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# The Scope of Bargaining in Minnesota Public Sector Labor Relations: A Proposal for Change

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# The Scope of Bargaining in Minnesota Public Sector Labor Relations: A Proposal for Change

## **Abstract**

This article surveys and analyzes the law on the scope of bargaining under the Minnesota Public Employment Labor Relations Act (PERLA) and suggests ways to make it more certain and responsive to public policy. Part II sets out the conflicting policy considerations to be accommodated in defining the scope of bargaining. These considerations form the basis for Part III's criticism of the present law under PERLA and guide the recommendations for change made in Part IV.

## **Keywords**

labor relations statute, employment law, collective bargaining, NLRA

## **Disciplines**

Labor and Employment Law

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DEBORAH A. SCHMEDEMANN†

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## I. INTRODUCTION

The Minnesota Public Employment Labor Relations Act<sup>1</sup> (PELRA) is now well into its second decade. Enacted in 1971,<sup>2</sup> PELRA is the comprehensive labor relations statute<sup>3</sup> that governs labor relations for most state and local government employees in Minnesota.<sup>4</sup> Since 1971, the statute has undergone repeated amendments by the legislature<sup>5</sup> and frequent interpretations by

1. MINN. STAT. §§ 179.61-.76 (1982), amended by Act of June 14, 1983, ch. 364, 1983 Minn. Laws 2765.

2. Act of July 1, 1972, Ex. Sess., ch. 33, 1971 Minn. Laws 2709 (codified at MINN. STAT. §§ 179.61-.76). For a detailed analysis of PELRA as originally enacted, see Note, *The Minnesota Public Employment Labor Relations Act of 1971: Another Public Employment Experiment*, 57 MINN. L. REV. 134 (1972).

3. See Note, *supra* note 2, at 134. PELRA covers a wide range of employees and employers and sets up a complete labor relations system. It is not, however, the sole statute pertaining to public sector employment. See *infra* note 79 and accompanying text.

4. See MINN. STAT. § 179.63, subd. 7 (1982), amended by Act of June 14, 1983, ch. 364, 1983 Minn. Laws 2510 (definition of "employee"); see also *id.* § 179.63, subd. 4 (definition of "employer").

5. Act of June 14, 1983, ch. 364, 1983 Minn. Laws 2765; Act of March 19, 1982, ch. 495, 1982 Minn. Laws 526; Act of March 19, 1982, ch. 568, 1982 Minn. Laws 1236; Act of March 19, 1982, ch. 588, 1982 Minn. Laws 1386; Act of April 30, 1981, ch. 70, 1981 Minn. Laws 303; Act of April 24, 1980, ch. 617, 1980 Minn. Laws 1577; Act of May 24, 1979, ch. 183, 1979 Minn. Laws 282; Act of May 24, 1979, ch. 332, 1979 Minn. Laws 935; Act of March 28, 1978, ch. 619, 1978 Minn. Laws 400; Act of March 28, 1978, ch. 776, 1978 Minn. Laws 1095; Act of March 28, 1978, ch. 789, 1978 Minn. Laws 1155; Act of May 19, 1977, ch. 119, 1977 Minn. Laws 208; Act of May 19, 1977, ch. 206, 1977 Minn. Laws 337; Act of May 19, 1977, ch. 284, 1977 Minn. Laws 495; Act of March 31, 1976, ch. 102, 1976

the judiciary.<sup>6</sup> Nevertheless, in many areas, the law under PELRA remains uncertain. Although the scope of bargaining lies at the core of the scheme of labor relations created by PELRA, the law on the scope of bargaining is especially unclear.

The scope of bargaining is the range of issues discussed in negotiations between an employer and the labor organization that represents its employees.<sup>7</sup> Under PELRA, public employees are grouped into bargaining units,<sup>8</sup> and the employees in each unit select an exclusive representative.<sup>9</sup> The representative and the employer<sup>10</sup> have the mutual obligation to meet and negotiate, that is, bargain collectively, over the employees' terms and conditions of employment.<sup>11</sup> The law on the scope of bargaining defines precisely what the parties must, may, or may not bargain about. While the law requires only that the parties negotiate in good faith,<sup>12</sup> the desired end of the negotiations is a duly ratified,<sup>13</sup> written<sup>14</sup> agreement binding both parties. It is an unfair practice<sup>15</sup> for

Minn. Laws 249; Act of March 13, 1974, ch. 114, 1974 Minn. Laws 173; Act of May 24, 1973, ch. 635, 1973 Minn. Laws 1526 (codified at MINN. STAT. §§ 179.61-.76 (1982)).

6. See *infra* notes 105-17 and 152-200 and accompanying text.

7. Gerhart, *The Scope of Bargaining in Local Government Negotiations*, 20 LABOR L.J. 545 (1969).

8. MINN. STAT. §§ 179.63, subd. 17, 179.71, subd. 3 (1982); see *id.* §§ 179.71, subd. 5(j), 179.74, subd. 4, 179.741, 179.742 (state and University of Minnesota employees); *id.* § 179.65, subd. 6 (certain confidential and supervisory employees, principal and assistant principal units).

9. See *id.* § 179.63, subds. 5, 6; see also *id.* § 179.65, subd. 6 (restrictions on the choice of exclusive representatives by supervisory and confidential employees). This generally is done through an election; *id.* § 179.63, subd. 6 (defining exclusive representative as "certified"); *id.* § 179.67 (election procedures). But see *id.* § 179.69, subd. 1 (appears to allow voluntary recognition).

10. See *id.* § 179.63, subd. 4.

11. *Id.* §§ 179.63, subd. 16, 179.65, subd. 4, 179.66, subd. 2, amended by Act of May 23, 1983, ch. 364, 1983 Minn. Laws 2765; *id.* § 179.66, subd. 4. For a discussion of "terms and conditions," see *infra* notes 139-200 and accompanying text.

12. Minnesota Statutes section 179.63, subdivision 16 defines "meet and negotiate" as "the performance of the mutual obligations . . . to meet at reasonable times . . . with the good faith intent of entering into an agreement with respect to terms and conditions of employment; provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession." *Id.* § 179.63, subd. 16.

13. Contracts are generally ratified by the employer via an ordinance or resolution. See *id.* § 179.70, subd. 2. State contracts are ratified by the legislature or approved temporarily by the commission of employee relations. *Id.* § 179.74, subd. 5; see Minnesota Educ. Ass'n v. State, 282 N.W.2d 915 (Minn. 1979), appeal dismissed, 444 U.S. 1062 (1980); Comment, *Labor Relations—Arbitration—Statute Reserving Rights of Legislature to Review and Modify Arbitration Awards of State Employees Does Not Violate Equal Protection*: Minnesota Education Association v. State, 282 N.W.2d 915 (Minn. 1979), 3 HAMLIN L. REV. 195 (1980).

14. See MINN. STAT. §§ 179.69, subd. 1, 179.70, subd. 1 (1982).

15. See *id.* § 179.68, subd. 1. Notwithstanding the unfair practice cause of action,

either party to refuse to meet and negotiate<sup>16</sup> in good faith.<sup>17</sup>

PELRA provides substantial incentives, in addition to the unfair practice action, to serious collective bargaining. PELRA affords many public employees the right to strike<sup>18</sup> once a deadlock in bargaining has occurred and certain procedural requirements have been met.<sup>19</sup> In addition, PELRA provides for binding interest arbitration,<sup>20</sup> whereby neutral third parties resolve the differences in the parties' positions and essentially write the contract for them. The scope of interest arbitration parallels the scope of bargaining.<sup>21</sup> The potential for strikes and interest arbitration makes effective collective bargaining crucial and underscores the importance of the scope of bargaining.

The scope of bargaining has a direct impact on employer-employee relations for the life of a collective bargaining agreement. Under PELRA, collective bargaining agreements are administered through the processing and arbitration of grievances.<sup>22</sup> The scope of bargaining determines in large part<sup>23</sup> which issues are set by

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"refusal to bargain" cases have been brought in various other legal postures. *E.g.*, Minneapolis Fed'n of Teachers, Local 59 v. Minneapolis Special School Dist. No. 1, 258 N.W.2d 802 (Minn. 1977) (declaratory judgment); International Bhd. of Teamsters, Local No. 320 v. City of Minneapolis, 302 Minn. 410, 225 N.W.2d 254 (1975) (writ of mandamus).

16. *See supra* note 12.

17. MINN. STAT. § 179.68, subd. 2(5) (1982) (employer); *id.* § 179.68, subd. 3(3) (employees' and labor organizations).

18. *Id.* § 179.64. Absent certain exceptions, confidential, essential, managerial, and supervisory employees, principals and assistant principals may not strike. *Id.* § 179.64, subd. 1. For definitions of these classes of employees, see *id.* § 179.63, subs. 8, 9, 9(a), 10, 11, 14.

19. These procedural requirements include impasse, a forty-five day mediation period, and ten days' written notice. *Id.* § 179.64; *see id.* § 179.63, subd. 12.

20. *Id.* § 179.72, subd. 7. For essential employees, arbitration is ordered at the request of either party. *Id.* § 179.69, subd. 3(a). For non-essential employees, arbitration is available if the parties agree to it. *Id.* § 179.69, subd. 3. In some cases, PELRA requires or allows final-offer arbitration. *Id.* § 179.72, subs. 7, 7(b). The parties are required to execute a written contract containing the terms of the award. *Id.* § 179.69, subd. 1. Arbitration awards are ratified as described at *supra* note 13. It is an unfair practice to fail to comply with an arbitration award. MINN. STAT. § 179.68, subd. 2(9) (1982) (employer); *id.* § 179.68, subd. 3(5) (employees and labor organizations).

21. The scope of interest arbitration is confined to terms and conditions of employment and other items determined by the director. MINN. STAT. § 179.72, subd. 3; *see* City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979).

22. *See generally* MINN. STAT. § 179.70 (1982) (arbitration procedure). Indeed, contracts negotiated pursuant to PELRA must provide for grievance arbitration. *Id.* § 179.70, subd. 1.

23. Grievances are statutorily defined as disputes regarding the interpretation or application of contract terms. *Id.* § 179.70, subd. 6. To the extent the law on the scope of bargaining dictates contract terms, that law also determines what is grievable and arbitrable.

contract and, hence, which issues public employees may grieve and arbitrate and which issues remain in the province of the employer.

The scope of bargaining also dictates the course of "meet-and-confer." Professional employees<sup>24</sup> and their employers are obligated to confer on issues over which bargaining is not required.<sup>25</sup> The desired end of meet-and-confer is an exchange of views, rather than a binding agreement.<sup>26</sup>

Thus, PELRA focuses attention on the scope of bargaining. The Minnesota Supreme Court's construction of PELRA makes the scope of bargaining important in other ways as well. The court has created the duty to provide certain information about subjects relevant to collective bargaining.<sup>27</sup> The court also has prohibited an employer's unilateral change, that is, a change made without notice to and negotiations with the labor organization, in a subject about which the parties are obligated to bargain.<sup>28</sup>

This Article surveys and analyzes the law on the scope of bargaining under PELRA and suggests ways to make it more certain and responsive to public policy. Part II sets out the conflicting policy considerations to be accommodated in defining the scope of bargaining. These considerations form the basis for Part III's criticism of the present law under PELRA and guide the recommendations for change made in Part IV.

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24. *See id.* § 179.63, subd. 10 (definition of professional employee).

25. *Id.* §§ 179.63, subd. 15, 179.65, subd. 3, 179.66, subds. 3, 7; *see id.* § 179.73. To the extent faculty members have no opportunity to select their representatives for meet-and-confer purposes without joining the union, meet-and-confer requirements unconstitutionally infringe on the faculty members' first amendment rights. *See Knight v. Minnesota Community College Faculty Ass'n*, 111 L.R.R.M. 3156 (D. Minn. 1982), *aff'd mem.*, 103 S. Ct. 1493, *prob. juris. noted*, 103 S. Ct. 1496 (1983).

26. *See* MINN. STAT. § 179.63, subd. 15 (1982).

27. *See International Union of Operating Eng'rs Local No. 49 v. City of Minneapolis*, 305 Minn. 364, 233 N.W.2d 748 (1975). In *Operating Engineers*, the court held that under PELRA the city had the duty to disclose to the exclusive representative of its employees the questions and answers to a civil service promotional examination, provided the exclusive representative refrained from disclosing the requested information to applicants who would take that examination in the future. *Id.* at 371, 233 N.W.2d at 753. The court held that the city also had a duty to disclose information regarding when and how long each applicant for promotion had worked for the supervisor who rated his performance. *Id.*

28. *See Ogilvie v. Independent School Dist. No. 341, Atwater*, 329 N.W.2d 555 (Minn. 1983); *Minnesota Arrowhead Dist. Council 96 of AFSCME v. St. Louis County*, 290 N.W.2d 608 (Minn. 1980); *General Drivers Union Local 346 v. Independent School Dist. No. 704, Proctor School Bd.*, 283 N.W.2d 524 (Minn. 1979); *Minneapolis Fed'n of Teachers, Local 59 v. Minneapolis Special School Dist. No. 1*, 258 N.W.2d 802 (Minn. 1977); *cf. Minnesota Educ. Ass'n v. Independent School Dist. No. 495, Grand Meadow*, 290 N.W.2d 627 (Minn. 1980) (arbitration context).

## II. POLICIES UNDERLYING THE SCOPE OF BARGAINING

### *A. Introduction*

The scope of bargaining should reflect the law's accommodation of the significant policy considerations underlying public sector bargaining. The policies underlying public sector bargaining stem from the interests of three main parties: employees, the government, and citizens. Not surprisingly, the interests of each group at times call for different outcomes. The Minnesota Legislature has identified and described these interests and policies in PELRA's statement of purpose:

It is the public policy of this state and the purpose of sections 179.61 to 179.76 to promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare.

The relationships between the public, the public employees, and their employer governing bodies imply degrees of responsibility to the people served, need of cooperation and employment protection which are different from employment in the private sector. So also the essentiality and public desire for some public services tend to create imbalances in relative bargaining power or the resolution with which either party to a disagreement presses its position, so that unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.

Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties; adequate means must therefore be established for minimizing them and providing for their resolution. Within the foregoing limitations and considerations the legislature has determined that overall policy may best be accomplished by:

- (1) granting to public employees certain rights to organize and choose freely their representatives;
- (2) requiring public employers to meet and negotiate with public employees in an appropriate bargaining unit and providing for written agreements evidencing the result of such bargaining; and
- (3) establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public

employee, the public employer and the public at large.<sup>29</sup>

In defining the scope of bargaining, it is useful to categorize the major public policies to be accommodated. These policies primarily point in one of two directions: toward a broad scope of bargaining or toward a narrow scope of bargaining.<sup>30</sup> Certain policies, however, have little to do with the breadth or narrowness of the scope of bargaining; rather they pertain to the integrity and workability of the law. This Article does not attempt to reconcile these policy considerations into an optimum abstract scope of bargaining. Substantial empirical research would be required for such a task. In addition, the task of weighing and reconciling public policies is best left to the political and judicial processes. In any event, choosing the label of "broad" or "narrow" does not alone resolve concrete bargaining questions. The more important inquiry is to establish which policy considerations are at work in particular cases and to make bargaining determinations accordingly.

### *B. Arguments Supporting a Broad Scope of Bargaining*

The arguments for a broad scope of bargaining in the public sector focus on the "collective bargaining" aspect of the phrase "public sector collective bargaining." If collective bargaining is to achieve its goals of labor peace and efficient government, it must be "real" collective bargaining, not a pale and ineffective imitation. While the law may allow or require bargaining over a subject, it does not require that the parties agree on that subject during their negotiations and write that agreement into a binding collective bargaining contract. Collective bargaining requires only that the parties meet and negotiate in good faith with the intent of reaching an agreement.<sup>31</sup>

The first argument for a broad scope of bargaining begins with the obvious point that public employees are employees, and public employers are employers. The considerations which led to the legality and public acceptance of collective bargaining in the private sector—a concern for labor peace, a desire to institute democracy in the workplace, and the expectation that unions would bring

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29. MINN. STAT. § 179.61 (1982).

