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# Bargaining and Discussion-Is It a Happy Marriage?

Barbara W. Doering

*Indiana Education Employment Relations Board*

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## Symposium

### A Year of Teacher Bargaining in Indiana

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### Bargaining and Discussion—Is It a Happy Marriage?

BARBARA W. DOERING\*

Indiana passed its first public employee bargaining law in the 1973 legislative session.<sup>1</sup> Like other states which have made the step towards collective relations with public employees,<sup>2</sup> the Indiana law was adopted only after considerable debate and a number of unsuccessful attempts.\*

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\* B.A. 1965, Cornell University; M.S. 1969, N.Y.S.S.I.L.R., Cornell University; Member, National Labor Arbitration Panel, American Arbitration Association; Member, Labor Arbitration Panel, F.M.C.S.; Employment Relations Mediator, Indiana Education Employment Relations Board. Opinions expressed in this article are not necessarily those of the IEERB.

Ms. Doering has been a member of the ad hoc panel of mediators and fact-finders for the New York State Public Employment Relations Board since June 1969. Her analysis of teacher bargaining disputes under New York's Taylor Law appears in *Impasse Issues in Teacher Disputes Submitted to Fact Finding in New York*, 27 *ARB. J.* (n.s.) 1 (1972).

<sup>1</sup> The Indiana Education Employment Relations Act, IND. CODE §§ 20-7.5-1-1 to -14 (1973), IND. ANN. STAT. §§ 28-4551 to -4564 (Supp. 1974) [hereinafter referred to as P.L. 217 or the Act]. Sections of the Act referred to are from the session law, Pub. L. No. 217, [1973] Ind. Acts 1080, as amended, Pub. L. No. 1, § 5, [1974] Ind. Acts 3.

<sup>2</sup> See BNA GOV'T EMPLOYEE REL. REP. [hereinafter cited as G.E.R.R.] 51:501-21 (Ref. File 1973) for a compilation of state bargaining statutes.

<sup>3</sup> Prior legislative attempts are discussed in Brickner, *The Status of Public Employee Bargaining*, 22 *LAB. L.J.* 492 (1971).

This law, designed initially as a comprehensive statute, covered only teachers in its enacted form. The final compromise, while borrowing in many of its provisions from the experience of other states and the ACIR Report of 1969,<sup>4</sup> is unique in its treatment of scope of bargaining and in the dual obligation it imposes on the parties to bargain on certain subjects and to discuss others.<sup>5</sup> While there is experience in other states with narrow-scope bargaining laws for teachers,<sup>6</sup> and with "meet and confer" laws,<sup>7</sup> which are essentially "discussion" mandates,<sup>8</sup> only six states besides Indiana require both discussion and bargaining, and only two of these expressly make it an unfair practice to refuse to discuss in good faith.<sup>9</sup> Under Indiana's law the discussion mandate, although

<sup>4</sup> ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT (1969), excerpted in G.E.R.R. 51:101-23 (Ref. File 1970) [hereinafter referred to as ACIR STUDY]. The most apparent influence of the ACIR Study is in the management rights provision. Compare *id.* at 102 with IND. CODE § 20-7.5-1-6(b) (1973), IND. ANN. STAT. § 28-4556(b) (Supp. 1974).

<sup>5</sup> IND. CODE §§ 20-7.5-1-3, -4, -5 (1973), IND. ANN. STAT. §§ 28-4553, -4554, -4555 (Supp. 1974). See Note, *Determining the Scope of Bargaining Under the Indiana Education Employment Relations Act*, 49 IND. L.J. 460, 462-69 (1974).

<sup>6</sup> *E.g.*, PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1974), as construed in *Pennsylvania Lab. Rel. Bd. v. State College Area School Dist.*, 9 Pa. Cmwlth. 229, [State College Educ. Ass'n v. Pennsylvania Lab. Rel. Bd.] 306 A.2d 404 (1973). See also VT. STAT. ANN. tit. 16, § 2004 (Supp. 1974).

<sup>7</sup> *E.g.*, KAN. STAT. ANN. § 72-5414 (1972), as construed in *National Educ. Ass'n of Shawnee Mission v. Board of Educ.*, 212 Kan. 741, 512 P.2d 425 (1973). Alaska, California, Delaware, Nebraska, and Washington have also adopted the "meet and confer" approach. G.E.R.R. 51:501-21 (Ref. File 1973).

<sup>8</sup> "Meet and confer in good faith" . . . means the obligation of both the public employer and an employee organization to meet at reasonable times, to exchange openly and without fear information, views, and proposals, and to strive to reach agreement on matters relating to wages, hours, and such other terms and conditions of employment as fall within the statutorily defined scope of the discussion. The resulting memorandum of understanding is submitted to a jurisdiction's governing body, and it becomes effective when the necessary implementary actions have been agreed to and acted on by pertinent executive and legislative officials.

ACIR STUDY, *supra* note 4, at 101.

<sup>9</sup> The Pennsylvania bargaining law requires both collective bargaining and discussion. PA. STAT. ANN. tit. 43, §§ 1101.701, 1101.702 (Supp. 1974). The employer retains implementary discretion over the subjects of discussion: "any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised." *Id.* § 1101.301(17). The duty to meet and discuss, *id.* § 1101.702, can be enforced by unfair labor practice procedures. *Id.* § 1101.1201(9).

Montana, in its teacher negotiations statute, also requires both bargaining ("professional negotiations") on "salary, hours and other terms of employment," MONT. REV. CODES ANN. § 75-6119 (1971), and "meet and confer" discussion on virtually all other matters. *Id.* § 75-6118. It is an unfair practice to refuse to negotiate or meet and confer in good faith, *id.* § 75-6120(c); however, since the act sets up no administrative board, enforcement must be by judicial proceedings. *Id.* § 75-6125.

On the other hand, HAWAII REV. STAT. §§ 89-9(a), (c) (Supp. 1973) also requires both bargaining and discussion, the latter duty extending to "all matters affecting employee relations, including those that are, or may be, the subject of a regulation promul-

it does not require that any agreements made during discussion be included in the written contract, is nevertheless an affirmative obligation which must be met in good faith, and procedural compliance is guaranteed under the unfair practice provisions.<sup>10</sup>

The Indiana Education Employment Relations Board (IEERB), a three-member board appointed by the Governor, is charged with administering the Act.<sup>11</sup> Under section 9 of the Act,<sup>12</sup> the Board may appoint mediators to assist the parties when they have reached an impasse, and it may also appoint fact-finders to make recommendations on unresolved disputes over bargainable issues. Section 7 of the Act<sup>13</sup> makes certain conduct of the parties of an unfair labor practice, and the IEERB is empowered by section 9(e)<sup>14</sup> to appoint a hearing examiner to hear either party's complaint that an unfair practice has been committed.

Both the Act's coverage of teachers only and its dual obligation to bargain and to discuss will be subjects for review in the 1975 biennial session of the General Assembly.<sup>15</sup> Since the restricted scope of the

gated by the employer . . . ." *Id.* § 89-9(c); yet the duty to confer is protected, if at all, only by the umbrella prohibition that the employer shall not "[r]efuse or fail to comply with any provision of this chapter . . . ." *Id.* § 89-13(a)(7).

Likewise, in Minnesota a "meet and confer" obligation is imposed over those educational policies of the school district not subject to bargaining, MINN. STAT. ANN. §§ 179.65(3), 179.66(3), 179.63(18) (Supp. 1974), but the obligation is covered in the section on unfair labor practices only by an umbrella provision. *Id.* § 179.68(2).

Delaware, also sets up twin duties of bargaining and conferral, DEL. CODE ANN. tit. 14, §§ 4008(a), (b) (Cum. Supp. 1970); but the obligation to confer is protected only indirectly under a catch-all provision. *Id.* § 4009. In practical terms this omission is not significant since the scope of bargaining is coextensive with the scope of discussion. Compare *id.* § 4008(a) with *id.* § 4008(b).

Maine provides no statutory remedy for its separate duty to discuss. Bargaining and discussion are both mandated, bargaining over the customary economic items and conditions of employment, with discussion required over matters of educational policy, ME. REV. STAT. ANN. tit. 26, § 965(1)(C) (1974), but the statute does not extend the remedy of unfair labor practice complaints to the obligation to discuss, even under a general prohibition. See *id.* § 964. Unlike other states, Maine expressly prohibits bargaining over subjects reserved to discussion. *Id.* § 965(1)(C).

<sup>10</sup> IND. CODE §§ 20-7.5-1-5, -7 (1973), IND. ANN. STAT. §§ 28-4555, -4557 (Supp. 1974).

<sup>11</sup> IND. CODE § 20-7.5-1-9 (1973), IND. ANN. STAT. § 28-4559 (Supp. 1974).

The Board employs one researcher and four professional staff members who serve as hearing officers in representation and unfair practice cases and who also serve as mediators and fact-finders in impasse disputes. The Board maintains an ad hoc panel of about 60 people around the state who are used in addition to the full time staff on mediation and fact-finding cases. Additionally, a dozen members of this panel have been trained to serve as ad hoc hearing examiners.

<sup>12</sup> *Id.* See also IND. CODE §§ 20-7.5-1-12, -13 (1973), IND. ANN. STAT. §§ 28-4562, -4563 (Supp. 1974).

<sup>13</sup> IND. CODE § 20-7.5-1-7 (1973), IND. ANN. STAT. § 28-4557 (Supp. 1974).

<sup>14</sup> IND. CODE § 20-7.5-1-9(e) (1973), IND. ANN. STAT. § 28-4559(e) (Supp. 1974). See also note 25 *infra*.

<sup>15</sup> The Indiana General Assembly meets in a long (61-day) session every two years,

bargaining obligation is perhaps the most controversial item in the law as it was enacted,<sup>16</sup> the experience under this statute after one round of bargaining should be examined and recorded before the law itself is reviewed by the legislature. The question of scope, after all, is probably the major reason for treating teachers separately from other public employees, and it is certainly worth examining the experience if other employees are to be added either under this statute or under a separate statute.

