UIC Law Review

Volume 12 | Issue 3 Article 2

Spring 1979

# The Permissible Scope of Public Sector Bargaining in Illinois: A Proposed Solution, 12 J. Marshall J. Prac. & Proc. 509 (1979)

Stanley B. Eisenhammer

Robert J. Trizna

# THE PERMISSIBLE SCOPE OF PUBLIC SECTOR BARGAINING IN ILLINOIS: A PROPOSED SOLUTION

STANLEY B. EISENHAMMER* & ROBERT J. TRIZNA**

## INTRODUCTION

The proliferation of public employment on the federal, state and local levels within the last twenty years has been matched by a concomitant growth in public employees' union membership.[1] Public school teachers stand at the vanguard of these organizational activities. For instance, eighty percent of the Illinois public school teachers are covered by collective bargaining contracts.[2]

Despite the prevalence of union membership by public school teachers, only eighteen states have statutes granting to public school teachers the express right to collectively bargain;[3] sixteen states have either failed or refused to enact legislation conferring such right.[4] Illinois follows the minority approach

* Associate, Robbins, Schwartz, Nicholas & Lifton, Ltd., Chicago, Illinois; former law clerk to the Honorable William L. Guild, Illinois Appellate Court, Second District; J.D., University of Illinois, 1973; A.B., Washington University, 1970.

** Law Clerk to the Honorable George N. Leighton, United States District Court, Northern District of Illinois; J.D., The John Marshall Law School, 1978; A.B., University of Notre Dame, 1974.

1. [1976] 645 GOV'T EMPL. REL. REP. (BNA), A-9; [1976] 648 GOV'T EMPL. REL. REP. (BNA), B-21.

2. In 1977, of the 1,012 school districts in the state, 438 had collective bargaining contracts covering teachers. The Illinois Education Association was the exclusive bargaining agent in 350 school districts covering 42,362 full-time teachers; the Illinois Federation of Teachers was the exclusive bargaining agent in 76 school districts, including the Chicago School District covering 34,392 full-time teachers; and independent organizations were exclusive bargaining agents in 12 school districts representing 1,664 teachers. ILLINOIS TEACHERS SALARY SCHEDULE POLICY STUDY 1977-78, ILL. OFFICE OF EDUC. (1978).

3. [1977] IRF-152 GOV'T EMPL. REL. REP. (BNA).

4. *Id.* These states are Arizona, Arkansas, Colorado, Illinois, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming.
It would appear that Ohio should also be included in this group, since the Ohio legislature's failure to override Governor Rhodes' veto of Senate Bill 70 in November, 1975, has resulted in continued reliance upon judicial interpretation of the state's school code in determining the collective bargaining relationship between school boards and teachers, a situation very similar to

which does not legislatively mandate that public sector employers collectively bargain with employees. However, Illinois courts have judicially recognized the authority of local boards of education to bargain on a permissive basis with teachers.[5]

Absent statutory authorization, the prevailing issue in public sector collective bargaining involves the determination of the permissible scope of collective bargaining agreements. The Illinois Supreme Court, in an attempt to delineate the proper scope of these collective bargaining agreements, stated that the governmental powers which are "discretionary" may be neither restricted by a collective bargaining agreement nor delegated to an arbitrator or other third party.[6] In applying the Illinois Supreme Court's decision, the lower Illinois courts have attempted to define the exact contours of the permissible scope of public sector bargaining on a case-by-case approach. However, the frequency of litigation between teachers and school boards indicates that the present *ad hoc* approach to collective bargaining is depriving the public of the certainty necessary in furnishing such an essential governmental service.[7]

---

the one that exists in Illinois. *See* Note, *Collective Bargaining and Grievance Arbitration in Ohio Public Education*, 37 OHIO ST. L.J. 670 (1976) for a useful analysis of the judicial development of collective bargaining rights for Ohio public school teachers.

5. *See* Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966). This year, the Illinois legislature has recognized judicially approved public sector collective bargaining by amending Section 24-12 of the School Code, ILL. REV. STAT. ch. 122, § 24-12 (1979) to permit school boards to alter the statutorily prescribed method for the honorable dismissal of tenured teachers through the collective bargaining process. *See* H.B. No. 1576, 81st Gen. Assm., 1st Sess. (1979).

6. Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979); Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); Illinois Educ. Ass'n v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975). This argument has been adopted by the courts of several other states which, like Illinois, do not have public sector collective bargaining statutes. *See, e.g.*, Greeley Police Union v. City Council, 553 P.2d 790 (Colo. 1976), where the Colorado Supreme Court held that binding arbitration was an unlawful delegation of legislative authority; United Teachers v. Orleans Parish School Bd., 348 So. 2d 232 (La. 1977) Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975), where the Supreme Court of Ohio upheld the validity of grievance arbitration but refused to extend that holding to interest arbitration.

Courts in states possessing public sector collective bargaining statutes have been less reluctant to approve compulsory interest arbitration provisions. *See, e.g.*, City of Biddefor Bd. of Educ. v. Biddefor Teachers Ass'n., 304 A.2d 387 (Me. 1973); Dearborn Fire Fighters Local 412 v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969).

7. Additionally, since public collective bargaining in Illinois is permissive, local school boards may withdraw from negotiations at any time and unilaterally impose contract terms upon the employees. *See* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 487, 315 N.E.2d 634, 639 (1974), in which the court quotes Miller, *The Alice-In-Wonderland World of Public Employee*

The general uncertainty engendered by judicial attempts to delineate the parameters of permissible collective bargaining has caused commentators to recommend that the legislature institute reform measures.[8] Since over forty percent of the Illinois boards of education collectively bargain with local labor associations representing a substantial majority of the teachers, the legal issues involved in this collective bargaining, in the absence of legislative guidance, are still of primary importance.[9] This article will analyze cases that deal with the permissive scope of public employee collective bargaining, and will attempt to present a workable, systematic approach to resolving issues concerning the scope of collective bargaining in the absence of legislative guidelines.

## THE DEVELOPMENT OF COLLECTIVE BARGAINING: NON-DELEGABILITY OF DISCRETIONARY POWERS

The reluctance of Illinois courts to sanction comprehensive public sector collective bargaining stems from the doctrine of non-delegation of statutory authority. This doctrine, as propounded by Judge Dillon in his treatise on municipal corporations, provides that school boards possess only that power expressly or impliedly conferred by the legislature, and thus cannot lawfully delegate or contract away any of that power absent legislative authorization.[10]

Based upon Dillon's Rule, Illinois courts have established the principle that public employers may neither delegate nor restrict their discretionary powers without specific statutory authorization. In *Lindblad v. Board of Education*,[11] the court defined "discretionary powers" as follows:

> [D]iscretionary powers are broad, but they are powers to conduct and manage common schools only. They include the discretionary

*Bargaining*, 50 CHI. B. REC. 223, 225 (1969) in holding that a bargaining situation which leaves the final decision on all negotiated matters up to the school board's discretion presents a condition "which any experienced negotiator in the private sector quickly recognizes as being totally inconsistent with both the concept and the practice of collective bargaining." *See also* Harper College Faculty Senate v. Board of Trustees, 51 Ill. App. 3d 443, 366 N.E.2d 999 (1977); Chicago Div. of Ill. Educ. Ass'n. v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

8. *See* Kiley, *A Public Employee Labor Act in Illinois? Clear Need With No Clear Solution*, 4 LOY. U. CHI. L.J. 309 (1973); Miller, *The Alice-in-Wonderland World of Public Employee Bargaining*, 50 CHI. B. REC. 223 (1969); Schwartz, *Collective Bargaining by School Boards*, 57 ILL. B.J. 548 (1969); Shaw and Clark, *The Need For Public Employee Labor Legislation in Illinois*, 59 ILL. B.J. 548 (1971); Comment, *Teacher Negotiation in Illinois: Current Status and Proposed Reforms*, 1973 U. ILL. L.F. 307 (1973).

9. *See* note 2 *supra*.

10. *See* 1 J. DILLON, MUNICIPAL CORPORATIONS, §§ 237-244 (5th ed. 1911).

11. 221 Ill. 261, 77 N.E. 450 (1906).

> power to employ teachers, fix their salaries and discharge them if they fail to perform their duties in a satisfactory manner, the power to determine in what grade each teacher shall find employment, and the power to determine the length of the school terms, when they shall begin and when they shall end.[12]

The legal controversy concerning collective bargaining between school boards and teachers focuses on attempts to negotiate subjects involving the school board's discretion as expressed or implied in the School Code.[13] Therefore, courts have focused primarily on whether a particular subject was reserved to the board of education's sole discretion by the legislature.

In *Chicago Division, Illinois Education Ass'n v. Board of Education*,[14] the Illinois Appellate Court held that the school board did not need express legislative authority to collectively bargain with teachers.[15] The right of the school board to collectively bargain was a natural extension of the power to enter into employment contracts with individual teachers. The court concluded that collective bargaining was not contrary to public policy[16] as long as it did not involve delegation or restriction of the board's discretionary powers.[17]

Although *Chicago Division* recognized that a board might collectively bargain with its employees, the court held that collective bargaining was permissive.[18] A board is not required to continue negotiations when the parties are confronted with an impasse.[19] In addition, since Illinois does not have a mandatory

---

12. *Id.* at 271, 77 N.E. at 453.