30. In speaking of "broad" and "narrow" scopes of bargaining, it is tempting to use the law under the National Labor Relations Act as a measuring stick. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. 1981). While the NLRA serves as a handy point of reference, it is more productive to analyze public sector bargaining on its own terms.

31. For a definition of "meet and negotiate," see *supra* note 12.

about better political representation of the working class—apply to government employment as well.<sup>32</sup> Public employees have as much at stake in their employment as do private sector workers and an equal right to a voice in determining the terms of their employment.<sup>33</sup> Indeed, some public employees may claim an even broader scope of bargaining than is generally found in the private sector. The public sector is characterized by the unionization of professional employees—employees with experience, expertise, and interest in issues beyond labor's traditional concern over terms and conditions of employment.<sup>34</sup>

Second, for collective bargaining to be effective, there must be a reasonably broad scope of negotiable matters. Collective bargaining is a process of trade-offs.<sup>35</sup> The fewer the issues available to the bargaining parties, the less room there is for trading and the less productive the negotiations will be.<sup>36</sup> Both parties could quickly become intractable, for example, if they were limited to negotiating only the hourly wage.

Collective bargaining also serves as an exchange of views between an employer and its employees. The broader the scope of bargaining, the more the employer learns about the concerns of employees and the more involved and respected the employees will

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32. H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 8, 12 (1971). The authors note an additional reason for private sector collective bargaining—the employer's monopsony over labor—that they deem inapplicable to the public sector. *Id.* Arguably, at certain times, even this policy has application to the public sector.

33. Indeed, at least one state court has held that the state's constitution requires parallel scopes of bargaining for the public and private sectors. *See City of Tallahassee v. Public Employees Relations Comm'n*, 393 So. 2d 1147, 1150 (Fla. Dist. Ct. App. 1981).

34. *See generally* H. DAVEY, M. BOGNANNO & D. ESTENSON, *CONTEMPORARY COLLECTIVE BARGAINING* 341-45 (1982) [hereinafter cited as *CONTEMPORARY BARGAINING*]; H. WELLINGTON & R. WINTER, *supra* note 32, at 23-24. Whether professional employees use collective bargaining to claim a broader scope of bargaining than is generally found in the private sector or to further their social goals is open to debate. *Compare* Kilberg, *Appropriate Subjects for Collective Bargaining in Local Government Labor Relations*, 30 MD. L. REV. 179, 193-94 (1970) with Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?* 51 OR. L. REV. 177 (1971). There remains the equity question of whether professional employees should be granted more bargaining power than other employees simply by virtue of their greater experience and education.

35. *See* Wollett, *supra* note 34, at 178; *see also* Gerhart, *supra* note 7 (discussion of trade-offs made by parties engaged in public sector bargaining and how those trade-offs are not evident in the final contract).

36. *See* Kilberg, *supra* note 34, at 191; *see also* Rehms, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919, 926-29 (1969) (discussion of statutory restraints on scope of collective bargaining).

feel.<sup>37</sup> At the same time, collective bargaining informs the employer of employees' ideas concerning the administration of the government, some of which stem from the unique perspective of employees. As the Minnesota Supreme Court has recognized, collective bargaining can lead to improvement in the delivery of government services.<sup>38</sup>

Third, a broad scope of bargaining helps to channel the efforts of the parties toward bargaining and away from debating, indeed litigating, what they may, may not, or must negotiate. The parties know well enough which issues concern them and are amenable to resolution through collective bargaining. It is distracting and counterproductive for the parties first to ascertain and then apply the legal rules. Rather, the parties themselves should decide the subjects of bargaining and what bargain to make.<sup>39</sup>

### *C. Arguments Supporting a Narrow Scope of Bargaining*

The arguments in favor of a narrow scope of bargaining in the public sector focus on the "public sector" aspect of the phrase "public sector collective bargaining." These arguments focus on the fact that the employer is the government.<sup>40</sup> They begin with the observation that the government operates differently than the

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37. See Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 916 (1973).

38. *Minneapolis Fed'n of Teachers, Local 59 v. Minneapolis Special School Dist. No. 1*, 258 N.W.2d 802, 805 (Minn. 1977). The court was concerned in this case with collective bargaining involving professional employees. The argument would seem to apply to other employees as well. See also Kilberg, *supra* note 34, at 184 (collective bargaining is a means of achieving labor peace and employee efficiency).

39. Of course, the law has a proper place in proscribing and prescribing certain subjects. An early article in the literature on public sector labor law, however, eloquently warns of laws which remove too many subjects from the scope of bargaining:

Such laws, which encourage or require public employers [one could add, public employees] to avoid problems rather than deal with them, are mischievous because they produce strife and frustration rather than understanding and peaceful accommodation of conflicts between government and its employees. In the public sector, as well as the private, what is bargained about, as well as what the terms of the bargain are, should be a function of the bargaining process, not of abstract concerns over sovereignty or responsiveness to misperceived legislative constraints.

Wollett, *supra* note 34, at 182.

40. The legal rubrics here are the doctrines prohibiting the abridgement of state sovereignty and the illegal delegation of power. The former states that the state or city loses its inalienable sovereign power when it engages in collective bargaining. The latter states that the legislature may not delegate certain powers, and collective bargaining constitutes such a delegation. The sovereignty doctrine should not be viewed as raising an obstacle to public sector collective bargaining; for collective bargaining is simply the negotiation of a contract, a function government undertakes routinely in other settings. Once the legisla-

private sector. Politics, not the market, runs government<sup>41</sup>—a simple observation with several aspects worth noting.

First, the constraints on negotiations in the public sector are complex, elusive, and perhaps ineffective. Comparisons to the market forces which constrain private sector bargaining are useful.<sup>42</sup> Private sector bargaining represents a struggle between two parties, the employer and employee, each with sharply divergent interests. Public sector bargaining involves many parties—the employer, employees, taxpayers, users of government services, interest groups—whose interests coincide or conflict as bargaining moves from issue to issue.<sup>43</sup> Market considerations are relatively easy to discern, and the profit motive provides a clear standard by which private employers can gauge bargaining proposals. By contrast, the political process is often cumbersome and important viewpoints may be slighted or ignored. While the market generally provides a quick and unequivocal reaction to the bargain struck in the private sector, there is no corresponding assurance of accountability in the public sector. Citizens cannot always judge the performance of negotiators, and elections often occur long after the bargaining concludes.<sup>44</sup> Although citizens are becoming more responsive to tax increases,<sup>45</sup> the government's ability to raise revenue and to spread the costs of operations probably makes the public sector more impervious to cost issues than the private sector.<sup>46</sup> Furthermore, many government operations are monopolies

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ture has chosen collective bargaining and fashioned appropriate parameters, the delegation of authority should be deemed proper.

41. The literature on this simple observation is extensive. Foremost is H. WELLINGTON & R. WINTER, *supra* note 32. See also Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1 (1973); Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look via a Balancing Formula*, 40 MONT. L. REV. 231 (1979); CONTEMPORARY BARGAINING, *supra* note 34; Kilberg, *supra* note 34; Rehmus, *supra* note 36; Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C.L. REV. 155 (1977); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

42. For a detailed comparison of the private and public sectors, see H. WELLINGTON & R. WINTER, *supra* note 32, at 8-29.

43. See Summers, *supra* note 41, at 1159; H. WELLINGTON & R. WINTER, *supra* note 32, at 22-23.

44. Sackman, *supra* note 41, at 165.

45. See Vaughn & Dozier, *Public Sector Bargaining Issues in the 1980s: A Neutral View*, PROCEEDINGS OF N.Y. UNIV. THIRTY-THIRD ANNUAL NATIONAL CONFERENCE ON LABOR 317, 318 (1981).

46. See H. WELLINGTON & R. WINTER, *supra* note 32, at 17-21. *Contra* Kilberg, *supra* note 34, at 192.

not pressured by cost and efficiency issues.<sup>47</sup>

Second, collective bargaining represents a radical change in government decisionmaking. Collective bargaining is a secret, bilateral process while the political process is open and multilateral. The obvious concern is the stifling of the public's voice.<sup>48</sup> At least where the public stands to gain or lose substantially and directly from the results of bargaining, or where the issues are controversial, something important in the way of democracy is lost if the scope of bargaining is unduly broad.<sup>49</sup>

The corollary to this concern is the fear that public employees exercise too much influence with access to both the standard political process and collective bargaining to push their demands.<sup>50</sup> Thus, the scope of bargaining should be narrow to assure that the clout of public employees does not become disproportionate to that of other citizens.<sup>51</sup>

Third, the structure of government is best suited to a narrow scope of bargaining. Government is complex, with power diffused among various levels, branches, departments, and decisionmaking bodies. It may be difficult to determine in some instances who has the authority to agree to and deliver particular contract terms to public employees.<sup>52</sup> Any scheme of public sector collective bargaining must accommodate this system of diffused authority, in part by limiting the scope of bargaining to what is practicable.

Fourth, public policy dictates that employment relations in the

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47. See H. WELLINGTON & R. WINTER, *supra* note 32, at 18.

48. See, e.g., Corbett, *supra* note 41, at 255; Kilberg, *supra* note 34, at 192-93; Sackman, *supra* note 41, at 160.

49. While the observation that collective bargaining differs from the political process is common, the implications drawn from the observation vary. See, e.g., Corbett, *supra* note 41, at 250 (institute balancing test weighing interests of employees and management's prerogatives or public interest); Summers, *supra* note 41, at 1192 (limit the scope of bargaining to areas where unions encounter massed resistance in political process). For a lengthy discussion of the role of the public's interest in scope of bargaining decisions, see Sackman, *supra* note 41, at 168.

50. See CONTEMPORARY BARGAINING, *supra* note 34, at 380; Summers, *supra* note 41, at 1160. *But see* Edwards, *supra* note 37, at 915 (political process meant to be a warring of various interest groups). The question remains open whether public employees shift their attention to collective bargaining and away from the political process once bargaining is made available.

51. See H. WELLINGTON & R. WINTER, *supra* note 32, at 25; *see also* Summers, *supra* note 41, at 1193 (craft scope of bargaining to reflect clout unions bear in standard political process).

52. See, e.g., Blair, *supra* note 41, at 8-9. The problem can be more or less acute. Compare, for example, the plight of a school board which has no independent means of raising revenues with a school board with taxing authority.

public sector be uniformly governed by a system based on merit, due process, and efficient government. Decades ago, these considerations led to the establishment of civil service systems, designed to eliminate inefficiency, extravagance, and arbitrariness.<sup>53</sup> Even if the civil service system per se were to yield to collective bargaining, some of its time-honored principles should survive and thereby constrict the scope of collective bargaining.

The fifth argument parallels the argument for private sector management rights: running the operation is so difficult that the employer needs maximum flexibility to make decisions. The difficulties of management in the public sector are due in part to the nature of politics and government, discussed above. In addition, government is now beleaguered by financial constraints, shrinking resources, increased demands for services, and a decline in public confidence.<sup>54</sup>

Altering the process of collective bargaining could provide a partial solution to the problems of accommodating collective bargaining to government employment.<sup>55</sup> Regardless of the method of bargaining used, however, the issue of defining its scope remains.

#### *D. Securing Labor Peace and Avoiding Disruption in Government Services*

Public sector labor statutes were enacted in large part to deal with actual or threatened unrest in government employment.<sup>56</sup>

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53. Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826 (1971).

54. Vaughn & Dozier, *supra* note 45; *see also* Ogilvie v. Independent School Dist. No. 341, Atwater, 329 N.W.2d 555 (Minn. 1983) (in scope of bargaining decision, supreme court acknowledges needs of government for flexibility to administer its programs).

55. PELRA sends negotiated contracts or arbitration awards to the political process for ratification. PELRA also provides that negotiation sessions are public unless authorized to be closed by the director. MINN. STAT. § 179.69, subd. 2 (1982); *see* Minnesota Educ. Ass'n v. Bennett, 321 N.W.2d 395 (Minn. 1982); *see also* MINN. STAT. § 471.705 (1982). PELRA's definition of "public employer" recognizes the structural difficulties inherent in government. *Id.* § 179.63, subd. 4. Finally, as noted above, PELRA provides for non-binding meet-and-confer on issues other than terms and conditions of employment.

One could, for example, provide for traditional collective bargaining on certain subjects and multi-party bargaining, including a panel of citizens, on broader policy questions. H. WELLINGTON & R. WINTER, *supra* note 32, at 150-51. Or, one could hold public hearings on tentative contracts or proposals. *Id.* at 152-53; CONTEMPORARY BARGAINING, *supra* note 34, at 396. Other possibilities include having a legislator serve on the bargaining team, Blair, *supra* note 41, at 18, and pattern bargaining across several units, Summers, *supra* note 41, at 1198.

56. Blair, *supra* note 41, at 5; H. WELLINGTON & R. WINTER, *supra* note 32, at 13.

Indeed, this was PELRA's genesis.<sup>57</sup> Services and products provided by government are widely viewed as essential or sensitive, in part because they truly are so and in part because they are provided by government.<sup>58</sup> Thus, strife in public sector labor relations, which may lead to disruption in government services, is widely viewed as something to avoid if possible.<sup>59</sup>

It is unclear how this concern for labor peace affects the scope of bargaining. Uncertainty about the scope of bargaining no doubt leads to frustration and probably to work stoppages in attempts to force the issues.<sup>60</sup> The uncertainty problem aside, opinions about the role of labor peace diverge. On the one hand, the more issues there are to bargain over, the more issues there are to strike over.<sup>61</sup> On the other hand, an expansive scope of bargaining may provide the opportunity for trade-offs and hence the striking of a bargain which could avert a work stoppage.<sup>62</sup>

The role played by the availability of the right to strike is equally unclear. The Minnesota Supreme Court has indicated that employees deprived of the right to strike deserve a broad scope of bargaining, apparently to compensate for the lack of this bargaining weapon.<sup>63</sup> The logic of this quid pro quo is debatable. The right to negotiate over a wide range of issues does not really compensate employees for the inability to make bargaining demands felt by striking legally.<sup>64</sup> In any event, strikes occur whether they are legal or illegal,<sup>65</sup> and the more important ques-

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57. PELRA grew out of a bitter teacher's strike in Minneapolis in 1970. Note, *supra* note 2, at 136; see also *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42 (Minn. 1979).

58. H. WELLINGTON & R. WINTER, *supra* note 32, at 18-19.

59. *But see* Sackman, *supra* note 41, at 163 (noting that public employees and the public are becoming more willing to "take" strikes).

60. Corbett, *supra* note 41, at 241.

61. *E.g.*, Kilberg, *supra* note 34, at 188.

62. *E.g.*, Blair, *supra* note 41, at 6.

63. *See, e.g.*, *International Bhd. of Teamsters, Local No. 320 v. City of Minneapolis*, 302 Minn. 410, 415, 225 N.W.2d 254, 257 (1975); *accord* *City of Richfield*, 276 N.W.2d 42, 47 (Minn. 1979); *Minneapolis Fed'n of Teachers v. Minneapolis Special School Dist. No. 1*, 258 N.W.2d 802, 805 (Minn. 1977).

64. One could also argue that other mandatory impasse resolution methods have the same effect as the strike. Edwards, *supra* note 37, at 922. Furthermore, there is reason to doubt that a change in the law on strikes would bring about a change in the law on scope of bargaining. Clark, *The Scope of the Duty to Bargain in Public Employment*, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 81, 98 (1981).

65. An example of an illegal strike is the Minneapolis teachers' strike of 1970. *See* Note, *supra* note 2, at 134. The sanctions available for violations of strike bans may make some difference. PELRA makes a strike in violation of PELRA an unfair practice, MINN.

tion is what scope will least incline employees to strike.

