THE ALASKA SUPREME COURT AND THE RIGHTS OF PUBLIC SCHOOL TEACHERS AS EMPLOYEES: A SUGGESTED RESPONSE TO JUDICIAL LIMITATION OF COLLECTIVE BARGAINING RIGHTS

I. INTRODUCTION

In *Anchorage Education Association v. Anchorage School District,*[1] the Alaska Supreme Court considered whether the Public Employment Relations Act (PERA)[2] granted the right to strike to public school teachers. The court held that the statute granted no such right, thus leaving teachers with no right to strike under either statutory or common law.[3] The court held further that the legislature's failure to grant this right to teachers while granting it or an alternative right to engage in compulsory interest arbitration[4] to other public employees did not violate equal protection.[5]

The decision in *Anchorage Education Association* is not a substantial departure from the court's recent treatment of statutes defining the rights of teachers as public employees. The court has consistently construed these statutes narrowly.[6] The court enunci-

1. 648 P.2d 993 (Alaska 1982).

2. ALASKA STAT. §§ 23.40.070-.260 (1981). The right to strike is found in ALASKA STAT. § 23.40.200 (1981).

3. 648 P.2d at 996.

4. "Interest arbitration" involves "the determination of certain terms of a new collective bargaining contract by an impartial third person" when the bargaining parties reach impasse. Note, *Impasse Resolution Mechanisms and Teacher Strikes,* 7 U. MICH. J.L. REFORM 575, 581 (1974).

5. 648 P.2d at 996-97. The equal protection challenge was based on U.S. CONST. amend. XIV, § 1 and ALASKA CONST. art. I, § 1.

6. *See, e.g.,* Rouse v. Anchorage School Dist., 613 P.2d 263, 264-66 (Alaska 1980) (salary benefits under collective bargaining agreement do not constitute a "vested" right entitled to judicial protection); Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416, 423 (Alaska 1977) (mandatory bargaining topics include only teachers' salaries, fringe benefits, the number of hours to be worked, and the amount of leave time to be granted).

ated yet another limitation on the collective bargaining rights of teachers in *Anchorage Education Association*. The purpose of this note is to examine the judicial limitations on teachers' rights and the impact of those limitations on employer/employee relations. To this end, the decision in *Anchorage Education Association* serves as the focal point. It is scrutinized both for its own validity and for its implications in the larger context of employer/employee relations in the public schools.

II. SYNOPSIS OF *ANCHORAGE EDUCATION ASSOCIATION V. ANCHORAGE SCHOOL DISTRICT*

A. Facts and Procedural Posture of the Case

The *Anchorage Education Association* case arose out of contract negotiations between the association and the board of education. The negotiations commenced in late 1978 and continued without agreement until early September 1979. The parties' failure to consummate an agreement for the 1979-80 school year prompted the teachers to strike on September 5, 1979. The teachers remained on strike until September 10, when the superior court issued a temporary restraining order (TRO). The court enforced the TRO by issuing contempt citations and bench warrants for those teachers who continued to strike.

The parties subsequently agreed to a settlement plan which permitted the association to seek a declaratory judgment on the issue of the legality of teachers' strikes. The plan was included in the settlement order issued by the superior court. No further proceedings were held and the teachers returned to their classrooms.

In spite of the resolution of the contract dispute, the association did not adhere to the terms of the settlement and appealed the TRO to the supreme court without seeking declaratory judgment of their right to strike under PERA.[7] Thus, the supreme court was unaided by a lower court decision concerning the legality of the strike.

B. Summary of the Legal Issues Presented to and Resolved by the Court

The case involved several related issues concerning the rights of teachers as public employees. Although the primary issue before the court was whether teachers have the right to strike under PERA, the court also considered whether such a right exists under the common

7. In light of the importance of the issues presented and in the interest of judicial economy, the court "decided to relax the normal rules and proceed to a consideration of the merits of [the] case, as though a declaratory judgment had been entered." 648 P.2d at 994.

law. Having resolved the right to strike issue against the teachers' association under both statutory and common law, the court was compelled to consider whether the legislature's failure to include teachers in either the right to strike or the compulsory interest arbitration provisions of PERA violated the constitutional mandate of equal protection of the laws. Specifically, the court considered whether denying teachers a right to strike or to engage in compulsory interest arbitration, while granting those rights to other public employees, bore a fair and substantial relation to a legitimate legislative purpose.

— Whether Teachers Enjoy a Right to Strike Under Statutory or Common Law

Writing for the majority, Justice Connor first addressed the question whether the right to strike granted by the legislature in PERA[8] extended to public school teachers. The statute states that "public utility, snow removal, sanitation and public school and other educational institution employees" are permitted to "engage in a strike after mediation . . . for a limited time."[9] This language, standing alone, appears to grant teachers a limited right to strike.[10]

The majority did not end its scrutiny with the seemingly unequivocal language of the statute. Relying on the definitional section of PERA which declares that a "public employee" is "any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or teachers or noncertificated employees of school districts,"[11] the majority concluded that the statutory right of public employees to strike did not extend to public school teachers.[12] Quite simply, the court held that teachers were not "public employees" for purposes of PERA.

