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The Scope of Collective Bargaining in Public Education under the Pennsylvania Public Employee Relations Act

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The Scope of Collective Bargaining in Public Education Under The Pennsylvania Public Employe Relations Act

> The test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.
>
> —F. Scott Fitzgerald
> *The Crack-Up*

I. INTRODUCTION

The enactment in 1970 of the Pennsylvania Public Employe Relations Act,[1] popularly known as Act 195,[2] signalled the beginning of a new age in the field of public sector collective bargaining in Pennsylvania. While the stated legislative intent in enacting the Pennsylvania Public Employe Act was to provide for the orderly and peaceful settlement of labor disputes in the public sector by means of collective bargaining,[3] mediation[4] and arbitration,[5] and establishment of a limited right to strike,[6] the intent—as to what subjects are within the scope of collective bargaining[7]—was, and remains to a great extent, uncertain. While the title of Act 195 refers to defining the "scope of collective bargaining,"[8] the text of the Act seems to

1. PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Supp. 1975).

2. The popular name is derived from the Act's order of passage as Act of July 23, 1970, No. 195, [1970] Laws of Pa. 563.

3. PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1975). The term "collective bargaining" is used here to describe the process of establishing terms and conditions of employment in a written agreement negotiated between the public employer and a union acting as exclusive representative of the employees in the bargaining unit. The term is not specifically defined in either Act 195 or in the Pennsylvania Labor Relations Act, PA. STAT. ANN. tit. 43, §§ 211.1-.13 (1964).

4. PA. STAT. ANN. tit. 43, § 1101.801 (Supp. 1975).

5. *Id.* §§ 1101.804-.805.

6. *Id.* § 1101.1003. *See* Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262, 271 (Pa. 1975) (Pomeroy, J., concurring).

7. The "scope of collective bargaining" usually refers to the range of issues included in negotiations between the parties to a labor agreement. Gerhart, *The Scope of Bargaining in Local Government Labor Negotiations*, 20 LAB. L.J. 545 (1969).

8. The title of Act 195 reads in part: "An Act establishing rights in public employes to

speak with two, apparently conflicting, voices: what the legislature has specifically made bargainable[9] and what the legislature has also specifically allowed management to reserve to its unilateral decision-making.[10] This conflict has appeared most dramatically in the field of public education. While Act 195 covers most state and local public employees,[11] the center stage has been occupied by public education, where the relationship between school boards and teacher associations has, in many instances, been anything but "orderly and constructive"[12] since the passage of Act 195.[13] Not only did the first test of the efficacy of the Act occur in public education,[14] but the most significant case law and nearly a majority of the administrative decisions that have been handed down interpreting that Act have centered upon the field of public education.

It is the aim of this comment to examine, in the context of public education in Pennsylvania, the conflicting perspectives of teacher associations and school boards[15] on the scope of collective bargain-

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organize and bargain collectively through selected representatives; . . . defining the scope of collective bargaining . . . ." PA. STAT. ANN. tit. 43, § 1101.101 (Supp. 1975).

9. *See id.* § 1101.701. For the text of this statute see text accompanying note 58 *infra.*

10. *See id.* § 1101.702. For the text of this statute see text accompanying note 60 *infra.*

11. *Id.* § 1101.301(2) provides in relevant part:

> "Public employe" . . . means any individual employed by a public employer but shall not include elected officials, appointees of the Governor with the advice and consent of the Senate as required by law, management level employes, confidential employes, clergymen or other persons in a religious profession . . . and those employes covered under the act of June 24, 1968 (Act No. 111), entitled "An act specifically authorizing collective bargaining between police and firemen and their public employers . . . ."

12. The phrase is taken from the stated "public policy" of Act 195, PA. STAT. ANN. tit. 43, § 1101.101 (Supp. 1975), which reads in part: "[I]t is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employes . . . ."

13. For example, in the three year period from October 1970 (the effective date of the Act) to November 1973, there were a total of 159 public school strikes in Pennsylvania, mostly by teachers. Alderfer, *Follow-up on the Pennsylvania Public School Strikes*, 25 LAB. L.J. 161 (1974). For an examination of the effect of these strikes, see Alderfer, *id.*; Alderfer, *Teachers Hold Record in Pennsylvania Strikes*, NAT'L CIVIC REV. 368-71 (1973); Alderfer, *The 1971 Pennsylvania Public School Strikes*, 23 LAB. L.J. 41-50 (1972). *See also* PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, XI INFORMATION LEGISLATIVE SERVICE, Feb. 2, 1973, at 1-9; PENNSYLVANIA STATE EDUCATION ASSOCIATION, RESEARCH APPENDIX, May 17, 1973, at 1-21.

14. This first test involved the January 1971 Pittsburgh teachers' strike. For an analysis of Act 195's application to this dispute, see Comment, *The Public Employe Relations Act and Pennsylvania Teachers: A Legal Analysis in Light of the January, 1971 Pittsburgh Dispute*, 10 DUQ. L. REV. 77 (1971) [hereinafter cited as Comment, *The Public Employe Relations Act*].

15. Although the Public School Code of 1949 uses the phrase "board of school directors,"

ing[16] and to analyze the development of case law and administrative decisions pertaining to the scope of that bargaining under Act 195, in order to provide some guidance as to future developments in this area of public sector labor law.

Any examination into this unique and often stormy area of public labor relations must begin with an understanding of the circumstances that existed prior to passage of Act 195, in order to understand the "mischief sought to be remedied"[17] by its enactment.

II. PRE-ACT 195

The growth of public employment in the post-World War II era[18] was accompanied by a surge of public employee union organization[19]

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see PA. STAT. ANN. tit. 24, § 3-301 (1962), the author has used the term "school board" throughout this comment for the sake of clarity to the reader.

16. In the field of education, the expression "professional negotiations" is often substituted for the term "collective bargaining." The terms are synonymous. The former term merely connotes that employees of professional standing are participating and does not convey a fundamentally different meaning than does collective bargaining. *See* Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities*, 49 MARQ. L. REV. 487, 488 (1966). *See also* GOV'T EMP. REL. REP. REFERENCE FILE 91:03. Although PA. STAT. ANN. tit. 43, § 1101.301(7) (Supp. 1975) provides a separate definition for "professional employe," no distinction is drawn under the law (Act 195) or in practice between "professional employes" and other public sector employee groups with respect to the scope of collective bargaining.

For an excellent discussion of salaried professionals, their aspirations, and their effect on the scope of public sector bargaining, see Kleingartner, *Impact of Professionalism on Scope of Bargaining in the Public Sector*, in SCOPE OF BARGAINING IN THE PUBLIC SECTOR—CONCEPTS AND PROBLEMS (P. Prasow ed. 1972).

17. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262, 266 (Pa. 1975).

18. The growth of public employment is indicated in chart 1, page 430 *infra*.

For an analysis of the burgeoning of public employee unionism in this period, see Gitlow, *Public Employee Unionism in the United States: Growth and Outlook*, 21 LAB. L.J. 766 (1970) [hereinafter cited as Gitlow]; Petro, *Sovereignty & Compulsory Public Sector Bargaining*, 10 WAKE FOREST L. REV. 25-37 (1974).

19. The growth of public employee union organization is indicated in chart 2, page 430 *infra*.

On the topic of public employee organization, see Gitlow, *supra* note 18; Jones, *Union Militancy of Nation's 10.5 Million Public Employees Is Found Increasing*, N.Y. Times, April 2, 1967, at 79, col. 1; Posey, *The New Militancy of Public Employees*, 28 PUB. AD. REV. 111 (1968). The most dramatic public employee organizational drive and growth occurred in the field of public education. *See* Hight, *Teachers, Bargaining, and Strikes: Perspective from the Swedish Experience*, 15 U.C.L.A.L. REV. 840, 842 (1968).

On the general history of the significant developments, statutory enactments, court decisions and organizational activities in the teachers' drive to achieve collective negotiations, see D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS (1970).

Chart 1 — Growth of Public Employment

Year	Total Number of Civilians Employed in the United States	Government Employees			Percentage of Total Employees
		Federal (Civilian)	State and Local	Total	
1950	58,918,000	2,117,000	4,285,000	6,402,000	11%
1955	62,170,000	2,378,000	5,054,000	7,432,000	12%
1960	65,778,000	2,421,000	6,387,000	8,808,000	14%
1965	71,088,000	2,588,000	8,001,000	10,589,000	15%
1970	78,627,000	2,881,000	10,147,000	13,028,000	16%
1974	85,936,000	2,874,000	11,794,000	14,668,000	17%

Source: U.S. Bureau of Labor Statistics, Dep't of Labor, Handbook of Labor Statistics 1975—Reference Edition [Bull. 1865] Table 1, at 26, & Table 47, at 119 (1975).
Note: Because of rounding, sums of individual items may not equal totals.

Chart 2 — Growth of Public Employee Union Organization

Year	Governmental Employee Unions	
	Number	Members
		Number
1956	34	915,000
1960	41	1,070,000
1964	59	1,453,000
1968	59	2,155,000
1972	51	2,460,000

Source: U.S. Bureau of Labor Statistics, Dep't of Labor, Handbook of Labor Statistics 1975—Reference Edition [Bull. 1865] Table 155, at 382-86 (1975).

aimed at attaining for public employees the right to bargain collectively, a right guaranteed to workers in the private sector by the National Labor Relations Act of 1935.[20] National legislation had never extended the right to bargain collectively to public employees; indeed, all governments—federal, state, and local—traditionally had prohibited, either by statute or judicial decision, collective bargaining in their public services.[21]

The transition from uniform disapproval to majority acceptance of public employer collective bargaining began in 1955, when New Hampshire adopted legislation authorizing town governments to engage in collective bargaining with public employee unions.[22] By the beginning of the 1960's, three additional states had enacted

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For a brief history of the organization of teachers and the role of the two major teacher organizations, the National Education Association (NEA) and the American Federation of Teachers (AFT) in the development of militant organizations to promote collective bargaining for teachers, see Engel, *Teacher Negotiation: History and Comment*, 1 J. LAW & ED. 487 (1972). *See also* M. MOSKOW, TEACHERS AND UNIONS 93-114 (1966). On the NEA, see Muir, *The Tough New Teacher*, in THE COLLECTIVE DILEMMA: NEGOTIATIONS IN EDUCATION (P. Carlton & H. Goodwin, eds. 1969). *See also* E. WESLEY, NEA: THE FIRST HUNDRED YEARS: THE BUILDING OF THE TEACHING PROFESSION (1957). For the history of the AFT, see R. BRAUN, TEACHERS AND POWER: THE STORY OF THE AMERICAN FEDERATION OF TEACHERS (1972); COMMISSION ON EDUCATIONAL RECONSTRUCTION, ORGANIZING THE TEACHING PROFESSION: THE STORY OF THE AMERICAN FEDERATION OF TEACHERS (1955); W. EATON, THE AMERICAN FEDERATION OF TEACHERS, 1916-1961: A HISTORY OF THE MOVEMENT (1975); J. Clarke, The American Federation of Teachers: Origins and History from 1870 to 1952, June 1966 (unpublished doctoral dissertation, Cornell University).

20. 29 U.S.C. §§ 151-68 (1970).

21. For a review of the legal theories utilized by courts to invalidate public employer collective bargaining in the absence of prohibiting legislation, see Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539 (1969).

In 1937, President Franklin D. Roosevelt stated the view that prevailed throughout the United States prior to the 1960's:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of the government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with employee organizations. The employer is the whole people who speak by means of laws enacted by their representatives in Congress. Accordingly, administratives and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

Letter from Franklin D. Roosevelt to Luther C. Steward, President of the National Federation of Federal Employees, Aug. 16, 1937, in C. RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW 436-37 (1946).

22. N.H. REV. STAT. ANN. § 31:3 (1970).

similar legislation.[23] In 1962, President John F. Kennedy issued Executive Order 10988,[24] which established the rights of unionization and collective bargaining for most federal employees.[25]

The examples set by the passage of the several state public employee acts in the 1950's and the promulgation of the Executive Order affecting federal employees, and the widespread labor unrest in the public sector,[26] led to the adoption of legislation by an increasing number of states which either permitted or required designated public employers to bargain collectively with their employees.[27]

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23. Two years after passage of the New Hampshire legislation, the Minnesota legislature enacted a law requiring all public employers to meet at regular intervals with representatives selected by their workers in order to negotiate over working conditions in the public service. MINN. STAT. ANN. § 179.52 (1966), *as amended* (Supp. 1972). By 1959, Wisconsin and Massachusetts similarly had enacted legislation authorizing municipalities to bargain collectively with representatives chosen by municipal employees. MASS. ANN. LAWS ch. 40, § 4C (1961), *as amended* ch. 149, §§ 178G-N (1971); *see* WIS. STAT. ANN. § 111.70 (1974).