On balance, the better argument is that a relatively expansive scope of bargaining which encompasses subjects amenable to resolution through collective bargaining is most likely to lead to labor peace. This position assumes that frustration over not having a voice in employment decisions leads workers to strike, which indeed seems to be the case.<sup>66</sup>

### *E. A Workable Legal Framework*

It is one thing to formulate law which properly accommodates conflicting interests and policy considerations. It is quite another to craft law which works well for those it governs. Too often, our legal system creates abstract rules and regulations which prove confusing and counterproductive in application.<sup>67</sup>

At least three goals must be met in drafting workable law on the scope of public sector bargaining. First, rules or standards must be sufficiently straightforward to lead to readily discernible results. Accordingly, tests which are not self-defining should be defined or replaced.<sup>68</sup> The system of legal analysis should be as simple as possible.<sup>69</sup> Second, the law must afford a reasonable degree of flexibility. Public sector labor law is still a relatively new phenomenon<sup>70</sup> with many unanswered questions. In addition, public sector labor laws cover a wide range of employers and em-

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STAT. §§ 179.64, subd. 1(b), 179.68, subd. 3(11) (1982), and grounds for termination, *id.* § 179.64, subd. 2.

This Article does not resolve the major policy question of whether public sector strikes should be legal. The arguments in favor of the right to strike include the equity argument that public employees should be able to strike if private employees can and the concern that the strike is necessary for effective bargaining. A chief argument against legal public sector strikes is that they afford public employees undue clout given the essentiality of government services. Some would say this clout is incompatible with the public trust held by public employees.

66. For example, the air traffic controllers' strike against the Federal Aviation Administration in August of 1981 stemmed from the union's inability to negotiate matters of central concern to the controllers. See Murdock & Arnold, *The Congressional Mandate Against a Federal Strike: the Government's Enforcement of That Statutory Guidance*, 47 J. AIR L. & COM. 303, 308-09 (1982); Notis, *In Defense of PATCO*, 47 J. AIR L. & COM. 317, 332 (1982).

67. See Bok, *A Flawed System*, 85 HARV. MAG. 38 (1983).

68. See Edwards, *supra* note 37, at 914.

69. See H. WELLINGTON & R. WINTER, *supra* note 32, at 146 (pattern of laws affecting scope of bargaining is "bizarre").

70. The first step toward public sector bargaining occurred in New Hampshire in 1955. Blair, *supra* note 41, at 2. At the time of this writing, PELRA is only a dozen years old.

ployees whose interests and situations vary. Finally, no matter how well the law is drafted, disputes over the bargainability of particular subjects in particular cases will arise. Thus, the law must provide for a quick, efficient, and reasonably available method of resolving bargaining disputes.<sup>71</sup> This method should create a body of precedent to guide parties in the future as well.

The importance of establishing a workable legal framework must not be underestimated. In this sensitive area, where reasonable minds clearly differ and the law's preferred method of resolving disputes easily comes to a standstill, the law's guidance should be clear.

### III. THE SCOPE OF BARGAINING UNDER PELRA

#### A. Introduction

Defining the scope of bargaining in Minnesota is needlessly difficult. The law is intricate and ambiguous; it employs inconsistent doctrines and standards that defy definition. To compound the problem, the system for resolving bargaining disputes under PELRA is inefficient in producing solutions in particular cases and inadequate in facilitating the development of the law. Furthermore, the law does not always lead to sound results. In many areas, results are based on the application of technical legal rules rather than on the important policy considerations set forth in Part II.

This section is organized to parallel the analytical steps one must take to determine whether a proposed subject is bargainable. The bargainability of the subject depends first on whether PELRA limits or prohibits bargaining on the matter at issue. The next step entails a study of other state statutes and local ordinances and resolutions which touch on public employment and may operate to restrict the scope of bargaining. If PELRA or other state and local regulations do not proscribe bargaining on the subject, the inquiry extends to whether the subject is a "term or condition of employment" or an "inherent managerial policy." Bargaining is mandatory if the subject is determined to be a "term or condition of employment." Bargaining is permitted but not required if the subject is labeled an "inherent managerial policy." Unfortunately, the results of this analysis are not always clearcut. Thus, parties often resort to litigation to resolve bargaining disputes.

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71. See Edwards, *supra* note 37, at 927.

### B. *Statutory Limitations on the Scope of Bargaining*

Many contract terms in Minnesota public sector labor relations are not negotiated by the parties. Various laws, including PELRA, dictate certain contract terms and remove certain subjects from the scope of bargaining by vesting sole authority over those subjects in the government. This aspect of the law on the scope of bargaining under PELRA is the most problematic, although there are a few bright spots.

#### 1. *Terms Set by PELRA*

PELRA itself prescribes several contract terms. Contracts negotiated under PELRA are generally limited to terms of no more than three years.<sup>72</sup> All contracts must contain grievance procedures and provide for compulsory binding arbitration of grievances.<sup>73</sup> PELRA mandates union dues check-off for the exclusive representative,<sup>74</sup> and requires employers to afford reasonable time off to officers of exclusive representatives so they can fulfill their collective bargaining duties.<sup>75</sup>

These provisions stand in welcome contrast to the generally troublesome character of this area. Although setting terms by statute necessarily constricts the options available to negotiators, the terms required by PELRA are justifiable. These terms preserve collective bargaining and do not unduly infringe on those aspects

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72. Teacher contracts must have two-year terms and must begin on July 1st of odd-numbered years. There may be no wage reopeners. MINN. STAT. § 179.70, subd. 1 (1982); see *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42 (Minn. 1978) (arbitration award of survivorship clause limited to three years); *Skeim v. Independent School Dist. No. 115*, 305 Minn. 464, 234 N.W.2d 806 (1975) (two-year rule does not apply to individual teachers' contracts issued under MINN. STAT. § 125.12 (1982)); Op. Att'y Gen. 172-c (June 30, 1980) (§ 179.70, subd. 1 of the Minnesota Statutes prohibits mid-year renegotiation of compensation).

73. MINN. STAT. § 179.70, subd. 1 (1982). In the event the contract fails to contain these procedures, the grievance and arbitration procedure promulgated by the Director of Mediation Services is imposed. *Id.*

74. *Id.* § 179.65, subd. 5; see *Anoka-Hennepin Educ. Ass'n v. Anoka-Hennepin Indep. School Dist. No. 11*, 305 N.W.2d 326 (Minn. 1981). PELRA provides for a fair share fee for the exclusive representative. MINN. STAT. § 179.65, subd. 2 (1982); see *Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872*, 316 N.W.2d 551 (Minn. 1982), *appeal dismissed*, 103 S. Ct. 24 (1982) (fair share fee provisions satisfy due process requirements); see also *Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers, Local 872*, 307 Minn. 96, 239 N.W.2d 437 (1976), *vacated*, 424 U.S. 880 (1975) (similar litigation over previous system); Note, *Union Support by Nonunion Bargaining Unit Members in Minnesota Public Employment*, 10 Wm. Mitchell L. Rev. 267 (1984).

75. Officers also must be granted leaves of absence upon request. MINN. STAT. § 179.66, subd. 10 (1982).

of the employer-employee relationship best left to the parties' negotiations.<sup>76</sup> Furthermore, these provisions provide fairly clear rules for negotiators.<sup>77</sup>

## 2. *The Role of Other Laws*

### a. *Introduction*

PELRA was not written on a clean slate. When PELRA was enacted in 1971, the Minnesota Statutes contained many laws governing public employment,<sup>78</sup> and similar local ordinances and resolutions existed as well. Many of these state and local laws survived PELRA and remain in effect today.<sup>79</sup> The interaction of PELRA and these state and local laws has produced conflicts and confusion.

*General Drivers, Local 346 v. Aitkin County Board*<sup>80</sup> provides a glimpse into the types of laws which coexist with PELRA and the confusion that can result. *Aitkin County* involved the termination of three deputy sheriffs in three different counties and required the supreme court to evaluate the job security of each deputy. Two of the three sheriffs relied on a century-old statute which allows sheriffs to hire and fire deputies at will.<sup>81</sup> The third sheriff relied on compliance with the civil service system for deputy sheriffs which

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76. Although the substance of these provisions is for the most part unobjectionable, the provision setting contract terms provides a source of debate. The arguments for the statutory contract requirements include: safeguarding against unduly long contracts which become obsolete; providing for contract stability, in the case of the prohibition on reopeners; facilitating the coordination of negotiations with budget cycles; and confining potential labor unrest to times when the public can tolerate it. The chief argument to the contrary is that these provisions may call for disruptive renegotiation of a satisfactory contract. Furthermore, the reopener prohibition locks both parties into terms and hence contracts that may prove restrictive. See *City of Richfield*, 276 N.W.2d at 48; Op. Att'y Gen. 172-c (June 30, 1980).

77. These provisions, however, are scattered throughout PELRA. None is found in the basic sections on the scope of bargaining. The four terms listed are found in three different parts of PELRA. Once they are located, these provisions are generally easy to understand. The major exception is the provision requiring grievance and arbitration procedures. Section 179.70, subdivision 1 requires the "arbitration of grievances including all disciplinary actions." MINN. STAT. § 179.70, subd. 1 (1982). This language provides that arbitration of grievances is not limited to disciplinary actions but gives no indication as to other subjects which must be arbitrated.

78. Public sector collective bargaining did exist prior to PELRA, but not in a comprehensive form. See Note, *supra* note 2, at 134-35.

79. One informal survey of the 1982 Minnesota Statutes by the author yielded a count of seventy statutes directly touching on various public employees' terms of employment.

80. 320 N.W.2d 695 (Minn. 1982).

81. MINN. STAT. § 387.14 (1982).

his county had adopted pursuant to state law.<sup>82</sup> One of the deputies was a veteran who claimed Veterans Preference rights under yet another Minnesota statute.<sup>83</sup> Finally, the three deputies relied on collective bargaining agreements negotiated pursuant to PELRA.<sup>84</sup>

As this case demonstrates, other laws can have a considerable impact on the scope of bargaining. If other laws prevailed over PELRA, the scope of bargaining would constrict markedly. For example, a deputy's job security in effect would not be bargainable if the sheriffs statute prevailed over any agreement covering the deputy. The job security provisions of a contract would have to allow for Veterans Preference rights if that statute prevailed over PELRA.

Civil service systems may have an especially great impact on the scope of bargaining. Such systems typically encompass many subjects covered by collective bargaining.<sup>85</sup> The statute creating the civil service system in *Aitkin County*, for example, includes the following matters: classification of employees, promotion procedures, suspensions,<sup>86</sup> grounds for removal from employment, procedures for contesting removals,<sup>87</sup> and "[s]uch other rules" as may be needed to accomplish the purposes of the system.<sup>88</sup>

The present system for accommodating collective bargaining and other statutes can best be understood by referring first to pertinent PELRA provisions, then to judicial decisions which grapple with those provisions, and finally to other statutes which have been revised to accommodate PELRA.

#### b. *PELRA Provisions*

Several PELRA provisions<sup>89</sup> touch on the relationship between

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82. *See id.* §§ 387.31-.45.

83. *See id.* § 197.46.

84. The result: The sheriffs statute is superseded by any of the other three—the civil service system, the Veterans Preference statute, and the collective bargaining agreements. The civil service system and the agreement coexist, giving the employee his choice between the two. The veteran could claim the protections of both the collective bargaining agreement and the Veterans Preference statute, although only the agreement's procedures need be followed if the agreement incorporates Veterans Preference rights. *Aitkin County*, 320 N.W.2d at 699-702. For a more detailed discussion of the court's reasoning, see *infra* notes 112-14 and accompanying text.

85. *See* Comment, *supra* note 53, at 826; Rehms, *supra* note 36, at 927.

86. MINN. STAT. § 387.36 (1982).

87. *Id.* § 387.41.

88. *Id.* § 387.36.

89. One PELRA provision which accommodates collective bargaining and other stat-

PELRA contract terms and state and local statutory and regulatory law. The chief provision, section 179.66, subdivision 5 of the Minnesota Statutes,<sup>90</sup> provides:

Any provision of any contract required by section 179.70, which of itself or in its implementation would be in violation of or in conflict with any statute of the state of Minnesota or rule or regulation promulgated thereunder or provision of a municipal home rule charter or ordinance or resolution adopted pursuant thereto, or rule of any state board or agency governing licensure or registration of an employee, provided such rule, regulation, home rule charter, ordinance, or resolution is not in conflict with sections 179.61 to 179.66, shall be returned to the arbitrator for an amendment to make the provision consistent with the statute, rule, regulation, charter, ordinance or

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utes is section 179.63, subdivision 4, which contains the definition of "employer." *Id.* § 179.63, subd. 4. This section was at issue in *Aitkin County*. As then written, the definition made the county board, which served as the PELRA employer, the "governing body" with final budgetary authority. The section also provided that the sheriff, as the appointing authority, retained whatever power was consistent with the collective bargaining agreement. The court found that the collective bargaining agreements were valid; they had been negotiated by the county boards, although not by the sheriffs. *Aitkin County*, 320 N.W.2d at 705 (the opinion of Judge Thomas J. Stahler of the Eighth Judicial District was incorporated by the court). Under section 179.63, subdivision 4, PELRA and hence the collective bargaining agreements prevailed over the sheriffs statute. *Id.* at 700.

The *Aitkin County* problem is not peculiar to the employment relationship between deputy sheriffs and their employers. In *Arrowhead Regional Corrections Board v. Graff*, 321 N.W.2d 53 (Minn. 1982), the court followed *Aitkin County* in a case involving the termination of a probation officer by a judge. At issue was Minnesota Statutes section 260.311, subdivision 1. *Id.* Similar conflicts probably exist between other statutes and collective bargaining agreements. *See, e.g.*, MINN. STAT. § 384.08 (1982) (deputy county auditors); *id.* § 385.02 (deputy county treasurers); *id.* § 388.10 (assistant county attorneys); *id.* § 487.10 (deputy county clerks of court); *see also id.* § 179.66, subd. 1 (restrictions against contracts which limit the right to hire supervisory employees or state managers); *id.* § 179.66, subd. 6 (legislature retains right to establish compensation for its employees).

The legislature amended the definition of "public employer" in 1982. Act of March 22, 1982, ch. 588, § 1, 1980 Minn. Laws 1341-42. This amendment occurred while the Minnesota Supreme Court was considering *Aitkin County*. The statute now indicates that the governing body of a government unit is the PELRA employer, notwithstanding laws such as the sheriffs statute, and that the views of "appointing authorities" must be considered by the PELRA employer. Unfortunately, there are some inconsistencies. The "appointing authority" referred to in section 179.63, subdivision 4 is defined as the person who has standing to institute interest arbitration. MINN. STAT. § 179.63, subd. 4 (1982). County boards acting as employers have standing to institute interest arbitration under PELRA. *Id.* § 179.69, subs. 3, 3a. In addition, it is unclear what happens if the views of the appointing authority are not sought.

90. For a brief time, this provision was ungrammatical and hence nonsensical. *See International Bhd. of Teamsters, Local No. 320 v. City of Minneapolis*, 302 Minn. 410, 225 N.W.2d 254 (1975).

resolution.<sup>91</sup>

A parallel provision provides that decisions of arbitration panels which violate state statutes and local regulations or ordinances shall have no force or effect.<sup>92</sup>

Early in PELRA's history, the Minnesota Supreme Court construed section 179.66, subdivision 5 to be a general prohibition on contract terms which conflict with the public employers' home rule charter.<sup>93</sup> The court also determined that the section operates to limit the scope of bargaining.<sup>94</sup> More recently, the court affirmed that although the employer must honor its contractual obligations to the fullest extent possible, PELRA and collective bargaining agreements do not supersede the sources of law listed in the section.<sup>95</sup> For example, an employer which has agreed to negotiate over terms covered by a civil service system can do so, but cannot agree to terms which violate the civil service system.<sup>96</sup>

Section 179.66, subdivision 5, a crucial section of PELRA, is poorly drafted. The statutory language does not say what it intends or at least what the courts have construed it to say—that other laws override PELRA. Furthermore, the statutory language proves vague in application. For example, while a contract provision calling for a school year of 175 days would clearly “conflict with” a statute requiring 180-day school years, it is unclear whether the same provision would conflict with a statute giving school boards the responsibility of setting school calendars.

