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The Authority of the Public Employer to Engage in Collective Bargaining in the Absence of a State Statute: Ohio, a Case in Point

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ON JULY 5, 1935, THE CONGRESS OF THE UNITED STATES enacted the original National Labor Relations Act.[1] Through this Act Congress sought to encourage collective bargaining and protect the workers' "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[2] The Act created a duty to bargain on the part of the employer[3] though it excluded from the term employer "any State or political subdivision thereof . . . ."[4] Thus, this statute created no duty on the part of the public employer to bargain collectively with its employees though many states subsequently enacted legislation which either required or permitted the public employer to "meet and confer" or to bargain collectively with its employees.[5] In contrast, it was generally held that in those states

[1] 29 U.S.C. §§ 151-168 (1970).

[2] *Id.* § 151.

[3] *Id.* § 158(a)(5).

[4] *Id.* § 152(2).

[5] At least twenty-five states have enacted reasonably comprehensive legislation; at least fifteen states have separate statutes granting teachers the right to collectively bargain; and at least eight states have laws concering firemen and/or policemen. R. SMITH, H. EDWARDS, & R. CLARK, LABOR RELATIONS IN THE PUBLIC SECTOR 332-33 (1974) [hereinafter cited as SMITH].

Comprehensive: ALASKA STAT. §§ 23.40.070 -.260 (1972); CAL. GOV'T CODE §§ 3500 -09 (West 1966), *as amended*, (West Supp. 1975); CONN. GEN. STAT. ANN. §§ 7-467 to -479 (1958); DEL. CODE ANN. tit. 19, §§ 1301-12 (1974); FLA. STAT. ANN. §§ 447.201-.607 (Cum. Supp. 1975-76); HAWAII REV. STAT. §§ 89-1 to -20 (Supp. 1974); KAN. STAT. ANN. §§ 75-4321 to -4337 (Supp. 1975); ME. REV. STAT. ANN. tit. 26, §§ 979 to 979-0 (1964), *as amended*, (Supp. 1975-76); MASS. GEN. LAWS ANN. ch. 150 E, §§ 1-15 (Supp. 1974); MICH. COMP. LAWS ANN. §§ 423.201 -.216 (1967); MINN. STAT. ANN. §§ 179.61 -.77 (Supp. 1975-76); MO. ANN. STAT. §§ 105.500 -.530 (Vernon 1966), *as amended*, (Vernon, Cum. Supp. 1975); MONT. REV. CODES ANN. §§ 59-1601 to -1616 (Supp. 1974); NEB. REV. STAT. § 48-837 (1970); NEV. REV. STAT. §§ 288:140 - :220 (1975); N.H. REV. STAT. ANN. §§ 273-A:1 to -A:16 (Supp. 1975); N.Y. CIV. SERV. LAW §§ 200 - 204a (McKinney 1973), *as amended*, (McKinney Supp. 1975-76); OKLA. STAT. ANN. tit. 11, § 548.4 (Supp. 1975-76); ORE. REV. STAT. §§ 243.650 -.782 (1973); PA. STAT. ANN. tit. 43, §§ 1101.101 -.2301 (Supp. 1975-76); R.I. GEN. LAWS ANN. §§ 28-9.4-1 to -9.4-19 (1969); S.D. COMPILED LAWS ANN. §§ 3-18-1 to 3-18-17 (1974); VT. STAT. ANN. tit. 21, §§ 1721 -35 (Cum. Supp. 1975-76); WASH. REV. CODE ANN. §§ 41.56.010 to 41.56.950 (1972), *as amended*, (Supp. 1974); WIS. STAT. ANN. §§ 111.70 -.77, .80 -.97 (1974).

Teachers: ALASKA STAT. § 14.20.560 (1975); CAL. EDUC. CODE §§ 13080 -13090 (West 1975); CONN. GEN. STAT. ANN. §§ 10-153a to -153h (Supp. 1975); DEL. CODE ANN. tit. 14, §§ 4001 -13 (1975); IDAHO CODE §§ 33-1271 to -1276 (Supp. 1975); IND. CODE §§ 20-7.5-1-1 to 20-7.5-1-14 (Burns 1975); KAN. STAT. ANN. §§ 72-5413 to -5425 (1972); MD. ANN. CODE tit. 77, § 160 (1975); MONT. REV. CODE ANN. §§ 75-6115 to -6128 (1971); NEB. REV. STAT. §§ 79-1287 to -1295 (1971); N.D. CENT. CODE §§ 15-38.1-01 to -15 (1971); OKLA. STAT. ANN. tit. 70, §§ 509.1-.10 (1972); R.I. GEN. LAWS ANN. §§ 28-9.3-1 to -9.3-16 (1969); VT. STAT. ANN. tit. 16, §§ 1981-2010 (Cum. Supp. 1975); WASH. REV. CODE ANN. §§ 28A.72.010-.090 (1970).

without such statutes the public employer had no duty or even any right or power to bargain collectively with its employees.[6]

Ohio is one such state in which there is no statute explicitly enabling a public employer to engage in collective bargaining, and until recently the courts have usually invalidated any such agreement. Despite the non-legal status of these agreements, public employers have with increasing frequency been engaging in collective negotiations and entering into the resultant "contract." Thus, an anomalous situation has been created wherein the public employer and the union representing the public employees engage in bargaining though the union is aware that the employer is not bound to carry through the terms of the agreement.

