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I. Introduction

For policemen and firemen in Pennsylvania, 1979 marks the beginning of the second decade of collective bargaining. Collective bargaining for all other public employees in Pennsylvania is in its ninth year of development. This article surveys the principles developed by the courts and the Pennsylvania Labor Relations Board (PLRB) under Pennsylvania's public sector collective bargaining laws—the Collective Bargaining by Policemen and Firemen Act (Act 111)[1] and the Public Employe Relations Act (PERA).[2] Both are complicated statutes governing the relationship between public employers and employees, a relationship that can itself become most complicated.[3]

II. Preliminaries to Bargaining Under PERA

A. The Appropriate Bargaining Unit

Certain statutory requirements must be complied with before collective bargaining is required under PERA. These requirements are intended to establish an appropriate bargaining unit of employees[4] and to determine whether the members of that unit want repre-

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1. Act of June 24, 1968, Pub. L. 237, No. 111, PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1979).

2. Act of July 23, 1970, Pub. L. 563, No. 195, PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1979).

3. This survey article provides a concise overview of the operation of Pennsylvania's public sector collective bargaining statutes. A more detailed and indepth analysis of particular points can be found in J. THRUSH, PENNSYLVANIA PUBLIC EMPLOYEE LABOR RELATIONS (1977), and the law review articles noted in the footnotes.

4. An "appropriate bargaining unit" is a unit in which the employees have an identifi-

sentation by a labor organization. Although the parties may be in agreement regarding the appropriateness of the bargaining unit, it must be found appropriate by the PLRB in a unit determination hearing.[5]

Unit determination hearings are informal proceedings conducted by a hearing examiner. Although characterized as nonadversary, practical considerations enter into the parties' assertions regarding the propriety of the unit, and it is an important determination for both the public employer and the labor organization. Generally, as a matter of strategy, a public employer resisting unionization will argue that the largest possible unit is the appropriate one because the larger the number of employees, the more difficult it is for the union to organize.[6] Similarly, a union will argue for a unit in which it is most likely to win an election.

For a number of reasons, unit determinations are rarely appealed to the courts. Perhaps the most significant reason for not taking an appeal is the narrow standard of review,[7] which recognizes that unit determinations are difficult to make and that the courts should defer to the findings of the PLRB in the absence of a clear showing of arbitrary action by that administrative tribunal.[8]

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able community of interest. The PLRB must also guard against overly fragmented units, however. PA. STAT. ANN. tit. 43, § 1101.604(1) (Purdon Supp. 1979).

A simplified statement of what constitutes a community of interest is common supervision, similarity of skills possessed and work performed by the employees, similar working conditions, wages, fringe benefits, and the integration of work functions directed toward a common purpose.

Striking a balance between a "community of interest" and "overfragmentation" is a difficult task, and the resolution will vary with the facts and circumstances of each case. The PLRB consistently states it need find only an appropriate unit, not the most appropriate. *See, e.g.*, Lehigh County Commissioners, 7 P.P.E.R. 150, 151 (PLRB 1976); Court of Common Pleas of Dauphin County, 6 P.P.E.R. 308 (PLRB 1975); West Shore School Dist., 6 P.P.E.R. 200 (PLRB 1975).

5. PA. STAT. ANN. tit. 43, §§ 1101.602(a), 1101.604 (Purdon Supp. 1979). *See, e.g.*, Loyalsock Twp., 10 P.P.E.R. ¶ 10054 (PLRB 1979). *See also* 34 Pa. Code §§ 95.11(b)(3), 95.12(b)(2), 95.13(b)(1), 95.14(3) (1979).

6. This is frequently referred to as a "wall-to-wall" unit. The public employer may also attempt to include supervisors or employees who it believes would vote against union representation in the election. Other considerations must also be taken into account and weighed by the public employer, for example, the simplicity of dealing with one union rather than several, and whether the larger unit would be stronger or weaker in bargaining should the union win the election.

7. The findings of the PLRB are conclusive "if supported by substantial and legally credible evidence . . . ." PA. STAT. ANN. tit. 43, § 1101.1502 (Purdon Supp. 1979). An equally plausible reason is that the parties do not compare their situation with other bargaining units deemed appropriate by the PLRB, and fail to attach sufficient importance to the unit determination.

8. "[T]he Board . . . is considered . . . better qualified . . . to weigh the facts and to appreciate the complexities of the subject of labor relations, including the appropriateness of the proposed bargaining unit." Western Psychiatric Inst. v. PLRB, 16 Pa. Commw. Ct. 204, 211, 330 A.2d 257, 261 (1974).

B. Statutory Specialized Bargaining Units

PERA requires special bargaining units for certain classes of employees. Act 111, because of its limited scope, does not set out such requirements.

1. Professional Employees.—PERA prohibits the inclusion of professional employees in bargaining units with nonprofessional employees.[9] An important qualification to this rule is that a majority of professional employees may vote for inclusion in a nonprofessional bargaining unit.[10] A professional employee is statutorily defined,[11] but the application of the definition to individual employees is problematic.[12]

2. Guards.—PERA also segregates persons employed as guards protecting the property of public employers or the safety of persons on the public employer's property.[13] Such employees can neither be included in a bargaining unit with other public employees performing different functions nor be represented by a labor organization that is affiliated with unions representing persons other than guards.[14] The practical consideration is obvious—to ensure protection of the public employer's property during times of labor unrest.

3. Guards at Prisons and Mental Hospitals.—Guards at prisons and mental hospitals also are placed in bargaining units of their own, separate and apart from the bargaining units of other guards.[15] Moreover, they are expressly denied the right to strike accorded other public employees.[16]

4. Court Related Employees.—The same statutory provision that excludes guards at prisons and mental hospitals from bargaining units of other public employees excludes court related employees

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9. PA. STAT. ANN. tit. 43, § 1101.604(a) (Purdon Supp. 1979).

10. *Id.*

11. *Id.* § 1101.301 (7).

12. Whether a person does or does not have a college degree does not conclusively determine whether that person is a professional employee. *Compare* York Day Nursery and Kindergarten, 3 P.P.E.R. 101 (PLRB 1973) *with* Allegheny County, 1 P.P.E.R. 72 (PLRB 1971). All of PERA's statutory qualifications must be met, and fitting or not fitting the definition of a professional employee in other statutes is not conclusive. *See* Great Valley School Dist., 1 P.P.E.R. 13 (PLRB 1971).

13. PA. STAT. ANN. tit. 43, § 1101.604(3) (Purdon Supp. 1979).

14. *Id.* School crossing guards, who help protect school children, are not guards protecting personnel and property at the school, and will be included in rank-and-file bargaining units. Falls Township v. PLRB, 14 Pa. Commw. Ct. 494, 322 A.2d 412 (1974).

A difficulty encountered is whether persons asserted to be guards are actually policemen or firemen covered by the Collective Bargaining by Policemen and Fireman Act of June 24, 1968, Pub. L. 237, No. 111, PA. STAT. ANN. tit. 43, §§ 211.1-.10 (Purdon Supp. 1979). *See* notes 25-27 and accompanying text *infra*.

15. PA. STAT. ANN. tit. 43, § 1101.604(3) (Purdon Supp. 1979).

16. *Id.* § 1101.1001.

from bargaining units of other public employees.[17] As with guards at prisons and mental hospitals, PERA expressly denies court related employees the right to strike.[18]

The problem of who was the employer of court related employees for purposes of negotiating collective bargaining agreements was a much litigated point under PERA. Initially, the Pennsylvania Supreme Court ruled that persons working for judges should be regarded as being employed jointly by the courts, which controlled the employees' activities, and by the county commissioners, who paid the employees' salaries.[19] When next presented with the issue of who was the employer of employees working in "row offices" or for the courts, but paid out of county funds, the court upheld an amendment to the County Code that granted county commissioners "the sole power and responsibility to represent judges of the courts of common pleas"[20] against constitutional challenges.[21] Thus, joint representation of managerial representatives in PLRB proceedings and collective bargaining negotiations involving court related employees is no longer necessary.

5. First Level Supervisors.—PERA requires the exclusion of first level supervisors from rank-and-file bargaining units and inclusion of first level supervisors in "meet and discuss" units.[22] PERA thus does not grant first level supervisors the right to bargain collectively, but only the right to "meet and discuss," which differs substantially from collective bargaining.[23]

6. Policemen and Firemen.—Both policemen and firemen are covered by Act 111,[24] and hence, may not be included in bargaining units with employees covered by PERA.[25] Conversely, public employees covered by PERA may not be included in bargaining units

17. PA. STAT. ANN. tit. 43, § 1101.604(3) (Purdon Supp. 1979).

18. *Id.* § 1101.1001.

19. *See* Costigan v. Local 696, AFSCME, 462 Pa. 425, 341 A.2d 456 (1975); Sweet v. PLRB, 457 Pa. 456, 322 A.2d 362 (1974).

20. The County Code, Act of August 9, 1955, Pub. L. 323, *as amended by* Act of June 29, 1976, Pub. L. 460, 115, PA. STAT. ANN. tit. 16, § 1620 (Purdon Supp. 1979). Although this statute applies only to counties of the third through eighth classes, the Pennsylvania Supreme Court held the amendment applicable to Allegheny County. Ellenbogen v. County of Allegheny, 479 Pa. 429, 435-36, 388 A.2d 730, 733-34 (1978).

21. Board of Judges, Court of Common Pleas of Bucks County v. Bucks County Comm'rs, 479 Pa. 457, 388 A.2d 743 (1978); Sweet v. PLRB, 479 Pa. 449, 388 A.2d 740 (1978); Commonwealth *ex rel.* Bradley v. PLRB, 479 Pa. 441, 388 A.2d 736 (1978); Ellenbogen v. County of Allegheny, 479 Pa. 429, 388 A.2d 730 (1978).

22. PA. STAT. ANN. tit. 43, § 1101.704 (Purdon Supp. 1979). *See also* notes 29-35 and accompanying text *infra*.

23. *See* notes 138-150 and accompanying text *infra*.

24. The Collective Bargaining by Policemen and Fireman Act of June 24, 1968, Pub. L. 237, No. 111, PA. STAT. ANN. tit. 43, § 217.1-.10 (Purdon Supp. 1979).

25. The Public Employe Relations Act of July 23, 1970, Pub. L. 563, No. 195, PA. STAT. ANN. tit. 43, § 1101.301(2) (Purdon Supp. 1979).

of policemen and firemen. Because Act 111 does not define "policemen" or "firemen," a determination of whether particular employees come under the coverage of PERA or Act 111 is determined on a case by case basis.[26] The PLRB may be resolving doubts in favor of a finding that the employees are policemen or firemen covered by Act 111 in order to ensure that the legislative prohibition on strikes by employees providing police and fire protection is not frustrated.[27]

C. Exclusions From Bargaining Units

In addition to the categories of employees discussed above, which must be placed in specialized collective bargaining units, various other employees, whether by statute or by court or PLRB decision, must be excluded from bargaining units. These employees, with the exception of supervisors, are accorded neither the right to bargain collectively nor the right to "meet and discuss."[28]

1. Supervisors.—Supervisors are not included in collective bargaining units of rank-and-file employees under PERA.[29] The definition of supervisor in PERA is taken almost word for word from the federal Labor Management Relations Act of 1947.[30] An important difference, which adds a somewhat new dimension to the definition of supervisor, is that under PERA a supervisor need not have authority to hire, transfer, suspend, layoff, recall, promote, discharge or discipline employees if he can "to a substantial degree effectively recommend such action."[31] This qualification seems particularly appropriate when one recognizes that supervisory employees in the public sector rarely have control over hiring, firing, or promoting employees.[32]

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26. It is clear that the mere use of the title "policeman" or "fireman" is not controlling. *See* Venneri v. County of Allegheny, 12 Pa. Commw. Ct. 517, 316 A.2d 120 (1974); Commonwealth of Pennsylvania, 3 P.P.E.R. 57 and 3 P.P.E.R. 60 (PLRB 1973). Two relevant factors to consider are the responsibility to keep peace in the community, *see* Township of Falls v. PLRB, 14 Pa. Commw. Ct. 494, 322 A.2d 412 (1974); and the power of arrest as a primary responsibility. Hartshorn v. County of Allegheny, 460 Pa. 560, 333 A.2d 914 (1975); *cf.* Venneri v. County of Allegheny, 12 Pa. Commw. Ct. 517, 316 A.2d 120 (1974) (arrest power not primary responsibility).

27. *See, e.g.*, Philadelphia Housing Authority, 9 P.P.E.R. ¶ 9256 (PLRB 1978). *See also* Bucks County Park Rangers, 9 P.P.E.R. ¶ 9292 (C.P. Bucks 1978).

28. PA. STAT. ANN. tit. 43, § 1101.301(2) (Purdon Supp. 1979).

29. *See* note 22 *supra.*

30. *Compare* 29 U.S.C. § 152(11) (1976) *with* PA. STAT. ANN. tit. 43, § 1101.301(6) (Purdon Supp. 1979).

31. *Id.*

32. One court concluded that the legislature inserted this phrase to make clear that the recommendations of supervisors need not have "controlling weight." *In re* Employees of Bermudian Springs School Dist., 6 P.P.E.R. 79 (C.P. Adams 1975). The PLRB decisions are inconsistent. *Compare* Bellefonte Area School Dist., 3 P.P.E.R. 60 (PLRB 1973) *with* Altoona Area School Dist., 3 P.P.E.R. 97 (PLRB 1973).

The rule under federal private sector labor law is that a supervisor's power effectively to recommend, for example, a discharge must be controlling. *See* Risdon Mfg. Co., 195 N.L.R.B. 579, 581 (1972). As noted, however, there is a significant difference between the language of

The PLRB cases attempting to apply the definition of supervisor in particular factual situations are legion. One fairly well-established principle that emerges is that the PLRB will neither set quantitative standards for the determination of supervisory status[33] nor police the job descriptions of the public employer.[34] Nevertheless, the public employer cannot preclude collective bargaining by placing employees in job classifications that indicate supervisory status and power if the employees do not in fact perform supervisory duties.[35]

Act 111, covering policemen and firemen, contains no definition of supervisor. Moreover, it does not state whether supervisors should be included with rank-and-file policemen and firemen, be set up in separate bargaining or "meet and discuss" units of supervisors, or be completely denied bargaining rights. Because of these shortcomings, the task of deciding these issues fell on the PLRB.[36] At this time, the PLRB strikes a middle ground and includes supervisors in rank-and-file bargaining units.[37] Chiefs of police are included in rank-and-file units when the police force consists of fewer than ten persons.[38] When ten or more persons are involved, however, the chief is presumed to be a managerial employee, and not an employee for collective bargaining purposes.[39] No courts have addressed the propriety of this resolution as of yet.