13. ILL. REV. STAT. ch. 122, §§ 1-1 to 35-31 (1979).

14. 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

15. *Id.* at 472, 222 N.E.2d at 251.

16. Unlike public employee collective bargaining the Supreme Court of Illinois has found strikes by public employees including teachers to be against public policy and unlawful. *See* City of Pana v. Crowe, 57 Ill. 2d 547, 316 N.E.2d 513 (1974); Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965).

17. *See* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974), where the court held that a dispute arising out of a requirement that teachers write in students' names on monthly attendance cards, allegedly in violation of the provision of the bargaining agreement that prohibited assigning clerical duties to teachers, was a "minor" dispute; arbitration of such dispute does not constitute a delegation of authority by a board of education in violation of the School Code. *Compare* Louisiana Teachers Ass'n. v. Orleans Parish School Bd., 303 So. 2d 564 (La. App. 1974) *and* Daytona Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975) (in which Louisiana and Ohio courts, in the absence of a collective bargaining statute, upheld collective bargaining agreements as a proper exercise of a school board's discretionary power) *with* Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

18. This principle has continued to be followed in Illinois. *See* Harper College Faculty Senate v. Board of Trustees, 51 Ill. App. 3d 443, 366 N.E.2d 999 (1977).

19. *See* Harper College Faculty Senate v. Board of Trustees, 51 Ill. App. 3d 443, 366 N.E.2d 999 (1977); Board of Educ. v. Johnson, 21 Ill. App. 3d 482,

bargaining statute, the board does not have to bargain on any specific subject,[20] and may insist upon its own terms. *Chicago Division*, however, failed to enumerate which subjects are permissive, thus not rendering a collective bargaining agreement invalid.[21]

Subsequent cases have established certain subjects which may not be included in a collective bargaining agreement. In *Board of Education v. Rockford Education Ass'n.*,[22] the court held that an agreement cannot vest in a third party those discretionary powers which are vested in the board by statute.[23] In *Rockford*, the school board rejected all teacher applications for administrative positions, and the association sought arbitration. Since the board was empowered by the School Code to hire teachers and determine their salaries,[24] the court concluded that the decision concerning the appointment of teachers to administrative positions was not delegable by agreement to an arbitrator.[25] The rationale of *Rockford* was adopted by the Illinois Supreme Court in *Illinois Education Association v. Board of Education*,[26] and *Board of Trustees v. Cook County College Teachers Union, Local 1600*.[27] In both cases, the board and the teachers union entered into a collective bargaining agreement

315 N.E.2d 634 (1974); Chicago Div. of Ill. Educ. Ass'n. v. Board of Ed., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

20. *See, e.g.*, IND. CODE ANN. §§ 20-7.5-1-4, -5 (Burns Supp. 1975), which makes bargaining mandatory as to "salary, wages, hours, and salary and wage related fringe benefits" while permitting bargaining as to, inter alia, textbook selection, student discipline and class size.

21. *Compare* Board of Educ. of Union Free School Dist. No. 3 v. Assoc'd Teachers of Huntington, Inc., 30 N.Y.2d 122, 282 N.E.2d 109 (1972), where the court liberally interpreted N.Y. CIV. SERV. LAW §§ 200 *et seq.* (McKinney 1964) (commonly known as the Taylor Law) to grant broad mandatory bargaining obligations *with* ME. REV. STAT. ANN. tit. 26, 965(1)(c) (Supp. 1973), which limits the scope of bargaining to mandatory subjects only.

22. 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972).

23. *Id.* In *Rockford*, the Appellate Court relied upon *Lindblad* in holding that a collective bargaining agreement may not restrict nor delegate to a third party discretionary powers of the school board.

24. ILL. REV. STAT. ch. 122, § 10-20.7 (1969) (current version at ILL. REV. STAT. ch. 122, § 10-20.7 (1979).

25. The Illinois courts, however, have long sanctioned arbitration as a means to resolve disputes arising out of valid and enforceable provisions of a public contract. School Dist. No. 46 v. Del Bianco, 68 Ill. App. 2d 145, 215 N.E.2d 25 (1966). The appellate courts first recognized use of binding arbitration in public-sector collective bargaining contracts in Board of Educ. v. Champaign Educ. Ass'n., 15 Ill. App. 3d 335, 304 N.E.2d 138 (1973) and expressly approved its use in Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974). The Illinois Supreme Court gave its express approval of binding arbitration in Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) and Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979).

26. 62 Ill. 2d 127, 340 N.E.2d 7 (1975).

27. 62 Ill. 2d 470, 343 N.E.2d 473 (1976).

which included a provision requiring the evaluation of non-tenured faculty members before a teacher could be discharged. In *Illinois Education Association*, the court held that the board could discharge a teacher without complying with the terms of the collective bargaining agreement because the School Code and Teacher Tenure Law vested in the school board the authority to appoint and terminate teachers' employment contracts.[28] A contrary holding would result if a discretionary power of the board was being restricted by a collective bargaining contract. Relying on *Illinois Education Association*, the court in *Board of Trustees*, held that non-tenured teachers were properly discharged, even though the evaluation provisions of the bargaining agreement were violated. The court invalidated the arbitrator's award which had required the rehiring of the dismissed teachers. The court held that the Board's power to appoint teachers was discretionary and non-delegable. Thus, the arbitrator had no authority to award an employment contract as a remedy for a breach of the collective bargaining agreement.[29]

In *Board of Trustees*, the court also found that a contractual provision requiring the allocation of "extra work" assignments on a rotational basis was enforceable as not involving a discretionary non-delegable power of the Board of Trustees. The court held that the Board retained the authority to select extra courses and to offer rotational employment only to teachers it had determined to be qualified.

## THE SCOPE OF COLLECTIVE BARGAINING: AN ALTERNATIVE APPROACH

Illinois courts have found the discretionary power of a board

28. ILL. REV. STAT. ch. 122, § 24-11 (1975) (current version at ILL. REV. STAT. ch. 122, § 24-11 (1979)). The court held that the Teacher Tenure Law "created a liability where none would otherwise exist and must, therefore, be strictly construed." 62 Ill. 2d at 130, 340 N.E.2d at 9. As a result of strictly construing the Teacher Tenure Law, the court was unwilling to recognize an implied power in the board of education to modify the procedure for teacher termination.

29. States with collective bargaining statutes are not immune to the difficulties and inconsistencies of determining the proper scope of bargaining. *Compare* Board of Educ., Great Neck Union Free School Dist. v. Areman, 41 N.Y.2d 527, 362 N.E.2d 943 (1977), where the Court of Appeals of New York upheld a permanent stay of arbitration on the ground that the subject of the arbitration, inspection of teacher personnel files by the board of education, was within the ambit of the non-delegable statutory duty of the board to employ qualified teachers; *with* Board of Educ., Bellmore-Merrick Central High School Dist., v. Bellmore-Merrick United Secondary Teachers, Inc., 39 N.Y.2d 167, 347 N.E.2d 603 (1976), where the Court of Appeals of New York upheld an arbitrator's order of temporary reinstatement of a probationary teacher for the purpose of an evaluation in accordance with procedures set forth in the collective bargaining agreement.

of education sufficiently amorphous to encompass almost all areas of teacher employment.[30] Under *Lindblad v. Board of Education*, virtually any power can be termed "discretionary" and hence non-delegable. However, courts have found instances where the board's discretionary power has been properly subject to a collective bargaining agreement.[31] The court's inability to clearly demarcate the proper scope of collective bargaining indicates a need for an alternative approach. Illinois Supreme Court decisions reveal that the scope of collective bargaining agreements should focus upon three issues:

(1) Does the collective bargaining agreement provision contravene either public policy, or an express or implied provision of the School Code or other applicable statute;[32]

(2) When the collective bargaining agreement provision involves

30. *See, e.g.*, Board of Educ., Valley View Community Unit School Dist. No. 365 v. Schmidt, 64 Ill. App. 3d 513, 381 N.E.2d 400 (1978) (retroactive pay increase to non-qualified teacher pursuant to contract is unlawful and hence, not a matter for arbitration); Board of Educ. v. Murphy, 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978) (provision of collective bargaining agreement setting a minimum number of sabbatical leaves held unenforceable as exceeding board's discretionary powers); Harper College Faculty Senate v. Board of Trustees, 51 Ill. App. 3d 443, 366 N.E.2d 999 (1977) (recognition clause of collective bargaining contract cannot require the Board of Trustees to bargain); Weary v. Board of Educ., 45 Ill. App. 3d 182, 360 N.E.2d 1112 (1977) (school board's power to control its budget, fix salaries of its employees, apply funds to payments of deficits and allocate funds for particular educational purposes is discretionary and not the proper subject of bargaining).

31. *See, e.g.*, Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979); Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) (class assignments); Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977) (fixing of teachers' salaries); Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974) (minor classroom duties); Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973) (intra-district transfers).

Other courts have attempted to limit the harshness of a strict application of the discretionary non-delegable doctrine by characterizing certain disputes arising from the collective bargaining agreement (and, presumably, the actual bargaining subjects themselves over which the disputes arise) as "minor" and, therefore, arbitrable without violating the non-delegability standard. *See, e.g.*, Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974), where the court, while upholding the arbitrability of a grievance, recognized that "[t]he problem inherent in our deciding that certain 'minor' disputes are arbitrable is that [legislative] standards are necessary to determine which disputes are minor" and that "it becomes impossible in the abstract to contemplate which contract disputes will be minor in nature and therefore arbitrable." *Id.* at 492, 315 N.E.2d at 642.