24. 3 C.F.R. 521 (Comp. 1959-63), *revoked by* Exec. Order No. 11,491, 3 C.F.R. 191 (COMP. 1969), *as amended* 3 C.F.R. 505 (1972). Executive Order 11491, which superseded Executive Order 10988, aligns labor-management relations in the federal sector closely with labor-management relations in the NLRA-regulated private sector, but retains unique concepts introduced by Executive Order 10988. Executive Order 11491, however, does not apply to United States Postal Service employees, who are governed by the Postal Reorganization Act of 1970, 39 U.S.C. §§ 1201-09 (1970), which grants them virtually all rights—except the right to strike—enjoyed by private industrial workers under the NLRA.

25. Executive Order 10988 was more comprehensive than its earlier state counterparts. While existing state laws merely authorized or required various public employers to engage in collective bargaining, Executive Order 10988 established a complete framework for management-employee relations similar to the one prevailing in the private sector under the NLRA.

26. The figures in chart 3, page 433 *infra*, document the widespread labor unrest in the public sector.

For a thorough summary of teacher strikes occurring during the period 1960-1968, see E. SHILS & C. WHITTIER, TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING 20-92 (1968).

For a discussion concluding that the public's failure to be even fundamentally fair with its employees has caused numerous strikes, see Taylor, *Public Employment: Strikes or Procedures?*, 20 IND. & LAB. REL. REV. 617, 628-29 (1967).

27. States fall into three categories. Some states have a single statute that either authorizes or requires all state public employers to engage in collective bargaining. Other states divide their public employers into categories, such as school boards or fire departments, and by separate legislation authorize or require each different group to engage in collective bargaining. Still other states have enacted single public employer collective bargaining acts that authorize or require only a limited group of public employers to engage in collective bargaining. For the current status of public sector collective bargaining in the individual states, see U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, STATE PROFILES: CURRENT STATUS OF PUBLIC SECTOR LABOR RELATIONS. *See also* GOV'T EMP. REL. REP. REFERENCE FILE State and Local Programs. For a summary and analysis of the scope of bargaining provisions of public employee bargaining laws, see J. NAJITA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: SCOPE OF NEGOTIATIONS (1973).

Chart 3 — Public Sector Strikes

Year	Stoppages Beginning in Year		Days Idle During Year (All Stoppages)	
	Number	Workers Involved	Number	Percent of Estimated Total Working Time
1956	27	3,460	11,100	*
1958	15	1,720	7,510	*
1960	36	28,600	58,400	*
1962	28	31,100	79,100	*
1964	41	22,700	70,800	**
1966	142	105,000	455,000	.02
1968	254	202,000	2,550,000	.08
1970	412	333,500	2,023,300	.06

Source: U.S. Bureau of Labor Statistics, Dep't of Labor, Handbook of Labor Statistics 1975—Reference Edition [Bull. 1865] Table 163, at 406-09 (1975).

* Statistics not available.

** Less than 0.005 per cent, or fewer than 100 workers or days.

In Pennsylvania, the legal posture of public labor relations prior to Act 195 was defined by the Public Employe Act of 1947[28] which prohibited all strikes by public employees[29] and did not require public employers to bargain collectively with their employees.[30] Pennsylvania followed the national pattern of post-war expansion of public employment[31] and growth of public employee union organiza-

28. PA. STAT. ANN. tit. 43, § 215.1-.5 (1964). This act was repealed by Act 195 as to those public employees covered by the provisions of Act 195. *Id.* § 1101.2201 (Supp. 1975).

29. *Id.* § 215.2 (1964).

30. *See id.* § 215.1(b).

31. The growth in the number of governmental employees in Pennsylvania is indicated in the following chart:

Chart 4 — Pennsylvania Governmental Employees

YEAR	EMPLOYEES ON GOVERNMENT PAYROLL IN PENNSYLVANIA
1950	338,700
1955	396,100
1960	436,200
1965	508,400
1970	618,700
1974	673,700

Source: U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1975—REFERENCE EDITION [BULL. 1865] Table 50, at 124-25 (1975).

tion in the 1960's,[32] accompanied by numerous illegal work stop-

There also occurred, during this period, a growth in the number of teachers in Pennsylvania:

Chart 5 — Professional Employment in Pennsylvania Schools

School Year	Number of Professional Personnel		
	Teachers	Others	Total
1945-46	54,206	4,595	59,801
1950-51	56,541	6,100	62,641
1955-56	63,470	7,811	71,281
1960-61	75,055	9,257	84,312
1965-66	85,302	11,242	96,544
1970-71	108,772	15,834	124,606
1975-76	116,255	18,100	134,355

Sources: Pennsylvania Bureau of Educational Statistics, Dep't of Education, Statistical Report of the Secretary of Education 1 (1968); Pennsylvania Dep't of Public Instruction, 15 Our Schools Today: The Professional Personnel Report, No. 6, 1976, at 3 [hereinafter cited as Our Schools Today]; 10 Our Schools Today, *supra*, No. 6, 1971, at 1; Pennsylvania Dep't of Public Instruction, Statistical Report of the Superintendent of Public Instruction 1 (1963); *id.* (1959); *id.* (1953); *id.* (1948).

32. Typical of the growth of public employee unionization in Pennsylvania is that which occurred among teachers in the state:

pages and strikes.[33] The chaotic climate that resulted from this ob-

Chart 6 — Teacher Unionization in Pennsylvania

School Year	Total Professional Personnel in Pennsylvania Public Schools	Teacher Association Membership in Pennsylvania	
		National Education Association (NEA)*	American Federation of Teachers (AFT)
1960-61	84,312	53,796	(not available)
1965-66	96,544	61,566	(not available)
1970-71	124,606	85,890	(not available)
1973-74	130,423	96,723	(not available)

Sources: National Education Association, NEA Handbook 155 (1974); National Education Association, NEA Handbook 413 (1969); 13 Our Schools Today, *supra* note 31, No. 6, 1974, at 2; 10 Our Schools Today, *supra* note 31, No. 6, 1971, at 1; 1974 Pennsylvania Statistical Abstract 181

*NEA membership figures include active, associate, life, and retired members. NEA student membership is not included in the figures.

33. Work stoppages in Pennsylvania are indicated in charts 7 & 8:

Chart 7 — Work Stoppages in Pennsylvania

Year	Stoppages Beginning in Year		Days Idle During Year (All Stoppages)	
	Number	Workers Involved	Number	Percent of Estimated Total Working Time
1960	398	180,000	2,040,000	.25
1965	404	132,000	1,640,000	.19
1970	636	278,200	3,695,100	.37
1973	623	201,800	3,031,800	.27

Source: U.S. Bureau of Labor Statistics, Dep't of Labor, Handbook of Labor Statistics 1975—Reference Edition Bull. 1865 Table 164, at 411-19 (1975).

viously intolerable situation occasioned the creation, in 1968, of the Governor's Commission to Review the Public Employe Law of Pennsylvania.[34]

This commission, known as the Hickman Commission,[35] issued a report[36] recommending repeal of the then existing Public Employe

Chart 8 — Work Stoppages in the Public Sector in Pennsylvania

Year	Stoppages Beginning in Year		Work-days Idle
	Number	Workers Involved	
1970	30	40,400	44,400
1971	87	36,100	257,800
1972	73	33,900	493,700
1973	65	30,700	652,800

Source: Gov't Emp. Rel. Rep. Reference File Table 6, at 71:1017-18, Table 8, at 71:1022.

Between July 1960 and June 1974, Pennsylvania witnessed 171 teacher strikes, involving 100,432 personnel, with 1,140,611 work-days lost. In 1973-74, Pennsylvania witnessed 26 teacher strikes, involving 5,507 personnel, with 61,765 work-days lost (.03% of the total work-days of instruction). Gov't Emp. Rel. Rep. Reference File Table 1, at 71:1052, Table 2, at 71:1053, Table 5, at 71:1055-56.

On the increase in work stoppages in the public sector, particularly among teachers, see Gitlow, *supra* note 18, at 773. For a study concluding that public schools are the most frequently struck governmental service, with school teachers being involved in the great majority of such strikes, see Hall, *Work Stoppages in Government*, 91 Monthly Lab. Rev. 53 (1968). *See also* Gov. Emp. Rel. Rep. Reference File 71:1011-12.

34. Pennsylvania Governor Raymond P. Shafer directed the Commission to
> review the whole area of the relations of public employees and the public employers and to make recommendations . . . for the establishment of orderly, fair, and workable procedures governing those relations including legislation . . . .

Report and Recommendations of the Governor's Commission to Revise the Public Employe Law of Pennsylvania Appendix A, ii (1968) [hereinafter cited as Report of Governor's Commission].

35. The twelve-member Commission's popular name was derived from the name of the chairman, Leon E. Hickman.

36. Report of Governor's Commission, *supra* note 34.

Act and the passage of a new law which would permit the right of all public employees to bargain collectively.[37] In recommending this change, the commission emphasized the need for collective bargaining to restore harmony in the public sector[38] and to eliminate the numerous illegal strikes and the widespread labor unrest.[39]

Subsequent to the issuance of the report of the Hickman Commission, various bills were introduced in the Pennsylvania General Assembly to effectuate the commission's recommendations.[40] The final result was the enactment into law, on July 23, 1970, of Act 195.[41]

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37. *Id.* at 3. As indicated previously, in response to the demands of police and firemen, the Pennsylvania General Assembly had already passed a statute guaranteeing to those two groups collective bargaining rights, but denying them the right to strike; instead, compulsory arbitration was provided for as the ultimate impasse resolution device in negotiations over contract terms. PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Supp. 1975). *See* Note, *Pennsylvania's Proposed Public Employees Relations Act: A Landmark of Sound Progress or an Invitation to a Quagmire?*, 30 U. PITT. L. REV. 693 (1969) [hereinafter cited as Note, *Pennsylvania's Proposed Public Employees Relations Act*].

38. REPORT OF GOVERNOR'S COMMISSION, *supra* note 34, at 9.

On the comparative differences in the scope of collective bargaining between the private and the public sectors, see Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 857-61 (1970). *See also* H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 202 (1971); Shaw & Clark, *The Practical Differences between Public and Private Sector Collective Bargaining*, 19 U.C.L.A.L. REV. 867 (1972); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

As to whether private sector collective bargaining could serve as a model for collective bargaining in the public sector, see Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969), which takes the position that it could not.

There are others who emphasize the similarities between public and private bargaining and who would solve problems in the public sector by analogizing to the private sector. *See, e.g.*, Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357 (1972); Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973); Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969). However, most of those who analogize to the private sector pattern generally acknowledge the need for some modification. *See, e.g.*, Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 909 (1969).

39. REPORT OF GOVERNOR'S COMMISSION, *supra* note 34, at 6, 7, 9, 17. The Commission's judgment was that the "inability to bargain collectively has created more ill will and led to more friction and strikes than any other single cause." *Id.* at 6. *See also* Note, *Pennsylvania's Proposed Public Employees Relations Act, supra* note 37, at 695.

40. For a synopsis of the subsequent history of the Hickman Commission's Report and the resultant bills introduced in the Pennsylvania General Assembly, see PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, ACT 195, at 184-85 (rev. ed. 1973) [hereinafter cited as ACT 195]. For a critique of the then-proposed legislation, see Note, *Pennsylvania's Proposed Public Employees Relations Act, supra* note 37.

41. Act of July 23, 1970, No. 195, [1970] Laws of Pa. 563 (codified at PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Supp. 1975)).

Act 195, as enacted, did not effect all of the Hickman Commission's recommendations. For example, police and firemen were excluded from the Act's coverage; their separate coverage

III. The Scope of Collective Bargaining in Public Education

A. *Introduction*

The public policy of Pennsylvania has long emphasized the importance of fostering and advancing public education.[42] The primary responsibility for effecting this policy is constitutionally vested in the Pennsylvania General Assembly which is to "provide for the maintenance and support of a thorough and efficient system of public education."[43] To implement this constitutional mandate, the Pennsylvania General Assembly has enacted a comprehensive Public School Code[44] that designates local school boards as "agents" to administer this constitutional duty.[45] The school boards,[46] being

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under Pa. Stat. Ann. tit. 43, §§ 217.1-.10 (Supp. 1975) was continued. These groups were afforded the right to bargain collectively but not the right to strike.

42. Sagot & Jennings, *Limited Right to Strike Laws—Can They Work When Applied to Public Education*, 2 J. Law & Ed. 715, 716-18 (1973) [hereinafter cited as Sagot & Jennings]. The judicial deference attributed to this policy is succinctly expressed in Commonwealth *ex rel.* Hetrick v. Sunbury School Dist., 335 Pa. 6, 11-12, 6 A.2d 279, 281-82 (1939). *See also* Appeal of Walker, 332 Pa. 488, 491, 2 A.2d 770, 772 (1938).

43. Pa. Const. art. III, § 14. This constitutional mandate is a direct carryover from Pa. Const. art. X, § 1 (1874) which directed the legislature to maintain a "thorough and efficient system of public schools." *See generally* E. Bolmeier, School in the Legal Structure 63-77 (1968); N. Edwards, The Courts and the Public Schools 27-46 (3d ed. 1971).

44. Pennsylvania school districts are established and conducted pursuant to the Public School Code of 1949, Pa. Stat. Ann. tit. 24, §§ 1-101 to 27-2702 (1962). A proposed recodification of the Code, containing extensive changes, is currently pending before the Pennsylvania General Assembly.

