

OHIO STATE LAW JOURNAL

Volume 44, Number 4, 1983

Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees

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I. INTRODUCTION

In 1983 Ohio enacted a landmark public employee collective bargaining statute amid great heat and controversy.¹ The heat of the new law's creation resulted in the strongest administrative structure in the history of Ohio public administration, the new State Employment Relations Board.

Public employee collective bargaining is a well-established fixture in the great majority of states.² Proponents of the Ohio legislation testified that only those states with a history of anti-union animus had held firm against statutory recognition of public employee labor relations. Among the heavily industrialized, heavily unionized states, Ohio was exceptional in its political opposition to the cause of public sector bargaining. As a result of union efforts between 1963 and 1983³ there emerged the strongest public sector employee statute in the nation,⁴ and, to administer it, the strongest of the state labor relations agencies.⁵

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1. 1983 Ohio Laws 140 (to be codified at OHIO REV. CODE ch. 4117). The full text of the statute appears at 1983 OHIO LEGIS. BULL. 1119-47 (Anderson) and at 1983 OHIO LEGIS. SERV. 5-237 to -246 (Baldwin). Because the statute has not yet been printed in the supplement to either annotated Code, citations to individual sections of the new law will be given thus: OHIO REV. CODE § 4117.--. To achieve consistency with other sections of the Revised Code the new statute also amended §§ 124.02, .03, .05, and .08.

2. Thirty-nine states adopted public sector labor relations legislation before Ohio. Testimony of James Monroe, Counsel to the Ohio Civil Service Employees Association Before the House Commerce and Labor Committee, June 14, 1983 [hereinafter cited as Monroe Testimony]. The details of public employee collective bargaining statutes vary greatly from state to state. For an overview, see 1 PUB. PERSONNEL ADMIN. (P-H) ¶ 5146.

3. "Ohio, with its long history of essentially harmonious labor relations, and a decidedly pro-union atmosphere, certainly does not belong in the same class with these other states, with their tradition of worker repression, low wages and generally regressive economic climates." Monroe Testimony, *supra* note 2.

4. The efforts were led by the Ohio AFL-CIO, the Communications Workers of America, the Ohio Civil Service Employees Association, the Ohio Education Association, the American Federation of State County & Municipal Employees, and the Ohio Federation of Teachers.

5. Ohio's State Employment Relations Board has greater powers than comparable agencies in any other state because it combines so many adjudicative levels and so much administrative authority in one three-member body. Compare OHIO REV. CODE § 4117.02 with CAL. GOV'T CODE §§ 3500-3525 (West 1980); MICH. COMP. LAWS ANN. §§ 423.3-.5 (West 1978); and 43 PA. CONS. STAT. ANN. §§ 1101.501-.503 (Purdon Supp. 1965-1982).

The Ohio Public Employee Collective Bargaining Act (the "Act") has three major aspects—politics, economics, and administrative law. A major state political development, it generated great controversy, and its pendency influenced, and was influenced by, state elections in 1982.⁶ It is an expensive but perhaps cost-effective piece of legislation, acting countercyclically to expand government at a time when costs and agency budgets are being drastically reduced as the state's tax base declines.⁷ Finally, the Act is a new, improved model of legislation for the administrative resolution of labor issues that, in other states, have produced many years of litigation and controversy.

This Article will focus on the administration of the Act by the new State Employment Relations Board (SERB). For purposes of comparison, the collective bargaining statutes of four populous states—Pennsylvania,⁸ Michigan,⁹ New York¹⁰ and California¹¹—will be examined. The other states' experiences and their case law will be used to fill in the interstices of the comprehensive Ohio statute. Further, this Article will examine the system by which the SERB's powers will be exercised.

II. HISTORICAL BACKGROUND

The Ohio courts have been hostile to public employee unionization for years. The strong condemnation of employee organization efforts in the 1947 Ohio Supreme Court decision *Hagerman v. City of Dayton*¹² stood as the state's key precedent for three decades. In the same year the legislature adopted the same attitude of strong opposition to adversarial labor relations by passing the Ferguson Act.¹³

The *Hagerman* decision invalidated the city of Dayton's checkoff of union dues for a city employee labor organization.¹⁴ The court spoke in strident terms against public sector collective bargaining, stating that unions "have no function which they may discharge in connection with civil service appointees" and that the employer city could not delegate any of its functions to such an organization.¹⁵ The delegation theory was applied strictly by the lower courts to proscribe the union security clauses that public sector unions traditionally have sought.¹⁶

6. Ohio elected a Democratic governor, Senate, and House of Representatives.

7. Ohio, as many other midwestern states, experienced significant funding problems and tax increases in the 1983 budget period, concurrent with debate on the new bill. See, e.g., *Celeste to Unveil Tax Relief Package Tuesday; Budget Proposal Due Wednesday*, 56 Gongwer Ohio Report, March 28, 1983, at 1; and State of Ohio, Executive Budget for the Biennium (July 1, 1983 to June 30, 1985), at 5.01.04 (1983).

8. 43 PA. CONS. STAT. ANN. §§ 1101.201-.503 (Purdon Supp. 1965-1982).

9. MICH. COMP. LAWS ANN. §§ 423.1-.247 (West 1978 & Supp. 1983-1984).

10. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1983).

11. CAL. GOV'T CODE §§ 3500-3525 (West 1980).

12. 147 Ohio St. 313, 71 N.E.2d 246 (1947).

13. 1947 Ohio Laws 122 (repealed 1983, but still codified at OHIO REV. CODE ANN. §§ 4117.01-.05 (Page 1980)). The Ferguson Act is discussed in several articles, including Hoffman & Newman, *Public Employee Strikes in Ohio: The Ferguson Act Reconsidered*, 5 AKRON L. REV. 203 (1972); Note, *Ohio Public Sector Labor Relations Law: A Time for Reevaluation and Reform*, 42 U. CIN. L. REV. 679 (1973) [hereinafter cited as Note: *Ohio Public Sector Labor Relations Law*]; and Case Note, *Labor Law—Collective Bargaining and Grievance Arbitration in Ohio Public Education*, 37 OHIO ST. L.J. 670 (1976).

14. 147 Ohio St. 313, 71 N.E.2d 246 (1947). The city by contract had agreed to the dues checkoff; members executed a note payable to the union that would be repaid by the employer deductions. *Id.* at 314.

15. *Id.* at 328-29, 71 N.E.2d at 254.

16. *Foltz v. City of Dayton*, 27 Ohio App. 2d 35, 272 N.E.2d 169 (1970).

The Ferguson Act prohibited public employee strikes.¹⁷ Employees who went on strike were not to be protected from disciplinary action, and they could be fined for participation in a strike.¹⁸ The Act provided, for purposes of due process, that an employee engaged in a work stoppage was not on strike until the employer notified the individual that he or she was considered to be on strike; after that point, penalty provisions would apply.¹⁹ This notice provision allowed employers to withhold punitive action as a means of settling strikes before the incident was legally designated as a prohibited strike.²⁰

Since the single most potent weapon of employees in the collective bargaining situation is the strike,²¹ it was very difficult for Ohio's public sector unions to accomplish effective bargaining with public employers in the absence of a legal right to strike. The first effort toward legislative change, begun by the Ohio Education Association in the early 1960s,²² accomplished a small statutory change—public employers were permitted to check off dues.²³ In turn, this change led to the evolution of a common-law right to collective bargaining,²⁴ but without the union security clause of an agency shop.²⁵

The first draft of comprehensive Ohio public sector labor relations legislation was prepared in 1971, and the first progress with that bill was made in 1973 under Democratic Governor John Gilligan.²⁶ The 1973 effort never emerged from the Republican controlled Senate Commerce and Labor Committee,²⁷ but by 1975 prospects were improving, on both the political and judicial fronts.

In 1975 the Ohio Supreme Court, deviating from the *Hagerman* precedent, ruled in *Dayton Classroom Teachers Association v. Dayton Board of Education*²⁸ that a school district has inherent discretionary authority to enter into collective bargaining agreements with unions.²⁹ The court did not address or attempt to reconcile the *Hagerman* precedent.³⁰ In the following year, however, limits were placed upon judicially sanctioned collective bargaining when the same court rejected collective bargaining for lower court employees and asserted that only certain public bodies had

17. 1947 Ohio Laws 122 (repealed 1983).

18. OHIO REV. CODE ANN. § 4117.05 (Page 1980), *repealed by* 1983 Ohio Laws 140.

19. *Id.* § 4117.04, *repealed by* 1983 Ohio Laws 140.

20. *See Note, Ohio Public Sector Labor Relations Law, supra* note 13.

21. "[C]ollective bargaining, true joint determination, cannot exist without the prospect of a strike." Kheel, *The Taylor Law: A Critical Examination of Its Virtues and Defects, Developments in New York Law*, 20 SYRACUSE L. REV. 181, 188 (1968). The Ohio Federation of Teachers informed the legislature that the right to strike was a "must" for "true collective bargaining." Ohio Federation of Teachers, Legislative Policy Statement (Mar. 5, 1983).

22. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983.

23. OHIO REV. CODE ANN. § 9.41 (Page 1978). A "checkoff" is a device by which the employer collects dues for the union automatically with each designated pay period.

24. *Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ.*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975); *Youngstown Educ. Ass'n v. Youngstown City Bd. of Educ.*, 36 Ohio App. 2d 35, 301 N.E.2d 891 (1973); *Foltz v. City of Dayton*, 27 Ohio App. 2d 35, 272 N.E.2d 169 (1970).

25. An agency shop is defined as a contractual arrangement whereby employees must either join the union or pay the union a service fee equivalent to periodic union dues. R. SMITH, H. EDWARDS & R. CLARK, JR., *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 596 (1974). *See* OHIO REV. CODE § 4117.09(C).

26. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983.

27. *Id.*

28. 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

29. *Id.* at 132, 323 N.E.2d at 717.

30. *Dayton Teachers* did not even refer to *Hagerman*.

the power to contract with their employees.³¹ The court held that the power to enter into collective bargaining was created by statute alone and was not inherent in any particular employer.³²

Ohio's first comprehensive public employee bill passed both houses of the state legislature in 1975 after extensive lobbying for it and a number of compromises.³³ Republican Governor James Rhodes vetoed the bill, and an attempt to override the veto failed.³⁴ The provisions of the 1975 bill were taken from a number of sources, principally the 1970 Pennsylvania labor relations legislation.³⁵ A modified, but still comprehensive, text was introduced in the 1977 legislature, and it also was passed and vetoed. An attempt to override this second veto also failed.³⁶ The fact that Ohio law prohibited strikes and that collective bargaining was weak did not prevent strife on the public labor front during the 1970s. Federal statistics indicate that 428 public employee work stoppages occurred in Ohio from 1973 through 1980.³⁷

The legislature's composition changed significantly after the 1982 elections, with the advent of a Democratic majority in both houses.³⁸ Critics of the labor movement were very quick to point out the huge campaign contributions that had been made to the Democratic candidate for governor. Proponents of the legislation retorted that the governor, an advocate of public sector bargaining legislation, subscribed to the 1977 legislation well before the electoral campaigns. It was alleged that the reelection efforts of principal legislative figures, who later became involved with the effort to pass a public sector collective bargaining statute, had been helped by labor; but it also was argued that the bill's proponents in the legislature had supported collective bargaining legislation long before 1983.³⁹

The collective bargaining bill passed in relatively rapid time because much of the debate had been heard in prior legislative sessions.⁴⁰ The bill, S. 133, was introduced in the Ohio Senate on March 17, 1983, passed the Senate Commerce and Labor Committee on April 19, and passed the Senate by a seventeen to sixteen vote on April 21. It was reported from the House Commerce and Labor Committee on June 21, passed by the House on June 30, cleared by the Senate as amended on June

31. *Malone v. Court of Common Pleas*, 45 Ohio St. 2d 245, 344 N.E.2d 126 (1976).

32. *Id.* at 248, 344 N.E.2d at 129.

33. Note, *Collective Bargaining in Ohio's Public Sector: The Blueprint of Senate Bill 222 for Constructive Labor Relations*, 7 CAP. U.L. REV. 295 (1977) [hereinafter cited as Note, *Collective Bargaining*].

34. *Id.* at 298.

35. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983. The Pennsylvania statute is found at 43 PA. CONS. STAT. ANN. ch. 19 (Purdon Supp. 1965-1982).

36. Interview with Stewart Jaffy, General Counsel, Ohio AFL-CIO, June 13, 1983.

37. Monroe Testimony, *supra* note 2. By contrast, the number of strikes during the same period in Maine was eight, and in Washington, 90. *Id.* When the sponsor, Senator Eugene Branstool, introduced the bill, his statistics indicated that there had been 434 strikes in Ohio in the period from 1971 to 1981. Press Release of Senator Eugene Branstool on Introduction of S.B. 133 (Mar. 18, 1983).

38. The Democratic majority in the Senate was 17 to 16, and the bill passed by that margin. *Bargaining Bill for Public Employees Approved by Senate*, 56 Gongwer Ohio Report, Apr. 21, 1983, at 1.

39. Jordan, *Labor's Investment Reaps Dividends*, Columbus Dispatch, May 1, 1983, at F4. Jordan asserts that Governor Celeste received more than \$1,000,000 in campaign contributions from unions and that primary sponsor Branstool received campaign contributions of \$43,000. The Jordan article was circulated by the bill's opponents, the Ohio Information Committee. *Id.* All labor proponents interviewed strongly disagreed, noting that support for the bill carried over from 1977 and could not have been purchased, and that contributions for allies had no role in the adoption of the bill.

40. A total of 152 changes were made, but most were relatively minor wording concessions. Interview with Stewart Jaffy, General Counsel, Ohio AFL-CIO, Aug. 4, 1983.

30, and signed by the Governor July 6, 1983.⁴¹ Though the final bill was fifty-seven pages in length, it is likely that most of its provisions were well known to the legislators because of the history of controversy that brought the bill to the top of the legislative agenda.

III. STRUCTURE OF THE NEW LAW

Ohio's new collective bargaining law for public employees constitutes a comprehensive blanket of coverage for public sector workers. Each of the disparate pieces of the Act evolved concurrently during the decade preceding adoption, and they will be construed together by the courts.⁴² This overview will be followed by a discussion of the new administrative agency and its multiple roles. Portions of the Act relating to each of the roles will be discussed in greater detail later in this Article.

Every employee representative organization in Ohio will be given rights and responsibilities. The labor organization must register and provide periodic reports to the state.⁴³ Employee organizations that already have collective bargaining agreements with public employers are covered by "grandfather" provisions that favor the existing representatives.⁴⁴ Public employees who are not now represented are likely to have many competing solicitations for representation by those organizations already involved in the representation of public employees and those who seek to expand their union's membership.⁴⁵

The new law provides that bargaining unit determinations will be made by the SERB.⁴⁶ Thereafter, the SERB will certify representative organizations for bargaining. Certification occurs either by election⁴⁷ or by direct request when more than fifty percent of employees have signed for membership.⁴⁸ As the bargaining progresses, the SERB will police the fairness of bargaining and will enforce the mandatory contents of the agreement.⁴⁹ For example, the SERB will assure that the method of grievance resolution is stated in the contract.⁵⁰ If the employee unit is comprised of fire fighters, police, guards, or other designated special purpose employees, the agreement will include provisions on binding arbitration, which will require a "conciliator" to select from the final offers of the disputing parties on an issue-by-issue basis.⁵¹

41. Because Ohio lacks legislative history chronicles, the progress of the bill was reported most closely in a newsletter, the Gongwer Ohio Report, which detailed each stage of its consideration between March and July of 1983. 56 Gongwer Ohio Report, Nos. 53-124 (1983).

42. This is especially so since the legislation is remedial in nature. 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 60.02 (4th ed. 1974).

43. OHIO REV. CODE § 4117.19.

44. 1983 Ohio Laws 140, § 4.

45. Andry, *Unions Covet Public Employees*, Cincinnati Post, June 1, 1983, at 8B.

46. OHIO REV. CODE § 4117.06(A).

47. *Id.* § 4117.04. Compare 43 PA. CONS. STAT. ANN. § 1101.602(a) (Purdon Supp. 1965-1982), which permits a joint employer-employee request for certification.

48. OHIO REV. CODE § 4117.05(A).

49. The primary enforcement tool is unfair labor practices enforcement. *Id.* § 4117.11. Mandatory terms of the bargain include grievance resolution procedures, *id.* § 4117.09, which was protested during deliberations. Testimony of Frank Stewart Before Senate Commerce and Labor Committee, Apr. 6, 1983.

50. OHIO REV. CODE § 4117.09(B)(1).

51. *Id.* § 4117.14(D),(G).

The right to strike is granted to public employees,⁵² except those with a special safety purpose, and the SERB is able to limit unlawful strikes through its power to control access to the courts of equity.⁵³ Although the SERB has the authority to adopt regulations,⁵⁴ most of its work likely will be done by adjudication of unit determinations, jurisdictional disputes, and unfair labor practice complaints.⁵⁵

Ohio consciously chose not to follow the federal model for its central labor authority. The National Labor Relations Board has five members.⁵⁶ An independent official, the NLRB General Counsel, issues the complaints of unfair labor practices, which the Board members adjudicate.⁵⁷ A separate federal entity, the Federal Mediation and Conciliation Service, provides mediators to aid with settlement of significant disputes.⁵⁸ And a third agency, the Department of Labor, conducts studies and training in labor relations areas.⁵⁹ The federal Merit Systems Protection Board adjudicates special civil service employee appeals.⁶⁰ Ohio combines all of these functions in the SERB.⁶¹

The SERB has three members, selected for staggered six-year terms.⁶² Experience in personnel or labor relations is required of the members, and no more than two may be of the same political party.⁶³ Although there were originally to have been five members, the Senate Commerce and Labor Committee adopted a three-member amendment in April 1983 in response to arguments that budgets would be smaller and meetings easier with two fewer members.⁶⁴ Critics of the political test for member selection had argued that designation should be based on management or union affiliation, for a Board heavily favoring labor or employers could result too easily if political affiliation were the only test. The Act's sponsors, citing difficulties with requiring management or union affiliation, disagreed and prevailed.⁶⁵

The SERB acts as initial investigator, adjudicator, decision maker, registrar of unions, supervisor of civil service appeal actions, and appointer of participants in mediation. At the request of the Attorney General, a late amendment made him the legal representative of the SERB in Ohio courts.⁶⁶ That modification is significant

52. *Id.* § 4117.14(D)(2).

53. *Id.* § 4117.16(A).

54. *Id.* § 4117.02(H)(8).

55. *See id.* § 4117.14.

56. 29 U.S.C. § 153(a) (1976).

57. *Id.* § 153(d); *see also* E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB (1977).

58. 29 U.S.C. § 172 (1976).

59. *Id.* § 9.

60. 5 U.S.C. § 7702 (1982).

61. OHIO REV. CODE § 4117.02.

62. *Id.* § 4117.02(A).

63. *Id.*

64. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983.

65. Opponents felt a distribution by representative group would be best. Interview with John F. Lewis, June 14, 1983 [hereinafter cited as Lewis interview]. Proponents disagreed since the Board was to be a body representative of the public, and not exclusively of constituents. Interview with Stewart Jaffy, General Counsel, Ohio AFL-CIO, Aug. 4, 1983. Due process concerns were raised over the possibility that adjudicative decisions might be prejudged by a Board member who has previously formed opinions regarding the parties' positions. A division based on union or management affiliation was ruled invalid in a comparable Arizona statute, and the case is now pending before the Ninth Circuit en banc. *See United Farm Workers v. Agricultural Employment Relations Bd.*, 696 F.2d 1216 (9th Cir. 1983) (opinion in the Federal Reporter was withdrawn from the bound volumes when the case was taken en banc).

66. OHIO REV. CODE § 4117.02(E).

because it brings the SERB into parallel with the state Civil Rights and Public Utilities Commissions in terms of Attorney General representation.⁶⁷ With this single exception, the Board controls all aspects of public labor relations.

Because they considered centrally administered expertise essential to the functioning of public sector collective bargaining, commentators have argued that no bill should be passed unless it included an effective central agency.⁶⁸ But Ohio has a diverse set of local needs and a great number of rural communities. Legislators consciously created a central agency that will be forced to respond rapidly—one day for appointment of fact-finding boards⁶⁹ and seventy-two hours for ruling on legality of strikes.⁷⁰ There is express authority for “directors for local areas,”⁷¹ who will, as a sheer function of decisional time, be delegated a great deal of discretion.

Other states offered different models. Pennsylvania’s Public Employment Relations Board was the primary model used by the labor union advocates of an Ohio bill.⁷² New York allowed each area to develop its own system, provided that it met state standards and was not in conflict with the state board’s control.⁷³ Michigan’s non-civil service employees are covered by a state board, from whose control the state civil service employees are excluded by a constitutional provision.⁷⁴ Ohio has eliminated its civil service board and subordinated its personnel review board to the new SERB.⁷⁵ In spite of the potential delegation of authority to “directors for local areas,” the Ohio SERB has stronger central authority than any of these counterparts in other states.

The three principal arguments made against the centralized authority of the SERB were that it would ignore the local governmental authority’s needs in resolving labor troubles,⁷⁶ that it would cost an estimated three million dollars per year in direct costs alone,⁷⁷ and that federal mediation services were available.⁷⁸ Advocates re-

67. All state agencies follow the Attorney General’s formal advice; see OHIO REV. CODE ANN. §§ 109.12, .20 (Page 1978), and 1 OP. ATT’Y GEN. 534 (1939). The Attorney General will not issue opinions on matters pending before an adjudicative body of the state. Interview with Executive Assistant Attorney General John Biancamano, Aug. 24, 1983. The first House committee amendment made the Attorney General the “legal adviser,” but a later amendment gave the Attorney General the duty of representing the Board in the courts. OHIO REV. CODE § 4117.02(E). After adoption, the Attorney General took the position that representation of “agents” meant that he would represent the Board’s position in the hearings before the trial examiners and the Board once the agents had investigated and brought the charges. This implicit power clarified an ambiguity in § 4117.02(E).