The rationales which the courts in Ohio have used to invalidate public employer collective bargaining agreements reflect the arguments traditionally used in other jurisdictions. Since these rationales are no longer in congruence with the realities of labor relations in the public sector, they need to be reexamined so that a firm legal basis can be created for participation by all public employers in collective negotiations. The courts in Ohio have been considering the issue with increasing frequency,[7] and recently the Ohio Supreme Court in *Dayton Classroom Teachers Association v. Dayton Board of Education*[8] reached the decision that school boards do have the authority to enter collective bargain-

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Firemen and/or Policemen: ALA. CODE tit. 37, § 450 (3) (Cum. Supp. 1973); GA. CODE ANN. §§ 54-1301 to -1315 (1974); KY. REV. STAT. ANN. §§ 345.010 -.130 (1973) (only cities containing a population of at least 300,000 or any city that petitions the Commissioner of Labor); PA. STAT. ANN. tit. 43, §§ 217.1 -.10 (Supp. 1975-76); R.I. GEN. LAWS ANN. §§ 28-9.1-2 to 28-9.1-14 (1969); S.D. COMPILED LAWS ANN. §§ 9-14A-1 to -22 (Supp. 1975); TEX. REV. CIV. STAT. art. 5154c-1 (Cum. Supp. 1975-76); WYO. STAT. ANN. §§ 27-265 to -273 (Cum. Supp. 1975).

[6] International Union of Operating Eng'rs Local 321 v. Water Works Bd., 276 Ala. 462, 163 So. 2d 619 (1964); Dade County v. Amalgamated Ass'n of Street Employees, 157 So. 2d 176 (Fla. Ct. App. 1963); Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); International Longshoremen's Ass'n v. Georgia Ports Authority, 217 Ga. 712, 124 S.E.2d 733 (1962); Wichita Public School Employees Local 512 v. Smith, 194 Kan. 2, 397 P.2d 357 (1964); Mugford v. Mayor & City Council, 185 Md. 266, 44 A.2d 745 (1945); Weakley County Municipal Elec. Sys. v. Vick, 43 Tenn. App. 524, 309 S.W.2d 792 (1957); City of Alcoa v. Electrical Workers Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957).

[7] From 1945 to 1968 only two published cases were decided which dealt with public sector collective bargaining. Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947); City of Cleveland v. Street Employees Div. 268, 30 Ohio Op. 395 (C.P. 1945).

Since 1969 at least eight decisions have dealt with the issue. They are: Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975); Malone v. Court of Common Pleas, No. 33362 (Ohio Ct. App. Jan. 9, 1975); North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974); Hamilton Bd. of Educ. v. Arthur, 84 L.R.R.M. 2468 (Ohio Ct. App. 1973); Youngstown Educ. Ass'n v. Youngstown City Bd. of Educ., 136 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); Ohio Civil Service Employees Ass'n v. Division 11 of the Ohio Dep't of Highways, 28 Ohio Misc. 153, 272 N.E.2d 919 (C.P. 1970); Cincinnati Metropolitan Housing Authority v. Cincinnati Dist. Council No. 51, 17 Ohio Misc. 134, 244 N.E.2d 898, *rev'd on other grounds*, 22 Ohio App. 2d 39, 257 N.E.2d 410 (C.P. 1969).

[8] 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

ing agreements.[9] The decision of the court, however, seems superficial and incomplete, leaving many questions in the area unanswered.

This comment will discuss the traditional arguments against collective bargaining, suggest answers to those arguments, and analyze the *Dayton Classroom Teachers Association* decision. It will conclude with an analysis of how the issues should be considered and suggest the problems which are presented by Ohio's case law.

I. The Issues Involved in Public Employer Collective Bargaining

The arguments which Ohio courts have used to invalidate public employer collective bargaining agreements include the initial proposition that labor relations statutes do not apply to public employers and public employees, and the more basic arguments that local governmental powers are narrowly construed, that such an agreement would be contrary to the purpose of civil service laws, and that a local governmental body cannot delegate its authority. There is also the argument that a public employer cannot bind its successors and though this argument has not been used to invalidate any public employer agreements which will be specifically discussed in this comment, it has nevertheless been rebutted in a recent Ohio case.[10] Some courts have likewise rejected the proposition that a proprietary-governmental dichotomy would be relevant to the labor relations sphere.[11]

In addition to the collective bargaining issue there are the sub-issues of exclusive representation, union security, and arbitration. The arguments against allowing collective bargaining in the public sector are equally applicable to these sub-issues. Thus, there is no scarcity of issues or arguments though their application leaves much to be desired.

A. *Statutory Use of "Employer" and "Employee"*

The initial point of analysis in several cases has revolved around the question of whether the statutory use of the words "employer" and "employee" include the public employer and public employee.[12] In Ohio, as in several other jurisdictions,[13] the courts have determined that a public employer and a public employee cannot be included by implication when only the terms "employer" and "employee" are used in the

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[9] *Id.* at 132, 323 N.E.2d at 717.

[10] North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974). *See* text accompanying notes 70-72 *infra*.

[11] *See* cases cited note 73 *infra*.

[12] *See generally* Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947); City of Cleveland v. Street Employees Div. 268, 30 Ohio Op. 395 (C.P. 1945).

