University of Dayton Law Review

Volume 9
Number 3 *Antitrust Symposium*

Article 12

7-1-1984

S. 133: Ohio's Public-Sector Collective-Bargaining Framework

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S. 133: OHIO'S PUBLIC-SECTOR COLLECTIVE-BARGAINING FRAMEWORK

I. INTRODUCTION

With the enactment of S. 133,[1] Ohio revoked the Ferguson Act[2] which prohibited strikes by public employees, and adopted a comprehensive collective-bargaining statute governing labor relations in the public sector. Considering the large amount of public employment in Ohio, the adoption of a comprehensive law governing labor relations between public employers and public employees is certain to create controversy. For example, since collective bargaining has existed in Ohio without the guidance of any legislative framework,[3] the very necessity of S. 133 may be questioned. The provisions of S. 133 which control the collective-bargaining process will also create controversy over their interpretation and implementation.

The process of collective bargaining constitutes a complex and intricate procedure well beyond the scope of this note.[4] However, this note will attempt to furnish a historical perspective of the factors and decisions which prompted passage of this bill, an overview of the act's major provisions, and an analysis of the bill's more controversial provisions—the right to strike and binding arbitration.

II. HISTORICAL BACKGROUND

A. Public-Sector Collective Bargaining in the United States

Private-sector collective bargaining has been accepted and utilized in the United States for nearly five decades.[5] However, public-sector collective bargaining did not receive legislative authorization until 1959.[6] Today, some form of public-sector collective bargaining is statu-

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1. Act of July 7, 1983, 1983 Ohio Legis. Serv. 5-237 (Baldwin) (to be codified in scattered sections of chs. 1 and 41 OHIO REV. CODE ANN.).

For a general outline of the developing law of collective bargaining in Ohio, see generally 2 PUB. EMPLOYEE BARGAINING REP. (CCH) ¶¶ 26,001–26,305 (1983); 1 PUB. EMPLOYEE BARGAINING REP. (CCH) ¶ 436 *passim* (1984); 3 PUB. EMPLOYEE BARGAINING REP. (CCH) (1984).

2. OHIO REV. CODE ANN. §§ 4117.01–.05 (Page 1980), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

3. *See infra* notes 10–25 and accompanying text.

4. For a detailed explanation of the collective-bargaining procedure in the public sector, see M. MOSKOW, J. LOEWENBERG & E. KOZIARA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT (1970).

5. *See generally* T. BROOKS, TOIL AND TROUBLE: A HISTORY OF AMERICAN LABOR (2d ed. 1971).

6. Wisconsin was the first state to adopt a comprehensive collective-bargaining statute governing public employees. WIS. STAT. ANN. §§ 111.70–.71 (West 1974 & Supp. 1979–1980).

torily recognized in nearly every state.[7] With Ohio's enactment of S. 133, there are now only ten states without some form of legislative authorization of collective-bargaining procedures.[8] However, despite the quantity of existing public-sector statutes, there is little uniformity among the collective-bargaining statutes found in each state.[9] This lack of uniformity may well create difficulties in referring to other states' collective-bargaining statutes in any attempt to interpret Ohio's new collective-bargaining law.

B. Public-Sector Collective Bargaining in Ohio

Prior to S. 133, Ohio's statutory law lacked any legal framework authorizing collective-bargaining procedures between governmental employers and their employees. In fact, prior to S. 133 there were only two Ohio statutes covering public employer-employee relations.[10] The Ferguson Act, repealed by S. 133, neither recognized nor established any collective-bargaining procedures. This statute merely prohibited strikes by public employees and created sanctions for those employees rehired after dismissal.[11] Section 9.41 of the Ohio Revised Code, passed in 1959, provided public employees with the required legislative authorization to honor voluntary checkoffs[12] on the wages of public employees for payment of union dues.[13] Although the checkoff provision

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7. By 1981, 39 states, the District of Columbia, and the Virgin Islands had statutes providing legal frameworks governing collective-bargaining procedures for some or all of their governmental employees. [1 Reference File] GOV'T EMPL. REL. REP. (BNA) 51:501-30 (Apr. 20, 1981).

8. The 10 states which do not authorize collective bargaining in the public sector are: Arizona, Arkansas, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, Utah, Virginia, and West Virginia. *Id.*

9. For example, some states have adopted mandatory collective-bargaining procedures, while other states have adopted permissive collective-bargaining procedures. 37 OHIO ST. L.J. 670, 672–73 (1976). Furthermore, only a few states with collective-bargaining statutes grant a right to strike to their public employees. With the passage of S. 133, Ohio becomes the ninth state to authorize a limited right to strike. The other states permitting some type of limited right to strike are: Alaska (ALASKA STAT. § 23.40.200 (1983)); Hawaii (HAWAII REV. STAT. § 89-12 (1976)); Minnesota (MINN. STAT. ANN. § 179.64 (West Supp. 1984)); Montana (MONT. CODE ANN. § 39-31-201 (1983)); Oregon (OR. REV. STAT. § 243.726 (1983)); Pennsylvania (PA. STAT. ANN. tit. 43, § 11.01.1003 (Purdon Supp. 1984)); Vermont (VT. STAT. ANN. tit. 21, § 1730 (1978)); Wisconsin (WIS. STAT. ANN. § 111.70 (West Supp. 1984)).

10. The only two statutes concerning public employer/employee relations were: (1) the Ferguson Act, OHIO REV. CODE ANN. §§ 4117.01–.05 (Page 1980), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin); and (2) OHIO REV. CODE ANN. § 9.41 (Page 1978), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

11. OHIO REV. CODE ANN. §§ 4117.01–.05 (Page 1980), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

12. Checkoffs, as used in this statute, constitute deductions from the employee's salary. OHIO REV. CODE ANN. § 9.41 (Page 1978), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

13. OHIO REV. CODE ANN. § 9.41 (Page 1978), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

may arguably be interpreted as implicit statutory recognition of public employees' right to unionize and engage in collective bargaining,[14] it had been widely accepted that a public employer lacked authority to negotiate a contract or enter into an agreement with its employees.[15]

Despite the absence of state law recognizing collective bargaining in Ohio's public sector, a substantial amount of collective bargaining has occurred in Ohio between governmental employers and employees. A recent report by the Ohio Legislative Service Commission[16] indicates that in 1977,[17] Ohio had 3,333[18] public jurisdictions[19] at both state and local levels.[20] Out of these jurisdictions, roughly 23.2% engaged in some type of labor relations characterized by the Census Bureau as "collective bargaining."[21] Although 23.2% is not an overwhelming amount of collective-bargaining activity, the commission believes that the actual number of employees involved in collective bargaining is significant. For example, 1977 statistics reveal that out of "580,371 public employees in the state, 232,896, roughly half, [engaged] in some type of collective bargaining unit and 195,638 were covered by [some type] of contractual agreement."[22] According to the commission's report, the degree of activity varies among the different jurisdictions.[23] For example, school districts and municipalities have larger volumes of collective bargaining in relation to other jurisdictions.[24] Based on these statistics,

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14. In Youngstown Educ. Ass'n v. Youngstown Bd. of Educ., 36 Ohio App. 2d 35, 301 N.E.2d 891 (1973), the Mahoning County Court of Appeals specifically stated that "R.C. 9.41 authorizes a board of education to enter into a binding collective bargaining agreement." *Id.* at 43, 301 N.E.2d at 897 (Lynch, J., concurring).

