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Pennsylvania's Public Employe Relations Act (Act 195) and Impasse—The Public Employer's Right to Make Unilateral Changes in Employment Conditions

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I. Introduction

The right of Pennsylvania's private sector labor force to bargain collectively is protected by federal legislation in the National Labor Relations Act (NLRA),[1] and by state legislation in the Pennsylvania Labor Relations Act (PLRA).[2] Public employees, however, were excluded from these statutes.[3] In Pennsylvania, public employee collective bargaining was considered a policy violation because of danger to the general welfare.[4] This attitude changed in the 1960's and since 1968, the Pennsylvania Legislature has furthered the rights of police, fire fighters, and all other public employees to organize and bargain collectively. Act 111,[5] enacted in 1968, pro-

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1. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-69 (1970 & Supp. I 1976).

2. Pennsylvania Labor Relations Act, PA. STAT. ANN. tit. 43, §§ 211.1-.13 (Purdon 1964 & Supp. 1981-82).

3. *See* 29 U.S.C. § 152(2) (1970 & Supp. I 1976) (term "employer" does not include a state or political subdivision thereof); PA. STAT. ANN. tit. 43, § 211.3(c) (Purdon 1964 & Supp. 1981-82) (term "employer" does not include the Commonwealth of Pennsylvania or a political subdivision thereof).

4. *See* Philadelphia Fire Officers Ass'n v. Pa. L.R.B., 470 Pa. 550, 553, 369 A.2d 259, 260 (1977). It was considered part of the American tradition that there was "no right to strike against the public safety by anybody, anywhere, anytime." Broadwater v. Otto, 370 Pa. 611, 618, 88 A.2d 878, 880 (1952). *Cf.* De Blasio v. Cecil Township, 42 Wash. Co. 193, 28 D. & C.2d 450 (1963) (Public employee strikes might cripple an important governmental function to the detriment of the public); PA. STAT. ANN. tit. 43, § 215.2 (Purdon 1964), partially repealed by PA. STAT. ANN. tit. 43, § 1101.2201 (Purdon Supp. 1981-82) (prohibits public employee strikes).

5. The Act of June 24, 1968, Pub. L. 237, No. 111 (Act 111), established the right of policemen and firemen to organize and bargain collectively through selected representatives. PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1981-82).

vides for police and fire fighters collective bargaining; Act 195,[6] passed in 1970, provides comprehensive collective bargaining by all other public employees.

Public sector collective bargaining legislation has affected the traditional unilateral decision-making of public employers. No longer are public employees isolated individuals. Today, Pennsylvania's public employers increasingly confront employees united in organizations and deal with them through a new set of relationships circumscribed by collective bargaining that imposes bilateral decision-making.

The concept of impasse is important for both the private and public sectors. Impasse is a deadlock in negotiations when collective bargaining has failed to produce an agreement and the parties are confronted with the decision of whether to continue bargaining. This article examines impasse as the primary exception to the rule prohibiting unilateral public employer change of terms and conditions of employment. The unique nature of public sector collective bargaining and the lack of dispositive Pennsylvania authority on its' many facets necessitates consideration of other sources for guidance. Private and public sector court and labor board decisions are reviewed by balancing public sector labor relations needs with standards applied in the private sector.

II. The Impact of Private Sector Labor Rulings on Pennsylvania's Public Sector

Collective bargaining is still a new concept in the public sector with a paucity of decisions covering key issues. Because public sector labor relations is regulated by individual state or local statutes, executive orders, and attorney general opinions, the case law in any jurisdiction may be limited or nonexistent.[7] Applicability of case law among different jurisdictions may be restricted because collective bargaining laws vary. Precedent is extensive in the private sector, however, since the NLRA is interpreted through a centralized agency, the National Labor Relations Board (NLRB).

Several public sector tribunals have relied on private sector precedents because the statutory language in both sectors often coincides.[8] When parallel statutory language exists, the private sector

6. All Pennsylvania public employees other than police and fire fighters were given the right to organize and bargain collectively by the Act of July 23, 1970, P.L. 563, No. 195 (Act 195). PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1981-82).

7. At least 45 states provide some form of collective bargaining for either all or a portion of their public employees. 51 GOV'T EMPL. REL. REP. (BNA) 501 (1981).