The difficulty with section 179.66, subdivision 5 goes beyond poor draftsmanship. The provision creates a blanket override, regardless of the law involved. It places substantial restrictions on bargaining based on the mere existence of other laws. Such restrictions complicate bargaining by diverting the parties' attention from bargaining to legal proscriptions and hamper their ability to

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91. MINN. STAT. § 179.66, subd. 5 (1982).

92. *Id.* § 179.72, subd. 7. In two respects the provisions are not parallel: 1) section 179.66, subdivision 5 lists rules governing licensure of employees, while section 179.72, subdivision 7 does not, and 2) section 179.72, subdivision 7 speaks of incurring penalties under the listed laws, while section 179.66, subdivision 5 speaks only of violations of the listed terms. *See also id.* § 179.70, subd. 5 (arbitration decisions subject to section 179.72, subd. 7). Section 179.72, subdivision 7 also applies to grievance arbitration decisions. *Id.* § 179.72, subd. 7.

93. *Teamsters*, 302 Minn. at 417-18, 225 N.W.2d at 258-59.

94. *Id.* at 418, 225 N.W.2d at 259.

95. *See Minnesota Arrowhead Dist. Council 96 of AFSCME v. St. Louis County*, 290 N.W.2d 608, 612 (Minn. 1980).

96. *Id.*

make trade-offs and exchange views. These restrictions serve no useful purpose unless they are justified by policy concerns, such as assuring political resolutions of fundamentally political problems or reserving authority to an appropriate governmental entity. Clearly, not all laws deserve to override collective bargaining. For example, providing veterans with preferential employment rights may comport with Minnesota's public policy, regardless of what employers and employees may wish. But it is incongruous to provide for collective bargaining for deputies while retaining the powerful unilateral control sheriffs have over the employment of deputies under the sheriffs statute.

The blanket override function afforded local legislation under section 179.66, subdivision 5 is particularly questionable. The state legislature can properly institute checks on the system of collective bargaining it created; it is another matter for local bodies to institute such checks or to opt out of the collective bargaining system altogether. PELRA clearly grants full collective bargaining rights to local employees<sup>97</sup> at their option, rather than at the option of their employers.<sup>98</sup>

The counterargument—that failing to allow local legislative preemption of collective bargaining impermissibly affronts local autonomy—is easily rebutted. Most matters deemed to be of overriding importance to local governments are likely to be covered by state statutes, which more properly supersede collective bargaining, or qualify as permissive subjects.<sup>99</sup> Other matters should yield to the superior state policy favoring collective bargaining. In any event, local employers remain free to resist making concessions.<sup>100</sup>

This flaw in section 179.66, subdivision 5 is ameliorated by the 1983 amendment to section 179.66, subdivision 2, which sets out the general requirement that employers meet and negotiate:

The public employer's duty under this subdivision exists notwithstanding contrary provisions in a municipal charter, ordinance, or resolution. A provision of a municipal charter, ordinance, or resolution which limits or restricts a public

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97. Local employees are covered by PELRA, as are state employees. MINN. STAT. § 179.63, subs. 4, 7 (1982).

98. A collective bargaining relationship comes into being when employees so choose. *See id.* § 179.67.

99. For a discussion of permissible subjects, see *supra* notes 162-66 and accompanying text.

100. PELRA does not require that a party make concessions to meet the test of bargaining in good faith. MINN. STAT. § 179.63, subd. 16 (1982).

employer from negotiating or from entering into binding contracts with exclusive representatives is superseded by this subdivision.<sup>101</sup>

This amendment appears to repeal the statutory and regulatory override of subdivision 5 insofar as local legislation is concerned.

While this amendment moves in the right direction, it lacks clarity. The amendment can be read to forbid only local ordinances which opt out of collective bargaining altogether, or it can be construed to forbid ordinances which set employment terms which should be bargained. Furthermore, subdivision 5 as construed and the amendment to subdivision 2 conflict regarding local legislation.

In one respect, PELRA calls for the coexistence of collective bargaining and other laws. Section 179.70, subdivision 1 provides that employees covered by civil service and collective bargaining agreements have their choice between civil service appeals and grievance arbitration of adverse disciplinary decisions.<sup>102</sup> This section is noteworthy because it seeks to accommodate collective bargaining and the system existing prior to PELRA.<sup>103</sup> It represents a more refined approach to this general problem than do the blanket rules under subdivisions 2 and 5 of section 179.66. Furthermore, section 179.70, subdivision 1 is well-drafted. Unfortunately, its relationship to section 179.66, subdivisions 5 and now 2 is not expressed in the statute.

As a review of the above statutory sections indicates, the sections of PELRA which seek to define its relationship with other laws are scattered throughout the statute. None are readily detectable as provisions affecting the scope of bargaining.<sup>104</sup> The awkward placement of these provisions aggravates the difficulty encountered in interpreting them.

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101. Act of May 23, 1983, ch. 364, 1983 Minn. Laws 2767.

102. Once the employee has made his or her choice, that election is binding. The provision does not require employers or unions to bargain on matters other than terms and conditions of employment. MINN. STAT. § 179.70, subd. 1 (1982).

103. At least, this is the accommodation made between state civil service and collective bargaining. *Cf. id.* §§ 43A.01-.47 (state civil service act). One could argue that, under the amended section 179.66, subdivision 2, civil service systems created by local law are contrary to collective bargaining agreements and defer to those agreements. On the other hand, one could argue that the appeals aspect of local civil service systems is not contrary under section 179.66, subdivision 2, in light of section 179.70, subdivision 1's express accommodation, and thus that the two coexist.

104. For example, the provision on civil service systems is tucked away in a section on grievance arbitration. *See id.* § 179.70, subd. 1.

*c. Case Law*

Given the confusing interaction between PELRA and other state and local laws, it is not surprising that the case law under this aspect of PELRA is confusing as well. A brief survey of the cases decided before the amendment to section 179.66, subdivision 2 underscores the criticisms of the statute set forth above. In one line of cases, the court has found collective bargaining not to conflict with other laws. In a second line of cases, limits are placed on the scope of bargaining by other laws.

In several cases, collective bargaining has prevailed for various reasons notwithstanding other laws. In *International Brotherhood of Teamsters, Local No. 320 v. City of Minneapolis*,<sup>105</sup> the parties were allowed to negotiate over written reprimands in the absence of a controlling city charter provision.<sup>106</sup> In *International Union of Operating Engineers, Local No. 49 v. City of Minneapolis*,<sup>107</sup> the court found that rules promulgated by the Minneapolis Civil Service Commission under its authority granted by the Minneapolis charter did not limit the city's duty to provide information, since the rules are not a source of law listed as superseding collective bargaining.<sup>108</sup> In *Skeim v. Independent School District No. 115*,<sup>109</sup> the court found that a state statute granted the school board the authority to conduct school on Columbus Day.<sup>110</sup> In dictum, the court indicated that teaching on legal holidays could be bargainable.<sup>111</sup> In *Aitkin County*, the court again refused to allow the existence of other laws to limit the scope of bargaining under PELRA.<sup>112</sup> The supreme court held that the deputy claiming rights under the Veterans' Preference Act was entitled to both the protections of that statute and his rights under the collective bargaining agreement.<sup>113</sup> The court also allowed a deputy to choose between the protection of

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105. 302 Minn. 410, 225 N.W.2d 254 (1975).

106. *Id.* at 418, 225 N.W.2d at 259.

107. 305 Minn. 364, 233 N.W.2d 748 (1975).

108. *Id.* at 371-72, 233 N.W.2d at 754. The rules pertained to the Commission's duty to release data about competitive exams.

109. 305 Minn. 464, 234 N.W.2d 806 (1975).

110. *Id.* at 470-71, 234 N.W.2d at 811; *see* MINN. STAT. § 126.13 (1982).

111. 305 Minn. at 464, 234 N.W.2d at 811. The court ruled that the teachers' individual contracts, which had provided for school on Columbus Day, were enforceable even though the teachers had selected an exclusive bargaining representative; there was no collective bargaining agreement. *Id.*

112. 320 N.W.2d 695 (Minn. 1982).

113. *Id.* at 701. Since the collective bargaining agreement had incorporated his Veterans' Preference rights, the court held that proceeding under the grievance procedure in the collective bargaining agreement would suffice. *Id.*

the civil service system or the collective bargaining agreement.<sup>114</sup> Thus, in some cases the court has followed the technical rules of PELRA to find in favor of collective bargaining, while in other cases, the court's decision in favor of collective bargaining is not readily explainable.

The second line of cases demonstrates a contrary approach. In these cases, the court has allowed the existence of other laws to restrict the scope of bargaining under PELRA. In *Teamsters*, for example, a Minneapolis city charter provision allowing thirty-day suspensions without a hearing operated to bar negotiations on suspensions.<sup>115</sup> In *Minnesota Arrowhead District Council 96 of AFSCME v. St. Louis County*,<sup>116</sup> the St. Louis County civil service system, which classified employees and set wage scales, was held to restrict the scope of bargaining.<sup>117</sup> Both cases represent a relatively straightforward application of section 179.66, subdivision 5.

As these cases demonstrate, the case law in this area is confusing for two reasons. The law's present approach, while capable of yielding answers, is based not on a sound judgment of what collective bargaining should encompass, but rather on the application of technical legal rules and the fortuity of other existing laws.<sup>118</sup> Why parties should be allowed to negotiate over written reprimands, but not over thirty-day suspensions, is inexplicable. It is illogical to include competitive exams within the scope of bargaining while excluding wage scales.

In addition, the opinions in these cases do not further the rational development of the law. In *Skeim*, for example, there is virtually no analysis of why the Columbus Day statute allows bargaining over school holidays. Nor is there any significant analysis of the Veterans Preference question in *Aitkin County*. The supreme court has not yet elucidated what constitutes a "conflict" or "violation" under section 179.66, subdivision 5. One suspects that the weaknesses in the case law testify to the foibles of PELRA's provisions in this area.

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114. *Id.* at 702.

115. 302 Minn. at 418, 225 N.W.2d at 259.

116. 290 N.W.2d 608 (Minn. 1980).

117. *Id.* at 611.

118. One could argue that the existence of a law which prevails over PELRA attests to the decision of lawmakers that the law ought to set the terms governed by the statute. This may be true in some cases, but many laws which conflict with PELRA pre-date PELRA. In any event, it is unclear from the face of many of the laws at issue that the precedence of these laws is based on the policy considerations discussed in Part I. *See supra* notes 30-66 and accompanying text.

*d. Accommodations Made in Other Statutes*

The problem of integrating collective bargaining and other laws has been approached, to a limited degree, from the other direction. Other statutes have been amended to accommodate PELRA.<sup>119</sup> This approach is another bright spot in this area of the law.

One example is provided by Minnesota's general teacher tenure statute.<sup>120</sup> The hiring and tenuring of a teacher are governed solely by statute.<sup>121</sup> The statute contains exclusive substantive and procedural provisions for almost all of the grounds on which a teacher's employment may be terminated.<sup>122</sup> The statute, however, allows collective bargaining agreements to govern unrequested leaves of absence due to cutbacks in staff;<sup>123</sup> absent an agreement, the statute provides the rules.<sup>124</sup> This accommodation of collective bargaining is not, however, made for first-class city teachers.<sup>125</sup> Thus, the statutory system of teacher tenure accommodates collective bargaining only to a limited extent.<sup>126</sup>

A much more extensive integration of collective bargaining and other statutes is found in chapter 43A of the Minnesota Statutes,<sup>127</sup> the state civil service statute. Chapter 43A creates a complete civil service system which governs certain terms of employment for all state civil servants. Other terms set out in the statute yield to collective bargaining agreements where they exist and apply where there is no agreement. The accommodation is indicated by statements throughout the chapter that collective

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119. Two rules of construction govern the accommodation of PELRA and other statutes: (1) the specific provision controls the general or (2) the non-PELRA statutes no longer conflict with PELRA under section 179.66, subdivision 5. *See* MINN. STAT. § 179.66, *subd.* 5 (1982).

120. *Id.* § 125.12. Section 125.12 governs most teachers, although teachers in first class city school districts are excluded. *Id.* § 125.12, *subd.* 13. Section 125.17 covers teachers in first class city school districts. *Id.* § 125.17; *see* *Skeim v. Independent Dist. No. 115*, 305 Minn. 464, 234 N.W.2d 806 (1975) (individual contracts under section 125.12 co-exist with collective bargaining agreements).

121. MINN. STAT. § 125.12, *subs.* 2-4 (1982).

122. Such grounds include retirement, inefficiency or neglect of duties, gross misconduct, or the illness of the teacher. *See id.* § 125.12, *subs.* 5-8.

123. *Id.* § 125.12, *subd.* 6a.

124. *Id.* § 125.12, *subd.* 6b.

125. This matter is covered exclusively by statute. *See id.* § 125.17, *subd.* 11.

126. *See id.* § 125.12, *subd.* 2 (individual contracts required except where "master agreement" exists); *id.* § 125.12, *subd.* 4 (timing of termination letters tied into negotiations); *id.* § 125.12, *subd.* 14 (collective bargaining grievance procedure used to contest personnel files). Section 125.17, subdivision 12 parallels section 125.12, subdivision 14—the only accommodation made in section 125.17 to collective bargaining.

127. *Id.* §§ 43A.01-47.

bargaining agreements supersede the statutory terms.<sup>128</sup> For example, collective bargaining agreements may cover the classification of positions and the establishment of salary ranges;<sup>129</sup> compensation, subject to state policies calling for nondiscrimination, parity, and merit pay;<sup>130</sup> and procedures for challenging discipline and discharges, although the definition of just cause is set by statute.<sup>131</sup> Yet, in areas such as affirmative action,<sup>132</sup> political activities,<sup>133</sup> and retirement,<sup>134</sup> collective bargaining is given no role. In some respects, collective bargaining and the previous system have been combined.<sup>135</sup> Although one can criticize the lines drawn in some areas,<sup>136</sup> chapter 43A constitutes a more-refined and, hence, better accommodation of collective bargaining and civil service than is generally found in Minnesota.<sup>137</sup>

The approach taken by the teacher tenure statute and chapter 43A are preferable to PELRA's blanket override. Amending other statutes to accommodate collective bargaining allows for, indeed requires, careful thought about what collective bargaining should encompass. The policies underlying collective bargaining can best be considered in a clear and specific statutory framework.

#### *e. Summary*

Fitting collective bargaining into a pre-existing system of civil service and other laws touching on public employment was not destined to be an easy task. Unfortunately, the efforts of the past twelve years have not produced a viable solution. The PELRA provisions on this crucial matter are poorly drafted and inconsis-

128. *See id.* § 43A.01(2). This subsection provides that collective bargaining agreements supersede certain listed sections only to the extent expressly permitted in those sections. This provision is puzzling, because it is unclear whether PELRA contracts may supersede sections not listed.

129. *Id.* § 43A.07(2).

130. *Id.* §§ 43A.18, 43A.01(2), (3), 43A.20.

131. *Id.* § 43A.33(2), (3).

132. *Id.* § 43A.19.

133. *Id.* § 43A.32.

134. *Id.* § 43A.34.

135. *See, e.g., id.* § 43A.05(5) (monies to ameliorate inequities in pay among male-dominated and female-dominated jobs are allocated by legislature to bargaining units and disbursed within units according to collective bargaining agreements).

136. *See id.* § 43A.16 (sets parameters on probationary periods). It is unclear why this should not be entirely subject to negotiation.

137. As *Teamsters, Operating Engineers, and Arrowhead Council 96* demonstrate, other civil service systems have not undergone this reform. *See also id.* §§ 44.01-.16 (basic municipal civil service system). After the amendments to section 179.66, subdivision 2, the status of these systems is an open question.

tent. The law's general thrust—the blanket override of collective bargaining—is ill-advised, since it tends to ignore or gloss over the policy considerations underlying collective bargaining.

There are, however, some signs of improvement: the amendment to section 179.66, subdivision 2, which acknowledges that local law should not prevail over collective bargaining, and the accommodation of collective bargaining found in chapter 43A. These recent changes represent a more refined approach to the problem of defining PELRA's relationship to other laws. Part IV of this Article recommends that the law build on these first steps toward a more rational system.