45. Wilson v. Philadelphia School Dist., 328 Pa. 225, 231, 195 A. 90, 94 (1937). *See also* Pennsylvania Labor Relations Bd. v. State College Area School Dist., 9 Pa. Commw. 229, 239, 306 A.2d 404, 410 (1973).

The school district in Pennsylvania is an agency of the state, rather than of a municipality (even though it might be coexistent with a municipality). Pennsylvania case law characterizes local school districts and school boards as state agents created by the state for the purpose of carrying out a purely state function. *See, e.g.*, Slippery Rock Area Joint School Sys. v. Franklin Township School Dist., 389 Pa. 435, 442, 133 A.2d 848, 852 (1957); Wilson v. Philadelphia School Dist., 328 Pa. 225, 230, 195 A. 90, 94 (1937). In practice, however, school boards are generally perceived as units of local government, and this ambiguity may result in complex legal-conceptual struggles among the city government, the school district, and the state legislature on a wide variety of school matters. *See generally* N. Edwards, The Courts and the Public Schools 54-142 (3d ed. 1971); E. Reutter & R. Hamilton, The Law of Public Education 107-27, 223-44 (1970). This conceptualization/characterization problem also raises a related issue as to the extent, if any, to which the local electorate may participate in the formulation of school board policy, *i.e.*, is policy determined by the state, the local school board, parents, teachers, etc., either solely or in some combination.

46. There are 505 school districts in Pennsylvania, each having a governing board of school directors. For a complete listing of the 505 school districts in Pennsylvania, see Pennsylvania Dep't of Education, Education Directory (1975). School boards have organized themselves

creatures of statutory creation, possess only such powers as are specifically, or by necessary implication, granted to them.[47] The Public School Code, with respect to the administration of school districts, is a broad statutory grant of managerial prerogative to school boards.[48] As a result of this state legislation, the local school board is the basic unit of educational policy-making and administration.[49] In light of this, Pennsylvania courts have consistently held that in exercising their delegated authority over policy matters, school boards must be given broad discretionary power in order to ensure the best possible education for the children under their care.[50] While in general, in the public sector, many non-economic matters lie

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into a state-wide organization, the Pennsylvania School Boards Association, headquartered in Harrisburg, Pennsylvania.

47. Chartiers Valley Joint Schools v. County Board, 418 Pa. 520, 211 A.2d 487 (1965); Barth v. Philadelphia School Dist., 393 Pa. 557, 143 A.2d 909 (1958). PA. STAT. ANN. tit. 24, § 2-211 (1962) provides: "The several school districts in this Commonwealth shall be, and hereby are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act."

48. PA. STAT. ANN. tit. 24, § 5-510 (1962) sets forth the broad inherent managerial prerogatives of school boards as follows:

> The board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and other appointees or employes during the time they are engaged in their duties to the district.

49. This is also reflective of the tradition that school governance is a local matter. The public school, as it exists today, was not adopted in Pennsylvania until many years after the American Revolution. Although the Pennsylvania Constitutions of 1776, 1790, and 1838 and the laws recognized the schools' vital role in the state, it was only in 1834, after Governor George Wolf's crusade for education, that the common schools became an integral part of a state system of public schools. Wilson v. Philadelphia School Dist., 328 Pa. 225, 230-31, 195 A. 90, 94 (1937). On the history of the development of the public school system in Pennsylvania, see PENNSYLVANIA DEP'T. OF PUBLIC INSTRUCTION, ONE HUNDRED YEARS OF FREE PUBLIC SCHOOLS IN PENNSYLVANIA (1934); L. WALSH & M. WALSH, HISTORY AND ORGANIZATION OF EDUCATION IN PENNSYLVANIA (1930); J. WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA (1886); C. Mitchell, The Development and Control of State Support of Education in Pennsylvania, June 1931 (unpublished doctoral dissertation, University of Pittsburgh); J. Nietz, The Constitutional and Legal Bases of the Public School System of Pennsylvania, June 1933 (unpublished doctoral dissertation, University of Chicago).

50. *See, e.g.*, Smith v. Darby School Dist., 388 Pa. 301, 314, 130 A.2d 661, 668-69 (1957): "School authorities must be given broad discretionary powers to ensure a better education for the children of this Commonwealth . . . ." Thus any restriction in the exercise of a board's powers has been strictly construed on the theory that its public interest in education as expressed in its policy decisions predominates over the interest of any individual or group of individuals. Smith v. Darby School Dist., *supra*; Walker v. Scranton School Dist., 338 Pa. 104, 12 A.2d 46 (1940). Most case law interpreting the inherent managerial authority of the school board, however, antedates enactment of the Public Employe Relations Act.

beyond the authority of the public employer and require legislative enactment to effect a change, the school board has traditionally been an exception to the rule that the public employer has less discretion over management policy than does his private sector counterpart.[51]

Given the traditionally wide discretion afforded local school boards in the management of school district affairs, the enactment of Act 195, which mandated collective bargaining[52] while affirming school board management prerogatives,[53] ensured that the scope of collective bargaining would be the critically important question.[54] Indeed, no other single issue has more exacerbated teacher-school board bargaining relations.[55]

The principal conflict as to the scope of bargaining centers upon two provisions of Act 195,[56] each of which was designed to effectuate an important policy. Section 701,[57] captioned "Matters subject to bargaining," was designed to grant public employees a right to bargain over items basic to the well-being of employees:

> Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.[58]

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51. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 9 Pa. Commw. 229, 244 n.5, 306 A.2d 404, 413 n.5 (1973).

52. *See* PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1975).

53. *See id.* § 1101.702.

54. That this is the critical question has been recognized by both teacher organizations and school boards. *See, e.g.*, Fondy, *A Brief Discussion of Pennsylvania's New Public Employee Bargaining Act*, 23 THE PUB. SCHOOL DIG., No. 2, 1970-71, at 2 [hereinafter cited as Fondy]; Heddinger, *A Perspective of Pennsylvania's Collective Bargaining Law for Public Employees*, 23 THE PUB. SCHOOL DIG., No. 2, 1970-71, at 4 [hereinafter cited as Heddinger].

55. Comment, *The Public Employe Relations Act, supra* note 14, at 81.

56. A conflict also exists as to a third provision of Act 195—section 703, PA. STAT. ANN. tit. 43, § 1101.703 (Supp. 1975). That conflict is dealt with below. *See* text accompanying notes 143-47 *infra*.

57. PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1975).

58. *Id.*

Section 702,[59] captioned "Matters not subject to bargaining," was adopted in the public interest to assure public employers the ability to manage their institutions in a relatively unfettered fashion. It provides:

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.[60]

Thus the stage for conflict was set by these two sections; one establishes certain basic items as mandatorily bargainable and specifically exempts nothing from the scope of collective bargaining, while the other allows relatively unfettered exercise of discretion by the school board in overall school management, making permissive the discussion of matters of inherent managerial policy.[61]

B. *The Teachers' Perspective*

A proper understanding of the teachers' perspective is premised on a clear perception of the forces that have moved teachers to negotiate collectively. The contributing factors that account for the shift from relative docility to aggressive militancy are to be found in teachers themselves, in the school systems in which they work, and in the larger society in which they live.[62]

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59. *Id.* § 1101.702.

60. *Id.*

61. *I.e.*, the language of the management prerogative exception is so broad that many of the conditions of employment arguably may not be negotiated without the employer's consent.

62. These contributing factors include: (1) the personal desire on the part of teachers to be professionals and to aspire to professional level social and economic rewards; (2) the larger percentage of men who have entered the teaching profession and who are determined to enjoy a rewarding career; (3) the increased level of preparation, expertise, and technology which today's teachers bring to their work; (4) the pressures and impersonal relations (as among teachers, school boards, and students) which result from large school systems; and finally, without having exhausted the causal factors, (5) the greater acceptance of bargaining in the public sector of the economy. Francis, *Collective Bargaining and Professional Negotiation in*

The thrust of the teachers' collective bargaining effort is not only toward better salaries and improved working conditions but also toward *shared control* over policy formulation and administrative decision-making in areas traditionally considered the unilateral responsibility of boards and administrators.[63] This desire for shared control forms the core of teacher philosophy toward collective bargaining, as expounded by both teacher association leaders[64] and by leading educators,[65] the rationale being that inspired teaching and professional dedication are not compatible with unilateral decision-making. With such a view, the traditional school board-dominated system does not adequately utilize the constructive contributions that teachers can make in the formulation of educational programs.[66]

The restrictive approach to inherent managerial policy taken by school boards[67] under Act 195 is labeled by teachers as "unreasonable, unrealistic and unenforceable," rendering the collective bargaining process little more than "advisory" in nature.[68] The teach-

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Public Schools, 19 THE PUB. SCHOOL DIG., No. 2, 1966-67, at 58, 60 [hereinafter cited as Francis]. *See also* Note, *Collective Bargaining and the California Public Teacher*, 21 STAN. L. REV. 340, 340-48 (1969) [hereinafter cited as Note, *Collective Bargaining*].

63. Francis, *supra* note 62, at 60.

The issue, from the teachers' point of view, is not a threshold one of whether professional public employees *should* participate in decisions about the nature of the services they provide. Teachers take it as a given that every school district should be interested in, and heavily reliant upon, the judgment of its professional staff. The issue, from such a perspective, rather is the *manner* of that participation. Conclusions about that issue go to the heart of the decision-making process and the impact of collective bargaining on that process.

64. *See, e.g.*, Fondy, *supra* note 54.

65. *See, e.g.*, Francis, *supra* note 62.

66. Indeed, the argument has been made that school boards are not possessed of superior expertise in discharging the duty with which they are statutorily charged. "[T]hey are at best dilettantes as to what is, or is not, sound education. Conversely, their employees, the teachers, *are* trained *and* certified in the production and evaluation of sound education." R. DOHERTY & W. OBERER, TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD 90 (1967) (emphasis in original). This argument must be understood in light of the fact that school board members are traditionally unpaid and have full-time jobs by which they earn their living. Thus unlike other public officers, they are not continuously involved in operations and are not familiar with the day-to-day functioning of the school system. F. LIVINGSTON, COLLECTIVE BARGAINING AND THE SCHOOL BOARD, PUBLIC WORKERS AND PUBLIC UNIONS 63, 73 (S. Zagoria ed. 1972) [hereinafter cited as LIVINGSTON]. *See also* Note, *Collective Bargaining*, *supra* note 62, at 375.

67. *See, e.g.*, ACT 195, *supra* note 40; Heddinger, *supra* note 54. The restrictive approach as to the scope of collective bargaining is reflected in the periodicals of the Pennsylvania School Boards Association: ACT 195, *supra* note 40; INFORMATION LEGISLATIVE SERVICE; NEGOTIATIONS GUIDEBOOK; NEGOTIATION GUIDELINES; PSBA BULLETIN.

68. Fondy, *supra* note 54, at 2.

ers' interpretation of "wages, hours and *other terms and conditions of employment*" under section 701 of Act 195 is a very broad one. Teachers hold that virtually all items are negotiable,[69] reasoning that policy decisions which would have no effect on the terms and conditions of employment or production of other public employees *do* have a significant effect on the employment conditions of teachers.[70] Thus, teachers interpret the above-quoted phrase to include literally hundreds of items,[71] among which are class size,[72] student discipline, curriculum determination,[73] and extracurricular assignments.[74] The essence of the teachers' position is that all matters connected with terms and conditions of employment must be regarded as negotiable issues since no state statute contains any explicit prohibition against bargaining on them.[75]

C. *The School Board's Perspective*

A school board is unique among public employers; its perspective on collective bargaining arises from its singular structure and functions. Unlike most other governmental units, a school board is a legislative as well as an executive body.[76] A school board, in addition

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69. *Id.* at 3.

70. For example, a typical government clerk works eight hours daily. If there are fewer clerks working with him, this simply means that work is turned out more slowly; it does not necessarily result in more burdensome working conditions for the clerk. On the other hand, fewer teachers means that each teacher has a greater load of students and this does affect the conditions of his employment. LIVINGSTON, *supra* note 66, at 63, 68.

71. Collective bargaining negotiations between a teachers' association and a school board may deal with hundreds of items, and the resulting collective bargaining agreement may include as many items. *See* D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS (1974). *See also* NATIONAL EDUCATION ASSOCIATION, GUIDELINES FOR PROFESSIONAL NEGOTIATION (rev. ed. 1965).

72. On this most "ancient" of items, see H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 137-38 (1971). *See also* Jascourt, *The Scope of Negotiations in Public Education: Overview*, 2 J. LAW & ED. 137, 138 (1973) [hereinafter cited as Jascourt]; Note, *Collective Bargaining and the Professional Employee*, 69 COLUM. L. REV. 277, 288 (1969).

73. On the increasing commonness of this as an item of teacher involvement, see Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017, 1027 (1969).

