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I. Introduction

In June of 1968 the Governor's Commission to Revise the Public Employe Law of Pennsylvania, the Hickman Commission, recommended that the existing law "be replaced by an entirely new law governing relationships between public employers and employes."[1] In a marked departure from traditional public employee relations, the Commission recommended that the new law "recognize the right of all public employes, including police and firemen, to bargain collectively, subject to enumerated safeguards."[2]

Among the safeguards recommended by the Commission was a more limited duty to bargain than exists in the private sector. While it was suggested that public employers be required to bargain regarding wages, hours and conditions of employment, the Commission proposed that the duty to bargain be "qualified by a recognition of existing laws dealing with aspects of the same subject matter and

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1. REPORT AND RECOMMENDATIONS, GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYE LAW OF PENNSYLVANIA, JUNE 1968, SUMMARY OF RECOMMENDATIONS, 2.

2. *Id.* at 3.

by a carefully defined reservation of managerial rights."[3]

The Public Employe Relations Act (PERA),[4] enacted in July of 1970, incorporated the Hickman Commission recommendations regarding the duty to bargain in sections 701, 702 and 703.[5] Perhaps inevitably, Article VII of that Act did not precisely delineate the matters that are subject to collective bargaining or those that remain within the exclusive control of management. The provisions of the Act pertaining to the duty to bargain left a great deal of scope for judicial interpretation.

The Pennsylvania Supreme Court first dealt with the interpretation of sections 701, 702 and 703 in *PLRB v. State College Area School District*.[6] In the *State College* opinion the court attempted to resolve the inherent conflict between section 701, defining the topics that are subject to bargaining, and section 702, defining the matters left to management discretion by means of a balancing test. The court held that

> where an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy. It is the duty of the board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable affect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does effect wages, hours and terms and conditions of employment, the public employer

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3. *Id.*

4. Act of July 23, 1970, P. L. 563, No. 195 (codified at PA. STAT. ANN. tit. 43, §§ 1101.101-.1201 (Purdon Supp. 1979)).

5. *Section 701.* 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.

Id. at § 1101.701.

Section 702. 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.

Id. at § 1101.702.

Section 703. 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 and the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.

Id. at § 1101.703.

6. 461 Pa. 494, 337 A.2d 262 (1975).

shall be required to meet and discuss such subject upon request by the public employe's representative pursuant to Section 702.[7]

The court in *State College* also chose to adopt a narrower view of section 703 than that proposed by the commonwealth court.[8] In the court's view section 703 did not constitute a further definition of "inherent managerial policy" as set forth in section 702, but rather represented an effort to retain the continuing vitality of existing law. As a consequence, that a subject is covered by legislation does not necessarily remove it from collective bargaining. When a public employer is given discretion in a particular area by statute, the employer may agree to restrict that discretion in a collective bargaining agreement. It is only when a statute mandates a particular condition or decision-making process to the exclusion of all others that the topic is excluded from collective bargaining by section 703.[9]

The *State College* decision established the general framework for the interpretation of sections 701, 702 and 703. In June of 1978 the Report of the Governor's Study Commission on Public Employe Relations, after reviewing seven years of experience under PERA, recommended maintenance of the status quo with regard to the duty to bargain under the Act,[10] and specifically affirmed "the balancing test established by the State Supreme Court in the *State College* case as the most appropriate manner of resolving scope of bargaining questions."[11] The Commission proposed that further definition of the duty to bargain be left to the PLRB and the courts. It was suggested that questions regarding the duty to bargain were better resolved through litigation than by legislative action.[12]

This Article examines the significant litigation concerning the duty to bargain under PERA. The primary focus is on aspects of the bargaining obligation outside of the context of the negotiation of a collective bargaining agreement. It is in these areas that Pennsylvania's public sector labor law differs most from the federal private sector labor law. Moreover, these areas are the ones that will most likely be an expensive snare for the unwary public employer.

II. Subcontracting and the Duty to Bargain

The question whether there will be subcontracting of work for-

7. *Id.* at 507, 337 A.2d at 268.

8. *See* PLRB v. State College Area School Dist., 9 Pa. Commw. Ct. 229, 306 A.2d 404 (1973), *remanded*, 461 Pa. 494, 337 A.2d 262 (1975).

9. *Id.*

10. GOVERNOR'S STUDY COMMISSION ON PUBLIC EMPLOYE RELATIONS, RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE CHANGE TO THE PUBLIC SECTOR COLLECTIVE BARGAINING LAWS OF PENNSYLVANIA, June 1, 1978, pp. 19-20. A minority of the Commission recommended changes to Section 703. *Id.*

11. *Id.* at 19.

12. *Id.*

merly performed by bargaining unit members is an emotionally charged issue for both union and public employer. Subcontracting, by its very nature, threatens the livelihood of individual employees and the collective strength of the employee representative organization. From the viewpoint of the public employer, however, subcontracting of work often offers a less expensive means of providing services. Whether or not the subcontracting is permissible turns on whether the public employer bargained in good faith on the issue. It is not surprising that a specialized and somewhat complicated law regarding this aspect of the public employer's duty to bargain developed under PERA.