### *C. Terms and Conditions of Employment Versus Inherent Managerial Policies*

If no law prohibits bargaining on a subject, the subject is bargainable. The question then arises whether the subject is mandatory or permissive. If the subject is mandatory, a party must bargain over it if the other party so requests. If the subject is permissive, a party may bargain over it at the request of the other party, but is not required to do so. Under PELRA, "terms and conditions of employment" comprise the category of mandatory subjects and "inherent managerial policies" comprise the category of permissive subjects. For the most part, the legislature has left the difficult task of drawing the line between the two categories to the courts.

#### *1. The Statutory Categories and Their Significance*

PELRA obligates employers and exclusive representatives to meet and negotiate<sup>138</sup> over "terms and conditions of employment."<sup>139</sup> Section 179.63, subdivision 18 defines "terms and conditions of employment" as:

[T]he hours of employment; the compensation therefor including fringe benefits except retirement contributions or benefits, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district. The terms in both cases are subject to the provisions of

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138. "Meet and negotiate" entails meeting at reasonable times with the good faith intent of entering into an agreement. *Id.* § 179.63, subd. 16.

139. *Id.* § 179.65, subd. 4 (employees' obligation); *id.* § 179.66, subds. 2, 4 (employer's obligation). Both parties are also obligated to negotiate regarding grievance procedures.

section 179.66 regarding the rights of public employers and the scope of negotiations.<sup>140</sup>

Section 179.66, subdivision 1 provides:

A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel . . . .<sup>141</sup>

PELRA makes clear that bargaining over terms and conditions is mandatory, while bargaining over managerial policies is permissive. The parties have the "obligation" to negotiate over terms and conditions,<sup>142</sup> while the employer "is not required" to negotiate over managerial policies.<sup>143</sup> Although the Minnesota Supreme Court at first seemed to view matters of managerial policy as non-negotiable,<sup>144</sup> the court now holds that bargaining may occur over such matters if the employer so chooses.<sup>145</sup> Thus, there are two classes of bargaining subjects under PELRA, mandatory terms and conditions and permissive managerial policies.<sup>146</sup>

The statutory language has several flaws. As a technical matter, the sentence in section 179.63, subdivision 18 excluding "educational policies of a school district" from the terms and conditions of professional employees<sup>147</sup> is incongruous; some professional em-

140. *Id.* § 179.63, subd. 18.

141. *Id.* § 179.66, subd. 1. The section also provides that public employers may not limit their rights to select supervisory employees or state managers. *See id.*

142. *Id.* §§ 179.65, subd. 4, 179.66, subds. 2, 4.

143. *Id.* § 179.66, subd. 1. It should be noted that the employer chooses whether to negotiate over managerial policies. There is no comparable category controlled by the exclusive representative. Furthermore, contracts may contain terms and conditions of employment and "such other matters as may be agreed upon." *Id.* § 179.70, subd. 1.

144. *Minneapolis Fed'n of Teachers v. Minneapolis Special School Dist. No. 1*, 258 N.W.2d 802, 804, 806 (Minn. 1977).

145. *Minnesota Arrowhead Dist. 96 v. St. Louis County*, 290 N.W.2d 608, 611 (Minn. 1980); *see also St. Paul Fire Fighters, Local 21 v. City of St. Paul*, 336 N.W.2d 301, 302-03 (Minn. 1983); *Arrowhead Public Serv. Union v. City of Duluth*, 336 N.W.2d 68, 71-72 (Minn. 1983).

146. PELRA also requires professional employees and their employers to meet and confer over matters not considered terms and conditions of employment. *See MINN. STAT.* §§ 179.65, subd. 3, 179.66, subd. 3 (1982); *see also id.* § 179.73. Thus, for professional employees the categorization of a subject determines whether bargaining must occur over the subject—not whether it is foreclosed from mandatory discussion altogether. However, meet-and-confer has relatively little substance to it. For example, it is not an unfair practice to refuse to meet and confer, although it is unfair to refuse to meet and negotiate. *Id.* § 179.68. Thus, the more important question is the scope of meet-and-negotiate.

147. *Id.* § 179.63, subd. 18.

ployees do not work for school districts, and no similar express exclusion is made for them.<sup>148</sup> Moreover, while an attempt has been made to define the two terms by providing examples, the examples are no more self-defining than are “terms and conditions” or “inherent managerial policies.” Finally, sections 179.63 and 179.66 define two categories which should be mutually exclusive in such a way that there is significant overlap. An item which has to do with the “selection . . . of personnel,” for example, is almost certain to “affect the working conditions of employees.”<sup>149</sup>

Furthermore, the wisdom of the basic stance taken by PELRA—that there be mandatory and permissive subjects—is subject to debate. Collective bargaining becomes more complicated because the parties must take into account a fine legal line. Perhaps the parties should be obligated to discuss all items not precluded by other laws and decide between themselves the terms of the contract.<sup>150</sup> If the distinction is to be retained, it should be as clear as possible, while still providing flexibility to cover many different situations. The resolution of this debate thus depends on how well the line is drawn.

## 2. *Drawing the Line Between the Categories*

### a. *Introduction*

Since PELRA's enactment, the line drawn between terms and conditions and inherent managerial policies, or between mandatory and permissive subjects,<sup>151</sup> has been a fertile ground for

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148. Whether retirement benefits should be excluded from terms and conditions is a policy question open to debate. The exclusion reflects the fact that government employee pension and retirement programs are governed by statute. *Id.* chs. 352, 352A, 352B, 352C, 352D, 353. While the exclusion no doubt provides standardization and centralization, and may produce cost savings and a method of controlling corruption, it also removes from bargaining a major aspect of the employment relationship.

This provision has yielded an unusual scope of bargaining case. In *AFSCME Councils 6, 14, 65 and 96, AFL-CIO v. Sundquist*, the supreme court concluded that the language excepting retirement contributions from terms and conditions renders retirement matters illegal subjects of bargaining. 338 N.W.2d 560, 563 (Minn. 1983). The case arose when the legislature changed the contributions of public employees into public pensions as a result of a state fiscal crisis.

149. Section 179.63, subdivision 18 ends with a reference to section 179.66. This reference could be interpreted as indicating that in doubtful situations, the subject at issue is not a term or condition of employment. Thus far, this reference has not been viewed as a method of resolving the overlap problem.

150. See Edwards, *supra* note 37, at 916; Kilberg, *supra* note 34, at 182.

151. Several Minnesota Supreme Court decisions raise the question whether there truly is a line between the two statutory categories. Although early in PELRA's history the court recognized a dividing line, the current view seems to be that there is an area

litigation. A catalogue of litigated issues exposes the trouble spots. The Minnesota Supreme Court has held the following to be terms and conditions of employment or mandatory bargaining subjects:<sup>152</sup> disciplinary matters,<sup>153</sup> the fairness of exams used for promotions,<sup>154</sup> the criteria used to transfer teachers within a school district,<sup>155</sup> a survivorship clause,<sup>156</sup> subcontracting and the effects of the employer's subcontracting of union work,<sup>157</sup> the impact of a decision to divest certain positions of administrative functions,<sup>158</sup> the criteria and procedures used to transfer a teacher to another school district,<sup>159</sup> the adoption of criteria for selection of employees for a training program,<sup>160</sup> and the pay and work hours for trainees.<sup>161</sup> On the other hand, the court has held the following not to be terms and conditions of employment and hence permissible bargaining subjects: the decision to use competitive exams for promotions,<sup>162</sup> the decision to transfer teachers within a school district,<sup>163</sup> the procedure used to divest administrative functions from certain positions,<sup>164</sup> lay-offs due to financial problems or lack of

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where the two overlap. The latter view derives from the court's parsing a subject into a decision, its implementation, and its effect on employees. See *infra* notes 185-200 and accompanying text; see also *St. Paul Fire Fighters*, 336 N.W.2d at 305-07. Whatever the answer to this fine semantic question, there clearly is a line between permissive and mandatory subjects.

152. Some earlier cases used the terminology of the statute, while later cases used the terms "mandatory" or "permissive." Earlier cases are also unclear regarding the negotiability of managerial policies.

153. *International Bhd. of Teamsters, Local No. 320 v. City of Minneapolis*, 302 Minn. 410, 225 N.W.2d 254 (1975).

154. *International Union of Operating Eng'rs, Local No. 49 v. City of Minneapolis*, 305 Minn. 364, 233 N.W.2d 748 (1975).

155. *Minneapolis Fed'n*, 258 N.W.2d at 804.

156. *City of Richfield*, 276 N.W.2d at 42.

157. *General Drivers Union, Local 346 v. Independent School Dist. No. 704, Proctor School Bd.*, 283 N.W.2d 524 (Minn. 1979). The parties agreed that the subcontracting itself was a mandatory subject. *Id.* at 527.

158. *Minneapolis Ass'n of Adm'rs & Consultants v. Minneapolis Special School Dist. No. 1*, 311 N.W.2d 474 (Minn. 1981).

159. *Ogilvie v. Independent School Dist. No. 341, Atwater*, 329 N.W.2d 555 (Minn. 1983); see also *Minnesota Fed'n of Teachers, Local 331 v. Independent School Dist. No. 361*, 310 N.W.2d 482, 485 (Minn. 1981) (Simonett, J., concurring) (impacts of change in teacher workload are term and condition of employment).

160. *St. Paul Fire Fighters*, 336 N.W.2d at 301.

161. *Id.*

162. *Operating Engineers*, 305 Minn. at 364, 233 N.W.2d at 748.

163. *Minneapolis Fed'n*, 258 N.W.2d at 802.

164. *Minneapolis Adm'rs*, 311 N.W.2d at 474; see also *Minnesota Fed'n Local 331*, 310 N.W.2d at 482 (teaching load is not term or condition of employment).

work,<sup>165</sup> and the decision to have a training program and its content.<sup>166</sup>

As the catalogue demonstrates, most of the issues litigated concern work assignment or job security. While these subjects are important to the parties and thus likely to produce litigation, it is troublesome that litigation occurs frequently over a relatively narrow range of subjects. This pattern suggests that the law under PELRA has not stabilized into principles or analyses which lead to predictable results.

In some cases, the court has relied on the statutory language, unembellished by analogies or presumptions.<sup>167</sup> In many instances, however, the statutory language is susceptible to various interpretations. Hence, the court has developed aids to construction of the two provisions.

*b. The Presumption in Favor of a Liberal Scope of Bargaining*

Early in PELRA's history, the court determined that PELRA requires a broad scope of mandatory bargaining:

A major purpose of PELRA is to further the resolution of labor disputes through negotiation. Because of the severe restrictions on strikes contained in the act, we believe that the legislature intended the scope of the mandatory bargaining area to be broadly construed so that the purpose of resolving labor disputes through negotiation could best be served.<sup>168</sup>

The quid pro quo drawn by the court between strike rights and the scope of bargaining is not entirely convincing. A broad scope of bargaining does not necessarily compensate for a weak bargaining position. In addition, since 1975, when the quid pro quo was suggested, the right to strike under PELRA has expanded significantly.<sup>169</sup> Furthermore, strike rights for different types of employ-

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165. *City of Duluth*, 336 N.W.2d at 71-72.

166. *St. Paul Fire Fighters*, 336 N.W.2d at 302-03.

167. *E.g.*, *Minneapolis Adm'rs*, 311 N.W.2d at 476 (decision to divest administrative functions goes to "organizational structure and the selection and direction and number of personnel"); *City of Richfield*, 276 N.W.2d at 49 (survivorship clause affects the welfare of the employees); *Minneapolis Fed'n*, 258 N.W.2d at 805 (decision to transfer teachers goes to direction of personnel, but criteria affect employees' welfare); *Teamsters*, 302 Minn. at 416, 225 N.W.2d at 257 (disciplinary matters affect the employees' working conditions).

168. *Teamsters*, 302 Minn. at 414, 225 N.W.2d at 257 (citation omitted); accord *City of Richfield*, 276 N.W.2d at 49; *Minneapolis Fed'n*, 258 N.W.2d at 805.

169. Originally, PELRA provided for the termination of any employee who participated in a strike. A 1973 amendment provided for a legal strike when the employer refused to arbitrate or comply with an arbitral award. See *Teamsters*, 302 Minn. at 415, 225

ees vary dramatically. Confidential, essential, managerial, and supervisory employees, for example, may not strike.<sup>170</sup> The question then arises whether the scope of mandatory bargaining should constrict accordingly.<sup>171</sup>

In *Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District No. 1*,<sup>172</sup> a case involving the negotiability of transferring teachers, the court advanced another rationale for a broad scope of bargaining, stating:

If all districts must negotiate, input from the teachers' organizations is assured. Both administrators and school boards, on the one hand, and teachers, on the other, must be deemed to have the interests of the students and the school district at heart. Both are competent to recommend changes in policy. We believe the legislature intended that the public would benefit from the contributions of both groups by the passage of this act and that the transfers of individual teachers were intended to be a negotiable item.<sup>173</sup>

Although this rationale for the presumption in favor of a broad scope of bargaining has more intrinsic logic than the strike rights argument, it also appears to lead to different scopes of mandatory bargaining for different employees. Arguably, professional employees, such as teachers, should secure a broader scope of mandatory bargaining than other employees. This distinction at least bears a logical relationship to one of the purposes of collective bargaining: to address the interests of employees.

A liberal presumption toward the scope of bargaining is not necessarily ill-advised. For example, if one's chief concern were labor peace, a liberal attitude toward the scope of bargaining would be appropriate, all else being equal.<sup>174</sup> The crucial phrase is "all else being equal." A major difficulty with a presumption toward a

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N.W.2d at 257 n.2. Compare the present section 179.64, enacted in 1980, Act of April 25, 1980, ch. 617, § 22, 1980 Minn. Laws 3930.

170. See MINN. STAT. § 179.64 (1982).

171. As to the 1980 amendments, the answer may depend on the definition of "restricted." Although strike rights for public employees now are greater than before, they still do not compare to those of private employees under the NLRA. See R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 209-373 (1976). The Minnesota Supreme Court appears not to have reiterated the rationale discussed here since the 1980 amendments liberalizing the right to strike. Nevertheless, it has continued to cite cases relying on the rationale. See, e.g., *Ogilvie*, 329 N.W.2d at 558 (citing *Minneapolis Fed'n*, 258 N.W.2d at 802).

172. 258 N.W.2d at 802.

173. *Id.* at 805.

174. See *supra* notes 56-66 and accompanying text.

broad, or for that matter narrow, scope of bargaining is that it tends to ignore the diverse policy considerations underlying collective bargaining. Thus, more than a mere presumption is needed to produce sound, principled results.

In any event, the presumption favoring a broad scope of bargaining under PELRA has not sufficiently sharpened the line between mandatory and permissive bargaining subjects. Thus, the Minnesota Supreme Court has developed other approaches to the problem.

*c. Analogies to the NLRA*

Early in PELRA's history, the Minnesota Supreme Court indicated a willingness to consider case law developed under the National Labor Relations Act (NLRA) in construing PELRA provisions. The NLRA, like PELRA, requires employers and unions to negotiate over "terms and conditions of employment."<sup>175</sup> As the court has stated:

While we find these [NLRA] decisions instructive, they are not controlling because the NLRA contains no definition of the phrase 'terms and conditions of employment,' while the PELRA does contain such a definition. In any event, it is clear from decisions such as *Fibreboard Corp. v. N.L.R.B.* [citation omitted] that the United States Supreme Court has given broad definition to the phrase 'terms and conditions of employment' in interpreting the National Labor Relations Act.<sup>176</sup>

Shortly thereafter, the court stated more forcefully that NLRA decisions are not binding on the court.<sup>177</sup> The court focused on the different contexts governed by PELRA and the NLRA and on the legislature's statement of policy<sup>178</sup> providing that different rules should be drafted for the public sector under PELRA.<sup>179</sup>

While there is some justification for referring to private sector precedent, such a reference is not a satisfactory answer to the problem of defining the scope of bargaining under PELRA. A chief argument for looking to NLRA precedent is the similarity in lan-

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175. 29 U.S.C. § 151 (1976).