8. *See, e.g.*, Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974); Kerrigan v. City of Boston, 361 Mass. 24, 278 N.E.2d 387 (1972); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974). *See also* Drachman & Ambash, *Is Looking Up Case Precedent in Other Jurisdictions Worth-*

precedents may provide analogous authority. Blind deference is unwarranted, however, unless the legislature intended the statute to be so construed.[9]

Although private sector precedents offer some guidance, public sector issues cannot be interpreted solely by reference to the private sector. Indeed, Pennsylvania courts have held that it is necessary to consider "the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public employees."[10]

III. Unilateral Public Employer Action

The Pennsylvania Public Employe Relations Act (Act 195) governs labor relations for all public employees except police and fire fighters. Its statutory language is patterned after the NLRA. Consequently, private sector interpretations of the NLRA provide some guidance to Act 195's meaning, but are not controlling.[11] Collective bargaining pursuant to Act 195 entails a mutual obligation by the public employer and the employees' representative to confer in good faith regarding wages, hours, and other terms and conditions of employment.[12] This requirement is similar to the NLRA's good faith bargaining obligation.[13] Act 195's goal is to bring parties to the ne-

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while in Public Sector Labor Relations?—A Management Perspective, 6 J.L. & EDUC. 209 (1977); Kahn, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations?—The Perspective of a Neutral*, 6 J.L. & EDUC. 221 (1977).

9. For example, the California Agricultural Labor Relations Act provides that the Agricultural Labor Relations Board "shall follow applicable precedents of the National Labor Relations Act as amended." CAL. LAB. CODE § 1148 (Deering 1976 & Supp. 1981).

10. State College Educ. Ass'n v. Pa. L.R.B., 9 Pa. Commw. Ct. 229, 306 A.2d 404 (1973), *aff'd*, 461 Pa. 494, 499, 337 A.2d 262, 264 (1975). The Pennsylvania Supreme Court also stated:

> We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that 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.

Id. at 500, 337 A.2d at 264-65. *See also* Pa. L.R.B. v. AFSCME, 22 Pa. Commw. Ct. 376, 348 A.2d 921 (1975); Borough of Wilkinsburg v. Sanitation Dep't., 463 Pa. 521, 345 A.2d 641 (1975).

11. State College Educ. Ass'n v. Pa. L.R.B., 9 Pa. Commw. Ct. 224, 306 A.2d 404 (1973), *aff'd*, 461 Pa. 494, 337 A.2d 262 (1975).

12. PA. STAT. ANN. tit. 43, § 1101.701 (Purdon Supp. 1979-80). Section 1101.701 of Act 195 provides:

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

Id.

13. 29 U.S.C. § 158(d) (1970 & Supp. I 1976). Section 158(d) of the NLRA provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any

gotiating table who are willing to: (1) present proposals supported by reasons; (2) listen to and evaluate proposals; and (3) ultimately reach an understanding that forms the foundation for a written agreement.[14] The duty to bargain does not, however, require a party to participate in fruitless marathon discussions.[15] When irreconcilable differences remain after exhaustive negotiations, Act 195 acknowledges the existence of an impasse, which is a deadlock in the negotiating process that suspends the statutory bargaining obligation.[16]

A. The Impasse Exception

The most important statutory limitation upon unilateral public employer change of employment conditions is section 1101.1201(a)(5) of Act 195,[17] which is similar to section 158(a)(5) of the NLRA.[18] Both make it an unfair labor practice to refuse to bargain in good faith. Section 1101.1201(a)(5) is significant only after the union obtains bargaining rights, and it affects unilateral public employer action in two ways.[19] First, it determines the range of sub-

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> question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Id.

For a discussion of the private sector's duty to bargain in good faith, *see* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968).

14. *See* Comment, *A Power Shift in Public School Management*, 80 DICK. L. REV. 795 (1976); Comment, *The Scope of Collective Bargaining in Public Education under the Pennsylvania Public Employe Relations Act*, 14 DUQ. L. REV. 427 (1976).

15. PA. STAT. ANN. tit. 43, § 1101.701 (Purdon Supp. 1981-82); Pa. L.R.B. v. Com., State Liquor Control Bd., 28 Pa. Commw. Ct. 145, 367 A.2d 805 (1977). For private sector authority *see* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952); National Labor Relations Board v. Gen. Elec. Co., 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

16. PA. STAT. ANN. tit. 43, §§ 1101.701, 1101.801 (Purdon Supp. 1981-82).

17. *Id.* § 1101.1201(a)(5). This section relates to unfair labor practices by public employers and prohibits "[refusal] to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative." *Id.*

18. 29 U.S.C. § 158(a)(5) (1970 & Supp. I 1976). This section concerns unfair labor practices by private employers and prohibits a "[refusal] to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title." *Id.*

Section 159(a) provides that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Id. § 159(a).

19. Act 195 bargaining rights may be obtained through a Pennsylvania Labor Relations

jects that the union may properly insist upon negotiating. This includes recognition of "bargainable," "nonbargainable," and "permissive" negotiation subjects.[20] Bargainable or mandatory items must be negotiated and a refusal to negotiate constitutes an unfair labor practice. Permissive or nonmandatory subjects may only be negotiated if the parties agree. Consequently, if the parties have agreed to negotiate a permissive subject, an unfair labor practice may result for a refusal to bargain in good faith. Nonbargainable items need not be negotiated or discussed and an unfair labor practice will not result from a refusal. This differentiation helps to determine the contour of the bilateral agreement reached by the parties in negotiations. Second, section 1101.1201(a)(5) limits the public employer's right to take unilateral action because it prohibits employment condition changes absent prior negotiations with the union. This prohibition emphasizes the importance of determining what must, may, and may not be negotiated.