68. Note, *Ohio Public Sector Labor Relations Law*, *supra* note 13, at 697 n.84 (quoting W. Heisel, *Considerations in Preparation of Ohio Legislation for Public Employee Collective Bargaining* (1972) (unpublished manuscript)).

69. OHIO REV. CODE § 4117.14(C)(3).

70. *Id.* § 4117.23(A).

71. *Id.* § 4117.02(E).

72. 43 PA. CONS. STAT. ANN. ch. 19 (Purdon Supp. 1965–1982) was adopted in 1970 and provided much of the material for Sub. S.B. 70, 111th Gen. Ass’y., Reg. Sess. (1975), the first public sector collective bargaining bill to pass the Ohio legislature.

73. See N.Y. CIV. SERV. LAW § 205 (McKinney 1983), which specifies the powers and functions of the Board.

74. See MICH. COMP. LAWS ANN. § 423.3 (West 1978); MICH. CONST. art. IV, § 48.

75. 1983 Ohio Laws 140, § 1.

76. Ohio PTA, Legislative Policy Statement (Mar. 2, 1983); Memo to the Senate Commerce and Labor Committee from J. Coleman, Ohio Municipal League, Apr. 19, 1983.

77. Testimony of John Stewart, Ohio Information Committee, Before the Senate Commerce and Labor Committee, Mar. 29, 1983.

78. Testimony of Ohio Ass’n of School Business Officials Before the Senate Commerce and Labor Committee, Mar. 30, 1983.

sponded that uniformity and balance would save the disruption costs of strikes,⁷⁹ that costs had been overestimated,⁸⁰ and that voluntary mediation would require mutuality, which had been missing under the existing system.⁸¹ As an accommodation, the federal mediation system was inserted by reference in the state bill, to be used as an alternative;⁸² and the bill was amended to create a separate office of mediation within the SERB to afford some segregation of responsibility, upholding the ostensible neutrality of the SERB mediators.⁸³ No serious consideration was given to a system of decentralized authorities, like those in New York, in which regional bodies meet state norms but have autonomy.⁸⁴

IV. THE NEW AGENCY WITHIN THE STATE STRUCTURE

A. *Its Formation and Powers*

Accompanying the creation of the SERB was the establishment of a new agency within the Department of Administrative Services. This new Office of Collective Bargaining, first included in the 1977 bill⁸⁵ and expanded in 1983,⁸⁶ performs central negotiation functions for the entire state government. Other public employers have the right to select freely their own representatives,⁸⁷ but the Office, by law, must represent each state agency.⁸⁸ While the creation of the SERB was a predictable part of all the proposed collective bargaining bills, it is striking that a bill that was drafted principally by labor unions designed so precisely the structure of labor's chief bargaining opponent. Centralization of bargaining tends to strengthen the employer's position as an adversary.⁸⁹

Skeptics might observe that because governors are directly elected, immediate control of the state negotiators within a Cabinet department by a politician who faces periodic reelection is likely to make the bargaining posture of the employer representatives somewhat more flexible during election years.⁹⁰ A state hospital whose superintendent drove a hard bargain in 1981 may have won concessions greater than the governor's staff members will demand at the same site during the electoral campaign of 1986. Arguably, the governor of a large, economically depressed state is likely to remain unaware of this additional new responsibility, unless and until an

79. Monroe Testimony, *supra* note 2.

80. *Id.*; Interview with Stewart Jaffy, General Counsel, Ohio AFL-CIO, June 13, 1983.

81. Monroe Testimony, *supra* note 2.

82. OHIO REV. CODE § 4117.02(E).

83. *Id.* § 4117.02(H)(1).

84. See, e.g., Kheel, *supra* note 21; McHugh, *New York's Experiment in Public Employee Relations: The Public Employees' Fair Employment Act*, 32 ALB. L. REV. 58 (1967).

85. The 1977 bill, Sub. S.B. 222, 112th Gen. Assy., Reg. Sess., is described in Note, *Collective Bargaining*, *supra* note 33.

86. OHIO REV. CODE § 4117.10(D).

87. *Id.* However, this section provides that the Office is not required to represent colleges or statewide elected officials.

88. *Id.*

89. See, e.g., the position of Pennsylvania's office on strikes in Decker, *The Right to Strike for Pennsylvania's Public Employees—Its Scope, Limits, and Ramifications for the Public Employer*, 17 DUQ. L. REV. 755 (1978-1979).

90. Ohio's governor has a four year term. OHIO CONST. art. III, § 2.

adversary challenges him to change the cabinet office's policies or personnel. A measure of the influences upon the office may be its authority regarding multiunit bargaining, which is permissive and may favor the larger statewide unions.⁹¹

Proponents of the Office will argue that a governor who must keep the state budget balanced cannot lose control of the huge labor cost item in his budget. No governor can buy labor peace in all corners of the state, and in an era of income deficits, no governor could afford great economic concessions to some or all unions.⁹²

Administratively, this preemptive control agency will be much more than a policy coordination body. There is no method under state law for a state board or agency to compel the new office to change its position on an issue or a concession.⁹³ The central office will bargain on behalf of numerous state agencies. If communications between this office and its clients are not handled well, internecine warfare, outstripping the conflicts between the state and its unions, may break out within the ranks of management.

Interaction between the Board and the Attorney General will also be crucial. Because the Attorney General is to represent the SERB in court⁹⁴ and serve as its legal adviser,⁹⁵ problems may arise if the views of the SERB and the Attorney General on legal issues begin to diverge. The Attorney General personally asked for the power, and his staff feels strongly that no conflicts will develop. Nonetheless, the structural cohesion of this arrangement will depend on mutual attachments and cooperation.⁹⁶

The SERB can issue adjudicative opinions and educational materials; the Attorney General acts as counsel in their drafting. The Attorney General issues opinions, which normally bind state agencies and which usually avoid fields of current adjudicative activity. If the two sources of interpretation disagree, the Attorney General's Office expects that the courts will hear a unified state position, or that a special counsel may be appointed in exceptional cases.⁹⁷

At any one time, politics can shift alliances. For example, a governor and a two to one SERB majority of one party may take one position on a question of major interpretative significance to public employers, while an Attorney General and an

91. See OHIO REV. CODE § 4117.06(D).

92. For example, the Ohio human services budget, a largely personnel related cost item, increased from \$4,020,600,000 in 1980-81 to \$7,190,200,000 in 1984-85. State of Ohio, Executive Budget for the Biennium (July 1, 1983 to June 30, 1985), at 5.01.04 (1983).

93. See OHIO REV. CODE § 4117.10(D).

94. *Id.* § 4117.02(E).

95. This resulted from a two-stage committee amendment. The role of legal adviser came first; then, at the request of the Attorney General, authority was given to allow his office to represent the Board in all proceedings. Since court and administrative proceedings were not distinguished, the Attorney General has adopted the view that the prosecution of administrative cases was his office's duty. Once the agents investigate the cases, the Attorney General prosecutes the charge before the trial examiner and then before the Board. If a conflict occurs, the Attorney General will almost always defer to the SERB's decision; in rare cases a special counsel may be appointed. Interview with Executive Assistant Attorney General John Biancamano, Aug. 4, 1983.

96. See OHIO REV. CODE § 4117.02.

97. OHIO REV. CODE ANN. § 109.12 (Page 1978). The Attorney General does not, as a policy matter, issue an opinion on a matter that is likely to be in adjudication, such as an issue pending before the SERB. Interview with Executive Assistant Attorney General John Biancamano, Aug. 4, 1983.

SERB minority of the other party hold the opposite view. The statutory duty to be legal adviser implies that the Attorney General will represent the client's position. But loyalty to the client will override neither the primary constitutional duties nor the individual sensitivity to the need for reelection.⁹⁸ The potential for tension in powers of legal interpretation is thus built into the law. Ultimately, the legislature may wish to reconsider the shift of authority and add an independent legal staff to the SERB.

The United States Supreme Court has infrequently invoked the doctrine that excessive delegation to an administrative agency is unconstitutional.⁹⁹ However, each new agency can be scrutinized to determine if the legislative body has adequately set forth standards within which the agency's exercise of discretion will be canalized.¹⁰⁰ The powers of the SERB appear to be adequately canalized.¹⁰¹ The SERB powers were given with accompanying criteria and are for the most part reviewable by a court under a substantial evidence test.¹⁰² Enough criteria exist to guide the SERB, the fact finders, and the conciliators, whose powers all flow from the new law.¹⁰³

One very controversial delegation, the power of the SERB to select appropriate bargaining units,¹⁰⁴ has been criticized as a nonreviewable area, subject to abuse and likely to give rise to future disputes.¹⁰⁵ Because SERB decisions concerning units cannot be judicially reviewed, except perhaps through mandamus proceedings, employers may find a multiplicity of units involved in a decision that affects a single school or state garage. Unit determinations are a significant source of controversy in the private sector since elections can be affected by inclusion or exclusion of workers from a particular unit.¹⁰⁶ Legislative trade-off of voting support apparently occurred with faculty unions,¹⁰⁷ craft unions,¹⁰⁸ and teachers;¹⁰⁹ future amendments to override unpopular SERB unit decisions can be anticipated as well.

Other states permit review of unit determinations, but accord them great deference.¹¹⁰ Ohio's failure to create a statutory right of review delegates authority exclusively to the SERB.¹¹¹ Proponents noted that the criteria were adequately set out in

98. The Attorney General is a constitutional officer, OHIO CONST. art. III, § 1. No conflicts in opinions have arisen in public utility and civil rights cases handled by the Attorney General. Interview with Executive Assistant Attorney General John Biancamano, Aug. 4, 1983.

99. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

100. See B. SCHWARTZ, *ADMINISTRATIVE LAW* §§ 11-14, at 34-39 (1976).

101. Limitations on SERB discretion and the specification of legislated policy choices save the Ohio Act from the *Schechter* standard. Arguments alleging the excessive delegation of authority to labor agencies rarely succeed; see, e.g., *City of Detroit v. Detroit Police Officers Ass'n*, 408 Mich. 410, 294 N.W.2d 68, *appeal dismissed*, 450 U.S. 903 (1981).

102. See, e.g., OHIO REV. CODE § 4117.13(B).

103. Criteria for conciliators are found at *id.* § 4117.14(G)(7).

104. *Id.* § 4117.06(A).

105. Interview with Frank Stewart, Ohio Information Committee, June 1983.

106. For example, a union may win an election among 80 production workers, but the inclusion of 20 office workers in the unit can sway the outcome of the election in the employer's favor.

107. See OHIO REV. CODE § 4117.01(C)(14), .06(D)(4).

108. 1983 Ohio Laws 140, § 4.

109. See OHIO REV. CODE § 4117.01(F)(4).

110. *Hospital Employees' Div. of Local 79 v. Flint Osteopathic Hosp.*, 390 Mich. 635, 212 N.W.2d 897 (1973); *In re Civil Serv. Employees Ass'n v. Helsby*, 25 N.Y.2d 842, 250 N.E.2d 731, 303 N.Y.S.2d 690 (1969); *Pennsylvania Labor Relations Bd. v. Venango/Clarion Medical Health Center, Inc.*, 52 Pa. Commw. 341, 415 A.2d 1259 (1980).

111. Although statutory review is barred, a mandamus action can still be brought. See OHIO REV. CODE § 4117.06(A).

the statute,¹¹² while a critic observed that mere “lip service” could be paid to the criteria while the Board adopted whichever units served its unarticulated purposes.¹¹³

The delegation in the Ohio law is much more detailed than that in the provisions of comparable states like Pennsylvania.¹¹⁴ A proponent explained that it was “better to have certain things nailed down.”¹¹⁵ Unfriendly SERB members cannot alter definitions of “management employees,”¹¹⁶ for example, as the changed composition of the NLRB has changed statutory interpretations within federal labor relations policy.¹¹⁷ Strong delegations of power were accompanied by a tight leash. Legislative definitions will limit the courts and the agency in future cases.¹¹⁸

Opponents of the legislation were critical of the precise definitions chosen. There are still ambiguities on key issues, such as the binding aspect of an arbitrated order. It was argued that any defining of terms must be done in context; critics charged that the facts of a particular work situation control whether a supervisory title means a person is a “supervisor.”¹¹⁹

The new law is particularly subject to close analysis for the rationality of its exempted categories because the Act purports to give broad powers over all workers. Political bargaining cut out workers in smaller areas of the state and may have produced results different from, and arguably less rational than, those definitions that a contested adjudication would produce. However, legislation has never been subject to a substantial evidence standard of required support. For example, mandatory inclusion of fire-fighting officers other than the chief of a fire department¹²⁰ within the fire fighters’ bargaining unit¹²¹ means that no fire employees will be available to fight fires if their unions, active participants in drafting the legislation, should strike a municipal employer.¹²² The rationality of the legislation’s categories is presumed.

Advocates of the bill defend the definitions, asserting that the legislature codified the law at approximately the same place where litigation would have led it.¹²³ Because votes were taken on many different amendments,¹²⁴ directly elected repre-

112. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983.

113. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983. Mr. Stewart noted the importance of judicial review of unit determinations, as illustrated by cases in which the NLRB contravened its statutory authority and was overruled by the courts. *See, e.g.*, *NLRB v. Frederick Memorial Hosp., Inc.*, 691 F.2d 191 (4th Cir. 1982), and *NLRB v. HMO Int'l/Cal. Medical Group Health Plan, Inc.*, 678 F.2d 806 (9th Cir. 1982).

114. *Compare, e.g.*, certification provisions in 43 PA. CONS. STAT. ANN. § 1101.602 (Purdon Supp. 1965-1982), with Ohio's new process, OHIO REV. CODE §§ 4117.05-.07.

115. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983.

116. OHIO REV. CODE § 4117.01(K).

117. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

118. Definitions contained in OHIO REV. CODE § 4117.01 intentionally limit the scope of authority of the agency, making it significantly less able to vary from statutory terms. New York's approach is much looser; *see N.Y. CIV. SERV. LAW* § 201 (McKinney 1983).

119. Interview with Frank Stewart, Ohio Information Committee, June 1983.

120. OHIO REV. CODE § 4117.01(F)(2) excludes fire and police lieutenants and captains from coverage except when they are in a position that would allow them to act as a substitute for the chief. *Cf.* 43 PA. CONS. STAT. ANN. § 1101.604(5) (Purdon Supp. 1965-1982).

121. OHIO REV. CODE § 4117.01(F)(2).

122. Memo to Mayors and Managers Regarding Collective Bargaining Legislation from J. Coleman, Ohio Municipal League, Mar. 24, 1983; Testimony of John Stewart, Ohio Information Committee, Before Senate Commerce and Labor Committee, Mar. 29, 1983.

123. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983. For example, the Act treats civil service eligibility lists as a nonbargainable matter. OHIO REV. CODE § 4117.07(A)(1).

124. Dozens of amendments were offered, but few were adopted that were not offered by the bill's principal sponsors. A news report about the lone Republican on the Senate subcommittee stated: “Senator Gaeth had about three

sentatives made many of the decisions that in other states were left to unelected Board members. Further, the pros and cons of the amendments were aired adequately, with changes favoring each side.¹²⁵ The net effect of legislated definitions is more predictable decision making by the administrative agency in future cases.

A final delegation of powers is to the arbitration official, the conciliator, for whom standards exist but within whose power a great deal of authority to make policy and financial decisions resides.¹²⁶ Time will tell what authority will be upheld against future attacks.

B. Rulemaking, Adjudication, and the SERB

That the legislation creating the SERB is indisputably remedial of the problems of public sector workers¹²⁷ is demonstrated by the rulemaking and adjudicatory powers conferred on the SERB.

The SERB has extensive power to issue procedural and substantive regulations.¹²⁸ At the federal level the National Labor Relations Board has similar powers,¹²⁹ but it has chosen to adopt few rules and to operate mostly by adjudicative precedents.¹³⁰ The Supreme Court has upheld that reluctance.¹³¹ The SERB has express rulemaking power, and in some cases it must establish rules that will define the procedures for certain actions by mediators, parties, and others.¹³²

The SERB can choose to define substantive terms either by rulemaking or by adjudication. Unlike many administrative bodies, the SERB's rulemaking power is tied to formal hearings.¹³³ Participation in rulemaking is to be guaranteed through

dozen amendments but offered only 15, observing that the Bill appears to be 'pretty much etched in concrete' and not subject to amendments that would permit some flexibility." *Binding Arbitration Removed from Collective Bargaining Bill*, 56 Gongwer Ohio Report, Apr. 11, 1983, at 2.

125. Some amendments took note of management pleas that smaller cities and townships be excluded from the coverage of the new law. See OHIO REV. CODE § 4117.01(B). A 2,000 population limit on the Act's coverage was the only amendment accepted on the Senate floor during a three-hour debate. See *Bargaining Bill for Public Employees Approved by Senate*, 56 Gongwer Ohio Report, Apr. 21, 1983, at 1. A House floor amendment then increased the threshold to 5,000. OHIO REV. CODE § 4117.01(B). This Code section will limit the local application of the bill to 266 of the 939 incorporated areas in Ohio that have 5,000 or more residents. The 670 areas excluded may still bargain if they choose to do so, but the Act does not so mandate. See *id.* § 4117.03(C). (The statistics referenced in subsection 4117.01(B) are census figures, and the 266 figure will be operative for 1980-1990. See BUREAU OF THE CENSUS, OHIO CENSUS OF POPULATION—NUMBER OF INHABITANTS, at 37-38 (1982)). This exemption will not change until 1991-92 under § 4117.01(B) as worded. Labor supported amendments that tailored specific protective clauses to specific items, such as the definition of the retirement clerks as "safety forces" exempt from strikes. See OHIO REV. CODE § 4117.14(D)(1).

126. See OHIO REV. CODE § 4117.14(G).

127. Remedial legislation, which corrects a problem for which the statutes had formerly provided no solution, is likely to be read liberally by the courts to accomplish the broad purpose of the statute. 3 C. SANDS, *supra* note 42, at § 60.02. The legislature expressly demanded liberal construction of the new statute. OHIO REV. CODE § 4117.22.

128. OHIO REV. CODE § 4117.02(H)(8).

129. 29 U.S.C. § 156 (1976).

130. The NLRB chooses to follow precedential adjudications rather than rules. R. GORMAN, *BASIC TEXT ON LABOR LAW* 17-20 (1976).

131. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

132. See, e.g., OHIO REV. CODE § 4117.14(C)(3)(e), (6).

133. See *id.* § 4117.02(H)(8). Most Ohio rules are issued in final form only after the agency has conducted a formal hearing. OHIO REV. CODE ANN. § 119.03(C) (Page 1978). By contrast, the great majority of federal rules are adopted without hearings, by informal rulemaking, see 5 U.S.C. § 553 (1982). See generally J. O'REILLY, *ADMINISTRATIVE RULEMAKING* ch. 5 (1983).

mailing lists for dissemination of notice of hearings.¹³⁴ With the mailing list and a fixed minimum time for advance notice,¹³⁵ the SERB formal rulemaking system should be protective of rights, yet rather cumbersome. On controversial issues, if the federal experience with mandates for formal rulemaking is any indication, the SERB is more likely to choose to adopt requirements by precedents.¹³⁶ Provided it avoids creation of a prospective "rule" through nonrulemaking procedures,¹³⁷ the SERB's rulemaking authority is likely to gain judicial deference.¹³⁸

Adjudication comes naturally to an agency that has a decisional structure like the SERB. Precedential development of labor law principles is likely to be the principal means for defining SERB requirements. The SERB would be prudent to announce its procedural requirements in the form of rules and its substantive decisions in adjudicative precedents.¹³⁹

The likelihood that the SERB will prefer adjudication is underscored by the availability of direct judicial review: the SERB is authorized to appeal, *sua sponte*, by certifying its final order to the courts of appeals.¹⁴⁰ Until the legislation reached the House in 1983, it provided for direct review by the Ohio Supreme Court of questions of public interest certified to the court by the SERB.¹⁴¹ This novel approach to administrative agency decisions will be discussed below.¹⁴² But the final version of the statute expressly gives the SERB standing to challenge its own decisions once they become a "final order."¹⁴³

The intent of this section was, at first, to insure prompt review of difficult policy interpretations by the highest court in the state. The final bill deleted the advisory role, however, and required a final order as a precondition to the SERB's self-initiated appeals.¹⁴⁴ Intriguing questions arise about whether an SERB that is unsympathetic to its enabling legislation could kill part of the law that created it. The SERB could, for instance, take the statutory rule banning police sergeants from a

134. OHIO REV. CODE § 4117.02(H)(8)(a).

135. This time period is 30 days. *Id.* § 4117.02(H)(8)(a). It was 35 days in an earlier version of the same bill. The Ohio Federation of Teachers asked for at least 60 days prior notice. Ohio Federation of Teachers, Legislative Policy Statement (Mar. 5, 1983).

136. If the SERB chooses to follow the NLRB, it will make sense for the state agency to organize its policy decisions so that they are issued in the adjudicative process. The benefit to the SERB would be not only greater precision, but also increased flexibility because of the ability to change precedents.

137. In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Court held that a "rule" could be adopted by the NLRB only by following the requirements of the Administrative Procedure Act and could not be adopted through an adjudication.

138. Deference to an administrative agency's adjudicatory opinions means that the reviewing court will accord great weight to the policy aspects of the agency decision. Though courts can be deferential to adjudicatory decisions, those which resemble rules gain less deference. *See id.*

139. The decision to issue a rule may be reserved for special cases, which will allow for predictability and provide for direct notice by the Board to a wide group of persons. The NLRB's handling of jurisdiction over universities illustrates this point; *see* 29 C.F.R. § 103.1 (1983). Adjudication's gravest weakness is its inability to assert a coherent body of comprehensive control through one document, as rulemaking can through the Federal Register. Adjudicative decisions are available but not easily obtainable unless they are published by a commercial reporting service, 5 U.S.C. § 552(a)(2) (1982).

140. OHIO REV. CODE § 4117.02(L).

141. *See* § 4117.02(L) in S.B. 133, 115th Gen. Assy., Reg. Sess., as introduced in the Senate (Mar. 18, 1983). A basis for similar Supreme Court action has lain dormant for years. OHIO REV. CODE ANN. § 4141.28(N) (Page 1980).