74. Francis, *supra* note 62, at 45, 58.

75. This philosophy is reflected in the principal periodicals of the National Education Association and its Pennsylvania affiliate, the Pennsylvania State Education Association: NEA HANDBOOK; NEA NEWSLETTER; NEA RESEARCH BULLETIN; NEA RESEARCH MONOGRAPH; NEA RESEARCH REPORT; PENNSYLVANIA SCHOOL JOURNAL; TODAY'S EDUCATION: NEA JOURNAL. A similar philosophy is reflected in the principal periodicals of the American Federation of Teachers: CHANGING EDUCATION; THE AMERICAN TEACHER.

76. While it is true that, in some local governmental units, there is some mingling of executive and legislative functions, school boards are the only major spending unit of state or local government in which the legislative and executive functions are completely mixed.

to the executive function of administering the school system through its staff, also performs the legislative functions of raising funds through taxes, allocating these funds by adopting budgets, and setting general policies for the school district.[77]

The role of a school board in the area of collective bargaining is likewise unique. While other governmental executive officers negotiate directly with public employees, as does a school board, such negotiations are either subject to the appropriation of funds by a different and independent legislative body or must be kept within the parameters of funding previously appropriated by the legislature for employee salaries and benefits. Such is not the case with school boards.[78] On the other side of the coin, legislative bodies act similarly to school boards in levying taxes and appropriating funds but, unlike school boards, do not bargain with public employees. The problem for school boards arises because they must legislate when confronted with collective bargaining responsibilities with which a legislative body normally does not deal.[79]

The basic school board perspective is reflected in its concept of itself as the protector of the public interest[80] rather than as an employer. The school board's view is that it is prohibited from negoti-

77. LIVINGSTON, *supra* note 66, at 64.

78. In Pennsylvania, school districts are empowered to levy taxes, not to exceed millage rates as set by the Pennsylvania General Assembly. *See* PA. STAT. ANN. tit. 24, §§ 6-652, -672 (1962).

79. LIVINGSTON, *supra* note 66, at 64-65.

80. For an example of this viewpoint, see the statement of the executive secretary of the Pennsylvania School Boards Association in Heddinger, *supra* note 54, at 4-5 ("ensuring that employers . . . effectively represent general public interest").

Public employers may ground their reluctance to bargain on certain items on the argument that the decision-making authority is vested in them as a public trust, a trust that cannot be shared with the employees. This concept may be subject to challenge in that the same individuals who define themselves as holding a public trust may not be accountable to the public. Moreover, when asked to share this same trust with the public, their response is not infrequently negative. In reality, the public trust concept, as a limitation to bargaining, is more illusory than real. This is especially true for school boards who are not elected by the public, but instead are appointed officials.

In Pennsylvania, all school boards, except two, are elected. PA. STAT. ANN. tit. 24, §§ 3-303 to -306 (1962). The two exceptions are Philadelphia and Pittsburgh where school directors are appointed by the judges of the court of common pleas of the county wherein each school district is situated. *Id.* § 3-302. A recent statutory enactment, *id.* § 3-302.1 (Supp. 1975), provided for a public referendum to be conducted within the Pittsburgh school district to determine if the citizens desired retention of the existing appointive system or direct election of the school board by the voters. At the referendum, the voters opted for direct election of the school board.

ating on any item unless the law expressly requires it to be negotiated.[81] The board generally considers any concession that it makes through negotiations as compromising the public good and tends to resist teachers' demands as an unwarranted intrusion into its heretofore unfettered discretion in the management of all aspects of the school district.[82] Where the perspective is grounded upon an overriding obligation to the children and the general public, it is little wonder that school boards believe that collective bargaining procedures cannot be allowed to impinge upon the education of children.[83]

The same items which teachers consider part of the "terms and conditions of employment" are not considered so by the boards. The school board has an interest in maintaining its organizational structure by regulating everything from class size to extracurricular assignments, and in controlling the enormous budgetary effect of those items, measured primarily in terms of manpower and facilities.[84]

While a redefinition of roles is taking place and a change from unilateral to bilateral decision-making is occurring, school boards have displayed their intention to remain as the executives who determine policy—while policy may be recommended by faculty, or faculty and school board together, it cannot safely be left to the art of compromise, that is, to collective bargaining.[85]

D. *The Conflict of Perspectives*

Reflective of the previously-mentioned perspectives of teachers and school boards, the period of time since passage of Act 195 has witnessed an effort by teachers to expand the scope of negotiable items and an equally determined effort by school boards to assert managerial rights—both groups relying upon sections 701 and 702 of Act 195 to support their respective positions. This has resulted in such serious disagreements that judicial interpretation of those two sections of the Act has been necessary to resolve the issues presented.

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81. This viewpoint is reflected in the publications of the Pennsylvania School Boards Association. *See* note 67 *supra*.

82. Sagot & Jennings, *supra* note 42, at 716. As to the extent of this discretion, see text accompanying notes 48-51 *supra*.

83. Heddinger, *supra* note 54, at 5, 8.

84. Jascourt, *supra* note 72, at 137-38.

85. Metzler, *The Need for Limitation Upon the Scope of Negotiations in Public Education, I*, 2 J. LAW & ED. 139 (1973).

Three cases[86] have reached the Pennsylvania appellate courts on the issues of what is encompassed by the phrase "meet and discuss"[87] and what is encompassed by the term "mandatory" in collective bargaining situations affecting public education. These decisions are somewhat in conflict.[88] However, two recent decisions by the Pennsylvania Supreme Court[89] may be read as the first steps in establishing an identifiable guide for determing the scope of collective bargaining in public education under Act 195.

E. *Judicial Interpretation*

The difficulty in determining the scope of collective bargaining with some relative precision may be accounted for not only because of the apparent conflict between the statutory provisions of Act 195, but also because there exist one administrative body[90] and three levels of the judiciary[91] that may be called upon to address that issue, with the resultant possibility of varying or even contradictory decisions. The importance of this complicating procedure and the confusion which can result is amply reflected in the administrative and judicial history of Act 195 in the first five years after its enactment.

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86. Board of Educ. v. Local 3, AFT, 346 A.2d 35 (Pa. 1975); Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262 (Pa. 1975); Canon-McMillan School Bd. v. Commonwealth, 12 Pa. Commw. 323, 316 A.2d 114 (1974).

87. PA. STAT. ANN. tit. 43, § 1101.301(17) (Supp. 1975) reads:

> "Meet and discuss" means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employes: Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised.

88. *Compare, e.g.*, Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262 (Pa. 1975), *with* Pennsylvania Labor Relations Bd. v. State College Area School Dist., 9 Pa. Commw. 229, 306 A.2d 404 (1973) (same case). *See also* Canon-McMillan School Bd. v. Commonwealth, 12 Pa. Commw. 323, 328, 316 A.2d 114, 117 (1974) (Mencer, J., dissenting), wherein the view was expressed that the commonwealth court's decision in *Canon-McMillan* was "diametrically opposite" the same court's decision in *State College, supra*.

89. Board of Educ. v. Local 3, AFT, 346 A.2d 35 (Pa. 1975); Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262 (Pa. 1975).

90. The Pennsylvania Labor Relations Board [hereinafter referred to as PLRB or Board]. The three-member Board, which was created by and which functions under PA. STAT. ANN. tit. 43, § 211.4 (1964), is a division of the Pennsylvania Department of Labor and Industry and is headquartered in Harrisburg, Pennsylvania. Regional offices of the PLRB are located in Philadelphia and in Pittsburgh. As to the extent of the role that the PLRB is to play in interpreting Act 195, see PA. STAT. ANN. tit. 43, §§ 1101.501-.503 (Supp. 1975).

91. The courts of common pleas, the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court.

The first case to involve the scope of collective bargaining in public education under Act 195 was *State College Area School District*,[92] which arose less than four months after the effective date of the Act.[93] That case arose out of negotiations between the State College Area School District and the State College Area Education Association (SCAEA), which represented elementary and secondary school teachers employed by the school district. On February 26, 1971, the teachers' association filed an unfair practice charge[94] with the Pennsylvania Labor Relations Board (PLRB), alleging that the school directors had acted contrary to the provisions of section 1201(a)(5)[95] of Act 195 by refusing to bargain[96] over twenty-three items[97] as required by section 701.

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92. 1 Pa. Pub. Emp. Rep. 115 (Pa. Lab. Rel. Bd. 1971), *rev'd in part on rehearing*, 2 Pa. Pub. Emp. Rep. 102 (Pa. Lab. Rel. Bd.), *rev'd in part*, 2 Pa. Pub. Emp. Rep. 177 (C. P. Centre Co. 1972), *aff'd*, 9 Pa. Commw. 229, 306 A.2d 404 (1973), *rev'd*, 337 A.2d 262 (Pa. 1975).

93. Act 195, enacted into law on July 23, 1970, took effect ninety days later, on October 21, 1970. PA. STAT. ANN. tit. 43, § 1101.2301 (Supp. 1975).

94. *Id.* § 1101.301(8) reads: " 'Unfair practice' means any practice prohibited by Article XII of this act." Article XII of Act 195 enumerates a long list of prohibited acts. *See id.* § 1101.1201.

95. *Id.* § 1101.1201(a)(5) provides:

(a) Public employers, their agents or representatives are prohibited from:

. . . .

(5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

96. The school board had offered to "meet and discuss" with the teachers in respect to the items, in accordance with section 702 of Act 195. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 9 Pa. Commw. 229, 232 n.1, 306 A.2d 404, 407 n.1 (1973). As to the definition of "meet and discuss," see note 87 *supra*.

97. The twenty-three items were:

1. The availability of proper and adequate classroom instructional printed material;

2. The provision for time during the school day for team planning of required innovative programs;

3. The timely notice of teaching assignment for the coming year;

4. Providing separate desks and lockable drawer space for each teacher in the district;

5. Providing cafeteria for teachers in the senior high school;

6. Eliminating the requirement that teachers perform non-teaching duties such as but not limited to hall duty, bus duty, lunch duty, study hall, and parking lot duties;

7. Eliminating the requirement that teachers teach or supervise two consecutive periods in two different buildings;

8. Eliminating the requirement that teachers substitute for other teachers during planning periods and teaching in non-certificated subject areas;

9. Eliminating the requirement that teachers chaperone athletic activities;

10. Eliminating the requirement that teachers unpack, store, check or otherwise handle supplies;

Following a three-day hearing before an examiner, the PLRB on October 14, 1971, issued a nisi decision and order[98] which held that none of the items[99] were negotiable and dismissed the charge.[100] Following a personnel change in the Pennsylvania Labor Relations Board,[101] SCAEA filed an amended charge with the PLRB. An additional hearing was held and on June 26, 1972, the PLRB issued a

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11. Providing that there shall be one night each week free for Association meetings;

12. Providing that a teacher will, without prior notice, have free access to his personnel file;

13. Permitting a teacher to leave the building any time during the school day unless he has a teaching assignment;

14. Providing special teachers with preparation time equal to that provided for other staff members;

15. Provision for maximum class sizes;

16. Provision that the Association will be consulted in determining the school calendar;

17. Provision that school will officially close at noon of the last day of classes for Thanksgiving, Christmas, Spring and Summer vacation;

18. Provision that at least one half of the time requested for staff meetings be held during the school day;

19. A provision that school teachers not be required to be in the school more than 10 minutes prior to the time students are required to be in attendance and not more than 10 minutes after students are dismissed;

20. A provision that the present Tuesday afternoon conference with parents be abolished and teachers hold conferences with parents by appointment at a mutually convenient time;

21. Provision that secondary teachers not be required to teach more than 25 periods per week and have at least one planning period per day;

22. A provision that elementary teachers shall have one period or fifteen minutes per day for planning purposes; and

23. Provision for released time for the president of the Association for Association business.

Record at 469a-71a, Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262 (Pa. 1975). For clarity, the same item numbers used before the PLRB have been retained throughout this comment.

98. A nisi decision and order is a provisional decree which is made absolute unless, within the prescribed time, the party affected by it shows cause why it should not be made absolute. 6A M. LEWIS, STANDARD PENNSYLVANIA PRACTICE ch. 29, § 92 (1960). *See also* BLACK'S LAW DICTIONARY 1197 (4th ed. 1951).

99. Items 19 and 23, *supra* note 97, were withdrawn by mutual consent of the parties at the hearing and were not in issue at the time of the nisi decision and order.

100. 1 Pa. Pub. Emp. Rep. at 117.