[13] *See* Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741 (1946); Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); International Bhd. of Elec. Workers v. Robison, 91 Idaho 445, 423 P.2d 999 (1966); Wichita Public School Employees Local 512 v. Smith, 194 Kan. 2, 397 P.2d 357 (1964); City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947).

legislation.[14] An example of this analysis can be seen in the Ohio Supreme Court decision of *Hagerman v. City of Dayton*[15] in which the issue was whether an ordinance implementing an agreement between the City of Dayton and the Dayton Public Service Union should be enforced. The ordinance authorized voluntary deductions (or "check-offs") from the wages of classified civil service employees which were to be paid to their union.[16] Such a procedure was thought valid since section 6346-13[17] of the Ohio General Code authorized check-off agreements between employers and unions. The *Hagerman* court, however, held the check-off invalid since a municipal corporation "does not come within the meaning of 'employers' as used in section 6346-13" and "civil service appointees do not come within the definition of 'employees' as used in such section."[18]

No court in Ohio dealing with the public employer bargaining issue has specifically rebutted the conclusion of *Hagerman* regarding the meaning of the words "employer" and "employee" and it appears that this interpretation is well grounded in judicial decisions.[19] Thus, given the case law, it would be very difficult to expand the interpretation of labor statutes which refer only to "employers" and "employees" to include *public* employers and their employees.

B. *Authority of Local Government*

A second argument against the right of the public employer to engage in collective bargaining is the traditionally narrow reading of the authority of local governmental bodies. Municipal corporations have been historically considered creatures of law with their acts being necessarily authorized either by their charters or other laws.[20] McQuillin, in *Law of Municipal Corporations*, describes the powers of a municipal corporation as:

> (1) powers expressly conferred by the constitution, statutes or charter; (2) powers necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) powers essential to the declared objects and purposes of the municipality, the latter often being classified as among the implied powers. This enumeration of powers is exclusive and no other powers exist . . . .[21]

This analysis of the authority of municipal corporations has also been applied to define school board authority and the more traditional cases

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[14] Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947); City of Cleveland v. Street Employees Div. 268, 30 Ohio Op. 395 (C.P. 1945).

[15] 147 Ohio St. 313, 71 N.E.2d 246 (1947).

[16] *Id.* at 314, 71 N.E.2d at 247.

[17] OHIO GEN. CODE ANN. § 6346-13 (Page 1945), *as amended*, OHIO REV. CODE ANN. § 1321.32 (Page 1962).

[18] Hagerman v. City of Dayton, 147 Ohio St. 313, 327, 71 N.E.2d 246, 253 (1947).

[19] *See* cases cited note 13 *supra*.

[20] E. MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 10.09 (3d ed. 1966).

[21] *Id.*

narrowly apply the principle and insist upon the need for express authority.[22] Some of the more progressive decisions in Ohio, however, have given a rather flexible interpretation to McQuillin's analysis, especially parts (2) and (3), and have found the authority of a school board to collectively bargain "essential to the declared objectives and purposes" of the board.[23]

The first of the modern decisions which attempted to fit the authority to engage in collective bargaining within the express or implied powers of the governing body was *Youngstown Education Association v. Youngstown City Board of Education*.[24] In that opinion two of the three presiding judges recognized the argument that there must be a specific grant of power in some statute or charter before a local government could enter into a collective bargaining agreement. This authority was found in section 9.41[25] of the Ohio Revised Code which was enacted in response to the holding of *Hagerman*. It states:

> Notwithstanding section 1321.32 of the Revised Code, the state of Ohio and any of its political subdivisions or instrumentalities may checkoff on the wages of public employees for the payment of dues to a labor organization of public employees upon written authorization by the public employee. Such authorization may be revocable by written notice upon the will of the employee.
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> A labor organization or other organization of public employees receiving such checkoff of dues may be required by the state of Ohio and any of its political subdivisions or instrumentalities to defray the actual cost of making such deductions.[26]

While section 9.41 may be indicative of the legislature's disapproval of *Hagerman* and its recognition and acceptance of the role which unions are now playing in the public employment sphere, it does not provide the explicit authority to bargain collectively as the *Youngstown Education Association* opinion declared. This section of the code only gives the public employer the authority to participate in a voluntary check-off of dues. Although section 9.41 can be viewed as one step in an argument that public employers do have the right to bargain collectively because of its implied sanction of the collective bargaining process, it cannot be considered an explicit grant of legislative authority.

A better approach to the problem entails a consideration of the statutes which state the purpose for which a governing body was created and give that body its authority. For example, in the case of school boards, section 3313.47[27] delegates to the board of education the man-

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[22] *See* Schwing v. McClure, 120 Ohio St. 335, 166 N.E. 230 (1929); Hamilton Bd. of Educ. v. Arthur, 84 L.R.R.M. 2468 (Ohio Ct. App. 1973).

[23] *See* cases cited notes 24 and 30 *infra*.

[24] 36 Ohio App. 2d 35, 301 N.E.2d 263 (1973).

[25] OHIO REV. CODE ANN. § 9.41 (Page 1968).

[26] *Id.*

[27] *Id.* § 3313.47 (Page 1972).

agement and control of all public schools within its district; section 3313.17[28] grants the board of education the authority to contract and be contracted with; and section 3319.08[29] grants the board the authority to enter into written contracts for the employment of teachers. Several recent decisions have found that these provisions provide an implied basis for a school board to engage in collective bargaining[30] and the court in *North Royalton Education Association v. North Royalton Board of Education*[31] held that although these sections do not require collective bargaining they do provide a basis for an implied authority to bargain collectively. The court noted that there was no indication of a legislative intent to place the duty upon a school board to negotiate each employment contract individually and indicated that such a duty would be too burdensome to be implied.[32] The same reasoning that the *North Royalton* court used in terms of school boards can be likewise applied to a local governing body. When such a body has both the power to enter into employment contracts and the right to establish the working conditions of its employees it can then be legitimately inferred that the governing body also has the authority to collectively bargain.