15. J. LEWIS & S. SPIRN, OHIO COLLECTIVE BARGAINING LAW 4 (1983).

16. OHIO LEGISLATIVE SERV. COMM'N, THE LEGAL FRAMEWORK IN OHIO FOR PUBLIC EMPLOYEE COLLECTIVE BARGAINING (1983) (on file with University of Dayton Law Review).

17. The commission recognizes these statistics may be somewhat dated. However, the statistics have been taken from the most recent survey available, and as the commission notes, remain valid for the point being made. *Id.* at 1 n.1.

18. A 1983 publication establishes that Ohio had 3,353 governmental units in 1983. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982–1983, at 294 (103d ed. 1983). An increase of only 20 governmental units between 1977 and 1982 supports the commission's contention that the 1977 data remain a reliable source upon which to base its conclusions.

19. "Public jurisdiction," as used by the commission, refers to the "state government and its various instrumentalities, counties, municipalities, townships, school districts, and special districts." OHIO LEGISLATIVE SERV. COMM'N, *supra* note 16, at 2.

20. *Id.* (citing BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE & LABOR-MANAGEMENT SERVS. AD., U.S. DEP'T OF LABOR, Series GSS No. 100, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1979, at 49 (1980)).

21. OHIO LEGISLATIVE SERV. COMM'N, *supra* note 16, at 2.

22. *Id.*

23. *Id.*

24. The commission's report breaks down the various public jurisdictions and establishes the degree of collective bargaining which occurred in 1982: school districts—63.9%; municipalities—39.8%; special districts—35.9%; state government—21.5%; counties—12.6%; and town-

the commission concluded that prior to the passage of S. 133, extensive collective bargaining was occurring throughout Ohio's public-sector labor force without legislative approval or supervision.[25]

In an effort to provide a legal framework for collective bargaining, the Ohio General Assembly has frequently attempted to incorporate a collective-bargaining provision into Ohio law. In 1970, a comprehensive collective-bargaining bill, patterned after Pennsylvania's collective-bargaining bill, was introduced in the general assembly for the first time.[26] However, this bill never received attention after committee.[27] Further attempts to pass a comprehensive collective-bargaining bill were also unsuccessful[28] until the passage of S. 133.

Despite the absence of legislative legitimization or regulation of public employees' collective-bargaining powers, Ohio courts had delineated the parameters of public-sector collective bargaining prior to S. 133.[29] The courts have generally recognized the legality of collective-bargaining agreements and have formulated policies regarding content and procedures.[30]

The first Ohio Supreme Court decision regarding public-sector collective bargaining, *Hagerman v. City of Dayton*,[31] did not provide encouragement for bargaining procedures in the public-employment area. At issue in *Hagerman*[32] was the legality of a Dayton city ordinance authorizing a voluntary dues checkoff system for public employees. In striking down the ordinance,[33] the court concluded that the municipality was operating beyond the confines of its constitutionally permitted police power.[34] In the most sweeping language denouncing the validity of *any* collective-bargaining agreement, the court stated that "[t]here is no municipal purpose served by the checkoff of wages"[35] and such a "check-off is contrary to the spirit and purpose of the civil service laws

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ships—2.5%. *Id.*

25. *Id.* at 1.

26. J. LEWIS & S. SPIRN, *supra* note 15.

27. *Id.*

28. In both 1975 and 1977 the Ohio General Assembly approved and passed such a bill. However, on both occasions, the Democrats (supporters of a collective-bargaining bill) were unable to override a gubernatorial veto. *Id.*

29. *See infra* text accompanying notes 31–62.

30. *Id.*

31. 147 Ohio St. 313, 71 N.E.2d 246 (1947).

32. *Id.*

33. This decision was statutorily overruled by OHIO REV. CODE ANN. § 9.41, which authorized voluntary checkoff dues. OHIO REV. CODE ANN. § 9.41 (Page 1978), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

34. 147 Ohio St. at 328, 71 N.E.2d at 253.

35. *Id.*

of the state."[36] Since the Ohio Constitution provides the necessary authority to create regulations concerning wages, hours, and conditions of employment for public employees,[37] the court concluded that "[t]here is no authority for the delegation either by the municipality or the civil service appointees of any functions to any organization of any kind."[38] Thus with its decision in *Hagerman*,[39] the Ohio Supreme Court had dictated that *any* contract between a public employer and a union representing public employees would constitute an unlawful delegation of the public employer's authority.[40] However, subsequent Ohio Supreme Court decisions have rejected this holding.[41]

Although section 9.41,[42] authorizing a voluntary checkoff of union dues, was passed by the general assembly in 1959, and this section had been interpreted as legislative recognition of public employees' right to contract with public employers,[43] there was no Ohio Supreme Court authority upon which to base collective-bargaining rights until the landmark case of *Dayton Classroom Teachers Association v. Dayton Board of Education*.[44]

In altering its earlier position in *Hagerman*,[45] the court in *Dayton Teachers* stated in the syllabus that "[a] board of education is vested with discretionary authority to negotiate and enter into a collective bargaining agreement with its employees, so long as such agreement does not conflict with or purport to abrogate the duties and responsibilities imposed upon the board of education by law."[46] This "discretionary authority," according to the court, was granted by the general assembly via the broad contractual powers delegated to school boards.[47]

An examination of the powers granted to townships, counties, and municipalities illustrates that these public bodies possess contractual authority similar to that which the court found delegated to school boards.[48] Arguably, contractual authority may be found to exist in almost any public employer. Such an interpretation would acknowledge a

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36. *Id.*
37. OHIO CONST. art. XV, § 10.
38. 147 Ohio St. at 329, 71 N.E.2d at 254.
39. 147 Ohio St. 313, 71 N.E.2d 246 (1947).
40. 37 OHIO ST. L.J. 670, 675 (1976).
41. *See infra* text accompanying notes 42–49.
42. OHIO REV. CODE ANN. § 9.41 (Page 1978), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).
43. 36 Ohio App. 2d 35, 301 N.E.2d 891 (1973).
44. 41 Ohio St. 2d 147, 323 N.E.2d 714 (1975).
45. 147 Ohio St. 313, 71 N.E.2d 246 (1947).
46. 41 Ohio St. 2d at 127, 323 N.E.2d at 715.
47. *Id.* at 131–32, 323 N.E.2d at 717.
48. OHIO LEGISLATIVE SERV. COMM'N, *supra* note 16, at 3. *See also* AFSCME Local 1045 v. Polta, 59 Ohio App. 2d 283, 394 N.E.2d 310 (1977).

broad judicial recognition of collective-bargaining powers in all government employers. However, the Ohio Supreme Court has rejected such an expansive interpretation.[49]

The courts have gone beyond recognition of the *existence* of bargaining capacity in the public sector. Ohio courts have also promulgated policies governing the *content* of ultimate agreements as well as the *negotiation process* itself.[50] For example, in the landmark case of *Dayton Teachers*,[51] the court went beyond recognition of collective-bargaining authority and upheld the validity of a binding grievance arbitration[52] clause contained in a collective-bargaining agreement.[53] In *Loveland Education Association v. Loveland City School District Board of Education*,[54] the supreme court upheld a portion of a collective-bargaining agreement which outlined the negotiation procedures required for reaching a future collective-bargaining agreement[55] but placed a limitation on the clause. The court held that a recognition agreement "is valid and enforceable, so long as such agreement does not conflict with or purport to abrogate the duties and responsibilities imposed . . . by law."[56] This decision was followed by lower courts faced with similar preagreement negotiation processes.[57]

The Ohio Supreme Court has also set guidelines regarding the aspects of the collective-bargaining process. In *Civil Service Personnel Association v. City of Akron*,[58] the court promulgated guidelines with respect to bargaining-unit determination.[59] In this case, the court rec-

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49. *See* Malone v. Court of Common Pleas, 45 Ohio St. 2d 245, 344 N.E.2d 126 (1976) (wherein the court applied a narrow definition of "contractual authority," in holding that a juvenile court judge is not authorized to enter into an employment agreement with court employees); *AFSCME*, 59 Ohio App. 2d 283, 394 N.E.2d 310 (1977) (wherein the Erie County Court of Appeals held that in the absence of statutory authority, a county engineer lacked authority to execute a collective-bargaining agreement).