Nevertheless, the prohibition against unilateral action under section 1101.1201(a)(5) does not absolutely bar changes by the public employer, who is merely required to bargain in good faith to impasse before taking unilateral action. Consequently, the importance of impasse is its status as the major exception to the rule[21] that a public employer violates section 1101.1201(a)(5) by implementing unilat-

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Board (PLRB) certification of a Board conducted election, or by a voluntary recognition, or through a bargaining order. PA. STAT. ANN. tit. 43, §§ 1101.601-.607 (Purdon Supp. 1981-82). A similar procedure is followed in the private sector. *See* 29 U.S.C. § 159 (1970 & Supp. I 1976). NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

20. PA. STAT. ANN. tit. 43, §§ 1101.701-.703 (Purdon Supp. 1981-82); Pa. L.R.B. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975). A similar distinction exists in the private sector. 29 U.S.C. § 158(d) (1970 & Supp. I 1976). For a discussion of the mandatory, permissive, and nonbargainable relationships in the private sector see C.J. MORRIS, THE DEVELOPING LABOR LAW 389-439 (1971).

21. For a survey of this rule under various circumstances encountered in Pennsylvania's public sector see Pa. L.R.B. v. Williamsport Area, 486 Pa. 375, 406 A.2d 329 (1979); Appeal of Cumberland Valley School Dist., 483 Pa. 134, 394 A.2d 946 (1978); Borough of Wilkinsburg v. Sanitation Department, 463 Pa. 521, 345 A.2d 641 (1975); AFSCME v. Pa. L.R.B., 67 Mun. 176 (1975); Red Rose Transit Auth., 12 P.P.E.R. ¶ 12162 (1981); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); Clarion County Comm'rs., 8 P.P.E.R. 106 (1977); Millcreek School Dist., 8 P.P.E.R. 47 (1976); Dallastown Area School Dist., 7 P.P.E.R. 102 (1976); Laurel School Dist., 6 P.P.E.R. 351 (1975); Curwensville Area School Dist., 6 P.P.E.R. 327 (1975); New Brighton Area School Dist., 6 P.P.E.R. 296 (1965); Millersburg Area School Dist., 6 P.P.E.R. 290 (1975); Hickory Township Bd. of Education, 6 P.P.E.R. 222 (1975); Upper St. Clair School Dist., 5 P.P.E.R. 96 (1974); W. Mifflin Area School Dist., 5 P.P.E.R. 51 (1974); Highland Sewer & Water Auth., 4 P.P.E.R. 116 (1974); Reynolds School Bd., 3 P.P.E.R. 228 (1973); Borough of Berwick, 3 P.P.E.R. 183 (1973); City of Phila., 3 P.P.E.R. 143 (1973); *See also* S. Butler County School Dist., 9 P.P.E.R. 46 (1978). In the private sector *see* NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964); NLRB v. Intercoastal Terminal, Inc., 286 F.2d 954 (5th Cir. 1961); Stratford Indus., Inc., 215 N.L.R.B. 682 (1974); Midwest Casting Corp., 194 N.L.R.B. 523 (1971); Eddie's Chop House, 165 N.L.R.B. 861 (1967); Korn Indus., Inc., 161 N.L.R.B. 866 (1966); American Laundry Machinery Co., 107 N.L.R.B. 1574 (1954); Quaker State Oil Ref. Corp., 107 N.L.R.B. 34 (1953).

eral changes in wages, hours, or other terms and conditions of employment.

Impasse is a factual and judgmental matter, requiring an exhaustion of the possibility of reaching agreement.[22] Before public employer unilateral action on a particular matter is permitted, impasse must have been reached on that issue.[23] Under Act 195, this includes resorting to, fully utilizing, and exhausting the Act's impasse resolution mechanisms.[24] After exhausting the Act's impasse resolution mechanisms, the public employer may grant benefits or make other changes that improve the terms and conditions of employment but do not exceed those offered in negotiations.[25] A reduction in benefits is permitted after impasse if this was discussed in

22. Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980). Examples of the factors that evidence impasse in the private sector are set forth in Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *petition for review dismissed*, 395 F.2d 622 (D.C. Cir. 1968). *Taft* is cited in numerous cases dealing with impasse. *See, e.g.*, Supak & Sons v. NLRB, 470 F.2d 998 (6th Cir. 1972); Wantagh Auto Sales, Inc., 177 N.L.R.B. 153; C153 (1969).