The problem of narrowly construed local authority aside, the construction of the powers of home rule municipal corporations has been particularly difficult. The Ohio constitution provides for home rule in section three of article XVIII:

> Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

As an initial reading might suggest, the language of this provision has had conflicting analyses.[33] For example, the court in *Hagerman* broadly defined police regulations, determined that the check-off in question

[28] *Id.* § 3313.17.

[29] *Id.* § 3319.08.

[30] Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 774 (1975); Malone v. Court of Common Pleas, No. 33362 (Ohio Ct. App. Jan. 9, 1975); North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974).

[31] 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974).

[32] *Id.* at 217, 325 N.E.2d at 907.

[33] J. FARRELL, JR., FARRELL-ELLIS OHIO MUNICIPAL CODE § 1.22 (11th ed. 1962). Farrell finds that the phrase "all powers of local self-government" has been criticized as vague language. *Id.* The Ohio Supreme Court in Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), indicated that "all powers of self-government" included the power to enact all laws necessary for the governing of the municipality, including the power to adopt police, sanitary, and other regulations and that the balance of article XVIII § 3 is merely a limitation on the power of municipalities to adopt police, sanitary, and other similar regulations. *Id.* at 108, 146 N.E.2d at 859.

Farrell contends that *Benjamin* marked a departure from prior analysis. Farrell also discusses conflict over the term "general laws" stating that there can be no conflict within the meaning of article XVIII § 3 unless the general law is a police regulation prescribing a rule of conduct for the entire state. See also Note, *Ohio Public Sector Labor Relations Law: A Time for Reevaluation and Reform*, 42 U. CIN. L. REV. 679, 689-93 (1973), for a discussion of how home rule problems relate to labor relations in the public sector.

came within that description, and consequently found the ordinance in conflict with the general laws of the state (§ 6346-13 and the civil service laws) and thus invalid.[34]

The determination of *Hagerman* that a labor relations-type ordinance is an exercise of police regulatory power has never been explicitly overruled; this conclusion, however, needs to be reconsidered in light of a later Ohio Supreme Court decision, *State ex rel. Canada v. Phillips*.[35] In that case the court held that a municipality can establish its own civil service system in the exercise of its "powers of local self-government"[36] and it further stated that the words "as are not in conflict with general laws" modify only police regulations and not general local powers. Consequently, provisions of a municipal civil service system dealing with police promotion which were implemented under powers of local self-government were valid in spite of the fact that a state statute provided for different and conflicting regulations.[37]

Inasmuch as both deal with terms and conditions of employment, it is difficult to determine why a labor relations ordinance is an exercise of a police regulation while provisions of a civil service system are not. If, under the reasoning of *Canada v. Phillips*, labor relations ordinances were considered exercises of powers of local self-government, then the conflict clause would not apply. Thus, the municipalities would be able to legislate ordinances pursuant to collective bargaining agreements despite state civil service laws that might conflict. This appears to be one sound basis on which the narrow interpretation of municipal powers in *Hagerman* could be avoided.

C. *Potential Conflict with Civil Service Laws*

Following the argument of the limited authority of local governmental bodies, another argument which has been used against the right of the public employer to engage in collective bargaining is that such a procedure would be contrary to the spirit and purpose of civil service laws.[38] Section 10 of Article XV of the Ohio constitution provides:

> Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practical, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

The traditional argument is that this section of the constitution and the laws passed pursuant to it so preempt the area of public labor relations,

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[34] Hagerman v. City of Dayton, 147 Ohio St. 313, 328, 71 N.E.2d 246, 257 (1947).

[35] 168 Ohio St. 191, 151 N.E.2d 722 (1958).

[36] *Id.* at 191, 151 N.E.2d at 724.

[37] *Id.*

[38] Hagerman v. City of Dayton, 147 Ohio St. 313, 328, 71 N.E.2d 246, 253 (1947); *see also* Ohio Civil Service Employees Ass'n v. Department of Highways Div. 11, 28 Ohio Misc. 153, 272 N.E.2d 919 (C.P. 1970); City of Cleveland v. Street Employees Div. 268, 30 Ohio Ops. 395 (C.P. 1945).

at least where civil service employees are involved, that labor unions and collective bargaining have no role to play.[39] The court in *Hagerman* stated:

> The laws of this state, the regulations of the civil service commissions, state and municipal, and the valid ordinances of the particular municipality cover fully all questions of wages, hours of work and conditions of employment affecting civil service appointees.[40]

The supreme court decision in *Hagerman* that public employers of civil service employees do not have the authority to engage in collective bargaining has not been overruled; several lower courts, however, have indicated disapproval in dicta. The first case to do so was *Foltz v. City of Dayton*[41] which dealt with the issue of whether an involuntary union security clause, which was part of a collective bargaining agreement, could be enforced. Although the court used *Hagerman* style reasoning and found the cause invalid because it was an exercise of a police regulation which conflicted with the Ohio Revised Code,[42] the decision contained a statement that civil service employees have a right to bargain collectively.[43] Made without any recognition of opposing decisions in prior cases and without the use of precedent or discussion of the problems, the proposition apparently seemed so self-evident to the court that it failed to provide support. Although this statement was not part of the issue and consequent holding of the case, it was used by later courts seeking to find precedent which approved public employer collective bargaining.[44] Although it did not deal with civil service employees, another case which noted that those employees have a right to bargain collectively with their employer was *North Royalton.*[45]

The issue of whether employers of civil service employees can engage in collective bargaining presents problems which are not involved in other instances and which have not been adequately dealt with in Ohio case law. The situation should not be viewed in the terms of *Hagerman*; collective bargaining as a process is not inherently contrary to the purpose of civil service laws, but rather should be viewed as a process which creates a channel for employer and employee to communicate with respect to conditions of employment. This type of communication is frequently beneficial in maintaining satisfactory and stable relations between gov-

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[39] Hagerman v. City of Dayton, 147 Ohio St. 313, 328-29, 71 N.E.2d 245, 254 (1947).