50. *See infra* text accompanying notes 51–72.

51. 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

52. "Grievance arbitration," as used in this note, refers to arbitration resulting from disputes arising out of an existing contract and is usually limited to violations, misinterpretations, or misapplications of the agreement. J. LEWIS & S. SPIRN, *supra* note 15, at 142.

53. In the second paragraph of the syllabus, the court specifically states that a binding grievance arbitration clause must be honored by a public employer where "(1) the grievance involves the application or interpretation of a valid term of the agreement and (2) the arbitrator is specifically prohibited from making any decision which is inconsistent with the terms of the agreement or contrary to law." 41 Ohio St. 2d at 127, 323 N.E.2d at 715.

54. 58 Ohio St. 2d 31, 387 N.E.2d 1374 (1979).

55. *Id.* at 36, 387 N.E.2d at 1377.

56. *Id.*

57. *See* Trotwood Madison Classroom Teachers Ass'n v. Trotwood Madison City School Dist. Bd. of Educ., 52 Ohio App. 2d 39, 367 N.E.2d 1233 (1977); Xenia City Bd. of Educ. v. Xenia Educ. Ass'n, 52 Ohio App. 2d 373, 370 N.E.2d 756 (1977).

58. 48 Ohio St. 2d 25, 356 N.E.2d 300 (1976).

59. A bargaining unit is a group of employees whose interests are represented by an em-

ognized the importance of community of interest[60] by holding that public employees' right to separate bargaining units could not be negated by the public employer.[61] These guidelines were subsequently utilized by a lower court in announcing unit determination guidelines,[62] thus furthering the impact of judicial decisions on the public-sector collective-bargaining process.

Although the legislative branch failed to provide Ohio with any guidelines or procedures governing collective bargaining prior to S. 133, it is apparent that the judicial branch had taken an active role in not only recognizing public employer-employee bargaining capacity and authority, but also in delineating many guidelines and procedures to be followed in Ohio's public-sector collective-bargaining process.

III. PROVISIONS OF S. 133

Against the background of existing public-sector collective-bargaining activity supervised only by judicial guidelines concerning rights and procedures, the Ohio General Assembly passed S. 133. This bill is a comprehensive statute delineating labor relations between public employers[63] and public employees.[64] The general assembly has established rights[65] and obligations[66] of both parties; created guidelines for unit determination;[67] provided procedures concerning exclusive representa-

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ployee union. *See* OHIO REV. CODE ANN. §§ 4117.05–.06 (Page Supp. 1983). Accordingly, the determination of which employees will constitute a bargaining unit is an important determination since different types of employees may have competing interests.

60. "Community of interest" means that the employees of a particular unit have similar interests. *See* BLACK'S LAW DICTIONARY 254 (5th ed. 1979).

61. 48 Ohio St. 2d at 27, 356 N.E.2d at 302.

62. Ohio Ass'n of Pub. School Employees v. Cleveland City Bd. of Educ., 69 Ohio App. 2d 101, 430 N.E.2d 1335 (1980).

63. "Public employer" is defined as:

> the state or any political subdivision of the state located entirely within the state including, without limitation, any municipal corporation with a population of at least five thousand . . . [a] county, township with a population of at least five thousand in the unincorporated area of the township . . . [a] school district, state institution of higher learning, any public or special district, any state agency, authority, commission, or board, or other branch of public employment.

OHIO REV. CODE ANN. § 4117.01(B) (Page Supp. 1983).

64. "Public employee" is defined as:

> any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the National Labor Relations Board has declined jurisdiction on the basis that the involved employees are employees of a public employer . . . .

Id. § 4117.01(C).

65. *Id.* § 4117.03.

66. *Id.* § 4117.04.

67. *Id.* § 4117.08.

tion[68] by an employee organization;[69] defined many aspects of the collective-bargaining process;[70] defined unfair labor practices;[71] and provided impasse procedures,[72] including a limited right to strike[73] and binding arbitration.[74] The act will certainly spur litigation and require judicial interpretation.[75]

After establishing the parties affected by the act,[76] S. 133 delineates the rights and obligations of the parties involved. Generally, public employees have the right to (1) join or refrain from joining any employee organization; (2) engage in activity for the purpose of collective bargaining; (3) be represented by an employee organization; (4) bargain collectively with their public employer; and (5) present grievances and have them adjusted.[77] While these rights are specifically guaranteed by the act, the judiciary may apply a narrower scope to these rights than applied in the private sector, deferring to the interests of public policy which permeate public-sector employment.[78]

S. 133 also delineates the obligations of the public employer.[79] The bill establishes that a public employer is obliged to extend to the employee organization[80] the right of exclusive representation of a bargaining unit for a period of at least twelve months following certification,[81] and if the parties enter an agreement, for a period of no more than three years from the date of the agreement.[82] This bill therefore mandates that once exclusive representation is certified, the public employer must bargain in good faith with the representative. To understand the extent of its duties, the public employer must consider Ohio Revised

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68. *Id.* § 4117.05.

69. "Employee organization" is defined as "any labor or bona fide organization in which public employees participate and which exists for the purpose, in whole or in part, of dealing with public employers concerning grievances, labor disputes, wages, hours, terms and other conditions of employment." *Id.* § 4117.01(D).

70. *Id.* §§ 4117.08–.10.

71. *Id.* § 4117.11.

72. *Id.* § 4117.14.

73. *Id.* § 4117.14(D)(2).

74. *Id.* § 4117.14(D)(1).

75. Since many of the provisions of S. 133 parallel the National Labor Relations Act, 29 U.S.C. §§ 151–69 (1976 & Supp. V 1981), National Labor Relation Board decisions may prove beneficial in interpreting the provisions of S. 133. *See generally* J. LEWIS & S. SPIRN, *supra* note 15. A full discussion of this conclusion is beyond the scope of this legislation note. However, a general comparison of the two acts will reveal striking similarities. *Id.*

76. OHIO REV. CODE ANN. § 4117.01 (Page Supp. 1983).

77. *Id.* § 4117.03(A)(1)–(5).

78. J. LEWIS & S. SPIRN, *supra* note 15, at 43.

79. OHIO REV. CODE ANN. § 4117.04 (Page Supp. 1983).

80. The bill provides specific guidelines regarding certification of an employee organization. *Id.* § 4117.05.

81. *Id.* § 4117.04(A).