142. *See infra* text accompanying notes 495-500.

143. OHIO REV. CODE § 4117.02(L).

144. Interview with Stewart Jaffy, General Counsel, Ohio AFL-CIO, June 13, 1983.

police officer bargaining unit¹⁴⁵ and refuse to follow it as an infringement on sergeants' freedom of association.¹⁴⁶ If the court of appeals were deferential and agreed with the SERB, that portion of the bill would be defunct. The fact that adjudications can be taken to the courts in this manner, but that rules cannot be, indicates the legislative intent that significant policy work be done through adjudication.¹⁴⁷

A separate aspect of the scope of the new SERB's authority is that this change in Ohio's labor policy is intentional and dramatic. With few exceptions, such as the prepenalty notice to strikers,¹⁴⁸ the Act departs significantly from Ohio precedent.¹⁴⁹ Courthouse patronage power is made vulnerable from within by exposing it to challenge by the appointed workers themselves.¹⁵⁰ Legislative exemptions designed to save such dominions were partially successful, but political patronage may be fatally fragmented by the changes in workers' rights.¹⁵¹

Opponents of the bill threatened that the change in scope of authority came too suddenly. The public would be alarmed to find that arbitrators' awards were binding on the taxing authority, it was asserted.¹⁵² Newspapers were harshly, and almost uniformly, critical of the bill's effects on the public sector's labor peace.¹⁵³ Diametrically contrary views from labor sent the message that, if Ohio had been figu-

145. OHIO REV. CODE § 4117.06(D)(6).

146. That prohibition from membership has been tested in other states on various grounds. *See, e.g.,* City of Des Moines v. Public Employment Relations Bd., 264 N.W.2d 324 (Iowa 1978); Local 446, Professional Firefighters Ass'n v. City of Aberdeen, 270 N.W.2d 139 (S.D. 1978); *see also* International Union of Police Ass'ns, Local 189 v. Barrett, 524 F. Supp. 760 (N.D. Ga. 1981).

147. OHIO REV. CODE § 4117.02(L) governs only final orders; the Board files with the court the record of the adjudicatory proceeding, including the transcript. The outcome of the SERB decision in a contested case is an "adjudication" that produces a final order. OHIO REV. CODE ANN. §§ 119.01(D), .06 (Page 1978). The definitions in chapter 119 apply in full to the SERB. *See* OHIO REV. CODE § 4117.02(M).

148. The requirement that a striker be told that he or she is on strike was incorporated in the earlier law, OHIO REV. CODE ANN. § 4117.04 (Page 1980), *repealed* by 1983 Ohio Laws 140, and continued in the revised law, OHIO REV. CODE § 4117.23(B)(1). The content of the notice differs in that the employer now gives the strikers notice that the SERB has determined that the strike is not authorized. The use of the notice differs in that strikes will now, on many occasions, be "authorized" and not subject to this notice provision.

149. Standing precedent is strongly contrary to the views embodied in the new Act. *See, e.g.,* Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947); *see also* Note, *supra* note 33.

150. The discharge of a patronage employee because of his or her union activities would be a prohibited unfair labor practice that could result in both an injunction and an automatic certification of the union. *See* OHIO REV. CODE §§ 4117.11(A)(1), .12(A), .07(A)(2).

151. Late amendments to the bill excluded election employees and assistant prosecutors from the bill's coverage; others, such as court employees and court clerks, who do not perform a judicial function, will be covered by the new law. *Id.* § 4117.01(C)(8).

152. Binding arbitration was especially criticized by the Ohio Information Committee, a coalition group of opponents of the bill. Testimony of John Stewart, Ohio Information Committee, Before the Senate Commerce and Labor Committee, Mar. 29, 1983. The conciliator's selection between two competing offers during settlement, OHIO REV. CODE § 4117.14(G), was considered more moderate than the bill's original final and binding arbitration provision. The consensus to do away with final and binding arbitration, which would have allowed middle positions to be drafted by the arbitrator alone, was so strong that the bill's sponsor, who chaired the subcommittee into which the bill was introduced on March 18, agreed with the amendment on April 11. *Binding Arbitration Removed from Collective Bargaining Bill*, 56 Gongwer Ohio Report, Apr. 11, 1983, at 2.

153. [T]he bill's progress can be viewed only as an example of the quintessential governmental arrogance which holds that lawmakers must do what is "best" for the public in spite of the public. That must be it, for the Democrats in the general assembly certainly have not paid a whit of attention to the many voices raised in opposition . . . The Statehouse should be buried in an avalanche of cards and letters protesting this crime against the public interest.

Clerc, *Papers Condemn Labor Bill*, Cincinnati Enquirer, June 13, 1983, at A6.

ratively at war before the law was passed, peace would break out.¹⁵⁴ The predictions of those interviewed varied directly by their orientation, with management lawyers expecting more litigation¹⁵⁵ and labor lawyers expecting less.¹⁵⁶

C. Certification and Election Powers

The decision of individual state and local employees to be represented by a union is not a foregone conclusion, even with the strong policy favoring collective bargaining embodied in the new Act. Each election offers "no representative," and no employee can be compelled to join a union.¹⁵⁷

Ohio's new system appears to incline more toward unionization, however, than before. Certainly, the established collective bargaining representatives are more favored as a matter of administrative procedure than new unions seeking to represent already organized workers.¹⁵⁸ Special arrangements, such as those for craft units, are covered by special statutory exceptions.¹⁵⁹ Once a unit is defined by the SERB,¹⁶⁰ the union's chances of election and later reelection are very strong.

The SERB's full control of the unit designation process is paralleled by its broad power in representation and election proceedings, especially as compared to the power conferred by other states.¹⁶¹ Certification procedures¹⁶² appear to put a premium on timely action by a potential competitive union seeking to represent an established unit.¹⁶³ The certification process is not difficult. At the organizational stage, the union that is interested in representing nonunion employees must be able to present to the employer evidence of representation of a simple majority of the workers, fifty percent plus one.¹⁶⁴ SERB rules will define the quality of substantial evidence needed,¹⁶⁵ which supersedes the former requirement of a showing of

154. Monroe Testimony, *supra* note 2.

155. Management lawyers interviewed for this article viewed the bill as likely to provoke extensive employer objections and multitudes of interpretation difficulties for the courts. Their views were fully consistent with the testimony of their clients and allied groups. *More Strikes Predicted if Collective Bargaining Bill Passes*, 56 Gongwer Ohio Report, Apr. 18, 1983, at 2.

156. Labor lawyers interviewed for this article agreed that some litigation was inevitable but asserted that administrative remedies would detour the cases from courts into the administrative channels of the SERB with fewer cases actually going to trial. Interviews with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983, and Stewart Jaffy, General Counsel, Ohio AFL-CIO, June 13, 1983.

157. One's right not to be represented by a union is assured. OHIO REV. CODE § 4117.03(A)(1). The election process must offer the opportunity to vote for "no representative," *id.* § 4117.07(C)(4), and since no person can be compelled to join the union, even though it has become the person's exclusive representative through certification, union membership remains voluntary. *Id.* § 4117.09(C).

158. The net impression formed from a study of the grandfather provisions in § 4 of the bill, and OHIO REV. CODE § 4117.07(B), is that the existing unions are much more likely to prevail in elections than are challengers.

159. Section 4(E) was added to the bill on the House floor. It establishes a special craft unit provision as an exception to normal unit determination provisions. By doing so, it freezes a craft unit's current status.

160. OHIO REV. CODE § 4117.05(A)(2).

161. Most state labor relations boards and the NLRB get deference from the courts, but not the exclusivity of unreviewable power. *See, e.g., Hospital Employees' Div. of Local 79 v. Flint Osteopathic Hosp.*, 390 Mich. 635, 648, 212 N.W.2d 897, 903 (1973).

162. *See* OHIO REV. CODE §§ 4117.05, .06.

163. *See id.* § 4117.07(C)(6).

164. *See id.* § 4117.05(A)(2).

165. The standard is "substantial evidence based on, and in accordance with, rules prescribed by the Board." *Id.* Compare Pennsylvania's standards, which appear to be more liberal. 43 PA. CONS. STAT. ANN. § 1101.603 (Purdon Supp. 1965-1982).

credible evidence.¹⁶⁶ By equating the standard for showing support and the standard for review of SERB actions, the Act makes a clear definition of "substantial evidence" important.

A copy of the union's certification request is sent to the SERB, and the time for action begins with the date of filing with the employer.¹⁶⁷ The Act requires the public employer to post a notice of the request and wait for opposition to union certification.¹⁶⁸ On the twenty-second day after the union has filed for that unit's certification, if no timely opposition has been filed and the employer fails to object, the union is certified by the SERB.¹⁶⁹

In the event that the SERB finds that the employer engaged in unfair labor practices that affect the union's former majority status and preclude a "free and untrammelled" election, the SERB can certify the union without an election.¹⁷⁰ This latter provision differs from the federal test and may provoke disputes if the SERB broadly defines the effect of employer preelection conduct.¹⁷¹ An illustration may be the initial effort to suppress organization of politically appointed workers. Interesting questions of imputed authority will arise if a political leader who is not a "public employer" makes threats to give the organizers' jobs to more faithful party members. The prudent political party will need sophisticated legal advice before opposing the union, lest it provoke an automatic certification as a penalty for misconduct.

Once a union is in place, the representative has at least one year and perhaps as much as three years to operate.¹⁷² The SERB will administer the statutory program affording a "window" of time within which challenges by other potential representatives will be considered.¹⁷³ The statute includes a contract bar to the recognition of other exclusive representatives, but it is limited to contracts of three years or less. A competing union can file a request for an election 120 days before the expiration of an existing contract, but no later than ninety days before expiration.¹⁷⁴ The challenger must claim that it now represents thirty percent of the workers or that the incumbent union has lost its majority position.¹⁷⁵ Procedural rules will be set by the SERB for the resultant contests and elections.¹⁷⁶ Litigation of ambiguities in comparable laws in other states teaches that the period of time consumed by extensions of a contract does not affect the timing of representation contests.¹⁷⁷

166. S.B. 222, 112th Gen. Ass'y., Reg. Sess. (1977).

167. OHIO REV. CODE § 4117.05(A)(2).

168. *Id.* § 4117.05(A)(2)(a).

169. *Id.* § 4117.05(A)(2).

170. *Id.* § 4117.07(A)(2).

171. If the employer's conduct constitutes an unfair labor practice and the union had the support of a majority of the workers in the unit at one time, the SERB may certify the union without an election; but in order to do so the SERB must find that a "free and untrammelled election cannot be conducted" as a result of the employer's practices. Because the Ohio statute lacks a free speech proviso like that found in federal law, 29 U.S.C. § 158(c) (1976), many of the early Ohio disputes are likely to concern employer statements against a particular union's request to represent the workers. By contrast, the NLRB can certify without election only if there have been "outrageous" unfair labor practices. *See, e.g., United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980).

172. OHIO REV. CODE § 4117.07(C).

173. *Id.*; *cf. MICH. COMP. LAWS ANN.* § 423.214 (West 1978) and 43 PA. CONS. STAT. ANN. § 1101.605(7) (Purdon Supp. 1965-1982).

174. OHIO REV. CODE § 4117.07(C)(6).

175. *Id.* § 4117.07(A)(1).

176. *Id.* § 4117.07(C)(1), (2). The rulemaking power is given to the SERB in § 4117.02(H)(8).

177. SERB's role is going to be delicate, and the allegiances of its initial three members will be watched closely.

It would be prudent for the SERB to adopt painstaking neutrality in recognition disputes and to adhere strictly to deadlines. The SERB will be born in an environment of vigorous and healthy interunion competition. The newspapers have predicted extensive infighting among Ohio unions.¹⁷⁸ The initial competition will be keen, and thereafter the thirty-day period near the end of each contract will be the focal point of the certification process.¹⁷⁹ It may be that the certification processes will be a measure of survival for the better unions; the effort to enlist new members probably will require monitoring the other unions that offer similar services to comparable units of workers.

For the new Office of Collective Bargaining the prospect of interunion strife will be bad news indeed. Each union competing for members will closely watch for concessions made to the state during bargaining by other unions; and though the incumbent union may be more experienced, its success or failure will be measured during representation disputes by how vigorously it acted as adversary to the Office of Collective Bargaining.¹⁸⁰ One cannot predict fully whether a union's success against the state's central bargaining agency will be used by other state employee unions as a weapon in interunion competition—but it is likely to be so.

Questions concerning representation are to be decided through a formal SERB hearing system.¹⁸¹ Because unit determinations are not reviewable,¹⁸² a great deal of employer energy may be expended against the more active unions and in favor of the "no representation" or less energetic union options. Too much lobbying may be an unfair labor practice, triggering certification of the union without an election.¹⁸³ If there are any relatively unsophisticated public sector personnel officers, their mistakes during election periods may be as damning to the employer's cause as errors made in the private sector.¹⁸⁴ Because the Ohio bill does not have the saving clause regarding free speech and expression found in the federal labor relations statute,¹⁸⁵ the SERB is very likely to develop a jurisprudence of impermissible oral expressions. Precedents concerning which threats or promises can be made will be followed closely. Especially difficult will be the interpretation of comments by first-level managers to employees; the SERB is unlikely to read into the law a broad range of permissible expressions, when the legislature was aware that the Ohio bill differed from federal law on this point.¹⁸⁶

178. Andry, *supra* note 45. Most unions with few or no public sector members have ambitious organizational plans to cut into the heavy lead enjoyed by the established public employee unions. One representative quoted in the article stated that the Teamsters see Ohio public workers as "fertile new ground." One public employee union is spending one million dollars on its Ohio advertising campaign. *Id.*

179. OHIO REV. CODE § 4117.07(C).

180. The Office is established by *id.* § 4117.10(D). See *supra* text accompanying note 86.

181. OHIO REV. CODE § 4117.06(A).

182. *Id.*

183. See *id.* § 4117.07(A)(2).

184. The period before elections is an especially delicate one for labor related statements by the agents of the employer. Statements within this period are also likely to have great political visibility. The courts will have to decide which politicians and which newspaper reports of unnamed official sources will count as unfair coercive statements on behalf of the employer.

185. 29 U.S.C. § 158(c) (1976) provides that the free speech and expression of the parties are not to be unfair labor practices, unless some element of force or coercion is shown in a particular case.

186. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

D. Contract Formation and Negotiation

The Ohio Public Employee Collective Bargaining Act established a schedule for required collective bargaining that was the best or the worst of all possible schemes, depending on one's view of the collective bargaining process. In contract formation there are two principal timing concepts: (1) interunion challenges may occur only within a narrow window of time, thirty days in every one to three years, depending on the duration of the contract;¹⁸⁷ and (2) brief periods for renewal or initial negotiations require that all steps of impasse resolution be expedited.¹⁸⁸ As an administrative solution to a problem, Ohio's system of bargaining may have a surfeit of riches. The SERB, while offering many options in the form of fact-finding, mediation, and conciliation, requires their completion in such a short period that implementation will be difficult for well-intentioned employers and onerous for those resistant to progress in labor relations.

Before the formation of an initial contract, the bargaining process starts with a mandatory discussion period beginning on the ninetieth day before a date set by one of the parties, usually the recognized collective bargaining representative.¹⁸⁹ This period permits the parties, before any SERB involvement, to agree on the procedures to be used during their discussions.¹⁹⁰ It is to the advantage of neither to concede early. It may be said that an employer would lose ground under five of the six available options,¹⁹¹ each of which involves some concession for arbitration.¹⁹² The union would generally be better off with arbitration processes that will be available in cases of impasse.¹⁹³ Like any new administrative agency, the SERB can be expected to referee an early swarm of charges of obstruction and bad faith. In lieu of the ninety days for initial contracts, renewals have a sixty-day lead time before the known date of expiration.¹⁹⁴ If the system of self-selected impasse resolution fails, the failure will be due not to the deficiency of the SERB, but to the unrealistic expectations of the drafters.¹⁹⁵

During the discussion period, the parties probably will not agree on procedures. For example, a county probably will not favor multiunit bargaining with a central union unless it feels that better results can be achieved through one uniform contract and that it is able to assume the risk of one large county-wide strike.¹⁹⁶ The hope of

187. See OHIO REV. CODE § 4117.07(C)(6).

188. See *id.* § 4117.14(C).

189. *Id.* § 4117.14(B)(2).

190. *Id.*

191. The Coalition of Public Employers, Administrators and Taxpayers issued a joint position statement on May 10, 1983, that was critical of the selection of this option.

192. Of the six, five involve some form of arbitration as a resolution of the dispute and the sixth is undefined and to be negotiated. OHIO REV. CODE § 4117.14(C)(1).

193. *Id.*

194. *Id.* § 4117.14(B)(1).

195. The expectation that negotiations will begin with agreement on resolution mechanisms is based on the assumption that the parties will settle most disagreements early, with few to be arbitrated. This is subject to some argument depending on the extent of the experience of the employer, for the less sophisticated may be so adamant against concessions that all of the major issues may end up in some form of arbitration proceeding. Objections to the 90-day period were aired by school spokesmen during the legislative hearings. *More Strikes Predicted if Collective Bargaining Bill Passes*, 56 Gongwer Ohio Report, Apr. 18, 1983, at 2.

196. See OHIO REV. CODE § 4117.06(D)(5).

the legislative drafters that the parties would "decide how to decide" may reflect an overexpectation.¹⁹⁷ Natural adversaries are unlikely to consent to the use of a process that may forfeit an advantage for their respective sides. The drafters' hope for mutual-ity in the collective bargaining process appears to be counterbalanced by the incentives that both sides commonly experience—employers to demand continued concessions without strikes and unions to get parties other than the employer to agree with its needs.

In the optimal case, friendly discourse about procedures will lead to early settlement and agreement in an atmosphere of mutual respect. In the worst case, the fight among several competing unions will officially begin at the ninetieth day before contract expiration since competing organizations seeking to become the exclusive representative can begin campaigns for that status on the ninetieth day.¹⁹⁸ The more adroit unions can be expected to urge their militancy upon prospective members as a legitimate recruiting point. Thus, at the sixtieth day before an existing contract expires, the employee representatives will have just won or reconfirmed their status at the time when the discussion on new contract terms begins.¹⁹⁹

No statute can predict each of the methods of appropriate resolution that could be used. The final offer settlement procedure, for example, is a relatively recent arbitration development for public sector legislation.²⁰⁰ The parties may take any of the statutory options. Before the final House floor action on the legislation, any other system of settlement beyond the statutory options required SERB approval or, for state employees, the legislature's approval.²⁰¹ One reason for deleting that step was to free the SERB and the legislature from devoting more time to each new additional procedure that may be developed. The parties are free to resolve their differences by any means "mutually agreed to."²⁰² If an option is used, however, it must be invoked no later than forty-five days before either the date set by the initial negotiations request, or the expiration of the contract.²⁰³

A distinction in timing is made between initial and renewal contracts. The ninety-day period for bargaining of an initial contract becomes a sixty-day period for bargaining in renewals.²⁰⁴ No strike is permitted on an initial contract until after the ninety days of bargaining have passed.²⁰⁵

197. *Id.*

198. *Id.* § 4117.07(C)(6); from 90 days before expiration no more representation petitions can be filed, and the SERB will proceed to hold the election among the competing unions. Since the SERB will give 10 days advance notice and will usually take at least 10 days to prepare, elections can be held at day 70, during the period when active bargaining is beginning and only 25 days before the first step of impasse—the mediator assignment by the SERB. See LEGISLATIVE SERVICE COMMISSION, ANALYSIS OF AMENDED SUB. S.B. 133, 115th Gen. Assy., Reg. Sess. (1983).

199. This juxtaposition of pressures occurs in the same cycle each time because elections of new union representatives and contract renewals are always tied in together. Consequently, the union that holds the exclusive representation status must be both a good administrator during the contract period and a flexible negotiator ready to enter into active negotiations if it prevails in the election. The former wins votes, and the latter assures that the victorious union can prevail over the employer on issues of economic and working conditions.

200. The procedure was first conceived in 1966. Note, *Ohio Public Sector Labor Relations Law*, *supra* note 13, at 700.

201. Formerly, approval was needed, but this section was dropped in the House floor bargaining. OHIO REV. CODE § 4117.14(C)(1).

202. *Id.* § 4117.14(C)(1)(f).

203. *Id.* § 4117.14(C).

204. *Id.* § 4117.14(B)(2).

205. *Id.* § 4117.14(B)(3).

After bargaining continues to the point that fifty days remain for action, either the employer or the union may ask the SERB to intervene and investigate.²⁰⁶ The SERB has five days within which to act.²⁰⁷ The SERB investigation may take either a conciliatory or an investigatory form. SERB action will be comparable in some cases to a federal NLRB investigation of potential unfair labor practice charges.²⁰⁸ If the party seeking SERB intervention does not want to start out with such charges, it can ask the SERB to "determine whether the parties have engaged in collective bargaining."²⁰⁹ If the SERB finds that collective bargaining has only led to an impasse, or if there are only forty-five days left in the process, the SERB appoints a mediator from one of its lists.²¹⁰

E. Mediation Roles

Mediation is the well-known practice of bringing a neutral outsider into collective bargaining for the purposes of finding common ground and suggesting a compromise solution.²¹¹ The mediator seeks common ground and cautiously splits the differences between opposing sides. This knowledge gathering process and the effort to offer alternatives take time. The principal weakness of mediation as an administrative settlement device in the Act is that the time schedule allows too brief a period for the performance of successful mediation. Also, mediators propose solutions that are voluntarily accepted or rejected by the parties. There is no incentive to show mutuality of agreement, however, when both sides know that the next step will trigger a final offer settlement process that can include final and binding arbitration or a strike.²¹²

The SERB has two primary types of mediation roles—contract formation and strike settlement. The SERB has a special Bureau of Mediation that proposes the list of mediators.²¹³ The mediators can also be selected from common sources such as the Federal Mediation and Conciliation Service and the American Arbitration Association.²¹⁴

A pragmatic problem for the mediator will arise if he or she first enters the process too close to the statutory deadline. Experience, particularly in the states of Pennsylvania²¹⁵ and Michigan,²¹⁶ suggests that the Ohio time provision, under which

206. *Id.* § 4117.14(C)(2).