32. *See, e.g.*, Illinois Educ. Ass'n. v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975), where the collective bargaining agreement provision which required evaluation prior to dismissal of a non-tenured teacher was contrary to teacher tenure law and therefore unenforceable. *Compare* Board of Educ. v. Chicago Teachers Union, 26 Ill. App. 3d 806, 326 N.E.2d 158 (1975) (two year collective bargaining agreement violated statute concerning necessity of prior appropriations and was therefore void) *with* Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977) (five

a discretionary power of the board of education, has the board established adequate standards governing the exercise of that power;[33] and

(3) Is there an adequate enforceable remedy for a breach of the collective bargaining agreement.[34]

### *Violation of a Statute*

Most courts which have considered the permissible scope of collective bargaining have recognized that the agreement may not contravene a School Code provision.[35] Collective bargaining provisions invalidated because of violation of the School Code include a two-year bargaining agreement which violated the School Code requirement concerning the appropriation of funds

---

year collective bargaining contract held valid where no statutory or case law restriction applied).

33. *Compare* Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977) (collective bargaining provision requiring annual teachers' salary adjustment based upon Consumer Price Index upheld as valid exercise of board's discretionary power to fix teacher salaries) *and* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) (collective bargaining provision requiring "extra work" assignments to be offered to previously board-determined qualified teachers upon a rotational basis upheld as valid exercise of board's discretionary power to assign teachers) *with* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974) (determination of teacher's qualifications for purposes of involuntary transfer to another school held to be discretionary power of the board and non-delegable to an arbitrator).

34. *See, e.g.*, Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) (authority to award employment contracts or order reevaluation of teacher's qualifications as a remedy for violation of collective bargaining agreement rested exclusively with board of education and could not be delegated to an arbitrator).

35. *See, e.g.*, Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974). The court held: "Thus we believe that only terms in collective bargaining agreements which are not in contravention of the [School] Code are arbitrable." *Id.* at 492, 315 N.E.2d at 642. Other jurisdictions without collective bargaining statutes have recognized similar statutory limitations. In Dayton Classroom Teachers Ass'n. v. Dayton Board of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975), the Ohio Supreme Court reached a similar conclusion in upholding a binding grievance arbitration provision of a collective bargaining agreement. A Louisiana Appellate Court likewise utilized that rationale in reversing a lower court's decision requiring arbitration for grievances related to teacher evaluation. United Teachers v. Orleans Parish School Board, 348 So. 2d 232 (La. App. 1977). In jurisdictions with collective bargaining statutes, the scope of collective bargaining is usually limited only by matters of inherent managerial policy, such as hiring and firing of employees, budgetary allocations, etc. *See, e.g.*, HAWAII REV. STAT. § 89-9(d)(1970); PA. STAT. ANN. tit. 43, § 101.702 (Purdon Cum. Supp. 1979). Such states, however, are still confronted by the problem of determining what terms and conditions fall under the heading of "inherent managerial policy," although both New Jersey and New York City have bargaining laws that contain a procedure for resolving disputes over the scope of bargaining. N.J. STAT. ANN. § 34:13A-5.4(d) (West Cum. Supp. 1977); N.Y.C. AD. CODE § 1173-5.0(a)(2) (1975). *See also* Tener, *The Public Employment Relations Commission: The First Decade*, 9 RUT. CAM. L.J. 609 (1978).

prior to committing them to specific uses;[36] a school term which was shorter than the "minimum term" required by statute.[37] Similarly, the courts have invalidated contractual provisions requiring prior school board evaluations of probationary teachers before non-renewal of their contracts, because these provisions were inconsistent with the statutorily prescribed procedures for teacher dismissals.[38]

In contrast, those contractual provisions upheld by the courts were deemed consistent with the School Code and case law involving board powers.[39] Provisions that were upheld included multi-year collective bargaining contracts which were neither prohibited by statute nor inconsistent with existing case law;[40] and procedures defining and limiting teachers' monthly attendance-taking duties, because "there is no statutory language invalidating its inclusion in the agreement nor governing its resolution."[41]

---

36. 26 Ill. App. 3d 806, 326 N.E.2d 158 (1975); ILL. REV. STAT. ch. 122, § 34-49 (1969) (current version at ILL. REV. STAT. ch. 122, § 34-49 (1979)).

37. 26 Ill. App. 3d 172, 325 N.E.2d 43 (1975); ILL. REV. STAT. ch. 122, § 10-19 (1979). *See also* Board of Educ. v. Schmidt, 64 Ill. App. 3d 513, 381 N.E.2d 400 (1978) (retroactive pay increase to unqualified teacher as required by contract is unlawful and hence not a matter for arbitration).

38. Illinois Educ. Ass'n. v. Board of Educ. 62 Ill. 2d 127, 340 N.E.2d 7 (1975); Wesclin Educ. Ass'n. v. Board. of Educ., 30 Ill. App. 3d 67, 331 N.E.2d 335 (1975). Under ILL. REV. STAT. ch. 122, § 10-22.4 (1971) (current version at ILL. REV. Stat. ch. 122, § 10-22.4 (1979)), the school board's authority includes the power to "To dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause and to dismiss any teacher, whenever, in its opinion, the interests of the school require it, subject, however, to the provisions of Sections 24-10 to 24-15, inclusive. Marriage is not a cause of removal." *See* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); ILL. REV. STAT. ch. 122, §§ 24-11, 12 (1979). Additionally, the operation of an otherwise valid contractual provision cannot violate the public policy of the state. Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979).

39. Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) (allocation of extra work assignments); Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977) (multi-year contracts with salary provisions are tied to a cost of living index); Board of Trustees v. Cook County College Teachers Union, 55 Ill. App. 3d 435, 371 N.E.2d 66 (1977), *rev'd. on other grounds*, 74 Ill. 2d 412, 386 N.E.2d 47 (1979) (allocation of extra work assignments); Deizman v. Board of Educ., 53 Ill. App. 3d 1050, 369 N.E.2d 257 (1977) (definition of sick leave); Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974) (procedure for taking attendance); Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973) (intra-district transfers).

40. Libertyville Educ. Ass'n. v. Board of Educ. 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977). The court went on to hold that salary provisions of the contract that were tied to a cost of living formula did not involve an impermissible restriction of a discretionary power. *See* text accompanying note 48-49 *infra*.

41. Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634. The court framed the issue as follows:

> What concerns us here, consistent with the above portions of this

### *Adequacy of Standards*

A particular contractual provision may satisfy the statutes, yet violate the second of the three-part test—adequate standards for the exercise of the board's discretionary power. The board's discretionary power may be restricted in two ways. First, the contractual provision may require that the board take certain procedural steps before exercising its power (procedural restriction). An example of a procedural restriction is a requirement that prior to transferring a teacher, a school board evaluate a teacher, give the teacher notice, and state reasons for the transfer.[42] Second, a contractual provision may require the school board to exercise its power in a certain manner (substantive restriction). A substantive restriction would be a requirement that a school board determine a teacher's qualifications by means of certain guidelines prior to making an involuntary transfer.[43]

Procedural restrictions have been upheld unless they violate the School Code.[44] These restrictions only add a condition precedent to the exercise of a discretionary power; they do not restrict the power itself.[45] The board remains free to exercise its

---

opinion, is whether the grievance involved is arbitrable as a 'minor' dispute contemplated by the express terms of the contract, or whether arbitration is precluded because the specific grievance is governed by a provision of the School Code (by our definition, therefore, not a 'minor' dispute).

and concluded:

There being no governing statutory authority and the submission to arbitration not being a delegation of the plaintiff's duties as provided for by statute, the dispute was one, certainly minor in nature, that could have been submitted to arbitration pursuant to a collective bargaining agreement.

*Id.* at 495, 315 N.E.2d at 644. *See also* Deizman v. Board of Educ., 53 Ill. App. 3d 1050, 369 N.E.2d 257 (1977) (definition of sick leave consistent with statute)

42. *See* Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973).

43. *See* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

44. *Compare* Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973) (teacher evaluation requirements imposed upon the board of education by the collective bargaining agreement are neither a delegation nor limitation of the statutory duties of the board, since these requirements merely serve to supplement the Teacher Tenure Act with considerations of fundamental fairness) *with* Illinois Educ. Ass'n. v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975) (Teacher Tenure Law sets out express requirements for dismissal of probationary teachers that could not be restricted or expanded by the collective bargaining agreement).