Under Indiana's Public Law 217 the scope of the collective relationship is now broken down by subject matter under the bargaining and discussion mandates.<sup>17</sup> There is a duty to bargain<sup>18</sup> and enter into a contract on a limited number of mandatory items (economic items, hours, and possibly grievance procedure),<sup>19</sup> and a duty to discuss and exchange "meaningful input"<sup>20</sup> on a much broader range of additional items (working conditions and some policy items).<sup>21</sup> Moreover, the parties may bargain discussible items if both parties wish to do so.<sup>22</sup>

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and on the off year a short (30-day) session is held to take care of emergency legislation. Major changes are usually handled only in the long biennial session. See IND. ANN. STAT. §§ 2-2.1-1-2, -3 (Code ed. Supp. 1974).

<sup>16</sup> See Brickner, *supra* note 3. Generally, scope of bargaining problems occur more frequently in professional negotiations than in situations traditionally governed by the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970).

[T]here are seldom any significant differences over scope of negotiations as among blue-collar workers and other nonprofessionals in either the private or public sectors. Among salaried professionals, however, the conflict is both fundamental and sharp. Public management correctly perceives that the salaried professional poses a greater threat to managerial prerogatives than other public employee groups. . . . Public management, in stressing the need for limiting the scope of negotiations, is reasserting a strong desire to maintain complete control over matters of fundamental policy.

U.S. DEP'T OF LABOR, SCOPE OF BARGAINING IN THE PUBLIC SECTOR—CONCEPTS AND PROBLEMS 7-8 (1972).

<sup>17</sup> IND. CODE §§ 20-7.5-1-3, -4, -5 (1973), IND. ANN. STAT. §§ 28-4553, -4554, -4555 (Supp. 1974). See generally Note, *supra* note 5, at 462-69.

<sup>18</sup> Defined in section 2(n) of the Act, IND. CODE § 20-7.5-1-2(n) (1973), IND. ANN. STAT. § 28-4552(n) (Supp. 1974).

<sup>19</sup> "[S]alary, wages, hours, and salary and wage related fringe benefits. A contract may also contain a grievance procedure . . . ." IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1974).

<sup>20</sup> Defined in section 2(o) of the Act, IND. CODE § 20-7.5-1-2(o) (1973), IND. ANN. STAT. § 28-4552(o) (Supp. 1974).

<sup>21</sup> IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1974):

Working conditions, other than those provided in Section 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations . . . .

See also Note, *supra* note 5, at 462-63.

<sup>22</sup> In cases where there were 1972-1973 agreements, all items included therein are grandfathered into the bargaining obligation regardless of whether some are only discussible under P.L. 217. The proviso in section 5(a) states: "Provided, however, That any

The bargaining mandate differs from discussion in that agreements reached in discussion need not be reduced to writing or included in a contract,<sup>23</sup> and that in substantive disputes occurring in discussion the parties are not required to use the impasse procedures.<sup>24</sup> Nevertheless, lack of good faith *in meeting either obligation* may be the subject of an unfair practice.<sup>25</sup>

It is the purpose of this study first to look at the practical impact of this dual obligation on the structure of employment relations, and second, to shed some light on the meaning of "good faith discussion" and what the parties may be required to do in order to meet this obligation. The problems which occurred in the first year were both procedural and substantive in nature. The procedural problems will be dealt with first, since chronologically they occurred first, and as a practical matter, many had to be resolved before substantive questions could even be brought to hearing, much less go the full route to a decision.<sup>26</sup>

#### PROCEDURAL PROBLEMS UNDER THE NEW LAW

The bargaining provisions of P.L. 217 took effect on January 1, 1974.<sup>27</sup> Table bargaining<sup>28</sup> was mandated to start at least 180 days prior to budget submission.<sup>29</sup> This would have been roughly February 12th.

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items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable." IND. CODE § 20-7.5-1-5(a) (1973), IND. ANN. STAT. § 28-4555(a) (Supp. 1974).

<sup>23</sup> IND. CODE § 20-7.5-1-2(o) (1973), IND. ANN. STAT. § 28-4552(o) (Supp. 1974).

<sup>24</sup> *Id.*

<sup>25</sup> "It shall be an unfair practice [to] . . . refuse to bargain collectively or discuss . . ." IND. CODE § 20-7.5-1-7(a) (1973), IND. ANN. STAT. § 28-4557(a) (Supp. 1974) (emphasis added).

<sup>26</sup> The graphs and charts reproduced in the Appendix, *infra*, depict the change in caseload from procedural problems at first to the more substantive questions later. Impasse problems have not been confined to urban school districts, nor to any particular part of the state. See Appendix map.

<sup>27</sup> Although P.L. 217 took effect July 1, 1973, [1973] Ind. Acts 1096 (Pub. L. No. 217, § 4), the obligations of bargaining and discussion were expressly made effective only on January 1, 1974. IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1974).

<sup>28</sup> Table bargaining refers to actual negotiation of the contract. This should not be confused with the duty to bargain collectively, which is a more general and ongoing obligation and which neither starts nor ends with the signing of the contract, but continues with regard to any bargainable subject not covered nor expressly waived by the negotiation of the contract and, also, once a contract is signed, includes the obligation to implement the provisions of the contract in good faith.

<sup>29</sup> Section 12 of the Act, IND. CODE § 20-7.5-1-12 (1973), IND. ANN. STAT. § 28-4562 (Supp. 1974), sets up a bargaining timetable, beginning 180 days before school budgets must be completed, in order to coordinate the costs of the bargained contract with available school funding. This procedure works against the backdrop of an express prohibition against "any agreement that would place [the] employer in a position of deficit financing . . ." IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1974).

Due to a backlog of representation cases,<sup>30</sup> however, many districts did not actually complete recognition procedures and start bargaining until about mid-April. To put in perspective the discussion of bargaining problems that follows, it should be noted that half of the 276 corporations involved in collective bargaining in 1974<sup>31</sup> were able to reach agreement without any resort to impasse procedures.<sup>32</sup> By the end of August, as the first schools were opening, all but 46 of the 300 potential bargaining units<sup>33</sup> were covered by contract. One hundred thirty-four of the 230 contracts negotiated prior to September 1<sup>34</sup> were the product of the parties' efforts unaided by neutral assistance. In the 137 corporations where impasses developed, in many cases these occurred because each side arrived at the table determined not to give up anything which it felt entitled to get or retain under its reading of the Act.

The scope of bargaining and discussion, and the nature of the dual

<sup>30</sup> See Appendix.

<sup>31</sup> This is not an all-inclusive list, since three corporations were covered by multi-year contracts, and an additional 21 corporations did not bargain at all, either because no exclusive representative of their certificated employees had been recognized or because there was no request to bargain. These 24 districts are:

Not bargaining in 1974:\*

Carr Twp.

Milan

New Harmony

Northeast Dubois

North Montgomery

Salem (Washington)

Speedway

Springs Valley

Tippecanoe Valley

Turkey Run

Union Twp. (Kewana)

Valparaiso

Vernon Twp.

Whitley County (8 districts)

Multi-year contracts:

East Chicago

Tri Creek

Northwestern Shelby

\* Note in two of the districts not bargaining in 1974 there were requests for recognition by an employee organization. In both cases elections were held. In North Montgomery the organization failed to poll a majority of unit employees. In Tippecanoe Valley there was a dispute about challenged ballots which is awaiting resolution in court.

<sup>32</sup> Since strikes are prohibited, impasses reached over bargainable or permissively bargained items are subject to impasse procedures which include mediation, followed if necessary by fact-finding with recommendations, and additional mediation or fact-finding as the IEERB deems appropriate. The parties may also voluntarily enter into binding arbitration.

<sup>33</sup> Three hundred potential bargaining units are comprised of two special education units and 298 regular units which include Porter County schools (six townships) as a single unit and Cass-Dewey school (two townships) as a single unit, since in each case bargaining was carried on for all the member schools with a single exclusive representative.

<sup>34</sup> The number of contracts cited refers to the date of signing. There may in fact have been other corporations which had completed bargaining and reached a tentative agreement, but whose contracts were not yet ratified or signed.

obligation very quickly became major areas of contention. Many of the employee organizations took the position that since negotiation of "discussible" items is permissive, all items should be discussed at the bargaining table and, if agreement is reached, included in the contract. Although some school corporations went along with this approach, at least to the extent of dealing with all items at the bargaining table, many took the position that the processes of bargaining and discussion should be separate and distinct. To emphasize the distinction they appointed both a bargaining team and a discussion team made up of different individuals. The bargaining team then steadfastly refused to talk about anything other than mandatory items, lest at some later date the teachers seek inclusion of permissive items in the contract on the grounds that the scope of bargaining had been voluntarily expanded.<sup>35</sup>

Frustrations with collective bargaining ran especially high in corporations where the parties literally spent months talking about what they were not going to talk about. Disputes were eventually referred to the IEERB,<sup>36</sup> either in the form of impasses or unfair practices. Although the parties are not required to submit disputes over discussible items to the impasse procedure,<sup>37</sup> of necessity mediators must handle questions of scope of bargaining and differentiation between mandatory and permissive areas of bargaining if these problems stand in the way of settlement of those issues which must be negotiated. The law contemplates and in fact mandates this function to the mediator in section 12(b).<sup>38</sup>

Since mediation is a confidential procedure,<sup>39</sup> there is no record of

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<sup>35</sup> In fact, such a charge was eventually filed (U-74-40-3625), alleging that exchange of proposals on preparation time constituted permissive bargaining, and, having exchanged proposals, the school employer was estopped from refusing to bargain to agreement on this item. The charge, however, was dismissed without hearing by the IEERB since there can be no wrongful refusal to bargain unless there is a duty to bargain the item in the first place.

<sup>36</sup> IND. CODE § 20-7.5-1-11 (1973), IND. ANN. STAT. § 28-4561 (Supp. 1974) (unfair practices); IND. CODE § 20-7.5-1-13 (1973), IND. ANN. STAT. § 28-4563 (Supp. 1974) (impasse procedure).