Factors that may indicate that an impasse has been reached include bargaining history, the good faith of the parties in the negotiations, the length of negotiations and number of bargaining sessions, the significance of the items to the parties in light of particular bargaining objectives, the absence of movement on open issues, the use of mediation or conciliation when the mediator has split the parties up, the making of a final offer, the absence of counter proposals to such an offer, and the stated positions and understandings of the parties that there is an impasse.

23. Pa. L.R.B. v. Williamsport Area, 486 Pa. 375, 406 A.2d 329 (1979); Appeal of Cumberland Valley School Dist., 483 Pa. 134, 394 A.2d 946 (1978); Red Rose Transit Auth., 12 P.P.E.R. ¶ 12162 (1981); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); City of Phila., 3 P.P.E.R. 143 (1973). For private sector cases *see* Tesoro Petroleum Corp., 192 N.L.R.B. 354 (1971); Laclede Gas Co., 171 N.L.R.B. 1392 (1968).

24. PA. STAT. ANN. tit. 43, §§ 1101.801-.807, 1101.1003 (Purdon Supp. 1981-82). These sections detail the resolution mechanisms followed prior to any lawful strike or to a public employer's unilateral change in employment conditions. The collective bargaining parties are required to submit to, utilize, and exhaust mediation procedures. Fact-finding may also be required by the PLRB; however, binding arbitration is voluntary. After exhausting these impasse resolution procedures, certain public employees may strike and the public employer may impose unilateral changes. For discussions of impasse and the public employer's duty to exhaust impasse resolution procedures prior to making any unilateral changes, *see* Pa. L.R.B. v. Williamsport Area, 486 Pa. 375, 406 A.2d 329 (1979); Appeal of Cumberland Valley School Dist., 483 Pa. 134, 151, 394 A.2d 946, 955 (1978); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Sto-Rox School Bd., 9 P.P.E.R. 127 (1978); Millcreek School Dist., 8 P.P.E.R. 47 (1976). For an article examining the operation of impasse resolution mechanisms *see* 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).

25. Pa. L.R.B. v. Williamsport Area, 486 Pa. 375, 406 A.2d 329 (1979); Appeal of Cumberland Valley School Dist., 483 Pa. 134, 151, 394 A.2d 946, 955 (1978); Red Rose Transit Auth., 12 P.P.E.R. ¶ 12162 (1981); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); City of Phila., 3 P.P.E.R. 143 (1973). In the private sector *compare* Manor Mining & Contracting Corp., 197 N.L.R.B. 1057 (1972), Falcon Tank Corp., 194 N.L.R.B. 333 (1971), and Terry Indus., 188 N.L.R.B. 745 (1971), in which the unilateral increases exceeded pre-impasse proposals, *with* Continental Nut Co., 195 N.L.R.B. 841 (1972), Midwest Casting Corp., 194 N.L.R.B. 523 (1971), and Chemical Producers Corp., 183 N.L.R.B. 141 (1970), in which the increases did not excess pre-impasse proposals.

negotiations.[26] The overall public employer's good faith in negotiations is also relevant in determining the propriety of unilateral public employer conduct allegedly warranted by impasse.[27]

After impasse has been reached, Act 195 permits a public employer to make certain changes in employment conditions. Any unilateral change, however, must be reasonably comprehended within a public employer's pre-impasse proposals. Thus, when good faith bargaining results in impasse and the Act's impasse resolution procedures are utilized and exhausted, a public employer may unilaterally institute changes that are equal to or no more favorable than those offered or approved in the negotiations preceding impasse.[28] This rule is necessary because when further discussions become unproductive, a rule requiring the freezing of employment terms and conditions may impair the governmental services offered and disadvantage the employees.[29] Taxpayers may be adversely affected if the public employer continues to spend funds for services no longer covered by a contract.

Furthermore, permitting unilateral change after impasse does not simply benefit public employers, but provides flexibility in dealing with the union. The union's desire to continue discussion should not indefinitely bind the public employer to maintain the status quo. Unilateral change after impasse is justified not only to possibly break the impasse and resume productive negotiations, but also because the failure of the parties to reach an agreement through good faith negotiations should not permanently restrain the public employer from making changes.[30]

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26. *See* note 23 *supra*. For additional private sector authority *see* Teamsters Local 745 v. NLRB, 355 F.2d 842 (D.C. Cir. 1966); DuPont & Co., 189 N.L.R.B. 753 (1971).

27. Pa. L.R.B. v. Williamsport Area, 486 Pa. 375, 406 A.2d 329 (1979); Appeal of Cumberland Valley School Dist., 483 Pa. 134, 151, 394 A.2d 946, 955 (1978); Borough of Wilkinsburg v. Sanitation Dep't, 463 Pa. 521, 345 A.2d 641 (1975); Red Rose Transit Auth., 12 P.P.E.R. ¶ 12162 (1981); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); Highland Sewer & Water Auth., 4 P.P.E.R. 116 (1974). In the private sector, *see* Molders Local 155 v. NLRB, 442 F.2d 742 (D.C. Cir. 1971).