The teachers contended that they must be included within the right to strike provision, lest the language of the statute be rendered meaningless. The court disposed of this claim by observing that the statutory language would be meaningless only if teachers were the sole class of public school employees.[13] "Since other certificated employees, such as principals and counselors, are also public school employees, that term is not meaningless in light of our construc-

8. ALASKA STAT. § 23.40.200 (1981).

9. *Id.* § 23.40.200(c).

10. Indeed, commentators routinely included Alaska in the group of states allowing teachers to strike. *See, e.g.,* McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining,* 13 HARV. J. ON LEGIS. 479, 513-14 (1976); Note, *supra* note 4, at 577-78.

11. ALASKA STAT. § 23.40.250(5) (1981).

12. 648 P.2d at 995-96.

13. *Id.*

tion."[14] The court acknowledged the possibility that such employees might have the right to strike but did not resolve that issue.[15]

The majority found further support for its statutory construction by reference to the legislature's silence on the issue. The court found, upon an extensive examination of the law in other jurisdictions, that when PERA was enacted in 1972, the prevailing rule was that public employees had no right to strike in the absence of express statutory authorization.[16] According to the court, the legislature's failure to expressly disavow the majority rule as it applied to teachers could only be taken as its affirmation of the rule.[17]

The court then turned to the question whether a right to strike exists under common law. The court adhered to the prevailing rule in finding no such right.[18] In reaching its decision, the court was influenced by "a recognition of the special role that teachers fill in society and [the court's] acknowledgment of [its] functional limitations . . . when attempting to make social policy decisions."[19]

— Whether the Exclusion of Teachers from the Strike and Interest Arbitration Provisions of PERA Is a Denial of Equal Protection

1. *Summary of Opinions.* Having concluded that teachers have no right to strike under Alaska law, the court was compelled to address the association's argument that the legislative exclusion of teachers from both the right to strike and the interest arbitration provisions of PERA constituted a denial of equal protection under the United States and Alaska Constitutions. Accordingly, the court scrutinized the exclusion to determine whether it bore a "substantial relation"[20] to the dual purposes of PERA which are "to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government."[21]

The court looked beyond PERA in determining whether the exclusion bore a substantial relation to the purpose of promoting harmonious and cooperative public employer/employee relations. The

14. *Id.*
15. *Id.* at n.5.
16. *Id.* at 995-96.
17. *Id.* at 996.
18. *Id.*
19. *Id.*
20. The court employed the "substantial relation" standard applicable to the Alaska Constitution, noting that if the exclusion could withstand this level of scrutiny, it would also pass muster under the less strict "rational basis" standard which would have been applied under the United States Constitution. 648 P.2d at 996 n.7.
21. ALASKA STAT. § 23.40.070 (1981).

court found this purpose fulfilled, not by the provisions of PERA, but rather by the provisions in Title 14 (Education) for collective bargaining,[22] advisory mediation,[23] and binding grievance arbitration.[24] The court disposed of the association's contention that the absence of a right to strike would encourage school boards to negotiate in bad faith by noting that a statutory obligation[25] to bargain in good faith is imposed on school boards.[26]

Having found the first purpose of PERA fulfilled, the court considered whether the exclusion assured effective and orderly governmental operations. This question could only be answered affirmatively, as the primary effect of teachers' work stoppages is to disrupt the operation of the schools. Thus, denying teachers the right to strike bore a substantial relation to the purpose of insuring that the operation of the schools would not be impaired.[27]

The court's construction of the statute did not satisfy the association, which further argued that the concurrent exclusion from the compulsory interest arbitration provision constituted a denial of equal protection since all other public employees who are denied the right to strike are given the right to engage in interest arbitration under the statute. The court stated: "It is permissible for the legislature to have found that teachers, although necessary to the functioning of society so as to forbid strikes, were not so essential as to require compulsory arbitration. Thus the strike provisions . . . are substantially related to the legislative goal of uninterrupted school operation."[28]

Chief Justice Rabinowitz agreed with the majority's statutory construction. He dissented sharply, however, from the majority's equal protection analysis. The chief justice framed the equal protection issue differently, stating:

> The question is not, however, whether the legislature is required to grant arbitration rights to public employees; rather, it is whether the legislature, having granted strike or binding arbitration rights to a substantial portion of public employees, can lawfully deny these same rights to a particular sub-class of public employees.[29]

Rather than asking whether there was a fit between the exclusion

22. *Id.* §§ 14.20.550-.560.
23. *Id.* §§ 14.20.570-.580.
24. *Id.* § 14.20.590.
25. *Id.* § 14.20.550.
26. 648 P.2d at 997.
27. *Id.*
28. *Id.*
29. *Id.* at 999 (Rabinowitz, C.J., dissenting).