[40] *Id.*

[41] 27 Ohio App. 2d 35, 272 N.E.2d 169 (1970).

[42] *Id.* at 42-43, 272 N.E.2d at 173. The court noted a conflict with OHIO REV. CODE ANN. § 9.40 (Page 1968).

[43] *Id.* at 42, 71 N.E.2d at 173.

[44] North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974); Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., No. 4291 (Ohio Ct. App. Nov. 20, 1973), *aff'd in part, rev'd in part*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

[45] North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 216, 325 N.E.2d 901, 906-07 (1974).

ernment and its employees.[46] Yet the potential for conflict between collective bargaining agreements and civil service laws must be recognized. The issue would best be resolved by legislative indication of whether civil service laws or collective bargaining agreements should have priority; since the legislature has not yet expressed itself on this matter, several alternatives should be considered. The obvious and logical fact is that collectively bargained agreements can be written in such a manner as to anticipate and attempt to avoid any conflicts with civil service law.[47] If portions of the contract do not avoid that conflict it would appear that those offending provisions could be deleted and the remainder of the contract could continue in effect.[48]

To some extent Ohio case law has been fashioned by the fact that early cases dealing with collective bargaining concerned employers of civil service employees.[49] *Hagerman*, for example, referred to civil service employees and yet has been cited for the general proposition that it prohibits any public employer from engaging in collective bargaining.[50] Recent cases in the area have dealt with non-civil service employers[51] and this may in part account for the confusion and subsequently emerging trend of allowing public employers to engage in collective bargaining. The distinction, however, must be clearly drawn and the authority of the employer of civil service employees to engage in collective negotiations needs to be carefully rethought. *Hagerman* no longer presents realistic guidelines which can be followed.

D. *Delegation of Authority*

The argument that it is an unlawful delegation of authority for a public employer to engage in collective bargaining has been used to void collective agreements,[52] especially those which contain binding arbitration clauses.[53] It has been stated that "the principle is fundamental and of

[46] Foltz v. City of Dayton, 27 Ohio App. 2d 35, 272 N.E.2d 169 (1970) (Crawford, J., concurring).

[47] North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 216, 325 N.E.2d 901, 907 (1974).

[48] Norwalk Teachers Ass'n v. Board of Educ. of Norwalk, 138 Conn. 269, 83 A.2d 482 (1951). *See also* Seasongood & Barrow, *Unionization of Public Employees*, 21 U. CIN. L. REV. 327, 368 (1952).

[49] Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 245 (1947); City of Cleveland v. Street Employees Div. 268, 30 Ohio Op. 395 (C.P. 1945).

[50] Youngstown Educ. Ass'n v. Board of Educ., 36 Ohio App. 2d 35, 42, 301 N.E.2d 891, 896 (1973) (concurring opinion).

[51] Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975); Malone v. Court of Common Pleas, No. 33362 (Ohio Ct. App. Jan. 9, 1975); North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974); Hamilton Bd. of Educ. v. Arthur, 84 L.R.R.M. 2468 (Ohio Ct. App. 1973); Youngstown Educ. Ass'n v. Youngstown City Bd. of Educ., 36 Ohio App. 2d 35, 301 N.E.2d 891 (1973).

[52] Hagerman v. City of Dayton, 147 Ohio St. 313, 329, 71 N.E.2d 246, 254 (1947); Youngstown Educ. Ass'n v. Youngstown City Bd. of Educ., 36 Ohio App. 2d 35, 40, 301 N.E.2d 891, 895 (1973).

[53] Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., No. 4291 (Ohio Ct. App. Nov. 20, 1973), *aff'd in part, rev'd in part*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975); Hamilton Bd. of Educ. v. Arthur, 84 L.R.R.M. 2468 (Ohio Ct. App. 1973).

universal application that public powers conferred upon a municipal corporation and its officers and agents can not be surrendered or delegated to others."[54] The *Hagerman* court applied the delegation of authority argument to collective bargaining and stated that if an employer were to engage in collective bargaining it would then be delegating its authority under the civil service laws to the union with which it was bargaining.[55]

When the delegation of authority argument is used to invalidate a collective bargaining agreement or to declare that a public employer cannot engage in collective bargaining, it can be rebutted as it was in *Malone v. Court of Common Pleas of Cuyahoga County*.[56] The court in that case stated that engaging in the collective bargaining process should be construed as an exercise of authority rather than an unlawful delegation of authority.[57] When the public official bargains with a union he is not transferring all his power to a union but is maintaining his authority as the employer. With the change in the bargaining process from the relationship of the employer and employee to the relationship of the employer and his organized employees, the balance of power may become more equalized but the employer still maintains his authority. Given the present state of labor relations, the traditional manner of dealing with a single employee may not be fruitful, whereas collective bargaining enables the employer to exercise his authority to conclude a master contract which may be more conducive to stability. This is the implication of *Malone*, and it appears to be an acceptable response to the argument of unlawful delegation of authority.