28. *See* note 21 *supra*.

29. A rule that freezes the terms and conditions of employment appears to directly contradict Act 195's express terms. Section 1101.701 states in part that the "obligation does not compel either party to agree to a proposal or require the making of a concession." PA. STAT. ANN. tit. 43, § 1101.701 (Purdon Supp. 1981-82). A number of commentators have addressed aspects of this doctrine. *See, e.g.*, Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487, 500 (1956); Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1, 20-49 (1977); Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133, 188-89 (1974); Schatski, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470, 495 (1966); Stewart & Engeman, *Impasse, Collective Bargaining and Action*, 39 U. CIN. L. REV. 233, 240-48 (1970); Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769 (1966).

30. Within the private sector, the NLRB has set forth in detail a rationale for post-impasse change in working conditions:

> This freedom of action which the employer has after, but not before, the impasse springs from the fact that having bargained in good faith to impasse, he has satisfied

Realistically, the public employer's action is not "unilateral" because the union may be seeking the concession of at least as much as the public employer granted at impasse. Even though the union is frozen into its bargaining position, this should not preclude the public employer from implementing "implicitly" agreed-upon changes. The announcement of a change is not an erosion of the bargaining obligation or a disparagement of the union's status because the union can claim some credit for the benefit obtained.[31]

Impasse is noteworthy for an additional reason. After impasse, either party may decline to continue negotiations. Because impasse signifies that the parties have exhausted the avenues of bargaining, termination of bargaining cannot be regarded as demonstrating a state of mind against reaching agreement.[32]

It is arguable that impasse should not be necessary to allow the employer to implement an improvement in wages, hours, and conditions of employment that it has already offered the union but which the union has rejected. In such situations, the public employer is at least partially complying with the union's demands, especially if it acted without prejudice to continued negotiations on those matters, did not deprive employees of their rights, and did not disparage or undermine the bargaining agent.[33] A pre-impasse unilateral increase may be possible, provided it is an amount already rejected by the union and is implemented only after notice to and consultation with the union.[34]

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his statutory duty to determine working conditions, if possible, by agreement with his employees. Having fulfilled his obligation to fix working conditions by joint action, he acquires a limited right to fix them unilaterally, that is, he is limited to the confines of his preimpasse offers or proposals. Any other changes he were to institute might, if offered before or after the impasse, have led or lead to progress or success in the collective negotiations; hence unilateral action of this different scope forecloses this possibility, just as would his refusal to consider a proposal, with a violation as apparent in the one instance as in the other. In explaining this result, it is sometimes said that the employer's postimpasse action "breaks" the previous impasse, although it is perhaps more precise and less susceptible of misinterpretation to say that no impasse can be said to have been reached when the reference is to changes never introduced into the collective bargaining arena. Or, applying another familiar formulation, the employer may not be heard to say that had he offered his unilaterally instituted changes to the employees' representative, the resulting negotiations (which could as a result have taken on new directions or scope) would nevertheless have ended in deadlock.

Bi-Rite Foods, Inc., 147 N.L.R.B. 59, 65 (1964).

31. MURPHY, *supra* note 29, at 25-26.

32. Cheney Cal. Lumber Co. v. NLRB, 319 F.2d 375 (9th Cir. 1963).

33. *See* NLRB v. Bradley Washfountain Co., 192 F.2d 144 (7th Cir. 1951).

34. *See* NLRB v. Katz, 369 U.S. 736, 745 n.12 (1962). In *Katz*, the Supreme Court, after finding that a pre-impasse wage increase in excess of that offered the union in negotiations was illegal, stated that "there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low." The Supreme Court cited the court of appeals decision in *Bradley Washfountain*, 319 F.2d 144, 147 (7th Cir. 1951). The *Katz* opinion referred to a hypothetical wage increase granted *after* impasse, but the *Bradley Washfountain* decision encompassed a *pre*-impasse increase, if the increased amount has already been rejected by the union and is implemented only after notice to and consultation with the union.

Not only is the concept of impasse important for unilateral public employer action, it also relates closely to the permissibility or legality of any Act 195 strike. Act 195 altered prior Pennsylvania law by granting public employees a right to strike.[35] Not all employees, however, enjoy this privilege. Furthermore, those who are permitted to strike do not enjoy rights identical to those in the private sector.[36] A legal or permissible Act 195 strike is one by public employees who are statutorily accorded the strike right. The right commences after the use and exhaustion of the impasse procedures.[37] Illegal strikes include all others. Examples of illegal strikes are those occurring (1) by employees not statutorily accorded the right; (2) prior to the existence of any collective bargaining agreement; (3) during the existence of any collective bargaining agreement; or (4) prior to utilizing and exhausting the impasse procedures to be followed before beginning a legal strike.