<sup>37</sup> Section 2(o) of the Act, IND. CODE § 20-7.5-1-2(o) (1973), IND. ANN. STAT. § 28-4552(o) (Supp. 1974), provides in part: "A failure to reach an agreement on any matter of discussion shall not require the use of any part of the impasse procedure, as provided in Section 13 [IND. CODE § 20-7.5-1-13 (1973), IND. ANN. STAT. § 28-4563 (Supp. 1974)]." Cf. *id.* § 12(b), IND. CODE § 20-7.5-1-12(b) (1973), IND. ANN. STAT. § 28-4562(b) (Supp. 1974): "[T]he board shall appoint a mediator if either party declares an impasse either in the *scope* . . . or on the substance of any item to be bargained collectively." (Emphasis added.)

<sup>38</sup> *Id.*

<sup>39</sup> It is the intent of the legislation that the mediation process shall be confidential in nature. The mediator shall not be subject to the subpoena power of courts or



what transpired with regard to settlement of scope disputes. Of 111 mediated cases, however, 70 were settled. Forty-one went to fact-finding and of these 41, 18 were settled without report—essentially through additional mediation by the fact-finder. Moreover, of the 26 cases which went to fact-finding without benefit of prior mediation,<sup>40</sup> two were withdrawn and 13 were settled short of report. Thus mediation accounted for settlements in 101 of 137 cases.<sup>41</sup> It would seem that mediators and fact-finders were persuasive in getting the parties to reach some agreement on how to handle discussible items and the scope of bargaining at least for the purposes of finalizing a contract.<sup>42</sup>

One factor which may have contributed to the large number of mediated settlements is the exception of permissive items from the formal fact-finding procedure. Since the fact-finder's report is restricted to bargainable items only, there was no advantage in holding

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other administrative agencies of the state regarding the subjects discussed as a part of the mediation process.

Section 13(a) of the Act, IND. CODE § 20-7.5-1-13(a) (1973), IND. ANN. STAT. § 28-4563(a) (Supp. 1974).

<sup>40</sup> At its meeting of July 18th, the IEERB decided in view of the very short time remaining prior to budget submission that:

The Chairman of the IEERB be given the authority on due consideration of each case to send in a fact finder when a mediator is requested between now and budget submission time. The fact finder has the authority to mediate if both parties agree on this process.

Minutes of the IEERB, July 18, 1974, at 1 [on file with the INDIANA LAW JOURNAL].

<sup>41</sup> Three additional cases were filed but withdrawn. Of the 137 cases, 101 settlements account for a little over 73%. Comparing this settlement rate with statistics from New York we find that from the effective date of the Taylor Law in September 1967 through 1972 there was an overall rate of 49.8% of impasses settled in mediation, plus an additional 26.0% settled (no report) in fact-finding, or a total of 75.8% settled through mediation. In school cases only, the statistics, which were not kept separately until 1969, show that the rate of settlement has been somewhat lower than for all public sector cases:

(New York)	1969	1970	1971	1972
School Impasses	498	440	533	619
Withdrawn	-25	-14	-5	-1
	<hr/>	<hr/>	<hr/>	<hr/>
	473	426	528	618
Mediated Settlement	198	237	239	221
Fact-finding, No Report	+44	+46	+66	+145
	<hr/>	<hr/>	<hr/>	<hr/>
	242	283	305	366
% Settled	51%	66%	57%	59%

Letter from Jack A. Ginsburg, Associate Economist, Research Div., N.Y. State PERB, to Barbara W. Doering, Jan. 11, 1973 [on file with the author].

<sup>42</sup> The actual handling of discussion is yet to come, and it is anyone's guess whether it will solve more problems than it creates, or vice versa.

out on clearly permissive items. In cases involving issues which one party claimed were bargainable and the other party claimed were just discussible, fact-finders were faced with the substantive problem of deciding their own jurisdiction in order to know whether or not to offer a recommendation. The two most common of these issues were the definition of "hours" and the question whether the grievance procedure, mentioned among the section 4 "Subjects of Bargaining,"<sup>43</sup> was meant to be a mandatory subject. The fact-finders' recommendations in these areas will be discussed later, along with other substantive interpretations of scope.

### THE DUAL OBLIGATION AND UNFAIR PRACTICE DECISIONS

In cases where no accommodation could be reached on the distinction between mandatory and permissive items or where bargaining was completely stalled, the unfair practice route was followed.<sup>44</sup> Before analyzing those hearing examiners' decisions that ruled upon the bargainability of specific items, we will look first at those decisions which discussed the nature of the obligations in terms of what is procedurally necessary in order that the obligation be met.

#### *The Nature of the Obligation*

The first decision which speaks to the nature of the two obligations was issued July 5, 1974 in the *Tippecanoe* case.<sup>45</sup> This case involved an

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<sup>43</sup> Section 4, IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1974), states in part: "A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances . . . ." It is unclear whether the "may" is to be read with only the culmination in arbitration or with the whole concept of grievance procedure. If the whole concept was meant to be permissive, one would expect to find it in section 5, not section 4. Note, *supra* note 5, at 462 n.16.

<sup>44</sup> The hearing of unfair practice charges is commenced with the filing, under oath, by any employee or employer, of a complaint specifying the section of the Act allegedly violated, and the facts constituting the offense. The Board, upon receipt of the complaint, notifies the person or organization against whom the complaint is brought. A hearing examiner may be appointed, and may take testimony and render findings of fact, and the Board may issue enforcement orders. IND. CODE § 20-7.5-1-11 (1973), IND. ANN. STAT. § 28-4561 (Supp. 1974). Judicial review is provided as under the Indiana Administrative Adjudication Act, IND. ANN. STAT. §§ 4-22-1-1 to -30 (Code ed. 1974). *Id.* A refusal to bargain over items claimed to be beyond the scope of mandatory bargaining can be tested under the substantive prohibitions against unfair practices in sections 7(a)(5) and 7(b)(3), IND. CODE §§ 20-7.5-1-7(a)(5), -7(b)(3) (1973), IND. ANN. STAT. §§ 28-4557(a)(5), -4557(b)(3) (Supp. 1974).

<sup>45</sup> *Bobbe June Blom v. Tippecanoe School Corp.*, [Unfair Practice] Case No. U-74-15-7865 (IEERB, July 5, 1974). [Unfair practice decisions and fact-finders' reports of the IEERB have not yet been published. Board practice is to distribute copies of the findings only to the parties. Copies of all unfair practice decisions and fact-finders' reports are on file with the IEERB, State Office Building, Indianapolis; in addition, a com-

alleged refusal to bargain and to discuss. Although several issues were in dispute, the central problem was that the parties held different positions on what constitutes good faith discussion.

The initial dispute revolved around what was to be done with agreements on discussible items. Although the parties had not yet discussed the merits of any issues or reached any agreements, they had spent a great deal of time debating what should be done with such agreements if and when they were reached. The employee organization took the position that at least some of the agreements on discussible items should be included in the contract. It relied on a copy of a letter from the Chairman of the IEERB written in January to the Charles A. Beard School Corporation.<sup>46</sup> The letter indicated that although the parties are not required to enter into a contract on discussible items, in view of the interrelated nature of some discussible and bargainable items and the necessary give-and-take of bargaining, the IEERB would be surprised to see a contract which did not include some discussible items. The Tippecanoe School Corporation disagreed with this view and wrote for, and eventually received, its own letter answering more specific questions with regard to treatment of discussibles.<sup>47</sup> This letter indicated that the parties could record or acknowledge agreements on discussible items in any way that was practicable and agreeable. It listed some of the various ways other corporations had devised for handling such agreements and encouraged the parties to work out their own solution.

The hearing examiner held that regardless of the final form the agreements assume, the parties are obligated to discuss the issues on their merits in a meaningful way with a view towards jointly resolving the issue or problem. The hearing examiner noted that more was required from the school board than the following two courses of action: 1) merely listen and ask a few questions for clarification, if clarification is not then used to try to reach some mutual understanding; 2) ask for specific local examples, investigate, and take unilateral action on those cited, meanwhile refusing to discuss any items which are not specifically illustrated by local problems. While there is nothing wrong with clarification, investigation, and action to correct inequities, the obligation to discuss is *mutual* and requires positive contributions from both sides.<sup>48</sup>

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plete set of all fact-finders' reports for 1974, and copies of the unfair practice decisions discussed in this article, are on file with the INDIANA LAW JOURNAL.]

<sup>46</sup> Letter from Franklin K. DeWald to James R. Kellam, Jan. 11, 1974.

<sup>47</sup> Letter from Franklin K. DeWald to K.L. Thayer, May 9, 1974.

<sup>48</sup> In rejecting the employer's approach of "just listen," the hearing examiner pointed out:

Sec. 2(o), the definition of the word "discuss," indicates that the parties are

It is not a one-way street, and even though written agreements are not required, items which have been investigated or clarified ought to be brought back to the table for resolution or at least for explanation and discussion of the employer's views once the employer is acquainted with the facts.

### *Effectuation of the Obligation*

In addition to exploring the meaning of "good faith discussion," the *Tippicanoe* decision also speaks to the effectuation of the two obligations, noting that the duty to discuss is not set in any time frame under the law and therefore must be carried out on the request of either party with regard to any discussible item(s) at any time unless the parties are bound by an agreement on the item or by a procedural agreement for handling discussion.<sup>49</sup> Table bargaining is a less open-ended obligation, since it is mandated to begin 180 days prior to budget submission, and it continues until a contract is ratified.<sup>50</sup>

This point is underlined and even more clearly elaborated in a subsequent hearing examiner's decision in the *Baugo* case<sup>51</sup> issued in September. In the *Baugo* decision, in a footnote to the recommended order, the hearing examiner put it this way:

The obligations to bargain and to discuss are continuing in nature. Of course, to the extent that any matter is dealt with in a contract the obligation to discuss or bargain it is met for the term of the contract. If either a bargainable or discussible item is subject to the grievance procedure, the obligation to bargain or discuss can be met during the contract term (or outside it) if the parties, by contract or otherwise, agree to submit the matter to the grievance procedure and use the procedure in good faith.<sup>52</sup>

The implication here is that the IEERB might stay proceedings in

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*mutually* obligated ". . . to provide meaningful input, to exchange points of view . . ." While the parties are not required to agree to a proposal or make concessions, meaningful input is more than just listening and taking unilateral actions. "Input" refers to the discussion process; each side is required to put something *in* to it.