82. *Id.*

Code section 4117.08[83] which delineates the scope of bargaining. Failure to follow these rules may result in the finding of an unfair labor practice,[84] and thereby subject the employer to the appropriate sanctions.[85]

Determination of the appropriate employee unit[86] is a key determination since all rights of the employees are protected through this unit and all rights and obligations delineated in the bill are phrased in reference to the exclusive representative of this "unit." The act provides that the State Employment Relations Board[87] (SERB) determines the appropriate unit for collective-bargaining purposes.[88] In determining the appropriateness of a unit, the board is specifically required to consider, among other relevant factors, the desires of employees, wages, hours, working conditions, any community of interest, the administrative structure of the employer, the efficiency of operations, the effect of over-fragmentation, and the history of collective bargaining.[89] The act places limitations upon the SERB's determination by specifically providing that certain combinations of employees do not constitute appropriate units.[90] For example, a unit consisting of professional and nonprofessional employees would not constitute an appropriate unit and is therefore statutorily prohibited.[91] Nothing in the provision excludes multi-unit bargaining.[92] One should note, however, that the SERB's de-

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83. Section 4117.08 of the Ohio Revised Code delineates the scope of bargaining. *See also infra* text accompanying notes 100–04.

84. Unfair labor practices, OHIO REV. CODE ANN. § 4117.11 (Page Supp. 1983), are discussed later in this note. *See infra* text accompanying notes 117–23.

85. OHIO REV. CODE ANN. § 4117.12 (Page Supp. 1983). *See also* J. LEWIS & S. SPIRN, *supra* note 15, at 45.

86. *See supra* note 59.

87. The SERB implements and administers rules and hearings made necessary under the act. This three-member appointive board is by far the most important panel created by S. 133. OHIO REV. CODE ANN. § 4117.02 (Page Supp. 1983) (creates the SERB and lists its powers and duties).

On November 28, 1983, Governor Richard F. Celeste appointed the first State Employment Relations Board. The appointees are: Theodore Dyke, labor law professor at Cleveland State University; Helen Fix, former Cincinnati state representative; and William Sheehan, executive secretary-treasurer of Cincinnati AFL-CIO and vice president of Ohio AFL-CIO. Since the board positions are full-time, the appointees will be required to discontinue their current private employment or take a leave of absence. Columbus Dispatch, Nov. 29, 1983, at B2, col. 1.

88. OHIO REV. CODE ANN. § 4117.05 (Page Supp. 1983).

89. *Id.* § 4117.06(B).

90. *Id.* § 4117.06(D)(1)–(6).

91. *Id.* § 4117.06(D)(1). This section also creates an exception to the general rule. The section will permit the creation of a unit consisting of both professional and nonprofessional employees if a majority of both votes for inclusion in the same unit. *Id.*

92. *Id.* Multi-unit bargaining permits multiple employers to act as a single employer for the purposes of collective bargaining with the exclusive representative of all employees in one unit. J. LEWIS & S. SPIRN, *supra* note 15, at 145.

termination of the appropriate unit is final and unappealable.[93]

After the SERB has designated the appropriate unit, all negotiations concerning the rights and obligations of the employees of that unit are conducted through an employee organization which is established as the exclusive representative of that particular unit. Unless an organization has attained the status of being an "exclusive representative" of a public-employee bargaining unit, the public employer has no duty to negotiate with that representative.[94] An employee organization may gain exclusive representation status in one of two ways: by election or by recognition procedures.[95] The election procedure requires that the organization be certified by the SERB after a majority of the voting employees select the employee organization as their exclusive representative in a board-conducted election.[96] The recognition procedure requires that the employee organization be recognized by the public employer and then certified by the SERB.[97] The act supplies a detailed procedure regarding employer recognition, which provides for rebuttal by the public employees within the particular unit which the organization wishes to represent.[98] Once an employee organization attains the status of "exclusive representative" by one of these methods, it remains the exclusive representative for a minimum of one year from the date of certification, and if an agreement is subsequently reached, for a maximum of three years from the date of the agreement.[99]

The act places an obligation upon the employer to bargain collectively with the exclusive representative of the public-employee unit in good faith.[100] This collective-bargaining procedure is a crucial part of the statute, in that almost all other sections of S. 133 revolve around collective bargaining. As stated by the Ohio General Assembly, to "bargain collectively" means

> to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms

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93. OHIO REV. CODE ANN. § 4117.06(A) (Page Supp. 1983).

94. In pertinent part, § 4117.04(A) states: "Public employers shall extend to an exclusive representative . . . the right to represent exclusively the employees in the appropriate bargaining unit and the right to exclusive representation . . . ." *Id.* § 4117.04(A). *See infra* text accompanying notes 100–04.

95. OHIO REV. CODE ANN. § 4117.05(A) (Page Supp. 1983).

96. A board-conducted election is defined in OHIO REV. CODE ANN. § 4117.07(C) (Page Supp. 1983).

97. *Id.* § 4117.05(A)(2).

98. *Id.*

99. *Id.* § 4117.04(A). *See also* OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: AM. SUB. S.B. 133, at 6 (1983) [hereinafter cited as BILL ANALYSIS] (on file with University of Dayton Law Review).

100. *See supra* text accompanying notes 79–85.

> and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. This includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession.[101]

Although this definition is broad and may incorporate almost all aspects of employment, the bill specifically reserves certain matters to the public employer's sole discretion.[102] These matters are therefore not appropriate subjects for collective bargaining. The act also provides that other matters concerning inherent managerial policy[103] are not topics of collective bargaining unless the public employer agrees otherwise.[104]

S. 133 promulgates further guidelines concerning collective bargaining by specifying "required" and "permitted" provisions in the ultimate collective-bargaining agreement.[105] Every agreement is *required* to contain (1) a grievance procedure which may end in binding arbitration[106] and (2) a provision authorizing the public employer to deduct fees or dues of members of the employee organization upon a written authorization by the employee.[107] The ultimate agreement may *not* contain (1) a provision for a "union shop"[108] and (2) an expiration date beyond three years (although the agreement may be extended).[109] Section 4117.09(C) also provides several "permissive" provisions[110] which *may* be included in the ultimate agreement.

Once an exclusive representative and a public employer arrive at an ultimate agreement, the legislative body[111] of the public jurisdiction

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101. OHIO REV. CODE ANN. § 4117.01(G) (Page Supp. 1983).

102. Matters left to employer discretion include the conduct and grading of civil service examinations, eligibility lists, and original appointments from lists. *Id.* § 4117.08(B).

103. For a brief synopsis of matters which constitute inherent managerial policy, see *id.* § 4117.08(C)(1).

104. OHIO REV. CODE ANN. § 4117.08(C) (Page Supp. 1983).

105. *Id.* § 4117.09.

106. *Id.* § 4117.09(B)(1).

107. *Id.* § 4117.09(B)(2).

108. *Id.* § 4117.09(C). A "union shop" provision "would require as a condition of employment that every employee in a bargaining unit become and remain a member of the employee organization." BILL ANALYSIS, *supra* note 99, at 9.

109. OHIO REV. CODE ANN. § 4117.09(D) (Page Supp. 1983).

110. OHIO REV. CODE ANN. § 4117.09(C) (Page Supp. 1983). The bill states that it is permissible to include a provision which requires employees who are not members of the employee organization to pay a fair-share fee. *Id.* This requirement is based on the presumption that the organization has a legal duty to protect the interests of all employees within the bargaining unit, including those who refrain from union membership.