Prior to engaging in any strike, public employees must utilize and exhaust Act 195's impasse procedures.[38] These impasse procedures include mediation[39] and fact finding.[40] Refusal by either the public employee or the public employer representative to submit to Act 195's impasse procedures is an unfair labor practice[41] and constitutes a refusal to bargain in good faith. A complaint may be filed by either party or by the PLRB.[42] After exhaustion, strikes are not prohibited unless or until they create "a clear and present danger or threat to the health, safety or welfare of the public."[43] This legislative pronouncement indicates willingness to accept certain inconveniences caused by public employee strikes. A strike is allowed,

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The *Katz* court's endorsement is not expressly conditioned upon the existence of an impasse. Nonetheless, the National Labor Relations Board (NLRB) adheres to its' position that unilateral changes made prior to impasse, are tantamount to a refusal to bargain. *See* Alsey Refractories Co., 215 N.L.R.B. 785 (1974).

35. PA. STAT. ANN. tit. 43, §§ 1101.0110-.1010 (Purdon Supp. 1981-82). Act 195 defines a "strike" as:

> [C]oncerted action in failing to report for duty, the wilful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment.

Id. § 1101.301(9). For a discussion of the strike right for Pennsylvania's public employees see [Decker], *supra* note 24.

36. In the private sector, the strike right exists without the constraints imposed in the public sector. For a survey of the private sector strike right and its perimeters, *see* Morris, *supra* note 20, at 517-34.

37. PA. STAT. ANN. tit. 43, §§ 1101.1001-.1003 (Purdon Supp. 1981-82).

38. *Id.* §§ 1001.1002-.1003; *see also* United Transp. Union v. S.E. Pa. Transp. Auth., 22 Pa. Commw. Ct. 25, 347 A.2d 509 (1975).

39. PA. STAT. ANN. tit. 43, § 1001.801 (Purdon Supp. 1981-82).

40. *Id.* § 1001.802.

41. *Id.* § 1001.803; *see also id.* §§ 1001.1201(a)(5), 1001.1201(b)(3).

42. PA. STAT. ANN. tit. 43, § 1001.803 (Purdon Supp. 1981-82).

43. *Id.* § 1001.1003.

however, only after prescribed impasse procedures are utilized and exhausted by certain public employees.

Utilization and exhaustion of the Act's impasse procedures are significant for unions and public employers. Unions must comply with this prerequisite before any legal strike may occur. Similarly, public employers must meet this requirement before any unilateral change in employment conditions can be implemented.

B. Limitations on the Impasse Exception

Limitations exist, however, on the public employer's right to make unilateral changes after impasse. Specifically, these limitations are on (1) the extent of the change—no unilateral change is permitted if it is not included in the proposals offered to the union during negotiations; (2) the context of the change—the impasse must have resulted from good faith bargaining; (3) the manner of the change—the unilateral action must not disparage the employes' bargaining representative or the collective bargaining process; and (4) the effect of the contract's expiration—despite the contract's expiration the unilateral change must still occur during an impasse that results after the Act's impasse procedures have been utilized and exhausted.

1. Extent of Change.—The first limitation is a constraint on public employer action and requires that the subject of the unilateral change must have been discussed during negotiations.[44] During the negotiations in *Appeal of Cumberland Valley School District*,[45] neither party proposed the reduction or elimination of fringe benefits. After the contract's expiration, the public employer unilaterally cancelled the fringe benefits. Because this unilateral change had not been discussed during negotiations, the public employer committed an unfair labor practice.[46]

This limitation includes the extent of the change. If, after impasse occurs regarding wages, the public employer grants to its employees a wage increase *greater* than any offered at the bargaining table, an Act 195 violation results.[47] This limitation on post-impasse

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44. Appeal of Cumberland Valley School Dist., 483 Pa. 134, 394 A.2d 946 (1978); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); Clarion County Comm'rs., 8 P.P.E.R. 106 (1977); Highland Sewer & Water Auth., 4 P.P.E.R. 116 (1974); Reynolds School Bd., 3 P.P.E.R. 228 (1973); City of Phila., 3 P.P.E.R. 143 (1973). In the private sector *see* I.B.S. Mfg. Co., 96 N.L.R.B. 1263, 1268 (1951), *enforcement denied*, 210 F.2d 634 (5th Cir. 1954).

45. 483 Pa. 134, 394 A.2d 946 (1978). *But see* Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980).

46. *Id.*

47. Highland Sewer & Water Auth., 4 P.P.E.R. 116 (1974); Reynolds School Bd., 3 P.P.E.R. 228 (1973). For private sector cases *see* NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949); Horizon Communications Corp., 211 N.L.R.B. 792 (1974).

changes also encompasses unilateral *decreases*.[48] A corollary to the rule is that a public employer may only make unilateral changes to the extent the changes are consistent with rejected offers to the union.[49] An overall impasse will not justify unilateral changes regarding a subject not bargained.[50] For a unilateral change to be valid it cannot involve an item not offered to or bargained over with the union.