and the legislative purpose, the chief justice compared the group excluded with the group included under the legislative act. In his opinion, differential treatment of the two groups could have been justified only if it had been "shown that there is a substantial difference between the group excluded and the group covered by the act. The suggested difference must be such that it is reasonable to treat the group differently with respect to the legislation in question."[30] This analysis enabled the chief justice to conclude that "no persuasive reason has been advanced for the exclusion of public school teachers from the limited right to strike — binding arbitration provision provided for in [ALASKA STAT. §] 23.40.200."[31]

2. *Comparative Analysis of Opinions.* The majority's equal protection analysis appears, at first blush, to be an unjustified rejection of the association's legal position, especially when compared to the sharp dissent of the chief justice. Upon closer examination, however, it is apparent that the court did not believe that teachers would have no rights as employees following its decision. Teachers have the rights to engage in bargaining as a means of achieving recognition of their demands related to wages, hours, and terms and conditions of employment and to employ advisory mediation as a means of impasse resolution.[32] Thus, the court did not find it necessary that teachers should have either the right to strike or the right to engage in binding interest arbitration in order to give meaning to their recognized rights as employees. In this respect, the majority exhibited great deference to the legislative determination that teachers were not in need of these bargaining weapons.

The court did not view the statutory rights to strike or to engage in binding interest arbitration as ends in themselves. Instead, the court's analysis is apparently based on the assumption that such rights are but one part of the whole of public employer/employee relations; they may or may not be a necessary part of the relationship. When examined from this perspective, teachers are not placed at a disadvantage in relation to other public employees when they are denied the right to strike or the right to engage in binding interest arbitration.

The court did not ignore the teachers' position that they, as employees, were in need of a method of impasse resolution. Instead, the court looked closely at the rights granted to teachers under Title 14. These rights include collective bargaining,[33] binding grievance

30. *Id.* (citations omitted).
31. *Id.*
32. ALASKA STAT. §§ 14.20.550-.560, .570-.590 (1982).
33. *Id.* §§ 14.20.550-.560.

arbitration,[34] and, most importantly, advisory impasse mediation.[35] The existence of the statutory right to engage in advisory mediation was critical to the court's disposition of the equal protection question. Mediation is an alternative to both strikes and interest arbitration as a method of impasse resolution.[36] Thus, under the provisions of Title 14, teachers are provided a method for resolving collective bargaining disputes with their employers. Although mediation is a less coercive method of impasse resolution,[37] the court recognized that the legislature had adopted it as the proper method to be used between teachers and boards of education. The court refused, as a matter of proper equal protection analysis, to examine the wisdom of this legislative choice and accepted the legislature's decision that mediation would be the only method of impasse resolution used in the public schools.

Having satisfied itself that teachers do enjoy many of the benefits conferred by PERA, it appears that the court became less concerned with whether exclusion of this group from the statutory provisions bore a fair and substantial relation to the legislative purpose of promoting harmonious and cooperative labor relations, and more concerned with whether the exclusion bore the proper relation to the enunciated purpose of "assuring effective and orderly operations of government." While focusing on this purpose, the court could arrive at but one conclusion — that the exclusion did bear a fair and substantial relation to this particular legislative purpose. By focusing on this legislative purpose, the court tacitly communicated its concern for the disruptive effects of strikes by public school teachers. It is this concern which caused the court to declare that the need of teachers for an effective method of impasse resolution was satisfied by the provisions for mediation contained in Title 14 and to conclude that the legislative purpose of preventing interruption of governmental services was satisfied by the exclusion of teachers from the right to strike and the interest arbitration provisions of PERA. Whether characterized as a deference to legislative choice or simply

34. *Id.* § 14.20.590.

35. *Id.* §§ 14.20.570-.580.

36. *See* Note, *supra* note 4.

37. Mediation, due to its advisory nature, requires the parties to concede very little of their control over the bargaining process. With a strike, the employer has no control over the employees' activities. In arbitration, neither party can control the result as they might otherwise be able to do through negotiation on the basis of a strong position since resolution of the impasse is achieved through an independent third party's judgment which binds the parties. In the private sector, interest arbitration is available as an impasse resolution mechanism only if the parties demonstrate a clear intent in the collective bargaining agreement to submit their bargaining differences to arbitration. *See, e.g.,* Local 50 v. Newspaper Printing Corp., 399 F. Supp. 593 (M.D. Tenn. 1974), *aff'd per curiam,* 518 F.2d 351 (6th Cir. 1975).

as a judicial assumption, the court's acceptance of mediation as an effective method of impasse resolution allowed it to safely conclude that the exclusion did not violate equal protection.