207. *Id.*

208. Unfair labor practice investigation procedures are provided for in federal law at 29 U.S.C. § 158 (1976) and in state law at OHIO REV. CODE § 4117.12.

209. OHIO REV. CODE § 4117.14(C)(2).

210. *Id.*

211. Mediation in public employment labor relations is a common practice; *see, e.g.*, R. SMITH, H. EDWARDS & R. CLARK, JR., *supra* note 25, at 792.

212. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

213. OHIO REV. CODE § 4117.02(H)(1).

214. The parties may agree on their own mediator or may accept the mediator provided to them by the SERB. *Id.* § 4117.14(C).

215. *See* 43 PA. CONS. STAT. ANN. § 1101.801 (Purdon Supp. 1965-1982). *See also More Strikes Predicted if Collective Bargaining Bill Passes*, 56 Gongwer Ohio Report, Apr. 18, 1983, at 2.

216. *See* MICH. COMP. LAWS ANN. § 423.10 (West 1978).

a mediator is appointed forty-five days before the expiration of the contract,²¹⁷ is too short. A decade of experience in other states indicates that a longer period and the capacity to explore issues with more flexibility would have improved the Ohio mediation system.²¹⁸

When he or she enters the case, at the request of "any party,"²¹⁹ the mediator has powers to bring the two parties together to discuss the issues on which they have reached an impasse. The mediator has the power to ask the SERB for a fact-finding panel between the mediator's appointment on the forty-fifth day before contract expiration and the last day for fact-finding requests, the thirty-first day before expiration.²²⁰ If a mediator enters a bitter impasse situation with only two weeks to reconcile the parties, his or her situation may be untenable because of the brief period available.²²¹

In some cases the mediator will need to go beyond the parties to discern the real bases of the disagreement. The 1975 version of the collective bargaining bill would have shielded mediators from outside contact.²²² The 1983 bill gives them more leeway. A prudent mediator may be in need of political and taxation advice before he or she can assess the validity of claimed inability to pay. Thus, when time is limited, the mediator may have to go directly to those who hold political office. The 1983 law does not proscribe such contacts.²²³

Will mediators have any success in narrowing the field of unresolved matters? With time, a skilled mediator could do so; but the more sophisticated bargainers on the union side will recognize that conciliation is the final step of the process and that holding out during mediation is likely to get more during the final settlement step, if it applies, or in a strike, if it does not. Smaller issues can be mediated, but the mediation effort is a distinctly weaker stage of negotiations than either the final binding arbitration stage or an actual strike. Offers to come halfway may not be made when the later stages serve the union's purposes so well.²²⁴

Mediators from the SERB will need prudence and a good sense of the politically possible; if the employer fights the SERB role in bargaining, it will be the mediator from the SERB who will bear the brunt of the challenge. Some friction is likely to develop between the Office of Collective Bargaining and the SERB mediation staff, who will be frequent coparticipants in negotiations.²²⁵

217. OHIO REV. CODE § 4117.14(C)(2).

218. Steiber & Wolkison, *Fact-Finding Viewed by Fact-Finders: The Michigan Experience*, 28 LAB. L.J. 89 (1977).

219. Either the employer or the union may seek mediation. In some cases there will be mutual desire for mediation; in others it will be solely the union's desire over employer objections, or *vice versa*. *Id.*

220. OHIO REV. CODE § 4117.14(C)(3).

221. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

222. Sub. S.B. 70, 111th Gen. Assy., Reg. Sess. (1975), would have restrained the nonparty contacts of the mediators and fact finders.

223. Mediators may contact anyone who will help resolve the disagreement in the particular situation; because the fact finder is limited in such contacts, it is highly relevant that the legislature in the final 1983 bill did not similarly limit the mediators. See Yaffe, *Fact Finding in Public Education Disputes—Its Values and Limitations: A Neutral View*, 3 J. LAW & EDUC. 267 (1974).

224. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

225. The role of the Office of Collective Bargaining makes it a natural adversary of the enforcement roles of the SERB. OHIO REV. CODE § 4117.10(D).

As an administrative agency employee, the mediator will be filling a role commonly filled by a completely neutral outsider. SERB mediators will need to be cautiously optimistic, and their failings at the local level will, for better or worse, reflect the flaws that local people perceive in the state agency. If mediation works well, as the voluntary efforts of the Federal Mediation and Conciliation Service have, the positive reflection on the SERB will enhance the credibility of the collective bargaining statute as a whole.²²⁶

Ohio's Sunshine Act will not apply to the mediation process,²²⁷ and it is unlikely that the mediator's offers and proposal documents will be made public under the Open Records Act. Just as its federal counterpart, the SERB agency would be put out of business if disclosure were required.²²⁸ An open records issue may arise if the drafts of documents that are required to be public²²⁹ are leaked. Can or will the SERB or the Office of Collective Bargaining choose to disclose more records to put the released material into context?

F. *Fact-Finding Stages*

Following the process of mediation discussed above, a separate process of fact-finding may be initiated at the mediator's request.²³⁰ It is important for a new agency like the SERB to develop guidelines for these requests. Fact-finding can be expensive, and half the costs will be borne by the SERB.²³¹ The mediator's request must be acted upon rapidly since no fact-finding panel can be appointed after the thirty-first day before expiration of the contract, absent mutual agreement.²³² The appointments must be made within one day²³³—suggesting that the Board must, as a practical matter, plan for the failure of the mediation stage while it is still underway. The SERB's rules for determining when to institute fact-finding will be important.²³⁴

The rulemaking powers of the SERB must be used to create the framework for implementing the fact-finding process.²³⁵ One, two, or three persons can be used on the panel.²³⁶ The SERB maintains the candidate list from which the parties select their candidates.²³⁷ An SERB rule for selection of the "uncommitted" candidate on a three-member panel will have great impact and may be hotly debated at the rulemaking hearings.²³⁸

226. Successful mediation work by the SERB will facilitate the several other missions in which SERB staff members may be adversaries of the parties to that mediation; the continuing relationships will be affected by early success or failures of SERB employees.

227. See OHIO REV. CODE § 4117.21.

228. *Id.* See also J. O'REILLY, UNIONS' RIGHTS TO COMPANY INFORMATION 176 (1980).

229. OHIO REV. CODE § 4117.17.

230. *Id.* § 4117.14(C)(3).

231. *Id.* § 4117.14(C)(5). See also Yaffe, *supra* note 223.

232. OHIO REV. CODE § 4117.14(C)(3).

233. *Id.*

234. The rulemaking power in fact-finding will contribute significantly to the fairness of the decision by the fact finders, an important element in public acceptance of their role. See *id.* For background, see Yaffe, *supra* note 223; and Steiber & Wolkinson, *supra* note 218.

235. OHIO REV. CODE § 4117.14(C).

236. See *id.* § 4117.14(C)(3).

237. *Id.*

238. *Id.* In Pennsylvania the State Board rather than the local parties select the fact finders. 43 PA. CONS. STAT. ANN. § 1101.802 (Purdon Supp. 1965-1982).

A fact finder forces the parties to confront financial truth. By exposing a city's true financial picture, for example, fact-finding may show that a theretofore unidentified fund can cover a raise in salary of twelve percent. A fact finder has a triple role—mediator, audit examiner, and personnel evaluator. She or he is an outsider peering into the employer's structure, looking for bargaining answers.²³⁹ Subpoena power, hearings, and testimony are helpful tools for the SERB's mission.²⁴⁰

Critics have asserted that fact-finding requires more time than the twenty-eight days allotted to it. The criteria to be applied are not simple; they will be the same as that which the conciliator will examine in the binding settlement procedure. This set of criteria was added in the House committee markup of the bill to tighten the fact finders' decisional process.²⁴¹ The Act's criteria include past agreements, pay of comparable workers, legal authority of the employer, traditional considerations applied in fact-finding (a reference to precedents in other states with fact-finding settlements), and "the ability of the public employer to finance and administer the issues proposed."²⁴² In retrospect, the final bill's inclusion in fact-finding of criteria intended for the conciliation process reinstated the original 1975 bill's proposed criteria.²⁴³ Between that 1975 bill and the final 1983 version, the criteria were to have been set by the SERB. Withdrawal of the SERB's authority to set fact-finding criteria lessens the qualitative impact the SERB will have on the fact-finding process and leaves the Board's rulemaking powers strictly in the procedural field.²⁴⁴

The final amendments in the 1983 House committee action also placed fact-finding in direct parallel with conciliation in another aspect. Both sides must state their position on each disputed issue,²⁴⁵ and final recommendations on each issue will be made by the panel.²⁴⁶ The safety forces conciliation mechanism uses an identical approach.²⁴⁷ The difference is that recommendations of fact finders can be rejected by sixty percent of the voting strength in the organization or legislative body, while conclusions of the conciliator bind the safety forces and employers.

Fact-finding is a neutral exploration of facts that are sometimes overlooked, and in some cases suppressed, by the employer.²⁴⁸ The public agency that the fact finders

239. Yaffe, *supra* note 223, at 270; see also Steiber & Wolkinson, *supra* note 218.

240. These are the powers provided to the Ohio fact finders; see OHIO REV. CODE § 4117.14(C)(4).

241. In the drafts prior to final House action the statute did not define the criteria to be considered by the fact finders. After the bill cleared the House Committee, an additional sentence was added to state that the panel must take into consideration the same factors, including employer ability to pay, that the conciliator would need to take into account in a conciliation award. *Id.* § 4117.14(G)(7). Thus, precisely the same set of factors will be considered twice, for safety forces, once at fact-finding and once at conciliation. The criteria that the conciliator would weigh had not previously been relevant to the non-safety force situation.

242. *Id.* § 4117.14(G)(7)(c).

243. Sub. S.B. 70, 111th Gen. Assy., Reg. Sess., was passed, but vetoed, in 1975. Its version of § 4117.14(A)(4) directed fact finders to consider "the logical and traditional concepts and principles vital to the public interest in efficient and economic government administration, the ability of the public employer to finance and administer the issues proposed, and the effects of the adjustments on the normal standard of public service."

244. See OHIO REV. CODE § 4117.4(C)(3)(a).

245. *Id.* This procedure may dilute the effectiveness of fact-finding since there may be dozens of unresolved issues in a complex unit, and the same deadlines exist regardless of the number of issues pending.

246. The legislation differentiates between "guidelines for the fact-finding panel to follow in making findings" and the duty to take into substantive consideration certain significant factors in the decisional process. See *id.* § 4117.14(C)(3)(e).

247. Compare the identical factors to be used in *id.* §§ 4117.14(C)(3)(e) and .14(G)(7); the first is the fact-finding stage, the second the conciliation stage.

248. Yaffe, *supra* note 223, at 270.

can show to have concealed its ability to pay loses credibility. The employer is in a very delicate position, of course, since its own accountants and financial analysts will be members of the bargaining unit.²⁴⁹ From the employer's standpoint, fact-finding procedure in the new law can be criticized as too superficial, too fast, and likely to be slanted against the employer.²⁵⁰ Like the individuals who serve as mediators and conciliators, the fact-finding representatives on the SERB list probably do not live with the employer's problems and may not reflect the sentiment of the voting taxpayers.²⁵¹

One item of fact-finding procedure is clear: the Ohio law prohibits shopping for settlements—the occasional practice of a fact finder to seek a middle ground with politically important nonparties. For example, a fact finder who learns that the city manager's offer of five percent can be overridden by a city council majority, who might give 6.5 percent, might want to go to the key council leaders for informal talks. Or, the negotiator for a local nursing unit that is represented by a statewide union may insist on eleven percent, but the fact finder may know that the statewide union would be satisfied with eight percent. The law forbids public discussion of settlement recommendations.²⁵² A violation of the provision can be punished in the courts, and courts will have to decide whether a contract based on a fact finder recommendation is voidable.

The fact-finding process can be characterized as a means of gathering support for a settlement. The data gathering must be completed and the conclusions reached, however, within fourteen days after appointment²⁵³—a timetable that may be too short for gathering much "new" information. The burden of error in the fact finders' conclusions falls against the employer. If the fact finders take the union's recommended position, they give a stamp of approval to the employer's ability to pay. At one time, the conciliation step, which follows fact-finding for the safety forces, included choices among both parties' recommended findings as well as those of the fact finders.²⁵⁴ This was changed in the last set of amendments; and recommenda-

249. Only those employees who are in a close continuing relationship with officials who directly participate in the bargaining are excluded as "confidential," OHIO REV. CODE § 4117.01(J); others who supply data are likely to be members of the bargaining unit for office employees. Access to many of the same records will be available through the political process, or under the Ohio Open Records Act, OHIO REV. CODE ANN. § 149.43 (Page 1978); State ex rel. Plain Dealer Publishing Co. v. Krouse, 51 Ohio St. 2d 1, 364 N.E.2d 854 (1977).

250. In fact-finding, "an unworkable short period of time is provided" so the "true collective bargaining process will disappear as unions will not bargain in good faith when they know they can try for an even better contract with an arbitrator." Memo to Mayors and Managers Regarding Collective Bargaining Legislation from J. Coleman, Ohio Municipal League, Mar. 24, 1983, at 3.

251. The Municipal League suggested the same. *Id.* There is no prohibition on placing a resident on the fact-finding panel, but a fact finder is often identifiable with one or another side and an outsider fares better. The negative aspect of the outsider selection is that it would be "unrealistic to assume that a fact finder can come into a strange community and in a matter of hours accurately assess the political power of the disputants in that community." Yaffe, *supra* note 223, at 269.

252. OHIO REV. CODE § 4117.14(C)(4)(f). For a useful discussion of the political dynamics of the fact-finding process, see Yaffe, *supra* note 223. See also R. SMITH, H. EDWARDS & R. CLARK, JR., *supra* note 25, at 792-94. That political element cannot be ignored but it is excluded from consideration by the statute at this stage.

253. OHIO REV. CODE § 4117.14(C)(5).

254. This provision was one of the few Republican amendments accepted in committee. Amend. I-30, House Commerce and Labor Committee, by Representative James M. Petro. The provision may have been too flexible, however, and was stricken on the House floor. It was not included in the final statute.

tions from fact finders are considered, but are not one of the conciliator's available options.²⁵⁵

Each of the parties has a legitimate need to "capture" the fact finders' conclusion on key issues. The conciliator may tend to favor the side whose views are aligned with those of the neutral fact finder.²⁵⁶ A settlement of a strike threat may be more feasible if the union has the backing of the neutral fact finder's recommendations. For non-safety forces the chance to win the publicity battle by capturing favorable recommendations is an important opportunity. Though such workers can strike, it is more prudent to strike for concessions that have the publicized support of neutral fact finders.

The end of the routine negotiation process will come, at most, seven days after the findings and recommendations of the fact finders are made.²⁵⁷ If both sides agree, the fact finder's recommendations will be accepted. But the House committee in 1983 adopted a novel concept of democratizing rejections. Votes must be taken if rejection is considered, making acceptance easier.²⁵⁸ Either the employer or the employee organization can reject by a three-fifths majority. Union organizations' voting methods on this particular type of balloting will be prescribed by SERB regulations.²⁵⁹ If the vote for the contract is at least forty-one percent of the body, the contract is ratified.²⁶⁰ The late amendment in 1983 means that the legislature may be asked to vote down a tentatively approved state contract, but sixty percent of the members of both houses will be necessary to reject the state contract.²⁶¹ For example, a Republican Senate minority of sixteen would need six Democratic supporters to upset a contract in the state Senate.²⁶²

If no rejection occurs, negotiators for both sides then frame the contract accord-

255. OHIO REV. CODE § 4117.14(G)(6). It is the duty of the SERB, independent of the parties' submissions, to give a copy of the fact finder's recommendations to the conciliator. While the SERB is neutral, there may be conciliators who view the fact finder's recommendations as implicitly endorsed by the SERB because the agency presents those recommendations to the conciliator. In a sense, however, they are the only neutral document that the conciliator will get from anyone.

256. The effectiveness of this information will vary with each situation. Surely, a reviewing court would be more likely to ratify the conciliator's arbitration award if the evidence includes a nearly identical set of findings by a fact finder who examined the same information.

257. See OHIO REV. CODE § 4117.14(D).

258. *Id.* § 4117.14(C)(6). A management effort to make the conciliator awards binding unless rejected by the same three-fifths majority of the legislative body was rejected along party lines in the Senate. *Bargaining Bill for Public Employees Approved by Senate*, 56 Gongwer Ohio Report, Apr. 21, 1983, at 1.

259. Problems may arise when the SERB rules "governing the procedures and methods for public employees to vote on the recommendations" conflict with the bylaws of the union involved. At the least, the unions will be active participants in any hearing on the proposed rule which will govern this voting. OHIO REV. CODE § 4117.02(H)(8)(c). Query whether the duty of fair representation will require that nonmembers be permitted to participate in the mandatory statutory vote of "public employees" on the recommendations of fact finders. *Id.* § 4117.14(C)(6).

260. See *id.* § 4117.14(C)(6).

261. The legislature is the only "legislative body" for most state workers, excluding higher education facilities. See the definition of "employer" at § 4117.01(B) and (C)(2). The Ohio legislature is the legislative body that may reject contracts which emerge from fact-finding. *Id.* § 4117.14(C)(6).

262. The bill passed the Senate along a strict party line vote. The strongest minority presence is in the Senate, which could, by having its members vote "no" to prevent the required 60% approval of a contract, precipitate a test of the new law. This political maneuvering, despite its many negative aspects for the workers and legislators alike, would force the non-safety force union into a strike. This result would place the Office of Collective Bargaining, which had first agreed to the fact finders' report, in a difficult position. Because this is not improbable, it raises the question why the House floor amendments, the last legislative action on the bill, included such a potentially divisive provision.

ingly and execute it promptly. But an impasse is reached if three-fifths of either the organization or the legislators vote to reject the tentative agreement.²⁶³ The system is designed to ease agreement and encumber rejection.

G. *Impasse Resolution*

When all else fails, and a contract is not going to be initiated or renewed peacefully, an impasse exists. SERB powers become extremely important, and their prudent exercise becomes vital. When the parties' electoral bodies reject the fact finder's recommendations, three options exist. First, designated police and safety forces must go to a special final offer settlement.²⁶⁴ Second, other employees may go on strike.²⁶⁵ Third, the employees who are not in the safety class may proceed to the next stage of the special procedures that they chose in their contract, which might include one of several forms of arbitration, including citizen's arbitration, a novel procedure.²⁶⁶ The options would be agreed to in advance, though several, like citizen's arbitration, are rather unlikely vehicles for experimentation.²⁶⁷

The principle behind separate safety and nonsafety remedies is to reward those who for urgent policy reasons cannot be allowed to strike. Originally, traditional safety forces like guards, fire fighters, and police were segregated from the strike category in Ohio, as they have been in other states.²⁶⁸ Politically motivated inclusions muddled the differentiations, however, with the addition of clerks from the retirement systems and exclusive nurse units to the binding arbitration classes.²⁶⁹

If public employees are not included in the designated no-strike classifications, they may strike ten days after their membership, or the employer legislative body, rejects the fact-finding recommendations.²⁷⁰ If, for example, the union's contract with a school board expires April 30, 1984, and the fact-finding report issues May 1, the teachers' rejection of the report on May 2 can be accompanied by a notice to the SERB and the employer that their strike begins May 12. If the contract voluntarily calls for another procedural stage, such as arbitration, the strike cannot take place until all contract steps have been fulfilled.²⁷¹

263. OHIO REV. CODE § 4117.14(C)(6).

264. *Id.* § 4117.14(D)(1).

265. *Id.* § 4117.14(D)(2).

266. *Id.* § 4117.14(E). A strike by a group that is otherwise permitted to strike is illegal if the group has agreed, by contract, to some form of post-fact-finding resolution of disputes, and the entire settlement process has not been completed. Section 4117.15(A) applies because the alternative settlement procedures are "settlement procedures" for purposes of the strike bar in § 4117.14(A).

267. *Id.* § 4117.14(C)(1)(e).

268. The 1975 bill was far less inclusive in the safety category, with nine fewer categories of workers than were covered by the final 1983 text. Among the additions were youth leaders, retirement clerks, nurses, paramedics, psychiatric attendants and dispatchers. Compare coverage in Sub. S.B. 70, § 4117.15(A), 111th Gen. Assy., Reg. Sess. (1975), as passed, with final 1983 Act, OHIO REV. CODE § 4117.14(D)(1).

269. OHIO REV. CODE § 4117.14(D)(1). The retirement clerks were added on the House floor; none of the published sources reveal why they were reclassified as "safety" forces, or how one would treat a retirement clerk who held other duties, *e.g.*, a school district payroll clerk who administered a retirement system in addition to other duties. One possible explanation is that recipients of the checks were represented by the unions of current employees whose interests properly were reflected in the House floor action on the bill.

270. *Id.* § 4117.14(D)(2).

271. *Id.* § 4117.14(E).

Safety force workers cannot strike; for them, a strike would be a clear violation of law, subject to rapid injunctive relief in the courts.²⁷² Because the strike weapon is unavailable, the final offer settlement process is sweetened to make up for the lack of more militant actions. First, the SERB orders the parties to conciliate.²⁷³ Second, a list of five conciliators from the SERB is offered.²⁷⁴ If the parties cannot agree, the SERB appoints its own candidate or appoints a person from the American Arbitration Association's list.²⁷⁵

The form of mandatory arbitration used for safety forces differs considerably from state to state.²⁷⁶ A change from the original Ohio provision for arbitration was agreed to during legislative development, and the term "conciliation" may or may not carry the benefit of the arbitration case law for affected employers.²⁷⁷ It is likely that the change in the name of the procedure will not prevent direct translation of Ohio's arbitration precedents since the legislature tied this section to the statutory process for commercial arbitrations.²⁷⁸ Transfer may be more difficult for review of binding awards, however, since Ohio uses commercial arbitration review standards,²⁷⁹ and other states have review adjusted to public employee settings.²⁸⁰ California uses a test of whether the arbitration award is "repugnant" to state labor law—a much tighter standard than Ohio's.²⁸¹

Conciliators enjoy several advantages. First, their schedules are much more flexible, especially when the prior contract has expired. As much as twenty-five days may pass between the order to conciliate and the parties' submission of "final offer

272. Strikes by public safety employees would be a violation of the Act that could be enjoined as a matter of equity, even where § 4117.15(A) might not apply. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983. The employer could seek equitable relief for a statutory violation, or the SERB could exercise its unfair labor practice jurisdiction. OHIO REV. CODE § 4117.13(A). The provision for "clear and present danger" injunctions in § 4117.16(A) is inapplicable to safety force strikes.