Unilateral increases or decreases effected without union discussion constitute a refusal to bargain under Act 195. No discernible justification for unilateral changes exists absent discussion between the parties. A public employer bargaining in good faith must be willing to make concessions and to obtain objectives through collective bargaining rather than use unilateral action as an end justifying the means. If a public employer contemplates placing greater or lesser benefits into effect it should offer them during negotiations. An impasse may be avoided if the public employer makes such an offer in early negotiation sessions. When a public employer effects a unilateral change inconsistent with the position it maintained in negotiations, the employer's intent to reach agreement with the union may be questioned.[51]

2. Context of Change. Public employer unilateral action after impasse is inapplicable if the deadlock results from bad faith or unfair labor practices.[52] For example, a public employer may desire to implement a unilateral change during bargaining. Since this can only be accomplished after impasse, the employer may be tempted to intentionally precipitate an impasse. A public employer cannot take advantage of an impasse and act unilaterally if lawful conduct is

48. Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); Clarion County Comm'rs, 8 P.P.E.R. 106 (1977); Borough of Berwick, 3 P.P.E.R. 183 (1973). For private sector cases *see* Times Herald Printing Co., 221 N.L.R.B. 225 (1975); DuPont & Co., 189 N.L.R.B. 753 (1971).

49. Appeal of Cumberland Valley School Dist., 483 Pa. 134, 394 A.2d 946 (1978); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); Clarion County Comm'rs., 988 P.P.E.R. 106 (1977); City of Phila., 3 P.P.E.R. 143 (1973).

50. Appeal of Cumberland Valley School Dist., 483 Pa. 134, 394 A.2d 946 (1978); Borough of Carlisle, 11 P.P.E.R. ¶ 11172 (1980); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Reynolds School Bd., 3 P.P.E.R. 228 (1973). In the private sector *see* Manor Mining & Contracting Corp., 197 N.L.R.B. 1057 (1972).

51. *See* Murphy *supra* note 29, at 36.

52. Borough of Wilkinsburg v. Sanitation Dep't, 463 Pa. 521, 345 A.2d 641 (1975); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Reynolds School Dist., 9 P.P.E.R. 135 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); Clarion County Comm'rs., 8 P.P.E.R. 106 (1977); Highland Sewer & Water Auth., 4 P.P.E.R. 116 (1974); City of Phila., 3 P.P.E.R. 143 (1973). For private sector cases *see* NLRB v. Herman Sausage Co., 275 F.2d 229 (5th Cir. 1960); NLRB v. Andrew Jergens Co., 175 F.2d 130 (9th Cir. 1949), *cert. denied*, 338 U.S. 827 (1949); Metlox Mfg. Co., 225 N.L.R.B. 1317 (1976); Vanette Hosiery Mills, 114 N.L.R.B. 1107 (1955).

used to reach the impasse.[53] Furthermore, a public employer may not differentiate between union and nonunion members in implementing a unilateral change after impasse.[54] For example, a public employer cannot grant nonunion members a wage increase greater than the increase extended to union members.

3. Manner of Change.—A public employer may not disparage either the collective bargaining process or the union's prestige and authority. For example, a public employer may not make unilateral changes affording greater benefits than originally offered because this undermines the bargaining agent's status and the negotiation process.[55] Similarly, if a public employer precipitates a bargaining impasse through bad faith or another unfair labor practice, its conduct reflects a rejection of the collective bargaining principle or a desire to undermine the union. Undermining the union may result if the unilateral change only affects the union members and not the nonunion members.[56] Although the public employer may effect a unilateral change after impasse, an impasse does not relieve a public employer of all statutory obligations.

4. Contract Expiration. A public employer's opportunity to make unilateral changes in employment conditions is also limited by the contract's expiration. This limitation arises when the contract expires and no extension of the prior contract is negotiated. It also occurs when the extension to a prior contract expires and no additional extensions are bargained. At this point, although no contract exists between the parties to govern the employment relation, the Act's impasse procedures still effect the public employer's ability to make unilateral changes. The mediation and fact finding stages contemplated by the Act as prerequisites to a strike must be utilized and exhausted.[57] Thus, before a public employer can make unilat-

53. Red Rose Transit Auth., 12 P.P.E.R. ¶ 12162 (1981); Norristown Area School Dist., 9 P.P.E.R. 197 (1978); Sto-Rox School Bd., 9 P.P.E.R. 126 (1978); City of Phila., 3 P.P.E.R. 143 (1973). For examples in the private sector *see* Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964); Industrial Union of Marine & Shipbuilding Workers of America v. NLRB, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 894 (1964); Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951), *enforced*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); Akron Novelty Mfg. Co., 224 N.L.R.B. 998 (1976).