2. Management Level Employees.—PERA both defines who

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the federal statute and PERA. *See* notes 30 and 31 and accompanying text *supra*. Therefore, the NLRB cases should not be looked to for guidance in construing who is a supervisor under PERA. *See* PLRB v. State College Area School Dist., 461 Pa. 494, 499, 337 A.2d 262, 264 (1975).

33. Upper Darby School Dist., 1 P.P.E.R. 85 (PLRB 1971). *See also* Bethel Park School Dist., 1 P.P.E.R. 51 (PLRB 1971); Tyrone Area School Dist., 1 P.P.E.R. 45 (PLRB 1971); Ephrata School Dist., 1 P.P.E.R. 25 (PLRB 1971).

34. *See* PLRB v. AFSCME, 20 Pa. Commw. Ct. 572, 576, 342 A.2d 155, 157-58 (1975).

35. Chambersburg Area School Dist., 6 P.P.E.R. 144 (PLRB 1975); Wilkes-Barre Gen. Hosp., 3 P.P.E.R. 30 (PLRB 1973). The definition of a supervisor in other legislation does not control the PLRB's determination. North Schuylkill School Dist., 1 P.P.E.R. 28 (PLRB 1971).

36. Philadelphia Fire Officers Ass'n v. PLRB, 470 Pa. 550, 369 A.2d 259 (1977) mandated that the Pennsylvania Labor Relations Act of June 1, 1937, Pub. L. 1168, No. 294, PA. STAT. ANN. tit. 43, §§ 211.1-211.13 (Purdon Supp. 1979) be read *in pari materia* with Act 111, thereby filling the gaps in the latter statute. *See generally* Decker, *The PLRB's New Jurisdiction for Police and Firemen*, 16 DUQ. L. REV. 185 (1977-78).

37. *See, e.g.*, City of Easton, 9 P.P.E.R. ¶ 9019 (PLRB 1978) (firemen).

38. The PLRB promulgated the rule that chiefs of police are presumptively rank-and-file employees when the police force consists of fewer than ten persons in Lower Allen Twp., 9 P.P.E.R. 376 (PLRB 1977).

39. *Id.* The presumption is rebuttable, however. *Compare* Centerville Borough Police Dept., 10 P.P.E.R. ¶ 10030 (PLRB 1979) (police chief included in rank-and-file bargaining unit) *with* Borough of Watsontown, 10 P.P.E.R. ¶ 10033 (PLRB 1979) (although less than ten employees on the police force, police chief had responsibilities for policy and budget, thereby exercising managerial authority warranting exclusion from rank-and-file unit). A police chief may be included even though the parties stipulate that the appropriate bargaining unit does not include the police chief. Bethlehem Twp., 10 P.P.E.R. ¶ 10050 (PLRB 1979).

are "management level employees,"[40] and excludes them from its definition of "public employee."[41] They are accorded neither bargaining nor "meet and discuss" rights.

Once again, PERA incorporated an exclusion developed by the National Labor Relations Board for the private sector.[42] The PLRB's occasional application of the NLRB's definition[43] can be challenged whenever an application of that test results in a denial of managerial status mandated by PERA's definition.[44] In short, the PLRB can look to NLRB cases for guidance, but PERA's statutory definition must control.[45]

As discussed previously, managerial employees are also excluded from coverage under Act 111 under a quantitative test developed by the PLRB.[46]

3. Confidential Employees.—The final category of employees excluded from the definition of "public employee" under PERA are confidential employees.[47] As with the categories of supervisors and management level employees, the exclusion is intended to avoid a commingling of employees that may jeopardize the formulation and implementation of the public employer's labor relations policy.

Again, PERA expressly defines who is a confidential employee,[48] and again, the PLRB on occasion adopts and applies the definition of confidential employees developed by the National Labor Relations Board for the private sector.[49] Although this practice was disapproved by the Commonwealth Court,[50] the Pennsylvania Supreme Court concluded that the PLRB may apply the National Labor Relations Board definition of confidential employee to narrow

40. "Management level employe means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision." PA. STAT. ANN. tit. 43, § 1101.301(16) (Purdon Supp. 1979).

41. *Id.* § 1101.301(2).

42. The NLRB definition is discussed at length in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

43. *See, e.g.*, Bucks County, 8 P.P.E.R. 26 (PLRB 1976); Philadelphia School Dist., 4 P.P.E.R. 128 (PLRB 1974).

44. *See* PLRB v. Altoona Area School Dist., 480 Pa. 148, 389 A.2d 553 (1978).

45. *See* PLRB v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975).

46. *See* notes 37-39 and accompanying text *supra*.

47. PA. STAT. ANN. tit. 43, §§ 1101.301(2) (Purdon Supp. 1979).

48. *Id.* § 1101.301(13).

49. West Shore School Dist., 3 P.P.E.R. 1 (PLRB 1973) and Churchill School Dist., 2 P.P.E.R. 26 (PLRB 1972). The PLRB stated,

> [T]he Board has definitely adopted the National Labor Relations Board's definition of confidential employe to the effect that no employe can be classified as confidential unless he or she is a secretary or aide to a principal managerial employe engaged in formulating or carrying out major labor relations policy and that such managing did not include first level supervisors because they handle grievances at the first level.

50. PLRB v. Altoona Area School Dist., 23 Pa. Commw. Ct. 344, 352 A.2d 560 (1976), *rev'd in part*, 480 Pa. 148, 389 A.2d 553 (1978).

the scope of the statutory definition provided in PERA.[51]

D. Certification of the Exclusive Bargaining Representative

The representative selected by public employees in a unit appropriate for collective bargaining is the exclusive representative of *all* the employees in that unit,[52] a practice consonant with the private sector approach.[53] PERA allows for voluntary recognition of a collective bargaining representative,[54] or for an election that may result in certification of a union as the representative of the bargaining unit by the PLRB.[55] Whatever the procedure, the bargaining representative is intended to be the representative desired by a majority of the employees in the bargaining unit. The statutory scheme is designed to enable the employees to choose or reject union representation without coercion by the employer or the union.

Unlike the detailed procedures spelled out in PERA, Act 111, which controls bargaining by policemen and firemen, makes no provision for determining an appropriate bargaining unit or for electing a bargaining representative. In *Philadelphia Fire Officers Association v. PLRB*[56] the Pennsylvania Supreme Court resolved the problem by ruling that Act 111 was intended to operate in conjunction with the Pennsylvania Labor Relations Act,[57] which does provide election procedures.[58] Although the decision provided a means of determining a majority representative for an appropriate bargaining unit of policemen or firemen by the PLRB, in practical effect the decision created what is analogous to a common law of labor relations.[59]

1. Voluntary Recognition.—A public employer voluntarily recognizes a union by filing a "joint request for certification," a form that enables the PLRB to make a determination regarding the appro-

51. PLRB v. Altoona Area School Dist., 480 Pa. 148, 156, 389 A.2d 553, 557 (1978).

52. PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1979). *See also* McCluskey v. Commonwealth, 37 Pa. Commw. Ct. 598, 391 A.2d 45 (1978) (holding that only the union, and not the employee whose grievance was arbitrated, has standing to appeal the arbitral award when the labor agreement gives the union the exclusive right to invoke arbitration).

Individual employees or a group of employees may, nevertheless, present grievances to their public employer without the intervention of the union so long as the *adjustment* is not inconsistent with the terms of the collective bargaining agreement and the union is given the opportunity to be present. PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1979). A provision in a collective bargaining agreement giving the union the exclusive right to invoke arbitration should, therefore, be effective in giving the union exclusive control over the grievance procedure.

53. Labor Management Relations Act of 1947, 29 U.S.C. § 159(a) (1976).

54. PA. STAT. ANN. tit. 43, § 1101.602(a) (Purdon Supp. 1979).

55. *Id.* §§ 1101.603(a)-(d).

56. Philadelphia Fire Officers Ass'n v. PLRB, 470 Pa. 550, 369 A.2d 259 (1977).

57. PA. STAT. ANN. tit. 43, §§ 211.1-211.13 (Purdon Supp. 1979).

58. *Id.* § 211.7.

59. *See generally* Decker, *The PLRB's New Jurisdiction for Policemen and Firemen*, 16 DUQ. L. REV. 185, 191-99 (1977-78).

priateness of the proposed collective bargaining unit.[60] It is still necessary for the PLRB to find the proposed unit appropriate for collective bargaining purposes, however, and an employer that voluntarily recognizes a minority union risks being found guilty of unlawful interference with the rights of its employees.[61] Additionally, the public employer might be found guilty of unlawful domination of a labor organization.[62] Similarly, a union that accepts representation of employees when it knows it is not the choice of the majority of those employees might be unlawfully interfering with the rights of the employees.[63] Thus, while the procedure is simple, it is not without its risks for both the public employer and the union in the context of employees covered by PERA. In contrast, voluntary recognition of a union purporting to represent policemen and firemen covered under Act 111 might pose a risk only for public employers.[64]

2. Elections.—An election is the preferred means of recognizing a representative of public employees. It involves the resolution of two issues: the appropriateness of the bargaining unit, and the choice or rejection by the public employees of a union to represent them. Because of its complexity, the election procedure is discussed in greater depth.

E. Elections

A public employer may obtain an election either by joining in a "joint election request"[65] or by refusing a request for a consent election and forcing the union to file a petition for representation,[66] but the former should not be used if the public employer intends to dispute the makeup of the proposed bargaining unit.[67] Additionally, a public employer can file a petition for an election, but only when the union demands recognition by notice that thirty percent or more of

60. 34 Pa. Code § 95.11 (1979). The PLRB has statutory authority for promulgating rules and regulations necessary to implement PERA. PA. STAT. ANN. tit. 43, § 1101.502 (Purdon Supp. 1979).

61. PA. STAT. ANN. tit. 43 § 1101.1201(a)(1) (Purdon Supp. 1979). Unfair labor practices are discussed at notes 151-219 and accompanying text *infra*.

62. *Id.* § 1101.1201(a)(2).

63. *Id.* § 1101.1201(b)(1).

64. The PLRB construes Philadelphia Fire Officers Ass'n v. PLRB, 470 Pa. 550, 369 A.2d 259 (1977) as giving the PLRB jurisdiction over charges of unfair labor practices under Act 111. City of Easton, 9 P.P.E.R. ¶ 9019 (PLRB 1978).

65. PA. STAT. ANN. tit. 43, § 1101.603(a) and (b) (Purdon Supp. 1979); 34 Pa. Code § 95.13 (1979).

66. PA. STAT. ANN. tit. 43, § 1101.603(c) (Purdon Supp. 1979); 34 Pa. Code § 95.14 (1979). *See also* § 95.13(8).

67. In Venago/Clarion Mental Health Center, 10 P.P.E.R. ¶ 10002 (PLRB 1978), the public employer and union stipulated the appropriateness of the unit, and the PLRB did not allow a unit clarification subsequently sought by the employer to change the unit composition. The PLRB reasoned that the employer had a full opportunity to present its views in the representation hearing. *Id.*

the employees want to be represented by that union and fails to request an election.[68]

1. Showing of Interest.—Before the PLRB will process a request for an election, thirty percent or more of the employees in "an appropriate unit" must want to be represented by a particular union.[69] The showing of interest can be made by authorization cards signed by the employees, or by a petition. No one but the PLRB's agents can investigate the "showing of interest,"[70] and the PLRB's determination regarding the cards is immune from collateral attack.[71]

2. Intervention.—The filing of a petition to represent a group of employees by one union may trigger interest in other unions that will also seek representative status by intervening in the election. An intervenor must have a ten percent "showing of interest" to participate in the representation hearing, but needs only a one percent showing to have its name placed on the ballot.[72]

3. Election Procedures.—Section 605 of PERA expressly spells out the procedures for the conduct of the election,[73] and it is supplemented by additional rules and regulations promulgated by the PLRB.[74] Elections are conducted by secret ballot and no bargaining representative will be certified unless it receives a majority of the ballots *cast*.[75] Hence, ballots must include a choice for "no representative" although a "no representative" choice need not be offered in a "run-off election" when two or more unions participate.[76]

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68. PA. STAT. ANN. tit. 43, § 1101.603(d) (Purdon Supp. 1979).

69. *Id.* § 1101.603. The PLRB will not go forward with an election if no party produces a thirty percent showing of interest. 34 Pa. Code § 95.14 (1979).

70. 34 Pa. Code § 95.17.

71. *Id.* The justifications for refusing to consider defects in showings of interest by authorization cards or petitions are that an examination might intimidate employees into not signing because the employer would see the signatures, and that considering defects is not necessary because any mistakes in securing cards will be corrected by the election. *See* Oxford School Dist., 10 P.P.E.R., ¶ 10043 (PLRB 1979); Reading Community Hosp., 2 P.P.E.R. 7 (PLRB 1972). The PLRB refuses to consider charges that the union misrepresented the purpose of the authorization cards in order to obtain signatures, or deem the cards void. *See* City of Philadelphia, 6 P.P.E.R. 345 (PLRB 1975); York County, 5 P.P.E.R. 2 (PLRB 1974); Williamsport Area Community College, 3 P.P.E.R. 296 (PLRB 1973).

72. 34 Pa. Code § 95.14(10) (1979). The PLRB rules for intervention are found at 34 Pa. Code § 95.44 (1979).

73. PA. STAT. ANN. tit. 43, § 1101.605 (Purdon Supp. 1979).

74. 34 Pa. Code §§ 95-11-95.22 and 95.51-95.57 (1979).

75. PA. STAT. ANN. tit. 43, § 1101.605(3) (Purdon Supp. 1979). Note that it is not a majority of the persons in the collective bargaining unit.

Void ballots are not considered a vote cast, but rather, are completely disregarded. Albert Einstein Med. Center v. Commonwealth, 30 Pa. Commw. Ct. 613, 374 A.2d 761 (1977). The PLRB will void ballots when the voters fail to follow the instructions for filling in ballots. Pottsgrove School Dist., 8 P.P.E.R. 66 (PLRB 1976) (writing "yes" or "no" rather than placing an "X" in the appropriate box).

76. PA. STAT. ANN. tit. 43, § 1101.605(4) and (5) (Purdon Supp. 1979).

4. Challenges and Objections to Elections.—The PLRB must certify the results of an election unless an unfair labor practice occurred that affected the outcome of the election.[77] If the charging party proves an unfair labor practice occurred, the guilty party has the burden of proving that its conduct did not affect the outcome of the election[78] if the election is to stand.