273. *Id.* § 4117.14(D)(1).

274. *Id.*

275. *Id.*

276. *See, e.g.*, MICH. COMP. LAWS ANN. § 423.233 (West 1978); N.Y. CIV. SERV. LAW § 209 (McKinney 1983); 43 PA. CONS. STAT. ANN. § 1101.805 (Purdon Supp. 1965-1982).

277. The bill had its direct legislative roots in an arbitration procedure. *See* Sub. S.B. 222 (1977), at proposed § 4117.14. When S.B. 133 was introduced in 1983, it had an arbitration system, but a subcommittee amendment adopted shortly thereafter changed it to "conciliation" and allowed the parties to select an alternative means of conciliation from a list of approved methods. *Binding Arbitration Removed from Collective Bargaining Bill*, 56 Gongwer Ohio Report, Apr. 11, 1983, at 1. Because the sponsor introduced the bill as an issue by issue final settlement process, Press Release of Senator Eugene Branstool on Introduction of S.B. 133 (Mar. 18, 1983), and because § 4117.14 as passed provides the same, Ohio's conciliators are not creators but choosers. Ohio courts will never face the Pennsylvania courts' question whether an arbitrator has power to expand the literal terms of the contract. *See* Ringgold Area School Dist. v. Ringgold Educ. Ass'n, 489 Pa. 380, 414 A.2d 118 (1980).

278. OHIO REV. CODE ch. 2711 is incorporated to provide the method of review for arbitration decisions. OHIO REV. CODE § 4117.14(H). It is significant that, originally, the bills that preceded this Act would have expressly limited both the jurisdiction and scope of the review of a conciliation award. Sub. S.B. 70, which was passed, but vetoed, in 1975, would have allowed review of an arbitrator's award in the courts of appeals on grounds that (1) the arbitrator lacked or exceeded jurisdiction in the award; (2) fraud, collusion or unlawful means were used; or (3) provisions of the arbitration section were not followed. Sub. S.B. 70 (1975). That bill created no right to a jury as § 2711.03 does for cases of refusals to arbitrate; and the 1975 version would not have allowed vacating an award, as § 2711.10(D) does.

279. OHIO REV. CODE ANN. § 2711.10 (Page 1981).

280. *See, e.g.*, Leechburg Area School Dist. v. Dale, 492 Pa. 515, 424 A.2d 1309 (1981); Ringgold Area School Dist. v. Ringgold Educ. Ass'n, 489 Pa. 380, 414 A.2d 118 (1981); Division 85, Amalgamated Transit Union v. Port Authority, 62 Pa. Commw. 528, 437 A.2d 105 (1981); and N.Y. CIV. SERV. LAW § 213 (McKinney 1983).

281. CAL. GOV'T CODE § 3514.5 (West 1980). Review of the award is by the administrative board. Ohio uses the courts, not the SERB, to review awards.

and rationale" papers.²⁸² Presumably, the two sides will modify the offers that each made to the fact finder during the preceding stage.²⁸³ Second, the fact finder's recommendations on each issue are part of the record, although they are not included as a third option for the conciliator's consideration.²⁸⁴ The task of selecting from two options is more difficult than creating a contract from the ground up. The legislators intended to omit from this concept the commercial arbitrator's powers to fashion remedies by creating a middle ground solution.²⁸⁵ Third, the conciliators are supported by the SERB, and the legislature has given them extensive powers.²⁸⁶ Their position is stronger than that of the fact finders and requires less diplomacy than the mediation role. Finally, the conciliator has broad authority to select between the competing solutions.²⁸⁷

Issues to be decided in final offer settlement proceedings should have been well shaped before the case comes to the conciliator. Though the doctrine of waiver or exhaustion of issues remains to be developed,²⁸⁸ one can expect that in each case where there has been fact-finding, the conciliator will not entertain bargaining issues that were not raised in fact-finding.²⁸⁹ Because the process is designed to be integrated, the statute cannot encourage any hidden agenda items. The advantage of conciliation as a final step would be lost if new issues were raised late in the bargaining. However, this puts the burden on both parties to watch the other carefully; so long as an issue remains open it can be concluded against one's interest at the conciliation stage.²⁹⁰

282. OHIO REV. CODE § 4117.14(G)(3).

283. *Id.* § 4117.14(C)(3)(a). Offers made to the fact finder, however, may be identical to those made to the conciliator. *Id.* § 4117.14(G)(3).

284. *See id.* § 4117.14(G)(2)-(3). At one time, the bill allowed the conciliator to offer the fact finder's recommendations as a third option if either party's position was desirable to the conciliator. This amendment was offered by Republican Representative James M. Petro; it was accepted in the House Committee but stricken on the House floor. OHIO LEGISLATIVE SERVICE COMMISSION, ANALYSIS OF AM. SUB. S.B. 133, at 14 (June 1983).

285. The primary sponsor of the bill, Senator Eugene Branstool, defended this approach: "[A]n outside conciliator would merely pick from the best offer from labor and the best offer from management." Press Release (May 4, 1983). The conciliation change from the original bill had Senator Branstool's support. *Binding Arbitration Removed from Collective Bargaining Bill*, 56 Gongwer Ohio Report, Apr. 11, 1983, at 1. At one time, Senator Branstool had considered that the arbitrator could revert back to the fact finder's report "if an arbitrator feels the last best offers are unreasonable." *Subcommittee Begins Redrafting Collective Bargaining Bill*, 56 Gongwer Ohio Report, Apr. 7, 1983, at 1.

286. *See* OHIO REV. CODE § 4117.14(G).

287. *Id.* § 4117.14(G)(7).

288. Arbitration case law suggests that waiver should be considered as a defensive issue. *Vulcan-Cincinnati, Inc. v. United Steelworkers*, 113 Ohio App. 360, 173 N.E.2d 709 (1960); Annot., 26 A.L.R.3d 608 (1969).

289. An arbitrator should, ideally, be dealing with a smaller number of issues than those presented to the fact finders at the earlier stage. It was the primary sponsor's intention that "only the toughest issues would reach conciliation for settlement." Senator Eugene Branstool, Press Release (May 4, 1983). However, the bill as amended on the House floor speaks of "the recommendations" of the fact finders as a package. Under the scheme of § 4117.14(C) as adopted, all unresolved issues go to the panel (subsection (C)(3)(a)); the panel must make recommendations on all issues (subsection (C)(5)); and the vote of the employer legislature and the employee membership is on "the recommendations" (subsection (C)(6)). In the case of the safety forces the conciliator then gets those issues that are subject to collective bargaining and "upon which the parties have not reached agreement." OHIO REV. CODE § 4117.14(G)(1). It may be unlikely that the negotiators will agree on issues that their principal constituencies have rejected by vote during the 25 days available for identifying the "unresolved issues." *Id.* § 4117.14(G)(3). An empirical study should be done to evaluate whether the existence of conciliation for all issues reduces the efficacy of fact-finding as a stage in the settlement process.

290. Parties must keep close track of what matters are "issues," and part of the inherent obligation of bargaining is to specify issues in sufficient detail.

Several statutory factors must be considered by the conciliator.²⁹¹ These are essential items, for the otherwise binding award could be reversed if the conciliator exceeded his or her statutory powers.²⁹² Because the drafting of the factors was done largely by pro-employee proponents, not all of the considerations rest equally well with all affected parties. The conciliator will take into account standard items like the bargaining and contract history, and the employer's legal authority. Additional factors, such as comparable work, pay, and job conditions, as well as any stipulations, will be considered.²⁹³

Two aspects that are sure to be litigated round out the criteria. The conciliator must consider the public interest, including "the ability of the public employer to finance and administer the issue proposed, and the effect of the adjustments on the normal standard of public service,"²⁹⁴ and other factors "normally or traditionally taken into consideration" in private or public labor arbitrations.²⁹⁵ Empirical research can determine how well the conciliator assessment jibes with the fact finder's recommendations on the same set of criteria.²⁹⁶

V. STRIKES AND THE ADMINISTRATIVE PROCESS

A. *In General*

The ultimate base of economic power for any employee organization engaged in collective bargaining is the ability to strike. Volumes have been written about whether a limited right to strike for public sector employees is supported by labor relations theory.²⁹⁷ Ohio's recognition in the 1983 Act that most public employees

291. These factors include: past agreements; comparable pay for comparable work in other private and public employment; authority of the employer, presumably including taxation authority; stipulations of parties; other "normal and traditional" factors in public or private arbitration; and the key item: "the interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service." *Id.* § 4117.14(G)(7).

292. These factors, read in conjunction with the standard of judicial review, do not mesh well. *See* OHIO REV. CODE ANN. § 2711.10(D) (Page 1981). That standard asks whether the arbitrator executed his or her power to decide the matter within these criteria "so imperfectly" that a "mutual, final and definite award upon the subject matter submitted was not made." *Id.* Once the arbitrated awards are appealed, the matter is in the hands of the courts, which use a commercial rather than a labor relations standard for reversing arbitrations. This may prove to be a systemic discontinuity that places unions' more controversial conciliation victories in jeopardy.

293. What work is comparable will undoubtedly be the subject of briefs by the parties in support of their respective final offers. The conciliator may be perplexed by the task of comparing a public job, with its benefits and character of relative security, to a private job of the same name, higher pay, and lower fringe benefits.

294. The ability to pay is one of the primary factors that the conciliator must consider, according to the bill's principal sponsor. "An appeal to the courts would result if this is not considered." Senator Eugene Branstool, Press Release (May 4, 1983).

295. The term is not defined in Ohio, Michigan, or California, but it may include prevailing practices, responsibility of the position, steadiness of employment, fringe benefits, ability to pay, wage pattern, and productivity. *See* F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (3d ed. 1973).

296. Comparability may reflect either time pressure on the fact finder or generosity of the conciliator. A pay increase may not be comparable, for example, if the conciliator receives new information about increases in the tax base or property tax assessments unavailable to the fact finders because of their limited time to study the issues. It is in the interest of both sides quickly and accurately to get the data before the fact finders because awaiting a conciliation decision may mean months of delay. The Ohio legislature was told that the arbitration-conciliation process could take as long as a year, as it has in Michigan. Memo to the Senate Commerce and Labor Committee from J. Coleman, Ohio Municipal League, Apr. 19, 1983.

297. The famous labor arbitrator, Theodore Kheel, said it best: "Our dilemma is thus apparent . . . We want to

should have the right to strike²⁹⁸ represents a major change from the draconian Ferguson Act of 1947.²⁹⁹ A "strike," as defined under the amended law, begins with "concerted action," an element not previously required.³⁰⁰ It includes slowdowns, as well as the more common stoppages that had been covered previously,³⁰¹ and, as with prior law, the action must be intended to induce, influence, or coerce a change in employment conditions, such as pay or privileges.³⁰² The amended strike definition deletes the alternative intention test under the 1947 law, which treated actions taken to influence other persons unlawfully as a strike.³⁰³ The amendment also changes the proscription against stoppage from "unlawfully" ceasing work to "willfully" doing so.³⁰⁴

In the 1983 Act the legislature modified the controversial and cumbersome procedures of the 1947 statute.³⁰⁵ Unfortunately, additional procedural steps in the 1983 Act appear even more difficult to administer. Prior law required the "superior" to notify the employee that he or she was considered to be on strike.³⁰⁶ Severe punishments would follow. Many employers did not choose to invoke the law.³⁰⁷ Under the new law, many strikes will be lawful at the conclusion of a bargaining impasse. In the illegal strike situations, the employer must ask the SERB to decide the status of the employees engaged in a strike.³⁰⁸ The employer cannot decide, on its own, that an employee is on an illegal strike; it cannot act against striking employees unless (1) the SERB has been brought in, at the employer's request, to make a determination of legality; (2) the SERB finds that the employer did not provoke the strike; and (3) each employee is given individual notice by the employer that he or she is engaged in a strike found illegal by the SERB.³⁰⁹ This multistep administrative

prevent strikes and simultaneously grant public employees the right to bargain collectively and participate in the determination of their working conditions. But collective bargaining, true joint determination, cannot exist without the prospect of a strike." Kheel, *supra* note 21, at 188. See also Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969); Note, *The Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549.

298. OHIO REV. CODE § 4117.14(D)(2).

299. 1947 Ohio Laws 122 (repealed 1983).

300. OHIO REV. CODE § 4117.01(H).

301. *Id.* This was criticized in testimony by an expert on federal labor law, who observed: "A slowdown is the most difficult form of concerted activity to prove, which is the one reason why it is not protected in the federal system." Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

302. OHIO REV. CODE § 4117.01(H).

303. OHIO REV. CODE ANN. § 4117.01(A) (Page 1980), *repealed* by 1983 Ohio Laws 140, also included the purpose of "intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment." This was deleted, but it still may be prohibited as an unfair labor practice. See OHIO REV. CODE § 4117.11(B).

304. Compare OHIO REV. CODE § 4117.01(H) with former OHIO REV. CODE ANN. § 4117.01(A) (Page 1980).

305. When the bill was introduced in the 1983 legislature, its primary sponsor said, "[T]he Ferguson Act is simply not working . . . [I]t only provides penalties, it does not provide tools to help parties resolve their disputes." Press Release of Senator Eugene Branstool on Introduction of S.B. 133 (Mar. 18, 1983). Compare the Ohio situation with Decker, *supra* note 89.

306. OHIO REV. CODE ANN. § 4117.04 (Page 1980), *repealed* by 1983 Ohio Laws 140, § 4.

307. Every one of the management and labor counsel interviewed for this article stressed the unevenness of application of the Ferguson Act penalties. Recent commentators have agreed. Note, *Collective Bargaining*, *supra* note 33; Note, *Ohio Public Sector Labor Relations Law*, *supra* note 13.

308. OHIO REV. CODE § 4117.23(A).

309. *Id.* § 4117.23.

adjudication will be arduous for employers.³¹⁰ By the time the determinations and notification are made, the employees may settle and come back to work.

Although the procedures for penalizing a striking employee appear to be severely limited, it is predictable that some employers will try to use them anyway. The penalty process is convoluted. Only those employers who scrupulously follow procedures can impose effective penalties. The due process provisions of the strike penalty clause are excellent models for advocates of the employee position because they allow only limited administrative remedies to the employer.³¹¹ It will be apparent over the first few years of the new law that public employers have lost a credible threat of punishment. The law merely adds a procedural inhibition to the inherent political inhibitions that elected officials must face when they consider penalizing their employees.³¹² In this aspect, the motivations of private sector and public sector employers diverge the most.³¹³

There are also two subsidiary losses to the public employer in the amended law's strike provisions. One is that a lockout cannot be conducted by the employer against the employee.³¹⁴ Employer advocates argued strenuously that this prohibition ties the employer's hands when predictability of public services is crucial and workers repeatedly threaten to strike.³¹⁵ A second problem for employers is that a slowdown must be treated as a strike, with all the attendant SERB determination and appeal steps.³¹⁶ Punishing a slowdown as a "strike" may be extremely cumbersome, but it may be the only remedy available.³¹⁷

B. *Classes of Strikes*

Although the statute fails to define systematically the classes of strikes now recognizable under the Ohio law, it is possible to identify those classes:

310. *Id.* § 4117.23(B)(3). This section provides for administrative review. The Act does not specify the means of appeal of the Board's decision. The venue for appellate review of the SERB order is limited to the court of common pleas for Franklin County in Columbus. OHIO REV. CODE ANN. § 119.12 (Page Supp. 1983).

311. See OHIO REV. CODE § 4117.23.

312. Elected officials generally lose votes, campaign workers, and supporters when they alienate large numbers of public employees who work in their jurisdiction.

313. The paradigmatic relationship between private employer and private employee is one in which the employee delivers only labor on assigned tasks, with such loyalty as the employer can extract by contractual limitations. By contrast, public employers who are elected officials need positive reinforcement of their policies from the general public at election time. The power of public employee organizations as electoral forces in Ohio is undisputed and, indeed, was one of the factors cited by opponents of the new Act: "Labor organizations contributed more than \$1 million to Gov. Richard Celeste's campaign and huge sums more for election of [legislators] . . . They are already halfway home on receiving up to \$50 million a year on their investment" [in the form of public employee union dues]. Jordan, *Labor's Investment Reaps Dividends*, Columbus Dispatch, May 1, 1983, at F4.

314. OHIO REV. CODE § 4117.11(A)(7).

315. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

316. A slowdown is a "strike," OHIO REV. CODE § 4117.01(H), so the employer must use the SERB remedy, provided in § 4117.23(B), for any relief short of a court order. *City of Dover v. International Ass'n of Firefighters, Local 1312*, 114 N.H. 481, 322 A.2d 918 (1974), held that a slowdown can be treated as a strike-like job action.

317. There is great difficulty in proving a slowdown. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983. A strike needs to manifest certain intentions before the union can be said to be actually on strike. OHIO REV. CODE § 4117.01(H). Police work, however, is so inherently discretionary that Ohio employers will find it difficult, if not impossible, to prove facts sufficient to punish police slowdowns under § 4117.23. *Cf. City of Dover v. International Ass'n of Firefighters, Local 1312*, 114 N.H. 481, 322 A.2d 918 (1974) (employer responses to police officers' quasi-strikes), and *Purcell v. Greenwald*, 1981-83 Pub. Bargaining Cas. (CCH) ¶ 37361 (N.Y. Sup. Ct. 1981).

(1) lawful strikes posing no public danger;³¹⁸

(2) lawful strikes posing some "clear and present" public danger, which may be enjoined;³¹⁹

(3) lawful strikes posing some public danger that is not "clear and present," which cannot be enjoined;³²⁰

(4) lawful strikes posing a clear and present public danger that have been enjoined for sixty days, termination of which bars the court from continuing or imposing new injunctions;³²¹

(5) strikes that are unlawful because of their timing, for example, during fact-finding under an existing contract;³²²

(6) strikes that are unlawful because of the class of worker involved, for example, fire fighters;³²³ and

(7) strikes that otherwise meet the definition of "strike" but are not treated as such as a matter of law because of the workers' "good faith" belief that there are "dangerous or unhealthful working conditions at the place of employment which are abnormal to the place of employment."³²⁴

One could forgive confusion on the part of an employer considering these differences in definitions.

The competing factions debated statistical projections of future strikes during the Senate and House passage.³²⁵ Heavy political cannon fire was exchanged between the warring political sides, with opponents predicting massive strikes, and proponents countering with statistics suggesting that Ohio needed the law to lower its rash of public sector strikes.³²⁶

Strikes can be challenged in court, but only under the statutory scheme. During the remedial procedure, discussed below, the SERB will attempt mediation and attempt to restart collective bargaining.³²⁷ If no judicial relief is allowed, the SERB may still make efforts to mediate the disputes.³²⁸

Employers especially will notice that a stoppage brought about by unhealthful working conditions is deemed not to be a strike under the law. This provision was first added in the 1977 proposal to allow strikes for the avoidance of "dangerous" working conditions.³²⁹ In 1983 the word "unhealthful" was added when the bill was

318. OHIO REV. CODE § 4117.14(D)(2).

319. *Id.* § 4117.16(A).

320. *See id.* The judge will hear evidence regarding the degree of danger before ruling.

321. *Id.*

322. *Id.* § 4117.15(A).

323. *Id.*

324. *Id.* § 4117.01(H).

325. Press Release, Senator Eugene Branstool (May 4, 1983); Monroe Testimony, *supra* note 2 (arguing that bill will reduce strikes); Testimony of John R. Stewart, Ohio Information Committee, Before the Senate Commerce and Labor Committee, Mar. 29, 1983; Memo to the Senate Commerce and Labor Committee from J. Coleman, Ohio Municipal League, Apr. 19, 1983 (arguing that bill will not prevent strikes).

326. According to statistics quoted in the statement of sponsor Senator Branstool on introduction of S.B. 133, 115th Gen. Assy., Reg. Sess., Ohio had 434 public employee work stoppages in 1971-81. Press Release of Senator Eugene Branstool on Introduction of S.B. 133 (Mar. 18, 1983).

327. *See* OHIO REV. CODE § 4117.16(B).

328. *See id.* § 4117.14(D)(2).

329. Sub. S.B. 222, 112th Gen. Assy., Reg. Sess., which contained proposed OHIO REV. CODE § 4117.01(H), was adopted, but vetoed, in 1977. At that time, it covered only abnormally hazardous working conditions directly affecting

reintroduced, presumably to address conditions that can cause cancer or other illnesses, and are chronically rather than acutely "dangerous."³³⁰ Little legislative history on this provision exists; it may be related to mining and industrial hazards, for which the Supreme Court has found strikes to be justifiable.³³¹ The Ohio Municipal League was particularly critical of the potential for abuse inherent in the term "unhealthful."³³² A debate about the vagueness of the term, and the difficulty of its interpretation at the worksite, understandably arose from employers' objections to its usage.³³³

A partial accommodation was reached when the words "abnormal to the place of employment" were added as a qualifier to the unhealthfulness of a work situation. If the worksite is an interstate highway, high-speed truck traffic is both dangerous and normal. If the employees object to working without air conditioning, they must show that air conditioning is both normal to their worksite and that, as a matter of good faith, its absence is unhealthful. Litigation was predicted by employers over the scope of the exception's coverage. If free asbestos particles may at some concentration be a lung hazard, the discovery of asbestos in the insulation of a school building would be a cause of significant dispute, for unhealthfulness may be asserted even though the school's existing insulation cannot be said to be "abnormal" to that worksite. Procedural intervention by the SERB is likely to define the scope,³³⁴ as with other SERB adjudications, this kind of determination will require support in the form of substantial evidence.³³⁵ This is one subject on which the SERB would be well advised to adjudicate early and cautiously.