176. *Teamsters*, 302 Minn. at 415, 225 N.W.2d at 257; cf. *Minneapolis Fed'n*, 258 N.W.2d at 805.

177. *Operating Engineers*, 305 Minn. at 364, 233 N.W.2d at 748.

178. MINN. STAT. § 179.61 (1982).

179. 305 Minn. at 369, 233 N.W.2d at 752.

guage in PELRA and the NLRA.<sup>180</sup> The terminology of the two statutes, however, is not identical. The NLRA neither defines "terms and conditions of employment" nor provides an equivalent to PELRA's inherent managerial policies.

A second argument in favor of borrowing NLRA precedent<sup>181</sup> is that it provides a handy reference. However, the contexts of the two statutes differ. For example, in creating a management rights limitation on the scope of bargaining under the NLRA, the United States Supreme Court has focused on the need of management to run the business.<sup>182</sup> While this concern also applies in the public sector,<sup>183</sup> this is neither the only nor the major limitation to be placed on public sector bargaining. Many of the policies underlying public sector collective bargaining do not apply to the private sector.

On balance, the Minnesota Supreme Court's use of NLRA precedent may have been justifiable in PELRA's earlier years. Now that PELRA has its own jurisprudence and parties have had experience with public sector bargaining, reliance on NLRA precedent is unnecessary.<sup>184</sup>

#### *d. Decisions, Implementation, and Effects*

Over the past eight years, the Minnesota Supreme Court has developed a different approach to scope of bargaining questions. This approach focuses on whether the item at issue is a decision (permissive), the implementation of a decision (mandatory or permissive), or the effect of a decision (mandatory). The inquiry then extends to whether the decision and its implementation are inextricably intertwined; this determination governs whether the implementation is mandatory or permissive. This approach, which now prevails, is misdirected and confusing to apply. Its subtleties

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180. Compare 29 U.S.C. §§ 158(a)(5), (d), 159(a) (1976) with MINN. STAT. § 179.63, subd. 18 (1982) ("terms and conditions of employment").

181. For a discussion of the NLRA law on the scope of bargaining, see R. GORMAN, *supra* note 171, at 496-531.

182. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677-80 (1981); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210-12 (1964).

183. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1500-03 (1982).

184. Another good reason for dispensing with NLRA precedent is that the law under the NLRA changes, making it a dubious reference point. Compare *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210-12 (1964) with *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

of analysis and genesis can be understood only by reviewing its evolution.

The court first recognized the distinction between decisions, procedure and criteria, or implementation, and effects in a case where the distinction was readily apparent. In the 1975 case *Operating Engineers*, the court found the decision to administer competitive examinations for promotion an inherent managerial policy, while the fairness of the examination fell within terms and conditions of employment.<sup>185</sup> Two years later, in *Minneapolis Federation*, the court determined that the decision to transfer teachers was a managerial policy, while the criteria for determining which teachers to transfer qualified as a term or condition of employment.<sup>186</sup> Thus, the general rule developed that employers need not bargain over decisions regarding, for example, selection and direction of personnel, but must bargain over criteria, procedures, and the effects of their decisions.

The law took a confusing turn in 1979. In *General Drivers Union Local 346 v. Independent School District No. 704, Proctor School Board*,<sup>187</sup> the court indicated, in dictum, that both subcontracting of union work and the effects of the subcontracting were mandatory bargaining subjects.<sup>188</sup> Perhaps the court's decision on the bargainability of subcontracting (a decision) can be discounted as dictum prompted by the parties' agreement on the issue.<sup>189</sup> It is more difficult to reconcile the general rule and *Minneapolis Association of Administrators and Consultants v. Minneapolis Special School District No. 1*.<sup>190</sup> There, the court found the procedure by which certain positions were to be divested of administrative functions a matter of managerial policy.<sup>191</sup>

The court's most recent decisions attempt to reconcile *Minneapolis Federation* and *Minneapolis Administrators*. In *Ogilvie v. Independent School District No. 341, Atwater*,<sup>192</sup> the court determined that the adoption of criteria by which to transfer a teacher to another school district part-time was a proper subject for negotiation.<sup>193</sup>

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185. 305 Minn. at 373, 233 N.W.2d at 754.

186. 258 N.W.2d at 805.

187. 283 N.W.2d 524 (Minn. 1979).

188. 283 N.W.2d at 527.

189. *Id.*

190. 311 N.W.2d 474 (Minn. 1981).

191. *Id.* at 479.

192. 329 N.W.2d at 558.

193. Although the court found the question of which teacher was to be assigned part-time at another school district moot since only one teacher was employed at the time the

The court in essence chose to follow *Minneapolis Federation*, rather than *Minneapolis Administrators*. The opinion offers two explanations for the difference between *Minneapolis Administrators* and the two teacher transfer cases. First, the decision and implementation were inextricably intertwined in *Minneapolis Administrators*, unlike the teacher transfer cases.<sup>194</sup> Second, the court alluded to the difference in size between the school districts involved, without quite explaining which way the difference cuts.<sup>195</sup>

In *St. Paul Fire Fighters, Local 21 v. City of St. Paul*,<sup>196</sup> the court held that the decision to set up a training program for all fire captains and the content of the program were not mandatory subjects, although aspects of the program's implementation, for example, the captains' pay during the program, did constitute mandatory subjects.<sup>197</sup> The court also indicated in dictum that, had the program been designed to allow only certain captains the opportunity to participate, the adoption of criteria for selecting participants would be a mandatory bargaining subject.<sup>198</sup> While the court's reasoning is oblique and inconsistent with previous cases,<sup>199</sup> it is clear that the court continues to follow the distinction between de-

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case reached the supreme court, it addressed the issue to determine the correctness of the trial court's decision. *Id.*

194. *Id.*

195. "There are, of course, significant differences in what is likely to hamper the direction of educational objectives in a school district which employs about 3500 teachers and what is likely to impede the direction of educational objectives in a school district like Atwater, which employs about 45 teachers." *Id.*

196. 336 N.W.2d 301 (Minn. 1983).

197. *Id.* at 303.

198. *Id.* at 302-03.

199. The *Fire Fighters* court stated:

As we have previously observed, areas of "inherent managerial policy" and "terms and conditions of employment" oftentimes overlap. *Minnesota Arrowhead District Council 96 of American Federation of State, County and Municipal Employees v. St. Louis County*, 290 N.W.2d 608, 611 (Minn. 1980). A decision in respect of a matter of inherent managerial policy—a discretionary decision which a public employer is not required to negotiate—may well impinge upon negotiable terms and conditions of employment. MINN. STAT. § 179.66 (1982). The impact upon the terms and conditions of employment of an inherent managerial policy decision does not, however, render the policy decision a subject of mandatory negotiation if the decision and its implementation are so inextricably interwoven that requiring the public employer to meet and negotiate the method of carrying out its decision would require the employer to negotiate the basic policy decision. See *Minneapolis Association of Administrators and Consultants v. Minneapolis Special School District No. 1*, 311 N.W.2d 474, 476-77 (Minn. 1981). If, however, the inherent managerial policy decision is severable from its implementation, the effect of implementation on the terms and conditions of employment is negotiable to the extent that negotiation is not likely to hamper the employer's direction of its functions and objectives. *Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District No. 1*, 258 N.W.2d 802, 805 (Minn. 1977); *International*

cisions, implementation, and effects. Furthermore, the opinion focuses on the first explanation set forth in *Ogilvie* for classifying certain procedures and criteria as mandatory and others as permissive. Procedures and criteria are mandatory if they are inextricably intertwined with decisions.<sup>200</sup>

Dividing a subject into a decision, the criteria and procedure by which it is implemented, and the decision's effects on employees is problematic. Few subjects can be so tidily divided. The fact that case law does not clearly define the categories makes the artificial lines between them unclear and difficult to apply. The aspect of the test requiring an analysis of whether a decision is inextricably interwoven with its implementation compounds the difficulty. In short, the approach is unworkable and unpredictable.

Equally important, this approach does not lead naturally to proper results. For example, the basic categorization rule would have required that the procedure in *Minneapolis Administrators* be labeled a mandatory subject. Nevertheless, negotiating the method by which administrative functions were to be divested from administrative positions understandably struck the court as close to the heart of management; thus, the rule was circumvented.

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*Union of Operating Engineers v. City of Minneapolis*, 305 Minn. 364, 233 N.W.2d 748 (1975).

The trial court enjoined the City from assigning veteran fire captains to the OTP on the ground that the manner of determining which fire captains should participate in the program was not a decision fundamental to the existence, direction and operation of the fire department. Since it cannot be seriously disputed that participation in the program affects the terms and conditions of employment as defined by Minn. Stat. § 179.63, subd. 18, had the decision been to designate some, but not all, fire captains for participation in the OTP, the adoption of selection criteria would have been an appropriate subject for negotiation. See *Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District No. 1*, 258 N.W.2d 802, 805 (Minn. 1977). The City's actual decision—to establish an Officers Training Program in which *all* fire captains, veterans as well as those newly appointed, must participate—is a policy decision directly related to the management of a traditional governmental function. To require the City to negotiate either the form and content of the program or criteria for exempting some fire captains would be to require negotiation of the basic policy decision, which we hold is a nonnegotiable matter of inherent managerial policy.

We conclude, however, that certain aspects of the implementation of the Officers Training Program which directly affect the terms and conditions of the fire captains' employment are severable from the inherent managerial policy decision and are appropriate subjects for negotiation.

*Id.* The opinion is inconsistent with previous holdings insofar as it suggests that (1) a decision could be a mandatory subject if it is not intertwined with its implementation; (2) effects of a decision are negotiable, in fact, "mandatory," only if the decision and its implementation are severable; (3) a decision which involves all employees is less mandatory than a decision which involves only some; and (4) it is important whether the activity is "a traditional governmental function."

200. *Id.*

The approach also proved unsatisfactory in *St. Paul Fire Fighters*. It is difficult to see why the creation of a training program for all fire captains was deemed permissive while the selection of participants in a program for selected captains would be a mandatory bargaining subject.

The difficulty is that the decisions/implementation/effects approach is misdirected. It focuses on inappropriate abstractions, such as the degree to which a decision and its implementation are intertwined. It does not focus on the policy considerations underlying collective bargaining which should govern scope of bargaining determinations. A better approach to the *Minneapolis Administrators* case, for example, would be to analyze such considerations as the employer's need to maintain a modicum of control over its operations and the benefits to be gained from bargaining with employees over the reorganization. While the decisions/implementation/effects approach can be manipulated to achieve proper results, the law should base those results on a straightforward analysis of the truly important facts and policies.

#### *e. Summary*

The line between mandatory and permissive subjects is poorly drawn at present. The present statutory language is vague. The judiciary has adopted several approaches which neither mesh well nor lead to predictable results. The court's use of the strike rights theory while simultaneously borrowing from NLRA precedent is particularly puzzling. In finding NLRA precedent instructive, the court has noted that the scope of bargaining under the NLRA—where employees may strike freely—is broad. Yet the court has justified a broad scope of bargaining under PELRA in order to compensate for the restricted strike rights of public employees. An inconsistency also exists between the presumption favoring a broad scope of bargaining and the decisions/implementation/effects approach. The latter is a technical test which is not aided by a presumption, whichever way the presumption cuts. These inconsistencies highlight the law's present lack of focus and guidance.

#### *D. Dispute Resolution*

The uncertainty of the law on the scope of bargaining under PELRA increases the likelihood of intractable disputes. The impact of disputes in this area is great, since disputes interrupt ongoing

ing collective bargaining relationships. Thus, there must be an effective, quick, and reasonably available method of resolving disputes. In addition, a system which can quickly develop a significant body of reliable precedent to guide negotiators is needed in this largely unsettled area. The present system for resolving bargaining disputes under PELRA achieves neither of these goals.

The method for resolving bargaining disputes under PELRA is the initiation of an unfair practice case against the employer<sup>201</sup> or against the exclusive representative of the employees.<sup>202</sup> Unfair practice charges are brought in the district court in whose jurisdiction the unfair practice occurred, and remedies consist of injunctive relief and money damages.<sup>203</sup>

The use of an unfair practice charge has many shortcomings. An action in district court involves the trappings of civil litigation: pleadings, discovery, motion practice, trials with formal rules of evidence, and appeals.<sup>204</sup> These trappings and the accompanying delay are ill-suited to the prompt resolution of disputes. Bargaining may cease and unilateral changes become *faits accomplis* while the dispute works its laborious way through the courts.

Furthermore, the present system is not designed to yield a large body of precedent. District court decisions are not compiled in a readily usable form and are of little precedential value. They may also be inconsistent, since they emanate from judges throughout the state. While supreme court decisions are compiled and do provide binding precedent, they are relatively few and far between and involve a narrow range of bargaining subjects. The current system of dispute resolution must therefore be reexamined and modified to increase efficiency and provide reliable precedent.

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201. MINN. STAT. § 179.68, subd. 2(5) (1982).

202. *Id.* § 179.68, subd. 3(3). Scope of bargaining issues also appear occasionally in arbitration cases. For example, an arbitrator may be asked to decide whether an employer has waived an inherent managerial policy. *See City of Duluth*, 336 N.W.2d at 68. The bargaining issue thus becomes merged with a contract question. Thus far, the chief forum for bargaining disputes has been the unfair practice case.

203. MINN. STAT. § 179.68, subd. 1 (1982).

204. Although the legislation creating the intermediate court of appeals does not expressly address the appeal of unfair labor practice rulings, these rulings presumably would be appealed first to the intermediate court and then to the supreme court. *See Act of June 1, 1983, ch. 247, 1983 Minn. Laws 934.*

#### IV. RECOMMENDATIONS FOR CHANGE

##### *A. Introduction*

The present law on the scope of bargaining in Minnesota is neither workable nor designed to produce sensible results overall. The following recommendations are offered to make the law understandable to those who must follow or apply it and to create law which more closely reflects Minnesota's policy in this area. The recommendations do not attempt to delineate which subjects are bargainable and which are not; rather, they suggest a better legal framework for making determinations.

The recommendations rest on an assumption that Minnesota law prefers a liberal scope of bargaining. PELRA states that Minnesota generally favors vital collective bargaining, limited only by the public's guarantees to health, safety, education, and welfare.<sup>205</sup> Furthermore, Minnesota has a generally liberal approach to public sector labor law. For example, many Minnesota public employees may strike legally,<sup>206</sup> even though this right is relatively rare in the public sector.<sup>207</sup> The Minnesota Supreme Court has consistently upheld public sector arbitration over claims that it improperly displaces the employer's role.<sup>208</sup> While the court's reasons for favoring a broad scope of bargaining may be debatable, the court's basic reading of Minnesota's public policy is taken to be accurate.

While the following recommendations assume a predisposition toward a broad scope of bargaining, the assumption does not supplant the need to consider the full range of policies underlying the scope of collective bargaining. Rather, the following recommendations call for consideration of the policies in light of Minnesota's general attitude toward this area.

The needed changes must come from both the legislature and the courts. Indeed, the changes entail action by a new administrative agency as well. The proposal may be summarized as follows:

(1) The legislature should reevaluate Minnesota's statutes touching on public employment. First, state statutes wholly in-

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205. MINN. STAT. § 179.61 (1982).

206. *Id.* § 179.64.

207. Few states permit public employee strikes. *See, e.g.*, ALASKA STAT. § 23.40.200 (1981); HAWAII REV. STAT. § 89-12 (Supp. 1981); MONT. CODE ANN. § 39-32-110 (1981); OR. REV. STAT. § 243.726 (1981); PA. STAT. ANN. tit. 43, §§ 1001-1010 (Purdon 1964).

208. *See, e.g.*, McGrath v. State, 312 N.W.2d 438 (Minn. 1981); Ramsey County v. AFSCME, Council 91, 309 N.W.2d 785 (Minn. 1981).

compatible with collective bargaining should be repealed. The remaining statutes should be amended to state their relationships to collective bargaining. Second, PELRA should indicate that collective bargaining preempts local legislation which is contrary to collective bargaining. Third, civil service should play only a minimal role where collective bargaining exists.