101. A change in the personnel of the PLRB occurred in December 1971. Chairman Petrikin and Member Stuart were replaced, respectively, by Chairman Scheib and Member Jones. Member Licastro continued to serve on the Board. ACT 195, *supra* note 40, at 82. That personnel change in the three-member Board, the composition of which is the same at the time of this writing, resulted in a decisive shift in the Board's decisions involving the scope of collective bargaining in public education. That shift in decision-making is dealt with *infra*.

final order[102] which reversed its previous nisi order as to five items,[103] ruling that the school district had failed to bargain in good faith with the teachers on those items which the PLRB found to be matters for mandatory collective bargaining under section 701; the PLRB reaffirmed the nisi order as to the remaining items which it ruled were part of inherent managerial policy and hence not bargainable by virtue of section 702 of the Act. Upon petition for review of the PLRB's final order,[104] the Court of Common Pleas of Centre County reversed the PLRB on the five items found negotiable and sustained the PLRB on the remaining non-negotiable items.[105] Appeal to the Pennsylvania Commonwealth Court followed, where it was held that none of the items were mandatory subjects for collective bargaining.[106]

A second case, *Canon-McMillan School Board*,[107] appeared less than a week after the *State College* suit was initiated. There the Canon-McMillan Education Association filed an unfair practice charge with the PLRB against the Canon-McMillan School Board, alleging a violation of section 1201(a)(5).[108] At the examiner's hearing, all items except one were withdrawn.[109] On August 20, 1971, the PLRB handed down a nisi order which held that the Board had committed an unfair practice in refusing to bargain on that one

102. State College Area School Dist., 2 Pa. Pub. Emp. Rep. 102, 104 (Pa. Lab. Rel. Bd. 1972).

103. The five items were: (3) the timely notice of teaching assignment for the coming year; (5) providing cafeteria for teachers in the Senior High School; (9) eliminating the requirement that teachers chaperone athletic activities; (12) providing that a teacher will, without prior notice, have free access to his personnel file; and (17) provision that school will officially close at noon of the last day of classes for Thanksgiving, Christmas, Spring and Summer vacation. *Id.* at 103.

104. PA. STAT. ANN. tit. 43, § 1101.1502 (Supp. 1975) provides for review of a PLRB final order in the appropriate court of common pleas.

105. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 2 Pa. Pub. Emp. Rep. 177 (C.P. Centre Co. 1972).

106. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 9 Pa. Commw. 229, 246, 306 A.2d 404, 414 (1973). The court was divided, however; three of the seven judges dissented in part, arguing that a balancing test should be employed to resolve the conflicts between sections 701 and 702, and finding that items 3 and 22 were bargainable. *See id.* at 247-50, 306 A.2d at 414-16 (Kramer, J., concurring in part and dissenting in part).

107. 1 Pa. Pub. Emp. Rep. 83 (Pa. Lab. Rel. Bd. 1971), *aff'd*, 2 Pa. Pub. Emp. Rep. 22 (Pa. Lab. Rel. Bd.), *aff'd*, 2 Pa. Pub. Emp. Rep. 204 (C.P. Wash. Co. 1972), *aff'd*, 12 Pa. Commw. 323, 316 A.2d 114 (1974).

108. PA. STAT. ANN. tit. 43, § 1101.1201(a)(5) (Supp. 1975).

109. That item was compensation for extracurricular duties of teachers.

item.[110] On January 18, 1972, the new PLRB[111] issued a final order[112] which in effect affirmed the prior nisi order. The Court of Common Pleas of Washington County affirmed the PLRB's final order.[113] The school board appealed to the Pennsylvania Commonwealth Court which, in January 1974, upheld the decisions of both the PLRB and the lower court that the item was bargainable.[114] Two members of the commonwealth court dissented, however, contending that the *Canon-McMillan* decision was "diametrically opposite" the same court's *State College* decision issued less than eight months earlier.[115]

To summarize, the following situation existed at the time when the Pennsylvania Supreme Court entertained, as a case of first impression, the appeal in *State College*. The Pennsylvania Labor Relations Board had initially taken a position that indicated a very narrow scope of bargainable items in teacher-school board negotiations,[116] although the board did not totally reject the existence of bargainable items.[117] However, following a change in the personnel of the Board,[118] that agency modified its stand, broadening somewhat the scope of bargainable items, as determined on a case-by-case basis.[119] Two courts of common pleas had reached different results as to the scope of bargainable items under Act 195.[120] A

110. 1 Pa. Pub. Emp. Rep. at 84.

111. *See* note 101 *supra*.

112. Canon-McMillan School Bd., 2 Pa. Pub. Emp. Rep. 22, 23 (Pa. Lab. Rel. Bd. 1972).

113. Pennsylvania Labor Relations Bd. v. Canon-McMillan School Bd., 2 Pa. Pub. Emp. Rep. 204 (C.P. Wash. Co. 1972). In its order, the three-judge panel adopted and approved, without discussion, the PLRB's final order.

114. Canon-McMillan School Bd. v. Commonwealth, 12 Pa. Commw. 323, 327, 316 A.2d 114, 116 (1974).

115. *Id.* at 327, 328, 316 A.2d at 116, 117 (Mencer, J., dissenting). Judge Rogers joined in the dissent.

116. *See* State College Area School Dist., 1 Pa. Pub. Emp. Rep. 115 (Pa. Lab. Rel. Bd. 1971).

117. *See, e.g.*, Canon-McMillan School Bd., 1 Pa. Pub. Emp. Rep. 83 (Pa. Lab. Rel. Bd. 1971).

118. *See* note 101 *supra*.

119. *See* State College Area School Dist., 2 Pa. Pub. Emp. Rep. 102 (Pa. Lab. Rel. Bd. 1972).

120. Pennsylvania Labor Relations Bd. v. Canon-McMillan School Bd., 2 Pa. Pub. Emp. Rep. 204 (C.P. Wash. Co. 1972); Pennsylvania Labor Relations Bd. v. State College Area School Dist., 2 Pa. Pub. Emp. Rep. 177 (C.P. Centre Co. 1972).

It is unclear whether the *Canon-McMillan* court had available, at the time it handed down its order, a copy of the Centre County Court's opinion in *State College*. If the *Canon-McMillan* court did not have that opinion available, its failure to write an opinion in the

divided commonwealth court in *State College* adopted a stringent two-part test[121] to be met before an item could be deemed bargainable; in *Canon-McMillan*, the same court appeared to speak with a different voice—the *State College* dissenting judges formed a new majority, with the author of the *State College* opinion now dissenting. Thus, the Pennsylvania Supreme Court's decision in *State College*,[122] rendered in April 1975, was envisioned as providing the opportunity to clarify, amidst a confusing jumble of administrative and judicial decisions, the scope of collective bargaining in public education under Act 195.

The threshold issue faced by the supreme court in *State College* was whether the precedent developed in private sector labor relations by the National Labor Relations Board and the federal courts would apply in public sector labor relations in Pennsylvania since section 701 had incorporated the language of section 8(d) of the National Labor Relations Act.[123] In interpreting the key phrase of section 8(d), "wages, hours and other terms and conditions of employment," the National Labor Relations Board and the federal courts had developed a distinction in the scope of bargaining in the private sector between "mandatory" and "permissive" subjects of

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Canon-McMillan case may be accounted for by a possible reluctance to become the first court in Pennsylvania to render a decision interpreting Act 195. If the *Canon-McMillan* court did have the *State College* opinion available, either the urgency for an immediate decision or a reluctance to take judicial notice of the Centre County Court's decision may account for the lack of an opinion.

121. *See* note 141 *infra*.

122. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262 (Pa. 1975).

123. 29 U.S.C. § 158(d) (1970) provides in pertinent part:

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

The above-quoted language is tracked in PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1975) which reads:

> Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

bargaining. Mandatory subjects, requiring bargaining until impasse, are those matters which directly relate to "wages, hours, and working conditions."[124] All other subjects[125] are labeled permissive subjects, which need be the focus of negotiation only if both parties agree, *i.e.*, bargaining with respect to permissive subjects is discretionary for both parties,[126] and neither is required to bargain in good faith to the point at which agreement or impasse is reached.[127]

While the Pennsylvania Supreme Court recognized that there is a carryover of the underlying distinction between mandatory and permissive subjects of bargaining, it declined to employ private sector precedent to resolve public sector cases that arise under Act 195.[128] The court specifically declined to accept a ready-made body of precedent, opting instead to resolve disputes on a "case-by-case basis" until overall principles could be developed.[129]

The resolution of this threshold issue required the court to address the remaining issues, namely the apparent conflict between sections 701 and, respectively, sections 702 and 703 of Act 195. If these sections were read literally and given full sweep, each would virtually eclipse the other. When the provisions of a statute are ambiguous, the legislative intent must be determined. In accordance with section 1921(c) of the Statutory Construction Act,[130] the court as-

124. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

125. Except illegal subjects of bargaining.

126. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

127. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

128. 337 A.2d at 264. That such precedent may be used, however, has not been ruled out inasmuch as the court recognized that these decisions may provide some guidance. *Id.* Thus the PLRB and the Pennsylvania courts may utilize such federal precedent from the private sector. Arguably, such precedent must first satisfy the balancing test as formulated by the Pennsylvania Supreme Court. *See* text accompanying note 137 *infra*. Since the court considers such "analogies [to] have limited application" it may be anticipated that the court will not readily favor the use of such precedent when cases containing such arise on appeal.

The PLRB has recognized the significance of decisions construing the NLRA in general and section 8(d) in particular. *See, e.g.*, North Hills School Dist., 7 PA. PUB. EMP. REP. 44 (Pa. Lab. Rel. Bd. 1976); Temple University, 3 Pa. Pub. Emp. Rep. 209 (Pa. Lab. Rel. Bd. 1973); Jeannette Dist. Memorial Hospital, Case No. PERA-C-1358-W (Oct. 6, 1972), *rev'd*, 3 Pa. Pub. Emp. Rep. 110 (C.P. Westmoreland Co. 1973); City of Pittsburgh, 2 Pa. Pub. Emp. Rep. 216 (Pa. Lab. Rel. Bd. 1972); Borough of Wilkinsburg, 2 Pa. Pub. Emp. Rep. 154 (Pa. Lab. Rel. Bd. 1972), *aff'd sub nom.*, Pennsylvania Labor Relations Bd. v. Employees' Committee, 16 Pa. Commw. 640, 330 A.2d 306 (1975).

129. 337 A.2d at 265.

130. PA. CONSOL. STAT. ANN. tit. 1, § 1921(c) (Supp. 1973) provides that, where the words of a statute are ambiguous, the intention of the Pennsylvania General Assembly may be ascertained by considering, *inter alia*:

(1) The occasion and necessity for the statute.

certained the legislative intent by considering the occasion and necessity for the statute, the former law, and the mischief to be remedied or the object to be attained.[131] This inquiry led the court to view the declaration of policy in Act 195[132] as clearly establishing the legislature's general intent that "the right to collective bargaining was necessary to promote orderly and constructive relationships between public employers and employes."[133] From this the court concluded that, given the legislative recognition of the crucial right of collective bargaining, the legislature would not deliberately intend to secure harmony in the public sector by providing an "illusory right of collective bargaining."[134]

To resolve the conflict between sections 701 and 702—the crux of the dispute in determining the scope of collective bargaining—the court adopted a "balancing test" between those matters relating to "wages, hours and other terms and conditions of employment" which are mandatory subjects of bargaining, and those matters of "inherent managerial policy" which do not require bargaining but are only "meet and discuss" items.[135] The paramount concern in striking the balance is the true public interest, which the court defined as "the effective and efficient operation of public employment."[136]

The balancing test, as formulated by the court, is: "[w]hether the impact of the issue on the interest of the employe in wages,

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(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.
(5) The former law, if any, including other statutes upon the same or similar subjects.
(6) The consequences of a particular interpretation.
(7) The contemporaneous legislative history.

The above is a statutory codification of existing case law. *See, e.g., In re* Martin's Estate, 365 Pa. 280, 74 A.2d 120 (1950).

131. Omitted from the analysis of the statutory provisions was any reference to the legislative history of Act 195, inasmuch as no formal legislative history existed in the Pennsylvania General Assembly as to that Act. *See* Brief for Intervenor-Appellant, AFSCME at 12, Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262, 271 (Pa. 1975).

132. PA. STAT. ANN. tit. 43, § 1101.101 (Supp. 1975). *See* note 12 *supra*.

133. 337 A.2d at 266. *See* PA. STAT. ANN. tit. 43, § 1101.101 (Supp. 1975).

134. 337 A.2d at 266.

135. *Id.* at 268.

136. *Id.* at 267. The court rejected the commonwealth court's view that the public interest was synonymous with preservation of inherent managerial policy while the employees' concern was a purely private interest, thus requiring the private interest to give way before the public good. *Id.*

hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole."[137] The Pennsylvania Supreme Court's test was not original; rather the court adopted, with a slight but significant modification, the test formulated by the Kansas Supreme Court[138] to resolve questions relating to the scope of collective bargaining under the Kansas public employee act covering public school teachers.[139] The Kansas court had formulated the test thusly: "The key . . . is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole."[140] The significant difference in the Pennsylvania court's formulation of the test is its substitution of the word "interest" for the term "well-being." "Well-being" lends itself to an objective and somewhat narrow definition; "interest," on the other hand, is arguably broader in its extent. Those items which may impact on a teacher's "interest" in "wages, hours and other terms and conditions of employment" are of greater dimension than those which may impact on the teacher's "well-being." The formulation of such a test represents the court's adoption of a standard which will provide a broader interpretation of section 701 rights than the Kansas test would have afforded.[141] Thus, under the balancing test, where

137. *Id.* at 268.

138. *See* National Educ. Ass'n v. Board of Educ., 212 Kan. 741, 512 P.2d 426 (1973).

139. KAN. STAT. ANN. §§ 72-5413 to -5424 (1972).

140. 212 Kan. at 753, 512 P.2d at 435.