111. "Legislative body includes the General Assembly, the governing board of a municipal corporation, school district, college or university, village, township, or board of county commission-

must approve the contract.[112] Accordingly, the public employer must submit the agreement to the legislative body, and the legislative body may either accept or reject the agreement.[113] In addition, the act specifically requires submission of a request for funds to implement an agreement, as well as a request for approval of any other matter requiring approval by the legislative body.[114] S. 133 establishes the time requirements of these submissions to the legislative body,[115] and further provides that in the event of a rejection of the proposed agreement, either party (the employer or employee organization) may reopen negotiations.[116]

Section 4117.11,[117] which defines unfair labor practices, is one of the act's most important provisions.[118] This section specifically defines what conduct establishes an unfair labor practice on the part of both the employer[119] and the employee.[120] Ohio's General Assembly has delegated to the SERB the authority to hold hearings[121] and issue orders[122] in relation to alleged unfair practices. Because of the importance of this section and its relevance to the many labor disputes certain to arise, it is sure to create numerous controversies and much litigation.[123]

Unfair labor practices will not be the exclusive source of public controversy. The bulk of public controversy surrounding S. 133 stems from the inclusion of section 4117.14, which details the impasse procedures to be followed by the public employer and the exclusive representative of the public employees.[124] Specifically, section 4117.14 grants certain public employees the limited right to strike,[125] and others the right to seek binding arbitration.[126]

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ers or any other body that has authority to approve the budget of their public jurisdiction." *Id.* § 4117.10(B).

112. *Id.*

113. *Id.* § 4117.10(C).

114. *Id.* § 4117.10(B).

115. *Id.*

116. *Id.*

117. *Id.* § 4117.11.

118. J. LEWIS & S. SPIRN, *supra* note 15, at 75.

119. OHIO REV. CODE ANN. § 4117.11(A) (Page Supp. 1983) establishes what conduct of an employer constitutes an unfair labor practice.

120. Section 4117.11(B) establishes what conduct of an employee organization constitutes an unfair labor practice.

121. *Id.* § 4117.12(B).

122. *Id.* § 4117.13(A).

123. J. LEWIS & S. SPIRN, *supra* note 15, at 75.

124. OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1983).

125. *Id.* § 4117.14(D)(2). Public employees other than those listed in (D)(1) of this section have the right to strike.

126. The section reads in part:

IV. RIGHT TO STRIKE

S. 133 was promulgated primarily in response to the reality that the Ferguson Act[127] was an ineffective means of dealing with public-sector employment relations.[128] State Senator Eugene Branstool[129] stated that "[i]t is clear that Ohio's current Ferguson Act is not working. Although it is illegal under Ohio Law for public employees to strike, Ohio has the third highest public employee strike rate in the country."[130]

Statistical data support Senator Branstool's assessment of Ohio's public-sector labor problem. Historically, Ohio has long been plagued with numerous public-sector work stoppages. In 1977, Ohio led the nation in public-sector work stoppages with sixty-two.[131] The following year, the number of public-sector work stoppages in Ohio increased to sixty-seven;[132] however, both Michigan and Pennsylvania experienced a greater number of public work stoppages that year with seventy-four[133] and sixty-nine[134] public-sector strikes, respectively. In 1979, Ohio was the fourth highest public-sector work stoppage state with fifty-six[135] strikes, but ranked third again in 1980 with sixty strikes.[136]

Despite the prohibition of public-employee strikes in the Ferguson

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> Public employees, who are members of a police or fire department, members of the state highway patrol, deputy sheriffs, dispatchers employed by a police, fire or sheriff's department or the state highway patrol or civilian dispatchers employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special policemen or policewomen appointed in accordance with Sections 5119.14 and 5123.13 of the Revised Code, Psychiatric attendants employed at mental health forensic facilities, or youth leaders employed at juvenile correctional facilities, shall submit the matter to a final offer settlement procedure . . . .

Id. § 4117.14(D)(1).

127. OHIO REV. CODE ANN. §§ 4117.01–.05 (Page 1980), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

128. Interview with Neil Zimmers, Ohio state senator, in Dayton, Ohio (Sept. 19, 1983).

129. State Senator Eugene Branstool was the prime sponsor of Senate Bill 133. He also serves on the Commerce and Labor Committee. 1983 Ohio Legis. Serv. 2-8 (Baldwin).

130. Branstool, *Senator, Former Mayor Debate Bargaining Bill*, Columbus Dispatch, June 28, 1983, at B3, col. 1.

131. Note, *Collective Bargaining, Impasse Resolution & Strikes in the Public Sector: A Recommendation to Amend Massachusetts General Laws Chapter 150E*, 16 NEW ENG. L. REV. 505, 540 (1981).

132. *Id.*

133. *Id.* at 539.

134. *Id.* at 538.

135. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT NO. 629, WORK STOPPAGES IN GOVERNMENT, 1979, at 10 (Mar. 1981) [hereinafter cited as WORK STOPPAGES, 1979].

136. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2120, ANALYSIS OF WORK STOPPAGES, 1980, at 53 (Mar. 1982) [hereinafter cited as WORK STOPPAGES, 1980].

Act,[137] Ohio public employees continued to strike at an alarming rate.[138] This problem is not unique to Ohio, however. In 1980, there were 536 state public-employee strikes in the United States.[139] All but eight states[140] prohibit strikes by public employees. However, in 1980, those states which granted a limited right to strike accounted for only 101 of the 536 public-sector strikes.[141] This data clearly indicates that the mere illegality of a strike has little if any deterrent effect on public employees. Public employees will in fact resort to strikes as a means of settling impasses or redressing grievances.

Despite the apparent inadequacies of the Ferguson Act, opponents of S. 133 vehemently criticize the right to strike in the public sector. John M. Brandt, director of legislative services of the Ohio School Boards Association, believes that strikes are bad public policy for the state of Ohio.[142] According to Brandt, "[e]xperience . . . [has shown] that legalizing strikes is likely to increase the number of strikes, resulting in the disruption of services that the taxpayers have paid for and have a right to depend on."[143] Further criticism of the strike provisions comes from the president of the Akron Board of Education:

> We cannot hope to diminish the number of public strikes by repealing a law prohibiting strikes and providing a new law legalizing strikes. Many law abiding public employees would never strike so long as it was a violation of law; Senate Bill 133 will make many employees more willing to strike.[144]

Relevant statistical information does not support the views of those who oppose S. 133 and its strike provisions. The evidence clearly indicates that granting a right to strike does not increase the frequency of public-sector work stoppages.[145] Of the eight states which currently grant public employees a limited right to strike,[146] only Pennsylvania suffers from a high number of public-employee work stoppages.[147] The

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137. OHIO REV. CODE ANN. §§ 4117.01–.05 (Page 1980), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

138. *See supra* notes 135–36 and accompanying text.

139. WORK STOPPAGES, 1979, *supra* note 135, at 53.

140. Currently eight states grant public employees a limited right to strike. *See supra* note 9.

141. WORK STOPPAGES, 1980, *supra* note 136, at 53.

142. Testimony of John M. Brandt, director of legislative services of the Ohio School Boards Association 3 (June 14, 1983) (testimony on S. 133 before the House Commerce and Labor Committee) [hereinafter cited as Brandt] (on file with University of Dayton Law Review).

143. *Id.*

144. Testimony of the Reverend Eugene E. Morgan, Jr., president, Akron Board of Education 3 (June 1, 1983) (testimony on S. 133) (on file with University of Dayton Law Review).