(2) There should be two statutory categories of bargainable matters: mandatory and permissive. PELRA should be amended to set out these two mutually exclusive categories, each defined by balancing the employees' interests in the subject against the employer's interests and by a non-exhaustive list of subjects. The supreme court should continue its presumption favoring a liberal scope of bargaining and shift to a case-by-case balancing test.

(3) The legislature should create an administrative agency similar to the National Labor Relations Board to resolve scope of bargaining questions in the first instance and to create a substantial body of reliable precedent under the new law.

### *B. Terms Set by Other Laws*

There is room in Minnesota public sector labor relations for employment terms set by state or local law rather than by collective bargaining. Unfortunately, the present law on this point is unclear. While certain small changes would lead to some improvement, only major amendments to PELRA and other laws bearing on public employment will accomplish the necessary changes.<sup>209</sup>

#### *1. Reevaluate Minnesota's Public Employment Statutes*

Some of the arguments favoring a narrow scope of bargaining in the public sector have substantial merit and call for the exclusion of certain subjects from the category of allowable bargaining subjects. Some decisions, for example, should be made at levels of government or by bodies which are not PELRA employers.<sup>210</sup> There are issues of great import and controversy that call for resolution via the multilateral political process rather than through bilateral collective bargaining.<sup>211</sup> Terms of employment should be

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209. For a general discussion of how this problem has been handled elsewhere, see Edwards, *supra* note 37, at 895-99; Sackman, *supra* note 41, at 168-78.

210. See, e.g., *AFSCME Councils 6, 14*, 338 N.W.2d at 576. In order to prevent decentralized and discordant administration of public persons, pension contribution levels are not deemed a permissible subject of bargaining. *Id.*

211. For example, most would agree that anti-discrimination principles ought to be applied in all public employment contexts.

set by statute and considered prohibited bargaining subjects where these policies prevail.

Statutorily defined terms of employment are appropriate in another situation. Where there is no collective bargaining relationship or a necessary employment term is not set by contract, statutorily defined terms are needed to fill the void. These fill-in terms may cover areas controlled by collective bargaining in other employment situations.

The Minnesota Statutes presently include laws of the two sorts just described as well as laws falling outside these categories. Thus, the first task for the legislature is to reevaluate all Minnesota statutes bearing on public employment. Statutes which are wholly incompatible with collective bargaining or, for that matter, other laws regarding public employment should be repealed.<sup>212</sup> Statutes which embody public policies more substantial than the policy favoring collective bargaining should be retained.<sup>213</sup> The legislature should also retain statutes to govern terms of employment not covered by collective bargaining agreements.<sup>214</sup> It is imperative that the legislature review all public employment statutes simultaneously;<sup>215</sup> piecemeal efforts will not provide the perspective necessary to achieve an equitable and rational system.

In sorting through the Minnesota Statutes to determine which statutes will supersede collective bargaining, the legislature should focus on which matters are appropriate for resolution through collective bargaining and which matters should be resolved by the legislature acting as the elected representative of the public. In selecting terms to be set by statute, the legislature should look to the degree of public interest in a subject, the structure of state and local government, the respective strengths and weaknesses of collective bargaining and the political process, the types of markets in

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212. *See, e.g.*, MINN. STAT. § 387.14 (1982). Pursuant to this statute, county sheriffs are entitled to remove deputies at will. *Id.* Broad, unchecked discretion of this magnitude is incompatible with collective bargaining principles. This discretion is also inconsistent with sound public policies militating against the arbitrary dismissal of public employees. Finally, such authority ignores employee property interest in certain government jobs. *See Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

213. *See, e.g.*, MINN. STAT. § 197.46 (1982) (Veterans Preference Act).

214. *See, e.g., id.* §§ 387.31-45 (Sheriffs Civil Service System).

215. The task described is of such major proportions that it probably would be best accomplished by a legislative commission working with or without the help of an advisory task force. There are presently two commissions which address public employment issues, the Commission on Employee Relations and the Commission on the Economic Status of Women.

which bargaining occurs, and Minnesota's public policy favoring public sector bargaining.

The remaining task is to mesh these proper statutory terms with PELRA.<sup>216</sup> The goal is to provide a system clearly indicating which statutes prevail over collective bargaining and which merely fill in for collective bargaining. While PELRA could be amended to list statutes by these two categories,<sup>217</sup> the better approach is to amend the other statutes to indicate their individual rankings with respect to collective bargaining.<sup>218</sup> In particular, each non-PELRA statute which is to defer to or supersede collective bargaining should expressly provide that deference or preference is to be accorded.<sup>219</sup> Second, PELRA should specify clearly that the scope of bargaining and the enforceability of contract terms<sup>220</sup> are limited to the extent indicated in other statutes. This provision would alert parties to check for other statutes.

This approach has two chief benefits. First, as chapter 43A attests, it affords great precision in meshing collective bargaining and other statutes, since it entails a section-by-section reconciliation where needed.<sup>221</sup> The process of painstakingly reviewing each statute would compel adequate consideration of the public policies at stake. Second, if the task is well performed, the result should be a workable system, for each statute would carry its own clear statement of the accommodation to be made. Furthermore, the difficulties inherent in writing a general rule in PELRA that would

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216. Two approaches taken in other public sector labor legislation clearly are inappropriate. These include attempts to render collective bargaining subordinate to all other statutes, *see, e.g.*, ME. REV. STAT. ANN. tit. 26, § 979-D(1)(E) (1964); TENN. CODE ANN. § 49-5510 (Supp. 1983), and legislation rendering all other statutes subordinate to collective bargaining, *see, e.g.*, CONN. GEN. STAT. § 5-278(e) (Supp. 1983-1984); WIS. STAT. § 111.93(3) (1974). Neither approach acknowledges that different statutes play different roles in collective bargaining. Furthermore, allowing collective bargaining to supersede any other statute would represent a substantial and probably excessive reallocation of power from the legislature to the employer and the unions. *See Blair, supra* note 41, at 12. Doing the opposite would render too few subjects negotiable for collective bargaining to work. *See id.*; Rehmus, *supra* note 36, at 927.

217. *See* MINN. STAT. § 179.63, subd. 4 (1982); *see also* MASS. GEN. LAWS ANN. ch. 150A, § 10 (West 1982).

218. *See* MINN. STAT. §§ 125.12, subds. 4, 6a, 14, 43A.01-47 (1982).

219. For example, Minnesota Statutes section 125.12, subdivision 6a might read, "This section does not apply where there is a collective bargaining agreement." *Id.* § 125.12, subd. 6a.

220. The legislature should consider how to handle terms that are unenforceable due to conflicts with superior statutes. Possibilities include rendering the term void or sending the term to an arbitrator. *See id.* § 179.66, subd. 5.

221. *See* notes 120-36 and accompanying text. *See generally* MINN. STAT. §§ 43A.01-47 (1982).

properly reflect the many relationships between PELRA and other statutes are obviated.

A residuum rule should be provided for statutes which do not indicate their rankings with respect to PELRA. The best option would be to provide that, where there is no statutory indication and a conflict arises,<sup>222</sup> collective bargaining defers to the statute. While the concept of "conflict" is troublesome as now used in PELRA, it should prove serviceable in this context. The rule's impact would be relatively minimal, because it would serve merely as a safety net for overlooked statutes. In addition, the phrase would be given meaning by analogy to the relationships crafted between PELRA and other similar statutes which indicate their rankings with respect to PELRA.

The matter of state regulatory law created pursuant to retained statutes remains. Such regulations would bear the same relationship to collective bargaining as do their enabling statutes.

## 2. *Render Local Legislation Superseded by PELRA*

Local legislation and rules generally should be superseded by PELRA,<sup>223</sup> because local legislation should not be permitted to frustrate the state policy favoring collective bargaining by constricting the scope of bargaining.<sup>224</sup> In one respect, however, local legislation has a place comparable to state statutes. No doubt, there will be local employees not represented by unions, and there may be topics not covered by collective bargaining agreements. In these situations, local legislation may properly define the terms of employment.

Thus, PELRA should define the scope of bargaining so that it is not limited by contrary local legislation or rules and should permit local legislation to govern in the absence of collective bargaining. The 1983 amendment to section 179.66, subdivision 2, which provides that local legislation that limits or restricts<sup>225</sup> the negotiation of binding contracts is superseded by PELRA, approximates what the law should do in this area. The legislature, however, should clarify the law.

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222. See, e.g., IOWA CODE ANN. § 20.28 (West Supp. 1983-1984).

223. The options available here are the same as those that exist at the state level. Compare, e.g., CONN. GEN. STAT. § 7-474(f) (1972) and MASS. GEN. LAWS ANN. ch. 150E, § 7(d) (West 1982) with MINN. STAT. § 179.66, subd. 5 (1982).

224. See *Local 1383, Int'l Ass'n of Fire Fighters v. City of Warren*, 411 Mich. 642, 311 N.W.2d 702 (1981).

225. See MINN. STAT. § 179.66, subd. 2 (1982).

In addition to the 1983 amendment to section 179.66, subdivision 2, PELRA should expressly address the problem of local legislation as an aspect of the scope of bargaining. The provisions recommended above concerning state statutes should be stated clearly as pertaining to state statutes only. A parallel clause should provide that local legislation shall not operate to constrict the scope of bargaining. This parallel provision would not impair the validity of local legislation which governs terms of employment where there is no collective bargaining relationship or contract term, because such local legislation by definition does not conflict with collective bargaining. Finally, state statutes authorizing local legislation which touches on public employment relationships should indicate that valid collective bargaining agreements supersede local legislation.

### 3. *A Special Problem: Civil Service Systems*

The existence of civil service systems at the state and local levels poses a special problem. These systems represent the former model and clash with the current model of collective bargaining.<sup>226</sup> Retaining civil service along with collective bargaining fosters confusion and disputes over their respective roles. On the other hand, to discard civil service entirely may prove imprudent; civil service generally embodies key public policies, such as the merit principle, and safeguards against arbitrary government action.<sup>227</sup> The legislature should carefully evaluate the continued viability of civil service systems and principles in reconciling collective bargaining and other laws.<sup>228</sup>

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226. See Comment, *supra* note 53, at 826, 828-29.

227. See MINN. STAT. §§ 43A.01-47 (1982); see also Comment, *supra* note 54, at 827. Civil service evolved in the late nineteenth and early twentieth century to deal with the "inefficiency, extravagance, and arbitrary dismissal of personnel following each change of political power." Comment, *supra* note 53, at 827. The subsequent establishment of the Civil Service Commission was an attempt to ensure that hiring decisions would be based solely on merit. *Id.*

228. The methods of accommodating collective bargaining and civil service are fundamentally the same as those for other state and local laws. The law could provide that collective bargaining replaces civil service, although this option appears unpopular. Laws which replace collective bargaining with civil service, however, are fairly popular. See, e.g., ME. REV. STAT. ANN. tit. 26, § 969 (1964); N.H. REV. STAT. ANN. § 273-A:3 (1977 & Supp. 1981); WASH. REV. CODE § 41.56.100 (Supp. 1983-1984). Middle ground positions call for a mix of the two, with civil service continuing to function either in areas ceded to it by law, see, e.g., ME. REV. STAT. ANN. tit. 26, § 979-D(1)(E)(2) (1964); WIS. STAT. § 111.93(2), (3) (1974), or in areas left to it by the parties in their collective bargaining agreements. See, e.g., MINN. STAT. §§ 43A.01-47 (1982). For a general discussion of these

Certain resolutions to this problem have more merit than others. Civil service systems at both the state and local levels are appropriate where there is no collective bargaining relationship. Even where collective bargaining exists, state policy may well indicate that certain civil service principles, such as merit selection and safeguards against arbitrary personnel actions,<sup>229</sup> should prevail. These principles could be perpetuated through the continuation of civil service systems<sup>230</sup> or transformed into legal requirements applicable to collective bargaining agreements.<sup>231</sup> The latter course is preferable, for it eliminates confusion and duplication of effort. For the same reason, the opportunity for the parties to contract into the civil service system itself, by failing to negotiate a term on point or by incorporating the system into the contract, should be minimal. Still, parties should be free to incorporate civil service standards or principles.

### *C. Permissive and Mandatory Bargaining Subjects: Balancing Interests*

Relatively few aspects of employment will be determined by statute under the proposed system. Terms not set by statute constitute the scope of allowable bargaining subjects available to the parties.

#### *1. Mandatory and Permissive Subjects*

The initial question which must be resolved considers whether allowable subjects should be divided into mandatory and permissive categories. The disadvantage of this distinction is that the line drawn by the law tends to preempt the parties' decisions concerning bargaining subjects.<sup>232</sup> The argument in favor of retaining the two categories is that an employer should have the right of unilat-

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options and what other states have chosen, see Edwards, *supra* note 37, at 910-12; Comment, *supra* note 53, at 829-30.

229. See Edwards, *supra* note 37, at 911 (civil service should continue to control at most hiring, promotions, and demotions); H. WELLINGTON & R. WINTER, *supra* note 32, at 145 (civil service should control only hiring of new applicants).

230. *E.g.*, MINN. STAT. §§ 43A.01-.47 (1982).

231. For example, Minnesota law forbids discrimination in employment on the basis of certain protected classifications. *Id.* § 363.03, subds. 1, 7. Collective bargaining agreements affronting this statute would be unenforceable. PELRA requires that all agreements contain grievance and arbitration procedures covering disciplinary matters. *Id.* at § 179.70, subd. 1.

232. Some have argued further that for various reasons the distinction is entirely inapt in the public sector. See, *e.g.*, Edwards, *supra* note 37, at 909-10; Sackman, *supra* note 41, at 188-94.

eral control over certain matters and that recognition of permissive subjects allows this control.<sup>233</sup> This choice is needed to give the employer flexibility and to make it truly accountable for its actions. To assure that the government fulfills its public trust, there should be core decisions which it alone has the freedom and responsibility to make, unilaterally or through collective bargaining.

While the issue is close, the better view retains the distinction between permissive and mandatory subjects. The most persuasive reason for this distinction is to safeguard the public trust held by the government. Furthermore, if the line between permissive and mandatory bargaining subjects is properly drawn, the argument against the two categories loses much of its force.

In addition, Minnesota's unique scheme of negotiations supplemented by meet-and-confer<sup>234</sup> justifies drawing the distinction. For professional employees with meet-and-confer rights, the harsh consequences of the line between mandatory and permissive subjects are softened, for the employer must confer over permissive subjects. This requirement presumably discounts the importance of the distinction to the parties and reduces their inclination to debate and litigate over it. Indeed, the legislature may wish, after studying meet-and-confer,<sup>235</sup> to extend it to other employees.

## 2. *Drawing The Line: A Balancing of Interests Test*

While the law should continue to provide for mandatory and permissive subjects, much of the present law regarding the line between the two categories should be abandoned. While certain small changes would yield some improvement,<sup>236</sup> these changes would not suffice, since the present law lacks proper focus.

There are many ways to draw the line between permissive and mandatory subjects.<sup>237</sup> The best approach is that which balances

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233. It should be noted that the concern that the employer will be forced to bargain about major issues of public policy can be eliminated by statutorily prohibiting the collective bargaining of certain subjects.

234. *See supra* note 25.

235. The legislature's study should include insuring the constitutionality of meet-and-confer requirements.

236. For example, the awkward reference to educational policies could be deleted from the definition of terms and conditions. The supreme court could choose one of its several approaches to this issue and follow that approach consistently.

237. Typically, statutes contain language much like PELRA's and the line-drawing is left to the courts. In some jurisdictions, the question is not whether a subject is mandatory or permissive, but whether it is negotiable at all. For a general discussion of approaches taken in various jurisdictions, see Clark, *supra* note 64, at 85; Sackman, *supra* note 41, at

the interests of employees in the matter at issue against the competing interests of the employer in controlling the matter.<sup>238</sup> While this approach may not yield immediately apparent results in all cases, it has much to recommend it.