*Bobbe June Blom v. Tippicanoe School Corp.*, [Unfair Practice] Case No. U-74-15-7865 (IEERB, July 5, 1974), at 10 (emphasis in original).

<sup>49</sup> *Id.* at 4.

<sup>50</sup> *Id.*, citing section 12 of the Act, IND. CODE § 20-7.5-1-12 (1973), IND. ANN. STAT. § 28-4562 (Supp. 1974).

<sup>51</sup> Consolidated cases *Sarah Borgman & Board of School Trustees of the Baugo Community School Corp.*, *Sharon Poyser & Board of School Trustees of the Baugo Community School Corp.*, [Unfair Practice] Cause No. U-74-11-2260-12; *Donald Bacher & Board of Trustees of the Baugo Community School Corp.*, [Unfair Practice] Cause No. U-74-11-2260-11 (IEERB, Sept. 5, 1974) [hereinafter referred to as *Baugo*].

<sup>52</sup> *Id.* at 17 n.\*.

future cases where the parties have submitted or are in the process of submitting the disputed item as a grievance.

### *Specific Examples*

While the *Tippecanoe* decision and the later *Baugo* decision outline the essential nature of the two obligations, the duty to discuss is given further definition in two discharge cases<sup>58</sup> where the hearing examiners found that the school employers had failed to meet their duty to discuss before terminating the complainants. In the *Delphi* case<sup>54</sup> the employer was also found to have improperly discriminated against the complainant because of his attempts to participate, as president of the employee association, in discussions relating to the granting of tenure to a colleague. The hearing examiner found that the employer had an obligation to discuss the promotion to tenure of the colleague with the exclusive representative as well as an obligation to discuss teaching methods, assignment, and student discipline with the complainant, before taking action in his case.

In the other discharge case, the *Baugo* decision, the hearing examiner pointed out that disputes relating to evaluation and evaluation procedures should be settled by the parties themselves by engaging in good faith discussion. He noted:

The primary responsibility to hear such problems rests with the school board. This has always been true and P.L. 217, Sec. 6(b) reaffirms this duty and power.

. . . .

The General Assembly in passing P.L. 217 has demanded that school [boards] take on the obligation of hearing from both sides before they exercise their Sec. 6 powers.<sup>55</sup>

Other unfair practice complaints which bear on the effectuation of the two obligations (rather than the substance of the scope of bargaining) have also been filed—some simply charging a general refusal to bargain without much elaboration,<sup>56</sup> and a few more specifically alleging 1) delays caused either by unwillingness to meet or unavailability of professional negotiators, 2) refusal to provide information needed for

<sup>58</sup> *Id.*, and Robert Brothers & Board of School Trustees of the Delphi Community School Corp., [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974).

<sup>54</sup> *Id.*

<sup>55</sup> *Baugo* at 13-14.

<sup>56</sup> Roughly 20 complaints alleging general refusal to bargain were filed. Eighteen were withdrawn upon settlement of the dispute, and two remain open as of December 16, 1974.

negotiations, and 3) bad faith in the ratification process.

These charges typically have been settled or withdrawn prior to hearing. Two cases<sup>57</sup> charging refusal to provide information were both settled and withdrawn prior to hearing. One charge of bad faith in a failure to recommend a negotiated agreement for ratification<sup>58</sup> was resolved by agreement and a consent order. The question of delays went to hearing in *Tippecanoe* and in one other case.<sup>59</sup> In both cases a pattern of delay was evident, although in neither case was the pattern clearly deliberate, more probably due to inexperienced negotiators. A remedy of more frequent meetings was ordered in *Tippecanoe* by the hearing examiner, and in the other case the parties agreed in a consent order to that same remedy.

### *Remedies*

In both the *Delphi* and *Baugo* cases, where a refusal to discuss section 5 items prior to termination was found, the hearing examiners recommended that the IEERB order the reinstatement of the complainant as a remedy. Explaining why reinstatement was ordered, the hearing examiner in the *Delphi* case pointed out that failure to reinstate after a finding of discrimination based upon the exercise of protected rights would be a failure of the IEERB to enter necessary orders to carry out the intent of the Act.<sup>60</sup> In the *Baugo* decision the hearing examiner further elaborated on the remedy and related it to the failure to discuss:

The NLRB and other labor boards have always remedied the taking of unilateral action by employers without bargaining by restoring the status quo ante as nearly as possible. That remedy is appropriate also in a case where a school board unilaterally reassigns a teacher or fails to renew one without meeting its obligation to discuss. When handed a *fait accompli*, the teacher['s] right to discuss is destroyed unless the decision is reversed and discussion is permitted before it is made again.<sup>61</sup>

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<sup>57</sup> Glenn Gamble v. Griffith School Corp., [Unfair Practice] Case No. U-74-25-4700 (IEERB, withdrawn July 5, 1974); Louise Cogan v. Northwest Ind. Special Educ., [Unfair Practice] Case No. U-74-52-4720a (IEERB, withdrawn Sept. 30, 1974).

<sup>58</sup> East Allen County Schools v. East Allen Educators Ass'n, [Unfair Practice] Case No. U-74-42-0255 (IEERB, Consent Order Oct. 1, 1974).

<sup>59</sup> Bobbe June Blom v. Tippecanoe School Corp., [Unfair Practice] Case No. U-74-15-7865 (IEERB, July 5, 1974); Gerald C. Bowell v. Lawrenceburg Community Schools, [Unfair Practice] Case No. U-74-5-1620 (IEERB, Consent Order Apr. 18, 1974).

<sup>60</sup> Robert Brothers & Board of School Trustees of the Delphi Community School Corp., [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974), at 8-9.

<sup>61</sup> *Baugo* at 14.

It should be noted that both of the discharge cases are currently under appeal.<sup>62</sup> The full Board (IEERB) has not yet heard or acted upon these appeals. The *Tippicanoe* decision, which ordered the parties to meet more frequently and to bargain and discuss in good faith, was not appealed and thus after 20 days automatically became an order of the Board under section 322.1 of the Board's rules and regulations.<sup>63</sup>

#### SUBSTANCE OF SCOPE—WHICH ITEMS ARE WHICH?

##### *Unit Determinations and Scope*

Before bargaining had even begun it had been determined in the representation cases that extracurricular duties are bargainable under "wages [and] hours."<sup>64</sup> The question arose in the context of the exclusion of supervisors from the bargaining unit, and specifically in the question of supervisory status for head coaches and athletic directors.

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<sup>62</sup> Both cases are being appealed, and the remedy may be the central issue in each. A recent decision in another state may serve as precedent. In Pennsylvania Lab. Rel. Bd. v. Board of School Directors of the Upper Merion Area School Dist., [Unfair Practice] Case No. PERA-C-2015-E (Pa. Lab. Rel. Bd., Sept. 15, 1972) [on file with the INDIANA LAW JOURNAL], the issue was whether the school board had committed an unfair practice in unilaterally changing the contracting period from 12 to ten months, without first discussing the change, as required under the meet-and-confer requirement in Pennsylvania's bargaining act, PA. STAT. ANN. tit. 43, § 1101.702 (Supp. 1974). The PLRB recognized that the employer's action was in an area saved to its discretion by the statute's management rights provision, but held that the meet-and-confer requirement extended to areas covered by the management rights provision.

The purpose of [the meet and confer obligation] is to allow for the full presentation and discussion of [matters of inherent managerial policy that affect hours and wages] so that a result may be reached most compatible to the interests of both parties and in furtherance of the policies of the Act. . . . Unilaterally taking such an action and then presenting the complainant with an opportunity to discuss it does not satisfy the obligation to meet and confer . . . .

*Upper Merion, supra*, at 4. The remedy ordered by the Board included the "[r]eturn [of] those employees whose jobs or salary was affected by the unilateral action to the status quo existing prior to the unilateral action." *Id.* at 8.

<sup>63</sup> Section 321.1 of the *Rules* states:

Within 20 days, or within such further period as the Chairman may allow, from the date of transfer to the Board, any party may file exceptions to the hearing examiner's findings and conclusions, or to any other part of the record or proceedings.

Section 322.1 states:

In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the hearing examiner as contained in his decision shall automatically become the decision and order of the Board and become its findings, conclusions, and order and all objections and exceptions thereto shall be deemed waived for all purposes.

IEERB Rules & Regulations at 20-21, reprinted in 555 G.E.R.R. E-1, E-7 (Current Rep. May 20, 1974).

<sup>64</sup> Section 4 of the Act mandates bargaining over "salary, wages, hours, and salary and wage related fringe benefits." IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1974).

In the first unit determination issued,<sup>65</sup> the IEERB hearing officer held that even though coaching or other extracurricular functions could be separated from teaching duties, the Act covers any condition arising out of the employment relationship without regard to whether it is curricular or extracurricular. Thus, coaching and extracurricular duties constitute bargaining unit work. On that basis supervisors of that work were excluded from bargaining units, and on the same basis extracurricular pay and hours were deemed obviously bargainable.<sup>66</sup>

### *Fact-Finders' Recommendations and Scope Questions*

It was noted earlier that fact-finders, because they make recommendations solely on bargainable subjects,<sup>67</sup> must on occasion draw some conclusions about the scope of bargaining and the extent of their own jurisdiction. Fact-finding reports and recommendations, of course, are only advisory opinions, and neither the parties nor the IEERB<sup>68</sup> are bound to accept these recommendations as precedent. Nevertheless, since the reports may have had some impact in the resolution of disputes, and since it was apparent that many disputes were resolved in these advisory proceedings, the fact-finders' opinions on negotiability are offered here as an indication of the views of those who, as members of the IEERB's ad hoc panel,<sup>69</sup> were active in the dispute resolution process.