45. *Compare* Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d at 228, 304 N.E.2d at 519 (1973) *with* Lockport Area Special Educ. Coop. v. Lockport Area Special Educ. Coop. Ass'n., 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975), where the court held that a school board's collective bargaining agreement providing both for the dismissal of teachers only for "just cause"

discretion. The contractual provision merely establishes the procedure which must be followed in order to exercise the power.[46]

In contrast to procedural restrictions, provisions imposing substantive restrictions upon the school board's discretion are invalid unless governed by an adequate, board-established standard for the exercise of that power. The rationale underlying this policy is that the board, by agreeing to use such a standard, has bound itself as to how it will exercise its discretion in the future. The standards also prevent courts and arbitrators from exercising unbridled discretion in substitution of the board's discretion. The court or arbitrator's decision is limited to applying the same standards as would have been applied by the board.[47]

A substantive restriction governed by an adequate, board-established standard was expressly approved in *Libertyville Education Ass'n v. Board of Education, School District No. 70, Lake County*.[48] In *Libertyville*, the substantive restriction was a multi-year contract with an automatic adjustment of teachers' annual salaries based upon fluctuations in the Consumer Price Index. The Illinois Appellate Court sustained the provision, stating: "Far from delegating any duty, the Board performed its duty to fix teachers' salaries, by agreeing that the teacher would receive a certain specific base pay, with annual adjustments approximately reflective of the cost of living . . . ."[49] An opposite result was reached in *Weary v. Board of Education*,[50] where the court struck down a provision calling for future salary increases which were not tied to any specific guidelines. In *Weary*, the board agreed to allocate a portion of a projected increase in state aid for increased salaries, fringe benefits and other budget items

---

and the submission of the issue of "just cause" to binding arbitration was an unlawful delegation of discretionary power, since the determination of whether "just cause" exists is "the very issue at the heart of the exercise of the Board's discretion," the restrictions imposed by the collective bargaining agreement were substantive rather than procedural. *Id.* at 794, 388 N.E.2d at 465.

46. It should be noted, however, that a contractual provision even though in harmony with the School Code, may be unenforceable because the relief requested cannot be awarded. *See* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976), where the Illinois Supreme Court held that an arbitrator was without authority to award an employment contract or require a reevaluation of a teacher's performance as a remedy for an alleged violation of the collective bargaining agreement.

47. *See* Comment, *Non-Salary Provisions in Negotiated Teacher Agreements: Delegation and the Illinois Constitution, Article VII, Section 10*, 24 DEPAUL L. REV. 731, 736-41 (1975).

48. 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977).

49. *Id.* at 509, 371 N.E.2d at 681.

50. 46 Ill. App. 3d 182, 360 N.E.2d 1112 (1977).

in accordance with a salary schedule to be prepared and submitted by the union in the future.[51] The *Weary* court held:

> The union thus is granted the Board's power and discretion to determine by what amount specific salaries shall be given. This portion of the agreement does not then result in establishing pay increases but instead results in a delegation to the union of the Board's duty to fix teachers' salaries.[52]

In *Board of Education v. Johnson*,[53] the court similarly invalidated a contractual provision covering involuntary transfers of teachers because of inadequate standards. The provision required that as part of its decision in transferring any teacher, the school board take into account the teacher's qualifications. The court found that under the agreement the school board had surrendered its power to transfer teachers without providing any specific guidelines from which an arbitrator could determine which teacher was best "qualified."[54] Since it was solely within

---

51. The contractual provision stated:

> Article XIX—Salaries
>
> Local 1220 and District 189 agree that $950,000.00 of any increase in state aid in the year 1969-70 shall be used to decrease the projected deficit, or liability, of the District; that 65% of the remainder of any increase in state aid shall be used as designated by Local 1220 for increased salaries and fringe benefits for persons represented by Local 1220 in accordance with a salary schedule to be submitted hereafter by Local 1220 and/or for any other budget item as designated by Local 1220.
>
> Should the School Board fail to use said $950,000.00 for the above purpose, then the persons covered by this Agreement shall receive 65% of that part of said sum not so used as a retroactive pay increase as designated by Local 1220.

*Id.* at 183, 360 N.E.2d at 1113.

52. *Id.* at 185, 360 N.E.2d at 1114-15. Interestingly, with respect to the portion of the contractual provision which permits the union to allocate a portion of the increase for budgetory items other than salaries and fringe benefits, the court intimated that such provision would be invalid even if the board had agreed upon specific dollar amounts to allocate enumerated budget items. Thus, this decision may represent an additional judicial requirement concerning the validity of provisions of collective bargaining agreements; the contractual provisions must directly affect the employees (*e.g.*, salaries, hours and the amorphous "working conditions"). For example, a collective bargaining agreement which requires the board to use specific textbooks at certain grade levels would be held invalid for this reason.

53. 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

54. The contract provision did contain the following section concerning teacher qualifications:

> ARTICLE IV
>
> Section 2. It is agreed that:
>
> (b) When involuntary transfer or reassignment is necessary, volunteers from those teachers affected will be transferred or reassigned first. A teacher's qualificiation, length of service in School District 111 and personal preference shall be major criteria in determining such transfers or reassignments.
>
> (c) The administration, in interpreting teacher qualifications, shall use the following guidelines:
>
> 1. Certification;

the board's discretion to determine teacher qualifications, delegation of this discretion to an arbitrator without adequate standards was impermissible.[55]

A distinguishable result was reached in *Board of Trustees v. Cook County College Teacher's Union*,[56] which involved a provision restricting the board's discretionary power over teacher assignments. The provision required the board to make assignments for summer school classes on a rotational basis among those teachers considered qualified by the board. Since the arbitrator was required to follow the set rotational system in selecting which of the qualified teachers would be allowed to teach, and the board was the sole determiner of which teachers were "qualified," the decision did not rest with the arbitrator.[57]

A collective bargaining agreement may therefore restrict the board's discretionary power provided the restriction neither contravenes the School Code nor lacks an adequate, board-established standard for the exercise of the power.[58] In theory, these standards prevent the actual delegation of discretionary power to a third party (arbitrator). In practice, the arbitrator who interprets and enforces the agreement is performing a ministerial function, since he is obligated to adhere to the board-established guidelines.[59]

---

2. Area of specialization (including degrees, research, publications, etc.);
3. Pertinent experience (educational and vocational); and
4. Teacher's ability as reflected by the whole of the teacher's written evaluation in the district.

*Id.* at 484, 315 N.E.2d at 637 n.4.

55. The section of the collective bargaining agreement left the arbitrator with too much discretion to determine which teachers were qualified for purposes of involuntary transfers. The arbitrator is required to make a value judgment of a teacher's ability under IV(c), as well as balance all four factors in arriving at his decision. *See* Murphy v. Board of Educ., 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978).

56. 62 Ill. 2d 470, 343 N.E.2d 473 (1976).

57. Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979). In both cases, the Illinois Supreme Court held that for disputes involving a set rotational assignment of extra work among teachers to be arbitrable, the school board must retain the authority both to select the extra courses and to offer the extra work only to teachers it had determined to be qualified to do the assigned work and the rotational system does not violate public policy.

58. The standards themselves must not violate the School Code, *see* Murphy v. Board. of Educ., 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978), nor the public policy of the state, *see* Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979).

59. *See* Comment, *Non Salary Provisions in Negotiated Teacher Agreements: Delegations and the Illinois Constitution, Article VII, Section 10*, 24 DEPAUL L. REV. 731 (1975).

*Availability of a Remedy*

A collective bargaining agreement may satisfy both the criteria of compliance with the statutes and adequacy of standards, yet fail because a remedy for a breach of a particular provision of the agreement is unavailable. Obviously, a contractual provision is of little value if there is no remedy by which compliance can be enforced. This issue will generally arise when a procedural restriction is involved, such as a requirement that the school board notify a teacher prior to involuntary transfer, or that it give notice to all teachers when there is a job vacancy. Should the board fail to comply with the procedural restriction, the aggrieved party normally will seek relief from the arbitrator. When a board fails to give notice of an involuntary, transfer the relief generally requested is invalidation of the transfer. Concerning the failure to notify of a job vacancy, the requested remedy involves appointment of the teacher to the vacancy. In these instances, however, the arbitrator is powerless to award the relief requested because the matters are committed to the discretion of the school board.[60]

The inability of an arbitrator to fashion a remedy was highlighted by *Board of Trustees v. Cook County College Teachers Union*,[61] where the collective bargaining agreement specified that the school board would receive advice and recommendations from the faculty before deciding whether to rehire non-tenured teachers. The board failed to rehire eight teachers without faculty input. The teachers union filed a grievance and a request to submit to binding arbitration. The Illinois Supreme Court, relying on *Illinois Education Ass'n. v. Board of Education*,[62] held that the arbitrator could not reverse the school board's decision and rehire the teachers. The court reasoned that "the Board's duties in appointing teachers are non-delegable, and it follows therefrom that the arbitrator is without authority to award an employment contract as a remedy for a violation of a collective bargaining agreement."[63]

Although *Board of Trustees* relied on *Illinois Education*

60. Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976). *Contra*, Lockport Area Special Educ. Coop. v. Lockport Area Special Educ. Coop. Ass'n., 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975); Classroom Teachers Ass'n. v. Board. of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973). In contrast, violations of substantive provisions may be enforced by the award of monetary damages, Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976), or ordering the board to comply with the contractual provision. *See* Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977).

61. 62 Ill. 2d 470, 343 N.E.2d 473 (1976).

62. 62 Ill. 2d 127, 340 N.E.2d 7 (1975).

63. *Id.* at 476, 343 N.E.2d at 476.