First, balancing tests are common in the law<sup>239</sup> and the factors to be considered would be easily recognized by employers, unions, and judges. In this respect, the balancing approach is clearly superior to the decisions/implementation/effects approach. Parties do

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168-88. The law could be guided by NLRA precedent. *See, e.g.*, *Fire Fighters, Local 1383 v. City of Warren*, 411 Mich. 642, 311 N.W.2d 702 (1981); *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974). Incorporating NLRA precedent is dubious, however, because the contexts of public and private labor relations are not sufficiently analogous. Another alternative is to focus on whether a particular matter is significantly, substantially, or directly related to working conditions. *See, e.g.*, *Beloit City School Bd. v. Wisconsin Employment Rel. Comm.*, 73 Wis. 2d 43, 242 N.W.2d 231 (1976); *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.*, 215 N.W.2d 837 (S.D. 1974); *Board of Educ. v. Englewood Teachers Ass'n*, 64 N.J. 1, 311 A.2d 729 (1973); *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972). This approach is one-sided, however, because an argument can be made that almost any subject bears heavily on working conditions. *See Clark, supra* note 64, at 85.

Another method, presently followed in Minnesota, is to divide a matter into constituents—the decision, how the decision is implemented, and the effects of the decision. *See supra* notes 185-200 and accompanying text. This, with some modification, is the approach taken by the federal public labor relations law. *See* 5 U.S.C. §§ 7103(14), 7106 (Supp. II 1978); *Department of Defense, Army - Air Force Exch. Serv. v. Federal Labor Relations Auth.*, 659 F.2d 1140 (D.C. Cir. 1981). Both Minnesota law and case law under the federal statute demonstrate the weaknesses of this approach. Another alternative would be for the legislature to set forth an exhaustive list of subjects, and the court, in turn, to require a relation between mandatory matters and one of the listed subjects. *See, e.g.*, *National Educ. Ass'n-Topeka v. USD 501, Shawnee County*, 225 Kan. 445, 592 P.2d 93 (1979); *Spokane Educ. Ass'n v. Barnes*, 83 Wash. 2d 366, 517 P.2d 1362 (1974). Yet, determining an appropriate scope of bargaining by legislating an exclusive list is difficult, especially where the statute covers many types of employees, as PELRA does. Another approach to drawing the line between permissive and mandatory subjects would be to refer to industry custom. *See, e.g.*, *West Hartford Educ. Ass'n v. De Courcy*, 162 Conn. 566, 295 A.2d 526 (1972). Relying on industry practice is also problematic, however, because written contract terms do not always reflect the true scope of fruitful negotiations. *See Clark, supra* note 64, at 65; *Gerhart, supra* note 7, at 550. The law could balance the interests of the employees against the interest of the public in resolving the matter politically. *See, e.g.*, *City of Boston v. Boston Police Patrolmen's Ass'n*, 392 N.E.2d 1202 (Mass. App. 1979); *City of Brookfield v. Wisconsin Employment Rel. Comm.*, 87 Wis. 2d 804, 275 N.W.2d 723 (1979). The appropriate use of this balancing test is to determine statutorily excluded subjects.

238. *See, e.g.*, *National Educ. Ass'n of Shawnee Mission v. Board of Educ.*, 212 Kan. 741, 512 P.2d 426 (1973); *Sutherlin Educ. Ass'n v. Sutherlin School Dist.*, 25 Or. App. 85, 548 P.2d 204 (1976); *Pennsylvania Labor Rels. Bd. v. State College Area*, 461 Pa. 494, 337 A.2d 262 (1975). This approach has proved popular with commentators. *See Corbett, supra* note 41, at 250-67; *Summers, supra* note 41, at 1192-97.

239. *See Corbett, supra* note 41, at 251.

not conceive of bargaining subjects as decisions, the implementation of decisions, or the effects of decisions.

Second, a balancing approach lends itself to flexible, case-by-case determinations.<sup>240</sup> The present approach is a technical legal construct with little room for consideration of the facts of each case. For example, under the current approach, a decision is not a mandatory subject regardless of its unimportance to the employer or importance to the employees. A balancing approach, by contrast, would take these factors into consideration.

The principal advantage of the balancing approach is that it openly acknowledges and focuses on the real issue:<sup>241</sup> the competing interests of employers and employees in setting contract terms through collective bargaining. It affords a forum for considering the facts presented by each case in light of the policies underlying collective bargaining. Under the balancing approach, for example, a decisionmaker would consider how the matter relates to the employer's need to control the running of the government, the contributions employees could make through bargaining over the subject, and to what degree the subject affects the working conditions of employees.

Current Minnesota law contains hints of a balancing of interests test. In developing the duty to provide information, the *Operating Engineers* decision focuses on the employees' interest in fair examinations and on the employers' competing interest in confidentiality.<sup>242</sup> In *Minneapolis Federation*, the supreme court observed the employees' substantial interest in being transferred,<sup>243</sup> while in *Minneapolis Administrators*, the court was influenced by the employer's substantial interest in directing the functions of administrative employees.<sup>244</sup>

While the shift to a balancing of interests approach could be initiated by either the legislature or the judiciary, the best approach is joint action.<sup>245</sup> The legislature should provide statutory language which calls for this analysis, and the supreme court and

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240. Clark, *supra* note 65, at 95.

241. *Id.* at 92.

242. 305 Minn. at 370-71, 233 N.W.2d at 753.

243. 258 N.W.2d at 805.

244. 311 N.W.2d at 476-77.

245. Another approach would be to relegate the matter to an administrative agency, *see infra* notes 255-73 and accompanying text, and proceed through rulemaking under Minnesota's Administrative Procedure Act. *See* MINN. STAT. §§ 14.01-.70 (1982).

agency recommended below should complement the amendments by adopting the new orientation.

### 3. *Legislative Changes*

The legislature should create two clearly distinct categories of bargaining subjects and establish a balancing of interests analysis. While this could be done in various ways,<sup>246</sup> a straightforward method is best.

First, PELRA should contain a single section on this point. This section should first state that parties must bargain over employment terms, and may, but are not required to, bargain over managerial policies. This general provision should clearly indicate that these are mutually exclusive categories. The statute should also define employment terms and managerial policies, again making clear that they are mutually exclusive categories. For example, the statute could define employment terms as aspects of the employer-employee relationship in which the legitimate interests of employees equal or outweigh the legitimate interests of the employer and managerial policies as aspects in which the legitimate interests of employees are less than those of the employer. Alternatively, the basic definition could be phrased in terms of the impact on employees compared to the impact on the government. Language indicating an allocation of evenly balanced subjects to the category of employment terms would reflect Minnesota's presumption toward a liberal scope of bargaining.

The statute should also contain a list of clearly identified illustrative matters for each category.<sup>247</sup> The present PELRA definitional lists are too abbreviated<sup>248</sup> and too general<sup>249</sup> to be useful. Rather than provide, for example, that the "selection and direc-

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246. Other possibilities include definitions which do not include illustrative lists and definitions which seek to define the legitimate interests of employers and employees. The former would likely prove too vague and the latter almost impossible to draft. *See, e.g.*, VT. STAT. ANN. tit. 21, § 1722 (1978).

247. The list could be introduced as follows: "Employment terms include, but are not limited to . . ." *See* MINN. STAT. § 179.66, subd. 1 (1982). The chief alternative is to list factors which suggest that either the employer's or the employees' interests are paramount. One could list, for example, working environment, compensation, and safety as employee interests. The chief difficulty is that almost any item could be argued to touch on a listed employee or employer interest.

248. *See, e.g., id.* § 179.63, subd. 18 (definition of terms and conditions).

249. *See, e.g., id.* § 179.63, subd. 18; *id.* § 179.66, subd. 1 (definition of managerial policies).

tion and number of personnel” are managerial policies,<sup>250</sup> the statute should indicate that, for example, the initial hiring of employees is a managerial policy. There is little risk that the list would be too detailed, since it must reflect PELRA’s comprehensive scope.<sup>251</sup>

Providing a list in addition to the basic definitions has two advantages. First, certain matters are categorized without the need for litigation. Second, the list provides a fertile ground for analogies in construing the basic definitions.<sup>252</sup> Analogies should yield more predictable results than does grappling with bare definitions.

#### 4. *Judicial Changes*

The proposed amendments to PELRA would require the Minnesota Supreme Court’s analysis of scope of bargaining cases to shift accordingly. In one respect, the present case law could be retained. Presumptions are useful in analyses which call for a balancing of interests, in order to resolve evenly-tipped scales. Since the recommendations made here are not intended to affect the degree to which the law in the abstract favors collective bargaining, the court’s presumption in favor of a liberal scope of bargaining would be retained.<sup>253</sup> Indeed, the proposed wording of the basic definition of employment terms perpetuates that presumption.

#### D. *An Agency to Resolve Bargaining Disputes*

The troubled character of the present law results in part from lack of legislative and judicial experience in public sector labor relations. To insure that future disputes are resolved in the first instance by expert decisionmakers,<sup>254</sup> the final recommendation of

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250. *Id.* § 179.66, subd. 1.

251. *Cf.* KAN. STAT. ANN. § 72-5413 (1980) (teacher’s contract statute providing detailed definitional list).

252. *See* National Educ. Ass’n v. United School Dist. No. 500, Wyandotte County, 227 Kan. 541, 608 P.2d 415 (1980).

253. However, the rationales for the presumption in favor of a liberal scope of bargaining should be abandoned. In addition, in one respect, the court’s present approach, which distinguishes decisions, their implementation, and their effects, has produced law harmonious with the recommended approach. It would be surprising if the effects of matters deemed managerial policies did not qualify as terms of employment under the statute. *Cf.* First Nat’l Maintenance Corp. v. NLRB, 449 U.S. 1076 (1983) (effects of managerial prerogative are mandatory bargaining subjects). While the present effects rule should not be retained as such, its import no doubt would survive under the new law.

254. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (court characterizes NLRB as “one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the au-

this Article is to urge the legislature to create an administrative agency whose charge includes resolving bargaining disputes. A second benefit of such an agency is that it would provide a large body of readily available precedent.<sup>255</sup> While the details of the structure and functioning of the agency<sup>256</sup> are beyond the scope of this Article, a few of the major issues merit mention.

The major issue facing the legislature will be the range of functions to be performed by the newly constituted agency. PELRA is presently administered by the Bureau of Mediation Services<sup>257</sup> and the Public Employment Relations Board,<sup>258</sup> neither of which addresses scope of bargaining disputes. The courts hear unfair practice cases, including those entailing scope of bargaining disputes.<sup>259</sup> An alternative to this diffused system is provided by the NLRA, which is governed by a single agency, the National Labor Relations Board<sup>260</sup> (NLRB). Among other things, the Board runs representation elections<sup>261</sup> and decides unfair labor practice cases,<sup>262</sup> including cases alleging a failure to bargain over mandatory bargaining subjects.<sup>263</sup> The merits of the comprehensive agency model are evident. Since the agency administers the entire law, it can place issues in perspective in adjudicating individual cases regarding the scope of bargaining. Confusion as to the relative roles of several agencies and the duplication of resources required to operate more than one agency are avoided.<sup>264</sup>

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thority of an expertness which courts do not possess and therefore must respect."); NLRB v. Hearst Publications, 322 U.S. 111, 130-31 (1944).

255. The NLRB publishes its decisions, as do private publishers. Private labor law sources include the *National Labor Relations Board Decisions* published by Commercial Clearing House, the *Labor Relations Reporter* published by the Bureau of National Affairs, and the *Labor Relations Reference Manual* also published by the Bureau of National Affairs.

256. Other issues demanding careful consideration include the method of agency member selection and terms of office, the compilation and promulgation of agency decisions, where the agency hears cases, the costs of litigation before the agency, and its litigation procedures.

257. The Bureau of Mediation Service (BMS) is a professional labor agency which, among other things, conducts elections, provides mediation services, and hears fair share fee challenges. MINN. STAT. § 179.71 (1982).

258. The Public Employment Relations Board (PERB) is a panel of citizens whose tasks include hearing fair share fee and bargaining unit appeals, determining the status of certain employees, and hearing "independent review" grievances. *Id.* §§ 179.72-76.

259. *See id.* § 179.68.

260. *See* 29 U.S.C. § 153 (1976); F. McCULLOCK & T. BORNSTEIN, *THE NATIONAL LABOR RELATIONS BOARD* (1974).

261. 29 U.S.C. § 159 (1976).

262. *Id.* § 160.

263. *Id.* §§ 158(a)(5), 159(b)(3).

264. This raises the question of what to do with the PERB and the BMS. The PERB

The legislature should carefully study the method by which scope of bargaining disputes are prosecuted. Under PELRA, aggrieved persons bring and litigate unfair labor practices;<sup>265</sup> refusal-to-bargain cases probably are brought by employers or exclusive representatives. Under the NLRA, the parties bring refusal-to-bargain complaints to the regional offices of the NLRB, which prosecute the unfair labor practices.<sup>266</sup> On balance, PELRA's approach has more merit than that of the NLRA. Requiring parties to litigate their own disputes may deter litigation. Affording the resources of the government to one party may make litigation more attractive and arguably provides the complainant an unfair advantage.<sup>267</sup> Furthermore, the NLRA approach is expensive for the public, in terms of both the government's money and its resources.

The legislature should consider mechanisms other than unfair labor practice charges. Certainly, the legislature should assure that bargaining disputes are resolved expeditiously, either through an expedited unfair labor practice procedure<sup>268</sup> or by another less detailed mechanism. The agency could, for example, issue advisory opinions.

Finally, the legislature should carefully study the relationship between the agency and the courts. While there should be judicial review of agency decisions, this review should not afford an opportunity for significant delay or judicial second-guessing of agency decisions. Mechanisms for avoiding these problems include a deferential standard of review,<sup>269</sup> an appeal route which skips the district court,<sup>270</sup> the requirement that the losing appellant bear the respondent's costs where the appeal is frivolous,<sup>271</sup> and making the

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as it now exists should be abolished. The BMS could continue as a separate, private sector agency. *See* MINN. STAT. §§ 179.01-.17 (1982). Another alternative is to create one labor agency, an expanded BMS, with both private and public sector functions.

265. *Id.* § 179.68.

266. 29 U.S.C. § 160 (1976).

267. On the other hand, under the NLRA, regional office attorneys gain an early opportunity to settle cases. Presumably, the government does not prosecute non-meritorious cases.

268. *See, e.g.*, IOWA CODE §§ 20.1-30 (1979).

269. *See, e.g.*, *Patzwald v. Public Employment Rels. Bd.*, 306 N.W.2d 118 (Minn. 1981) (substantial evidence standard applied to BMS bargaining unit decision; significant deference accorded).

270. There is little justification for skipping the new intermediate appellate court. There is substantial justification, however, for skipping the district court, which merely adds a superfluous layer without expertise in the area or an appellate perspective.

271. *See, e.g.*, *Heck's, Inc.*, 215 NLRB 765 (1974).

agency's order effective pending appeal.<sup>272</sup>

## V. CONCLUSION

Defining the scope of bargaining under PELRA has become an increasingly difficult and confusing task. The provisions of PELRA and the Minnesota Supreme Court decisions which interpret those provisions are inconsistent and ambiguous. The myriad of state and local laws coexisting with PELRA further complicates the task. The present mechanism for resolving the inevitable disputes that arise is inefficient and lacks the reliable precedent necessary to guide both judges and parties. This Article suggests that the law can be improved by refining which subjects are prohibited by statute; by focusing on the interests of the parties in determining which subjects are mandatory and which are permissive; and by instituting an effective means of resolving disputes. Nevertheless, the legal system's responsibility to those it governs entails a frank recognition of the law's limits.

The negotiating parties, in the public interest, should consider concessions which would facilitate the task of the other in carrying out its statutory functions where the benefit to one is clear and there is no corresponding detriment to the other. That is the way responsible people who are in good faith act when there is a public interest in their endeavors.<sup>273</sup>

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272. *See, e.g.*, N.J. REV. STAT. § 34:13A-5.2 (1974).

273. *National Educ. Ass'n v. Unified School Dist. No. 500*, 227 Kan. 541, 545, 608 P.2d 415, 417 (1980).