The types of conduct that require the setting aside of an election are many and varied.[79] Among them are captive audience speeches shortly before the election,[80] misleading statements and campaign trickery,[81] and increases in pay or benefits shortly before the election,[82] although increases may be permissible when made at the customary time of the year for such increases.[83] No electioneering is permitted at the polling place,[84] and supervisors or management personnel, as well as union officials, should stay away from the polling area.[85]

Challenges may also be made at the time of the election regarding the eligibility of certain employees to vote. Among the grounds for such challenges are that the employee was hired after the date of preparation of the list of eligible voters,[86] that the employee resigned

77. *Id.* § 1101.605(6). One such unfair labor practice is violating any of the rules and regulations established by the Board regulating the conduct of representation elections." *Id.* § 1101.1201(a)(7) (employer) and (b)(4) (union).

78. Western Psychiatric Inst. v. PLRB, 16 Pa. Commw. Ct. 204, 213, 330 A.2d 257, 262 (1974).

79. See the discussion of unfair labor practices notes 177-210 and accompanying text *infra*.

80. The PLRB has yet to find that meetings were compulsory or that the public employer made misrepresentations likely to affect the outcome of the election. *See* Williamsport Area Community College, 8 P.P.E.R. 143 (PLRB 1977); Monongahela Valley Hosp., 3 P.P.E.R. 374 (PLRB 1973); Unionville-Chadds Ford School Dist., 3 P.P.E.R. 178 (PLRB 1973); McKeesport Hosp., 3 P.P.E.R. 21 (PLRB 1974); Conemaugh Valley Mem. Hosp., 2 P.P.E.R. 115 (PLRB 1972).

81. The PLRB is generous in its approach to campaign propaganda. *See, e.g.*, Lebanon County, 5 P.P.E.R. 55 (PLRB 1974); Lehigh County, 2 P.P.E.R. 214 (PLRB 1972). Nevertheless, it ordered a new election when a public employer made misrepresentations about union-imposed fines. Unionville-Chadds Ford School Dist., 3 P.P.E.R. 178 (PLRB 1973).

82. *See* Williamsport Area Community College, 8 P.P.E.R. 143 (PLRB 1977).

83. Court of Common Pleas of Crawford County, 6 P.P.E.R. 217 (PLRB 1975); Unionville-Chadds Ford School Dist., 3 P.P.E.R. 178 (PLRB 1973). *Cf.* Conemaugh Valley Mem. Hosp., 2 P.P.E.R. 115 (PLRB 1972) (increase in benefits consonant with employer's past practice, but insurance refund checks prepared three weeks before election and not mailed until two days before the election voided the election).

84. 34 Pa. Code § 95.53 (1979). *Cf.* Oil City Hosp., 3 P.P.E.R. 262 (PLRB 1973); United Steelworkers, 3 P.P.E.R. 22 (PLRB 1973) (electioneering in places away from the polling area).

85. The PLRB voids elections when supervisors or managerial employees are in the polling place. Police, Fireman and Park Police Medical Ass'n, Inc., 3 P.P.E.R. 81 (PLRB 1973); McKeesport Area School Dist., 3 P.P.E.R. 48 (PLRB 1973). *Cf.* International Union of Operating Eng'rs, 3 P.P.E.R. 87 (PLRB 1973) (brief presence of union representative in the polling area not a basis for voiding the election).

86. In Pottsgrove School Dist., 8 P.P.E.R. 66, 67 (PLRB 1976), the PLRB ruled that a permissible cutoff date for determining eligibility to vote could be determined by using the payroll date prior to (1) the date of the filing of the election petition; (2) a different agreed upon date; or (3) the payroll date prior to the representation hearing or the PLRB's order of election. *See, e.g.*, Lebanon School Dist., 4 P.P.E.R. 21 (PLRB 1974).

or gave notice of an intent to quit,[87] or that the employee was laid-off for a substantial period of time.[88] Challenged ballots are not counted unless they are determinative of the election.[89]

5. Decertification Elections.—To protect the employees' right to engage or decline from engaging in union activity, PERA permits decertification of an existing union through an election procedure[90] that is similar to the election procedures discussed above. Either the employees or the public employer may file a decertification petition. The public employer may file when it has a good faith doubt regarding the union's majority status,[91] but it cannot refuse to bargain with the union on the basis of that good faith doubt,[92] interrogate employees regarding their union sentiments, or lend assistance to groups of employees opposed to their union.[93]

A decertification election may be challenged in much the same manner as an election to represent employees.[94] Furthermore, the bars applicable to representation elections also apply to decertification elections.

6. Bars to Elections.—Two important restrictions exist regarding when elections may be conducted. The first restriction is the "certification year" bar, which bars elections in bargaining units in which an election was conducted within the preceding twelve-month period.[95] The bar is intended to promote a degree of labor stability, and it affords the union time to negotiate a collective bargaining agreement before it is threatened with ouster by the employees. Similarly, the public employer who defeated a union drive is ensured a period of labor peace.

The second limitation on when elections may be held is the "contract bar" rule.[96] This rule forbids the holding of an election during the term of a collective bargaining agreement. It does not

87. Lysockview County Home, 5 P.P.E.R. 100 (PLRB 1974); Lower Dauphin School Dist., 5 P.P.E.R. 29 (PLRB 1974).

88. United Cerebral Palsy, 8 P.P.E.R. 137 (PLRB 1977) (laid-off one year).

89. Challenged ballots must be placed in an envelope marked with the employees name and the reason for the challenge. Ballots not segregated in this manner, cannot be challenged after the election. West Shore School Dist., 3 P.P.E.R. 38 (PLRB 1973).

90. PA. STAT. ANN. tit. 43, § 1101.607 (Purdon Supp. 1979).

91. *Id.* § 1101.607(ii). *See also* 34 Pa. Code & 95.22 (1979).

92. Houtzdale Mun. Auth., 6 P.P.E.R. 283 (PLRB 1975); Monogahela Valley Hosp., 3 P.P.E.R. 372 (PLRB 1973) (challenge to PLRB certification was pending).

93. *See* the discussion of employer unfair labor practices at notes 177-180 and accompanying text *infra*.

94. *See* Springfield-Delaware County School Dist., 4 P.P.E.R. 66 (PLRB 1974); Philadelphia School Dist., 3 P.P.E.R. 11 (PLRB 1973).

95. PA. STAT. ANN. tit. 43, § 1101.605(7)(i) (Purdon Supp. 1979). The twelve-month period runs from the date of the election. Lebanon School Dist., 6 P.P.E.R. 25 (PLRB 1975).

96. PA. STAT. ANN. tit. 43, § 1101.605(7)(iii) (Purdon Supp. 1979). This doctrine is examined in depth in Decker, *The Contract Bar Doctrine in Pennsylvania's Public Sector Labor Relations*, 39 U. PITT. L. REV. 495 (1978).

apply, however, for any part of the term of the collective bargaining agreement that exceeds three years.[97] The purpose of the rule is simply to prevent the disruption of a collective bargaining agreement. Nevertheless, petitions by employees who want to decertify the union or select a new one are permitted within a thirty day "window period," which is that period no sooner than ninety days or later than sixty days before the expiration of the labor agreement.[98]

III. Collective Bargaining and "Meet and Discuss"

A. The Bargaining Timetable Under PERA

The formal procedures for collective bargaining in the private sector pale when compared to the formalities established by PERA. The following is a breakdown of the procedure required for bargaining under PERA.

Step 1—Call in mediation
The Pennsylvania Bureau of Mediation must be called in,
(1) 21 days after negotiations commence; but
(2) no later than 150 days prior to the budget submission date.[99]

Step 2—Notify the PLRB of failure to agree
Mediation continues for so long as the parties fail to reach agreement. No later than 130 days prior to the budget submission date, however, the Bureau of Mediation will notify the PLRB if no agreement has been reached.[100]

Step 3—Factfinding
On receiving notice, the PLRB in its discretion may appoint a panel of factfinders. After hearings and not more than 40 days after the Bureau of Mediation notifies the PLRB of failure to agree, the panel makes findings of fact and recommendations that are sent to the parties and the PLRB.[101]

Step 4—The parties accept or reject factfinding
The parties must accept or reject the recommendations and findings of fact not more than ten days after the factfinding report is sent to them.[102]

Step 5—Publication of factfinding
The panel of factfinders publicizes its recommendations and findings of fact if the findings are not accepted by the parties.[103]

Step 6—Parties given further opportunity to accept or reject factfinding
Acceptance or rejection by the parties must occur not less than five or more than ten days after publication.[104]

Step 7—Striking becomes permissible

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97. Moreover, extensions of collective bargaining agreements do not affect the expiration date of the agreement for contract bar purposes. PA. STAT. ANN. tit. 43, § 1101.605(7)(i) (Purdon Supp. 1979).
98. *Id.* § 1101.605(7)(ii).
99. PA. STAT. ANN. tit. 43, § 1101.801 (Purdon Supp. 1979).
100. *Id.* § 1101.802.
101. *Id.* § 1101.802(1).
102. *Id.* § 1101.802(2).
103. *Id.*
104. *Id.* § 1101.802(3).

Employees are free to strike if the dispute is not settled prior to the exhaustion of the above procedures.[105]

Clearly the legislature was not anxious to afford employees a quick access to the right to strike. The purpose of mediation and factfinding serves more than a dilatory function, however. Mediation can bring the parties together by limiting and clarifying the issues in dispute and emphasizing the areas in which agreement is actually possible. Factfinding is some indication to the parties of how an impartial third person would resolve the dispute. Moreover, the publication of the recommendations and findings of fact can bring public pressure to bear on the parties.

Although mediation is mandatory, factfinding is not. The Commonwealth Court ruled that a failure to utilize mediation requires the enjoining of a strike.[106] A union can strike, however, if mediation is exhausted even if the PLRB fails or declines to appoint a factfinder or factfinding panel.[107]

B. The Bargaining Timetable Under Act 111

In contrast to the bargaining timetable under PERA, which is keyed to the budget submission date of the municipality,[108] bargaining under Act 111 is keyed to the start of the fiscal year.

Step 1—Bargaining begins

Collective bargaining begins at least six months before the start of the fiscal year.[109]

Step 2—Request for arbitration

A request for arbitration must be made at least 110 days before the beginning of the fiscal year, and is conditioned on an impasse in bargaining.[110] Impasse occurs when

(1) it may be factually established;
(2) the parties do not reach settlement of the disputed issues within 30 days after collective bargaining is initiated;
(3) in the case of political subdivisions as public employers, the agreement is not approved by the appropriate lawmaking body within 30 days after agreement;

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105. *Id.* § 1101.1003. Strikes before exhaustion of the above procedures may be enjoined regardless of whether the strike presents a clear and present danger or threat to the health, safety, or welfare of the public. *Id.* § 1101.1002.

106. Port Auth. of Allegheny County v. Division 85, Amalgamated Transit Union, 34 Pa. Commw. Ct. 71, 81, 383 A.2d 954, 980 (1978); United Transp. Union v. SEPTA, 22 Pa. Commw. Ct. 25, 347 A.2d 509 (1975).

107. Bellefonte Area Educ. Ass'n v. Bellefonte Area Bd. of Educ., 9 Pa. Commw. Ct. 210, 304 A.2d 922 (1973). This is so, even if mediation is continuing after the PLRB declines to appoint a factfinder so long as the PLRB determines that an impasse in bargaining exists. 9 Pa. Commw. Ct. at 219, 304 A.2d at 926.

108. The Commonwealth Court noted that one of the purposes of PERA's bargaining timetable was to assure that "the public employer's proposed budget of expenditures can be adequately prepared in time for submission to the appropriate governing body for final action on the date for which such submission is required by law or practice . . . ." United Transp. Union v. SEPTA, 22 Pa. Commw. Ct. 25, 31, 347 A.2d 509, 512 (1975).

109. PA. STAT. ANN. tit. 43, § 217.3 (Purdon Supp. 1979).

110. *Id.*

(4) in the case of the Commonwealth as public employer, the agreement is not approved by the legislature within six months after agreement.[111]

Step 3—Selection of arbitrators

The members of the board of arbitrators representing the employer and the employees must be selected within five days after the request for arbitration.[112]

Step 4—Proceedings

Within ten days after the appointment of the third, impartial arbitrator by the two party-appointed arbitrators, the board of arbitrators commences its proceedings. It must complete its proceedings within thirty days after the appointment of the third arbitrator.[113]

Although the Commonwealth Court held the time limits for arbitration under Act 111 to be mandatory,[114] the Pennsylvania Supreme Court ruled that strict compliance with the time schedules by a union is not necessary if the public employer is dilatory and not prejudiced by the deviation.[115]

C. *The Scope of Bargaining*

The subject matter of collective bargaining can be categorized under three headings: mandatory, permissive, and nonbargainable.[116] Generally speaking, mandatory subjects of bargaining encompass matters of wages, hours, and other terms and conditions of employment; permissive subjects are matters the employer may in its discretion bargain; and nonbargainable items are subjects contrary to law.

Federal court and National Labor Relations Board precedent are not necessarily controlling in deciding what is bargainable under PERA and Act 111 for several reasons. First, the profit motive dominates private sector bargaining while in public sector bargain-

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111. *Id.* § 217.4(a).

112. *Id.* § 217.4(b).

113. *Id.*

114. International Ass'n of Firefighters, Local 463 v. City of Johnstown, 21 Pa. Commw. Ct. 223, 344 A.2d 754 (1975), *rev'd*, 468 Pa. 96, 360 A.2d 197 (1976).

115. [A]ppellant's request for collective bargaining sessions and appellee's dilatory procedure in scheduling the sessions relieve appellant of the burden of meeting the scheme set out in Act 111. Moreover, the appellee is not prejudiced by the decision that they must arbitrate the labor contract.

Association of Firefighters v. City of Johnstown, 468 Pa. 96, 99 360 A.2d 197, 198 (1976).

The lesson is that timeliness in bargaining and requesting arbitration is required, but the public employer cannot delay to take advantage of statutory time limits. *See also* Plymouth Twp. Police Dept. v. Plymouth Twp. Comm'nrs, 27 Pa. Commw. Ct. 64, 366 A.2d 316 (1976); Borato v. Borough of Midland, 48 D.&C.2d 510 (C.P. Beaver 1969); Local 736 v. City of Williamsport, 47 D.&.C.2d 317 (C.P. Lycoming 1969).

116. *See generally* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). The typology is equally applicable to PERA.