A. The Duty to Bargain Over Subcontracting

The initial question presented in *Borough of Wilkinsburg v. Department of Sanitation*[13] was whether the decision to subcontract required bargaining or merely a discussion of the decision with the union. Under PERA when a matter is one of inherent managerial policy, the public employer need only "meet and discuss" with the union, and the final decision rests within the public employer's discretion.[14]

In *Wilkinsburg* the borough, during negotiations for a new contract, raised the issue of subcontracting sanitation services. The borough also sought bids for sanitation services during negotiations, made the union aware of the substance of the bids and then bargained to impasse with the union over possible concessions that would have reduced the cost of continuing the sanitation service by the borough's employees as an alternative to contracting out the work. After negotitating for several months on the issue and reaching impasse, the borough subcontracted the work and discharged all the employees in its sanitation department. The Pennsylvania Supreme Court upheld the decision of the PLRB that dismissed the unfair practice charges, held that there was a duty to bargain the contracting out of work previously performed by bargaining unit employees, and found that the borough met that duty by bargaining to impasse.[15]

The Pennsylvania Supreme Court again addressed the issue of subcontracting in *PLRB v. Mars Area School District*.[16] In *Mars* the

13. 463 Pa. 521, 345 A.2d 641 (1975).

14. PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1979).

15. The PLRB dismissed all charges; however, the Common Pleas Court of Allegheny County held that a violation of Section 1201(a)(5) had occurred. The Commwealth Court, in 16 Pa. Commw. Ct. 640, 330 A.2d 306 (1974), reversed the Common Pleas decision and held that no section 1201(a)(5) violation had occurred and also held that there was only a duty to meet and confer under section 702, not a duty to bargain under section 701, on the subject of subcontracting.

16. 480 Pa. 295, 389 A.2d 1073 (1978).

school district reached agreement on the terms of a collective bargaining agreement covering teacher-aides, which was to become effective on July 1, 1972. The school district had used, during at least the school year prior to 1972, both paid teacher-aides and volunteers to do essentially the same type of work. Four days before the collective bargaining agreement became effective, the school district unilaterally terminated all of the paid teacher-aides for "economic reasons" but continued to use the nonpaid volunteers. Although there was disagreement between the parties and among the Justices[17] regarding whether the volunteers replaced the paid teacher-aides, everyone agreed that no bargaining had occurred on the matter of the termination of the eleven paid teacher-aides.

In discussing whether the termination in the *Mars* situation was a bargainable matter or a meet and discuss matter, the Pennsylvania Supreme Court applied the balancing test of *PLRB v. State College Area School District*.[18] In its application of the *State College* test, the court in *Mars* found that the termination had "an immediate and direct impact" upon a "matter of fundamental concern to the employe's interest" in wages, hours and other terms and conditions of employment, that the policy to provide assistance to teachers had not changed, and therefore, that the termination's impact on the wages, hours and other terms and conditions of employment of the teacher-aides far outweighed any managerial policy considerations.[19] Stating that it could not "allow the public employer's economic concerns always to outweigh those of its employees," and that allowing public employers to take such unilateral action for economic reasons would encourage "the very discord in the public sector that PERA was designed to alleviate," the court reinstated the decision of the PLRB which had held that the failure to bargain on such a subject violated section 1201(a)(1) and (5) of PERA.[20] The court also noted in its decision that volunteers (and implictly subcontractors) need not take over each and every duty of the employees being replaced or terminated, but need only substantially perform the duties of the former employees.

Read together, *Wilkinsburg* and *Mars* clearly establish that sub-

17. *See id.* at 304, 389 A.2d at 1077 (Pomeroy, J., concurring in part and dissenting in part).

18. 461 Pa. 494, 507, 337 A.2d 258, 268 (1975). *See* note 7 and accompanying text *supra*. Justice Pomeroy concurred in part and dissented in part in *State College*. His opinion set forth the following test:

> If the effect of the granting or denial of a request (for bargaining) would be more direct, immediate and substantial upon the teachers' individual performance of their duties than it would upon the school board's overall operation of an educational system, the item should be considered negotiable.

461 Pa. at 515, 337 A.2d at 272 (1975) (Pomeroy, J., concurring and dissenting).

19. PLRB v. Mars Area School Dist., 480 Pa. 295, 300, 389 A.2d 1073, 1075 (1978).

20. *Id.* at 301, 389 A.2d at 1076.

contracting of work formerly done by bargaining unit employees is a bargainable item under section 701 of PERA. These two cases also establish several other principles relating to subcontracting that must be followed by public employers contemplating subcontracting. The *Wilkinsburg* opinion establishes the principle that if the parties are in negotiations and the employer informs the union of its intent to consider subcontracting, shares the bid information received from potential subcontractors with the union, and after sharing the information, bargains in good faith to impasse over employer proposed concessions that would reduce the bargaining agreement costs to a level comparable with the subcontract bids, the employer may then subcontract and not be found guilty of an unfair labor practice. *Mars* indicates that when there is no policy change involved in the replacement of paid employees by volunteers,[21] and the decision is purely one of economics, bargaining is still required and unilateral termination is an unfair labor practice.

B. The Duty to Bargain After Negotiation of a Labor Agreement

Several subsequent cases discuss and develop the balancing test of *State College* as applied to subcontracting, and provide a more complete outline of both employer and union duties concerning subcontracting under PERA. In *PLRB v. North Hills School District*[22] the school district had, during the term of a collective bargaining agreement, contracted out work previously done by school district bus drivers. The agreement was silent on the issue of subcontracting, and without any meaningful meetings, notice to the union or bargaining on the subcontracting issue, the school board unilaterally subcontracted the work and terminated its employees.

Both the PLRB and the Common Pleas Court of Allegheny County found that the district was simply changing the method of implementing the policy of providing bus transportation for its students, not changing or eliminating the policy.[23] Because the terminations had a fundamental effect on the wages, salaries, and other terms and conditions of employment of the employees, and this impact outweighed any effect on the employer's policy, the failure to bargain was held to be an unfair practice.[24]

Although *North Hills* reiterates the established rule that subcon-

21. Justice Pomeroy reasoned that there was a removal of paid employees, and a continuation of the volunteer employees. *Id.* at 309, 389 A.2d at 1080 (Pomeroy, J.).