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<sup>65</sup> *In re Kokomo Unit Determination*, [Representation] Case No. R-73-2-3500 (IEERB, Nov. 8, 1973).

<sup>66</sup> Section 3 of the Act, which sets up the duty to bargain collectively, extends coverage to "school employees." IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1974). The term "school employee" is defined in section 2(e) to exclude "school employee supervisors," IND. CODE § 20-7.5-1-2(e) (1973), IND. ANN. STAT. § 28-4552(e) (Supp. 1974); and "supervisor" is defined in part (h) of the same section, first, by function ("authority . . . to hire, transfer [etc.]; responsibility to direct school employees . . . ; or effectively to recommend the action set out in these categories"), and second, by title ("superintendents, . . . principals and vice-principals or department heads who have responsibility for evaluating teachers"). IND. CODE § 20-7.5-1-2(h) (1973), IND. ANN. STAT. § 28-4552(h) (Supp. 1974).

<sup>67</sup> See notes 37-38 *supra* & text accompanying.

<sup>68</sup> It should be noted that under section 13(e), IND. CODE § 20-7.5-1-13(e) (1973), IND. ANN. STAT. § 28-4563(e) (Supp. 1974), the IEERB may also make additional findings and recommendations based upon information in the report or in its own possession. After ten days it must release the fact-finder's report with or without additional findings of its own. In practice, it does not usually modify the interpretation of the facts, since the recommendations are advisory, and in any case the IEERB has not heard the parties' presentation. It does occasionally review jurisdictional questions, and in two cases added the modification that the report should not be taken as precedent for other cases.

<sup>69</sup> The IEERB initially received over 100 applications for its ad hoc panel of mediators and fact-finders. After screening these applications, the Board invited some 60 people to a three-day training seminar in February 1974. Later in May, June, and July, one-day briefing sessions were held.

One hundred eleven mediation cases were handled. Staff handled 22 of these, and



The two major issues dealt with by fact-finders were the definition of what may be included as bargainable under "hours" and whether or not a grievance procedure is a mandatory subject of bargaining. In addition, a few fact-finders spoke to the bargainability of such items as class size, job posting, due process in teacher dismissal, maintenance of standards, no-strike clauses, PTO/PTA as a required activity, and summer school.

Class size, due process, maintenance of standards, and no-strike clauses were all found to be subjects of discussion rather than of bargaining, and no recommendations were made. Job posting was found to be discussible by one fact-finder<sup>70</sup> and bargainable by another<sup>71</sup>—although in the first case, since the employer submitted its position on the merits without arguing bargainability, the fact-finder made a recommendation assuming willingness to bargain under the permissive language in section 5. Additionally, two fact-finders<sup>72</sup> found preparation time, attendance at PTO/PTA meetings, use of sick days in summer school, and rights of the employee association to be proper subjects of bargaining. In two other cases<sup>73</sup> where questionable items were raised, one fact-finder, noting that the parties were substantially in agreement, went ahead and recommended that the parties include their agreement in the contract, while the other fact-finder found the questionable items not to be significant to the impasse and declined to make any recommendations.<sup>74</sup>

With regard to the interpretation of "hours" as a mandatory (bar-

the remainder were handled by 39 of the ad hoc panelists. Thirty of the panelists had more than one case.

There were 67 cases which went to fact-finding. Only two of these were handled by staff. The remaining 65 were handled by 41 of the ad hoc panelists. These were not necessarily the same 39 who had served as mediators, since 11 who had had mediation cases for one reason or another did not handle fact-finding cases, and 12 who had not mediated were used in fact-finding. Of those who handled fact-finding cases, only 15 had more than one case.

Thus, in the first year, 51 ad hoc panelists gained experience in mediation and fact-finding under the impasse procedures of P.L. 217.

<sup>70</sup> Metropolitan School Dist. of Washington Twp. & Washington Twp. Educ. Ass'n, [Impasse Fact-Finding] Case No. F-74-16-5370 (IEERB, July 31, 1974).

<sup>71</sup> New Prairie United School Corp. & New Prairie Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-35-4805 (IEERB, Aug 21, 1974).

<sup>72</sup> *Id.*, and North Knox School Corp. & North Knox Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-44-4315 (IEERB, Sept. 13, 1974).

<sup>73</sup> Huntington County Community School Corp. & Huntington Community Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-37-3625 (IEERB, Aug. 20, 1974); and East Noble School Corp. & East Noble Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-63-6060 (IEERB, Sept. 5, 1974).

<sup>74</sup> *Id.* at 2, 3, 4. Section 13(b) states in part: "The fact-finder . . . may restrict his findings to those issues which he determines significant . . ." IND. CODE § 20-7.5-1-13(b) (1973), IND. ANN. STAT. § 28-4563(b) (Supp. 1974).

gainable) subject, there was a variety of opinion. Some fact-finders took guidance from an IEERB statement on this subject which appeared in the minutes of the July 18, 1974 meeting.<sup>75</sup> This statement was later rescinded at the next Board meeting on August 13 in favor of a case-by-case approach through the unfair practice procedures.<sup>76</sup> Based upon the July 18th statement, two fact-finders found preparation time to be discussible rather than bargainable as a matter of "hours"<sup>77</sup> and therefore declined to make any recommendation on the issue. Two other fact-finders<sup>78</sup> ignored or were unaware of the July 18th statement and found the subject bargainable, offering recommendations on it.

In addition to preparation time, the school calendar was raised as an item possibly negotiable under "hours." One fact-finder dealt with this to the extent of finding that in addition to the number of days to be worked, the starting and ending dates of the school year should be negotiated because of the teachers' legitimate concern with summer employment and summer courses.<sup>79</sup>

With regard to negotiability of grievance procedures, only ten of 30 fact-finders<sup>80</sup> were faced with the question, and all ten dealt with

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<sup>75</sup> Minutes of the IEERB, July 18, 1974, at 1-2 [on file with the INDIANA LAW JOURNAL].

<sup>76</sup> Minutes of the IEERB, Aug. 13, 1974, at 1 [on file with the INDIANA LAW JOURNAL]. Since the Board does not distribute its Minutes to the panelists, only those who called in or who were informed by the parties would have been aware of the policy statement.

<sup>77</sup> Mississinewa Community Schools Corp. & Mississinewa Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-4-2885 (IEERB, July 29, 1974), at 10-11; Prairie Heights Community School Corporation & Prairie Heights Educ. Ass'n, [Impasse Fact-Finding] Case No. F-74-57-4515 (IEERB, Aug. 28, 1974), at 6-7.

<sup>78</sup> New Prairie United School Corp. & New Prairie Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-35-4805 (IEERB, Aug. 21, 1974); North Knox School Corp. & North Knox Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-44-4315 (IEERB, Sept. 13, 1974).

<sup>79</sup> Kokomo-Center Twp. Consol. School Corp. & Kokomo Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-7-3500 (IEERB, Aug. 1, 1974), at 9.

<sup>80</sup> *Id.*; Metropolitan School Dist. of Washington Twp. & Washington Twp. Educ. Ass'n, [Impasse Fact-Finding] Case No. F-74-16-5370 (IEERB, July 31, 1974); North Judson-San Pierre School Corp. & North Judson-San Pierre Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-29-7515 (IEERB, Aug. 2, 1974); South Bend Community School Corp. & National Educ. Ass'n—South Bend, [Impasse Fact-Finding] Case No. F-74-31-7205 (IEERB, undated); Triton School Corp. & Triton Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-48-5495 (IEERB, Aug. 18, 1974); Prairie Heights Community School Corp. & Prairie Heights Educ. Ass'n, [Impasse Fact-Finding] Case No. F-74-57-4515 (IEERB, Aug. 28, 1974); Blackford County Schools & Blackford County Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-36-0515 (IEERB, Aug. 31, 1974; Addendum Sept. 25, 1974); North Knox School Corp. & North Knox Classroom Teachers Ass'n, [Impasse Fact-Finding] Case No. F-74-44-4315 (IEERB, Sept. 13, 1974); Indianapolis Public Schools & Indianapolis Educ. Ass'n, [Impasse Fact-Finding] Case No. F-74-40-5385 (IEERB, Aug. 13, 1974); Porter County Bd. of Educ. (Porter County Special Educ. Cooperative) & Special Educ.

this item as a bargainable subject and therefore made recommendations with respect to disputed aspects of the grievance procedures. In the *Porter Co-op* case<sup>81</sup> the fact-finder addressed himself to the negotiability question:

In the opinion of the Fact-Finder, the bargaining relationship between the parties does not cease upon the signing of an agreement. Indeed, Section 1, paragraphs (a), (b), and (c) contemplates an on-going relationship between school employee organizations and their employers. The "acceptance of the principle and procedure of collective bargaining" (re: Sec. 1 (b)) is mandated by the intent of the General Assembly of the State of Indiana in its "preamble" to Public Law 217.

The collective bargaining relationship between the parties requires some system of ameliorating disputes during the term of the agreement.

It is exceedingly difficult to conclude from the language in Section 1 and Section 4 of Public Law 217 that school employee organizations should be required to look to a breach of contract suit as a system for resolving differences regarding the interpretation and application of the contract to which they are a party.<sup>82</sup>

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Teachers Ass'n (Porter County), [Impasse Fact-Finding] Case No. F-74-41-0000 (IEERB, Aug. 29, 1974).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 8.

In discussing grievance procedures and arbitration, however, there appears to be some confusion among the parties as to the extent of authority an arbitrator may exercise. The parties should be clear about the different kinds of arbitration employed in public employment labor relations. See *Gary Teachers Union, Local 4, AFT v. School City*, — Ind. App. —, 284 N.E.2d 108 (1972); *accord*, *East Chicago Teachers Union, Local 511, AFT v. Board of Trustees*, — Ind. App. —, 287 N.E.2d 891 (1972), where the court makes reference to the different kinds of arbitration.