C. Strikes and the Courts

The SERB is given a very unusual power by one provision of the Act. The statute terminates the equity jurisdiction of the courts over employee strikes, with

employees at the place of employment. One close judicial parallel is the comment that "a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm." *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642 (1980).

330. OHIO REV. CODE § 4117.01(H). A possible factor in this change was the parallel effort of the AFL-CIO to enact statewide chemical ingredient disclosure information—the "right to know" legislation—that ostensibly would enable worker self-help against cancer hazards. State workers had been excluded from the protected class when the city of Cincinnati adopted its own ordinance, patterned on a state AFL-CIO draft, in 1982. O'Reilly, *Right to Know: Cincinnati's More Righteous, Less Knowing Experiment*, 52 U. CIN. L. REV. 337 (1983).

331. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974).

332. The Municipal League found this provision "most objectionable," because cities would have no recourse if police decided that crimes made their working conditions dangerous or firemen disdained a fire as unhealthful. Memo to Mayors and Managers Regarding Collective Bargaining Legislation from J. Coleman, Ohio Municipal League, Mar. 24, 1983.

333. *See id.*

334. The SERB will become involved when the employer demands a determination of illegality. OHIO REV. CODE § 4117.23.

335. Although OHIO REV. CODE § 4117.23(B) does not indicate how a negative determination on an employer's request is to be reviewed, the Act, in § 4117.02(M), makes an omnibus reference to chapter 119 procedure. This means that the order will be reviewable under the broad substantial evidence standard of OHIO REV. CODE ANN. § 119.12 (Page Supp. 1983), but apparently all such orders must be filed in the court of common pleas for Franklin County, because of the venue reservation contained in the second paragraph of § 119.12.

narrow exceptions,³³⁶ and replaces it with a remedy at law.³³⁷ This remedy at law is circumscribed by a novel provision. The court is divested of jurisdiction seventy-two hours after entering a temporary restraining order in a strike case.³³⁸ The administrative adjudicatory order, declaring a court injunction proper, is an absolute condition precedent to the jurisdiction of the courts.³³⁹ This is an exponential increase in administrative agency authority as compared to the traditional primary jurisdiction theory.³⁴⁰ Here, a constitutional power of the court—the power to resolve a matter arising in equity—must yield to a determination by a statutory adjudicator, the SERB.³⁴¹

It can readily be argued that Ohio's constitutional separation of powers is more flexible than the federal constitutional provision.³⁴² It also can be argued that the legislative scheme supplies the remedy at law subject to reasonable conditions, which reserve control over litigation to the expert agency, because an absence of control would wreak injunctive havoc with the scheme of the statute. But the ultimate arbiters of access to judicial review are not administrators or legislators, but judges.³⁴³ This inherent conflict is likely to surface early in the new statute's administration.

The Act creates two channels of judicial relief from strikes—one for workers other than safety forces and one for safety forces. The general workers can go on strike after the ten-day notice period, which follows the mediation and fact-finding discussed above.³⁴⁴ The law enables them to strike and puts a heavy burden on the employer to restrain their activity.³⁴⁵ The local or state employer cannot control whether an injunction issues. At best, the employer can obtain a seventy-two hour temporary restraining order by convincing a judge that a "clear and present danger to the health or safety of the public" exists.³⁴⁶ The matter then goes immediately to the SERB.³⁴⁷ The employer cannot file for any further equitable relief in this situation. Only if the SERB finds clear and present danger, and only after its order is presented

336. Courts have had inherent equitable authority to restrain violations of state law, including those under chapter 4117 of the Revised Code. See *Goldberg v. City of Cincinnati*, 26 Ohio St. 2d 228, 271 N.E.2d 284 (1971).

337. OHIO REV. CODE § 4117.16(A).

338. *Id.* Only "if" the SERB makes the finding that a clear and present danger exists will the court have jurisdiction to grant equitable relief.

339. *Id.*

340. Primary jurisdiction is the doctrine which holds that when a court and an agency each would be competent to consider a matter, the court should defer to the agency the first determination of a specialized factual question. Thereafter, the court will consider the matter. *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956). See also *Sovern, Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963). It may take several years for the SERB to acquire close familiarity with the decisional factors that are commonly urged by administrative agencies as reasons for the courts to defer to the primary jurisdiction of the SERB. B. SCHWARTZ, *supra* note 100, §§ 168-169, at 487-91.

341. Though the courts have exclusive control over the judicial power of the state, OHIO CONST. art. IV, § 1, and the legislature cannot impair the judicial authority, the legislature can define the jurisdiction of common pleas courts within certain constitutional limits. *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); 16 O. JUR. 3d *Constitutional Law* §§ 317, 319 (1979).

342. OHIO CONST. art. IV, § 1 does not have the case or controversy requirement that appears in U.S. CONST. art.

III.

343. *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922).

344. OHIO REV. CODE § 4117.14(D)(2).

345. *Id.*; see also *id.* § 4117.16(A).

346. *Id.* § 4117.16(A).

347. *Id.*

to the court by the Attorney General, or his or her representative, will the court have jurisdiction to handle further requests for injunctive relief.³⁴⁸

Evidence of a clear and present danger may exist, but the court would be limited to hearing what the statutory parties are willing to present.³⁴⁹ Here an ambiguity exists about the identity of the parties. It appears in section 4117.16(A) that the SERB determination is presented to the court by counsel from the Attorney General's office, which makes sense since the nature of the authority being invoked is a state agency's adjudication.³⁵⁰ The authority of the real party in interest, the employer, is not the legal subject matter of the action after the seventy-two hour period has passed.³⁵¹ If one presumes that the Attorney General's staff can be present in each county on short notice, this system will work.

An alternate reading requires the employer to ask the court for relief, using the SERB finding as a premise for the employer's suit.³⁵² For reasons of economy and speed, the court likely will read the ambiguity in favor of an employer's counsel presenting the SERB findings to the court. Overall, the statutory scheme has so clearly centralized the functions of policing the Act, focusing powers on the SERB to execute its own orders, that one can argue that the local employer is divested of its status as a party once the SERB comes on the scene, and that local enforcement of SERB orders would constitute a discontinuity in an otherwise central construct.³⁵³ The 1975 version, from which the final act evolved, would have required the employer to ask the SERB to seek the injunctive relief.³⁵⁴ The ambiguity remains to be decided.

Timing is clearly of the essence, for the temporary restraining order cannot last more than three days, and the SERB injunction cannot last more than an additional sixty days.³⁵⁵ The statute is not clear whether intervenors can enter appearances in these special equity proceedings; if the courts construe them as statutory proceedings with defined parties, taxpayers or persons with another interest may find themselves limited to an amicus role.³⁵⁶

Strike litigation places an enormous burden on the administration of the SERB and necessitates decentralization of litigation decisions to the SERB regional directors.³⁵⁷ Training, written policies, and communication will be critical needs. Here

348. *Id.*; see *id.* § 4117.02(G), regarding the Attorney General's authority to represent the SERB in court.

349. *Id.* § 4117.16(A).

350. The *res* of the dispute is the decision of the state administrative body; the role of the representative in court, the Attorney General, is to defend the position of the body that made the order, not the position of the employer.

351. OHIO REV. CODE § 4117.16(A).

352. Compare *id.* §§ 4117.13(A), .14(A), and .16(A), with former OHIO REV. CODE ANN. §§ 4117.13(A) and .14(A) (Page 1980), in which the employer is the equal of the SERB in seeking judicial relief. In OHIO REV. CODE § 4117.16(A) (third paragraph) the employer's case terminates automatically 72 hours after relief has been granted. The Board decision gives jurisdiction to the court to "issue orders to further enjoin the strike." An employer could argue that it is the real party in interest and revive a lapsed temporary restraining order by a new proceeding for a preliminary injunction.

353. For example, the employer could not settle an injunction action brought by the state against a union's unfair labor practice, for the settlement would not uphold the authority of the SERB to enforce its orders.

354. Sub. S.B. 70, 111th Gen. Assy., Reg. Sess. (1975) (proposed OHIO REV. CODE § 4117.15(A)).

355. OHIO REV. CODE § 4117.16(A).

356. Intervention is not provided for in the statute and may be a matter for further development under the civil rules.

357. Area officials are part of the SERB structure. *Id.* § 4117.02(E). The SERB's attorneys will be members of the Attorney General's staff or appointees of the Attorney General.

again, representation by the Attorney General was a politically expedient matter, but not necessarily administratively sound.³⁵⁸

During an injunction against a lawful but dangerous strike, the SERB mediator will continue to work with the parties in an effort to reach an agreement.³⁵⁹ Employers will probably go immediately to the SERB for a declaration that the strike is unlawful if there are grounds for that argument.³⁶⁰

An injunction against an unlawful strike is the second channel for judicial relief from strikes. A strike by safety forces is clearly illegal.³⁶¹ Presumably, routine equity proceedings alleging a violation of chapter 4117 will be brought against the strikers, and court orders will be issued.³⁶² Unlike the 1975 and 1977 bills, which required injunctive actions to be brought against striking safety force employees, the 1983 language is permissive.³⁶³ The existence of an employer unfair labor practice is not a valid defense.³⁶⁴ One can forecast a future argument that prohibitions against strikes by non-safety workers such as retirement office clerks, who were cast as "safety" workers for purposes of the Act, are unreasonable and lack an adequate statutory basis.³⁶⁵ That statutory basis will be examined closely by the courts, and inclusion of a subcategory that is obviously unrelated to safety may jeopardize the state's ability to defend the category in the courts. When the final offer settlement procedure has been used skillfully, there should be no economic reason for the union to strike. Numerous other means of pressuring an employer are contained in the Act.³⁶⁶

A strike also is unlawful if it occurs during the contract term or during statutory settlement procedures.³⁶⁷ The Act prohibits those strikes, and general equity relief is to be available.³⁶⁸ If an unfair labor practice charge is made simultaneously, the SERB may seek injunctive relief against the errant party.³⁶⁹

Practical responses to a strike are likely to be diverse. Replacement workers could be hired, but the tone of the statute suggests that they will not be permanent.³⁷⁰

358. *Id.* The section was amended during the last stages of House passage to eliminate the Board's power to represent itself in court—an exceptional authority enjoyed by the federal agency, the National Labor Relations Board.

359. *Id.* § 4117.16(B).

360. *Id.* § 4117.23.

361. *Id.* § 4117.14(D)(1).

362. *Id.* § 4117.15(A).

363. Compare *id.* ("may seek an injunction") with Sub. S.B. 70, 111th Gen. Assy., Reg. Sess. (1975), and Sub. S.B. 222, 112th Gen. Assy., Reg. Sess. (1977) ("shall" seek).

364. OHIO REV. CODE § 4117.15(B). It may be a defense in a proceeding to fine or discipline the workers, however, once the administrative remedies are invoked under § 4117.23(B).

365. *Id.* § 4117.14(D). The inclusion of the clerks is a mystery of legislative history, perhaps explained by the political power of retired workers whose interest in continued receipt of payments was heard by the creators of this very late House floor amendment.

366. Publicity, media attention to the fact finder's report, and a desire to work together in harmony are all reasons why an elected official might see the wisdom of the union's position.

367. OHIO REV. CODE § 4117.15(A).

368. *Id.*; see also *id.* § 4117.23.

369. *Id.* § 4117.13(A). The charging party may not bring the injunctive action until after the SERB has ruled on the charge of unfair labor practices at the administrative hearing level and affirmed the charge at the Board level.

370. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983. Query if a union can win an unfair practice "coercion" charge premised on such replacement action by the public employer. See OHIO REV. CODE § 4117.11(A)(1).

The employer cannot lock out employees,³⁷¹ and it may have to take back employees with no penalty against them if (1) it failed to follow the proper penalty procedures against strikers, or (2) the SERB concludes that the employer provoked the strike.³⁷²

Finally, none of the statutory relief provisions are self-executing: they require judicial enforcement. Some judges, however, who are sensitive to public employees' power, may be more reluctant than the SERB to block a strike.³⁷³ On the other hand, the new relief provisions may allow judges to utilize their powers of equity to produce injunctive relief that is stronger than the statutory remedies.

VI. GRIEVANCE PROCEDURES

The Ohio law favors grievance arbitration, but stops short of requiring mandatory arbitration of grievances. Some grievance procedures must be included in every agreement.³⁷⁴ The agreed upon procedure "may" culminate in final and binding arbitration of both grievances and the interpretations of the contract. Neither the bill as passed, nor the prior versions since 1975,³⁷⁵ compelled the inclusion of mandatory arbitration of grievances, as states such as Pennsylvania have done; but each version of the Ohio bill has required that some grievance resolution system be accepted by the parties.

Opponents of the bill argued against the scope of the required grievance procedures, for the grievance system can be used to interpret the contract and also to resolve an open-ended set of grievances.³⁷⁶ The law requires certain matters to be included in the contract, and the inclusion of some grievance procedure to interpret those matters makes sense. It was argued, however, that arbitrators might overreach their powers and reconstruct obligations under the contract through the grievance process.³⁷⁷ The potential reconstruction of management rights issues through grievance procedures would probably be one of the grounds cited by employers for refusing to agree to contract clauses that require grievances to be submitted to binding arbitration.

371. OHIO REV. CODE § 4117.11(A)(7). Stewart was very critical of this change. "Public employers should be entitled to no less than their private counterparts." Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

372. OHIO REV. CODE § 4117.23.

373. The court has jurisdiction to enter an injunction it considers proper; the Board "may" ask for relief; the employer "may" ask for relief. *See id.* § 4117.13. None of these compels the taking of the action or the granting of the injunction. It would be naive to ignore the realities of reelection as a factor in this equation of discretionary actions.

374. *Id.* § 4117.09(B)(1). It can be argued that an implicit trade off occurs when a no-strike provision is included in a contract; grievance arbitration should be mandatory because the sides should make equal concessions in the contract. But the Act, on its face, is not a mandate for arbitration of grievances. Interview with Dennis Morgan, Counsel to Communications Workers Union, June 6, 1983.

375. Sub. S.B. 70, 111th Gen. Assy., Reg. Sess. (1975); Sub. S.B. 222, 112th Gen. Assy., Reg. Sess. (1977).

376. "S.B. 133 gives SERB unwarranted control not only of the bargaining process, but of the bargain itself. This goes far beyond the authority given the NLRB in the federal area . . . [U]nions and employers have long recognized that arbitration is best confined to the application and interpretation of the expressed terms of the agreement itself—and no more." Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983. Stewart noted the open-endedness of using the arbitration to decide "unresolved grievances and disputed interpretations," where no limit was placed on which grievances could be arbitrated. *Id.*

377. Lewis Interview, *supra* note 65. Mr. Lewis used the example of class size, a matter which, in the past, has been classified as managerial, but may now be the subject of a grievance. The matter is not necessarily contractual, but the grievance arbitrator under § 4117.09(B)(1) is not limited to interpreting contracts.

Creative alternatives for the grievance settlement process can be worked out by the parties. Compared to that of other states, Ohio's grievance mechanism is relatively progressive. Pennsylvania's grievance procedures differ from Ohio's in two respects; no definite requirement for contractual grievance procedures is included in the statute, and all grievance disputes must go to compulsory arbitration.³⁷⁸ The grievance settlement cannot be inconsistent with state law.³⁷⁹ In Michigan the state commission mediates grievances, and arbitration is not compulsory.³⁸⁰ Grievance arbitration is expressly forbidden for safety forces such as fire fighters.³⁸¹ New York encourages the parties to voluntarily adopt a binding arbitration of their grievances. The state board has a set of procedures and a list of acceptable arbitrators to be used for grievance cases.³⁸² California law permits grievances and unfair labor practice charges to be filed together. The charges will proceed without deferral if the party convinces the state board that it would be futile to follow the grievance steps.³⁸³

Should the SERB and the Ohio courts defer processing a potential unfair labor practice charge when a matter could be taken to grievance arbitration? The doctrine of deferral to voluntary arbitration has strong roots in other states³⁸⁴ and the federal system.³⁸⁵ In states that have had arbitration for years, deferral to arbitration is strong, except when a statute forbids the redelegation of an issue to an arbitrator³⁸⁶ or when a constitutional barrier to delegation exists.³⁸⁷ The federal deferral doctrine is applied in the much more voluntary setting of private contractual grievance settlement. It may or may not be applied in Ohio. Ohio's deadlines leave so little time for action that deferral may contravene the statutory requirement.³⁸⁸ The model of the federal exception to deferral, the pursuit of unfair labor practice matters that relate to the protection of employee rights, would seem to weigh in favor of creating a comparable exception to the SERB process.

If a final and binding grievance procedure is contained in an existing contract, whether it involves arbitration or not, section 4117.10 removes the jurisdiction of the prior state boards of personnel and civil service review.³⁸⁹ There can be no election of

378. 43 PA. CONS. STAT. ANN. § 1101.903 (Purdon Supp. 1965-1982).

379. *Id.*; see also *Community College v. Community College of Beaver County Society of Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977).

380. MICH. COMP. LAWS ANN. § 423.207 (West 1978).

381. *Id.* § 423.233.

382. N.Y. ADMIN. CODE tit. 4, § 207 (1969).

383. CAL. GOV'T CODE §§ 3514.5(a), 3541.5(a) (West 1980).

384. See, e.g., Cowden, *Deferral to Arbitration by the Pennsylvania Labor Relations Board*, 80 DICK. L. REV. 666 (1976). Deferral acceptance is not universal, however. See *Detroit Fire Fighters Ass'n, Local 344 v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1980).

385. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

386. *In re Port Jefferson Station Teachers Ass'n, Inc. v. Brookhaven-Comsewogue Union Free School Dist.*, 45 N.Y.2d 898, 383 N.E.2d 553, 411 N.Y.S.2d 1 (1978); *In re Willink v. Webster Teachers Ass'n*, 81 A.D.2d 1008, 440 N.Y.S.2d 100 (1981).

387. *Detroit Fire Fighters Ass'n, Local 344 v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1980).

388. The period in which the SERB can act on an unfair labor practice charge is so short that deferral may be outside the legislative intent. See OHIO REV. CODE § 4117.12(B). The SERB will need to vindicate its authority during its early years. By analogy, the NLRB's power to uphold its authority through unfair labor practice cases cannot be compromised by private settlements. 29 U.S.C. § 160(a) (1976); *Walt Disney Prods. v. NLRB*, 146 F.2d 44, 48 (9th Cir. 1944), cert. denied, 324 U.S. 877 (1945). Deferral is not used by the NLRB when the allegations affect individual rights. *General Am. Transp. Corp.*, 228 NLRB 808 (1977), discussed in Case Note, 1978 S. ILL. U. L.J. 98.

389. OHIO REV. CODE § 4117.10(A).

remedies to take the disagreement through the personnel board, if the matter would be subject to a grievance procedure.³⁹⁰ The personnel board was made a part of the SERB, with limited jurisdiction,³⁹¹ and it may be phased out by subsequent legislation once the impact of the SERB has been assessed. Although the new Act's changes affect state civil service employees, some charter cities will continue to maintain their own civil service arrangements under home rule authority.

Employee organizations are likely to press vigorously for binding arbitration of grievances. Proponents argued that the no-strike provision during the term of the contract was a necessary trade off for a binding arbitration agreement on the employer's part, and since it was a quid pro quo, employers should agree to mandatory inclusion of the binding arbitration provision.³⁹²

Concerning grievances, a potential pitfall for employers is the treatment of management rights issues in section 4117.08,³⁹³ though a matter of management rights, such as the use of technology, need not be a subject of bargaining during contract negotiations,³⁹⁴ if it is legitimately within the statutory categories reserved to management, the same matter can be the subject of a grievance "based on the collective bargaining agreement."³⁹⁵ During the legislative development, employers feared that unions would use binding arbitration to expand the unions' rights and erode management prerogatives.³⁹⁶ This may be an infrequent occurrence, but no clear pattern will be visible for a time.

VII. RESOLUTION OF INTERUNION DISPUTES

Although the collective bargaining bill was vigorously promoted by each of the public sector unions, each member of the successful coalition knew that the passage of the bill would trigger vigorous contests for the organization of public employees.³⁹⁷ The SERB will have problems in the context of interunion disputes, which will center upon unit determinations, representation elections, and jurisdictional work disputes.

The first disagreement among representatives may come when the SERB makes its earliest unit determinations. The larger the unit, the more likely will be competition among unions. Negotiating with one rather than a dozen unions may be desired by the employer, but the sympathies of the workers in the unit may be divided along

390. *Id.*

391. 1983 Ohio Laws 140, § 1 (amending OHIO REV. CODE ANN. § 124.05 (Page 1978)).

392. Interview with Dennis Morgan, Counsel to the Communications Workers Union, July 23, 1983.

393. See OHIO REV. CODE § 4117.08(C).

394. *Id.* § 4117.08(C)(1).

395. *Id.* § 4117.08(C).

396. Lewis interview, *supra* note 65; Legislative Policy Statement, Coalition of Public Employers, Administrators, and Taxpayers (May 10, 1983). Cincinnati's Norman Murdock warned that the bill "put the coffers [of local government] up for grabs," and that the SERB would be above all local authorities and above the courts. *Local Officials Assail Public Employee Bargaining Proposal*, 56 Gongwer Ohio Report, Mar. 29, 1983, at 4.