22. 8 P.P.E.R. 208 (C.P. Allegheny 1977), *aff'g* 7 P.P.E.R. 121 and 7 P.P.E.R. 44 (PLRB 1976).

23. *Id.* The PLRB and the court also held that had the school district entirely terminated the school bus service for its students it would still have had an obligation to meet and discuss the effects of that policy change on the employees in accordance with section 702 of PERA, PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1979).

24. *See also* McKeesport Area School Dist., 6 P.P.E.R. 153 (PLRB 1975).

tracting is a mandatory subject for bargaining under section 701 of PERA, it greatly amplifies and outlines the employer's duty to notify the union, and the union's corresponding duty to request bargaining. As stated by the PLRB, the employer's duty is "an affirmative duty to seek out the Association, give the details of the subcontracting proposal it was considering and request the Association to make a counter-proposal."[25] In *North Hills* the district asserted among other things that the association had waived its right to bargain the subcontracting issue during the contract negotiations. Although the PLRB and the Court of Common Pleas of Allegheny County agreed that the union had an obligation to request bargaining when it received notice of the possibility of subcontracting by the employer, it held that indirect indications to the union that the district was looking into subcontracting were not sufficient to put the union on notice and thereby create an obligation on the union to request bargaining on the subject. In the PLRB's opinion, when the union receives actual knowledge of the bid specifications in sufficient time to raise the issue in contract negotiations, even though the employer did not officially provide the information and thereby breached its duty to bargain in good faith, the union must enforce its rights by requesting collective bargaining on the issue. The union may not simply file an unfair practice charge later.

In *Garnet Valley School District*,[26] a case almost identical to *North Hills*, the union did receive actual knowledge of subcontract bid specifications from a source other than the employer during negotiations for a new contract, and acquired that knowledge prior to the actual subcontracting. Even though the union notified the district of its objection to the possible subcontracting, it did not raise the issue at the bargaining table and made no counter-proposals to the bid specifications during negotiations. Because the union failed to meet its duty to raise and negotiate the subcontracting issue, the PLRB modified the remedy it originally awarded, rescinded its order to reinstate the terminated employees with back pay,[27] and merely required the district to bargain over the subcontracting issue.[28]

A different result from those of *North Hills, McKeesport* and *Garnet Valley* was reached in *Rostraver Township*.[29] In that case the

25. North Hills School Dist., 7 P.P.E.R. 44, 47 (PLRB 1976).

26. 8 P.P.E.R. 277, *remedy revised*, 8 P.P.E.R. 365 (PLRB 1977).

27. In both *McKeesport* and *North Hills*, the PLRB ordered reinstatement with backpay.

28. *See also* Sto-Rox School Bd., 9 P.P.E.R. ¶ 9065 (PLRB 1978) (no meaningful bargaining before subcontracting, failure to seek out and notify the union of the details of the subcontracting proposal, and union action sufficient to constitute a request to bargain the issue); Phoenixville Area School Dist., 9 P.P.E.R. ¶ 9268 (PLRB 1978) (failure to seek out and notify the union of the details of the subcontracting proposal, failure of the union to demand bargaining).

29. 7 P.P.E.R. 176 (PLRB 1976).

township adopted an alternative means of providing a service[30] that the township had determined through a policy decision it would provide for its citizens. In contrast to the actions of the school districts, the township did formally notify the union during negotiations for a new contract that it was considering contracting the work out, and indicated that it apparently could effectuate substantial savings by subcontracting. The township also made several negotiation proposals that would have made the agreement costs to the township comparable with the subcontracting bid costs. The union made no counter-proposals except to dismiss the township proposals out-of-hand, and did not request a copy of the subcontracting bid being considered by the township. On these facts the PLRB held that the township attempted to bargain the issue with an open mind, provided sufficient notice of consideration of subcontracting, sought union counter-proposals, and therefore, bargained in good faith before contracting out the bargaining unit work and eliminating bargaining unit jobs. Thus, the union was found to have waived its right to bargain the subcontracting.

Another aspect of the duty to bargain over subcontracting is discussed in *School District of the Township of Millcreek*.[31] Here the district advertised for bids for subcontracting janitorial and mowing services. Even though no action was taken by the district on the bids, the union asserted that bargaining or discussions should have taken place prior to the advertisement for bids. The PLRB stated that it regarded preliminary exploratory employer inquiries into subcontracting that are "made for the purpose of determining whether subcontracting is a viable alternative [as] a necessary prerequisite to intelligent bargaining."[32] By so holding, the PLRB indicated that the employer had the right to take necessary steps to investigate and evaluate the potential merits of subcontracting before being obligated to notify the union of the possibility of such action. The decision also indicates that there is no need to negotiate or meet and discuss before taking such investigatory actions. Of course, once bids have been received and it has been determined that subcontracting is a viable option, the employer will have to seek out the union to notify it that subcontracting is being considered, provide the specifics of any bids, and negotiate on the subject. At the same time, the employer will have to remain receptive to counter-proposals, unless the union by word or deed indicates it is not interested in bargaining.

30. The service in *Rostraver* was dispatching/communication as opposed to school bus service in *North Hills* and *McKeesport*, and part time custodial service in *Garnet Valley*.

31. 9 P.P.E.R. ¶ 9136 (PLRB 1978).

32. *Id.* at 295.