There are two quite different types of labor arbitration: grievance arbitration, or "arbitration of rights," and impasse arbitration or "arbitration of interests." In dealing with public sector labor relations, it is particularly important to be aware of the differences between the two. . . . Grievance arbitration involves the determination of rights under an *existing* contract by an arbitrator acting in a judicial capacity. Impasse arbitration, on the other hand, is utilized when the parties are unable to agree to the provisions of a labor contract at the bargaining table; it is a substitute for the economic weaponry of strikes and lockouts in the determination of what the contract rights of the parties *shall be*.

R. SMITH, H. EDWARDS & R.T. CLARK, JR., *LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS* 893 (1974) (emphasis in original). Section 4 of the Act speaks only to arbitration in the grievance procedure, rather than impasse (interest) arbitration. Impasse arbitration is also specifically condoned in section 13(c) of the Act, IND. CODE § 20-7.5-1-13(c) (1973), IND. ANN. STAT. § 23-4563(c) (Supp. 1974), but *only* through voluntary agreement by the parties.

Thus, where the contract calls for final arbitration of grievances, the method is merely a procedure for obtaining a fair and neutral interpretation of the language to which both parties have already agreed. The fact-finder in the *Prairie Heights* case spoke to this issue:

*Substantive Scope as Determined in Unfair Practices*

There were two unfair practice complaints filed for refusal to bargain in specific areas which may come under the definition of "hours." These two cases concern the school calendar<sup>83</sup> and preparation time.<sup>84</sup> The impact of these cases, however, on this year's bargaining was minimal since the hearing examiners' decisions were not issued until September 10th and September 23d respectively.

In the calendar case (*Fairfield*)<sup>85</sup> the issue was negotiability of the dates on the school calendar. The parties agreed that daily working hours or the number of days for which teachers would be paid were negotiable. Only the question of mandatory bargaining of starting and ending dates and allocation of unpaid vacation days within the calendar were at issue.<sup>86</sup> The employer had agreed to discuss these issues, but was unwilling to bargain over them or to include them in the contract.

The hearing examiner found that the General Assembly probably did not intend to mandate bargaining on these questions of calendar, and in view of the competing interests of personnel not in the bargaining unit, patrons, and the community at large, he found collective bargaining an inappropriate method of dealing with the questions involved.<sup>87</sup> Nevertheless, he did find that both questions were proper subjects for discussion. An *amicus curiae* brief which argued that setting the calendar is an inherent management right and neither bargainable nor discussible was rejected. This case was appealed to the full Board, and the IEERB's

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In grievance arbitration, the arbitrator does *not* formulate policy or contractual language; he does not change the contract; he simply *interprets* the agreement that the parties have previously negotiated and agreed to. . . . This process does not usurp the power or authority of the Corporation to formulate policy or negotiate a collective agreement. The arbitrator's only function is to resolve the grievance when all else has failed.

Prairie Heights Community School Corp. & Prairie Heights Educ. Ass'n, [Impasse Fact-Finding] Case No. F-74-57-4515 (IEERB, Aug. 28, 1974), at 4. Note, then, that where the contract does not cover permissive section 5 items, to permit binding arbitration of disputed discussible items would be, in effect, impasse or interest arbitration—and should be recognized as such.

<sup>83</sup> John Rouch v. Board of School Trustees of the Fairfield Community Schools, [Unfair Practice] Case No. U-74-7-2155 (IEERB, Sept. 10, 1974).

<sup>84</sup> Huntington County Community School Corp. v. Huntington Community Classroom Teachers Ass'n, [Unfair Practice] Case No. U-74-34-3625 (IEERB, Sept. 23, 1974).

<sup>85</sup> John Rouch v. Board of School Trustees of the Fairfield Community Schools [Unfair Practice] Case No. U-74-7-2155 (IEERB, Sept. 10, 1974).

<sup>86</sup> A secondary question was whether the teachers association could insist upon the inclusion in the contract of a proviso that school policy would not be changed during the period of coverage, even if the substance were not itself bargainable.

<sup>87</sup> *Fairfield* at 7-11.

ruling appears in the Minutes of its October 31, 1974 meeting.<sup>88</sup> The Board held: "Daily hours and the total number of days to be worked are negotiable items for collective bargaining. All other calendar items are discussable."<sup>89</sup>

In the preparation time case (*Huntington*)<sup>90</sup> the hearing examiner rejected the contention that preparation time is comprehended within either "salary and wage related fringe benefits" or "hours." He pointed out:

Preparation and planning time obviously is not salary and because it is not an emolument arising from the employment relationship, it is not a wage. . . . A change in preparation or planning time may result in a school employee subjectively perceiving that his salary, wages, and related fringe benefits, [have] relatively changed when they are compared to his employment, but this is because the employment has changed and not the emoluments arising from it.<sup>91</sup>

The item "hours" concerns hours of employment not what work will be performed during that time. The hours of employment [consist] of the number of the hours the school employee is going to work and the periods of time that the work will be performed. The time which the work is to be performed includes questions of the starting time, the ending time and the time out from work when the school employee is completely free from any assignment. The issue of preparation and planning concerns an issue of assignment in that it deals with the question of what work will be performed and not the issue of what hours the teacher has employment responsibilities.<sup>92</sup>

The hearing examiner therefore found that it was a refusal to bargain on the part of the employee organization when it refused to enter into a contract which did not include a clause on preparation time, since preparation time is not a mandatory subject of bargaining under P.L. 217 (It is discussible as a working condition.)<sup>93</sup> In so ruling, he notes that to propose and to demand to bargain a permissive item, or to offer it as

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<sup>88</sup> Minutes of the IEERB, Oct. 31, 1974, on file with the INDIANA LAW JOURNAL. The Board's Decision and Order was issued Nov. 22, 1974. The complainant filed for court review on Dec. 13, 1974.

<sup>89</sup> *Id.*

<sup>90</sup> *Huntington County Community School Corp. v. Huntington Community Classroom Teachers Ass'n*, [Unfair Practice] Case No. U-74-34-3625 (IEERB, Sept. 23, 1974).

<sup>91</sup> *Id.* at 5.

<sup>92</sup> *Id.* at 6.

<sup>93</sup> Section 5 of the Act, IND. CODE § 20-7.5-1-5 (1973), IND. ANN. STAT. § 28-4555 (Supp. 1974), requires discussion over "working conditions, other than those [which must be bargained]."

a compromise for resolution of a mandatory item, is not an unfair practice. It only becomes an unfair practice when insistence upon a permissive item is made a condition for agreement on mandatory subjects.<sup>94</sup> This decision was appealed to the IEERB, and the hearing examiner's decision was approved.<sup>95</sup>

#### SUMMARY AND ANALYSIS

##### *Problems of Application*

The experience to date indicates that in the first year under P.L. 217, bargaining progressed relatively smoothly, or at least without the need for neutral assistance, in over half the units covered. In the others, pressure from the employee side of the table to expand scope into the permissive areas was often apparent. In many if not most such cases there was determined resistance to this pressure resulting in either an impasse or the filing of unfair practice charges, or both. One thing is certain: a great deal of time was spent in fruitless debate or maneuvering over the treatment of discussible items. The frustration and hostility thus created in many instances pervaded the entire process and made agreement on mandatory items all the more difficult. Nevertheless, the figures indicate in the large majority of cases<sup>96</sup> settlements were reached. Of course, this says nothing for the degree of satisfaction with the law; it merely indicates a certain willingness to go along with the differentiation set forth in the law. Nor does it say anything for the degree of satisfaction with the settlements that were reached.<sup>97</sup>

##### *Substance of Scope*

Substance disputes were in general less of a problem than the procedural questions. There were really only two major items which caused concern. The first is the question of what is meant by "hours" as a mandatory bargainable item, and the second is whether it was the intent of the General Assembly to include a grievance procedure as a mandatory item.

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<sup>94</sup> *Huntington* at 5.

<sup>95</sup> At its meeting on December 12, 1974, the IEERB approved the hearing examiner's dismissal order in its entirety. The complainant filed for court review on December 31, 1974.

<sup>96</sup> See notes 31-34 *supra* & text accompanying.

<sup>97</sup> One should approach the first year's statistics with caution when looking to the future. Both the newness of the bargaining process and unfamiliarity with the impasse procedures may make these figures unrepresentative for future years. Also, the approach of the current legislative session and the desire to have a good record with Indiana's first public sector bargaining law may have helped to achieve settlements which might otherwise have been elusive, or at least involved more protracted negotiations.

The question on the interpretation of hours has been dealt with in two hearing examiner decisions,<sup>98</sup> the first of which found scheduling of unpaid vacations and the starting and ending dates in the school calendar to be discussible. The second decision dealing with work within the school day found all but unassigned duty-free time to be matters of assignment rather than bargainable hours. On appeal to the full Board, the first decision was broadened to make all items of calendar discussible with only the exceptions of daily working hours and the number of days to be worked.<sup>99</sup> On the question of preparation time the full Board agreed with the hearing examiner and approved the decision without modification.<sup>100</sup>

With regard to grievance procedure, the law is unclear on this point. Section 4, "Subjects of Bargaining," states that the contract may include a grievance procedure culminating in final and binding arbitration.<sup>101</sup> It is clearly permissive with regard to arbitration, but it obviously contemplates that contracts will include grievance procedures. Moreover, since the duty to bargain is continuous and includes the duty to see that the contract is implemented in good faith, it makes sense to meet the continuing obligation by agreeing upon a grievance procedure. Fact-finders faced with the question were unanimous in finding grievance procedure to be a bargainable item.<sup>102</sup> This is an area, however, where legislative clarification might be helpful in reducing the number of disputes.

#### *Procedures: The Nature and Extent of the Obligations*

The bargaining obligation, as far as table bargaining<sup>103</sup> is concerned, was only occasionally misunderstood. Most misunderstandings appeared to stem from inexperience and were generally in the area of attempting to establish preconditions to table bargaining or in delays of questionable validity. Some of the delays, however, were directly related to disagreements with regard to discussion.