141. The supreme court's adoption of this balancing approach, a concept advocated by Judge Kramer of the Pennsylvania Commonwealth Court in his dissenting opinion in the same case, 9 Pa. Commw. at 249, 306 A.2d at 415, was an explicit rejection of the commonwealth court majority's approach in making section 701 subject to section 702. The commonwealth court had devised a two-step inquiry to determine bargainability of a disputed item. First, an inquiry was to be made to determine if the item were one of "wages, hours and other terms and conditions of employment" under section 701. If it were not, the inquiry need not proceed further; if it were, the inquiry would proceed to the controlling question: does the item involve "inherent managerial policy" under section 702? If it did, bargaining would not be required. *Id.* at 238, 306 A.2d at 409-10. Thus, under the commonwealth court view, any item of "wages, hours and other terms and conditions of employment," if "affected" by a policy determination, would not be mandatorily bargainable, *id.* at 244, 306 A.2d at 412-13, but would be only subject to the "meet-and-discuss" requirement.

Since every "wages, hours and other terms and conditions of employment" issue is arguably "affected" by some managerial policy determination (*e.g.*, virtually every item which directly affects working conditions, wages or hours necessarily has a direct "impact on the overall budget" under the provisions of section 702 and, hence, would be non-negotiable), the supreme court rejected such a test as effectively emasculating section 701 and as thwarting the legislative policy embodied in Act 195. 337 A.2d at 267. *See also* 9 Pa. Commw. at 247, 306 A.2d at 414 (Kramer, J., dissenting).

a disputed item is a matter of fundamental concern to the employees' interest in "wages, hours and other terms and conditions of employment," it is not removed from the section 701 requirement of good faith bargaining simply because it may touch upon basic policy.[142]

An additional conflict purportedly existed in *State College*, namely that between sections 701 and 703. Section 703 provides:

> The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.[143]

The issue was thus raised in *State College* as to whether section 703 mandates that the duties imposed and the prerogatives granted to school boards under the Public School Code of 1949 may not be the subject of collective bargaining. The Pennsylvania Supreme Court stated that the mere fact that a particular item may be covered by legislation would not remove it from collective bargaining under section 701 "if it bears on the question of wages, hours and conditions of employment."[144] Moreover the fact that the legislature has granted a prerogative to school boards does not preclude the managerial decision to exercise that prerogative from being the subject of collective bargaining.[145]

Section 703 does not further define "inherent managerial policy" as set forth in section 702. The fact that a prerogative is statutorily recognized, as by the School Code, does not mandate that it be included within the "inherent managerial policy" concept of section

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The supreme court's balancing test may be compared to that devised by Judge Kramer, dissenting in the commonwealth court's decision in *State College*, which read: "If the item directly affects a teacher's personal rights, as it relates to wages, hours and conditions of employment, then it is subject to collective bargaining," 9 Pa. Commw, at 249, 306 A.2d at 415. Kramer repeated his test in his dissent in Pennsylvania Social Servs. Union v. Pennsylvania Labor Relations Bd., 15 Pa. Commw. 441, 445, 325 A.2d 659, 661 (1974) (Kramer, J., dissenting). The Pennsylvania Supreme Court noted this test, without commenting upon it. The court's disinclination to adopt such a formula may be due to its desire to provide a broader interpretation of section 701 rights, consonant with what the court considered the legislative intent in Act 195 to be, than even Judge Kramer's test would have secured.

142. 337 A.2d at 268.

143. PA. STAT. ANN. tit. 43, § 1101.703 (Supp. 1975).

144. 337 A.2d at 269.

145. *Id.*

702. The determination of whether an item falls within the confines of section 702 is to be reached *solely* on the basis of the application of the balancing test as formulated by the court. Thus, given the court's broad interpretation of section 701, and its restrictive interpretation of section 703, a bargainable item under section 701 can only be excluded under section 703 when an applicable statutory provision "explicitly and definitively prohibit[s the school board] from making an agreement as to that specific term or condition of employment."[146] In other words, "[s]ection 703 merely prevents a term of a collective bargaining agreement from being in violation of existing law."[147]

This last statement became the focal point of the second case to reach the Pennsylvania Supreme Court dealing with the scope of collective bargaining in public education, *Board of Education v. Local 3, AFT*.[148] In *Local 3, AFT*, the issue before the court was whether a school district could agree to submit the propriety of discharging a non-tenured teacher to arbitration. The school board maintained that the contractual provision in the collective bargaining agreement which provided for arbitration in such cases was an illegal delegation to a third party of the exclusive powers conferred on the board by the Public School Code of 1949,[149] and therefore invalid under section 703 of Act 195. Affirming the court of common pleas' decision,[150] the Pennsylvania Supreme Court held that a

146. *Id.* at 270. Although the court did not include "wages and hours" in this statement, they are presumably also bargainable notwithstanding even an "explicit and definitive" statutory prohibition.

The court's phrasing of the requirement to be met before excluding a section 701 bargainable item under section 703 is taken from Board of Educ. v. Associated Teachers, 30 N.Y.2d N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972), wherein the New York Court of Appeals, interpreting its Public Employees' Fair Employment Act (Taylor Law), stated:

> Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one . . . except in cases where some *other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment.*

Id. at 129, 282 N.E.2d at 113, 331 N.Y.S.2d at 23 (emphasis added).

147. 337 A.2d at 269.

148. 346 A.2d 35 (Pa. 1975).

149. Public School Code of 1949 §§ 510, 514, PA. STAT. ANN. tit. 24, §§ 5-510, -514 (1962) govern discharge of non-tenured teachers. Justice Pomeroy, in his dissent, asserted that the provisions relevant to discharge of a non-tenured teacher were sections 1108 and 1122 of the Public School Code, PA. STAT. ANN. tit. 24, §§ 11-1108, -1122 (1962). This difference among members of the court as to the relevant statutory sections did not affect either the majority's or the dissenter's analyses.

150. Board of Educ. v. Local 3, AFT, Civil No. 1574 (Pa. C.P. Phila. Co., Oct. Term 1974), *cited in* 346 A.2d at 35.

school board may agree to such a provision without violating section 703 of the Act.[151]

Analysis of the court's construction of the key phrase in section 703—that an item is improperly included in a collective bargaining agreement if its implementation would be "in violation of, or inconsistent with, or in conflict with" any statute—raised the question of whether the phrase "in violation of" subsumes the phrases "inconsistent with" and "in conflict with." While Justice Pomeroy, in dissent, argued that the majority had improperly confined its consideration of the board's claim to a determination of whether the contractual provision was "in violation of" existing law and had ignored the question of whether it was also "inconsistent with, or in conflict with" existing law,[152] the majority maintained that there was neither an inconsistency with the School Code nor a violation of any statutory scheme.[153] The majority dismissed Justice Pomeroy's conclusion that the delegation of school board power was inconsistent/in conflict with the Public School Code as a "nebulous appea[l] to the necessity of maintaining 'the best and most efficient school system possible.' "[154] The court's statement that it had "examined the statutory scheme and concluded that there is no inconsistency"[155] and its conclusion that the collective bargaining requirement of "just cause" for discipline of a teacher did not infringe on the school board's prerogative to adopt and enforce regulations regarding teacher conduct,[156] may indicate that the inquiry to determine if a "violation" exists encompasses the inquiry into inconsistency/conflict.

The "in violation of" inquiry is a restrictive test—more precise and objective than the other two inquiries, thus narrowing the court's inquiry solely to determine if there exists a prima facie violation. A challenged item found non-violative under this inquiry will necessarily be found consistent or not in conflict with a given statutory scheme. Since the stated purpose of Act 195 is to encourage collective bargaining, the logical effect of such a single inquiry is to expand the scope of legally bargainable items.

151. 346 A.2d at 36.
152. *Id.* at 45 (Pomeroy, J., dissenting).
153. *Id.* at 38-39 n.6, 40-41.
154. *Id.* at 42-43 n.17.
155. *Id.* at 38-39 n.6.
156. *Id.* at 40-41.

The majority concluded that the existence of an arbitration procedure did not restrict the substantive grounds for dismissal of a nontenured teacher.[157] The court's decision in *Local 3, AFT* was consistent with its decision in *State College*. The court reiterated the view that Act 195 "repudiated" the "traditional concept of the sanctity of managerial prerogatives in the public sector"[158] and again declined to decide the bargainability of specific items, leaving to the appropriate third party the determination, in the first instance, of the merits of the contending parties' claims.[159] In addition, the court adopted a restrictive interpretation of section 703.

The true significance of *State College* and *Local 3, AFT* lies in the fact that the Pennsylvania Supreme Court did not reach the substantive merits of the specific items presented for resolution. The court's remand of the twenty-one items in *State College* to the PLRB for reassessment[160] and its parallel decision in *Local 3, AFT* to leave to an arbitrator the determination of the merits of the parties' claims,[161] coupled with the court's decision to opt for a case-by-case analysis in order to develop general principles for resolution of such conflicts, indicate that the court will leave to the PLRB the resolution of specific items that arise in connection with attempts to determine the scope of collective bargaining in public education.[162] The court's decision to leave the resolution of disputed issues to the PLRB represents judicial recognition of the legislative intent in Act 195,[163] the expertise of the PLRB in such cases, and the PLRB's rather consistent pattern of decision-making[164] under Act 195.

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157. *Id.* at 42 n.17.

158. *Id.* at 39. *See also* Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262, 267 (Pa. 1975).

159. The court's unwillingness in *Local 3, AFT* to construe the collective bargaining agreement since that was a question for the arbitrator in the first instance, 346 A.2d at 41 n.13, parallelled the same court's refusal in *State College* to determine whether the twenty-one items at issue were in fact bargainable, that matter being left to the expertise of the PLRB in the first instance. The twenty-one items in *State College* were only listed by the court in a footnote and were never considered on the merits, *i.e.*, subjected to the balancing test.

160. 337 A.2d at 270. There is no subsequent history as to any PLRB action on the remanded twenty-one items.

161. 346 A.2d at 41 n.13.

162. The court in *State College* stated that "it is the duty of the [Pennsylvania Labor Relations] Board *in the first instance*" to apply the balancing test in line with the court's general principles of interpretation. 337 A.2d at 268 (emphasis added).

163. PA. STAT. ANN. tit. 43, §§ 1101.501, .1501-.1502 (Supp. 1975) provide that recourse shall be made in the first instance to the PLRB.

164. The only break in the new PLRB's (*cf.* note 101 *supra*) consistent interpretation of

F. *Administrative Interpretation*

As teachers and school boards have sought to determine the parameters of the scope of collective bargaining under Act 195, the number of cases that have been presented to the PLRB for resolution has increased.[165] A study of these decisions indicates that two lines of cases have developed—one dealing with the determination of the bargainability of specific items, and the second with the purported conflict between Act 195 and the Public School Code of 1949.

In *Canon-McMillan School Board*,[166] the PLRB found a duty in

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the collective bargaining provisions of Act 195 occurred during the interval between the commonwealth court's reversal of the Board's decision in *State College* (June 6, 1973) and the supreme court's reversal of that decision (April 17, 1975).

165. The large number of PLRB cases involving schools/school boards/teacher associations is indicated in the following chart:

Chart 9 — PLRB Decisions

Year	Total Number of Reported PLRB Opinions	Reported PLRB Opinions Involving Schools/School Districts/Teacher Associations*	
		Number	Percentage
1971	137	82	60%
1972	110	39	35%
1973	205	83	40%
1974	172	77	45%
1975	200	91	45%

Source: 1-6 Pa. Pub. Emp. Rep. (1971-75).

*Included in the totals are vocational-technical schools and non-public schools. Excluded from the totals are post-secondary and pre-primary educational institutions.

It should be noted that not all cases involving a school district also involved a teacher association (although this has generally been so); school support personnel (*e.g.*, teacher aides, bus drivers) have, on occasion, been the opposing party.

166. 1 Pa. Pub. Emp. Rep. 83 (Pa. Lab. Rel. Bd. 1971), *aff'd*, 2 Pa. Pub. Emp. Rep. 22 (Pa. Lab. Rel. Bd. 1972).

the school board to bargain over compensation for teachers' extracurricular duties. The PLRB ruled that while a school board retains the right to direct matters relating to its functions and programs, once a decision is made by a school board to offer an extra program or activity that involves extracurricular duties on the part of teachers, the board must bargain over the wages, hours and other terms and conditions of employment incident thereto. The PLRB's reiteration of the same conclusion in two subsequent cases[167] appears to have settled that particular issue.