C. *The Effect of Collectively Bargained Waiver Clauses*

Collectively bargained waiver and integration clauses are discussed in greater depth later in this article,[33] but an examination of the effect of such provisions on the obligation to bargain over subcontracting is in order. The PLRB recently addressed the issue of whether or not the duty to bargain could be waived by a general clause in a collective bargaining agreement that waives the right to bargain over any and all matters, whether discussed or not in the negotiation of a collective bargaining agreement.[34]

The PLRB, by its decisions in recent waiver clause-duty to bargain cases,[35] committed itself to a position that required a finding of no duty to bargain over subcontracting during the term of the agreement when the existing agreement contains a broad *Waynesboro*-type waiver or "zipper" clause. To rule otherwise would have required the PLRB to create one category of subjects that are bargainable, and to which the provisions of a broad waiver clause would apply, and a second category of bargainable subjects, to which the provisions of a broad waiver clause would not apply.

Neither the provisions of Article VII of PERA nor any Pennsylvania court decisions suggest or contemplate such a distinction between section 701 issues on which there is a duty to bargain. Therefore, the PLRB properly found no duty to bargain over subcontracting during the term of a collective bargaining agreement because the agreement contained a broad waiver and integration or "zipper" clause. Distinguishing between the effect of such a provision when subcontracting rather than some other bargainable item is implicated would have required the PLRB to adopt the erroneous rationale that the parties to a collective bargaining agreement intended that their waiver clause mean different things depending on whether the matter in dispute was subcontracting or any other bargainable matter. Implicit in such a rationale is the patronizing assumption that one of the parties to a collective bargaining agreement could not and did not freely, knowingly, and voluntarily waive its right to bargain, no matter how clear and emphatic the waiver of bargaining rights might be.

D. *Recapitulation*

It is clear from both the court and PLRB decisions that there is a duty to bargain, not simply to "meet and discuss," before subcontracting work previously performed by bargaining unit

33. *See* Section V *infra*.
34. Harrisburg School Dist., 10 P.P.E.R. ¶ 10116 (1979).
35. *See, e.g.*, Waynesboro Area Bd. of School Dirs., 9 P.P.E.R. ¶ 9066 (PLRB 1978) and 10 P.P.E.R. ¶ 10048 (PLRB 1979).

employees. An analysis of the PLRB decisions reveals that the following steps must be taken by the public employer in order to fulfill its bargaining obligation. The employer must:

(a) Inform the union of its intent to consider subcontracting;
(b) Seek out the union and provide the union with copies of the subcontracting bids being considered;
(c) Request the union to make a counter-proposal to the bids and give the union a reasonable amount of time to develop its proposal;
(d) Negotiate in good faith with an open mind over the counter-proposals made by the union and seek concessions that will bring the agreement cost reasonably in line with the subcontract cost.

The union must also be diligent in protecting the rights of its membership, and it must make a meaningful effort to engage in bargaining. The union must:

(1) After learning, either from the employer directly or through some indirect means, of the employer's intent to consider subcontracting, demand that the employer bargain over the subcontracting;
(2) Make counter-proposals to the subcontracting bids;
(3) Negotiate in good faith to try to reach agreement on terms that will eliminate the need to subcontract the work.

Failure to follow the above steps by the employer, and timely filing of an unfair practice charge by the union, will result in a finding of an unfair practice by the PLRB that might require reinstatement with backpay of terminated bargaining unit employees, in addition to an order to bargain over subcontracting. If the union failed to demand bargaining, the PLRB is likely to order bargaining without requiring the reinstatement of terminated employees as part of its remedial order.

After following the above steps, if the employer and union are at impasse in negotiations, the employer may subcontract the work and terminate the bargaining unit employees whose work was subcontracted. Additionally, in those situations in which subcontracting is contemplated during the term of an existing agreement, and the agreement contains no language barring subcontracting of work, but does contain a broad waiver or "zipper" clause, it would appear that there is no duty to bargain before subcontracting the work.

The PLRB and the courts properly interpreted and applied the provisions of PERA to the issue of subcontracting. Although there may be disagreement regarding whether the balancing test of the

majority in *State College* or the test proposed by Justice Pomeroy is the appropriate test to apply in duty to bargain situations,[36] it is clear that in the case of subcontracting the impact on the employee will almost always outweigh the impact on the policy determinations of the public employer. Therefore, the requirements outlined above are not likely to be modified in future cases.

III. Job Classification and the Duty to Bargain

The question whether there is a duty to bargain over the job classification of employees or the reclassification of employees' positions is less developed than the subcontracting issue. In *PLRB v. Commonwealth*[37] a dispute arose when the Commonwealth reclassified a number of positions with the result that after reclassification the positions were in a bargaining unit represented by a different union. The American Federation of State, County, and Municipal Employees (AFSCME), which represented the employees prior to the reclassification, charged that the public employer's unilateral reclassification violated either the duty to bargain under section 1201(a)(5)[38] or the duty to meet and discuss under section 1201(a)(9) of PERA.[39]

In the unfair practice proceeding, the PLRB determined that the employer's reclassification fell within the scope of the term "direction of personnel"[40] in the definition of management rights in section 702. In the PLRB's view '[a]n employer is free to reclassify employes and direct these employes in the performance of their jobs without an obligation to bargain with the bargaining representative."[41] Although the reclassification was considered to be a matter of "inherent managerial policy," section 702 required the employer to meet and discuss with the union.[42] That is, when a matter of inherent managerial policy directly affects the employees' fundamental interest in wages, hours, and terms and conditions of employment, there is no duty to bargain, but there is an obligation to meet and discuss with the bargaining representative of the public employees.