Although it is suggested that the collective bargaining process does not necessarily involve delegation of authority, it is conceded that an agreement so arrived at may result in such a delegation. This was apparently the situation in *Youngstown Education Association v. Youngstown City Board of Education*.[58] In that case the court concluded that section 9.41 of the Ohio Revised Code provided the necessary legislative sanction for public employer collective bargaining;[59] yet all three judges agreed that the board could not delegate its authority to manage the schools.[60] The case involved a master agreement which was understood to exist between the Youngstown Education Association (YEA) and the board of education. Subsequent to the formation of the agreement the board adopted certain policies pertaining to the management of the

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It has been further suggested by a conservative court that a second reason to invalidate an arbitration provision, in addition to the delegation rationale, is that the arbitrators might be ignorant of the civil service laws. City of Cleveland v. Street Employees Div. 268, 30 Ohio Op. 395, 410 (C.P. 1945). The speciousness of this argument is apparent.

[54] McQUILLIN, *supra* note 20, at § 10.39.

[55] Hagerman v. City of Dayton, 147 Ohio St. 313, 329, 71 N.E.2d 246, 254 (1947).

[56] No. 33362 (Ohio Ct. App. Jan. 7, 1975).

[57] *Id.* at 10.

[58] 36 Ohio App. 2d 35, 301 N.E.2d 891 (1973).

[59] *Id.* at 43, 301 N.E.2d at 897 (Lynch, P.J. and Donofrio, J., concurring).

[60] *Id.* at 40, 301 N.E.2d at 895.

schools and affecting the relationship of teachers, students, parents, and the board. The YEA felt that these policies were in breach of the master agreement which provided for negotiations over all teachers' working conditions, and sought to enjoin the superintendent from enforcing the regulations.[61] The decision did not describe exactly what policies were involved but indicated only the school board had the authority to make those policies; furthermore, if they were subject to negotiations between the board and the YEA an illegal delegation of authority would result. Since all three judges on the court agreed that in this particular circumstance only the board had the authority to make policies and since two of three judges found explicit legislative sanction for collective bargaining, the opinion further obfuscates the issue of what constitutes an illegal delegation of authority.

The delegation of authority problem is more apparent in contracts which contain binding arbitration clauses because in such contracts the employer has agreed to abide by the decision of a third party. Contracts arrived at through a collective bargaining process are likely to have such arbitration provisions in order to settle a controversy over the definition of a disputed contract term or to be employed as the final stage in a grievance procedure.

In collective bargaining cases no contract containing an arbitration provision was validated until 1974;[62] up to that time arbitration provisions were invalidated as impermissible delegations of authority.[63] The court in *North Royalton Education Association v. North Royalton Board of Education*[64] found, however, that the restriction against arbitration was not necessarily adhered to by the courts in cases which did not involve labor relations. In reaching its decision the court relied on *Goldman v. Board of Education*[65] which involved the right of a board of education to enter into a contract for the installation of plumbing which included an arbitration provision to resolve potential disputes. The *Goldman* court found authority for the arbitration clause under sections 2711.01 *et seq.* of the Revised Code[66] which set forth the provisions for arbitration of disputes which the parties have agreed to arbitrate. Both courts adhered to the philosophy that arbitration serves the purpose of avoiding long disputes and litigation[67] and the *North Royalton* court saw

[61] *Id.* at 38-39, 301 N.E.2d at 894.

[62] North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974), was the first case to validate an arbitration clause within a collective bargaining contract.

[63] *See* cases cited note 53 *supra.*

[64] 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974).

[65] 5 Ohio App. 2d 49, 213 N.E.2d 826 (1965).

[66] OHIO REV. CODE ANN. §§ 2711.01 - .16 (Page Supp. 1974). Until amended in 1955 these provisions covering arbitration explicitly excluded arbitration clauses in collective contracts between employers and employees with regard to terms and conditions of employment. This explicit exclusion, however, was omitted when the section was rewritten in 1955.

[67] North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 214, 325 N.E.2d 901, 905 (1974); Goldman v. Board of Educ., 5 Ohio App. 2d 49, 50, 213 N.E.2d 826, 827 (1965).

no reason to treat an arbitration provision in an employment contract any differently than an arbitration provision in another type of contract to which the board of education is a party. This is an interesting approach to the problem of validating collective bargaining by a public employer because in the past the authority of the public employer in labor relations has not been as broad as their authority in other functions. It is analytically helpful to use cases outside the labor relations sphere to buttress the argument that the public employer has the power to bargain collectively and to submit some grievances to arbitration.

Despite the fact that arbitration has been allowed outside the labor relations realm and that the process, like collective bargaining generally, may avoid long disputes and litigation, there nevertheless remains the delegation of authority problem. If binding arbitration is a desirable concomitant to the collective bargaining process, then the legislature or the courts need to delineate what areas can be submitted to arbitration.[68]

E. *Binding of Successors*

The impermissable binding of successors is the final argument used against collective bargaining by a public employer. Though none of the relevant cases have applied this argument to invalidate agreements collectively bargained, it has been used in other jurisdictions.[69] The court in *North Royalton* dealt with this issue in an interesting manner stating that a public official performs

> not for himself or for his successors. His principal is the public and when he acts for it he can bind it to contracts beyond his term in the absence of statutory impediments.[70]

In buttressing this argument, the *North Royalton* court again found support outside the labor relations sphere[71] and suggested that if the problem of binding successors is crucial, it, like the civil service laws, can be foreseen and taken into account in the making of the contract.[72] The *North Royalton* decision, which is one of the most complete in the area, has thus effectively disposed of the problem of binding successors.

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[68] In the private sector there is a presumption of arbitrability of grievances when there is a no-strike clause even though there is no express provision in the contract indicating that the particular grievance is arbitrable. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960). The courts, however, are not so willing to declare a dispute arbitrable in the public sector. "In large part, this has probably resulted because public employers are seen to retain broader discretion and 'management rights' to control the employment circumstance than are their private sector counterparts." SMITH, *supra* note 5, at 938.