145. *See infra* text accompanying notes 148–49; *see also* Note, *supra* note 131, at 534–35.

146. *See supra* note 7.

147. Note, *supra* note 131, at 518.

overwhelming majority of those states which have enacted prostrike statutes[148] have experienced no noticeable increase in public-sector work stoppages.[149]

Fear of an *increasing number* of strikes is not the only concern of opponents of S. 133. Opponents also rely on the traditional fear of public strikes—that such work stoppages may paralyze the government.[150] When one considers the already high number of annual public work stoppages which have not resulted in governmental paralysis it can easily be seen that this argument is without merit. Public-sector work stoppages under the Ferguson Act have not resulted in governmental paralysis; likewise, it is reasonable to conclude that strikes under S. 133 will not result in governmental paralysis. It is not the intent of S. 133 to encourage strikes or foster a governmental shutdown. This is clearly evidenced by the fact that the right to strike is not extended to all public employees, but rather is extended only to those employees not employed in the health and safety field.[151] S. 133 further protects against governmental paralysis by making available a temporary restraining order which can be granted by the court of common pleas when a lawful strike creates a clear and present danger to the health or safety of the public.[152]

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148. *See supra* note 9.

149. Note, *supra* note 131, at 534–35.

150. Comment, *Labor Law: Sympathy Strikes under the Minnesota Public Employment Relations Act*, 63 MINN. L. REV. 1023, 1031 (1979).

151. OHIO REV. CODE ANN. § 4117.14(D)(2) (Page Supp. 1983).

152. The temporary restraining order provision reads:

(A) Whenever the public employer believes that a lawful strike creates clear and present danger to the health or safety of the public, the public employer may petition the court of common pleas having jurisdiction over the parties to issue a temporary restraining order enjoining the strike. If the court finds probable cause to believe that the strike may be a clear and present danger to the public health or safety, it has jurisdiction to issue a temporary restraining order, not to exceed seventy-two hours, enjoining the strike.

Should a court issue a temporary restraining order, the public employer shall immediately request authorization of the State Employment Relations Board to enjoin the strike beyond the effective period of the temporary restraining order. The Board shall determine within the effective period of the temporary restraining order whether the strike creates a clear and present danger to the health or safety of the public.

If the Board finds that a clear and present danger exists, the common pleas court which issued the temporary restraining order has jurisdiction to issue orders to further enjoin the strike. However, the court shall make provisions in any injunction or other order issued beyond the temporary restraining order for the automatic termination of the injunction or other order at the end of sixty days following the end of the temporary restraining order or when an agreement is reached, whichever occurs first. Thereafter, no court has jurisdiction to issue any further injunction or other orders pursuant to this section. The order of the court is appealable as provided in the Appellate Rules.

(B) Whenever a court of common pleas has issued an order, other than a temporary restraining order, under division (A) of this section enjoining acts or practices which create a clear and present danger to the public health or safety, the parties to the labor dispute

Contrary to critics' predictions, S. 133 could actually reduce the number of strikes by public employees. James A. Monroe, the executive director of the Ohio Civil Service Employees Association, has indicated that S. 133 "provides for workable alternatives to strikes which never before were available to public employees. The fact finding and arbitration provisions will go far towards eliminating the frustrations which heretofore resulted in strikes."[153] Prior to this legislation, Ohio did not have a comprehensive bargaining statute. Under the Ferguson Act, a governmental entity had no duty to bargain with an employee representative.[154] S. 133 not only requires the public employer and the public-employee representative to engage in good-faith collective bargaining, but also encourages the parties to settle their disputes long before the right to strike will accrue.[155] Therefore, S. 133 should not be characterized as a "right to strike" bill, but rather as a reasonable means to deal with public-sector labor relations concerns on a statewide basis.[156]

Section 4117.14 encompasses many alternatives to strikes and encourages settlements to be made long before public employees could strike. Upon the receipt of notice,[157] the public employer and the pub-

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giving rise to the order shall engage in collective bargaining for a period of sixty days from the date of the order or until agreement is reached, whichever occurs first. The parties shall collectively bargain with the assistance of a mediator appointed by the Board. The mediator, at his discretion, may require that the parties collectively bargain in public or in private. At any time after there has been forty-five days of collective bargaining and no agreement has been reached, the mediator may make public a report on the current position of the parties to the dispute and the efforts which have been made for settlement. The report shall include a statement by each party of its position and a statement of the employee organization's and public employer's offers of settlement.

Id. § 4117.16.

153. Testimony of James A. Monroe, executive director of the Ohio Civil Service Employees Association 8 (June 14, 1983) (testimony on S. 133 before the House Commerce and Labor Committee) [hereinafter cited as Monroe] (on file with University of Dayton Law Review).

154. OHIO REV. CODE ANN. §§ 4117.01–.05 (Page 1980), *repealed by* Act of July 7, 1983, § 2, 1983 Ohio Legis. Serv. 5-237, 5-245 (Baldwin).

155. *See infra* notes 158–69 and accompanying text.

156. Testimony of Donald K. Day, first vice president of AFSCME Ohio Council 8 (June 14, 1983) (testimony on S. 133 before the House Commerce and Labor Committee) (on file with University of Dayton Law Review).

157. The notice provision reads:

(B)(1) In those cases where there exists a collective bargaining agreement, any public employer or exclusive representative desiring to terminate, modify, or negotiate a successor collective bargaining agreement shall:

(a) Serve written notice upon the other party of the proposed termination, modification, or successor agreement. The party must serve the notice not less than sixty days prior to the expiration date of the existing agreement or, in the event the existing collective bargaining agreement does not contain an expiration date, not less than sixty days prior to the time it is proposed to make the termination or modifications or to make effective a successor agreement.

(b) Offer to bargain collectively with the other party for the purpose of modifying or terminating any existing agreement or negotiating a successor agreement;

lic-employee representative shall enter into collective bargaining.[158] If the parties cannot reach an agreement, they may, at any time prior to the expiration of the collective-bargaining agreement, submit the issues in dispute to any mutually agreed upon dispute-settlement procedure.[159]

If the parties are unable to reach an agreement fifty days prior to the expiration of the collective-bargaining agreement, either party may request the SERB to intervene.[160] Upon such request, the board shall intervene and investigate the dispute to determine whether the parties have engaged in collective bargaining.[161] Forty-five days before the expiration of the collective-bargaining agreement, or if an impasse exists, the board shall appoint a mediator to assist the parties in the collective-bargaining process.[162]

If the mediator advises that an impasse does exist, or not later than thirty-one days prior to the expiration date of the collective-bargaining agreement, the board shall appoint a fact-finding panel.[163] It

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(c) Notify the State Employment Relations Board of the offer by serving upon the board a copy of the written notice to the other party and a copy of the existing collective bargaining agreement.

(2) In the case of initial negotiations between a public employer and an exclusive representative, where a collective bargaining agreement has not been in effect between the parties, any party may serve notice upon the board and the other party setting forth the names and addresses of the parties and offering to meet, for a period of ninety days, with the other party for the purpose of negotiating a collective bargaining agreement.

OHIO REV. CODE ANN. § 4117.14(B)(1)–(2) (Page Supp. 1983).

158. *Id.* § 4117.14(B)(4).