The difficulty in predicting the parameters of the scope of collective bargaining was soon evidenced by two PLRB decisions issued on the same day. In the first, *Nazareth Area Education Association*,[168] the Board ruled that teacher preparation time was not an appropriate subject for mandatory bargaining. While such a decision, standing alone, might have heralded a shift from the Board's heretofore expansive reading of section 701, such was not so, in light of the second case decided that day, *Richland School District*.[169] The significance of the second case lay in the fact that the Board, in an apparent attempt to clarify an already confused situation and to provide guidelines to aid both teacher associations and school boards in future collective bargaining negotiations, enunciated a new standard for determining what is a mandatory subject for bargaining and what falls within the "meet and discuss" requirements. The test would turn on whether the item in dispute "begin[s] at the management level and filter[s] down to the employes."[170] If so, the item would not be subject to mandatory bargaining; if the item "originate[s] closer to the employe level and ha[s] a direct, immediate bearing on them,"[171] the matter would be mandatorily bargainable. Stating that the items at issue in *Richland*—sick leave "bank," compensation for court and school board appearances and "occupational diseases," family bereavement leave, and procedural practices relating to teachers assaulted

167. Kiski School Dist., 2 Pa. Pub. Emp. Rep. 66 (Pa. Lab. Rel. Bd. 1972) (school district's duty to bargain on compensation for teachers' extracurricular duties); Cameron County School Dist., 2 Pa. Pub. Emp. Rep. 187 (Pa. Lab. Rel. Bd. 1972) (school district, while not required to bargain over the establishment of extracurricular activity/duty, must bargain on the impact of these established activities on wages, hours and conditions of employment).

168. 2 Pa. Pub. Emp. Rep. 194 (Pa. Lab. Rel. Bd. 1972).

169. 2 Pa. Pub. Emp. Rep. 195 (Pa. Lab. Rel. Bd. 1972).

170. *Id.* at 196-97.

171. *Id.* at 197.

or sued—directly involved teachers, the Board concluded that they were mandatorily bargainable.

It is unfortunate that the Board did not take the opportunity to explain precisely *how* each of the issues in *Richland* qualified under the "filter down" test[172] and why the test was not applied in *Nazareth*. This announced test has not been utilized expressly by the Board in any subsequent decisions involving the scope of collective bargaining between teachers and school boards. While the subsequent commonwealth court decision in *State College* may account for the PLRB's reluctance to utilize that test, that judicial decision—later reversed—cannot account for the PLRB's failure to use the *Richland* test in cases that were decided *prior* to the commonwealth court's decision.[173]

The PLRB's expansive reading of the language of section 701 and narrowing of the effect of section 702 as a limitation on the scope of bargaining continued in *Warwick School District*,[174] wherein the PLRB ordered the school board to bargain over the minimum starting salary for teachers. Although this item impacted on the school board's ability to select its personnel, the Board concluded that the only effect establishment of minimum starting salaries would have on the employer-employee relationship would be that the employer would have a minimum limit beyond which it could not hire a new employee. Since salaries are proper terms of employment, the establishment of a minimum salary pertaining to any employee position was deemed a proper subject of collective bargaining under section 701.

It is necessary at this point to note the commonwealth court's decision in *State College* so as to understand the impact of that decision upon the PLRB's previous expansive reading of section 701 and restrictive reading of section 702. The commonwealth court devised a two-step inquiry to determine bargainability of a disputed item. First, an inquiry was to be made to determine if the item were

172. In applying the "filter down" test, the policy decision in each case would be that of the board of school directors (*e.g.*, whether or not to offer a program); yet the execution of that policy necessarily has a direct and immediate consequence on the hours, wages, terms and working conditions of the teachers involved. Almost all school policies are decided at some administrative level and must of necessity filter down to the teachers.

173. For an explanation as to why the "filter down" test has not been used by the PLRB in cases that have been decided subsequent to the supreme court's decision in *State College*, reversing the earlier commonwealth court decision, see text at page 469 *infra*.

174. 3 Pa. Pub. Emp. Rep. 15 (Pa. Lab. Rel. Bd. 1973).

one of "wages, hours and other terms and conditions of employment" under section 701. If it were not, the inquiry need not proceed further; if it were, the inquiry would proceed to the controlling question: does the item involve "inherent managerial policy" under section 702? If it did, bargaining would not be required.[175] Thus, any item of "wages, hours and other terms and conditions of employment," if "affected" by a policy determination, would not be mandatorily bargainable,[176] but would be only "meet and discuss." Since every "wages, hours and other terms and conditions of employment" issue is arguably "affected" by some managerial policy determination, the result was an interpretation of section 701 and section 702 that ran directly contrary to that employed by the PLRB.[177]

The impact of this restrictive decision upon the PLRB's interpretation of the collective bargaining provisions of Act 195 was evidenced dramatically in the second *Richland School District*[178] case, wherein the Board ruled that sick leave "bank," binding arbitration, notification of teaching schedules, and adoption of a school calendar were not mandatorily bargainable items. The Board thus reversed an earlier decision, involving the same school district, in which it had held that a sick leave "bank" was a mandatorily bargainable item; arbitration for reaching a successor contract was now considered completely voluntary; and the Board deferred to the commonwealth court's *State College* decision on the issues of timely notice of teaching assignment and establishment of a school calendar.[179]

Although the PLRB's decision was affected by the commonwealth court's *State College* decision, the Board's disinclination to adhere to that restrictive decision, which was on appeal to the Pennsylvania Supreme Court, was evidenced in *Williamsport Education Association*.[180] The PLRB avoided a decision on the merits of the items in dispute[181] by ruling that the union's submission of items for

175. 9 Pa. Commw. at 238, 306 A.2d at 409-10.

176. *Id.* at 244, 306 A.2d at 412-13.

177. As to the supreme court's rejection of the commonwealth court's two-part test in *State College*, see note 141 *supra*.

178. 4 Pa. Pub. Emp. Rep. 2 (Pa. Lab. Rel. Bd. 1974).

179. In light of the Pennsylvania Supreme Court's reversal of the commonwealth court's decision in *State College*, reliance on the PLRB's ruling on the last two items in *Richland* (timely notice of teaching assignment and establishment of a school calendar), and possibly also on the first item (sick leave "bank"), is misplaced.

180. 6 Pa. Pub. Emp. Rep. 57 (Pa. Lab. Rel. Bd. 1975).

181. The items at issue were not mentioned by the Board in its decision.

negotiation labeled "non-negotiable" by the school district was not an unfair labor practice under Act 195 where the union did not *insist* upon bargaining about such items to the exclusion of all other bargainable items. The Board thus avoided adherence to the commonwealth court's restrictive interpretation of bargainable items that would have resulted in a decision unfavorable to the teachers' association.

The Pennsylvania Supreme Court's reversal of the commonwealth court's decision in *State College* removed from the PLRB the necessity to circumvent the commonwealth court's decision. The two decisions of the PLRB since the supreme court's *State College* decision reflect a return to an expansive reading of section 701 and a restrictive interpretation of section 702—which comports with the Pennsylvania Supreme Court's interpretation of the same sections of Act 195.[182]

The second line of PLRB decisions—those dealing with the purported conflict between Act 195 and the Public School Code of 1949—has consistently reflected the PLRB's philosophy that there is no repugnancy between those two statutory enactments since their respective provisions are reconcilable and a consonant construction of each enactment is achieved when the different subject matter is considered.[183] The Public School Code governs the professional relationship between the school districts and its teachers; Act 195 governs only the labor relations between the teachers and the school district—an entirely distinct and different phase of the relationship between the parties. Thus the Board has been able, in all of the cases decided, to reach a conclusion that furthers the public policy of Act 195 and is compatible with the School Code.

In the first case to present a purported conflict between Act 195

182. In Forest Hills School Dist., 6 Pa. Pub. Emp. Rep. 250 (Pa. Lab. Rel. Bd. 1975), the Board ruled that a school board's unilateral revision of the school calendar, thereby deleting four paid in-service days for which the parties had contracted, was an unfair labor practice, notwithstanding the fact that the teachers' association did not object to the school board's setting the school calendar, since paid in-service days are a condition of employment within the scope of collective bargaining. In a second case, Dallastown Area Education Ass'n, 7 PA. PUB. EMP. REP. 1 (Pa. Lab. Rel. Bd. 1976), the Board, citing the Supreme Court's decision in *State College*, ruled that the teachers' association did not violate sections 701 and 702 by insisting on unassigned preparation time and teaching-load being bargainable topics. The Board stated that "even if" these items were prerogatives of management, they would not be precluded from negotiation completely but would be permissibly bargainable.

183. Freeport Area School Dist., 3 Pa. Pub. Emp. Rep. 181, 183 (Pa. Lab. Rel. Bd. 1973).

and the School Code,[184] the Board stated that the Public School Code and Act 195 "are actually supplementary. Just as the [school district] must accept the rights and responsibilities granted by the Public School Code, it must also accept the responsibilities and obligations provided for in [Act 195]."[185] This same viewpoint was reflected in *Richland School District*[186] where the Board, in rejecting the school board's contention that the Code precluded bargaining on certain items, stated that the Code sets only minimums—the maximums may be established by collective bargaining. Thus a school board "cannot hide behind the [Code] and attempt to avoid its duties to bargain . . . ."[187]

The Board's philosophy, as outlined earlier, was forcefully stated in *Freeport Area School District*,[188] where the Board ruled that an arbitration award requiring a school district to discharge a teacher for failure to maintain union membership pursuant to a contractual "maintenance of membership" clause, did not violate the Public School Code. Since the Code provides for the discharge of employees who violate the "school laws of the Commonwealth"[189] and Act 195 is included among those school laws,[190] no conflict exists.[191]

This same philosophy of the Board was evident in its most recent

184. Upper Merion Area School Dist., 2 Pa. Pub. Emp. Rep. 143 (Pa. Lab. Rel. Bd. 1972). *See also* Upper Merion Area School Dist., 2 Pa. Pub. Emp. Rep. 86 (Pa. Lab. Rel. Bd. 1972).

185. 2 Pa. Pub. Emp. Rep. at 145.

186. 2 Pa. Pub. Emp. Rep. 195 (Pa. Lab. Rel. Bd. 1972).

187. *Id.* at 196.

188. 3 Pa. Pub. Emp. Rep. 181 (Pa. Lab. Rel. Bd. 1973).

189. PA. STAT. ANN. tit. 24, § 11-1122 (1962).

190. Freeport Area School Dist., 3 Pa. Pub. Emp. Rep. 181, 183 (Pa. Lab. Rel. Bd. 1973).

191. The Board's philosophy was also evidenced in two cases involving teacher association grievances. In Leechburg Area School Dist., 6 Pa. Pub. Emp. Rep. 97, 98 (Pa. Lab. Rel. Bd. 1975), the Board dismissed as "sheer sophistry" the school district's argument that processing of an entering teacher's salary schedule grievance was in conflict with section 1142 of the Public School Code, PA. STAT. ANN. tit. 24, § 11-1142 (Supp. 1975), and concluded that the Public School Code did not supersede the provisions of the collective bargaining agreement entered into by the school district.

In the second case, Union City Area School Dist., 6 Pa. Pub. Emp. Rep. 194 (Pa. Lab. Rel. Bd. 1975), the PLRB found that section 701 of Act 195 mandates, *inter alia*, the processing of a union grievance that arises under a collective bargaining agreement, notwithstanding the school board's argument that section 511 of the Public School Code, PA. STAT. ANN. tit. 24, § 5-511 (1962), renders the source of payment for school-dance chaperones a matter of inherent managerial policy. In *Union City*, the Board relied upon its previous decision in Freedom Area School Dist., 6 Pa. Pub. Emp. Rep. 40 (Pa. Lab. Rel. Bd. 1975), wherein it had ruled that a school district's refusal to submit to arbitration a grievance, filed on behalf of a teacher's widow claiming insurance benefits under a collective bargaining agreement, violated the school district's duty to bargain regarding grievances arising from contractual interpretation.

decision involving the Public School Code, *Oxford Board of School Directors*,[192] wherein it held that section 703 of Act 195 did not prevent implementation of an arbitration provision of a collective bargaining agreement, notwithstanding the school board's claim that permitting an arbitrator to decide upon the discharge of a teacher would constitute a violation of section 1123 of the Public School Code.[193] The Board determined that the identical issue had been disposed of by the Pennsylvania Supreme Court in *Local 3, AFT*.[194]

IV. The Future of Teacher-School Board Collective Bargaining

From the foregoing, it is evident that the Pennsylvania Supreme Court's decisions have resolved certain major questions relating to the scope of collective bargaining in public education and have established guidelines to aid the Pennsylvania Labor Relations Board and the lower courts in their handling of disputed items under the collective bargaining provisions of Act 195. The following conclusions as to the future of teacher-school board collective bargaining may be drawn.

In light of the Pennsylvania Supreme Court's decisions, courts should read Act 195 as requiring, under the provisions of section 701, the negotiation of *all* subjects directly related to "wages, hours and other terms and conditions of employment," and as adding the requirement to "meet and discuss" on matters of inherent managerial policy which impact on wages, hours and terms or conditions of employment. The determination of which matters more directly relate to wages, hours and employment conditions than to managerial policy must be made by a case-by-case analysis. Not infrequently, an item may not be easily classified as a section 701 item

192. 7 Pa. Pub. Emp. Rep. 19 (Pa. Lab. Rel. Bd. 1976).