*Ass'n.* in reaching its decision, there is an important distinction between the two cases. *Illinois Education Ass'n.* held that the evaluation procedures provision for dismissal of non-tenured teachers conflicted with the tenure section of the School Code.[64] *Board of Trustees*, however, involved the Community College Act, which did not prescribe the procedure for awarding tenure, leaving authority to establish such procedures to each local community college.[65] Thus, the evaluation procedure in *Board of Trustees* did not conflict with any statutory provision and therefore, should not have been automatically invalidated.[66] The court, however, construed the Community College Act to require the Board of Trustees to be the sole decision maker in hiring, dismissing and promoting teachers and invalidated the arbitrator's award of reinstatement.

Procedural restrictions may be enforced if the remedy does not involve the exercise of the board's discretionary power.[67] This may be accomplished by merely requiring the board to follow the agreed upon procedure. For example, the arbitrator could order the board to adhere to a pretransfer evaluation procedure under the contract if it could be accomplished without delaying the transfer of the employee.[68] This procedure, however, may be so unsatisfactory as to render the contractual provision unenforceable. Contractual provisions requiring notice

64. ILL. REV. STAT. ch. 122, §§ 24-11 -12 (1979).

65. ILL. REV. STAT. ch. 122, §§ 10-30, 10-32 (1979).

66. Additionally, since the evaluation procedures were merely procedural restrictions, they did not restrict the board's exercise of its discretionary power to hire and fire teachers. Nevertheless, the Illinois Supreme Court may view any restriction on a board's power to hire or fire as *per se* unenforceable. In *Board of Trustees v. Cook County College Teachers Union*, the Illinois Supreme Court indicated that the evaluation clause is not enforceable. The court held:

> The trial court's memorandum opinion, while prohibiting the arbitrator from renewing the teaching contract, indicated that the arbitrator could require a reevaluation in accordance with the terms of the collective bargaining agreement. That conclusion, in our judgment is incompatible with our opinion in *Illinois Education Association.* Since we held nonrenewal of the teachers' contracts valid even though accomplished without the prior performance evaluation, it is clear that the evaluation provision is not enforceable against the Board.

62 Ill. 2d at 476, 343 N.E.2d at 476.

67. *Cf.* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) (class assignments); Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977) (fixing teachers' salaries).

68. The strong language in Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976) concerning the board of education's discretionary non-delegable power to hire and fire its employees, however, may prevent courts from requiring compliance with any procedural restrictions affecting a board of education's power to hire and fire employees even if the arbitrator's award does not require the board to hire or fire employees.

before transfer or classroom evaluation before dismissal, become mooted issues if the teacher has been transferred or dismissed before the arbitrator reaches a decision. Not all remedies for procedural restrictions are rendered moot by the passage of time. A provision requiring a hearing prior to transfer may be as effective after the transfer as before it. In other instances, the injured teacher may receive adequate compensation in damages for breach of a procedural restriction.[69]

Individual elements of this suggested three-part test have previously been applied by Illinois courts in reviewing the validity of particular provisions of collective bargaining agreements. Application of the entire three-part test, however, would provide more consistency with prior decisions and would establish a workable alternative when deciding whether a particular subject is permissible in a collective bargaining agreement. To illustrate the workability and advantages of the three-part test in determining the scope of bargaining, the remainder of this article will apply the test to contractual provisions frequently contained in Illinois teacher collective bargaining contracts.

## DETERMINATION OF THE SCOPE OF COLLECTIVE BARGAINING

### *Salary and Fringe Benefits*

Salaries and fringe benefits are permissible subjects of collective bargaining. While a school board's power to set salaries is discretionary,[70] courts have upheld the validity of contractual or policy provisions which determine the compensation of a school board's employees.[71] These provisions have been struck down only where they violate an express provision of the School Code,[72] the public policy of the state,[73] or result in a complete

69. *See* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); *cf.* Bessler v. Board of Educ., 69 Ill. 2d 191, 370 N.E.2d 1050 (1977). In *Bessler*, the supreme court refused to require a board of education to rehire a non-tenured teacher whom the board had improperly dismissed because of a failure to give the appropriate statutory notices. The court, however, permitted an award of money damages. *See also* Burke v. Brown, 40 N.Y.2d 264, 353 N.E.2d 367 (1976) (city not required to rehire dismissed fire fighters in the throes of financial crisis, although it is a permissible subject for bargaining).

70. *See generally* Harper College Faculty Senate v. Board of Trustees, 51 Ill. App. 3d 443, 366 N.E.2d 999 (1977).

71. Board of Trustees v. Cook County College Teachers Union, 55 Ill. App. 3d 435, 371 N.E.2d 66 (1977), *rev'd on other grounds*, 74 Ill. 2d 412, 386 N.E.2d 47 (1979); Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977); *see* Littrell v. Board of Educ., 45 Ill. App. 3d 690, 360 N.E.2d 102 (1977); Davis v. Board of Educ., 19 Ill. App. 3d 644, 312 N.E.2d 335 (1974).

72. Board of Educ., v. Schmidt, 64 Ill. App. 3d 513, 381 N.E.2d 400 (1978); Board of Educ. v. Chicago Teachers Union, 26 Ill. App. 3d 806, 326 N.E.2d 158 (1975).

73. Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979).

delegation of board power without adequate standards.[74] Courts have approved compensation schedules which tie salaries to the cost-of-living index,[75] length of experience[76] or academic training,[77] and which are effective for a multi-year term.[78] These factors are considered adequate standards for the exercise of the board's discretionary power to fix salaries.[79]

*Weary v. Board of Education*[80] is the only Illinois decision invalidating a salary provision as an improper delegation of a discretionary power. In *Weary*, the final salaries were to be set at the discretion of the union in accordance with a salary schedule submitted by the union; the schedule needed no board approval to be effective. While *Weary* is an extreme situation, it provides a caveat for fringe benefit provisions. Its reasoning leads to the conclusion that for a provision requiring a board of education to donate a specified sum per employee to a pension or health fund to be valid, the plan must specify the plan administrator and the exact benefits and terms of the plan.

### *Hiring and Dismissal*

Neither procedural nor substantive restrictions upon the board of education's powers to hire, promote, grant tenure or dismiss are generally considered permissible subjects of bargaining. Illinois courts have invalidated almost every contrac-

74. Weary v. Board of Educ., 46 Ill. App. 3d 182, 360 N.E.2d 1112 (1977).

75. Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977).

76. Littrell v. Board of Educ., 45 Ill. App. 3d 690, 360 N.E.2d 102 (1977); Davis v. Board of Educ., 19 Ill. App. 3d 644, 312 N.E.2d 335 (1974).

77. *Cf.* Richards v. Board of Educ., 21 Ill. 2d 104, 171 N.E.2d 37 (1961) (teacher may not contend that a salary schedule instituted by the board based on teachers further study violates his tenure).

78. Libertyville Educ., Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977).

79. *Id.* (cost-of-living index does not restrict a discretionary power of the Board); Board of Trustees v. Cook County College Teachers College, 74 Ill. 2d 412, 386 N.E.2d 47 (1979) (rotational system for earning extra compensation does not restrict a discretionary power of the board. Payment of salaries based upon such factors as length of experience and academic training also does not violate the School Code. The minimum salary provision of the School Code recognizes payment of salaries on the basis of experience and academic training); *see* ILL. REV. STAT. ch. 122, § 24-8 (1979). The validity of multi-year contracts depends upon the applicable provisions of the School Code. *Cf.* Libertyville Educ. Ass'n v. Board of Educ. 56 Ill. App. 3d 182, 371 N.E.2d 676 (1977) *with* Board of Educ. v. Chicago Teachers Union, 26 Ill. App. 3d 806, 326 N.E.2d 158 (1975). The arbitrator can enforce these valid contractual provisions by an award of back pay. *See* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d at 479-82, 343 N.E.2d at 477-79 (1976).

80. 46 Ill. App. 3d 182, 360 N.E.2d 1112 (1977).

tual provision involving these discretionary powers.[81] Any restriction of the board's power in this area conflicts with an express or implied provision of the School Code or other statute.[82]

A school board's power to hire teachers is virtually unrestricted; the only limitations being the hiring of properly certified teachers[83] and a prohibition from unlawful discrimination.[84] Nonetheless, any contractual restriction on the board's power to hire, such as a requirement to fill a vacancy or hire a specified number of teachers, will normally be unenforceable.[85] Substan-

---

81. *See, e.g.*, Board of Educ. v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); Illinois Educ Ass'n. v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975); Lockport Area Special Educ. Coop. v. Lockport Area Special Educ. Coop. Ass'n., 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975); Wesclin v. Board of Educ., 30 Ill. App. 3d 67, 331 N.E.2d 335 (1975); Board of Educ. v. Rockford Educ. Ass'n., 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972).

82. Illinois Educ. Ass'n. v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975); Lockport Special Educ. Coop. v. Lockport Area Special Educ. Coop. Ass'n., 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975); Wesclin v. Board of Educ., 30 Ill. App. 3d 67, 331 N.E.2d 335 (1975); Board of Educ. v. Rockford Educ. Ass'n., 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972). Section 24-12 of the School Code permits boards of education to establish an alternative method for the determination of the sequence of the honorable dismissal of tenured teachers through the collective bargaining process. However, since the statute specifically requires tenured teachers to be dismissed on the basis of seniority, honorable dismissal procedures established through the collective bargaining process could not necessarily be considered restrictions on the discretionary power of the board. *See* H.B. No. 1576, 81st Gen. Assm., 1st Sess. (1979).