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<sup>98</sup> *Fairfield and Huntington*, discussed at notes 83 & 84 *supra*.

<sup>99</sup> Minutes of the IEERB, Oct. 31, 1974 [on file with the INDIANA LAW JOURNAL].

<sup>100</sup> Minutes of the IEERB, Dec. 12, 1974 [on file with the INDIANA LAW JOURNAL], approving the hearing examiner's dismissal.

<sup>101</sup> A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitration shall have no power to amend, add to, subtract from or supplement provisions of the contract.

IND. CODE § 20-7.5-1-4 (1973), IND. ANN. STAT. § 28-4554 (Supp. 1974). See also notes 43 & 82 *supra*.

<sup>103</sup> See note 28 *supra*.

The discussion obligation is harder to assess since especially in the first year, when many districts were negotiating a first contract, it would probably be naive to expect discussion to be meaningfully carried on before the parties had decided what to include in the contract. One suspects that discussion was not attempted to any great extent in this first year, and that the potential usefulness of discussion may not even have been appreciated; however, it is hard to know since only the problem cases come to the IEERB. Moreover, it may be significant that no new unfair practice complaints with reference to discussion were filed between the start of school in the fall and December 31, 1974.

The *Tippecanoe* unfair practice decision<sup>104</sup> underlines the fact that both parties are obligated to do more than just listen. There must be a meaningful exchange, and resolution should be sought jointly. The two discharge cases<sup>105</sup> show that discussion is proper and indeed may not be refused in making personnel decisions covered by section 5 "Subjects of Discussion." In such cases the employer may not refuse to discuss, nor may it discriminate against representatives of the bargaining agent for insisting on their right to discuss and to be present in the discussion of individual cases if requested by any other member of the bargaining unit. The hearing examiner explained that there is no conflict between the duty to discuss and the employer's section 6 rights, since the General Assembly was merely insisting that the employer hear and discuss both sides of the story before exercising its section 6 rights.<sup>106</sup>

The discussion obligation, if it is used, may have considerable impact on the management of employee relations in Indiana schools. While school employers may be willing to discuss general policies with the exclusive representative, they may well resist attempts by the exclusive representative to discuss the individual cases of members of the bargaining unit. The law, however, in section 5 does not distinguish between individual cases and general procedures in making working conditions and listed items discussible. Moreover, it will be difficult to reach agreement on general areas without discussing specific cases.

Thus, discussion may serve the general purpose of exchanging ideas on policy and program, and at the same time it may fill the role of a griev-

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<sup>104</sup> *Bobbe June Blom v. Tippecanoe School Corp.*, [Unfair Practice] Case No. U-74-15-7865 (IEERB, July 5, 1974), discussed *supra* at notes 45-50, 59.

<sup>105</sup> *Baugo*, and *Robert Brothers & Board of School Trustees of the Delphi Community School Corp.*, [Unfair Practice] Case No. U-74-17-0755 (IEERB, Aug. 21, 1974), discussed *supra* at notes 51-55, 60-62.

<sup>106</sup> *Id.* Cf. *Pennsylvania Lab. Rel. Bd. v. Board of School Directors of the Upper Merion Area School Dist.*, [Unfair Practice] Case No. PERA-C-2015-E (Pa. Lab. Rel. Bd., Sept. 15, 1972), discussed *supra* note 62.



ance procedure on nonbargainable working conditions. This does not mean that discussion could or should replace the contractual procedure; it simply may be used in addition to the contractual procedure on problems which are not covered within the scope of the contract.<sup>107</sup> When discussion is used in individual cases as a sort of grievance procedure, it will take a high degree of sophistication from both parties to make it work effectively. For example, from the employer's point of view the discussion procedure will be less convenient than a grievance procedure in that the scope of potential grievances is extremely broad and relatively vague since it is not limited by a set of specific provisions and agreements as would be the case under a contract. On the other hand, from the employees' point of view, discussion may be less satisfactory than a grievance procedure in that successful outcomes depend upon a good working relationship with the superintendent, since under the section 2(o) definition, the employer may meet its duty to discuss through its superintendent.<sup>108</sup>

Unlike most contractual grievance procedures, discussion may start and end at the top organizational and administrative levels.<sup>109</sup> The mandate, however, is sufficiently broad to enable parties genuinely interested in resolving their differences to transfer discussions either upward or downward to whatever level may be appropriate under the circumstances. Roughly one-third of negotiated contracts make some reference to discussion. Some of these contracts include provisions to ensure open communication with the school board on items which are being discussed.<sup>110</sup>

A second point which should be raised is that effective use of discussion demands that, if after airing a problem and thoroughly discussing it the parties find that they still disagree, they must be able to accept the

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<sup>107</sup> Discussion takes on an especially important role whenever the contract narrowly defines a grievance as a claimed misinterpretation or misapplication of the contract's terms. Thus, unless covered by a specific provision of the negotiated contract, problems arising in the context of discussible items could not be resolved via the grievance procedure. In this situation, discussion is the only method left for the sharing of ideas and proposals.

Even where the grievance procedure negotiated extends to a broad range of subjects, discussion can play an important role. Effective discussion can serve to prevent the misunderstandings which give rise to grievances, thereby creating a more favorable atmosphere for all employment relations. Discussion is ultimately a more cooperative and positive mechanism for resolving disputes than the grievance procedure, which, of necessity, can be invoked only after the potential for dispute has materialized.

<sup>108</sup> IND. CODE § 20-7.5-1-2(o) (1973), IND. ANN. STAT. § 28-4552(o) (Supp. 1974).

<sup>109</sup> A review of the contracts negotiated for 1974-75 does show, however, that in about 20 districts, building-level discussion is also called for.

<sup>110</sup> These figures were compiled based upon a review of 260 contracts (out of 278 negotiated).

fact that agreement is not always possible, and agree to disagree. If the discussion process is turned into a permanent debating match it will very quickly destroy a good relationship or prevent one from being established. If, on the other hand, it is used wisely, it could create a relationship which will carry over into bargaining and which should be of great value to both parties.

#### THE PROGNOSIS

##### *The Experience—Actual Versus Potential*

It is too early to assess the kind of working relationship which may develop under agreements as negotiated and under the continuing obligation to discuss section 5 items. The direction which actual experience has taken, as opposed to what might have been expected as the potential result of the dual obligation, is that in this first year the existence of the dual obligation did not actually operate to reduce the time commitment and degree of complexity in bargaining the contracts. The division between the two obligations clearly puts economic items on the bargaining table and working conditions with policy implications into the realm of discussion. Although discussible items may be included in a contract, the fact that they need not be so included and the fact that there is no specific timetable for discussion should create flexibility in dealing with these matters as they arise, and, over the long term, on items where greater depth is required to reach a solution than might be afforded within the framework of conventional economic bargaining.

While the open-ended nature of the discussion obligation may create some uneasiness, it is clear from unfair practice decisions (at least at the hearing examiner level) that the IEERB does not regard the obligation lightly and is looking for more than lip service in seeing that the discussion obligation is met. If the parties were to take advantage of good faith discussion—as many may be expected to do under procedures written into their contracts to ensure use of discussion and of school board input and feedback—then it would seem that far less time ought to be necessary for bargaining, and proportionately far more time spent in discussion.

The timetable for bargaining in section 12 was obviously patterned on time considerations in states with open scope bargaining. One hundred eighty days to bargain a contract on economic items alone appears to be excessive, particularly since the economic picture is generally not very clear until at least half of this time has elapsed. This will be especially true in years such as 1975 when the General Assembly is

meeting in its biennial long session.<sup>111</sup> With the property tax freeze, the state legislature is responsible for the lion's share of new money available for schools. It seems hardly likely that this sensitive issue will be settled by late winter when bargaining is slated to begin. Either the timetable should be amended<sup>112</sup> or scope should be expanded so that the parties have something to talk about when they sit down at the table. A repetition of this year's debates over voluntary expansion of scope would hardly serve the interests of either party or of the process in general.

*Should Discussion Be Dropped in Favor of Open Scope Bargaining?*

It was not really the purpose of this study to argue the merits of the dual obligation as opposed to open scope bargaining. This is a question which will doubtless be argued by many who have found this year's experience unsatisfactory. The purpose of this article has been to show why this year's experiences may have been unsatisfactory and to try to show how the dual obligation affected these experiences. One of the major conclusions drawn is that procedural disputes took up an inordinate amount of time, and although contracts were eventually negotiated, substantive discussion has probably been tried only in the last month or two, if at all.

Whatever happens with regard to scope in the law, a repetition of the fruitless debates—talking about what will not be talked about—should be avoided. Perhaps abandonment of the discussion obligation and broadening of scope of bargaining is necessary to resolve this problem. On the other hand, perhaps now that first contracts have been negotiated and the differentiation between discussible and bargainable subjects has been applied in practice with possibly some recent experience in discussion, the second year will progress more smoothly. It is possible that discussion procedures which have not yet been tried will be used effectively to the satisfaction of both parties. In theory it could work. In practice it did not work in the earlier portion of this year because the importance of discussion was somewhat eclipsed by the more pressing

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<sup>111</sup> See note 15 *supra*.

<sup>112</sup> The timetable in section 12 of P.L. 217 is inconsistent with the dual obligation—180 days seems excessive for the negotiation of monetary items alone. A timetable may not be necessary at all since the parties are not unaware of budget deadlines. In any case, April 15 or May 1 as a mandatory starting date rather than the second week of February (180 days prior to budget submission) would seem to be more consistent with the narrow scope approach. The parties should not be forced to spread over 180 days what could be done (assuming good faith and a desire to reach agreement) in a much shorter time.

need for a contract. The second year is bound to differ from the first, if only because half the year need not be spent on representation and unit determinations. Moreover, the parties have in most instances agreed, however reluctantly, that certain items be covered by contract and that others will remain discussible. It is an open question at this point as to how much discussion will take place and how effective it will be in serving the needs of both parties.