Another assumption appears to have shaped the court's decision as well. Although the court did not express this view, it appeared to believe that teachers are not in the same category as other public employees, such as sanitation workers, street maintenance crews, policemen, and firemen. Teachers are, instead, professionals who do not need to invoke the traditional weapons of labor in their disputes with the school district as an employer. Stated differently, the court appeared to assume that PERA is protective legislation, designed to assure that the rights of nonprofessional public employees are not trammeled in the course of the employer/employee relationship.[38] Teachers, however, are professionals who, by virtue of the nature of their positions, are not in need of such protection. The professionalism of teachers provides adequate protection of their rights as employees.[39]

Chief Justice Rabinowitz, in his dissent, appears to have viewed the rights to strike and to engage in binding interest arbitration as ends in themselves. His equal protection analysis is based on the theory that a benefit must be conferred on all if it is to be conferred on anyone. If the government chooses to differentiate among groups, such differentiation is justifiable only to the extent that a "persuasive reason"[40] supports the legislative choice.

The chief justice correctly recognized that the exclusion of teachers from the right to strike and the binding interest arbitration provisions of PERA "significantly handicaps public school teachers in their collective bargaining efforts."[41] A disadvantage exists to the extent that teachers, unlike other public employees, have no coercive tactics available for use in the bargaining process. The existence of a handicap is germane only to the extent that it triggers equal protection, but is not dispositive of the issue. This is where the chief justice differed from the majority and erred in his analysis. He allowed the existence of differential treatment to control his analysis and did not look to the purpose for the differential treatment to determine whether that purpose legitimized the exclusion. In short, his focus

38. Professors at state universities of Alaska are covered by PERA. Carter v. Alaska Public Employees Ass'n, 662 P.2d 916, 917 n.1 (Alaska 1983). The explanation for giving this group of professionals the protection of PERA and not treating the public school teachers similarly may lie in the fact that teachers receive collective bargaining recognition and rights under Title 14, while professors' rights are not recognized elsewhere.

39. *See infra* text accompanying notes 112-17.

40. 648 P.2d at 999 (Rabinowitz, C.J., dissenting).

41. *Id.*

on the exclusion itself and his disapproval of that exclusion allowed him to be unpersuaded by the rationale in support of the legislative choice. He either failed to recognize or chose to ignore the rule that if the legislatively imposed handicap bears a fair and substantial relation to a legitimate legislative purpose, then differential treatment is constitutional.

The difference, between the majority and dissenting opinions regarding whether the exclusion of teachers from PERA's right to strike and binding interest arbitration provisions bore a fair and substantial relation to the stated legislative purpose, was due to differing concepts of the nature of public sector labor relations. Chief Justice Rabinowitz apparently believes that all public employees must have the most powerful weapons available to insure the success of the collective bargaining process. His opinion is grounded in the erroneous belief that all public employees, like private sector laborers, are oppressed by their employers and must have the same tools available to them if healthy labor relations are to be achieved. Differences between public sector and private sector employment do exist which make public sector collective bargaining quite different from that in the private sector. The private sector relationship has been characterized as a struggle between the domineering forces of capital and the underpowered forces of labor.[42] The public sector relationship, especially in the situation of public schools, cannot be so characterized. This difference renders the justifications for the right to strike or the right to binding interest arbitration in the private sector inapplicable to the situation found in the public sector. Thus, the chief justice's underlying assumptions have no place in the case of public sector employer/employee relations.

III. CRITICAL EVALUATION OF *Anchorage Education Association*

A. Statutory Construction

The majority's interpretation of the language embodied in PERA appears to be a correct reading of the literal terms of the statute. However, the propriety of the majority's statutory construction does not render the consequences of the decision any more acceptable.

The troublesome result of the court's statutory interpretation is that the majority was compelled to conclude that the term "public school employees" in the right to strike provision of PERA might

42. This notion is, to a great extent, embodied in the National Labor Relations Act. As amended in 1947, the Act contains a finding that industrial strife is traceable to employers' denials of employee rights. 29 U.S.C. § 151 (1976).

include principals and counselors. Assuming, for the sake of argument, that this is what the legislature had in mind, the statute is illogical. It is difficult to believe that the legislature would deny teachers the limited right to strike while granting that right to administrative personnel. Administrators do not, as a rule, engage in collective bargaining or other concerted labor activities.[43] Instead, administrators' interests are aligned with those of the school board or "management" side of the employer/employee relationship.[44] The likelihood that they would engage in concerted activities, including strikes, is therefore diminished. A limited right to strike under PERA would have little or no meaning for these persons.

Having concluded that the term "public school employees" may include principals and counselors, the court will find it difficult to conclude that these persons have no right to strike.[45] Should the court conclude, in the future, that PERA does not include principals and/or counselors, the term "public school employees" will have no meaning.[46] Although stating that it reserved decision on the issue, the court effectively foreclosed the possibility of answering the issue in the negative.