83. ILL. REV. STAT. ch. 122, § 21-1 (1979). *See generally* Lenard v. Board of Educ., 57 Ill. App. 3d 853, 373 N.E.2d 477 (1978).

84. Illinois Fair Employment Practices Act, ILL. REV. STAT. ch. 48, § 851 (1979), prohibits discrimination against an individual with respect to his hiring, selection and training for apprenticeship in any trade or craft, tenure or terms or conditions of employment because of his race, color, religion, sex, national origin, ancestry, or physical or mental handicap unrelated to the ability of an individual, or unfavorable discharge from the military service. Section 4 of the Illinois Minimum Wage Act, ILL. REV. STAT. ch. 48, § 1004(b) (1979), prohibits differentials in pay between the sexes. Illinois Age Discrimination Act, ILL. REV. STAT. ch. 48, §§ 881-887 (1979), prohibits discrimination against persons over the age of 45. Section 24-4 of the School Code, ILL. REV. STAT. ch. 122, § 24-4 (1979), prohibits discrimination on the basis of color, race, sex, nationality, religion or religious affiliation in the hiring of employees and the assignment of positions (including the superintendent and principals); Sections 10-20.7, 10-21.1, 24-7 of the School Code, ILL. REV. STAT. ch. 122, §§ 10-20.7, 10-21.1, 24-7 (1979), prohibit discrimination on the basis of sex in the fixing of salaries for certificated employees; Section 10-22.4 of the School Code, ILL. REV. STAT. ch. 122, § 10-22.4 (1979), prohibits the dismissal of a teacher because of marriage or temporary or physical incapacity to perform teaching duties. ILL. CONST. art. I, § 17, prohibits discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer. ILL. CONST. art. I, § 18, states: "The equal protection of the laws shall not be denied or abridged on account of sex by . . . school districts." ILL. CONST. art. I, § 19, prohibits discrimination on the basis of physical or mental handicap unrelated to ability in the hiring and promotion practices of any employer.

85. Board of Educ. v. Rockford Educ. Ass'n., 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972).

tive contractual restrictions, such as those prescribing additional qualifications for teachers, improperly restrict the board's discretionary power.[86] Furthermore, the malady cannot be cured by the use of an objective standard.[87] Procedural restrictions, such as requiring posting notice of vacancies, are similarly ineffective. Although these procedural restrictions are not *per se* violations of the School Code, an arbitrator is unable to adequately remedy a breach of the restrictions by hiring the teacher.[88]

A board of education's power to dismiss or grant tenure to a teacher is explicitly controlled by the School Code,[89] and the board has no power to alter these statutory provisions.[90] Therefore, any contractual provision which either expands or restricts a board's power to dismiss an employee is invalid, as it conflicts with the School Code.[91] Additionally, placing preconditions such as teacher evaluations upon the board's power to dismiss have been held invalid, as have provisions which affect the board's power to dismiss for a specific reason or cause.[92]

---

86. Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

87. The use of objective standards will also be ineffective as the objective standards themselves violate the intent of the statutes which give the school board total discretion in hiring teachers on both objective and subjective factors. *Cf.* Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974) (not appropriate to subject faculty appointment at university level to federal court supervision); Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969) (promotion decision by a college's faculty, administration and governing body are not normally justiciable); School Dist. No. 175 v. Illinois Fair Employment Practice Comm'n, 57 Ill. App. 3d 979, 373 N.E.2d 447 (1978) (the determination of what criteria to be considered is for the professional educators and not the Commissioner); Shenefield v. Sheridan County School Dist., 544 P.2d 870 (Wyo. 1976) (function of the school board and not a reviewing court to award teacher positions).

88. The arbitrator cannot require the board to hire the mistreated teacher. *See* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976).

89. ILL. REV. STAT. ch. 122, §§ 24-11, 24-12 (1979); *Id.* § 10-22.4 (1979).

90. *See* Illinois Educ. Ass'n. v. Board of Educ. 62 Ill. 2d 127, 340 N.E.2d (1975).

91. *Id.*; Lockport Area Special Educ. Coop. v. Lockport Area Special Educ. Coop. Ass'n., 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975); Wesclin v. Board. of Educ., 30 Ill. App. 3d 67, 331 N.E.2d 335 (1975).

92. *See* note 91 *supra*. Because a board of education can only dismiss for those reasons stated in Section 10-22.4 of the School Code, ILL. REV. STAT. ch. 122, § 10-22.4 (1979), union security devices such as "agency shop" clauses are unenforceable. A board of education neither can be forced to dismiss nor dismiss on its own action a teacher who fails to pay his allocated portion of negotiation and contract administration expense pursuant to the agency shop clause of the collective bargaining agreement. *Board of Educ. v. LaVine*, Hearing Officer decision March 14, 1978. Referring to Section 24-12, the Hearing Officer stated:

> The foregoing statutory mandate [ILL. REV. STAT. ch. 122, §§ 10-20.7, 10-22.4] clearly requires the exercise of discretion with respect to the teacher's moral character, mental capacity and ability to teach; yet in this case, questions of character, intelligence and teaching ability were

The only exception to the above rule concerns "reduction in force" clauses which set out the order for the honorable dismissal of tenured teachers. The School Code requires a board of education to honorably dismiss tenured teachers by seniority when it must reduce the number of teachers or discontinue some type of teaching service.[93] Previously, Section 24-12 of the School Code left the order of the honorable dismissal of tenured teachers to the complete discretion of the board of education. The legislature recently passed an amendment to the section which constitutes a legislative attempt to permit collective bargaining upon a board's power.[94] Previously, the Illinois Supreme Court in *Illinois Education Ass'n. v. Board of Eduction* had determined this to be "discretionary" and non-delegable.[95] The legislature has, in essence, placed a valid *legislative* restriction upon a discretionary power of the board and has expressly sanctioned collective bargaining provisions which alter this restriction.

Although the legislature has expressly made any contractual provision concerning the honorable dismissal of tenured

---

without the ambit of the decision-making process of the board in the face of who LaVine's "failure to comply" with the agency shop provision. Because of that circumstance, the Board by reason of the School Code and Constitution, was wholly without authority or jurisdiction to discharge LaVine. Illinois Education Association v. Board of Education, 62 Ill. 2d 127, 340 N.E.2d 7 (1975); Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.3d 473 (1976); Wesclin Education Association v. Board of Education, 30 Ill. App. 3d 67, 331 N.E.2d 335 (5th Dist. 1975).

93. The only restriction upon this power is that the board must first dismiss any non-tenured teacher who holds a position for which a tenured teacher is legally qualified. ILL. REV. STAT. ch. 122, § 24-12 (1979); *see* Lenard v. Board of Educ., 57 Ill. App. 3d 853, 373 N.E.2d 477 (1978). The board must also rehire any honorably dismissed tenure teacher who is legally qualified if within one year the board "increases the number of teachers or reinstates the position so discontinued." ILL. REV. STAT. ch. 122, § 24-12 (1979). *See generally* Bilek v. Board of Educ., 61 Ill. App. 3d 323, 377 N.E.2d 1259 (1978).

94. *See* H.B. No. 1576, 81st Gen. Assm., 1st Sess. (1979) which amends section 24-12 of the School Code, ILL. REV. STAT. ch. 122, § 24-12 (1979) in pertinent part as follows:

> . . . .As between teachers who have entered upon contractual continued service, the teacher or teachers with the shorter length of continuing service with the district shall be dismissed first unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement or contract between the board and a professional faculty members' organization and except that this provision shall not impair the operation of any affirmative action program in the district, regardless of whether it exists by operation of law or is conducted on a voluntary basis by the board.

The statute, however, does not prescribe the order for the reinstatement of previously dismissed tenured teachers, nor does it expressly permit collective bargaining on this subject.

95. Illinois Educ. Ass'n v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975).

teachers *per se* consistent with the School Code, it failed to clarify whether these substantive contractual restrictions of the board's power to dismiss, must all contain adequate standards to govern the exercise of the board's dismissal power in order to be valid. The courts have approved substantive contractual restrictions which do not violate the School Code only when such restrictions contain adequate standards to govern the exercise of the board's power.[96] For example, contractual provisions which establish the order of assignment of courses based in whole or in part upon such subjective terms as "teaching ability" have been held to be invalid.[97] Thus, the validity of a contractually bargained "reduction in force" clause may still depend upon whether the order of dismissal is based upon adequate standards, using definable objective criteria such as length of experience and academic training.[98]

The final question regarding reduction in force clauses concerns whether an arbitrator is able to order the reinstatement of a teacher dismissed in violation of the clause. The answer arguably should be yes. In making an award under the clause, the arbitrator exercises no independent discretion; rather, he merely follows the exact standards set under the provisions of the statute. There is however, strong language in prior Illinois Supreme Court decisions militating against reinstatement as a

96. *See* Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); Board of Trustees v. Cook County College Teachers Union, 55 Ill. App. 3d 435, 371 N.E.2d 66 (1977), *rev'd on other grounds*, 74 Ill. 2d 412, 386 N.E.2d 47 (1979). Work assignments are clearly a permissible subject of collective bargaining. Courts have approved both procedural and substantive restrictions on a board's power to make work assignment. Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 473 N.E.2d 473 (1976); Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973). Although the power to make work assignments has been held to be discretionary one, *see* Lindblad v. Board of Educ., 222 Ill. 261, 77 N.E. 450 (1906); District 300 Educ. Ass'n. v. Board of Educ., 31 Ill. App. 3d 550, 334 N.E.2d 165 (1975), which is governed in part by the tenure provisions of the School Code, ILL. REV. STAT. ch. 122, § 24-11 (1977); *see* People *ex rel.* Brown v. Board of Educ., 66 Ill. App. 3d 164, 383 N.E.2d 711 (1978), the courts have held that restrictions upon this board power does not violate the School Code. Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973). Substantive restrictions on the board's power have only been struck down where the restriction has not been accompanied by adequate standards for determining the assignment. *See* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

97. *See, e.g.*, Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

98. Lindblad v. Board of Educ., 221 Ill. 261, 77 N.E. 450 (1906); People *ex rel.* Brown v. Board of Educ., 66 Ill. App. 3d 164, 383 N.E.2d 711 (1978); *cf.* Board of Educ. v. Classroom Teachers Ass'n., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973) (work assignments, are a permissible subject of collective bargaining). *See also* note 51 *supra*.

remedy.[99] Additionally, it is equally unclear whether the statute permits the parties to establish the precise remedies for a breach of the collective bargaining provision in the contract itself.