193. Pa. Stat. Ann. tit. 24, § 11-1123 (Supp. 1975).

194. The scope of discussion in the present comment has been restricted solely to cases involving school boards and teacher associations. It should be noted, however, that additional relevant cases, within the general framework of public education, do exist involving non-teacher associations. *See, e.g.*, McKeesport Area School Dist., 6 Pa. Pub. Emp. Rep. 153 (Pa. Lab. Rel. Bd. 1975) (school bus drivers); Reynolds School Bd., 3 Pa. Pub. Emp. Rep. 228 (Pa. Lab. Rel. Bd. 1973) (secretaries, teacher aides, and custodians); Mars Area School Dist., 3 Pa. Pub. Emp. Rep. 163 (Pa. Lab. Rel. Bd. 1973) (teacher aides), *rev'd*, 5 Pa. Pub. Emp. Rep. 43 (C.P. Butler Co. 1974), *aff'd*, 344 A.2d 284 (Pa. Commw. 1975).

or a section 702 item. In determining the appropriate classification, one should begin with the basic premise that the passage of Act 195 was intended to afford teachers meaningful access to the bargaining table to negotiate items fundamental to their jobs.[195] In most cases, this premise will lead to the inclusion of the item as a mandatorily bargainable item under section 701.

The discernible pattern in the area of collective bargaining in public education is that there is and will continue to be an expansion of the scope of bargainable subjects[196]—in line with the supreme court's and the PLRB's expansive interpretations of the language governing the scope of bargaining in section 701.

Section 702 will be construed narrowly, as an additional requirement imposed upon the public employer, rather than as a broad limitation on the scope of bargaining. While section 702 permits the school board to retain the unquestioned right to decide, in the first instance, matters of policy which properly come before it, section 702 also requires the public employer to "meet and discuss" on policy questions which have an impact on wages, hours and working conditions. When, however, the public employer decides upon implementing a particular policy matter, and the implementation of that matter directly relates to the wages, hours and other terms and conditions of employment of its employees, section 701 requires that the employer submit the matter to collective bargaining.[197] Thus a distinction exists between the initial decision to provide a specific program, which the school board has the unilateral power to make, and the implementation of the decision, which must be bargained about.

The Public School Code of 1949 is to be read to accommodate the

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195. It should be kept in mind that the public interest, even as defined by the Pennsylvania Supreme Court, is not always served by finding that every doubtful item be decided against the public employees' section 701 rights.

196. As to the expanded scope of interpretation at the judicial level, see text accompanying notes 90-164 *supra*; as to the expanded scope of interpretation at the administrative level, see text accompanying notes 165-94 *supra*.

197. *See, e.g.*, Canon-McMillan School Bd., 1 Pa. Pub. Emp. Rep. 83 (Pa. Lab. Rel. Bd. 1971), wherein the Board stated:

> It is true that the [school board] is not required to bargain over matters of inherent managerial policy . . . . However, once they have made a decision to include . . . functions and/or programs as part of the school program . . . then the . . . activities affect the teachers' wages, hours, and working conditions and the effects are mandatorily negotiable items.

Id. at 84.

purpose of Act 195 to encourage collective bargaining and settle labor disputes in a peaceful manner. The legislature was fully aware of the existence of the School Code when Act 195 was enacted.[198] Both, therefore, must be read as an integrated whole. In none of the decided cases have the provisions of the School Code been found to restrict the scope of collective bargaining. Neither a judicial nor an administrative finding of conflict between Act 195 and the Public School Code should be anticipated inasmuch as both the Pennsylvania Supreme Court and the PLRB view the Code as providing minimum standards which do not prohibit bargaining in those areas.

Act 195 is a clear departure from prior case and statutory law and from the Public School Code. Almost all judicial decisions setting forth the policy responsibilities of school boards predate the enactment of Act 195. Since previous employer-employee relationships were dramatically altered with the passage of Act 195, prior case law resolving school board responsibilities is generally inapplicable in interpreting the new relationships which come into play under Act 195.

The Pennsylvania Supreme Court's balancing approach, in an area of statutory ambiguity, faithfully maintains the legislature's accommodation of collective bargaining with school board discretion. Such an approach should minimize labor unrest because it will directly inquire into those factors that create bargaining impasses. Likewise, it should preserve school board powers in those areas in which the boards must serve and respond to student needs. The court's unwillingness to formulate a rule clearly favoring one provision of Act 195 (or one party) over the other leaves open a wide range of problems which the PLRB and the courts must resolve by applying, to diverse fact situations, a balancing of interests in the light of the overall purpose of the Act. Utilization of a balancing approach based on extensive factfinding does have a drawback, however; it

198. A proposed recodification of the Public School Code of 1949, containing extensive changes, is currently pending before the Pennsylvania General Assembly. Should enactment of a recodified Public School Code occur, the question will arise as to the precise scope of school board managerial authority under a new Code—in light of Act 195's alteration of inherent school board authority under the 1949 Code and in light of the Pennsylvania Supreme Court's expansive interpretation of the language governing the scope of collective bargaining in Act 195. Enactment of a new Public School Code is certain to generate new litigation respecting the relationship of a new School Code with the collective bargaining provisions of Act 195.

does not lend itself to situations in which a speedy decision is needed. In addition, it may result in different scopes of bargaining in different school districts. Nonuniformity is a necessary result since individual school boards and teacher associations may, at certain times, face peculiar exigencies and employment conditions. A fair disposition of bargainability disputes requires the factfinder to take these circumstances into consideration.

The PLRB's "filter down" test, in light of the Pennsylvania Supreme Court's adoption of a balancing test in *State College*, will not be utilizable for resolution of future disputes concerning the bargainability of disputed items between teachers and school districts. A test which is grounded upon the school board's inherent managerial decision-making power, the effects of which *may* "filter down" to teachers, does not comport with the supreme court's balancing test which is grounded upon the impact of an item on a teacher's interest in wages, hours and other terms and conditions of employment. The "filter down" test focuses initially upon the school board's managerial prerogatives, whereas the supreme court's test focuses initially on the teacher's interest. The difference between the two tests is significant since the initial focus often determines the ultimate decision as to bargainability of an item. Hence, the PLRB's resurrection and application of a "filter down" test, in any form, should not occur.

While there may be frustration with what appears to be the Pennsylvania Supreme Court's avoidance of specific substantive issues, the court's stance does encourage settlements tailored to the needs of the particular community. Such a stance promotes local initiative and guards against the danger of local inertia in passively awaiting and accepting judicially imposed decisions. This judicial recognition of the individuality of each school district and its relationship with its teachers is consonant with the traditional Pennsylvania treatment of its school districts. As a practical matter some school districts may be willing to acquiesce in certain contractual provisions because they are unimportant to that particular school district. Some school districts in the interest of reaching an agreement may acquiesce in the negotiation of certain policy items simply because they are unwilling to become involved in long, expensive and acrimonious legal proceedings. The same, of course, may be said of teachers with respect to issues that they consider bargainable. Thus, the scope of bargaining issue will be of a different magni-

tude in different school districts in the Commonwealth of Pennsylvania. That different patterns will emerge in Pennsylvania's school districts is exemplified by the PLRB's statement, contained in its brief before the Pennsylvania Supreme Court in *State College*, that since the implementation of Act 195 "hundreds of school districts have collectively bargained on many of the items raised in [*State College*] and incorporated agreements thereon into written contracts . . . ."[199]

The very nature of the collective bargaining process alters the once-unilateral decision-making power of school boards. Thus some management flexibility is necessarily eliminated in the interest of harmonious employment relations. However, since section 701 specifically provides that the collective bargaining process "does not compel either party to agree to a proposal or require the making of a concession," a school board cannot equate collective bargaining with destruction of its discretion. Such a viewpoint is unfounded both in the reality of actual practice as well as in the law itself. It is based on a misinterpretation of collective bargaining which equates negotiation of an item with complete abrogation of a school board's control over that item.[200]

Agreement by some school districts to bargain over one or more policy items cannot be used to force other school districts to recognize an obligation to bargain, until litigation ensues and a PLRB decision ordering such bargaining is forthcoming. Nonetheless, if the practice of a school district is currently out of line with the practices of most school districts—especially with those of sur-

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199. Brief for Pennsylvania Labor Relations Board at 94, Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262 (Pa. 1975). To determine current negotiation practices as evidenced by the negotiated provisions of current teacher-school board collective bargaining agreements, see the current collective bargaining agreements for each school district in the Commonwealth of Pennsylvania, on file with the Pennsylvania Labor Relations Board in Harrisburg, Pennsylvania.

200. *See* Seitz, *School Board Authority and the Right of Public School Teachers to Negotiate—A Legal Analysis*, 22 VAND. L. REV. 239 (1969), wherein he states:

> Good faith collective negotiations require recognition by both parties, not merely formal but real, that bargaining is a shared process in which each party has a right to play an active role. Each party balances what is desired against known costs of unresolved disagreement. These costs on the one side may be such things as loss of competent employees and the fostering of a general low morale, and on the other side the loss of community support if unreasonable demands are made.

Id. at 253. The Pennsylvania School Boards Association, however, urges school boards not to bargain on any issue involving "inherent managerial policy." *See* ACT 195, *supra* note 40, at 69.

rounding school districts—the exclusion of an item from bargaining may promote teacher unrest. The importance which teachers may place on this item may be evidenced from their willingness to trade off possible gains in other bargainable areas for concessions regarding this particular item. On the other hand, if the situation in a school district with respect to an item is comparable to that existing in other school districts, the exclusion of that item from bargaining has less likelihood of precipitating substantial teacher unrest.

Neither the Pennsylvania Labor Relations Board nor the courts appear to assume that the language of the request for bargaining is controlling regardless of the nature of the issue. Indeed, if the issue, and the resultant decision, were to turn only upon a matter of semantics, there would be no real guidance to school boards and teacher associations on what issues they may expect to bargain, and multiple court suits would occur to determine whether the "magic words" had been used in each case or whether such words veiled an altogether different issue. To avoid being confronted with continuous litigation seeking to define the proper scope of collective bargaining, the courts and the PLRB do not appear to subscribe to a theory of labor relations that permits negotiability to stand or fall on the wording of the request. Thus the focus is properly upon the nature of the issue which is sought to be bargained.

The Pennsylvania Supreme Court has stated that the resolution of disputed items is for the PLRB in the first instance. Although the courts function as final arbiters, the scope of review on an appeal taken from a PLRB decision and order, as established by Act 195, is quite narrow.[201] The Board's findings are not to be disturbed upon review where they are supported by substantial and legally credible evidence. The court may not substitute its views for those of the Board, legally charged with utilizing its expertise in resolving specialized controversies. Thus, so long as the Board's conclusions are reasonable and not capricious, they must stand, and a court may not supplant the Board's decisions with its own viewpoint, even though the court would have made a different determination had the matter been *de novo*.

An alternative to case-by-case clarification of the scope of collective bargaining by administrative decision-making and court interpretation would be legislative action to define with greater specific-

201. *See* PA. STAT. ANN. tit. 43, §§ 1101.1501-.1502 (Supp. 1975).

ity the provisions of sections 701, 702, and 703.[202] However, a statutory change in the present scope of bargaining provisions of Act 195 is unlikely. A committee of the Pennsylvania General Assembly, after hearings concerning the desirability of change in Act 195, recently concluded that no statutory change in the present scope of bargaining sections was desirable.[203] There would be an inherent danger in attempting such an "end run" around the bargaining table and/or the existing processes for resolution of issues. While both teacher associations and school boards unquestionably have legislative influence, an indiscriminate use of that influence may restrict collective bargaining in subsequent negotiations; the possibility of utilizing legislative channels to attain benefits denied to either group in negotiations is bound to have an unfavorable impact on the negotiating process.[204]

The supreme court's definition of the public interest as "the effective and efficient operation of public employment"[205] represents a conscious rejection by the court of the heretofore existing equation of the public interest with preservation of inherent managerial policy and equation of teachers' concerns with a purely private interest. The effect of such a change is to eliminate the favored position which school boards had enjoyed under the guise of advancing the "public interest" and to create a relative equality between the two parties which may achieve the constructive relationship between teacher associations and school boards that the legislature envisioned. Professional negotiations between teacher associations and school boards, when developed to a proper level of sophistication in both groups, should best effectuate the legislative intent that Act 195 "promote orderly and constructive relationships between all public employers and their employes."[206] Such a development will

202. *See* Comment, *The Public Employe Relations Act, supra* note 14, at 83.

203. 1975 GOV'T EMP. REL. REP. No. 587 at B-7, E-5 (Jan. 6, 1975). The legislators' conclusion is not without reason inasmuch as no guarantee exists that any public employee act, no matter how sophisticated or reasoned, would admit of no variant interpretations as specific issues arose. Also, the courts' interpretations of Act 195 apparently are not of such variance from what the committee perceived the legislative intent to be in Act 195 as to warrant additional legislation.

204. 3 LABOR MANAGEMENT RELATIONS SERVICE NEWSLETTER No. 2, Feb. 1972, at 4, *cited in* Siegel & Kainen, *Political Forces in Public Sector Collective Bargaining*, 21 CATH. U.L. REV. 481, 584-85 (1972).

205. Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262, 267 (Pa. 1975).

206. PA. STAT. ANN. tit. 43, § 1101.101 (Supp. 1975).

provide the opportunity for both parties to accomplish their common objective—quality education for the children of the Commonwealth of Pennsylvania.

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