[69] *See* American Fed'n of State Empl. Dist. 33 v. City of Philadelphia, 83 Pa. D. & C. 537 (C.P. 1952). *See generally* Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539, 548 (1969).

[70] 41 Ohio App. 2d at 216, 325 N.E.2d at 907 (1974).

[71] State *ex rel.* McGoldrick v. Lewis, 12 Ohio Dec. 46 (1901).

[72] 41 Ohio App. 2d at 216, 325 N.E.2d at 907 (1974).

F. *Proprietary Functions of Government*

In an effort to bring the law into congruence with the reality of public employer collective bargaining practices it has been suggested that a distinction be made between the government as an employer when it is involved in its traditional governing capacity and the government as an employer when it is involved in a proprietary capacity.[73] Most jurisdictions have held that though this distinction makes a difference in the tort liability of the governmental agency, it is not applicable to the government's capacity to engage in collective bargaining.[74]

The Ohio case rejecting this distinction is *City of Cleveland v. Street Employees Div. 268*.[75] In that case the defendant union argued that because of the proprietary nature of the transit board's functions the city had powers commensurate with those of a private corporation.[76] The court acknowledged that control of the transit system was a proprietary function with the consequent tort liability and that the city, in connection with the transit system, could perform in a capacity similar to that of a private corporation. The court, however, adhered to the traditionally strict view of municipal powers, *i.e.*, only those powers granted by law.[77]

The court's conclusion that, despite the proprietary nature of running a transit system, the powers of the Cleveland Transit Board are determined by the laws and interpretations governing public bodies rather than private corporations is particularly interesting. The facts revealed that the City of Cleveland had acquired the transportation system from a private organization, the Cleveland Railway Company, and that prior to the purchase Division 268 represented the employees of the Cleveland Railway Company and had obtained collective bargaining agreements with the company. Thus, the union was seeking to continue representing the same employees doing the same jobs they had previously performed, the only variation being the change in ownership of the transit system. Furthermore, the decision also noted that relations between Division 268 and the Cleveland Railway Company had been peaceful and stable.[78]

It is not the contention of this comment that a municipal corporation engaged in a proprietary function should have all the powers of a private corporation nor that this argument alone is a sound basis for determining that a public employer should be able to legally engage in collective bargaining. Nevertheless, the facts of this case highlight the theoretically unsound disparity in treatment.

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[73] *See* Cincinnati Metropolitan Housing Authority v. Cincinnati Dist. Council No. 51, 17 Ohio Misc. 134, 244 N.E.2d 898 (C.P.), *rev'd on other grounds*, 22 Ohio App. 2d 39, 257 N.E.2d 410 (1969). *See also* Christie v. Port of Olympia, 27 Wash. 2d 534, 179 P.2d 294 (1947).

[74] *See, e.g.*, City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal. App. 2d 36, 210 P.2d 305 (1949); Dade County v. Amalgamated Ass'n of St. Employees, 157 So. 2d 176 (Fla. Ct. App. 1963); City of Alcoa v. Electrical Workers Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957).

[75] 30 Ohio Op. 395 (C.P. 1945).

[76] *Id.* at 402.

[77] *Id.* at 406.

[78] *Id.* at 402.

Although it is suggested that the proprietary function of a public employer alone is not enough of a basis from which to argue that it should be able to engage in collective bargaining, it is one feature of a total analysis which indicates that the once narrow view of the authority of local government in labor relations is no longer meaningful. If collective bargaining in the private sector represents sound public policy designed to balance the power in the employer-employee relationship, then the same public policy should apply in the public sector when the government is engaged in proprietary functions.

G. *Exclusive Representation*

Although the proprietary-governmental distinction is the last of the basic lines of thinking which are part of the issue of public employer collective bargaining, one sub-issue, exclusive representation, needs yet to be discussed. The only Ohio case which deals with exclusive representation as part of the issue of public employer collective bargaining is *City of Cleveland v. Street Employees Div. 268*. The court in that case determined that it would be unconstitutional for a public employer to recognize an exclusive representative for its employees. It referred to the fourteenth amendment equal protection clause and declared that it "would be tantamount to forcing all employees to become members of the favored union, and would be unlawful."[79]

The issue of exclusive bargaining representation is central to the question of effective collective bargaining. Section 159(a) of the National Labor Relations Act[80] provides for such representation and although the public employer is exempt from that Act, the policy considerations are similar to those in the public employment sphere. If, as it is contended, collective bargaining is the most effective means of creating a stable type of labor relationship, then exclusive representation, as an essential concomitant, must also be allowed. Otherwise, rival employee representatives will create competitive pressures which will cause them to be reluctant to reach an agreement until every other representative has accepted the same terms.[81]

Although these practical guidelines do not entirely answer constitutional questions they do relate to fourteenth amendment considerations and if exclusive representation does not involve "invidious discrimination"[82] then it is not a denial of equal protection of the law by the state. The argument against exclusive representation thus appears weak.

As indicated, there are a number of arguments which can be used to analyze the validity of collective bargaining for public employers. A recent Ohio Supreme Court decision is demonstrative of how such an analysis is avoided.

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[79] *Id.* at 407.

[80] 29 U.S.C. §§ 151-168 (1970).

[81] *See* Dole, *supra* note 69, at 546.