### *Leave of Absence*

Granting leaves of absence is generally considered a permissible subject for collective bargaining, provided the provision is consistent with the School Code and does not involve an invalid delegation or restriction of power without adequate standards.[100] In *Board of Education v. Murphy*,[101] the provision required granting two leaves per year, based upon the recommendations of a committee comprised of faculty and administrators. This provision violated the School Code because it *mandated* granting two leaves per year, while the School Code *permitted* the granting of leaves at the board's discretion.[102] Additionally, no adequate standards were enumerated for the sabbatical leave committee to determine who would receive these leaves and under what conditions the leaves would be granted. Had the provision provided adequate standards, it may have been enforceable.[103]

By negative implication, the sabbatical leave section of the School Code authorizes grants of other types of leaves: "This section in no way limits the power of the board to grant leaves for other purposes."[104] Boards may thus grant maternity and personal leaves.[105] Contractual provisions centering on these

99. Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976). The court stated "The Board's duties in appointing teachers are non-delegable, and it follows therefrom that the arbitrator is without authority to award an employment contract as a remedy for the violation of a collective bargaining contract." *Id.* at 476, 343 N.E.2d at 476.

100. Board of Educ. v. Murphy, 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978); Deizman v. Board. of Educ., 53 Ill. App. 3d 1050, 369 N.E.2d 257 (1977).

101. 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978).

102. The court held, "the Board, as a matter of law does not have the power to delegate its discretionary power to award sabbatical leaves." *Id.* at 985, 372 N.E.2d at 901.

103. *See* Deizman v. Board of Educ., 53 Ill. App. 3d 1050, 369 N.E.2d 257 (1977) (court approval of a contractual definition of sick leave which is consistent with the terms of the sick leave statute); *cf.* People v. Engleman, 32 Ill. 2d 196, 204 N.E.2d 760 (1965) (the board may grant more than statutory minimum number of sick leave days). *But see* Bookhout v. Levitt, 43 N.Y.2d 612, 374 N.E.2d 111 (1978) (sick leave is a term and condition of employment).

104. ILL. REV. STAT. ch. 122, § 24-6.1 (1979).

105. *Cf.* Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503; 371 N.E.2d 676 (1977). In approving multi-year contracts the court stated:

> Since the School Code contains a general grant of power to the board to fix the salaries of teachers and there is no statute prohibiting the board

leaves are enforceable provided the provisions clearly spell out who is entitled to the leave and under what conditions it will be granted. Additionally, a board of education has express authority to grant sick leave.[106]

### *Class Size*

While collective bargaining provisions covering a variety of "minor" administrative matters such as attendance taking have been sanctioned,[107] courts have yet to rule on more "major" administrative matters, such as class size restrictions. However, *Weary v. Board of Education*[108] would seem to indicate that class size restrictions are invalid. *Weary* held that provisions involving educational policy, which do not directly affect teachers, are valid, even though they do not violate the School Code.[109] Additionally, class size restrictions would be unenforceable, because an arbitrator could not order a board to hire additional teachers to reduce class size.

### *Good Faith Bargaining and Impasse Procedures*

Illinois Appellate Court decisions have consistently held that collective bargaining by a board of education is strictly voluntary. Once the process of negotiation has begun, the board may refuse to bargain and may impose a settlement upon its employees.[110] Even if the board has contractually bound itself to bargain in a recognition agreement, it cannot be forced to bargain.[111] Yet, many collective bargaining agreements contain provisions concerning negotiation procedures. These provisions typically include a scope clause, in which the parties have agree upon the topics that they will negotiate in good faith, and an impasse procedure, which may include both fact finding and mediation.

---

from entering into a collective bargaining agreement for a term of more than one year, it is clear that the collective bargaining agreement in this case was not void or invalid merely because it was for a term extending beyond the terms of office of the individual members of the board.

*Id.* at 508, 371 N.E.2d at 680.

106. ILL. REV. STAT. ch. 122, § 24-6 (1979); *Id.* § 24-6.1 (1979). *See also Id.* §§ 10-20.7, 21-1, 24-13, 24-13.1 (1979) (other statutorily permitted leaves).

107. *See* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

108. 46 Ill. App. 3d 182, 360 N.E.2d 1112 (1977).

109. *Id.* at 186-7, 360 N.E.2d at 1114-5; *see* West Inondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46, 315 N.E.2d 775 (1974) (under Taylor Law, class size was not a term or condition at employment).

110. Chicago Div. of Ill. Educ. Ass'n. v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

111. Harper College Faculty Senate v. Board of Trustees, 51 Ill. App. 3d 443, 366 N.E.2d 999 (1977).

While the board's negotiation is purely voluntary, those provisions concerning resolution of impasse through fact finding or mediation may be binding upon the board and enforceable by the employees. These impasse procedures do not restrict the board's discretionary power to fix salaries. Rather, they impose definable procedural preconditions, which do not violate the public policy or statutes, upon the board's power to impose a settlement upon its employees. Unlike the mandatory injunction struck down in *Harper College Faculty Senate v. Board of Trustees*,[112] these procedures do not require a board to continue negotiations for a definite time period. Instead, the impasse procedures typically provide adequate and explicit procedures to which the board must adhere prior to breaking off negotiations and imposing a settlement upon its employees.

In contrast to the impasse procedures, the typical scope provision requiring the board to bargain in good faith on certain topics is probably not enforceable against the board if it chooses either not to bargain or engages in bad faith bargaining. The contractual requirement of good faith bargaining is *per se* inconsistent with the recognized discretionary power of the board to discontinue negotiations and impose a unilateral settlement.[113] Thus, even if the scope clause involves a topic which is a permissible subject of negotiation, the board cannot be forced to bargain.

## CONCLUSION

Following the Illinois Supreme Court decisions in *Illinois Education Ass'n. v. Board of Education*,[114] and *Board of Trustees v. Cook County Teacher's Union*,[115] commentators have feared that effective collective bargaining in Illinois has been severely hampered. They have argued that the cases have unduly restricted the scope of bargaining,[116] have failed to provide sufficiently definable standards for determining the scope,[117] and will lead school boards to include provisions with which they cannot comply and which they have no intention of honoring.[118]

112. *Id.*

113. *See* Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

114. 62 Ill. 2d 127, 340 N.E.2d 7 (1975).

115. 62 Ill. 2d 470, 343 N.E.2d 473 (1976).

116. *See* Note, *Scope of Public Sector Collective Bargaining*, 1977 U. ILL. L.F. 443 (1977).

117. *Id.*

118. Note, *Illinois Education Association v. Board of Educ. of School District No. 508 v. Cook County College Teachers Union, Local 1600: Ominous Implications for Public Sector Collective Bargaining in Illinois*, 8 LOY. CHI. L.J. 209 (1976).

Effective public collective bargaining, however, will continue in the absence of statute. There is a discernable formula for determining the permissible scope of collective bargaining in Illinois[119]—a scope which covers a significant number of subjects.[120] Furthermore, the pressures which have caused a significant number of boards to enter the collective bargaining process and negotiate agreements containing important, yet legally questionable, contractual provisions have and will cause the boards to honor these provisions and prevent wholesale post-negotiation attacks on their validity.[121]

If a board of education wishes, it may collectively bargain with its employees, and enter into enforceable agreements covering both "major" and "minor"[122] areas including, at the very least, salary and fringe benefits,[123] transfers,[124] work assignments,[125] classroom procedures[126] and leaves.[127] Disputes arising from these enforceable provisions may be submitted to final binding arbitration.[128] The board may even be bound, to a lim-

119. *See* text accompanying notes 30 to 75 *supra*.

120. *See* text accompanying notes 76 to 128 *supra*.