A serious equal protection issue is then raised. The legislature has granted a limited right to strike to a small class of public school employees while denying it to the larger class of employees which includes teachers and noncertificated personnel.[47] The justification for this differential treatment is elusive, and it is difficult to believe that the distinction bears any relation, much less a fair and substantial relation, to a legitimate legislative purpose. Indeed, it is difficult to grasp any purpose behind such differential treatment. Administrative personnel, such as principals and counselors, are a more integral part of the school's management team than are teachers. Two conclusions flow from this premise. First, it is doubtful that these

43. There are, however, exceptions to the general rule. Principals in Butte, Montana, organized and struck in February, 1983, due to a dispute with the board of education over job security in anticipation of layoffs expected in the 1983-84 school year. *Schools Close In Mont. City As Officials Walk Off Job,* Durham [N.C.] Morning Herald, Feb. 2, 1983, at 2A, col. 2 (Associated Press story).

44. *See generally* Peterson, *The Politics of American Education,* in REVIEW OF RESEARCH IN EDUCATION 348 (F. Kerlinger & J. Carrol eds. 1974).

45. A conclusion that principals and counselors have no right to strike would render the statutory language meaningless unless the court would hold that superintendents and/or assistant superintendents might have a right to strike. The absurdity of such a conclusion is obvious.

46. Previously, in Kenai Peninsula Borough School Dist. v. Kenai Peninsula Borough Dist. Classified Ass'n, 590 P.2d 437, 439 (Alaska 1979), the court held that noncertificated employees are not covered by the collective bargaining provisions of PERA.

47. *See id.*

persons would exercise the right to strike against the management team of which they are a part.[48] Second, and more importantly, they will not utilize collective bargaining as a means of negotiating their contracts. Instead, their contracts will be established through amicable discussion on an individual basis with their superiors. In essence, they have the influence to obtain favorable contract terms by virtue of their positions on the management team. Thus, principals and counselors are not so downtrodden as to need a coercive tactic such as a limited right to strike in order to deal effectively with their employers. Indeed, the fact that they stand on a more equal footing with their employers than do teachers indicates that principals and counselors are less in need of the protective weapon provided by a limited right to strike.

The tacit intent to avoid the disruptive effect of a teachers' strike, which helped to shape the *Anchorage Education Association* decision, also militates against the conclusion that the legislature could have intended that principals and counselors enjoy a limited right to strike under PERA. A strike by principals and counselors is potentially as disruptive as a strike by teachers.[49] Why the legislature would allow such disruption to occur at the hands of principals and counselors, but not at the hands of teachers, is unclear.

It is difficult to conclude that a right of principals and counselors to strike bears a fair and substantial relation to the purpose of PERA to prevent interruption of governmental services. Nor can the right be necessary to create harmonious employer/employee relations, as such harmony already exists to a large extent.[50] When compared with the apparent right of principals and counselors to strike, the exclusion of teachers from the right to strike provisions of the statute would, in all likelihood, fail to pass equal protection scrutiny.

The problem is hypothetical at this point since the court expressly reserved decision on the issue whether principals and counselors do, in fact, enjoy a limited right to strike under PERA.[51] By reserving decision on this issue, the court delayed confronting a serious equal protection issue.

A subsidiary problem with the court's construction of the statute is that it considers counselors to be nonteaching personnel. While

48. In 1979, 181 strikes involving 58,600 teachers were reported. In 1980, 232 strikes occurred, involving 107,700 teachers. No work stoppages involving principals were reported in either year. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, WORK STOPPAGES IN GOVERNMENT, 1980 at 7.

49. By enlisting the sympathy of teachers, the striking principals in Butte, Montana, *see supra* note 43, were able to close the 6400 student district when teachers refused to cross the picket line.

50. *See supra* note 48.

51. 648 P.2d at 995 n.5.

counselors in a larger school district such as Anchorage may have duties more akin to those of administrators, the more probable situation in the smaller districts of the state is that they function more like teachers.[52] Although Alaska has not decided whether counselors are to be considered teachers or administrators, other states consider counselors to be teaching personnel for purposes of collective bargaining and tenure.[53] A legislative decision to grant a limited right to strike only to one sub-class of teachers is difficult to justify either as a matter of law or policy.

The legislature's choice of terminology forced the court to engage in statutory construction with preposterous results. More importantly, the necessary construction creates a potentially serious equal protection issue. This situation could have been avoided if the court had employed another available avenue of reasoning to achieve the same result.

The court could have found that Title 14 is the exclusive statutory regulation of certificated public school employees' labor activities. Title 14 contains extensive regulation of the collective bargaining relationship between certificated employees and their employers, ranging from recognition of the right to organize and engage in collective bargaining,[54] to provisions for binding grievance arbitration as a method of dispute resolution.[55] These provisions specifically address the needs of teachers and other certificated personnel, yet stop short of creating the right to strike. Advisory mediation is the primary method of impasse resolution under Title 14 and, if it is unsuccessful, the governor may appoint an advisory arbitrator as the final step in the bargaining process.[56] This scheme for impasse resolution appears to be in direct conflict with the language of the right to strike provision of PERA on which the association relied. By applying the rule of statutory construction that a more specific statute controls a conflicting, more general statute, which is arguably applicable to the situation,[57] the court could have held that the spe-

52. While teaching duties are a matter of discretion in the local district, small districts may lack the demand for or finances to support a full-time counselor. Therefore, counselors' duties may include classroom instruction, as either a primary or secondary responsibility.