54. Appeal of Cumberland Valley School Dist., 483 Pa. 134, 394 A.2d 946 (1978).

55. Highland Sewer & Water Auth., 4 P.P.E.R. 116 (1974); Reynolds School Bd., 3 P.P.E.R. 228 (1973). For private sector cases *see* NLRB v. Crompton-Highland Mills, 337 U.S. 217, 223 (1949); Consumers Co-op. Ref. Ass'n, 77 N.L.R.B. 528 (1948), *enforced*, 180 F.2d 581 (5th Cir. 1950); Dixie Culvert Mfg. Co., 87 N.L.R.B. 554, 555 (1949).

56. Appeal of Cumberland Valley School Dist., 483 Pa. 134, 394 A.2d 946 (1978).

57. *Id.* at 147, 394 A.2d at 955. *See also* PA. STAT. ANN. tit. 43, §§ 1101.801-.802 (Purdon Supp. 1981-82).

Before implementing a public employer unilateral change when contract expiration and extension are involved, Pennsylvania's Unemployment Compensation Law must be considered. PA. STAT. ANN. tit. 43, §§ 751-912.5 (Purdon 1964 & Supp. 1981-82). Unemployment compensation benefits are not available to persons whose unemployment is due to a "strike"

eral changes both the union and employer are placed as relatively equal positions. After exhaustion and utilization of the Act's impasse procedures, the union may strike. If it does not strike, it may be subject to the public employer's unilateral change of employment conditions absent agreement on any extension of the expired contract during the impasse period. Should such a contract extension exist during the impasse period, the public employer is still barred from implementing any unilateral change. In this situation, the contract extension during impasse must expire and the public employer must utilize and exhaust the Act's impasse procedures before implementing any unilateral change.

Consequently, a public employer cannot unilaterally decrease or increase an expired contract's provisions until after bargaining to impasse by utilizing and exhausting the Act's impasse procedures. For example, if a contract containing a wage provision expires, the public employer may not be required to continue wages and the employees may not be required to render services. No wage provision is in effect. If the public employer desires to vary wages from the expired contract, this still cannot be unilaterally implemented unless impasse occurs and the Act's impasse procedures are utilized and exhausted. Likewise, the union may not legally strike until these impasse procedures are utilized and exhausted. If in the interim, however, the public employer accepts the employees services without a contract, it may still be required to remunerate under the old contract.[58] Past practice, status quo, and other considerations may become relevant.

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rather than a "lockout." *Id.* at § 802(d). A "lockout" for which benefits are payable occurs when a public employer does not grant the union's request for a contract extension covering a reasonable period of time under the preexisting terms and conditions of employment. Centennial School District v. Unemployment Compensation Board of Review, — Pa. Commw. Ct. —, 424 A.2d 569 (1981); Chichester School Dist. v. Unemployment Compensation Board, 53 Pa. Commw. Ct. 74, 415 A.2d 997 (1980); McKeesport Area School Dist. v. Unemployment Compensation Board, 40 Pa. Commw. Ct. 334, 397 A.2d 458 (1979); *see also* Vrotney Unemployment Case, 400 Pa. 440, 163 A.2d 91 (1960). This strongly suggests that a contract extension must be permitted for a reasonable period of time when requested by the union. Unilateral change is only permitted after this requested extension expires and the Act's impasse procedures have been exhausted. When the Act's impasse procedures have been exhausted prior to this requested extension, unilateral change may only occur after the extension's expiration, provided that an impasse still exists on the same basis as it existed prior to any requested extension.

58. Various vested obligations may remain under an expired contract. Examples of these vested obligations are vacation benefits, pension rights, and severance pay. For an article discussing the public employer's obligations regarding these vested rights see Decker, *Arbitrability of Public Sector Grievances after Expiration of a Contract*, in 7 J. COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 287 (1978). If a legal strike occurs after the contract expires and Act 195's impasse procedures are exhausted, the public employer may discontinue benefits. The rationale is that Act 195 prohibits the public employer from remunerating public employees in any manner during a strike. PA. STAT. ANN. tit. 43, § 1101.1006 (Purdon Supp. 1981-82); *see also* Hazelton Area Bd. of School Directors, 7 P.P.E.R. 169 (1976).

IV. Conclusion

If the public employer and the union have negotiated a proposed contractual change and if the parties bargain to impasse utilizing and exhausting Act 195's impasse procedures, the employer may implement the change. Absent a legitimate impasse and the failure to bargain the subject of a unilateral change, implementation cannot occur. The rule requiring utilization and exhaustion of the Act's impasse procedures is sound. Both the permanence of unilateral change and the likelihood that the public employer who unilaterally changes benefits does not genuinely desire to reach agreement require various restrictions on the right to implement a unilateral change. These include (1) the extent of the change; (2) the context of the change; (3) the manner of the change; and (4) the contract's expiration. In sum, the public employer's ability to effectuate legitimate unilateral changes after impasse will facilitate negotiations by encouraging the resumption of negotiations and the conclusion of a contract.