159. The applicable dispute-settlement provision reads:

(1) The procedures may include:

(a) Conventional arbitration of all unsettled issues;

(b) Arbitration confined to a choice between the last offer of each party to the agreement as a single package;

(c) Arbitration confined to a choice of the last offer of each party to the agreement on each issue submitted;

(d) The procedures described in division (C)(1)(a), (b), or (c) of this section and including among the choices for the arbitrator, the recommendations of the fact finder, if there are recommendations, either as a single package or on each issue submitted;

(e) Settlement by a citizens' conciliation council composed of three residents within the jurisdiction of the public employer. The public employer shall select one member and the exclusive representative shall select one member. The two members selected shall select the third member who shall chair the council. If the two members cannot agree upon a third member within five days after their appointments, the Board shall appoint the third member. Once appointed, the Council shall make a final settlement of the issues submitted to it pursuant to division (G) of this section.

(f) Any other dispute settlement procedure mutually agreed to by the parties.

Id. § 4117.14(C)(1)(a)–(f).

160. *Id.* § 4117.14(C)(2).

161. *Id.*

162. *Id.*

163. *Id.* § 4117.14(C)(3).

shall be the duty of the fact-finding panel to gather facts and make recommendations for the resolution of the matter.[164] The board may continue mediation, order the parties to engage in collective bargaining until the expiration date of the agreement, or both.[165]

The fact-finding panel must submit its findings of facts and recommendations on the unresolved issues to each party within fourteen days of its inception.[166] Within seven days after the findings of facts and recommendations are sent, either side may reject the recommendations by a vote of three-fifths of its total membership.[167] If neither party rejects the recommendations, they shall be deemed agreed upon as the final resolution of the issue submitted, and a collective-bargaining agreement shall be executed between the two parties, including the fact-finding panel's recommendations.[168]

Only after all of these procedures have been exhausted, and the exclusive representative has given ten days prior written notice of an intent to strike to the public employer and to the board,[169] may a public employee[170] strike. These alternatives to strike[171] were never before enjoyed in Ohio.[172] A public employee had virtually no choice under the Ferguson Act but to resort to an illegal strike in the event of a grievance or impasse. Therefore, S. 133 could reduce strikes in the public sector.

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164. *Id.* § 4117.14(C)(3)(a). "The board shall by its rules require each party to specify in writing the unresolved issues and its position on each issue to the fact-finding panel." Section 4117.14(C)(4) establishes the guidelines for the fact-finding panel. The following guidelines apply to fact-finding:

(a) The fact-finding panel may establish times and places of hearings which shall be, where feasible, in the jurisdiction of the state.

(b) The fact-finding panel shall conduct the hearing pursuant to the rules established by the board.

(c) Upon request of the fact-finding panel, the board shall issue subpoenas for the hearings conducted by the panel.

(d) The fact-finding panel may administer oaths.

(e) The board shall prescribe guidelines for the fact-finding panel to follow in making findings. In making its recommendations, the fact-finding panel shall take into consideration the factors listed in divisions (G)(7)(a) to (f) of this section.

(f) The fact-finding panel may attempt mediation at any time during the fact-finding process. From the time of appointment until the fact-finding panel makes a final recommendation, it shall not discuss the recommendations for the settlement of the dispute with the parties other than the direct parties to the dispute.

Id. § 4117.14(C)(4).

165. *Id.* § 4117.14(C)(3)(b).

166. *Id.* § 4117.14(C)(5).

167. *Id.* § 4117.14(C)(6).

168. *Id.*

169. *Id.* § 4117.14(D)(2).

170. *Id.*

171. *See supra* notes 158–69 and accompanying text.

172. *See supra* text accompanying note 155.

The existence of a limited right to strike could also have the effect of speeding labor negotiations and creating an air of cooperation in public-sector labor relations. By granting public employees a limited right to strike in Ohio, "employers would be reluctant to prolong negotiations and labor disputes would be more expeditiously terminated."[173] The existence or threat of a strike is a primary motivator forcing parties with competing interests to make concessions over terms and conditions of employment.[174]

V. BINDING ARBITRATION

Perhaps the most controversial aspect of S. 133 is the provision which provides public health and safety employees[175] with the right to seek binding arbitration.[176] At least one public employer,[177] the city of Kettering, has stated that the right to strike for all public employees is more favorable than compulsory binding arbitration.[178] Kettering claims that compulsory arbitration changes collective bargaining "from a communications process to a process of posturing so as to best influence a third party, the arbitrator, to render a favorable decision."[179]

The city of Kettering was not alone in its criticism of S. 133 and its compulsory arbitration provision. Many arguments have been made against the incorporation of the binding arbitration provision into S. 133. A primary fear of those opposed to binding arbitration is that it will discourage open discussion, debate, and compromise by encouraging the parties to rely on the decision of the arbitrator as being favorable to their position.[180] The County Commissioners Association of Ohio also criticized binding arbitration. The association claims that it is not equitable to subject the public sector to binding arbitration when the private sector is not subjected to the same burden.[181] The argument of the County Commissioners Association is supported by the fact that the private sector is able to shift the cost of binding arbitration to the consumer through product pricing,[182] an alternative which

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173. Note, *supra* note 131, at 537.

174. Olson, *The Use of the Legal Right to Strike in the Public Sector*, 33 LAB. L.J. 494 (1982).

175. OHIO REV. CODE ANN. § 4117.14(D)(1) (Page Supp. 1983).

176. *Id.*

177. Testimony of Richard L. Strader, personnel director of the city of Kettering 2 (May 23, 1983) (before Ohio House of Representatives) (on file with University of Dayton Law Review).

178. *Id.*

179. *Id.*

180. Brandt, *supra* note 142.

181. Testimony of the County Commissioners Association of Ohio (May 23, 1983) (testimony on S. 133) (on file with University of Dayton Law Review).

the public sector does not enjoy.

The arguments presented against binding arbitration, though not wholly without merit, overlook several important considerations. First, the existence of binding arbitration for public health and safety employees is the final step in the collective-bargaining process.[183] Section 4117.14 of the Ohio Revised Code provides for the same impasse procedures prior to binding arbitration as are provided prior to the right to strike—including fact-finding and mediation.[184] The overall goal of S. 133 is not changed by the inclusion of the binding arbitration provision. S. 133 seeks to facilitate a collective-bargaining agreement long before the right to binding arbitration would be incurred.

Binding arbitration, on an issue by issue last best offer basis,[185] might well have the effect of encouraging, rather than discouraging open discussion, debate, and compromise. For example, as a prerequisite to this type of arbitration, the parties must bargain in good faith.[186] Also, since the arbitrator will be selecting the last best offer of one of the two parties, it is in the best interest of each party to engage in open discussion and debate and to submit the most reasonable final offer possible in light of all the surrounding factors.[187] This result has been evidenced in several states which have enacted binding arbitration provisions. In Michigan, where final offer arbitration is followed, only ten to fifteen percent of all firefighters and police contracts are ultimately settled by an arbitrated award.[188] Similar results have been experienced in Iowa.[189] There, only 4.5 to 7.1% of all contract negotiations have resulted in arbitration awards.[190] In Minnesota, approximately thirty percent of all negotiations involving mediation for essential service employee disputes resulted in arbitration settlements.[191] Experience indicates that a binding arbitration provision is not a deterrent to open debate and discussion which are essential to good collective bargaining; rather, it is a last resort to be relied upon only when the employer and

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183. OHIO REV. CODE ANN. § 4117.14(D)(1) (Page Supp. 1983).

184. *See supra* notes 158–69 and accompanying text.