53. *See* Capella v. Board of Educ. of Camden County Vocational & Technical School, 145 N.J. Super. 209, 367 A.2d 444 (App. Div. 1976); Krolop v. South Range Local School Dist. Bd. of Educ., 47 Ohio App. 2d 208, 353 N.E.2d 642 (1974); McCoy v. Lincoln Intermediate Unit No. 12, 38 Pa. Commw. 29, 391 A.2d 1119 (1978), *cert. denied,* 441 U.S. 923 (1979).

54. ALASKA STAT. § 14.20.560 (1982).

55. *Id.* § 14.20.590.

56. *Id.* § 14.20.580(c).

57. *See, e.g.,* National Bank v. State, 642 P.2d 811, 817 (Alaska 1982)

cific regulations in Title 14 supplant the more general provisions of PERA.[58]

This approach would have enabled the court to reach the conclusion that teachers have no right to strike, while avoiding its anomalous conclusion that perhaps principals and counselors, but not teachers, enjoy a limited statutory right to strike. This approach would not have required reversal of any prior holding that PERA governs public school employer/employee relations.[59] Prior to *Anchorage Education Association,* the supreme court relied exclusively on Title 14 when called upon to determine questions concerning the collective bargaining rights of teachers.[60] By adopting this approach, the court could have avoided the problems arising out of its statutory construction in *Anchorage Education Association.*

B. Equal Protection Analysis

The majority's equal protection analysis focused almost exclusively on one purpose of PERA: to assure that governmental services would not be disrupted by labor strife. Although this is a legitimate and salutary legislative purpose, it is troublesome that the court allowed it to be nearly dispositive of the equal protection issue. The majority's focus on only one of the two purposes of PERA undermines the legitimacy of its equal protection analysis.

The problem with the majority's shortsighted view of the purpose of PERA is that if continuity of governmental services is the controlling purpose of the legislation, it follows that no group of public employees should have the right to strike or, at a bare minimum, the rights of public employees to engage in concerted activities should be severely restricted. This is not, however, the approach to public sector employer/employee relations endorsed by the legislature in PERA. The legislature recognized the need for harmonious employer/employee relations in the public sector[61] by allowing employees to bargain collectively,[62] while simultaneously recognizing

("[S]pecific statutes must control over general statutes, when the two enactments cannot be harmonized.") (footnote omitted).

58. Although the rule of statutory construction requires reconciliation of the two statutes if possible, that could not be achieved in this instance without rendering the term "public school employees" meaningless. Had the court hypothesized, as it did in *Anchorage Education Association,* that the term may include principals and counselors, the conflict would still exist since principals are granted collective bargaining rights under Title 14.

59. *See supra* note 46 and accompanying text.

60. *See, e.g.,* Rouse v. Anchorage School Dist., 613 P.2d 263 (Alaska 1980); Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n, 572 P.2d 416 (Alaska 1977).

61. ALASKA STAT. § 23.40.070 (1981).

62. *Id.* § 23.40.080.

the public's need for continuity in many governmental services,[63] thus restricting the types of coercive tactics available to certain classes of public employees as modes of enforcing their collective bargaining rights.[64]

The difficulty of accommodating these competing interests is evident on the face of the statute. The right to strike or to engage in other concerted activities in situations of impasse is critical to enforcing employees' right to bargain with their employer.[65] This right, however, is at odds with the public's need for uninterrupted governmental services. Thus, the legislature has divided public employees into three classes for purposes of granting the right to strike or the corresponding right to engage in binding interest arbitration.[66] First, critical employees, such as policemen and firemen, are denied the right to strike, yet granted the right to binding interest arbitration.[67] Second, semi-critical employees are granted the right to engage in strikes not longer than ten days in duration after engaging in mediation without reaching agreement.[68] Third, noncritical employees are allowed an unlimited right to strike.[69] In light of this extensive legislative effort to accommodate the recognized, yet competing interests of the public and governmental employees, it is distressing that the majority concluded that the legislature could properly exclude teachers from the right to strike provisions of the statute.