397. Opponents were exceptionally colorful in attacking this aspect of interunion attention during the drive to enact the bill. "(N)o body wants [S.B. 133] except some of the public employees, all of the public employee union officials and a few of the politicians they helped elect. Senate Bill 133 hasn't even been voted on yet and already the various public employee labor unions are starting to fight amongst themselves . . . The union bosses are already starting to behave like pigs at the trough." Testimony of John Stewart, Ohio Information Committee, Before the Senate Commerce and Labor Committee, Mar. 29, 1983.

craft or historical lines. The craft unions, such as state carpenters, obtained a last minute amendment to the bill that protected craft union units from SERB determinations during a transition period.³⁹⁸ Any substantial adverse decision that a union wishes to appeal from the nonreviewable SERB unit determinations will probably follow the craft union example and be sought as a legislated change to the collective bargaining law. This is unwise as a matter of administrative procedure for it balkanizes the administrative scheme and reduces predictability. But that is the price of making important adjudicative decisions nonreviewable.³⁹⁹

The election of a representative among several competing unions, during the "window" of election time,⁴⁰⁰ is an important challenge to the flexibility and competence of the SERB. The SERB should be sufficiently respected and neutral to conduct a fair election with few appeals to the courts. The SERB will be best served by cautious neutrality in elections and vigilance concerning the impact of its unit determinations on election results.

Election procedures will probably be modeled upon NLRB models. Where none of the optional parties receives a majority, a runoff election will be held,⁴⁰¹ for which the campaigning may be very vigorous. Prior to the certification of the union, it is an unfair labor practice for that union or any representative to attempt to coerce the employer into recognizing the union.⁴⁰² An employer can use the typical unfair labor practices remedies in such an instance.⁴⁰³

If the employer deals with three different unions at three or more locations where the same type of work is performed, it may be expected that multiunit bargaining would be favored by the employer, but disfavored by the unions.⁴⁰⁴ Interunion disagreements concerning the multiunit approach may involve the SERB in some controversies for which no acceptable, mutual settlement is possible.

Jurisdictional work disputes merit rapid attention from the SERB. Picketing or other aggressive actions are forbidden.⁴⁰⁵ If two unions disagree about proper work assignments, the SERB will rapidly decide the dispute. After ten days of interunion settlement effort, the dispute must go to a SERB hearing.⁴⁰⁶

VIII. ADJUDICATION OF UNFAIR LABOR PRACTICES

In the labor field an administrative agency cannot rely on rules and procedures alone. The decisions reached by the agency that concern unfair practices form the

398. 1983 Ohio Laws 140, § 4(E).

399. Because unit designations are not reviewable in the courts, OHIO REV. CODE § 4117.06(A), the legislature may act to reverse SERB unit designations by attaching rider clauses to other legislation.

400. This 30-day filing period is set out in *id.* § 4117.07(C)(6).

401. The runoff election includes only the top two choices from the first election. *Id.* § 4117.07(C)(5).

402. *Id.* § 4117.11(B)(5).

403. *Id.* §§ 4117.12-13.

404. *Id.* § 4117.06(D). Pennsylvania likewise allows multiunit bargaining, 43 PA. CONS. STAT. ANN. § 1101.604(4) (Purdon Supp. 1965-1982).

405. OHIO REV. CODE § 4117.11(B)(4). Some of the criteria for the SERB's precedents will be found in NLRB decisions, like International Ass'n of Machinists, Lodge No. 1743, 135 NLRB 1402 (1962).

406. OHIO REV. CODE § 4117.11(D). The sense of the exclusion is that settlement power is held by the Board, not the parties, after that date. NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116 (1971).

precedential case law under which the agency operates. Ohio's SERB will use the unfair labor practice procedures to assert control over both employers and unions. One can predict that the process will not be easy, and that court enforcement and defenses will be a growth area for litigation in the Board's first years.⁴⁰⁷

The Ohio procedure for handling unfair labor practice charges is almost identical to that of the National Labor Relations Board.⁴⁰⁸ But the Ohio SERB does not have the separation of roles that, in the federal statutory scheme, isolates prosecutorial discretion to bring an unfair practices complaint from the adjudicatory power to decide the merits of the complaint. These are the isolated roles that the "separation of functions" principle embodies in administrative law⁴⁰⁹ and that Congress has applied to federal structures for handling labor relations issues.⁴¹⁰ The SERB could be attacked for bias in its mixed organizational roles. But in its daily operation the SERB is directed to keep the individuals who actually hear cases separated from those who hear appeals.⁴¹¹ It may be that the federal system is superior, but it developed over a longer period and with a more reliable budget. The same separation of powers may evolve in Ohio, but, for the initial years, the charge of institutional conflicts of interest among the several roles is inevitable.

Both the statutory terms used to list unfair labor practices and the procedures for hearings are rather unremarkable.⁴¹² Where federal case law in the private sector is not instructive, case law from Michigan, Pennsylvania and other states may illuminate the meanings of the statutory prohibitions.⁴¹³ Two specific unfair labor practice categories were criticized as unfair to employers: the public employer cannot lock out employees to force a resolution of a lingering dispute,⁴¹⁴ and the employer can be charged with attempting to cause a union to commit an unfair labor practice against

407. Section 4117.12 will be an important source of litigation in particular, and it is very likely that early tests of SERB injunctive relief powers against unfair labor practices will arise. See OHIO REV. CODE § 4117.12(C). The extent to which the courts defer to the SERB while it develops expertise in labor relations will be a source of great controversy. During legislative hearings the need for a "new and inexperienced board" to adopt broad policies was challenged. See Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983. Questions of deference are discussed *supra* in subpart IV(B) and *infra* in part X.

408. See 29 U.S.C. § 158 (1976). For discussions of unfair labor practices, see also D. McDOWELL & K. HUHN, *NLRB REMEDIES FOR UNFAIR LABOR PRACTICES* (1976); Nolan & Lehr, *Improving NLRB Unfair Labor Practice Procedures*, 57 TEX. L. REV. 47 (1978).

409. The separation of functions doctrine is premised on the due process argument that one cannot be both investigator and judge; but constitutional application of the principle is limited. See *Withrow v. Larkin*, 421 U.S. 35 (1975); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

410. See 29 U.S.C. § 153(d) (1976). A combination of roles so interrelated gives rise to systemic bias, whether or not an individual bias develops. See generally B. SCHWARTZ, *supra* note 100, § 111, at 322. With its study and reporting roles as well, the SERB will need to exercise special care. See, e.g., *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368 (9th Cir. 1978).

411. The SERB combines investigation, complaint, adjudication, litigation, penalty, and educational roles in three persons comprising the Board. OHIO REV. CODE § 4117.02.

412. *Id.* §§ 4711.11-12.

413. Drafters of the bill relied on Pennsylvania and Michigan as primary models. Populous states, such as New York, have developed ample case law in the area. See Gagliardo, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations: A Union Perspective*, 6 J. LAW & EDUC. 215 (1977).

414. *Id.* § 4117.11(A)(7). A lockout has been defined as quitting work when the employer's actions leave "no alternative for [workers] but to leave their work"; the test is whether the conditions set by the employer are "such that the employees could not reasonably be expected to accept them." *Zanesville Rapid Transit, Inc. v. Bailey*, 168 Ohio St. 351, 355, 155 N.E.2d 202, 205-06 (1958) (quoting *Almada v. Administrator, Unemployment Compensation Act*, 137 Conn. 380, 77 A.2d 765 (1951)).

the employer.⁴¹⁵ The first is not normal in state collective bargaining laws;⁴¹⁶ the second is likely to be hotly contested, for the process of proving that an employer "caused" a union to violate section 4117.11 may be circular and complex.

An unfair labor practice may cause injury to persons other than the union or the employer, such as persons whose business is affected by a sudden strike for which no advance notice was given. The statute allows only the employer and the union to seek damages against the party who committed the unfair labor practice.⁴¹⁷ Others must seek general judicial relief without the benefit of the statutory remedy. A strike that is unlawful, such as a strike by a fire fighters' union, might be held to be an unfair labor practice, but it is not expressly included in the list of prohibited actions in section 4117.11.⁴¹⁸

Finally, the union bears a duty of fair representation to all public employees in the unit, whether members or not—a duty which can be pursued through SERB unfair practice proceedings.⁴¹⁹ Fair representation has produced much litigation.⁴²⁰ Adherent opponents of the compulsory union membership or fees provisions may be a source of breach of fair representation actions, as Ohio's case law develops in parallel with the federal case law on the subject.⁴²¹

IX. OPEN QUESTIONS ON THE NEW AGENCY'S AGENDA

A. In General

The early years of administering the Act will require the SERB to address a multitude of problems and to utilize the full range of the SERB members' skills. The size and shape of local and state employee units, and the degree of centralization of those units within state agencies, cities or districts, will be an early and vital question. The legislature delegated a great deal of power, with some politically necessary

415. OHIO REV. CODE § 4117.11(A)(8).

416. For example, it is not an unfair labor practice for an employer to lock out strikers under the Pennsylvania statute that served as an example for the earlier versions of the Ohio collective bargaining bill. 43 PA. CONS. STAT. ANN. § 1101.1201 (Purdon Supp. 1965-1982); *Pennsylvania Labor Relations Bd. v. Mars Area School Dist.*, 480 Pa. 295, 389 A.2d 1073 (1978). See MICH. COMP. LAWS ANN. § 423.210 (West 1978). New York requires that the contract be continued, which may be an implicit barrier to a lockout strategy. N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 1983).

417. OHIO REV. CODE § 4117.11(A)-(C).

418. A strike is not an unfair labor practice under Ohio law, *id.* § 4117.11, but it may be under the law of other states. See, e.g., 43 PA. CONS. STAT. ANN. § 1101.120(6) (Purdon Supp. 1965-1982).

419. OHIO REV. CODE § 4117.11(B)(6).

420. See, e.g., *Bowen v. United States Postal Serv.*, 103 S. Ct. 588 (1983); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967).

421. One interesting aspect of the bill is that the persons who pay fees to the exclusive representative must be fairly represented by the union, whether they are members or not. Any vote on a proposed agreement is for the union "membership" only. OHIO REV. CODE § 4117.14(C)(6). A future fair representation struggle may begin when the SERB adopts "rules governing the procedures and methods for public employees to vote on the recommendations of the fact finding panel." *Id.* Public employees may be covered by the procedures even if they are not union members. Query whether dissenting nonmembers must be given an opportunity to vote, as a duty of the exclusive representation. The current case law does not speak to the issue. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). There is room, however, for future court debates, in which nonmembers can be heard. Under *Abood* the nonmember financial arrangement in § 4117.09(C) is likely to be upheld; but the fate of nonmember settlement participation remains an open issue.

exceptions to protect craft and other unions.⁴²² The SERB will be closely watched as it sets the units in place. The SERB cannot take the second step, representation elections, until this unit step is completed.⁴²³ Nonreviewability and lack of an oversight body leave the SERB on its own in choosing a strategy for unit decisions.

New York opted for large units; its Governor set the larger unit size and overrode a state board similar to the SERB when that board challenged the unit determination. The vague New York criteria were easily met by the Governor's determination, and the new statutory board received less deference from that state's highest court than did the Governor.⁴²⁴ Disputes over unit size occasionally have been heard from New York, and the courts, over time, have become more deferential.⁴²⁵ Pennsylvania has used a community of interest test, comparable to that which the SERB will utilize, that is designed to avoid overfragmentation.⁴²⁶ An Ohio witness warned that fragmentation had occurred at the federal level, despite contrary congressional directives, and that Ohio should heed the warning and adopt a judicial review provision on unit determinations.⁴²⁷ Federal courts have been able to reverse the NLRB on this issue.⁴²⁸ Michigan, another model state for Ohio's new law, merely references in its statute the standard language for all labor unit determinations, the effect of which is to approve plant-specific units or historically recognized units.⁴²⁹

Delegation of authority remains an open issue. Increases in taxes may be required because of arbitrators' decisions, the law's opponents charged, and therefore the bill delegates too much governmental power.⁴³⁰ The courts will have to resolve the open question of how the final offer settlement procedure will be enforced. The conciliator's award must be implemented by the legislative body of the public employer.⁴³¹ If that body lacks sufficient taxing authority, this lack should be com-

422. OHIO REV. CODE § 4117.06(A) gives exclusive and unreviewable jurisdiction to the SERB, but § 4(E) of the law as enacted, 1983 Ohio Laws 140, forbids alteration of existing craft units by the SERB.

423. OHIO REV. CODE § 4117.07(A).

424. New York's selection of units was made by the Governor, and the Board in that situation did not agree; the highest court of the state upheld the Governor's selection over the Board. *In re Civil Serv. Employees Ass'n v. Helsby*, 25 N.Y.2d 842, 250 N.E.2d 731, 303 N.Y.S.2d 690 (1969). Because Ohio's scheme is much more tightly drafted in favor of the Board and against executive power than was New York's, the foregoing situation will not occur in Ohio.

425. New York courts are more deferential to the Board than Ohio's substantial evidence test appears to allow. A test related to arbitrariness was applied in New York Board decisions. *See In re Jefferson County Bd. of Supervisors v. New York State Pub. Employment Relations Bd.*, 36 N.Y.2d 534, 330 N.E.2d 621, 369 N.Y.S.2d (1975); *Bivins v. Helsby*, 55 A.D.2d 230, 389 N.Y.S.2d 917 (1976).

426. Pennsylvania's "community of interest" statutory requirement is found at 43 PA. CONS. STAT. ANN. § 1101.604(1)(i) (Purdon Supp. 1965-1982).

427. The SERB could, it was said, "ignore the will of the legislature or [more likely] merely give it lip service" in making its unit determinations. Testimony of Frank Stewart Before the Senate Commerce and Labor Committee, Apr. 6, 1983.

428. *See, e.g., NLRB v. Frederick Memorial Hosp. Inc.*, 691 F.2d 191 (4th Cir. 1982); *NLRB v. HMO Int'l/Cal. Medical Group Health Plan, Inc.*, 678 F.2d 806 (9th Cir. 1982).

429. MICH. COMP. LAWS ANN. § 423.9e (West 1978); *Hillsdale Community Schools v. Michigan Labor Mediation Bd.*, 24 Mich. App. 36, 179 N.W.2d 661 (1970).

430. Opponents charged that arbitrators would be able to raise taxes. Testimony of John Stewart, Ohio Information Committee, Before the Senate Commerce and Labor Committee, Mar. 29, 1983; Legislative Policy Statement, Coalition of Public Employers, Administrators, and Taxpayers (May 10, 1983). Opponents also argued that the state took away local controls without taking on responsibility for the consequences of increased costs. *Collective Bargaining Faces One Last Hurdle After Winning House Approval*, 56 Gongwer Ohio Report, June 30, 1983, at 1.

431. In the sponsor's press statement introducing the 1983 bill, an attached exhibit stated: "Approval of Settlement Requiring Appropriation of Money Must Be Approved by Legislative Authority." Press Release of Senator Eugene

municated to the conciliator, and the binding process may be challenged. A public employer might argue that the conciliator's award is void because he or she exceeded powers in failing to confine the award to the potential revenues available.⁴³²

In retrospect, the unions erred. The binding settlement process was exposed to significant jeopardy when the original 1975 text regarding review of the arbitrator's award was changed⁴³³ to its final text, which cross-references chapter 2711 of the Revised Code—the statutory procedure for review of commercial arbitration awards. The employer who refuses to honor an award that raises local taxes may get a local jury to decide the challenge to the award.⁴³⁴ The jury system is a noble instrument, but the opportunity to refuse to raise one's local taxes may be too high a temptation. This procedural route for enforcement is a risk for the union to take only after its victory with the conciliator.

The conscious inclusion of chapter 2711 in the final Act as the point of reference for conciliation review means that the conflict of enforcement or modification will be fought out under commercial arbitration procedures. Proponents felt that other arbitrations already conducted under chapter 2711 would give some precedential guidance to the courts. Noting that the chapter 2711 procedures allow jury decisions when a party refuses to perform, proponents asserted that in most cases the judge alone would decide the matter since both sides went through the arbitration process. Of course, if an unpopular binding order is subject to jury reversal, the finality of arbitration awards may be in some jeopardy.⁴³⁵

Grievances based on technology replacing workers are likely to increase. Management is, on the one hand, subject to grievances for changes in work conditions, and on the other hand, is able to decide "inherent management policy" matters, such as utilization of technology and the adequacy of the work force.⁴³⁶

Public employment labor relations law is full of constitutional quicksand.⁴³⁷ The right of an employee to criticize a teacher's union at a public meeting of the employer is an example of constitutionally protected speech.⁴³⁸ The right of the union to collect agency shop fees for services to nonmembers is also constitutionally established.⁴³⁹ Can the city or the union penalize a dissident member who criticizes the good faith of

Branstool on Introduction of S.B. 133 (Mar. 18, 1983). This refers, in the Act, only to the fact-finding stage of approval, OHIO REV. CODE § 4117.14(C)(6), and not to the end product of the conciliation. *Id.* § 4117.14(I).

432. OHIO REV. CODE ANN. § 2711.10(D) (Page 1981).

433. Sub. S.B. 70, 111th Gen. Assy., Reg. Sess. (1975), had more limited criteria for judicial review in proposed § 4117.14(E).

434. A jury may be used if the city refuses to arbitrate. OHIO REV. CODE ANN. § 2711.03 (Page 1981). "If the . . . failure to perform [an arbitration award] is in issue . . . either party may . . . demand a jury trial of such issue. . . . If the jury finds . . . there is a default in proceeding . . . the court shall make an order summarily directing the parties to proceed with the arbitration." *Id.* If two parties go through the conciliation process and one then refuses to accept the award, the court decides the question of vacating the award. *Id.* § 2711.10.

435. Most conciliation awards simply will be reviewed by the court under § 2711.10 of the Revised Code, because there usually will be a finished arbitration award rather than a default in the proceeding that would invoke § 2711.03 and potential jury review.

436. OHIO REV. CODE § 4117.08(C).

437. Constitutional issues involving public employee rights arise quite frequently, and several have reached the Supreme Court. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976); and *Arnett v. Kennedy*, 416 U.S. 134 (1974).

438. *Madison School Dist. v. Wisconsin Employment Relations Bd.*, 429 U.S. 167 (1977).

439. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

the employer's agreement with the union? Do libel laws and unfair labor practices intersect, as they do in the private sector?⁴⁴⁰ To repeat an earlier example, do police sergeants have a constitutional freedom of association that the Ohio law unreasonably infringes?⁴⁴¹ And since Ohio omitted the commonplace reservation of free speech rights during bargaining, found in federal and other states' laws,⁴⁴² do Ohio public employers have fewer protections than the private employers located next door to city hall?

One can argue that too much tinkering occurred with some sections, such as the "supervisor" definition⁴⁴³ and the inclusion of retirement clerks as safety forces prohibited from striking,⁴⁴⁴ to the extent that the legislature diminished the credibility of the statutory classifications. If and when a classification is challenged, the SERB will need deference from the courts.

The ultimate question is the extent to which Ohio courts, unaccustomed to such large powers as those vested in the SERB, will defer to the new agency. A court that is asked to defer to the statutory scheme may, in some cases, find that very scheme difficult to follow amid its negotiated exceptions. The SERB is certain to ask for judicial deference, but its members are not omniscient.⁴⁴⁵ The SERB will be only as good as its members and the people who appear before it as advocates. The SERB's duty is to be wise and prudent amidst competing claims of equal merit. If it succeeds in winning judicial deference in more cases than those in which it loses deference, it will be a relative success.

B. *Conflicts Between Labor Agreements and Prior Laws*

One late addition to the collective bargaining bill, as it moved through the legislature in 1983, had great symbolic significance. Ohio's State Personnel Board of Review was reconstituted as a subunit of the SERB.⁴⁴⁶ The civil service powers were, at least symbolically, subordinated to the new authority of the employers and unions as they engaged in collective bargaining. Another provision of the Act makes SERB-sanctioned grievance resolution procedures predominant over state personnel remedies.⁴⁴⁷ By the time of the June 1983 amendment, any doubt about the complete transition to the supremacy of collective bargaining in Ohio had ended.

The collective bargaining bill was not written on a clean slate, of course, for

440. *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S. Ct. 2161 (1983).

441. OHIO REV. CODE § 4117.06(D)(6) prohibits police sergeants from being members of the department-wide bargaining unit and from being classed as "supervisors." Thus, small units of sergeants will be nonexempt and will have less bargaining leverage than their lower-ranked colleagues. A contrary Michigan practice permits joint sergeant-police-officer units. See *City of Escanaba v. Michigan Labor Mediation Bd.*, 19 Mich. App. 273, 172 N.W.2d 836 (1969).

442. Absent coercion or threats, no oral statement can be made the basis for an unfair labor practice charge under the federal scheme. 29 U.S.C. § 158(c) (1976).

443. OHIO REV. CODE § 4117.01(F) (Note: the expanded definitional section becomes effective on April 1, 1984).

444. *Id.* § 4117.14(D)(1).

445. The law only requires that members have a certain political affiliation and that the members be "knowledgeable" about either labor relations or personnel practices. OHIO REV. CODE § 4117.02(A). Deference by the courts to the SERB is likely to be earned rather than given. New York experienced the same learning curve. See *In re Civil Serv. Employees Ass'n v. Helsby*, 25 N.Y.2d 842, 250 N.E.2d 731, 303 N.Y.S.2d 690 (1969).

446. OHIO REV. CODE § 4117.02(N).

447. *Id.* § 4117.10(A).

cities and state employer agencies have enacted legislation on employee benefits that opponents of the new legislation cited as examples of existing protection and privilege for public employees.⁴⁴⁸ These benefit laws are not preempted, and contract drafting from the union side is unlikely to allow conflicts with these laws.⁴⁴⁹ The bill was seen as remedial in nature; public employee unions were concerned that state legislation had not adequately protected worker rights.⁴⁵⁰ The collective bargaining and grievance processes improved the administration of the state, it was argued, and conflicts would be reduced.⁴⁵¹ The latter arguments had the votes to prevail.