Although the Commonwealth violated its meet and discuss obligation in this case by unilaterally reclassifying rank-and-file job positions, it did not violate its meet and discuss obligation by

36. *See* notes 17-21 and accompanying text *supra*.
37. 9 P.P.E.R. ¶ 9061 and ¶ 9165 (PLRB 1978).
38. PA. STAT. ANN. tit. 43, § 1101.1201(a)(5) (Purdon Supp. 1979).
39. *Id.* at § 1201(a)(9).
40. *Id.* at § 1101.1201(a)(9).
41. PLRB v. Commonwealth, 9 P.P.E.R. ¶ 906 at 120.
42. Section 702 of PERA, PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1979), provides in pertinent part that "[p]ublic employers . . . 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."

unilaterally reclassifying positions in a first level supervisory bargaining unit. Section 704 of PERA expressly limits the obligation to meet and discuss with first level supervisors to "matters deemed to be bargainable for other public employes covered by this act."[43] Therefore, because reclassification is not a bargainable item for rank-and-file employees, it is not a meet and discuss item for supervisory employees. In sum, the public employer is free to unilaterally reclassify first level supervisory positions.[44]

It should be noted that the PLRB was careful to prevent reclassifications by public employers from being used as a means of undermining union representation. Thus, a reclassification will merely result in a change of job titles within a certified bargaining unit. The public employer must initiate unit clarification proceedings before the PLRB in order to remove employees from a certified unit.[45] In effect, two actions are necessary. First, the public employer must reclassify the employees. Second, the employer must establish that the employees are not properly members of the previously certified bargaining units because of a change in their job function.

Treating job classification matters as a meet and discuss item is consistent with the intent to restrict bargaining over certain critical management functions expressed by the Hickman Commission Report.[46] Requiring the employer to initiate unit clarification proceedings before it can remove employees from one bargaining unit into a different bargaining unit represented by a different union or into a position without union representation, guards against reclassifications being used to deny employees their statutory right to collective bargaining. The balance thus struck by the PLRB between the employer's right to manage and direct the work force, and the employees' right to bargain collectively through representatives of their own choosing, is a fair one.

IV. Union Representation and the Duty to Bargain

Questions of who the public employer must bargain with can occur after the resolution of representation questions and the certifi-

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43. Section 704 of PERA, PA. STAT. ANN. tit. 43, § 1101.704 (Purdon Supp. 1979), provides,

> Public employers shall not be required to bargain with units of first level supervisors or their representatives but shall be required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employes covered by this act.

44. *See* PLRB v. Commonwealth, 9 P.P.E.R. ¶ 9061 at 120 (PLRB 1978).

45. A public employer can still promote an employee to a position outside the certified unit. *See* PLRB v. Commonwealth, 9 P.P.E.R. ¶ 9165 (PLRB 1978) (Final Order).

46. *See* notes 2-4 and accompanying text *supra*. In County of Northampton, 10 P.P.E.R. ¶ 10010 (PLRB 1978), the Board indicated that job classification issues would "at most" be meet and discuss issues under § 702. Apparently, the Board believes that some classification questions may not give rise to the obligation to meet and discuss.

cation of the union as the bargaining representative of the employees. Particular problems arise out of the concept of exclusivity of representation and the dual status of supervisors under PERA.

A. Exclusive Representation and the Duty to Bargain

In *Peters Township School District*[47] the PLRB addressed the question of an employee's right to deal directly with the employer without the intervention of the certified representative. The case arose out of the school district's refusal to consider the grievance of a member of the certified bargaining unit which was presented outside of the established contractual grievance procedure.

The employee filed an unfair practice charge alleging that section 606 of PERA gave her a statutory right to have her grievance considered independent of the certified representative. The PLRB disagreed with the complainant's interpretation of the Act. Section 606, the relevant portion of the Act, provides as follows:

> Representatives selected by public employes in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employes in such unit to bargain wages, hours, and terms and conditions of employment; Provided, that any individual employe or a group of employes shall have the right at any time to present grievances to the employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect; And, provided, further, that the bargaining representative has been given an opportunity to be present at such adjustment.[48]

Section 606 is almost identical to the language of section 9(a) of the Labor Management Relations Act.[49] Although the first proviso of the section relied on by the complainant has never been interpreted by the United States Supreme Court, the PLRB found a decision of the Second Circuit Court of Appeals,[50] and several opinions of the NLRB's General Counsel interpreting section 9(a) of the National Act,[51] to be persuasive authority regarding the interpretation of section 606.[52]

In *Black-Clawson Co. v. International Association of Machinists*[53] an employee covered by the terms of a collective bargaining agreement sought to compel arbitration of the merits of his discharge through the grievance procedure. The employer brought an action

47. 8 P.P.E.R. 81 (PLRB 1977).
48. PA. STAT. ANN. tit 43, § 1101.606 (Purdon Supp. 1979).
49. 29 U.S.C. § 159 (a) (1976).
50. Black-Clawson v. IAM, 313 F.2d 179 (2d Cir. 1962).
51. *See also* Malone v. United States Postal Service, 526 F.2d 1106 (6th Cir. 1975); Braneman v. A. & P. Tea Co., 353 F.2d 559 (2d Cir. 1965).
52. *See* Community College of Allegheny County, 8 P.P.E.R. 305 (PLRB 1977), for a discussion of the use of federal precedent in the interpretation of § 606 of PERA.
53. 313 F.2d 179 (2d Cir. 1962).