If the majority exhibited one type of shortsightedness in focusing solely on the purpose of PERA to prevent interruption of governmental services, Chief Justice Rabinowitz exhibited another type in his dissent. His nearly exclusive focus on the legislative intent to promote harmonious employment relations in the public sector led him to conclude that the exclusion of teachers from the right to strike provisions of the statute was at odds with that purpose, thus indefensible against the mandate of equal protection.[70] While this is a legitimate observation, its validity is undermined by the existence of the second purpose of PERA. The chief justice recognized this second purpose in stating that the equal protection violation arises not out of the denial of the right to strike, but out of that denial when coupled with the legislative failure to substitute the right to binding interest arbitration for the right to strike.[71] He gave little credence to

63. *Id.* § 23.40.070.
64. *Id.* § 23.40.200.
65. *See supra* text accompanying notes 33-37.
66. ALASKA STAT. § 23.40.200(a) (1981).
67. *Id.* § 23.40.200(a)(1).
68. *Id.* § 23.40.200(a)(2).
69. *Id.* § 23.40.200(a)(3).
70. 648 P.2d at 999 (Rabinowitz, C.J., dissenting).
71. *Id.*

the proposition that the advisory mediation provisions of Title 14 provide an adequate substitute, dismissing the majority's position in a footnote.[72] When compared to the majority's equal protection analysis, it becomes apparent that the chief justice missed the mark, relying on a belief that, if public employees' bargaining rights are to be meaningful, they must have the most coercive tactics available to enforce them. In this respect, his equal protection analysis lacks legal validity.

The majority's focus, however, is defensible since the court believed that the purpose of preventing disruption of governmental services is satisfied by the mediation provisions of Title 14. Without questioning the wisdom of advisory mediation as an impasse resolution mechanism, the majority accepted it as a substitute for the right to strike. This acceptance is implicitly founded upon a concern for the court's proper role in reviewing the legal propriety of legislative acts.[73] The court, however, should not have accepted advisory mediation as a valid impasse resolution mechanism without more serious inquiry into its efficacy. The court should have examined more fully whether the legislature intended that mediation at the hands of the Federal Mediation and Conciliation Service would adequately promote harmonious labor relations between teachers and boards of education.[74] Although this inquiry might have brought the court dangerously close to crossing the line of demarcation between legislative and judicial functions, it would have added more credibility to the court's decision on the most difficult and sensitive issue presented by the case.

IV. THE LARGER PERSPECTIVE

The court's decision in *Anchorage Education Association* is not unusual when compared to similar decisions in other jurisdictions. While some state courts have found that teachers have a right to strike under PERA-type legislation,[75] other jurisdictions have found no such right under similar statutes.[76] Moreover, such exclusions

72. *Id.* at n.6.

73. *Id.* at 996.

74. One practitioner with twenty-one years of experience in collective bargaining has characterized the work of the FMCS in non-major labor disputes as "at its best ineffective and at its worst harmful." Interview with Allen Siegel, of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., in Durham, N.C. (Sept. 6, 1983).

75. *See, e.g.,* School Dist. for Holland v. Holland Educ. Ass'n, 380 Mich. 314, 157 N.W.2d 206 (1968); Forest Hills School Dist. v. Forest Hills Educ. Ass'n, 45 Pa. Commw. 633, 405 A.2d 1346 (1979).

76. San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979); School Dist. No. 351, Oneida County v. Oneida Educ. Ass'n, 98 Idaho 486, 567 P.2d 830 (1977); Hortonville Educ. Ass'n v. Hortonville Joint

have been upheld against equal protection challenges.[77] These challenges differ from the one in *Anchorage Education Association,* however, in that most of them challenge the differential treatment of private and public sector employees.[78] Indeed, it appears that the equal protection challenge presented in *Anchorage Education Association* is quite novel in that it is founded on the differential treatment of classes of public employees.[79] While the legal basis of this challenge may be unprecedented elsewhere, the outcome is foreshadowed by decisions made within the past decade in other jurisdictions. The results of those decisions evidence a tendency to restrict, through judicial interpretation, the collective bargaining rights of teachers under PERA-type legislation.[80] This tendency reflects a similar trend in state legislatures to deny teachers collective bargaining rights by balking at the prospect of enacting PERA-type legislation.[81]

Both courts and legislatures have retreated from the era of expansion of teachers' collective bargaining rights which existed between 1970 and 1975.[82] The Alaska Supreme Court joined this retreat soon after it commenced. In 1977, in *Kenai Borough Peninsula School District v. Kenai Peninsula Education Association,*[83] the court was called upon to determine the proper scope of mandatory bargaining topics under Title 14. It held that the scope of mandatory bargaining topics was quite limited, including only salaries, fringe benefits, the number of hours to be worked, and the amount of leave

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School Dist. No. 1, 66 Wis. 2d 469, 225 N.W.2d 658 (1975), *rev'd on other grounds,* 426 U.S. 482 (1976).

77. *See, e.g.,* School Dist. No. 351, Oneida County v. Oneida Educ. Ass'n, 98 Idaho 486, 567 P.2d 830 (1977); Minnesota Fed'n of Teachers Local 59 v. Minnesota Special School Dist. No. 1, 258 N.W.2d 802 (Minn. 1977); Hortonville Educ. Ass'n v. Hortonville Joint School Dist. No. 1, 66 Wis. 2d 469, 225 N.W.2d 658 (1975), *rev'd on other grounds,* 426 U.S. 482 (1976).