[82] *See* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

II. DAYTON CLASSROOM TEACHERS ASSOCIATION v. DAYTON BOARD OF EDUCATION[83]

Dayton Classroom Teachers Association involved a factual situation similar to several of the cases previously discussed. Since 1967, the board of education and the superintendent of Dayton Schools had engaged in collective negotiations and had published their pacts as master agreements which contained provisions regarding salaries, payroll deductions, teaching environment, and other conditions. They also included a four-step procedure for the settling of grievances including a provision for binding grievance arbitration. Subsequently, the teachers' union filed working condition grievances and the board took the position that they were not proper grievances for arbitration. The issues of the case were whether a board of education may validly enter into a collective bargaining agreement and whether a binding arbitration clause in such an agreement is enforceable.[84]

The Ohio Supreme Court began with the proposition from *Schwing v. McClure*[85] that the contractual powers of a board of education are limited by statutory authority, *i.e.*, the board of education has only those powers expressly given or necessarily implied from its express powers.[86] The court then approved the policy that relations between public employers and their employees must be limited by legislative policies and goals.[87] Following this statement of policy the court considered the statutory authority of a board of education. It cited the sections of the code granting a board of education the authority to manage and control the schools, the authority to contract, and more specifically the authority to enter into written contracts for the employment of teachers.[88] Considering these provisions the court concluded that the board of education had been "granted broad discretionary powers in its dual role of manager of schools and employer of teachers."[89] Here the court used a more practical analysis in reaching its conclusion that the school board had implied authority to engage in collective bargaining.

In its consideration of the unlawful delegation of authority argument the court stated that agreements by boards of education are usually invalidated upon an unlawful delegation basis only when a school board has sought to absolve itself from fulfilling its responsibilities under the agreement. The court continued that when a school board benefits from an agreement, such an agreement is normally upheld by the courts.[90] The only case which the court referred to on this issue was *State ex rel. Ohio High School Athletic Association v. Judges of the Court of Common*

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[83] 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

[84] *Id.* at 130, 323 N.E.2d at 716.

[85] 120 Ohio St. 335, 166 N.E. 230 (1929).

[86] Hamilton Bd. of Educ. v. Arthur, 84 L.R.R.M. 2468 (Ohio Ct. App. 1973).

[87] 41 Ohio St. 2d at 131, 323 N.E.2d at 717.

[88] OHIO REV. CODE ANN. §§ 3313.08, .17, .33, .47 (Page 1972).

[89] 41 Ohio St. 2d at 131, 323 N.E.2d at 717.

[90] *Id.* at 131-32, 323 N.E.2d at 717.

Pleas.[91] Failing to distinguish the cases in principle, the court in *Athletic Association* upheld an agreement that authorized a public school to join a private association in which the school was bound by the by-laws of the association.[92] This case, then, clearly supports the position that delegation of authority by school boards has not always been held invalid. Additionally, it can once again be seen that cases outside the field of labor relations can be useful in determining labor relations questions.

The court proceeded to deal with the arbitration issue but again it cited no Ohio labor cases though it did refer to a Wisconsin case[93] for the proposition that arbitration of disputes may contribute to harmonious relations.[94]

This was the sum total of the decision of the Ohio Supreme Court in *Dayton Classroom Teachers Association.* Although the decision seems to bring Ohio law into congruence with modern trends by permitting public employers to bargain collectively, the decision was incomplete. The court made no reference to a distinction between a school board and any other kind of public employer; thus the holding narrowly applies only to school boards and would appear to have no effect on the *Hagerman* decision dealing with civil service employees. The court also failed to establish any guidelines regarding what matters can be included in a bargaining agreement or a binding arbitration clause and did not consider the position that some matters constitute such basic policy that they cannot be subjected to bargaining or arbitration. The decision would have been more helpful if it had presented an in-depth analysis of the issues as did the court in *North Royalton.* It does appear, however, that school boards can now legally enter collective bargaining agreements which will be enforced by the courts and that those agreements can include provisions for arbitration of grievances.

III. Conclusion

It is suggested that some form of a complete in-depth analysis and a set of guidelines are needed to cope with the problems of public employers and collective bargaining. It would be desirable if Judge Corrigan's pleas in his concurring opinion in *Malone* were heeded. He said that

> statements of policy will remain merely pallatives until more meaningful steps are taken by organized labor and an informed public to formalize by legislation, and not by strained judicial interpretation, the rights of the public employees not protected by civil service laws.[95]

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[91] 173 Ohio St. 239, 181 N.E.2d 261 (1962).

[92] *Id.* at 241, 181 N.E.2d at 262.

[93] Local 1226 v. Rhinelander, 35 Wisc. 2d 209, 151 N.W.2d 30 (1967).

[94] Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 133, 323 N.E.2d 714, 718 (1975).

[95] Malone v. Court of Common Pleas, No. 33362, at 10 (Ohio Ct. App. Jan. 9, 1975) (Corrigan, J., concurring). *Contra,* Green, *Concerted Public Employee Activity in the Absence of State Statutory Authorization: II,* 2 J. of Law & Ed. 419, 429-30 (1973), in

To ensure comprehensiveness, such legislation should also specify the right of civil service employees to engage in collective bargaining.

Short of broad legislation, any in-depth analysis by the courts must begin with a recognition of the traditional problems involved, *i.e.*, the narrowly construed powers of local government, the possible conflict of a collective bargaining agreement with merit legislation, the delegation of authority problem, and the binding of successors problem. These arguments need to be answered.

The issue must finally be viewed from the point of public policy. Public employers are engaging in collective bargaining with their employees whether the ultimate agreement has legal effect or not. Legalization of the bargaining process may be productive of a more stable labor relationship. Recent Ohio case law has failed to lend that much needed clarity and stability.

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which it is argued that despite the absence of legislation, collective bargaining is working and that adoption of legislation would destroy the flexibility now enjoyed by public employers and public employees.