The scope of bargaining for school teachers is examined in Comment, *A Power Shift in Public School Management*, 80 DICK. L. REV. 795 (1976) and Comment, *The Scope of Collective Bargaining in Public Education Under the Pennsylvania Public Employe Relations Act*, 14 DUQ. L. REV. 427, 439-66 (1976). Bowles, *Defining the Scope of Bargaining for Teacher Negotiations: A Study of Judicial Approaches*, 29 LAB. L.J. 649 (1978) provides a more generalized overview of how different state courts approach the scope of bargaining problem.

ing the primary concern must be the public interest.[117] Second, the statutory language of PERA differs from the federal law.[118] A third reason is that statutes and municipal home rule charters provide an additional dimension to public sector collective bargaining.[119]

Nevertheless, the fundamental principle of exclusive representation embodied in federal private sector labor law applies to PERA. The existence of contracts with individual employees does not relieve the public employer of the duty to bargain with the union representing those employees, and the collective bargaining agreement supersedes individual contracts.[120]

1. Mandatory Subjects of Bargaining.—PLRB v. State College School District[121] set forth a balancing test for determining whether a particular matter is a mandatory subject of bargaining under PERA. Simply stated, an inquiry must be made whether the matter weighs more heavily on the employees' interests in wages, hours, and working conditions than on the public employer's right and duty to manage the political entity.[122] Finding a matter to be a mandatory subject of bargaining is a critical determination because if the matter is not mandatory the public employer has no obligation to bargain in good faith and the union has no right to insist to the point of impasse on inclusion of that matter in a collective bargaining agreement. In sum, the public employer does not commit an unfair labor practice by refusing to bargain on the subject,[123] and the union cannot lawfully create a bargaining impasse and strike when a mandatory subject of bargaining is not involved.[124]

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117. *See* Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C. L. REV. 155 (1977). In determining what is not a subject of mandatory bargaining, an analogy exists between "the core of entrepreneurial control" of the private sector spoken of in Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) and PERA's "matters of inherent managerial policy," PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1979).

118. The Pennsylvania Supreme Court states that when the statutory language differs, "analogies have limited application and the experience gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment." PLRB v. State College School Dist., 461 Pa. 494, 500, 337 A.2d 262, 264 (1975).

119. PERA prohibits the implementation of provisions in violation of, or inconsistent with, statutes or home rule charters. PA. STAT. ANN. tit. 43, § 1101.703 (Purdon Supp. 1979). *See also id.* at §§ 1101.701 and 1101.702.

120. Canon-McMillan School Dist., 2 P.P.E.R. 150 (PLRB 1972); Beaver County Community College, 2 P.P.E.R. 131 (PLRB 1972). *See also* Jefferson-Morgan School Dist., . 9 P.P.E.R. ¶ 9056 (PLRB 1978). This principle emerged early in the development of federal private sector law. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 337-38 (1944). *See also* notes 52 and 53 and accompanying text *supra*.

121. 461 Pa. 494, 507, 337 A.2d 262, 268 (1975). *See also Labor, 1975-1976 Survey of Pennsylvania Law*, 38 U. PITT. L. REV. 185, 200-12 (1976).

122. 461 Pa. at 507, 337 A.2d at 268. This balancing test was reaffirmed in PLRB v. Mars School Dist., 480 Pa. 295, 299-300, 389 A.2d 1073, 1075 (1978).

123. *See* notes 155-169 and accompanying text *infra*.

124. *See* notes 105-07 and accompanying text *supra*. For a discussion of impasse bargaining under federal private sector labor law, see Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1 (1977).

Because the Legislature chose to follow the federal private sector approach of allowing the scope of bargaining to evolve through litigation, a definitive and all inclusive statement of the mandatory subjects of bargaining under PERA is impossible.[125] Each year will bring new bargaining proposals and new disputes regarding what is and is not a mandatory subject of bargaining.

2. Nonbargainable Subjects.—Section 703 of PERA prohibits the implementation of provisions in a collective bargaining agreement that are either in violation of or conflict with statutes or provisions of home rule charters.[126] This limitation on bargainable items is, however, narrowly construed. The Pennsylvania Supreme Court ruled that the mere presence of statutes dealing with wages, hours, or conditions of employment does not preclude the parties from bargaining over these subjects.[127] Collective bargaining provisions can be implemented insofar as they do not conflict with such statutes, and moreover, can go beyond statutory minimums without being inconsistent with the statute.[128]

Often parties challenged arbitration awards alleging that implementation of the award would violate section 703.[129] *Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh*,[130] however, appears to require that all questions concerning the legality of bargaining proposals be raised by a refusal to bargain charge.[131] Although the negotiating parties now must question the legality of bargaining proposals under the unfair labor practice provisions of PERA,[132] the Pennsylvania Supreme Court allows concerned citizen

125. The alternative approach of a statutory listing of specific items that are or are not bargainable is disfavored as too rigid. Among the reasons posited are that the list could never be complete, a recognition that the evolution of the scope of bargaining is limited only by the imagination of the negotiating parties, and that it would discourage negotiations on subjects that might be appropriate for bargaining in certain situations. REPORT OF GOVERNOR'S STUDY COMM'N ON PUB. EMP. LAB. REL. 19 (1978). The nonexclusive list of matters of inherent managerial policy set out in section 702 of PERA is, however, an attempt more narrowly to define mandatory subjects of bargaining. PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1979).

126. PA. STAT. ANN. tit. 43, § 1101.703 (Purdon Supp. 1979).

127. PLRB v. State College Area School Dist., 461 Pa. 494, 508, 337 A.2d 262, 269 (1975).

128. Milberry v. Board of Educ., 467 Pa. 79, 354 A.2d 559 (1976) (requirements for discharge of a teacher); Board of Educ. v. Philadelphia Fed'n of Teachers, Local No. 3, 464 Pa. 92, 346 A.2d 35 (1975) (requirements for discharge of a teacher); PLRB v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975) (salary levels).

129. *See, e.g.*, Dauphin County Tech. School Educ. Ass'n v. Dauphin County Area Vocational Tech. School Bd., 483 Pa. 604, 398 A.2d 168 (1978), *aff'g by an equally divided court* 24 Pa. Commw. Ct. 639, 357 A.2d 721 (1976).

130. 481 Pa. 66, 391 A.2d 1318 (1978).

131. *Id.* at 75, 391 A.2d at 1323.

132. This approach suggested by the Pennsylvania Supreme Court is questionable. It is naive to assume that a party to a collective bargaining agreement can forsee all possible constructions that might be given to a provision of the agreement by an arbitrator. Therefore, no means of ascertaining in advance whether an arbitral award might require an affirmative illegal act exists.

groups to challenge the legality of provisions of collective bargaining agreements by seeking an injunction in common pleas court.[133]

3. Act 111.—Because Act 111 requires interest arbitration in the event of a bargaining impasse,[134] scope of bargaining issues under Act 111 typically come to the courts as challenges to arbitral awards. In general, the bargainability or arbitrability of specific items depends on whether the matter is a legitimate condition of employment,[135] or an item on which the governing body can lawfully carry out the agreement or award.[136] The applications of these basic guidelines are not always consistent or free of theoretical difficulties.[137]

D. "Meet and Discuss"

The public employer's obligation to "meet and discuss," differs substantially from the duty to bargain in good faith. The most significant distinction is that decisions on matters after "meet and discuss" sessions remain with the public employer, whose determination is final on any issue or issues raised.[138]

An obligation to "meet and discuss" arises in two situations—when "bargaining" with first level supervisors,[139] and when "bargaining" with rank-and-file employees on a matter of inherent managerial policy.[140] Often a union will bargain legally bargainable matters, and at the same time, demand bargaining on matters of inherent managerial policy. The PLRB holds that the employer has a

133. Parents Union for Pub. Schools v. Board of Educ., 480 Pa. 194, 389 A.2d 577 (1978).

134. PA. STAT. ANN. tit. 43, § 217.4(a) (Purdon Supp. 1979). *See* notes 110-115 and accompanying text *supra*.

135. *See, e.g.*, Fraternal Order of Police v. City of Scranton, 26 Pa. Commw. Ct. 513, 364 A.2d 753 (1976) (extra pay for policemen based on graduate courses taken was proper); Appeal of Ross Twp., 21 Pa. Commw. Ct. 541, 346 A.2d 836 (1975) (shifts, hours of work, promotion procedures, and deletion of discipline from personnel records are proper subjects of bargaining); Cheltenham Twp. v. Cheltenham Police Dept., 11 Pa. Commw. Ct. 348, 312 A.2d 835 (1973) (picking up officers in police cars and driving them to the station to begin work is not a benefit to be bargained or awarded in arbitration).

136. The leading case is the *Washington Arbitration Case*, 436 Pa. 168, 259 A.2d 437 (1969), in which the court allowed the narrow illegality exception the bar on appeals from the arbitrators' awards contained in Act 111. *Id.* at 174, 259 A.2d at 441. The judicial construction accorded illegality of subjects of bargaining under PERA might also apply under Act 111 so that statutory benefit levels will be construed as minimums, and not a limitation on bargaining. *See* notes 126-28 and accompanying text *supra*.

137. *Compare* Allegheny County Firefighters, Local 1038 v. Allegheny County, 7 Pa. Commw. Ct. 81, 299 A.2d 60 (1973) (arbitrators cannot award a grievance arbitration procedure because it is not a proper subject of bargaining) *with* Appeal of City of Bethlehem, 27 Pa. Commw. Ct. 592, 598, 367 A.2d 409, 412 (1976) (Bowman, P.J., concurring) (suggesting that although arbitrators cannot properly award an arbitration procedure, the parties may lawfully agree to arbitrate their differences in a collective bargaining agreement, and be bound by that agreement). *See also* Cheltenham Twp. v. Cheltenham Police Dept., 8 Pa. Commw. Ct. 360, 301 A.2d 430 (1973).

138. PA. STAT. ANN. tit. 43, § 1101.301(17) (Purdon Supp. 1979).

139. *Id.* § 1101.704.

140. *Id.* § 1101.702.

right to demand that the "meet and discuss" matters be removed from the bargaining table so that bargaining can proceed on bargainable matters alone.[141] In one case, a public employer and a labor organization reached a written "meet and discuss" agreement, denominated a "memorandum of understanding." The PLRB ruled that this agreement was not binding on the public employer,[142] which ruling is sound because the statutory definition of "meet and discuss" precludes affording finality to such an agreement.[143] Agreements reached in "meet and discuss," unlike agreements reached in collective bargaining, need not be reduced to writing.[144]

Apparently, the Commonwealth Court followed a rationale that "meet and discuss" is not unlike permissive bargaining in the private sector when it concluded that a public employer who bargains and finalizes an agreement on a matter of inherent managerial policy is bound by that agreement.[145] This decision may be limited to the facts of that particular case because the decision fails to give full weight to the statutory provision that any final decisions or determinations on "meet and discuss" items remain with the public employer.[146]

Just what are "meet and discuss" items for first level supervisor units is relatively clear—all matters that may be bargained with rank-and-file employee units.[147] The only matters that are "meet and discuss" items for rank-and-file employee units are those of "inherent managerial policy."[148] Precisely what is a matter of inherent managerial policy is an area of the law that is still developing and lacking in certainty. Some guidance is provided by the reason for the meet and discuss requirement—"to permit input from the employes on policy matters affecting wages, hours and terms and conditions of employment so as to assist the public employer in ultimately making its discretionary resolution or disposition of the issues in

141. Williamsport Educ. Ass'n, 6 P.P.E.R. 57 (PLRB 1975); Littlestown Area School Dist., 3 P.P.E.R. 383 (PLRB 1973); Richland School Dist., 4 P.P.E.R. 2 (PLRB 1974); Littlestown Educ. Ass'n, 3 P.P.E.R. 383 (PLRB 1973).

142. Commonwealth of Pennsylvania, 6 P.P.E.R. 176 (PLRB 1975).

143. *See* note 138 and accompanying text *supra*.

144. PERA makes it an unfair labor practice for either an employer or union to refuse to reduce a collective bargaining agreement to writing. PA. STAT. ANN. tit. 43, § 1201(a)(6) and (b)(5) (Purdon Supp. 1979). *See* notes 175 and 176 and accompanying text *infra*.

145. Scranton School Bd. v. Scranton Fed'n of Teachers, Local 1147, 27 Pa. Commw. Ct. 152, 365 A.2d 1339 (1976).

146. PA. STAT. ANN. tit. 43, § 1101.301(17) (Purdon Supp. 1979).

147. *Id.* § 1101.704. Therefore, application of the PLRB v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975) balancing test determines what is a "meet and discuss" item for first level supervisors as well as what is a subject of mandatory bargaining regarding rank-and-file employees. *See* notes 121 and 122 and accompanying text *supra*.

148. The nonexclusive statutory examples are "the functions and programs of the public employers, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel." PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1979).

question."[149] Therefore, changes instituted by a public employer that clearly affect the interests of a significant number of employees triggers an obligation to "meet and discuss" the changes with the employee representative organization.[150]

IV. Unfair Labor Practices

The right of public employees to join or organize employee representative organizations or engage in lawful concerted activities for the purpose of collective bargaining or mutual aid and protection and the right to refrain from such activities[151] are protected by the unfair labor practice section of PERA. That section contains nine unfair labor practices under each of two subsections, one governing public employers,[152] and the other governing employee organizations.[153] PERA gives the PLRB exclusive jurisdiction to adjudicate in the first instance charges of unfair labor practices.[154]

A. Refusal to Bargain

Probably the key unfair labor practice is the one prohibiting public employers and employee organizations from refusing to bargain in good faith.[155] A refusal to bargain can arise from widely divergent factual situations. The common and recurring ones are examined and discussed.

1. Refusal to Provide Information.—A refusal to bargain occurs when the public employer refuses to provide a union with information that is reasonably necessary to collective bargaining or the administration of a collective bargaining agreement.[156] A union cannot intelligently bargain without knowing, for example, the wage structure and benefits of the employer. Similarly, the duty to provide information extends to administration of the collective bargain-

149. PLRB v. APSCUF, 24 Pa. Commw. Ct. 337, 343, 355 A.2d 853, 856 (1976).

150. Nevertheless, "good faith," in the technical, collective bargaining sense of that term, is not required. A "meet and discuss" obligation, although intended to promote an orderly and constructive relationship and to serve as a means of solving labor problems, was not intended to be a means for renegotiating, compromising, or amending existing collective bargaining agreements. *Id.*

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

152. *Id.* § 1101.1201(a).

153. *Id.* § 1101.1201(b).

154. *Id.* § 1101.1301. Hollinger v. Department of Pub. Welfare, 469 Pa. 358, 366, 365 A.2d 1245, 1249 (1976). *Cf.* Parents Union for Pub. Schools v. Board of Educ., 480 Pa. 194, 198, 389 A.2d 577, 579 (1978) (PLRB does not have to pass upon all complaints of violations of PERA; here conduct was not arguably an unfair labor practice).

The Commonwealth Court also held that the exclusive jurisdiction to resolve unfair labor practices under Act 111 is in the PLRB. Geriot v. Borough of Darby, 38 Pa. Commw. Ct. 337, 394 A.2d 1298 (1978).

