration procedures authorized by this subsection, the mediator-arbitrator shall give weight to the following factors:
>
> a. The lawful authority of the municipal employer.
> b. Stipulations of the parties.
> c. The interest and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
> d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.
> e. The average consumer prices for goods and services, commonly known as the cost-of-living.
> f. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stabililty of employment, and all other benefits received.
> g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
> h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.[115]

Binding arbitration under statutes similar to Wisconsin have met a great deal of resistance from employers generally. Criticism includes allegations that the process tends to be unpredictable, insensitive to the needs of taxpayers, unduly dependent upon the comparables and, above all, costly. The arbitrators tend to be reluctant to award changes in the status quo, rely extensively on comparables and seldom award changes from the status quo absent strong monetary incentives included in the employer's final offer.

A final word about the distinction between mandatory and permissive subjects of bargaining is in order. Most statutory impasse procedures, binding and advisory, provide permissive subjects of bargaining need not

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[115] *Id.* at § 111.70(4)(cm)7.

be submitted to factfinding or arbitration. Mandatory subjects must be. Where there is any doubt about the permissive nature of a specific proposal, many states have provisions for declaratory rulings by the state agency or a court to make this determination.[116] Resort to these procedures may delay the arbitration process and ultimate implementation of the changes desired by the employer. Each district should consult its state's statutes for specific guidance in this area.

Where an employer attempts to achieve changes in binding arbitration and the arbitrator rules against the district, the employer will have few alternatives. The standard to overturn an arbitrator's award is very difficult to meet in most states. The employer would have to show fraud, collusion or lack of jurisdiction on the part of the arbitrator. The remedy may be an order to return to the arbitration process. The district could challenge the award based on the arbitrator's failure to consider all the statutory factors, but again, the remedy may be a return to arbitration. Given this remedy and the likelihood of a successful challenge to an arbitrator's decision adverse to the employer interests, such an award should be considered final.

Where an arbitrator issues a decision in favor of the employer, this decision would be binding on employees to the same extent as an adverse decision is binding on the employer. The standards for challenge and potential remedy would be the same, so the arbitrator's decision is final for both sides.

V. Conclusion: An Overview of the Problem

The Commission's objective in reforming the educational process in America's public school is laudable. However, different persons would view the Commission's recommendations for resolving the question of educational excellence in American as debatable. For example, a teacher advocate could argue the recommendations basically require individual teachers to assume the burden of correcting the purported ills of America's educational system through increasing their student contact time, work day and work year, as well as be subject to increased critical evaluations and termination based on subjective judgments by unknown evaluators chosen by the district. Finally, the Commission promotes the notion of merit pay for outstanding performance by teachers in lieu of the now traditional automatic step increases and across-the-board negotiated increases. The notion of merit pay has been objectional to most representatives of labor and teachers are no exception; subjective decisions by school districts over salary increases were one of the first ob-

[116] *See id.* at § 111.70(4)(b).

jects of collective bargaining and their demise is now a matter of history.

To the extent that Commission's recommendations are unacceptable to individual teachers, districts will most probably incur substantial difficulty in achieving changes. The difficulties districts will experience extend through the bargaining process to and including arbitration. If a teacher organization can show, for example, that a mere lengthening of the student day has no ascertainable connection to improved student learning, it is doubtful a factfinder or arbitrator will support a substantial increase in teacher workload under such an unproven assumption. The same analysis holds true for increasing the length of the school year and introducing merit pay for performance as well as linking job security to evaluations. Laudable as these objectives may appear, their underlying assumptions have not been proven and may not be supportable. Indeed, the Commission's recommendations are conspicuously silent with regard to proven facts which underlie assumptions giving rise to the recommendations. Perhaps for this reason alone teacher organizations will approach bargaining about the recommendations with skepticism. This skepticism must be overridden before a district can expect to achieve voluntary agreement on the recommendations.

In any event, it is probably safe to assume that teacher organizations will expect a substantial *quid pro quo* for such changes. As with bargaining historically, the medium of exchange will include economic advantages to teachers and other cost related improvements attractive to teacher organizations. In light of the difficult economic times for school districts throughout the country and the apparently dim future for improvement therein, one can assume little economic flexibility on the part of school boards. One option that may exist, however, is with early retirements which can actually generate salary savings. Unfortunately, school teacher negotiators are adept at calculating economic gains to employers and have historically sought accountability for each dollar saved by way of a concomitant increase in benefits to remaining teachers. It can be assumed that teachers will also look to iron-clad job security guarantees: for example, no-layoff guarantees or other job security measures which offset the perceived value in granting the concessions districts seek to meet the Commission's recommendations.

Factfinders and arbitrators are likely to adopt a view consistent with the employee organizations' view toward district oriented concessions such as increased work day or work year. Using criteria such as comparables or other appropriate factors, neutrals will no doubt be wary of granting radical changes without concomitant economic gains in favor of teachers. Even if the employer were to offer economic advantages in exchange for concessions, arbitrators or factfinders may nevertheless be re-

luctant to dictate such changes absent mutual agreement. Without hard evidence justifying the changes and the lack of data showing other districts which have achieved such changes, the arbitration avenue may be useless to the district.

Perhaps the safest advice for districts seeking to improve quality of education is to consider using current evaluation and supervisory procedures to achieve excellence in teaching through improving upon traditional methodology. Most districts have reserved to themselves the right to evaluate their teaching staff and this right can be a central force in achieving improved teacher excellence as well as attaining higher educational output to students. This techinque circumvents the necessity for decision bargaining on radical changes in evaluations as well as bargaining over increased hours of work and salary determinations. Another advantage of this approach is allowing districts ample time to dovetail changes in overtime so as to minimize disruption in the work place. If teacher evaluation is successful, it is logical to assume that many of the results, including termination of incompetent teachers, recommended by the Commission can be achieved without necessity for resort to the analysis provided by this article. If a district intends to achieve the changes promoted by the Commission, it should be aware of the rather unique labor relations issues involved and be prepared to deal effectively with them.