Though the new Act provides that a collective bargaining contract overrides inconsistent provisions of prior statutes or ordinances,⁴⁵² the various drafts of the bill accumulated a lengthy set of exceptions that retained some existing laws. For example, state affirmative action laws, laws concerning the residency of employees, and the statutory minimum educational standards will not be alterable by contracts.⁴⁵³ A state requirement on the financial soundness of a school district also remains dominant over the collective bargaining law,⁴⁵⁴ whether a school district can pay more in salaries than it can expect to raise in taxes may be an early focus of conflicts. The state minima readily can be exceeded without any problems of statutory conflict, and the employer can agree to pay more than the minimum workers compensation or unemployment payments.⁴⁵⁵

The statutory preeminence of prior law may mean more in the public sector than it does in everyday private bargaining. The benefits of a private sector employee would be jeopardized by contract expiration, but statutory imposition of the existing set of Ohio public employee benefits is unaltered by the new collective bargaining process. Benefits can be improved but not removed, absent some legislative change.⁴⁵⁶

Eventually, if budget problems persist, the SERB may be called upon to perform the politically deadly task of ruling on which benefit program reductions may be made by general state appropriations legislation without further collective bargaining.⁴⁵⁷ One could also foresee piecemeal amendments to the collective

448. In addition to a minimum salary schedule, it was asserted that other legislatively mandated or authorized benefits for public workers included: sick leave, personal leave, maternity leave, tenure (civil service), vacation days, holiday time, due process procedures, pharmaceutical insurance, full or partial employer-paid life insurance, assault leave, professional leave, military leave, calamity leave, severance pay, retirement, automatic salary increases, hospitalization insurance, and dental insurance. Ohio PTA, Legislative Policy Statement (Mar. 2, 1983).

449. It is expected that bargaining will begin with mandated benefits and proceed from there, filling in any permissive benefits not yet provided by that employer. Such arrangements do not violate the Act. OHIO REV. CODE § 4117.10(A).

450. Monroe Testimony, *supra* note 2.

451. Interview with Stewart Jaffy, General Counsel, Ohio AFL-CIO, June 13, 1983.

452. OHIO REV. CODE § 4117.10(A).

453. *Id.*

454. OHIO REV. CODE ANN. § 5705.41 (Page Supp. 1983).

455. See OHIO REV. CODE § 4117.10(A).

456. A change in a statutory benefit would require legislation; but, as a mid-term change in a contracted benefit, it might also be a bargainable matter.

457. The impact of public employer financial distress should be considered in union planning under the new law. In New York budget deficit problems greatly affected the ability of public employee unions of benefit from arbitration. Fox, *Criteria for Public Sector Interest Arbitration in New York City: The Triumph of 'Ability to Pay' and the End of Interest Arbitration*, 46 ALB. L. REV. 97 (1981). Detroit's Mayor Coleman Young was quoted in Ohio testimony as saying that his city's cost was \$50 million per year, "and even more disastrous for Detroit, compulsory arbitration destroys sensible fiscal management." Memo to the Senate Commerce and Labor Committee from J. Coleman, Ohio Municipal League, Apr. 19, 1983.

bargaining legislation installing special exceptions to the Act. Just as there was no clean slate, there is no guarantee against erasures.

The ultimate battle that employee advocates of the new law must win is the enforcement of a mandate to raise taxes in those infrequent situations in which a binding order exceeds the budgetary ability of the local employer. This is a "must win" conflict in the courts, one sure to attract amicus curiae briefs in the early test cases. Compulsion to raise local taxes through injunctive relief is a feasible remedy in the abstract, and it appears possible, though purposely vague, in the statute.⁴⁵⁸ Ohio judges are also individual political figures, however, who must run for periodic reelection.⁴⁵⁹ A mandatory injunction is impossible without a judge willing to impose one; while judges often have been willing to grant the relief, the statutory change may change that propensity. Employees and unions must win when the fiscal realities of enforcement emerge in a contested case.

The probable focus of such a fight will be the conciliation orders given in situations in which safety force impasses have occurred or in which an employer, by contract, has accepted the final offer settlement procedure for use with non-safety workers. Other contract agreements can be rejected by the legislative body if sixty percent or more of the voting members of that body choose to reject and reenter negotiations,⁴⁶⁰ but the conciliator's order is binding. Time will tell how the judiciary responds to enforcement of an impasse-based final order, when tax increases are sought to be imposed on a reluctant legislative body.⁴⁶¹

C. Oversight and Politics

Administrative bodies like the SERB need oversight. Structurally, the SERB is independent of the executive branch of state government because it is a statutory body, its managers are appointed by the SERB members, and the members are not routinely subject to removal by the governor. The SERB's actions are final state actions subject to no cabinet level or gubernatorial review.⁴⁶²

The governor also cannot interfere with SERB actions without creating a major, publicized conflict of interest; it was to his Department of Administrative Services that the legislature attached the office which will represent state employer agencies before the SERB.⁴⁶³ A governor may feel that the SERB is beyond needed political control, but should hesitate to heal the problem through direct pressure. Whether scandal would attach to such an attempt to influence the SERB, it can be supposed

458. A mandate to increase taxes possibly is included in the requirement to take "whatever actions are necessary to implement the award." OHIO REV. CODE § 4117.14(I).

459. The legislature has given judges jurisdiction to review awards by conciliators. *Id.* § 4117.14(H); OHIO REV. CODE ANN. § 2711.10 (Page 1981). Ohio elects its judges, OHIO CONST. art. IV, § 6, and electoral politics may be at least an implicit factor in decisions on public employee cases.

460. OHIO REV. CODE § 4117.14(C)(6).

461. *Id.* § 4117.14(I). When asked about the process, union counsel suggested that the employer would be likely to test the enforcement of the arbitration award by refusing to pay, and the union then would move for enforcement of the award under chapter 2711 of the Revised Code. Interview with Dennis Morgan, Counsel to the Communications Workers Union, June 6, 1983. See *In re Port Jefferson Teachers Ass'n, Inc. v. Brookhaven-Comsewogue Union Free School Dist.*, 45 N.Y.2d 898, 383 N.E.2d 553, 411 N.Y.S.2d 1 (1978); *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976); *Tate v. Antosh*, 3 Pa. Commw. 144, 281 A.2d 192 (1971).

462. OHIO REV. CODE § 4117.02(A).

463. *Id.* § 4117.10(D).

that a prudent governor will wield only the indirect influence of new member appointments to the SERB.

Governors will, however, make personal decisions about the strategy to be used in the office of collective bargaining. During an election year, the individual candidate for reelection as governor may find it difficult to withstand the pressure from a very large and disciplined voting bloc comprised of public employees. The office of collective bargaining will have to be carefully and diplomatically managed.

The Public Employment Advisory and Counseling Effort Commission (PEACE) that was created by the new law will exist through 1986. It will have no power other than to study and report on public labor relations,⁴⁶⁴ and it will have none of the clout of the governor or legislators.⁴⁶⁵ Although it would be wise to obtain the insights of the members of the commission, PEACE should avoid becoming another forum for the same disputes debated in the legislature.

Legislative veto was a curious addition to the bill in late 1983.⁴⁶⁶ The curiosity comes from the fact that the bill was passed after the United States Supreme Court had held legislative veto unconstitutional at the federal level.⁴⁶⁷ Legislative veto is likely to be invalidated in Ohio, too, assuming that constitutional doctrine in the state and federal supreme courts is largely consistent. Thus, until a definitive invalidation, rules governing fact-finding procedure adopted by the SERB in 1984 in response to problems experienced in a strike could be vetoed by the legislature.⁴⁶⁸ This is the second veto provision in the bill, paired with the earlier power of the legislature to veto state employee contract fact finder recommendations by a three-fifths vote.

With gubernatorial oversight unlikely, the study commission of tenuous power and tenure, and the status of legislative veto in doubt, the only remaining threats to SERB power are the traditional oversight hearings and amendments by the legislature. These are likely to be the primary political guideposts for determining how well the new law is progressing. The legal guideposts will be set by the courts.

X. THE COURTS AND THE NEW STATUTE

Administrative lawyers can debate endlessly about the term "substantial evidence"; they have done so in the federal system.⁴⁶⁹ Ohio can expect the same debate in the context of labor relations.⁴⁷⁰ A great deal is at stake for employers, unions, and the SERB alike, in this definition.

464. 1983 Ohio Laws 140, § 7.

465. *Id.* The purpose of the Public Employment Advisory and Counseling Effort Commission is to ease the transition into the new legislation's enforcement.

466. OHIO REV. CODE § 4117.02(M).

467. *INS v. Chadha*, 103 S. Ct. 2764 (1983).

468. OHIO REV. CODE § 4117.02(M) interacts with OHIO REV. CODE ANN. § 119.03(H) (Page Supp. 1983). OHIO REV. CODE § 4117.02(H)(8) allows rules to be adopted, but they may be modified as provided in OHIO REV. CODE ANN. § 119.03 (Page Supp. 1983).

469. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951); B. SCHWARTZ, *supra* note 100, § 210, at 591-95 (1976); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:8 (2d ed. 1978).

470. Ohio already had substantial evidence as its standard of rulemaking review. *See* OHIO REV. CODE ANN. § 119.12 (Page Supp. 1983). Considerably more judicial construction can be expected for the term "substantial evidence" if projections about litigation against the SERB come true.

Apart from a few exceptional cases of review for arbitrariness, such as the review of union dues rebates⁴⁷¹ and the nonreviewable unit decisions,⁴⁷² virtually the whole universe of SERB action is dependent upon a court's finding of substantial evidence for the SERB decision. The Attorney General, who is the SERB's litigation attorney under the 1983 House amendments,⁴⁷³ may try to short-cut the debate over this critical term by issuing a formal opinion that will try to define "substantiality" in the abstract.⁴⁷⁴

The SERB may try to define the quantum of substantial evidence for its own adjudicatory purposes. Such a rule must be written to describe the substantial evidence required prior to certification.⁴⁷⁵ The SERB may get some deference for its view, as may the Attorney General. More likely, however, the courts will wrestle with each case, and each jurist will add his or her contribution to the precedential evolution of authority on the term.

From the federal precedents it can be predicted that substantial evidence review standards will demand more from the SERB record than the slightly more deferential arbitrary and capricious standard of review. Substantial evidence is more than a scintilla but less than a preponderance.⁴⁷⁶ It is comparable to the civil standard of "enough [evidence] to justify . . . a refusal to direct a verdict";⁴⁷⁷ and it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁷⁸ These and the Ohio precedents will form the basis for most of the review of cases arising under the new law.

Overall, the substantial evidence standard imposes greater scrutiny than the agency would receive under an arbitrariness review test, but it is not a guarantee of thoughtful review from every court. Those courts willing to read the record carefully and take account of administrative errors can use the substantial evidence standard as a tool to improve administrative determinations under the new law.⁴⁷⁹ Rebuttal evidence and contradictions must be examined fully;⁴⁸⁰ but courts that wish to reverse the outcome can also use this standard, with the inherent subjectivity of an "insufficient substantiality" judgment.⁴⁸¹

471. OHIO REV. CODE § 4117.09(C).

472. *Id.* § 4117.06(A).

473. *Id.* § 4117.02(E).

474. The Attorney General may issue opinions at the request of state agencies and officers. OHIO REV. CODE ANN. § 109.12 (Page 1978); 1 Op. Att'y Gen. 670 (1939). For the federal system, with long established expert agencies, "while courts are at pains to take into account the agency's experienced and informed reading of statutes, courts speak with some comfort and an authority of their own on such issues." Panel, *Managing the Regulatory Process*, 32 AD. L. REV. 239, 245 (1980) (Remarks of Judge Carl McGowan).

475. OHIO REV. CODE § 4117.05(A)(2).

476. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *ICC v. Northern Pac. R.R.*, 222 U.S. 541, 548 (1912).

477. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

478. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

479. A close examination of the record in an unfair labor practice case illustrates how the substantiality test can be applied by an active reviewing court; see, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Milgo Indus.*, 567 F.2d 540 (2d Cir. 1977).

480. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

481. Under the federal standard, recent case law has tended to meld the concepts of insubstantiality of evidence and arbitrariness of the decision. See, e.g., *Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor*, 487 F.2d

One major set of actions is not reviewable under substantial evidence and is not really SERB action at all—the arbitration and conciliation review. A specially tailored standard of review for commercial arbitration has existed for years in Ohio law.⁴⁸² That standard is not well tailored for labor relations in the public sector, but it was included as the review standard for final offer settlement proceedings.⁴⁸³ Jury determinations⁴⁸⁴ and the special review criteria that the arbitration statutes bring into the new collective bargaining law⁴⁸⁵ may create great difficulty for courts, and particularly for labor.

The substantial evidence test can be compared with the other standards of review in hypothetical cases. A conciliator who studies a county's ability to pay a nine percent raise demanded by the union will probably have substantial evidence in the documents to justify the award. This support would be sufficient to uphold a normal decision if made by the SERB itself.⁴⁸⁶ But the county will win on a motion to vacate the arbitration award if it can show, *inter alia*, that the conciliator exceeded his or her powers, "or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."⁴⁸⁷ Poor methods of financial analysis may constitute imperfect executions of the duty to consider a relevant statutory factor, such as the ability of the county to pay the raises.⁴⁸⁸ This will be a problematical area of case law development.

342, 350 (2d Cir. 1973). The application of this mixed standard of review in a rulemaking setting is difficult for the agency, for the reviewing court can invalidate federal agency rules if they are based on factors that the legislature did not intend for the agency to consider, or if the agency's explanation runs contrary to the evidence; both are situations that the SERB may experience in judicial review of its early determinations if it chooses to proceed with policies set by rulemaking. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856 (1983).

482. OHIO REV. CODE ANN. §§ 2711.10–.11 (Page 1981).

483. OHIO REV. CODE § 4117.14(H).

484. A jury determines whether a party is at fault for refusing to arbitrate an issue. For example, assume a disagreement about a management rights question, which the union takes to final offer settlement over the employer's objection. The conciliator awards the union its desired outcome. On appeal, the employer's refusal to arbitrate is the functional equivalent of breach of an agreement to arbitrate, which breach is subject to jury trial under § 2711.03 of the Revised Code. Part of the weakness of applying chapter 2711 is that no "written agreement for arbitration" in the commercial sense exists if the parties are silent in their labor contract regarding the final offer settlement procedure. Because the conciliator operates whether or not there is a written contract term referring to final offer settlement, and because the statutory section that mandates the content of collective bargaining contracts, OHIO REV. CODE § 4117.09, is silent regarding final offer settlements, there may be instances in which omission of the final offer procedure from the contract allows the union to avoid a jury trial because of the consequent inapplicability of the "written agreement" term of § 2711.03. Inevitably, the two sides will litigate this issue.

485. Criteria for the court to apply, on a motion to vacate an award, include: (A) fraud or "undue means"; (B) evident partiality on the part of the arbitrator(s), perhaps including collusion among ostensibly neutral members of a conciliation panel (*see* *Bethlehem Steel Corp. v. Fennie*, 55 A.D.2d 1007, 391 N.Y.S.2d 225 (1977)); (C) misconduct or misbehavior of arbitrators "by which the rights of any party have been prejudiced," which may include the determinative consideration of evidence that gives one side too great an advantage (*see, e.g., Voigt v. Bowen*, 53 A.D.2d 277, 385 N.Y.S.2d 600 (1976)); or (D) a finding that the arbitrators exceeded their powers "or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." OHIO REV. CODE ANN. § 2711.10 (Page 1981).

486. This documentation, if it could be assembled in time to be used, would be most helpful for the union. It would supply substantial evidence, for example, in an unfair labor practice refusal to bargain case under OHIO REV. CODE § 4117.13(B). There will be some evidence in support of the raise because the union will file a supporting rationale statement with its final offer. *Id.* § 4117.14(G)(3). An arbitrator's simple misconstruction of the facts by accepting one side's rationale does not invalidate an arbitration award. *See Springfield v. Walker*, 42 Ohio St. 543 (1885).

487. OHIO REV. CODE ANN. § 2711.10(D) (Page 1981).

488. This level of ambiguity in a provision of such great operative significance may be the Achilles' heel of the binding arbitration system, for it will be debated extensively in light of public concern over increasing taxes to fund final offer settlements. It is not enough that the reviewing court merely disagrees with the finding of fact made in a private

Was it a mistake for the legislation to apply commercial arbitration review principles to the different needs of public employee arbitration? Some will argue that it was; others can argue that, as a policy matter, the review of final offer settlement orders would be inadequate, and the public interest not sufficiently balanced if substantial evidence review were used.⁴⁸⁹ Contract agreements other than final offer conciliator orders still can be enforced under normal contract law principles if the parties choose to litigate.⁴⁹⁰

Three innovations in the law have special judicial review aspects. First, as discussed above, unit determinations are expressly nonreviewable in state courts. The potential exists for a due process claim in special circumstances, which could be brought in a federal court as a constitutional challenge to state action. An example may be police sergeants, whom the bill excludes from units of lower-ranking police officers. The unit determination that is statutorily barred from review could be an infringement of associational rights. A federal court may be reluctant to join the fray, even though it has the power to decide the constitutional question.⁴⁹¹

Second, strike injunctions cannot be issued by the court without prior agreement of the administrative body, the SERB.⁴⁹² This divestiture of jurisdiction pending administrative decision is rare for the courts.⁴⁹³

Third, the SERB can file a sua sponte review petition appealing its own final orders.⁴⁹⁴ The former versions of the bill allowed the SERB to certify questions to the Ohio Supreme Court.⁴⁹⁵ That created some doubt about the usual need for a case or controversy before a matter became subject to appellate judicial determination.⁴⁹⁶ During the 1983 deliberations, the provision was greatly modified so that the SERB must first reach a final decision, issue an order, and then file a petition for review in one of the courts of appeals.⁴⁹⁷ The SERB direct appeal action was expressly permitted, and standing and jurisdiction were granted by the Act. It remains to be seen whether a conflict among the courts of appeals will develop on the same issue.⁴⁹⁸

arbitration, for that would undo the private bargain from which the arbitration came, *Goodyear Tire & Rubber Co. v. Local Union No. 200*, 42 Ohio St. 2d 516, 520, 330 N.E.2d 703, cert. denied, 423 U.S. 986 (1975), but the reviewing courts may take a different tack when the parties do not acquiesce to arbitration but have it imposed upon them by the legislative body at the state level. See, e.g., *Newark Teachers Ass'n v. Newark City Bd. of Educ.*, 444 F. Supp. 1283 (S.D. Ohio 1978).

489. The issues are of such grave importance to the general population of taxpayers, employees, and recipients of essential services, that it can be asserted that the "more than a scintilla" standard of substantial evidence is not a sufficient measure for review of an arbitration award.

490. OHIO REV. CODE § 4117.11(C).

491. Constitutional claims can still be brought in federal courts under federal statutes, notwithstanding the state statute, if the normal procedural prerequisites to federal action are satisfied. See, e.g., *Newark Teachers Ass'n v. Newark City Bd. of Educ.*, 444 F. Supp. 1283 (S.D. Ohio 1978).

492. OHIO REV. CODE § 4117.16(A).

493. See *supra* text accompanying note 339.

494. OHIO REV. CODE § 4117.02(L).

495. See Sub. S.B. 222, 112th Gen. Assy., Reg. Sess. (1977) (proposed § 4117.02(L)). Cf. the dormant provision for Supreme Court review in OHIO REV. CODE ANN. § 4141.28(N) (Page 1980).

496. See *supra* text accompanying notes 141-42.

497. OHIO REV. CODE § 4117.02(L). The term "decision" was changed to "final order" by a House floor amendment. In the House committee an amendment eliminated the usual review jurisdiction of the court of common pleas for Franklin County over administrative final orders, OHIO REV. CODE ANN. § 119.12 (Page Supp. 1983), and replaced it with the court of appeals for the area where the public employer is situated. The jurisdiction of the court of appeals is limited to situations in which the SERB certifies the issue as being of great public interest. All other orders are appealed to the court of common pleas. OHIO REV. CODE § 4117.02(L).

498. By eschewing central appellate review under § 119.12 of the Revised Code, the House committee amendment opened up potential conflict among the courts of appeals. The SERB will use this power only in exceptional cases, and

Conflicting positions would embarrass an agency that asked courts for advice and then desired to reject the advice given. On that issue at least, the agency as appellant may be collaterally estopped from relitigating and may be limited to the answer it receives.⁴⁹⁹

The semiadvisory appeal process also endangers the precedential value of a party's favorable decision, since the "judge" can appeal its own decision though the litigants choose not to do so.⁵⁰⁰ The provision's proponents modeled this section on other states' opinion systems, and they expected it would speed decisions in the courts and lend early credibility to SERB decisions. This may happen, but the provision may ultimately be used infrequently by the SERB.

XI. CONCLUSION

No legislation can be perfect, and none of the sponsors claimed that the 1983 Ohio public employee collective bargaining law was perfect. The benefits of catching up to other states, most of which were ahead of Ohio on collective bargaining for public workers, appear to exceed the costs of the imperfections in the Ohio law. The extent of the benefit to the employee organizations will be known when representation elections are completed in 1984-85; and whether the benefit in the form of peaceful labor relations is realized will be known after a trial period of perhaps four years.

The costs of the new law are the biggest unknown, and the study commission's supervision of the process will be a good source of data on its additional costs. Students of the legislative process will watch the number and approach of the amendments that the new law inevitably will spawn in the legislature.

Under the new law, courts of equity will have narrower authority in some cases, while as reviewers of agency action they will have wider, record-reviewing authority in the new labor review settings. Local officials, particularly legislators, will face a frustrating adjustment period. Negotiators for both local and state government will have to carry the onus of rapidly learning to live with the SERB. Their comments and feedback can shape the agency's rules and policies. Last, but not least, the Ohio public employee, who waited two decades for this law, will be richer in wages, poorer in payroll deductions, but generally happier with the brave new world of Ohio collective bargaining.

presumably the Attorney General in representing the SERB will act as the United States Solicitor General does, to screen out less important appeals so as to reduce the prospect of damaging precedents. Because it would be prudent for the Attorney General to avoid disputes between the courts of appeals instigated by the SERB itself, only rarely should the same question be asked by the Board of two different courts.

499. Because the moving party is the Board itself, the likelihood that collateral estoppel will bar relitigation of the same legal issue is great. For that reason, the Board must start winning its cases early, or it may be in a difficult tactical position because of adverse precedents.

500. The final order by the SERB involves actual parties before the Board, but its ability to appeal to the court of appeals and later to the supreme court is independent of the real parties in interest. Because this is a statutory remedy for the Board, it may be difficult for the actual employer and employee parties to claim mootness.