for a declaratory judgment barring the arbitration on the basis that the grievance was not arbitrable. The employee argued in part that the first proviso of section 9(a) gave the employee a statutory right to have his grievance adjusted by the employer in a manner consistent with the collective bargaining agreement, which was separate and distinct from any contractual right to arbitration. The court, examining the legislative history and the language of section 9(a) as a whole, reached a different conclusion. It stated,

> Despite Congress' use of the word "right", which seems to import an indefeasible right mirrored in a duty on the part of the employer, we are convinced that the proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy.[54]

The PLRB adopted the Second Circuit's interpretation of the federal statutory language in its entirety in the interpretation of section 606 in *Peters Township School District*[55] and dismissed the unfair practice charge. Although federal precedents can not always be readily applied in the interpretation of PERA,[56] the *Peters Township* decision was properly decided by the PLRB. The decision in *Black-Clawson* was well-known prior to the enactment of PERA and is based on important policy considerations. Substantial benefits redound to all parties when the administration of a collective bargaining agreement is within the exclusive control of the certified representative. Exclusive union control of access to the mechanisms of contract enforcement tends to foster greater uniformity, effectiveness, and overall equity in contract administration.[57] The Pennsylvania courts recognized these policy considerations by refusing to grant individual employees access to arbitration or the courts to enforce a collective bargaining agreement absent clear language in the contract permitting individual enforcement actions.[58] In sum, the PLRB's narrow construction of the first proviso of section 606 appears to have a sound basis in legislative intent, and in important policy considerations supporting the principle of exclusive representation.

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54. *Id.* at 185. The court noted that portions of the House Reports concerning the federal legislation support the conclusion that the proviso in question was intended to permit, but not require, an employer to consider individual employee grievances. Viewing the section as a whole the court observed, "The office of a proviso is seldom to create substantive rights and obligations; it carves exceptions out of what goes before." *Id. quoting* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 624 (1956).

55. 8 P.P.E.R. 81 (PLRB 1977).

56. *See, e.g.*, PLRB v. State College Area School Dist., 461 Pa. 494, 499, 337 A.2d 262, 264 (1975).

57. *See* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 625-27 (1956).

58. *See* Falsetti v. Local Union No. 2026, 400 Pa. 145, 161 A.2d 882 (1960); Gardocki v. Commonwealth, 42 Pa. Commw. Ct. 579, 401 A.2d 410 (1979); McCluskey v. Commonwealth, 37 Pa. Commw. Ct. 598, 391 A.2d 45 (1978).

B. Cross-Unit Representation and the Duty to Bargain

PERA permits first level supervisors to organize for the purpose of meeting and discussing, but it expressly prohibits the inclusion of supervisors in rank-and-file employee bargaining units.[59] Moreover, under PERA, as under the federal private sector labor law, supervisors are agents of management, and the employer is liable for unfair labor practices committed by its supervisors.[60] Under the federal private sector law, however, supervisors are not permitted to unionize. Thus, supervisors have a unique status under PERA, and they may be both agents of management and members of the same union representing the rank-and-file employees they supervise.

In *PLRB v. Commonwealth*[61] the public employer refused to bargain with designated representatives of the rank and file bargaining unit who were also first level supervisors, and the union filed an unfair labor practice charge. The basic issues were whether members of a first level supervisory bargaining unit could represent rank-and-file employees in bargaining sessions and grievance meetings, and whether members of rank-and-file bargaining units could represent first level supervisors in similar preceedings; that is, whether cross-unit representation was permissible.

In its nisi decision[62] the PLRB ruled that the right to select an employee representative created by section 401[63] is, by implication, limited by sections 604(5) and 704.[64] It stated,

> [S]upervisory and nonsupervisory employes have complete and separate interests in their dealings with the employer. Due to the different interests, there is a real possibility that a conflict could arise in the manner in which certain matters could and would be pursued by representatives in cross unit situations. There is an inherent conflict of interest where an employe, who is a first level supervisor under Section 301(6) of the Act, bargains on behalf of employes who are rank and file employes and which he super-

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59. PA. STAT. ANN. tit. 43, § 1101.604(5) (Purdon Supp. 1979). *See also id.* at § 1101.704.

60. *See, e.g.*, Duquesne School Dist., 3 P.P.E.R. 351 (PLRB 1973). *See also* PLRB v. Bethel Park School Dist., 8 P.P.E.R. 2 (PLRB 1976).

61. 40 Pa. Commw. Ct. 468, 397 A.2d 858 (1979).

62. 6 P.P.E.R. 89 (PLRB 1975), *rev'd*, 8 P.P.E.R. 308 (PLRB 1977), *aff'd*, 40 Pa. Commw. Ct. 468, 397 A.2d 858 (1979).

63. Section 401 of PERA states,

> It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.

PA. STAT. ANN. tit. 43, § 1101.401 (Purdon Supp. 1979).

64. Section 704 of PERA states,

> Public employers shall not be required to bargain with units of first-level supervisors or their representatives but shall be required to meet and discuss with first-level supervisors or their representatives on matters deemed to be bargainable for other public employes covered by this act.

Id. at § 1101.704. *See also id.* at § 1101.604.

> vises, with the same employer. We cannot permit this possibility to exist. We must protect the integrity of each group and assume that the interests of each shall be pursued to the fullest extent. This is true for both collective bargaining and in pursuing grievances."[65]

Based on the above rationale, the nisi order dismissed the unfair practice charge.