121. Despite the plethora of litigation in recent years concerning a teacher's statutory rights when a board reduces staff, Bilek v. Board of Educ. 61 Ill. App. 3d 323, 372 N.E.2d 1259 (1978); Caviness v. Board of Educ., 59 Ill. App. 3d 28, 375 N.E.2d 157 (1978); Lenard v. Board of Educ., 57 Ill. App. 3d 853, 373 N.E.2d 477 (1978); Hagopian v. Board of Educ., 56 Ill. App. 3d 940, 372 N.E.2d 990 (1978); Relph v. Board of Educ., 51 Ill. App. 3d 1036, 366 N.E.2d 1125 (1977)), there has been no reported court challenge of a contractual "reduction in force" provision.

122. Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

123. Libertyville Educ. Ass'n. v. Board of Educ., 56 Ill. App. 3d 503, 371 N.E.2d 676 (1977).

124. Classroom Teachers Ass'n. v. Board of Educ., 15 Ill. App. 3d 224, 304 N.E.2d 516 (1973).

125. Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); Board of Trustees v. Cook County College Teachers Union, 55 Ill. App. 3d 435, 317 N.E.2d 66 (1977), *rev'd on other grounds*, 74 Ill. 2d 412, 386 N.E.2d 47 (1979).

126. Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

127. Deizman v. Board of Educ., 53 Ill. App. 3d 1050, 369 N.E.2d 757 (1977).

128. *See, e.g.*, Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979); Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); Board of Educ. v. Murphy, 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978); Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974); Board of Educ. v. Champaign Educ. Ass'n., 15 Ill. App. 3d 335, 304 N.E.2d 138 (1973). The only question which remains is whether a board of education can bypass the arbitrator and obtain an immediate court determination on the issue of the arbitrability of the grievance. In *Murphy*, the circuit court denied the board of education's request for a stay of the arbitration proceedings prior to arbitration and ordered the dispute to be submitted to the arbitrator on all issues including arbitrability. 56 Ill. 2d at 984, 372 N.E.2d at 900; *accord*, Board of Educ. v. Johnson, 21 Ill. App. 2d 482, 315 N.E.2d 634 (1974). *Contra*, Lockport Area Special Educ. Coop. v. Lockport Area Special Educ. Coop Ass'n. 33 Ill. App. 3d 789, 338 N.E.2d 463 (1975); Board of Trustees v. Cook County College Teachers Union, 22 Ill. App. 3d 1053, 318 N.E.2d 197 (1974). When the arbi-

ited extent, by previously agreed upon recognition and negotiation impasse procedure provisions.[129]

Quite clearly, collective bargaining in Illinois has all the indicia of a state possessing a collective bargaining statute, with one notable exception: the process is purely voluntary. The board cannot be forced to bargain with its employees if it chooses not to.[130] Even after the board enters the bargaining process, it is not required to negotiate on any particular subject.[131] Nor must a school board submit disputes to binding arbitration, unless it has previously bound itself to do so.[132] Finally, the board is under little, if any, obligation to continue the bargaining process once it has begun.[133]

Even though Illinois has almost all of the indicia of a state possessing a collective bargaining statute, this does not mean that there is no need for such a statute in Illinois. An effective statute could define more specifically the permissible scope of bargaining and could establish needed negotiation and bargaining impasse procedures, which are matters of public policy properly within the discretion of the legislature.[134] The primary purpose of a collective bargaining statute in Illinois, however, will be to make the process mandatory for all local boards rather than to effectuate "effective" bargaining.[135]

---

trability issue is submitted to an arbitrator for an initial determination, the arbitrator, at his discretion, may hear and decide the arbitrability issue prior to hearing on the merits. Board of Educ. v. Rockford Educ. Ass'n., 3 Ill. App. 3d 1090, 280 N.E.2d 286 (1972)), or he may hear and decide all issues at one time. Board of Educ. v. Champaign Educ. Ass'n., 15 Ill. App.3d 335, 304 N.E.2d 138 (1973).

129. Chicago High School Assistant Principals Ass'n. v. Board of Educ., 5 Ill. App. 3d 672, 284 N.E.2d 14 (1972); *see* text accompanying notes 126-129 *supra*.

130. Chicago Div. of the Ill. Educ. Ass'n. v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

131. Harper College Faculty Senate v. Board of Trustees, 57 Ill. App. 3d 443, 366 N.E.2d 999 (1977).

132. The enforceability of a collective bargaining contract does not however, depend upon whether the contract provides for binding arbitration of contract disputes. Collective bargaining contracts may be enforced through court action even in the absence of a binding arbitration provision. Illinois Educ. Ass'n. v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975); Deizman v. Board of Educ., 53 Ill. App. 3d 1050, 369 N.E.2d 257 (1977); Antioch Community High School Teachers' Ass'n. v. Board of Educ., 2 Ill. App. 3d 504, 275 N.E.2d 683 (1971).

133. Chicago Div. of the Ill. Educ. Ass'n. v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); *see* text accompanying notes 126-129 *supra*.

134. *See* H.B. No. 1576, 81st Gen. Assm., 1st Sess. (1979) which would provide, "as between teachers who have entered upon contractual continued service the teacher with the shorter length of continuing service . . . shall be dismissed first unless an alernative method of determining the sequence of dismissal is established in a collective bargaining agreement for contract . . . ."

135. An argument could be and has been made by the unions that there

A collective bargaining statute is not an instant panacea for solving the problems arising from public collective bargaining. Should Illinois choose to join those states already having bargaining statutes, the legislature must pay careful attention to those problems in scope determination which have proven nettlesome not only to Illinois courts but also to the judiciary of those states which have bargaining statutes.[136]

---

can be no truely effective bargaining unless the collective bargaining process is a mandatory one.

136. The piecemeal legislation designation of subjects which may be collectively bargained is not a satisfactory method of implementing public sector collective bargaining. This approached is evidenced by the recent amendment to Section 24-12 which permits boards to establish "an alternative method of determining the sequence of dismissal of tenured teachers in a collective bargaining agreement or contract between the board and a professional faculty members' organization. . . ." The amendment is actually a perfect example of how not to implement public sector collective bargaining. First, the statute does not define what constitutes "a professional faculty members' organization" or provide a method for the purposes of bargaining. The statute provides no method for the resolution of a dispute with respect to the negotion or the interpretation of the contractual provision. Nor does the statute prescribe the remedy for the breach of a contractual provision or whether the parties may bargain with respect to the appropriate remedy. The statute does not provide for a situation where a contractual provision is agreed upon through methods which are generally considered unfair labor practices. Furthermore, the statute provides no guidance on the validity of any contractual clauses in light of any the present status of case law and is vague with respect to what precise subjects may be collectively bargained. For example, does the amendment only applies to the order of dismissal and not to the order of reinstatement. *See* note 94 *supra*.

New York's Taylor Act, N.Y. CIV. SERV. LAW, §200 *et seq.* (McKinney 1973) is the best example of those states which have bargaining statutes for its public sector. Many of the problems faced in Illinois, however, exist in New York, despite the Taylor Act. *See* Board of Educ. v. Yonkers Federation of Teachers, 40 N.Y.2d 268, 353 N.E.2d 569 (1979)(may bargain only in absence of 'plain and clear' prohibition in statute); Board of Educ. v. Lakeland Federation of Teachers, 51 A.D.2d 1033, 391 N.Y.S.2d 515 (1979)(cannot modify the Education Law by collective bargaining). Also, in Illinois, one of the serious problems is what are subjects of bargaining. *See* Bookhout v. Levitt, 43 N.Y.2d 612, 374 N.E.2d 111 (1978) (sick leave is a term and condition of employment); Burke v. Bowen, 40 N.Y.2d 64, 353 N.E.2d 567 (1976)(job security is a permissible subject of bargain); New York City School Bds. Ass'n., Inc. v. Board of Educ., 39 N.Y.2d 111, 347 N.E.2d 568 (1976) (number of hours of instruction are permissible scope of bargaining); West Inondequoite Teacher's Ass'n. v. Helsby, 35 N.Y.2d 46, 315 N.E.2d 775 (1974) (class size is not a mandatory subject for negotiation). However, one serious difference between New York's statutory law, and Illinois' court-made law is that in New York the courts must determine what is a term of condition of employment. *See* N.Y. CIV. SERV. LAW §203(2) (McKinney 1973) which requires all public bodies to bargain with recognized and certified employee organizations on the terms and conditions of employment. But once a term and condition of employment is determined, the public employer can still voluntarily bargain on those subjects not controlled by statute or decisional law. *See* Board of Educ. v. Yonkers Federation of Teachers, 40 N.Y.2d 268, 353 N.E.2d 569(1976) (free to negotiate); Burke v. Bowen, 40 N.Y.2d 264, 353 N.E.2d 567 (1976) (job security). But then, it appears that at least one case held that if it is not mandatory-it is

not negotiable. *See* West Inondequoite Teachers Ass'n. v. Helsby, 35 N.Y.2d 46, 315 N.E.2d 775 (1974) (class size not negotiable). *Contra*, Board of Educ. v. Greenburgh Teachers Ass'n, 51 A.D.2d 1039, 381 N.Y.S.2d 517 (1976). Finally, there is the question of what effect a bargained employment contract has. Although it appears that the Taylor Law does provide an avenue for "fairplay" negotiations, it lacks the authority to enforce contracts. This must be had only by lengthy administrative and judicial procedures. Jefferson County Bd. of Sup. v. New York State PERDJ, 36 N.Y.2d 534, 330 N.E.2d 621 (1975). *See also* note 35 *supra*.