185. Last best offer means that each party submits a last offer on all issues in dispute to the conciliator. The conciliator then chooses the best of the two final offers on each of the issues as his or her award.

186. OHIO REV. CODE ANN. § 4117.14(B)(4) (Page Supp. 1983).

187. *See infra* note 78.

188. Gallagher, *The Use of Interest Arbitration in the Public Sector*, 33 LAB. L.J. 501, 502 (1982). *See* Testimony of Robert O. Mastin, Michigan state senator (June 14, 1983) (testimony on S. 133) [hereinafter cited as Mastin] (on file with University of Dayton Law Review).

189. Gallagher, *supra* note 188, at 502.

190. *Id.*

191. Brandt, *supra* note 142. *See also supra* note 144; Testimony of J. Steven Morris, city manager of Eaton, Ohio (May 23, 1983) (testimony on S. 133 before the Commerce and Labor Committee) (on file with University of Dayton Law Review).

the exclusive representative cannot resolve their differences by other means.

The principal criticism by opponents of binding arbitration concerns the nonaccountability of an independent arbitrator to the general public. According to opponents, binding arbitration "removes the final decision about salaries, fringe benefits, and other important issues from local accountable officials, and gives those decisions to arbitrators who never have to answer to voters or to anyone else."[192] This loss of control over local collective bargaining, according to opponents, will ultimately devastate the budgets of all units of local government.[193] This criticism seems to be premised upon the assumption that an arbitrator makes an award without considering the financial limitations of local government, and that such awards will exceed the budgetary limitations of local governments. Undoubtedly, this is a legitimate concern; however, it is not a concern ignored by S. 133.

The binding arbitration provision of S. 133 is not unresponsive to the needs of local government. A careful examination of the binding arbitration provision leads one to conclude that the provision is not designed to adversely affect either of the parties; it is rather designed to facilitate the most reasonable agreement possible in a fair and orderly fashion.

The binding arbitration procedure begins after the conciliator is selected to settle the dispute[194] and proceeds according to well-established guidelines.[195] First, the parties submit to final offer settlement those issues that are subject to collective bargaining.[196] The conciliator then holds a hearing within thirty days after the board's order to submit to a final offer settlement procedure.[197] Not later than five days

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192. Brandt, *supra* note 142.

193. Branstool, *supra* note 130, at B3, col. 4.

194. OHIO REV. CODE ANN. § 4117.14(D)(1) (Page Supp. 1983) governs the selection of the conciliator. This section reads in part:

> The parties shall request from the board a list of five qualified conciliators and the parties shall select a single conciliator from the list by alternate striking of names. If the parties cannot agree upon a conciliator within five days after the board order, the board shall on the sixth day after its order appoint a conciliator from a list of qualified persons maintained by the board or shall request a list of qualified conciliators from the American Arbitration Association and appoint therefrom.

195. *Id.* § 4117.14(G).

196. This section reads:

> The parties shall submit to final offer settlement those issues that are subject to collective bargaining as provided by Section 4117.08 of the Revised Code and upon which the parties have not reached agreement and other matters mutually agreed to by the public employer and the exclusive representative; except that the conciliator may attempt mediation at any time.

Id. § 4117.14(G)(1).

197. *Id.* § 4117.14(G)(2).

prior to the hearing, each of the parties submit to the conciliator, the opposing party, and the board a written report summarizing the unresolved issues, that party's final offer as to those issues, and the rationale for that position.[198] The conciliator will hear the testimony from both parties and consider the written report and recommendations of the fact finder.[199] Subsequent to this procedure, the conciliator will settle the dispute on an issue by issue basis, from each of the parties' final offers.[200]

The conciliator is not free to make awards on an ad hoc basis. S. 133 requires the conciliator to consider certain factors[201] in making the award. Specifically, the conciliator must consider the ability of the employer to finance and administer the issues proposed.[202] The effect of this statutory obligation is to protect local governments from outrageous awards which could be devastating to their budgets. The conciliator must also be responsive to the needs of the general public.[203] Though in a technical sense the conciliator is not answerable to the public in the same manner that an elected official is, he or she has a statutory duty to consider the interests and welfare of the public.[204]

Binding arbitration on a last best offer basis has proven successful in other states. Since the enactment of the Michigan Compulsory Arbitration Act[205] in 1969, there has been only one strike involving a public safety union in that state.[206] In Ohio, there were eight strikes involving

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198. *Id.* § 4117.14(G)(3).

199. *Id.* § 4117.14(G)(6).

200. *Id.* § 4117.14(G)(7).

201. In making his or her decision the conciliator must consider:

(a) Past collectively bargained agreements, if any, between the parties;

(b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

(c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(d) The lawful authority of the public employer;

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

Id. § 4117.14(G)(7)(a)–(f).

202. *Id.* § 4117.14(G)(7)(c).

203. *Id.*

204. *Id.*

205. MICH. COMP. LAWS ANN. § 423.231–.242 (West 1978).

206. Mastin, *supra* note 188.

the protection services in 1979 alone.[207] The following year, that figure increased to seventeen work stoppages.[208] This evidence suggests that binding arbitration, when conducted within the proper constraints,[209] can be a very effective means of preventing the devastating effects that could ensue from a police or firefighter strike.

Whether binding arbitration is a desirable means of preventing public-sector strikes or settling public labor disputes must be determined in light of the overall goals of collective bargaining. The purpose of collective bargaining is to facilitate a fair agreement, reasonable to both competing interests.[210] A conciliator cannot—and should not—become involved in the broader issues of governmental budgetary policy.[211] Accordingly, a governmental body should not claim an absolute inability to pay a conciliator's award when in reality it is simply unwilling to realign budgetary priorities in order to pay.[212] Ohio certainly does not want its health and safety employees to engage in strikes. Rather, stabilization of the work force is to be sought.[213] Instead of an increase in the number of strikes, binding arbitration could lead to an increase in public-worker morale and a rise in worker productivity.[214]

VI. CONCLUSION

Although collective bargaining has occurred in Ohio without any legislative framework governing the rights and obligations of the public employer and employee, the general assembly has now furnished Ohio with S. 133, a comprehensive statutory framework controlling all aspects of public employment relations in Ohio. Although some critics question the desirability and potential effectiveness of the strike and binding arbitration provisions contained in S. 133, there have been sufficiently positive results in other states with similar statutes to justify their inclusion here. The right to strike and binding arbitration provisions could go far toward improving Ohio's public labor relations problems. These provisions could in fact have the effect of decreasing the tendency of public-employee strikes in Ohio's public sector. Additionally, the strike and binding arbitration provisions of S. 133 could lead to an overall stabilization of Ohio's public-sector work force,

207. WORK STOPPAGES, 1979, *supra* note 135, at 16.
208. WORK STOPPAGES, 1980, *supra* note 136, at 60.
209. *See supra* note 201.
210. Rapid Roller Co. v. NLRB, 126 F.2d 452, 460 (7th Cir. 1942).
211. Mastin, *supra* note 188.
212. *Id.*
213. Monroe, *supra* note 153.
214. *Id.*

which would enable local governments to more effectively provide essential community services.

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Code Sections Affected: To amend sections 124.02–.03, 124.05, and 124.08, and to enact sections 4117.01–.05, and 4117.06–.23.

Effective Date: October 6, 1983.

Sponsor: Branstool (S)

Committees: Commerce and Labor (H)
Commerce and Labor (S)