The PLRB reversed its position in its final order.[66] Upon reconsideration of the question, the Board placed considerable weight on section 1801(a), which deals specifically with the general problem of conflict of interest, but is silent on the question of cross-unit representation.[67] The Board determined that it could not place limits on the freedom to select the employee representative on the basis of a conflict of interest, absent specific statutory language. Sections 604(5) and 704 in the Board's opinion were insufficient to overcome the legislative silence concerning the problem of cross-unit representation in light of the specific language of section 1801(a). The commonwealth court affirmed the rationale of the Board's final order and dismissed the Commonwealth's appeal.[68]

The Board's about face in this case reflects the inherent difficulty of the cross-unit representation problem. Clearly, there is a conflict of interest when a first level supervisor, an agent of the employer, acts as the representative of rank-and-file employees in negotiations with his employer and vice versa. The question that arises is whether the legislature intended to accept this conflict as part of an obvious legislative compromise over the status of first level supervisors, or intended to prohibit it pursuant to the limitations on the rights of first level supervisors contained in sections 604(5) and 704, a classic problem of statutory interpretation. Both the PLRB and the commonwealth court were forced to choose between placing greater emphasis on what they perceived to be the desired goals of the legislature based on the statute as a whole (the nisi order) or the more narrow, logical implications of a particular statutory provision (the final order). The two PLRB decisions underscore the difficulty presented by the cross-unit representation problem and demonstrate that in resolving a problem of imprecise draftsmanship, there is no necessarily correct answer.

V. Waiver of the Right to Bargain

One of the most significant developments under PERA is the willingness of the PLRB to give full force and effect to collectively

65. 6 P.P.E.R. at 90.
66. 8 P.P.E.R. 308 (PLRB 1977), *aff'd*, 40 Pa. Commw. Ct. 468, 397 A.2d 858 (1979).
67. PA. STAT. ANN. tit. 43, § 1101.1801(a) (Purdon Supp. 1979).
68. 40 Pa. Commw. Ct. 468, 397 A.2d 858 (1979).

bargained waiver and integration or "zipper" clauses. Nevertheless, careful draftsmanship is necessary to fulfill indirectly the bargaining obligation through such a provision in the labor agreement.

A. Waynesboro Area Board of School Directors

In *Waynesboro Area Board of School Directors*[69] the employer unilaterally implemented a no-smoking policy during the term of a collective bargaining agreement. The union filed unfair labor practice charges when the employer failed to retract the policy or bargain with the union over the change in working conditions.[70]

The employer defended the action on the ground that the union expressly waived the right to bargain pursuant to a waiver and integration provision in the parties' collective bargaining agreement. That clause provided as follows:

> The Employer and the Association acknowledge that during the negotiations which resolved in this Collective Bargaining Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Collective Bargaining Agreement. Therefore, the Employer and the Association, for the life of this Collective Bargaining Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Collective Bargaining Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or executed this Agreement.
>
> Upon prior mutual written agreement, the parties may, but shall not be obligated to, negotiate or renegotiate any subject or matter. Any agreement reached in such manner shall be reduced to writing, signed by the parties and treated as an addendum to this Collective Bargaining Agreement.[71]

In its nisi decision[72] the PLRB held that this provision fulfilled the employer's duty to bargain, as well as the obligation to meet and discuss, on any and all items whether or not included in the labor agreement, or discussed or contemplated by the parties in their negotiations. After reviewing both the federal[73] and Pennsylvania precedent,[74] the PLRB, in its final order,[75] affirmed and ruled that a party

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69. 9 P.P.E.R. ¶ 9066 (PLRB 1978) and 10 P.P.E.R. ¶ 10048 (PLRB 1979).

70. A public employer's unilateral action that alters a working condition within the ambit of mandatory subjects of bargaining violates the duty to bargain under PERA. *See generally* J. THRUSH, PENNSYLVANIA PUBLIC EMPLOYE LABOR RELATIONS 139-48 (1st ed. 1977).

71. 9 P.P.E.R. ¶ 9066 at 132.

72. 9 P.P.E.R. ¶ 9066 (PLRB 1978), *aff'd*, 10 P.P.E.R. § 10048 (PLRB 1979).

73. *See* notes 76-84 *infra*.

74. The PLRB made specific reference to Chambersburg Area School Dist., 9 P.P.E.R.

to a collective bargaining agreement may waive its right to bargaining regardless of whether there is a specific reference in the waiver provision to the matter at issue.

B. The Federal Precedent

Initially, the National Labor Relations Board required that a contractual provision specifically refer to the condition of employment in question in order to give rise to a valid waiver.[76] More recent NLRB authority allows for a waiver of the bargaining obligation without specific reference to the employment condition in question in appropriate circumstances. In *Radioear Corp. I*[77] the NLRB suggested four criteria to be considered in this regard:

(a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon;
(b) other proposals advanced and accepted or rejected during bargaining;
(c) the completeness of the bargaining agreement as an "integration"—hence the applicability or inapplicability of the parol evidence rule; and
(d) practices by the same parties, or other parties, under other collective-bargaining agreements.[78]

After an unsuccessful attempt to defer to arbitration in *Radioear Corp. I*, the NLRB examined the waiver clause in light of the above criteria in *Radioear Corp. II*.[79] At issue was the employer's unilateral termination of a "turkey money" bonus. After examining the bargaining history of the parties, the NLRB determined that the union had a full opportunity to raise all relevant issues in bargaining, and had actually sought a "maintenance of standards" provision without success. The majority reasoned that there was "a conscious, knowing waiver of any bargaining obligation as to non-specified benefits."[80]

Despite the assertions of the dissenting members, who feared that a process of case-by-case adjudication would give rise to "the vagaries of supposition, hypothesis, and guesswork,"[81] the federal circuit court opinions support the result reached by the majority in *Radioear Corp. II*. In *NLRB v. Southern Materials Co.*[82] the Fourth Circuit reversed the NLRB's finding of an unfair labor practice and

¶ 9080 (PLRB 1978); Keystone School Dist., 9 P.P.E.R. ¶ 9058 (PLRB 1978); and Bucks County Area Vo-Tech School, 6 P.P.E.R. 230 (PLRB 1975).