155. PA. STAT. ANN. tit. 43, § 1101.1201(a)(5) and § 1101.1201(b)(3).

156. *See, e.g.*, Community Mental Health Center of Beaver County, 8 P.P.E.R. 114, 115 (PLRB 1977).

ing agreement, such as labor arbitration.[157] The demanded data, however, must have some relation to negotiations or grievance handling,[158] and no duty exists to interpret or analyze the information.[159]

Closely related to the employer's duty to provide information necessary for negotiating or administering a labor agreement is its obligation to inform the union of its intent to, for example, subcontract bargaining unit work, or take any other action that must be bargained before being implemented. An important distinction is that a union must demand information necessary for negotiating or administering a labor agreement. The employer must on its own inform the union that it is considering a course of action that requires bargaining.[160] Nevertheless, when the union has actual knowledge of the employer's intent, for example, to subcontract, the union must enforce its right to collectively bargain immediately. That is, the union must protect its interest by attempting to bargain because if it waits until the subcontract is awarded and then files a refusal to bargain charge, it waives the right to bargain.[161]

2. Unilateral Changes.—Another common variant of a refusal to bargain is the unilateral discontinuance of benefits or other unilateral changes in wages, hours, or terms and conditions of employment.[162] Such unilateral action creates a *fait accompli*, and precludes bargaining on the subject.

Yet, not every change in working conditions need be bargained.[163] The collective bargaining agreement between the parties

157. *See* Bethel Park School Dist., 3 P.P.E.R. 174 (PLRB 1973); City of Williamsport, 2 P.P.E.R. 163, 165 (PLRB 1972).

158. Greater Greenburg Sewage Auth., 6 P.P.E.R. 37 (PLRB 1975).

159. Bellefonte School Dist., 3 P.P.E.R. 26 (PLRB 1973).

160. *See, e.g.*, Sto-Rox School Bd., 9 P.P.E.R. ¶ 9065 (PLRB 1978).

161. *See* Garnet Valley School Dist., 8 P.P.E.R. 365 (PLRB 1977).

162. Various unilateral changes constitute a refusal to bargain. *See, e.g.*, PLRB v. Mars Area School Dist., 480 Pa. 295, 389 A.2d 1073 (1978) (replacement of paid substitute teachers with unpaid volunteers); Norristown Area School Dist., 9 P.P.E.R. ¶ 9096 (PLRB 1978) (furlough or lay off of employees is a mandatory subject of bargaining, and employer must bargain to impasse before taking unilateral action); Clarion County Comm'rs, 8 P.P.E.R. 107 (PLRB 1977) (discontinuing observance of two holidays); Upper St. Clair School Dist., 5 P.P.E.R. 96 (PLRB 1974) (discontinuing one run of school bus service); Lawrence Housing Auth., 5 P.P.E.R. 39 (PLRB 1974) (employer announcement of strict adherence to rules after union selected when strict adherence deviated from past practice); Highland Sewer and Water Auth., 4 P.P.E.R. 116 (PLRB 1974) (unilateral wage increase during negotiations); Allegheny Twp., 3 P.P.E.R. 322 (PLRB 1973) (change in method of payment for "no work" days); Borough of Berwick, 3 P.P.E.R. 183 (PLRB 1973) (unilateral elimination of bonus).

163. *See* PLRB v. AFSCME, 22 Pa. Commw. Ct. 371, 348 A.2d 921 (1975). A unilateral transfer of employees was not a refusal to bargain when the employer offered to meet and discuss regarding the reassignment and the transfer was a matter of inherent managerial authority. County of Northampton, 10 P.P.E.R. ¶ 10010 (PLRB 1978).

When employees go on strike, their right to salary and benefits terminate, and discontinuance of these by the employer is permissible. Hazleton Area Bd. of School Dir., 7 P.P.E.R. 234 (PLRB 1976). When employees are not on strike and the collective bargaining agreement

might provide for unilateral control by the public employer over certain specific aspects of employment. A collective bargaining agreement provision can provide a basis for concluding that the employer fulfilled its obligation to bargain on that subject.[164] The agreement might also contain a "waiver and integration" clause that indirectly fulfills the obligation to bargain.[165] Although this is a troublesome area, the PLRB currently gives more credence to such provisions as evidenced by recent cases in which public employers unilaterally imposed residency requirements and smoking bans.[166]

3. Subcontracting.—Recently, the PLRB found a duty to bargain over the subcontracting of work fulfilled by a waiver and integration clause.[167] Whether the decision to subcontract is a matter of bargaining or of "meet and discuss" depends on whether the issue of subcontracting is a matter of inherent managerial policy,[168] a determination that must be made through application of the balancing test of *PLRB v. State College Area School District*.[169]

4. "Surface" vs. "Hard" Bargaining.—A number of refusal to

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expires, however, the employer must maintain existing terms and conditions of employment. PLRB v. Cumberland County School Dist., 483 Pa. 134, 394 A.2d 946 (1978).

164. If the union claims a unilateral change in a matter governed by a provision of the collective bargaining agreement, arguably, an arbitrator, and not the PLRB, should resolve the dispute. *Cf.* Cowden, *Deferral to Arbitration by the Pennsylvania Labor Relations Board*, 80 DICK. L. REV. 666 (1976) (PERA does not permit the PLRB to decline jurisdiction in the first instance in favor of arbitration). Nothing in PERA requires the PLRB to stay unfair labor practice proceedings pending the outcome of grievance arbitration on the same issues. PLRB v. General Braddock Area School Dist., 33 Pa. Commw. Ct. 55, 63, 380 A.2d 946, 950 (1977).

165. *See, e.g.*, Keystone School Dist., 9 P.P.E.R. ¶ 9058 (PLRB 1978); Bucks County Area Vocational-Tech. School, 6 P.P.E.R. 230 (PLRB 1975).

166. The unilateral imposition of residency requirements by public employers is a refusal to bargain. Ambridge Area School Dist., 9 P.P.E.R. ¶ 9034 (PLRB 1978); Erie School District, 9 P.P.E.R. ¶ 9031 (PLRB 1978). Nevertheless, a public employer's unilateral imposition of a residency requirement is not an unfair practice when a collective bargaining agreement with a broad waiver and integration clause waiving bargaining on all matters, irrespective of whether or not they were bargained, mentioned, or discussed, is in effect. Keystone School Dist., 9 P.P.E.R. ¶ 9058 (PLRB 1978); City of Reading, 9 P.P.E.R. ¶ 9293 (PLRB 1978). For a general discussion of residency requirements, see Hayford & Durkee, *Residency Requirements in Local Government Employment: The Impact of the Public Employers Duty to Bargain*, 29 LAB. L.J. 649 (1978).

The unilateral imposition of bans on smoking by public employers also engendered a number of refusal to bargain cases. Again the PLRB ruled that the impact on the employees' working conditions outweighed the effect of bargaining on the employer's basic policy, thus concluding that such bans were a mandatory subject of bargaining. Nevertheless, the PLRB ruled that the employers indirectly fulfilled their duty to bargain through the broad waiver and integration clauses in the collective bargaining agreements. Venango County Bd. of Assist., 10 P.P.E.R. ¶ 10013 (PLRB 1978); Chambersburg Area School Dist., 9 P.P.E.R. ¶ 9080 (PLRB 1978); Waynesboro Area Bd. of School Dir., 9 P.P.E.R. ¶ 9066 (PLRB 1978).

167. Harrisburg School Dist., 10 P.P.E.R. ¶ 10116 (PLRB 1979). *Compare* PLRB v. Mars Area School Dist., 480 Pa. 295, 389 A.2d 1073 (1978); PLRB v. Employees' Comm., Wilkinsburg Sanit. Dep't, 463 Pa. 521, 345 A.2d 641 (1975).

168. PA. STAT. ANN. tit. 43, § 1101.701 (Purdon Supp. 1979).

169. 461 Pa. 504, 506, 337 A.2d 266, 267 (1975). PLRB v. Mars Area School Dist., 480 Pa. 295, 299, 389 A.2d 1073, 1075 (1978) (replacement of paid teacher-aides with unpaid volunteers).

bargain cases arise out of conduct falling short of an outright refusal to discuss specific subjects.[170] One recurring problem comes about when the public employer sits down at the bargaining table without the slightest intention of reaching any agreement with the union.

A distinction must be made between unlawful "surface" bargaining, which occurs when the employer goes through the motions of bargaining, but makes it obvious that it will be impossible to reach any agreement,[171] and "hard" bargaining, which occurs when the employer or union insists on certain bargainable matters being included in or excluded from the agreement, and refuses to budge from its position.[172] The former practice is unlawful because one party is not attempting to discharge its obligation to bargain in good faith. The law does not require either side to make concessions, or agree to specific proposals,[173] but there must be some movement in the negotiations evincing an attempt to reach some middle ground.[174]

It is a separate and distinct unfair practice to refuse to reduce a collective bargaining agreement to writing, once an agreement is reached.[175] This unfair practice is closely related to a refusal to bargain, and a violation turns on the finding of whether an agreement was actually reached by the parties.[176]

B. Interference With Bargaining Representatives

1. Domination of Unions.—Employer domination of or interference with the formation, existence, or administration of an employee representative organization is an unfair labor practice.[177]

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170. *See, e.g.*, Phoenixville Area School Bd., 4 P.P.E.R. 50 (PLRB 1974) (unjustified and prolonged delay); Bethlehem Area School Dist., 3 P.P.E.R. 102 (PLRB 1973) (insistence on bargaining "in the sunshine").

A refusal to bargain charge can also arise out of an employer's refusal to allow union representation at disciplinary meetings. *Compare* Commonwealth of Pennsylvania, 5 P.P.E.R. 80 (PLRB 1974) (no grievance being discussed) *with* Warwick Bd. of School Dir., 4 P.P.E.R. 146 (PLRB 1974) (grievance discussed with individual without union representative present). The existence of a right to union representation during disciplinary meetings is discussed in Decker, *Public Sector Union Representation Rights at Investigatory Inverviews in Pennsylvania*, 82 DICK. L. REV. 655, 662-670 (1978).

171. The observation of Professor Cox that "[a]s long as there are unions weak enough to be talked to death there will be employers who are tempted to engage in the forms of bargaining without the substance," is equally applicable to the public sector. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958).

172. *See, e.g.*, NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978).

173. PA. STAT. ANN. tit. 43, § 1101.701 (Purdon Supp. 1979).

174. "[R]efusal to compromise as to one part of a collective bargaining proposal where concessions have been made on other aspects of the agreement is not a per se violation of Section 1201(a)(5) of the act." PLRB v. Commonwealth, 28 Pa. Commw. Ct. 145, 148, 367 A.2d 805, 807 (1977). *See also* Central Susquehanna Intermediate Unit # 16, 9 P.P.E.R. ¶ 9001 (PLRB 1977).

175. This is an unfair labor practice for both employers and unions. PA. STAT. ANN. tit. 43, § 1101.1201(a)(6) and § 1101.1201(b)(5) (Purdon Supp. 1979).

176. *See, e.g.*, Luzerne County Community College, 8 P.P.E.R. 113 (PLRB 1977).

177. PA. STAT. ANN. tit. 43, § 1101.1201(a)(2) (Purdon Supp. 1979).

Prohibiting this activity prevents the derogation of employee rights that would occur if the employer controlled the union. Although some cases dealing with allegations of employer domination of the union exist,[178] the majority of them contained charges of employer domination when other unfair practice charges were more apposite.[179] The PLRB properly found a violation when a school district gave financial support, albeit minor, to an affiliate of a labor organization that was contending for recognition with another union.[180]

2. Coercing the Employer's Selection of a Bargaining Representative.—Similar to the prohibition on employer domination of unions is PERA's prohibition of employees or their representative organizations restraining or coercing the employer in the selection of its bargaining representative.[181] The prohibition seeks to prevent efforts by a union to force an employer to pick a bargaining representative receptive to the union's demands. No cases exist construing this section of PERA.

C. Discrimination and Interference With Employees' Rights

Employees are guaranteed freedom to exercise or refrain from exercising the rights granted under PERA.[182] Therefore, mechanisms protecting against interference with these rights are necessary, and they must protect against both employer[183] and union interference.

1. Discrimination and Interference by the Employer.—It is clear that an employer cannot discharge or threaten an employee for engaging in union activity,[184] but not all union activity is protected.

178. *See, e.g.*, Interboro School Dist., 3 P.P.E.R. 125 (PLRB 1973); Bensalem Twp. School Dist., 2 P.P.E.R. 12 (PLRB 1972).

179. *See, e.g.*, Upper St. Clair School Dist., 5 P.P.E.R. 96 (PLRB 1974); Elizabethtown School Bd., 5 P.P.E.R. 31 (PLRB 1974). Often unfair labor practice complaints against employers include charges of union domination as a catchall provision. Duquesne City School Dist., 3 P.P.E.R. 351, 353 (PLRB 1973). It should be noted that although bypassing a union and communicating directly to employees about the course of collective bargaining is not domination of a union, Portage Area School Dist., 4 P.P.E.R. 23 (PLRB 1974), it may be an unlawful refusal to bargain. *See* North Bedford School Dist., 7 P.P.E.R. 194 (PLRB 1976). *But cf.* Williamsport Educ. Ass'n, 6 P.P.E.R. 57, 59 (PLRB 1975); Baldwin-Whitehall School Dist., 2 P.P.E.R. 165 (PLRB 1972) (suggesting that when the facts are not misrepresented and the communication is not coercive, there is no refusal to bargain).

180. Allentown School Dist., 1 P.P.E.R. 8 (PLRB 1971).

181. PA. STAT. ANN. tit. 43, § 1101.1201(b)(2) (Purdon Supp. 1979).

182. *Id.* § 1101.1201.

183. An employer is responsible for the unfair labor practices of its supervisors. Duquesne School Dist., 3 P.P.E.R. 351 (PLRB 1973). Thus, an anomaly results under PERA—first level supervisors can both subject an employer to liability for unfair labor practices and initiate the organization of rank-and-file employees. *See* Bethel Park School Dist., 8 P.P.E.R. 2 (PLRB 1976). Of course, first level supervisors are not placed in rank-and-file units. *See* notes 29-35 and accompanying text *supra*. Nonetheless, the potential for a conflict of interest remains.