### *The Dual Obligation and Extended Coverage*

Finally, inasmuch as this study lays the groundwork for several of the major questions which are sure to come up before the General Assembly in reviewing P.L. 217, there is one more question which should be raised. If collective bargaining is extended to other groups of public employees, does the dual obligation make sense? The discussion obligation as an adjunct to bargaining is obviously designed specifically for professional employees, whose expertise in policy areas cannot be overlooked.<sup>113</sup> There are many other public sector jobs where such a broad discussion obligation would probably be inappropriate. In these other jobs, however, working conditions can be more readily separated from policy. For example, the secretaries are not likely to try to negotiate what kind of letters are written or how often, nor are they likely to want contract clauses on how to handle clientele. They will be much more interested in take-home pay, benefits, and an equitable grievance procedure. Under open scope they might also want to talk about the temperature in the building and adequate lighting, but these working conditions are cost items which also do not have a direct bearing on the agency. In contrast to secretaries; however, teachers do have the training and experience to participate in decisions for handling policy questions and treatment of clientele. Discussion offers latitude in dealing with these matters. The current obligation to discuss is probably broader than the obligation to bargain would be even under open scope.

While the dual obligation is unnecessary and probably inappropriate for nonprofessional employees, it may offer advantages over conventional open-scope bargaining in professional employment. It is hard to assess its advantages or disadvantages until it has really been tried.

In the case of nonprofessional employees, or in fact of any other public employees not yet covered, it does not seem worth all the time and debate to make the distinction between bargaining and discussion. In the case of teachers, the time has been put in already and the distinc-

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<sup>113</sup> Cf. note 16 *supra*.

tion has been made. The questions, still unanswered, are these: having surmounted the procedural difficulties, will the dual obligation work, and what are the advantages and disadvantages of making this distinction at all?

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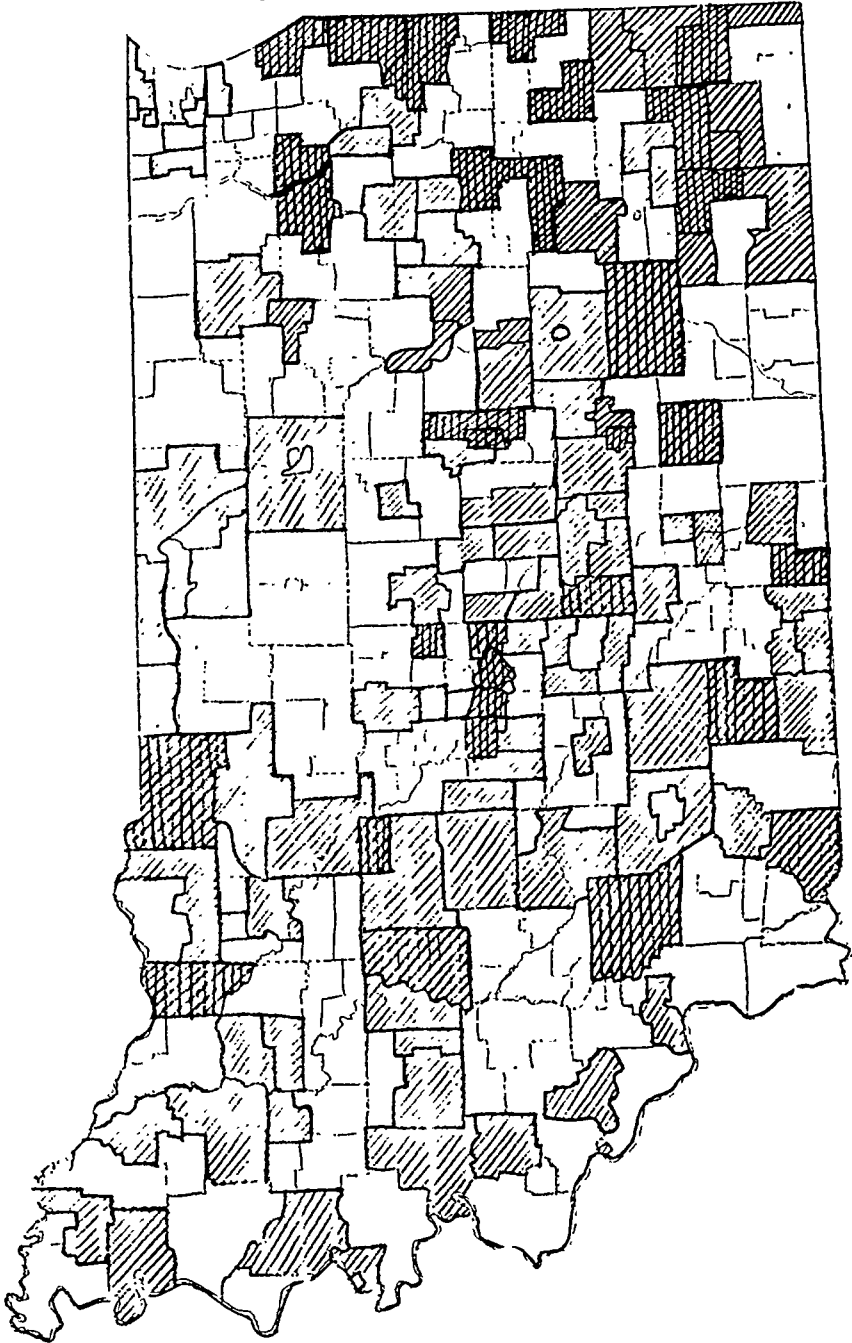
APPENDIX

CONTRACTS NEGOTIATED IN 1974, BY DATE OF SIGNING  
(276 School Corporations)

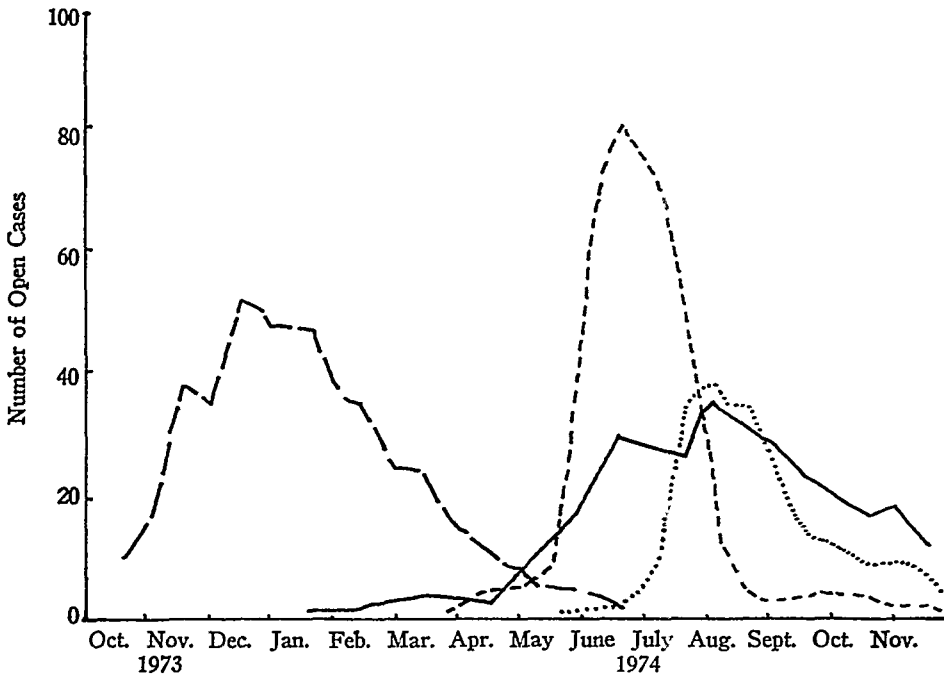
	Contracts Completed Without Neutral Intervention		Contracts Completed After Use of Impasse Procedures		All Contracts	
	In Month	Cumulative Total	In Month	Cumulative Total	In Month	Cumulative Total
December	1	139	6	137	7	276
November	0	138	8	131	8	269
October	3	138	10	123	13	261
September	1	135	17	113	18	248
August	26	134	54	96	80	230
July	26	108	35	42	61	150
June	29	82	7	7	36	89
May	42	53	0	0	42	53
April	2	11	0	0	2	11
March	9	9	0	0	9	9

Use of Impasse Procedures in 1974 Collective Bargaining Under P.L. 217

*Legend: Diagonal lines: Impasse, resolved through mediation;  
Crosshatching: Fact-finding report issued.*

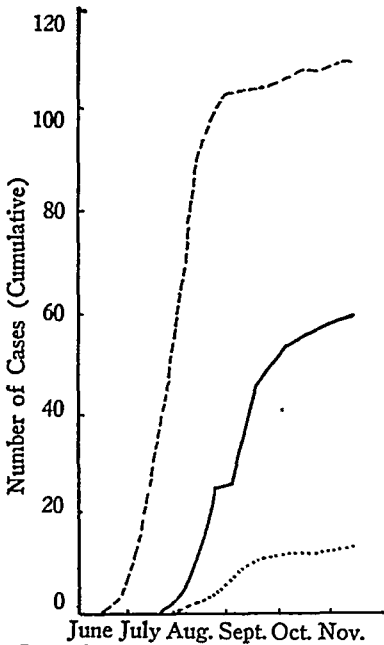


1973-1974 Caseload, by Type



Legend: long dashes: Open representation cases; solid: Open unfair practice cases; short dashes: Open mediation cases; dots: Open fact-finding cases.

Closed Conciliation Cases, Unfair Practice Decisions, 1974



Legend: dashes: Closed mediation; solid: Closed fact-finding; dots: Unfair practice decisions.

This graph shows that mediation was generally completed prior to issuance of unfair practice decisions. Fact-finding was well under way, and the closings indicated on the graph represent the dates of tentative or final agreement on all items in dispute.

The implication here is that substantive unfair practice decisions with regard to scope had little, if any, impact on this year's bargaining.