75. 10 P.P.E.R. § 10048 (PLRB 1979).
76. *See, e.g.*, Tide Water Assoc. Oil Co., 85 N.L.R.B. 1096 (1949).
77. 199 N.L.R.B. 1161 (1972).
78. *Id.*
79. 214 N.L.R.B. 362 (1974).
80. *Id* at 364.
81. *Id.* at 366 (Fanning and Jenkins, Members, dissenting).
82. 447 F.2d 15 (4th Cir. 1971).

ruled that a broad waiver provision[83] satisfied the NLRB's requirement of "clear and unmistakable" language giving rise to a valid waiver of bargaining rights even when the language of the waiver clause did not expressly refer to the terminated benefit. The Tenth Circuit also followed this approach in *NLRB v. Auto Crane Co.*[84]

C. The Extension of Waynesboro

Consistent with the federal authority, the PLRB resisted any rigid rule regarding collectively bargained waiver provisions and instead examined these provisions on a case-by-case basis. In *City of Erie*[85] the PLRB rejected the employer's contention that the union waived its right to bargain over the employer's unilateral imposition of a residency requirement on the ground that the waiver must be clear and unmistakeable to fulfill indirectly the obligation of good faith bargaining.[86]

Nevertheless, the current trend of PLRB decisions is to give full force and effect to collectively bargained waiver provisions, and the PLRB will not contradict the plain meaning of the language of a labor agreement.[87] In cases involving residency requirements,[88] no smoking policies,[89] and subcontracting[90] during the term of a collective bargaining agreement, the PLRB held that the public employer

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83. The waiver clause in *Southern Materials* provided,

> The Company and the Union for the life of said Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter referred to or covered in this Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement.

Id. at 17.

84. 536 F.2d 310 (10th Cir. 1976). The waiver clause in *Auto Crane* stated in part as follows:

> Therefore, the Company and the Union for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any matter or subject not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or signed this agreement.

Id. at 312.

85. 9 P.P.E.R. ¶ 9123 (PLRB 1978).

86. The PLRB stated,

> Where the language used by the parties raises doubts as to what their intention was in including such a provision it is no more logical to infer a waiver than to conclude that the parties did not intend such a result. Where such a case occurs . . . we must give the provision in question the narrowest reading thus promoting the general policy of encouraging parties to bargain over the terms and conditions of employment.

Id. at 263.

87. This is so even when the waiver and integration clause is less comprehensive than the provision in *Waynesboro*. *See, e.g.*, Commonwealth of Pennsylvania (Venango County Bd. of Assist.) 10 P.P.E.R. ¶ 10013 (PLRB 1978).

88. *See, e.g.*, Keystone School Dist., 9 P.P.E.R. ¶ 9058 (PLRB 1978).

89. Chambersburg Area School Dist., 10 P.P.E.R. ¶ 10099 (PLRB 1979); Commonwealth of Pennsylvania (Venango County Bd. of Assist.), 10 P.P.E.R. ¶ 10013 (PLRB 1978); Waynesboro Area Bd. of School Dirs., 9 P.P.E.R. ¶ 9066 (PLRB 1978).

90. Harrisburg School Dist., 10 P.P.E.R. ¶ 10116 (1979).

indirectly fulfilled its obligation to bargain in good faith, or conversely, the union waived its right to bargain over these items, when the collective bargaining agreement was silent on the particular employment condition and also contained a broad waiver clause.

This approach is sound because the PLRB should give effect to the entire agreement as written rather than pick and choose between the provisions of a collective bargaining agreement that it deems to be "boilerplate."[91] It is reasonable to presume that the parties to a collective bargaining agreement do not carefully write into a solemnly negotiated agreement words intended to have no effect.[92] Moreover, requiring the parties themselves to resolve the problem of the duty to bargain during the term of the agreement is consistent with the basic purposes of the duty to bargain as defined by PERA.

VI. Conclusion

The case-by-case evolution of the duty to bargain under PERA evinces that legislation could not anticipate, address, and resolve all the issues and problems likely to arise. Indeed, more particular legislation than that imposing an obligation to bargain in good faith, in all likelihood, would require more litigation and inject greater uncertainty into the bargaining relationship. It is unlikely that it would clarify the law.

Nine years of experience under PERA, and the lesson provided by the federal private sector labor law, indicate that the problems surrounding the duty to bargain are better resolved through the litigation process than by additional legislative action.[93] A new statutory pattern would only raise new questions and uncertainty. Therefore, despite the inherent ambiguity of Article VII of PERA, the best resolution of duty to bargain issues occurs within the flexible framework of the existing statutory language as it is interpreted by the PLRB and the courts.

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91. *See* County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 37 n.17, 381 A.2d 849, 854 n.17 (1977) ("we are obliged to take the agreement as the parties wrote it").

92. *See* John Deere Tractor Co., 5 Lab. Arb. & Disp. Settl. 631, 632 (Updegraff, Arb., 1946).

93. This is the conclusion reached by the Governor's Study Commission. GOVERNOR'S STUDY COMMISSION ON PUBLIC EMPLOYE RELATIONS, RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE CHANGE TO THE PUBLIC SECTOR BARGAINING LAWS OF PENNSYLVANIA, June 1, 1978, 19.