184. PA. STAT. ANN. tit. 43, § 1101.1201(a)(1) and (3) (Purdon Supp. 1979). This proscrip-

An employee receives no protection from PERA for engaging in unlawful union activity.[185]

Moreover, the employee or union charging unlawful interference or discrimination must prove certain essential elements. Knowledge of the employee's union activity is one element.[186] Another element is "antiunion animus," which is a willingness on the employer's part to act unlawfully toward that employee,[187] and which is analogous to specific intent in criminal law. Antiunion animus must be more than a general dislike of unions by the employer.[188] It can be established, however, by disparate treatment of an active union member,[189] or inferred from the fact that an employee is discriminated against shortly after the union activity comes to the attention of the employer.[190] The passage of a significant amount of time between the union activism allegedly motivating the discrimination and the employer's allegedly discriminatory conduct tends to rebut allegations of antiunion animus,[191] as does a showing that other union members were promoted or otherwise treated favorably by the employer.[192]

Surveillance or interrogation of employees for the purpose of learning of union activities likewise is an unfair labor practice.[193] Again, the purpose of the prohibition is to prevent employees from being coerced in the exercise of their rights under PERA. Therefore, employer surveillance should be unlawful only when related, or potentially related, to union activities.[194]

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tion extends to any conduct intended to discourage employees from exercising their rights under PERA. *See, e.g.*, Schuylkill County, 6 P.P.E.R. 15 (PLRB 1975) (forced transfers and/or resignation); Commonwealth of Pennsylvania, 5 P.P.E.R. 100 (PLRB 1974) (failure to promote); Cornwall-Lebanon School Dist., 3 P.P.E.R. 49 (PLRB 1973) (changes in work schedules).

185. PLRB v. Pleasant Valley School Dist., 66 D.&C.2d 637 (C.P. Monroe 1974).

186. *See* Shive v. Bellefonte Area Bd. of School Dir., 12 Pa. Commw. Ct. 543, 317 A.2d 311 (1974); Westmoreland County Community College, 3 P.P.E.R. 311 (PLRB 1973).

187. *See* PLRB v. Ficon, Inc., 434 Pa. 383, 388, 254 A.2d 3 (1969).

188. *See* Montefiore Hosp., 5 P.P.E.R. 98 (PLRB 1974).

189. *See, e.g.*, Penn Twp., 6 P.P.E.R. 187 (PLRB 1975); Charles Cole Mem. Hosp., 3 P.P.E.R. 286 (PLRB 1973).

190. *See, e.g.*, Philipsburg Borough, 7 P.P.E.R. 299 (PLRB 1976) (discharge two weeks after representation petition filed); Luzerne County, 3 P.P.E.R. 204 (PLRB 1973) (discharge two days after union meeting).

191. *See, e.g.*, Lower Bucks Hosp., 6 P.P.E.R. 142 (PLRB 1975); Barnes-Kasson Hosp., 4 P.P.E.R. 48 (PLRB 1974).

192. *See, e.g.*, Commonwealth of Pennsylvania, 6 P.P.E.R. 38 (PLRB 1975); Chartiers Valley School Dist., 4 P.P.E.R. 90 (PLRB 1974).

193. *See, e.g.*, General Braddock Area School Dist., 6 P.P.E.R. 99 (PLRB 1975) (bargaining unit members at a meeting asked to rise to indicate union preference); Brownsville Area School Dist., 3 P.P.E.R. 321 (PLRB 1973) (union grievance representative asked to report which employees he was visiting). *See also* Lower Bucks Hosp., 6 P.P.E.R. 142, 143 (PLRB 1975) (PLRB standards regarding when interrogation is unlawful).

194. Otherwise, the employer could not observe its employees to determine whether they are performing their jobs. *But see* Pennsylvania Game Comm'n, 7 P.P.E.R. 128 (PLRB 1976) (antiunion motivation not a prerequisite).

2. Union Interference with Employee Rights.—PERA permits a union to negotiate a significant restriction on employees' rights; namely, a maintenance of membership clause in a collective bargaining agreement.[195] This is, however, probably the least restrictive of union security provisions because an employee is not compelled to join a union as in "closed shop" or "union shop" situations, or contribute financial support as in an "agency shop" situation. An employee need only maintain his membership in the union by paying dues and assessments once the employee joins and becomes subject to the maintenance of membership clause. Of course, failure to maintain membership for any period other than the statutory "escape period"[196] may result in termination of employment.[197]

Unions cannot otherwise restrain or coerce employees in the exercise of rights granted employees under PERA,[198] but violations of this section are uncommon.[199] Disparate treatment on the basis of nonmembership in the union should constitute a violation of this section, which might arise when a union fails to arbitrate an employee's grievance. Such an abuse of discretion by the bargaining representative is a breach of its duty of fair representation.[200]

D. Other Unfair Practices

1. Protection of PLRB Processes.—It is an unfair labor practice when an employer disciplines or otherwise discriminates against an employee because the employee filed an affidavit, petition or complaint with, or gave any information or testimony to or before the PLRB.[201] Apparently the PLRB extends this protection to utilization of a collectively bargained grievance procedure.[202] Violations of this section are relatively rare.[203]

2. Boycotts.—PERA covers boycotts by unions in two unfair

195. PA. STAT. ANN. tit. 43, § 1101.705 (Purdon Supp. 1979). *See also id.* § 1101.301(18).
196. *Id.*
197. The PLRB finds no impropriety when employers terminate employees violating the collective bargaining agreement by not paying dues and assessments. Philadelphia Housing Auth., 3 P.P.E.R. 197 (PLRB 1973). The Commonwealth Court ruled, however, that school teachers cannot be terminated for failure to pay dues. Dauphin County Tech. School Educ. Ass'n v. Dauphin County Area Vocational Tech. School Bd., 24 Pa. Commw. Ct. 639, 357 A.2d 721 (1976), *aff'd by an equally divided court*, 483 Pa. 604, 398 A.2d 168 (1978).
198. PA. STAT. ANN. tit. 43, § 1101.1201(b)(1) (Purdon Supp. 1979).
199. The PLRB found a violation when a union threatened to fine an employee who validly resigned from the union for going back to work during a strike. Pennsylvania Social Serv. Union, 7 P.P.E.R. 266 and 7 P.P.E.R. 103 (PLRB 1976). *See also* City of Lebanon, 7 P.P.E.R. 244 (PLRB 1976); Baldwin-Whitehall School Dist., 3 P.P.E.R. 40 (PLRB 1973).
200. *See* Decker, *Fair Representation and Pennsylvania Public Employee Labor Relations*, 83 DICK. L. REV. 709 (1979).
201. PA. STAT. ANN. tit. 43, § 1101.1201(a)(4) (Purdon Supp. 1979).
202. Midland School Dist., 7 P.P.E.R. 317, 318 (PLRB 1976).
203. Representative cases are Plymouth Twp. Bd. of Comm'rs, 3 P.P.E.R. 315 (PLRB 1973); City of McKeesport, 3 P.P.E.R. 161 (PLRB 1973).

labor practice sections. The first prohibits a strike or boycott by a union when the striking union is involved in a jurisdictional controversy with another union.[204] The second is a broad prohibition of boycotts and a restriction on union attempts to compel recognition of a union not certified by the PLRB.[205]

3. Refusal to Comply with an Arbitration Award.—PERA makes a refusal to comply with an arbitration award a separate and distinct unfair labor practice for both public employers and unions.[206] In deciding whether the PLRB should consider the validity of the award before enforcing it, the Pennsylvania Supreme Court in *PLRB v. Commonwealth*,[207] ruled that the validity of the arbitrator's award could not be collaterally attacked in a PLRB proceeding, and held that the party against whom enforcement was sought must appeal directly to the courts if it believed the award was invalid.[208] Thus, the PLRB's role is limited to determining whether a final award of an arbitrator exists[209] and whether the party implemented the award.[210]

4. Unfair Labor Practices under Act 111.—Act 111 contains no unfair labor practice sections.[211] The PLRB, however, concluded that *Philadelphia Fire Officers Association v. PLRB*[212] authorized it to incorporate the unfair labor practice sections of the Pennsylvania Labor Relations Act[213] into Act 111.[214] In a somewhat anomalous decision that purportedly applies, but apparently misconstrues, the *Philadelphia Fire Officers* decision, the Commonwealth Court stated that *Philadelphia Fire Officers* required that PERA and Act 111 be read *in pari materia*[215] and concluded that the unfair labor practice provisions of PERA applied to Act 111.[216] The PLRB approach is the sounder of the two because PERA by its express language does

204. PA. STAT. ANN. tit. 43, § 1101.1201(b)(6) (Purdon Supp. 1979).
205. *Id.* § 1201(b)(7). The PLRB found violations of this section in Baldwin-Whitehall School Dist., 3 P.P.E.R. 40 (PLRB 1973) and Beaver County Educ. Ass'n, 1 P.P.E.R. 68 (PLRB 1971).
206. PA. STAT. ANN. tit. 43, § 1101.1201(a)(8) and (b)(8) (Purdon Supp. 1979). A refusal to comply with an arbitration award is not a refusal to bargain. Lancaster County Vocational-Tech. Attendance Area Bd., 9 P.P.E.R. ¶ 9091 (PLRB 1978).
207. 478 Pa. 582, 387 A.2d 475 (1978).
208. *Id.* at 588, 387 A.2d at 478.
209. That is, whether the 30 day time period for appealing the award under Pa. R.A.P. 1512(a)(1) ran out, or the award was upheld if an appeal was taken.
210. PLRB v. Commonwealth, 478 Pa. 582, 591, 387 A.2d 475, 479 (1978).
211. *See* Decker, *The PLRB's New Jurisdiction for Police and Firemen*, 16 DUQ. L. REV. 185, 197-98 (1978).
212. 470 Pa. 550, 369 A.2d 259 (1977).
213. PA. STAT. ANN. tit. 43, § 217. (Purdon Supp. 1979).
214. City of Easton, 9 P.P.E.R. ¶ 9019 (PLRB 1978).
215. Geriot v. Borough of Darby, 38 Pa. Commw. Ct. 337, 394 A.2d 1298, 1299 (1978).
216. *Id.* at 338, 394 A.2d at 1299.

not apply to policemen and firemen, who are covered by Act 111.[217] This point is recognized in *Philadelphia Fire Officers*,[218] but apparently was overlooked by the Commonwealth Court. Suffice it to say, *in pari materia* construction can cure legislative oversights, but should never contradict legislative intent.[219]

V. Strikes

Perhaps the most dramatic change PERA effected in Pennsylvania's public employee law was the creation of a limited right to strike.[220] The right to strike is limited by statutory provisions governing when a strike may occur.[221] Moreover, PERA denies the right to strike to guards at prisons and mental hospitals and employees directly involved with and necessary to the functioning of the courts.[222] Act 111 provides for collective bargaining and interest arbitration for policemen and firemen, but implicitly forbids strikes by these employees.[223]

A. Enjoining Strikes by Public Employees

PERA's prohibitions on strikes by policemen, firemen, guards at prisons and mental institutions, and court related employees are relatively clear. The prohibition of strikes that create a "clear and present danger to the health, safety and welfare of the public"[224] poses a more difficult determination for the courts, and engenders more litigation.

Bristol Township Education Association v. School Directors[225] considered seventeen separate items[226] that the lower court relied on

217. PA. STAT. ANN. tit. 43, § 1101.301(2) (Purdon Supp. 1979).

218. 470 Pa. 550, 558, 369 A.2d 259, 262 (1977). The Commonwealth Court's decision further complicates an already complicated area by requiring that three statutes rather than two be read *in pari materia*. See also notes 56-59 and accompanying text *supra*.

219. *See* 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 51.01-.08 (4th ed. 1973).

220. PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1979). Before the enactment of PERA, there was a broad and all inclusive prohibition on strikes by public employees. The Public Employe Law, Act of June 30, 1947, Pub. L. 1183, PA. STAT. ANN. tit. 43, § 215.2 (Purdon 1964). The right to strike afforded by PERA survived constitutional challenge in Butler Area School Dist. v. Butler Area Educ. Ass'n, 481 Pa. 20, 391 A.2d 1295 (1978) (per curiam). See generally, Decker, *The Right to Strike for Pennsylvania's Public Employees—Its Scope, Limits and Ramifications for the Public Employer*, 17 DUQ. L. REV. 755 (1979).

221. *See* notes 105-07 and accompanying text *supra*.

222. PA. STAT. ANN. tit. 43, § 1101.1001 (Purdon Supp. 1979).

223. *See* PA. STAT. ANN. tit. 43, § 217.11 (Purdon Supp. 1979). Also, by failing to include employees covered by Act 111 in its definition of public employee, PERA denies any right to strike by policemen and firemen. *See* PA. STAT. ANN. tit. 43, §§ 1101.301(2) (Purdon Supp. 1979).

224. *Id.* § 1101.1003.

225. 14 Pa. Commw. Ct. 463, 322 A.2d 767 (1974).

226. These items included the deprivation of the student's education, the impossibility of making up all the instructional days lost, the possibility of losing a state subsidy, the loss of wages of nonstriking employees, the loss of special education classes, and the loss of free lunches by indigent students. *Id.* at 468-69, 322 A.2d at 769-70.

in finding a clear and present danger. Nevertheless, the Commonwealth Court noted that it could not "hold that any one of them taken alone or considered together would necessarily constitute a basis for the injunction . . . ."[227] Basically, this is a recognition that the propriety of enjoining a strike, in the absence of a showing of manifest unreasonableness, is best left to the discretion of the lower court,[228] and that the formulation of a black letter rule regarding the issuance of an injunction is impossible.

B. The 180 Day Rule

A major factor influencing the enjoining of strikes in school systems is the requirement that school districts provide 180 days of instruction for the students.[229] Although this benefits the school district because it can utilize this requirement to persuade courts to enjoin strikes, the requirement also benefits striking teachers because it assures them that they will work approximately the same number of days in any given year regardless of whether or not they strike, a wage guarantee that private sector strikes lack.

Because the 180 day rule governs whether a school district receives its full state subsidy, failure to prove a threatened loss of this subsidy through an inability to make up the lost school days can result in the denial of an injunction.[230] When subsidies are not threatened, the strike is at most an inconvenience, and the courts recognize that in authorizing strikes by public employees the Legislature "indicated its willingness to accept certain inconveniences."[231] In the final analysis, however, the 180 day rule is an inchoate limitation on the length of school teacher strikes, albeit one counterbalanced by the political pressure exerted on the school district by the community at large.

VI. Arbitration

In labor relations, two types of arbitration exist. One is grievance or contract interpretation arbitration, which is when a third party or parties resolve a dispute between the union and the employer regarding the proper interpretation or application of an existing collective bargaining agreement. The other is interest

227. *Id.* at 470, 322 A.2d at 770.

228. *Id.* at 467-68, 322 A.2d at 769.

229. The Public School Code of March 10, 1949, Pub. L. 30, *as amended by* the Act of September 21, 1957, Pub. L. 925, PA. STAT. ANN. tit. 24, § 15-1501 (Purdon Supp. 1979).

230. Morris v. Pennsbury School Bd., 7 P.P.E.R. 302, 303 (C.P. Bucks 1976).

231. Armstrong School Dist. v. Armstrong Educ. Ass'n, 5 Pa. Commw. Ct. 378, 384, 291 A.2d 120, 124 (1972). *See also* Morris v. Pennsbury School Bd., 7 P.P.E.R. 302, 304 (C.P. Bucks 1976).

arbitration, which is a process in which a third party or parties resolve impasses in collective bargaining.

A. Act 111 Interest Arbitration.

Act 111 requires that a panel of interest arbitrators resolve a collective bargaining impasse between bargaining representatives of policemen or firemen and their employer.[232] The panel of arbitrators, after hearing the positions of both parties, makes a binding recommendation regarding what contract terms are reasonable. That is, the arbitrators write the collective bargaining agreement for the parties when the parties fail to resolve their differences in mediation. Interest arbitration is statutorily mandated by Act 111 as an alternative for a resort to a strike or lockout when a bargaining impasse occurs.

B. Arbitration Under PERA

In contrast to Act 111, PERA does not require that the parties utilize interest arbitration. Rather, it merely permits the parties voluntarily to submit a bargaining impasse to binding interest arbitration.[233] Section 903 of PERA, however, mandates grievance arbitration for all "disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement."[234] The Commonwealth Court construes this section as requiring that all collective bargaining agreements contain a grievance and arbitration procedure.[235] A more literal reading is that section 903 merely requires that all grievances and disputes be arbitrated regardless of whether the collective bargaining agreement spells out the procedure.[236] The PLRB holds that this section, which refers only to collective bargaining agreements, makes an arbitration provision in a "memorandum of understanding" between a public employer and a first level supervisor bargaining unit, and arbitration awards under such a provision, enforceable through PERA's unfair labor practice provisions.[237]

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232. *See* notes 112 and 113 and accompanying text *supra*.

233. PA. STAT. ANN. tit. 43, § 1101.804 (Purdon Supp. 1979).

234. *Id.* § 1101.903.

235. *See* PLRB v. Williamsport Area School Dist., 29 Pa. Commw. Ct. 355, 360, 370 A.2d 1241, 1243 (1977), *rev'd on other grounds*, — Pa. —, 406 A.2d 329 (1979).

236. PERA permits the parties to set out the grievance and arbitration procedure in the collective bargaining agreement, but it does not require that they do so. Section 903(1), PA. STAT. ANN. tit. 43, § 1101.903(1) specifies the procedure for selecting an arbitrator when the parties have not agreed. Of course, the failure to include a collectively bargained arbitration procedure in a labor agreement precludes a party from raising issues of procedural arbitrability, such as untimeliness in filing a grievance or invoking arbitration.

237. Commonwealth of Pennsylvania, 9 P.P.E.R. ¶ 9076 (1978). This construction is open to question because first level supervisors do not have the right to bargain collectively, only the right to "meet and discuss" with the public employer. Moreover, it is not an unfair labor practice to refuse to reduce to writing agreements reached in "meet and discuss" sessions be-

1. Refusing to Arbitrate.—Not every dispute or grievance is arbitrable. A number of factors such as untimeliness in invoking arbitration, the absence of a provision in the collective bargaining agreement covering the dispute, or even the absence of a collective bargaining agreement under which to arbitrate, as occurs when the labor agreement expires,[238] can affect arbitrability. Nevertheless, questions of procedural arbitrability, for example, whether or not a party complied with the time limits for invoking arbitration, are within the arbitrator's exclusive jurisdiction,[239] and a party cannot refuse to arbitrate such an issue.

The Pennsylvania Supreme Court emphasized the strong policy in favor of arbitration embodied in PERA[240] and held that enjoining or denying arbitration is not permissible unless it can "be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[241] Basically, if the grievance arguably involves an interpretation of the collective bargaining agreement, judicial inquiry is limited to determining whether the parties agreed to arbitrate, and whether the dispute comes within the language of the arbitration clause.[242] It is clear that a party cannot defend a refusal to arbitrate by relying on a provision of the collective bargaining agreement, even a provision stating that the matter is not subject to arbitration, to argue that the grievance does not arise out of the collective bargaining agreement.[243]

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cause the final decision always rests with the public employer. *See* PA. STAT. ANN. tit. 43, § 1101.301(17) and § 1101.704 (Purdon Supp. 1979). *See also* notes 145 and 146 and accompanying text *supra*.

238. *See* PLRB v. Williamsport Area School Dist., 29 Pa. Commw. Ct. 355, 370 A.2d 1241 (1977), *rev'd*, — Pa. —, 406 A.2d 329 (1979). *Cf.* Methacton School Dist., 10 P.P.E.R. ¶ 10029 (PLRB 1979) (grievances filed prior to the expiration of the collective bargaining agreement remain arbitrable). Arbitration during a contract hiatus period is discussed in Decker, *Arbitrability Of Public Sector Grievances After Expiration of a Contract*, 7 J. COLL. NEGOT. 287 (1978). Nolde Bros., Inc. v. Local No. 358, Bakery & Confect. Workers Union, 430 U.S. 243, *rehearing denied*, 430 U.S. 988 (1977), establishes the law regarding arbitration during a hiatus period in the federal private sector.

239. Duquesne School Dist. v. Duquesne Educ. Ass'n, 475 Pa. 279, 380 A.2d 353 (1977). *See* Western Beaver County School Dist., 10 P.P.E.R. ¶ 10035 (PLRB 1979); Methacton School Dist., 10 P.P.E.R. ¶ 10029 (PLRB 1979) (to refusing to arbitrate on grounds of procedural nonarbitrability is an unfair labor practice). *See also* notes 245-48 and accompanying text *infra*.

240. Board of Educ. v. Philadelphia Fed'n of Teachers, Local No. 3, 464 Pa. 92, 99, 346 A.2d 35, 39 (1975).

241. Lincoln Univ. v. Lincoln Univ. Chapt., Am. Ass'n of Univ. Prof., 467 Pa. 112, 119, 354 A.2d 576, 581-82 (1976). Basically this is a restatement of the federal standard for private sector labor arbitration. *See* United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574, 582-83 (1960).

242. *See, e.g.*, Carmichaels Area School Dist. v. Carmichaels Area Educ. Ass'n, 37 Pa. Commw. Ct. 142, 145, 389 A.2d 1203, 1205-06, (1978); North Star School Dist. v. PLRB, 35 Pa. Commw. Ct. 429, 433, 386 A.2d 1059, 1061 (1978). These decisions rely on Lincoln Univ. v. Lincoln Univ. Chapt., Am. Ass'n of Univ. Prof., 467 Pa. 112, 119, 354 A.2d 576, 580 (1976). Actually, only the second inquiry is necessary. It is irrelevant whether there was an agreement to arbitrate because PERA statutorily requires arbitration of all disputes under a collective bargaining agreement. *See* notes 235 and 236 and accompanying text *supra*.

243. *See, e.g.*, Trinity Area School Dist., 9 P.P.E.R. ¶ 9071 (PLRB 1978). The Board ruled

2. Compelling Arbitration.—The question regarding who should direct parties to go to arbitration when one of them refuses to arbitrate poses difficult problems. In federal private sector labor relations, a court is the proper forum for compelling a party to comply with its promise to arbitrate.[244] Whether a court or the PLRB is the proper forum for compelling arbitration under PERA remains unclear.

The PLRB announced that it regarded the refusal of any party to arbitrate as a refusal to bargain in *West Mifflin Area School District*,[245] and consistently followed this position in subsequent cases, equating the arbitration procedure with the grievance procedure.[246] When that position was challenged in the Commonwealth Court, that court rejected the argument that the PLRB could not order arbitration under the refusal to bargain theory.[247]

The difficulty with this approach is that it requires a ruling that the PLRB has exclusive jurisdiction over cases in which there is a refusal to arbitrate.[248] This is not, however, in accord with the approach taken by the Pennsylvania Supreme Court because that court accepted for review appeals concerning refusals to arbitrate that arose in the judicial system.[249] Moreover, the court also ruled that mandamus was a proper means for compelling arbitration.[250] Because mandamus is proper only when no other legal remedy is available,[251] arguably, the Pennsylvania Supreme Court does not

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that the grievance arose out of the collective bargaining agreement even though that agreement incorporated a statute governing the grievance.

244. *See, e.g.*, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

245. 5 P.P.E.R. 41 (PLRB 1974), *rev'd in part and modified*, 6 P.P.E.R. 139 (PLRB 1975).

246. *See, e.g.*, Plum Borough Area School Dist., 10 P.P.E.R. ¶ 10001 (PLRB 1978); Bristol Twp. School Dist., 8 P.P.E.R. 94 (PLRB 1977); Commonwealth of Pennsylvania, 7 P.P.E.R. 32 (PLRB 1976). Section 1201(a)(5) of PERA provides that for public employers a refusal to bargain in good faith includes but is "not limited to the discussing of grievances with the exclusive representative." PA. STAT. ANN. tit. 43, § 1101.1201(a)(5) (Purdon Supp. 1979). Apparently the PLRB and the Commonwealth Court construe the discussing of grievances as including the arbitration of grievances. Arguably, the discussion of grievances refers to prearbitration negotiation and procedure, arbitration of the dispute being a mutual recognition of an inability to achieve a collectively bargained result that requires an impartial third party to resolve the impasse. This explanation is theoretically consistent with Act 111 interest arbitration.

247. APSCUF v. Commonwealth, 30 Pa. Commw. Ct. 403, 409, 373 A.2d 1175, 1178-179 (1977).

248. PA. STAT. ANN. tit. 43, § 1101.1301 (Purdon Supp. 1979). The Commonwealth Court, with the notable exception of Judge Mencer, heartily endorses this conclusion. *See, e.g.*, Koch v. Bellefonte Area School Dist., 36 Pa. Commw. Ct. 438, 441, 388 A.2d 1114, 1115 (1978); North Star School Dist. v. PLRB, 35 Pa. Commw. Ct. 429, 433, 386 A.2d 1059, 1061 (1978); Penn Hills School Dist. v. Penn Hills Educ. Ass'n, 34 Pa. Commw. Ct. 507, 511, 383 A.2d 1301, 1303 (1978).

249. *See, e.g.*, Milberry v. Board of Educ., 467 Pa. 79, 354 A.2d 559 (1976).

250. "We believe that mandamus was the proper remedy to compel appellee to submit the dispute to arbitration . . . ." Rylke v. Portage Area School Dist., 473 Pa. 481, 491, 375 A.2d 692, 697 (1977), *rev'g*, 20 Pa. Commw. Ct. 158, 341 A.2d 233 (1975).

251. The Pennsylvania Supreme Court fully recognized this point. 473 Pa. at 490, 375 A.2d at 696.

subscribe to either the PLRB's view that a refusal to arbitrate is a refusal to bargain or the Commonwealth Court's rulings that exclusive jurisdiction for compelling arbitration is in the PLRB.

A further complication is the Pennsylvania Supreme Court's holding that PERA does not repeal the Arbitration Act of 1927[252] except when a clear inconsistency exists between the two acts.[253] Because the Arbitration Act of 1927 provides for judicial compulsion of arbitration[254] and PERA is silent on how to compel arbitration, the former should govern, which in turn means that a judicial forum is the proper one for compelling arbitration. This appears to be the most consistent and reasonable resolution of the problem. Nevertheless, it requires at least a *sub silentio* overruling of the mandamus theory that the court previously endorsed. This is not a great loss, however, because the Commonwealth Court never followed that precedent.[255]

The present state of the law under PERA is unfortunate for reasons other than its inconsistency. Because a public employer's argument that an unfavorable arbitral award could not be legally complied with is not allowed on the ground that it must be appealed under the Arbitration Act of 1927,[256] the unfair labor practice theory of the PLRB and the Commonwealth Court requires a multiplicity of litigation. The public employer must first arbitrate and then litigate on appeal if the award is unfavorable. It is both anomalous and an inefficient use of public funds to require both arbitration and a subsequent judicial proceeding when the latter alone might suffice in disposing of the claim. The policy of favoring arbitration does not require the arbitration of otherwise nonarbitrable claims, which arise when the issue is whether a school district must meet the 180 day requirement.[257]

Under the present state of the law, a public employer must seek to enjoin arbitration in order to obtain a judicial forum for determining the arbitrability of the dispute because a refusal to arbitrate guarantees a PLRB finding of a refusal to bargain and a PLRB order to arbitrate. In federal private sector labor law, questions of arbi-

252. Act of April 25, 1927, Pub. L. 381, No. 248, PA. STAT. ANN. tit. 5, §§ 161-181 (Purdon Supp. 1979).

253. Community College v. Community College, Soc'y of the Faculty, 473 Pa. 576, 595-96, 375 A.2d 1267, 1272 (1977).

254. PA. STAT. ANN. tit. 5, § 163 (Purdon Supp. 1979).

255. *See, e.g.*, Oxford Bd. of School Dir. v. PLRB, 31 Pa. Commw. Ct. 441, 376 A.2d 1012 (1977). *See also* notes 247, 248 and accompanying text *supra*. *But see* North Star School Dist. v. PLRB, 35 Pa. Commw. Ct. 429, 436, 386 A.2d 1059, 1062 (1978) (Mencer, J., concurring) (courts rather than the PLRB should determine arbitrability).

256. *See* North Star School Dist. v. PLRB, 35 Pa. Commw. Ct. 429, 436, 386 A.2d 1059, 1062 (1978).

257. *Id. See also* notes 229, 230 and accompanying text *supra*.

trability are always for the courts to pass on in the first instance.[258] The result would be the same under PERA if the Arbitration Act of 1927 is held to provide the proper and exclusive means of compelling arbitration.[259] It is hoped that future Pennsylvania Supreme Court decisions bring some consistency and guidance to this very muddled area.

C. *Judicial Review of Arbitration Awards*

Both interest arbitration awards under Act 111 and grievance arbitration awards under PERA are appealable. This is an area of public sector labor law in which a voluminous amount of litigation occurs. As with other areas of PERA and Act 111, the litigation frequently raises more questions than it resolves.

1. Petitioning for Review.—Unlike the standard of review applied on appeal of arbitrators' awards, the same procedural rules govern both interest arbitration under Act 111 and grievance arbitration under PERA. When the appeal is of an arbitration involving a local public employer, the appeal is taken to the court of common pleas of that county.[260] When the Commonwealth is the employer, the appeal is to the Commonwealth Court.[261] An appeal must be taken within thirty days "after the date of the award of the arbitrators"[262] in the case of an appeal to the common pleas court, and "within thirty days after the entry of the order"[263] in the case of an appeal to the Commonwealth Court. Although the Commonwealth Court did not squarely face the issue, apparently it considers the date on the arbitrator's award as being the date of entry of the order.[264] Because of its potential value in quashing untimely appeals from arbitration awards, the parties should direct an arbitrator to date the opinion and the award before mailing it.

It is clear that either the employer or the union can take an appeal. The question arises, however, whether an individual employee has standing to appeal an arbitration award. In *McCluskey v. Com-*

258. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). The NLRB does not deem a refusal to arbitrate a refusal to bargain. *See, e.g.*, Sucesion Mario Mercado & Hijos, 161 NLRB 696, 700 (1966); Central Pub. Serv. Co., 139 NLRB 1407, 1418 (1962); Textron Puerto Rico, 107 N.L.R.B. 583, 584 (1953). *See also* note 244 and accompanying text *supra*.

259. The PLRB rejected this position in Abington Heights School Dist., 10 P.P.E.R. ¶ 10007 (PLRB 1978). No courts have addressed the issue as of yet.

260. PA. R. CIV. P. 247(a). An appeal from the common pleas court's order is taken to the Commonwealth Court. *Id.* 247(b).

261. PA. R.A.P. 703.

262. PA. R. CIV. P. 247(a).

263. Pa. R.A.P. 1512(a)(1).

264. *See* County of Dauphin v. PSSU, 33 Pa. Commw. Ct. 456, 459, 375 A.2d 1353, 1354-355, *vacated on other grounds*, 33 Pa. Commw. Ct. 456, 382 A.2d 999 (1978). *See also* Ozolins v. Department of Educ., 30 Pa. Commw. Ct. 70, 73, 372 A.2d 1230, 1231 (1977).

monwealth[265] Judge Blatt reasoned that when the union reserves exclusive control over access to arbitration under the collective bargaining agreement, only the parties-signatory to the labor agreements—the employer or the union—can take an appeal.[266]

2. The Scope of Review Under PERA.—PERA does not provide a statutory standard of review for arbitration awards. When faced with the issue of what standard of review to apply, the Commonwealth Court adopted the federal private sector "essence" test[267] announced by the Supreme Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*,[268] and refined by the Third Circuit in *Ludwig Honold Manufacturing Co.*[269] The Third Circuit held,

> An arbitrator's award draws its essence from the collective bargaining agreement if the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by the principles of contract construction and the law of the shop, may a reviewing court disturb the award.[270]

The Pennsylvania Supreme Court subsequently ruled, in *Community College of Beaver County v. Community College of Beaver County, Society of the Faculty*,[271] that the Arbitration Act of 1927[272] governs the appeal of arbitration awards under PERA, but reasoned that the scope of review under the Act of 1927 and the "essence" test were conterminous.[273] Therefore, the test can be generally stated as whether the arbitrator's award can in any rational way be derived from the collective bargaining agreement.[274]

The truly significant holding of *Beaver County* is that the arbitrator is making a factual determination whenever the arbitrator construes a provision of the collective bargaining agreement.[275] This has important implications for the judicial review of public sector labor arbitration awards because once the arbitrator construes or applies a law, rather than an express term of the labor agreement, the award may be modified for error of law under the Arbitration Act of 1927. That Act permits modification of an award when "the award

265. 37 Pa. Commw. Ct. 598, 391 A.2d 45 (1978). *See also* Gardocki v. Commonwealth, 42 Pa. Commw. Ct. 579, 401 A.2d 410 (1979).

266. 37 Pa. Commw. Ct. at 603, 391 A.2d at 48.

267. Teamsters, Local 77 v. Pennsylvania Turnpike Comm'n, 17 Pa. Commw. Ct. 238, 331 A.2d 588 (1975).

268. 363 U.S. 593, 597 (1960).

269. 405 F.2d 1123 (3d Cir. 1969).

270. *Id.* at 1128.

271. 473 Pa. 576, 375 A.2d 1267 (1977). For an extended analysis of this decision see Comment, *Pennsylvania Supreme Court Review*, 1977, 51 TEMP. L.Q. 550, 715-26 (1978).

272. PA. STAT. ANN. tit. 5, § 161-181 (Purdon Supp. 1979).

273. 473 Pa. at 589-90, 375 A.2d at 1273.

274. *Id.* at 594, 375 A.2d at 1275-276.

275. *Id.* at 593, 375 A.2d at 1275.

is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict."[276]

This is a healthy development because it authorizes modification of the award for error of law. Legal scholars maintain that the same result will, or should, obtain under an application of the "essence" test,[277] but it is reassuring to see a judicial affirmation of the principle that courts are the ultimate arbiters of social policy, especially in the context of public sector labor arbitration when arbitration is required by statute rather than consensually agreed upon.[278] Nevertheless, the Pennsylvania Supreme Court emphasized in *Leechburg Area School District v. Leechburg Education Association*[279] that different sections of the Arbitration Act govern the scope of review when a party seeks to vacate rather than modify an award.[280] Therefore, the ground for the appeal under the Arbitration Act of 1927 controls the ultimate disposition, and an appealing party risks affirmance of the award unless they specifically ground the basis for their appeal in the language of the Arbitration Act, despite the language in *Beaver County* suggesting that the Arbitration Act sets forth the same standard of review as the "essence" test.[281]

The result of an application of the Arbitration Act, however, is no more predictable than the result under an application of the "essence" test. Perhaps the only significant difference between the two is that the former presents a slightly more difficult procedural hurdle in requiring the specification of the relief sought on appeal. That is, the balance struck in favor of the finality of arbitral awards by the "essence" test remains unaltered. On the other hand, it may require a "modification" of arbitral awards that, in effect, are reversals of the arbitrator.[282] An example of the latter is when the arbitrator's award, which would stand unaltered under the "essence" test, is "modified" and effectively reversed because it is based solely on hearsay evidence.[283] In sum, it might require a broader standard of

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276. PA. STAT. ANN. tit. 5, § 170(d) (Purdon Supp. 1979).

277. *See* Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 INDUS. REL. L.J. 97 (1977); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

278. *See* Comment, *Judicial Review of Labor Arbitration Awards Under Pennsylvania's Public Employe Relations Act*, 83 DICK. L. REV. 795 (1979).

279. 475 Pa. 413, 380 A.2d 1203 (1977).

280. *Id.* at 417, 380 A.2d at 1204. The majority in *Leechburg* reasoned that there was no ground for reviewing the award because the appellant stated no basis for vacating the award under the Arbitration Act of 1927. *See* PA. STAT. ANN. tit. 5, § 170 (vacation of an arbitrator's award) and § 171 (modification of an arbitrator's award) (Purdon Supp. 1979).

281. *See* Community College v. Community College, Soc'y of the Faculty, 473 Pa. 576, 598, 375 A.2d 1267, 1277 (1977). *See also* Leechburg Area School Dist. v. Leechburg Educ. Ass'n, 475 Pa. 413, 426, 380 A.2d 1203, 1207-1208 (Pomeroy J., concurring).

282. Scholastic Tech. Serv. Employees, Local 8 v. Pennsylvania State Univ., 37 Pa. Commw. Ct. 622, 626, 391 A.2d 1097, 1099 (1978).

283. The Commonwealth Court previously ruled that it would not set aside an arbitrator's

review than that afforded by the essence test despite the statement by the Pennsylvania Supreme Court that the "essence" test and Arbitration Act standards were the same.[284]

3. The Scope of Review Under Act 111.—The award of an arbitration panel under Act 111 is final on the issue or issues in dispute; the Act specifically states that no appeal will be allowed to any court.[285] Nevertheless, the Pennsylvania Supreme Court allowed review of Act 111 arbitrations in the nature of a narrow certiorari,[286] and the awards are appealable on the ground that the public employer cannot lawfully carry out the award.[287] The lawfulness of the award must be contested through an appeal rather than through refusing to comply with the award and raising the issue of lawfulness in a mandamus action brought to compel compliance with the award.[288]

D. Injunctions Pending Arbitration

Increasingly, public employees and public employee unions attempt to enjoin actions by public employers pending arbitration on the issue of whether the course of action contemplated by the public employer violates the collective bargaining agreement. Most frequently, injuctions are sought in situations when a strike by the employees would be ineffective; namely, in the case of layoffs or terminations.[289] The increase in the numbers of this type of action in the public sector parallels the development and increasing use of this type of suit in the private sector. The propriety of enjoining employers pending arbitration is a popular topic among commentators.[290]

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award even if the arbitrator based his award on hearsay evidence. United Transp. Union, Local 1594 v. SEPTA, Red Arrow Div., 28 Pa. Commw. Ct. 323, 368 A.2d 834 (1977); Allentown School Dist. v. Allentown Educ. Ass'n, 23 Pa. Commw. Ct. 224, 351 A.2d 292 (1976). This is in accord with the federal private sector approach. *See* United Instrument Workers, Local 116 v. Minneapolis-Honeywell Co., 54 L.R.R.M. 2660, 2661 (E.D. Pa. 1963). Whether the Commonwealth Court's decisions survive under the judgment n.o.v. standard mandated in Community College v. Community College, Soc'y of the Faculty, 473 Pa. 576, 375 A.2d 1267 (1977) is unsettled.

284. Community College v. Community College, Soc'y of the Faculty, 473 Pa. 576, 589-90, 375 A.2d 1267, 1273 (1977).

285. PA. STAT. ANN. tit. 43, § 217.7(a) (Purdon Supp. 1979).

286. Washington Arbitration Case, 436 Pa. 168, 174, 259 A.2d 437, 440-41 (1969).

287. *See* notes 135 and 136 and accompanying text *supra*. PA. R. CIV. P. 247 governs the review of awards when a local governmental unit is the employer. PA. R.A.P. 703 governs the review when the Commonwealth is the employer. *See also* the Judicial Code of July 9, 1976, Pub. L. 586, No. 142, *as amended by* the Act of April 28, 1978, Pub. L. 202, No. 53, 42 PA. CONS. STAT. ANN. § 763 and § 933 (Purdon Supp. 1979).

288. Polarkoff v. Town Council of Aliquippa, 39 Pa. Commw. Ct. 604, 606, 396 A.2d 75, 77 (1979).

289. See notes 291, 293, and 295 *infra*.

290. *See* Gould, *On Labor Injunctions Pending Arbirtration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978); Payne, *Enjoining Employers Pending Arbitration — From M-K-T to Greyhound and Beyond*, 3 INDUS. REL. L. J. 169 (1979); Simon, *Injunctive Relief to Maintain the Status Quo Pending Arbitration: A Union Practitioner's View*, 29th Ann. N.Y.U. CONF. LAB.

In New York, actions to enjoin public employers pending arbitration meet with little success because of a stringent application of the irreparable injury requirement by the courts of that state.[291] One commentator argues that the focus of the irreparable injury inquiry should be on the effect of the employer's actions on the arbitration process,[292] which appears to be the majority view in the federal private sector labor law.[293] The New York public sector cases view arbitration as an adequate remedy at law.[294] In Pennsylvania's public sector labor relations law the cases are mixed.[295] Recent Commonwealth Court cases suggest, however, that the Commonwealth Court will focus on how the public employer's proposed course of action will affect arbitration on the ground that premature judicial intervention to preserve the status quo might usurp the arbitrator's remedial powers.[296]

VII. Conclusion

PERA, the public sector collective bargaining statute that covers the majority of Pennsylvania's public sector employees, resembles the federal statute governing private sector labor relations. Nevertheless, the court and PLRB decisions recognize that significant differences exist between public and private sector labor relations law. As the second decade of public sector bargaining dawns in Pennsylvania, it is clear that federal private sector law does not always provide a pat answer to the somewhat perplexing questions that arise in the context of public sector labor relations. This article pointed out a number of anomalies and inconsistencies that presently exist in the Pennsylvania law as applied and construed by the courts and the PLRB. These evolutionary growth pangs are to be expected. The

317 (1976); Comment, *Injunctions Restraining Employers Pending Arbitration: Equity and Labor Policy*, 82 DICK. L. REV. 487 (1978) (hereinafter cited as Comment, *Equity and Labor Policy*); Note, *Boys Markets Injunctions Against Employers: Lever Brothers, Inc. v. Chemical Workers Local 217*, 91 HARV. L. REV. 715 (1978).

291. *See* Armitage v. Carey, 49 App. Div. 2d 496, 375 N.Y.S. 2d 898 (1975); DeLury v. City of New York, 48 App. Div. 2d 595, 378 N.Y.S.2d 49 (1975); Cohen v. Department of Soc. Serv., 37 App. Div. 2d 626, 323 N.Y.S.2d 603 (1971), *aff'd*, 30 N.Y.2d 571, 330 N.Y.S.2d 789, 281 N.E.2d 839 (1972). Apparently, the courts of Maryland take a similar view. *See* Coster v. Department of Personnel, 36 Md. App. 523, 373 A.2d 1287 (Ct. Spec. App. 1977).

292. Comment, *Equity and Labor Policy*, *supra* note 288, at 507.

293. *See, e.g.*, Lever Brothers, Inc. v. Chemical Workers Local 217, 554 F.2d 115 (4th Cir. 1976); Transit Union, Division 1384 v. Greyhound Lines, Inc., 550 F.2d 1237 (9th Cir.), *cert. denied*, 98 S. Ct. 127 (1977).

294. *See* note 291 *supra*.

295. *See* Joint Bargaining Comm. v. Commonwealth, 1421 C.D. 1977 (Pa. Commw. Ct. Aug. 19, 1977) (order denying preliminary injunction); Council 13, AFSCME v. Shapp, 1508 C.D. 1977 (Pa. Commw. Ct. Aug. 2, 1977) (order granting preliminary injunction), *appeal docketed*, No. 77-99 (Pa. Sup. Ct., Aug. 3, 1977) (dismissed as moot, Oct. 27, 1977); Mudd v. Borough of Rankin, 28 Pa. Commw. Ct. 33, 367 A.2d 338 (1976). Bristol Twp. Educ. Ass'n v. Bristol Twp. Bd. School Directors, 55 D.&C.2d 605 (C.P. Bucks Co. 1972).

296. AFSCME v. Commonwealth, — Pa. Commw. Ct. —, 405 A.2d 592 (1979); Burchfield v. Commonwealth, 41 Pa. Commw. Ct. 121, 399 A.2d 796 (1979).

critical analysis in this article was made in the belief that a recognition of problem areas is a necessary first step toward resolving them. Although this article is far from being comprehensive, it is hoped that it will assist in adding logic and consistency to the inevitable further developments in Pennsylvania's public sector collective bargaining laws. It is also hoped that it will provide a useful basic reference and starting point for practitioners in this specialized and fairly complicated area of Pennsylvania law.

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