78. *See, e.g.,* School Dist. No. 351, Oneida County v. Oneida Educ. Ass'n, 98 Idaho 486, 567 P.2d 830 (1977). *But see* Hortonville Educ. Ass'n v. Hortonville Joint School Dist. No. 1, 66 Wis. 2d 469, 225 N.W.2d 658 (1975), *rev'd on other grounds,* 426 U.S. 482 (1976) (challenge based on grant of binding interest arbitration to police and firemen but not to teachers).

79. *But see* Hortonville Educ. Ass'n v. Hortonville Joint School Dist. No. 1, 66 Wis. 2d 469, 225 N.W.2d 658 (1975), *rev'd on other grounds,* 426 U.S. 482 (1976).

80. Jascourt, *Labor Relations in the Decade Ahead,* 10 J.L. & EDUC. 357, 363 (1981).

81. Clark, *Labor Relations in the Decade Ahead: A Management Perspective,* 10 J.L. & EDUC. 365, 366 (1981).

82. *See id. But see* Public Employee Collective Bargaining Act, 1983 Ohio Legis. Bull. 1121 (Anderson) (enacted June 30, 1983 and modeled after National Labor Relations Act). (Ohio is one of only three states predicted to enact public sector collective bargaining statutes in the 1980's. Clark, *supra* note 81, at 366).

83. 572 P.2d 416 (Alaska 1977).

time to be granted.[84] Topics such as relief from nonprofessional chores, elementary planning time, paraprofessional tutors, teacher specialists, teacher's aides, class size, pupil-teacher ratio, teacher ombudsmen, teacher evaluation of administrators, school calendar, selection of instructional materials, use of secondary department heads, secondary teacher preparation and planning time, and teacher representation on school board advisory committees were found to be nonnegotiable.[85]

The justification for excluding these items from the scope of bargaining is found in Title 14, which provides that: "Nothing in [ALASKA STAT. §§] 14.20.550-14.20.600 of this chapter may be construed as an abrogation or delegation of the legal responsibilities, powers, and duties of the school board including its right to make final decisions on policies."[86] Both the statute and the court's examination of the employment relation between teachers and boards of education evidence a deference to the position of the school board as the ultimate decisionmaker on questions of educational policy.

The restrictive scope of bargaining under Title 14, as interpreted by the court, does not vary substantially from the scope of bargaining found to exist under similar legislation in other jurisdictions.[87] Indeed, it appears that a limited scope of bargaining is the rule in a majority of other states,[88] particularly those which addressed the issue after 1975.[89] The rule, however, is not unanimous.[90]

The importance of the decisions in *Kenai* and *Anchorage Education Association* lies not so much in the legal rules that teachers enjoy only a limited scope of bargaining and have no right to strike or otherwise compel their employer to reach agreement on contract terms, but rather in the court's conception of the employment rela-

84. *Id.* at 423.

85. *Id.*

86. ALASKA STAT. § 23.40.610 (1981).

87. *See, e.g.,* Chee-Chaw Teachers' Ass'n v. Unified School Dist. No. 247, 225 Kan. 561, 593 P.2d 406 (1979); Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978); *In re* Cumberland Valley School Dist., 394 A.2d 946 (Pa. 1978).

88. *See* cases cited *supra* note 87.

89. *See* cases cited *supra* note 87. *But see* City of Beloit v. Wisconsin Employment Relations Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1976) (scope of mandatory bargaining topics includes the *impact* of matters which are otherwise matters of educational policy).

90. *See, e.g.,* City of Beloit v. Wisconsin Employment Relations Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1976) (mandatory bargaining topics include not only matters which are primarily related to wages, hours, and conditions of employment, but also matters of educational policy which have an *impact* on wages, hours, and conditions of employment, such as teacher evaluations, a just cause standard of dismissal, reduction in force, discipline of problem students who represent threats to teachers' safety, school calendar, class size, and reading program).

tionship between teachers and boards of education. In this respect, the decisions were shaped as much by policy considerations as they were by the statutes construed. These policy considerations are critical to teachers' associations, boards of education, and counsel when preparing for and engaging in contract negotiations. A proper respect for these policy considerations by both parties to the negotiations may ameliorate the potentially harsh effects of these decisions on the teachers' position at the bargaining table.

A. The Political Balance of Power and the Political Processes Involved in Public Sector Collective Bargaining

The initial consideration which shaped these decisions, particularly that in *Kenai,* is the notion that the school board, as a governmental entity, has certain functions which cannot, according to statute,[91] be infringed upon by the collective bargaining process. Particularly, the board of education's function as the sole educational policymaker for the district is endangered by collective bargaining.[92] It is the board's duty to decide matters of educational policy and provide a meaningful education to its students.[93] The legislature declared that these duties are nondelegable and that the fulfillment of these duties shall not occur through the collective bargaining process.[94]

The court's protection of the school board's function as the educational policymaker is implicitly founded on an attempt to maintain the balance of power between teachers and boards of education. School boards are political bodies and are therefore susceptible to the influence of a number of interest groups including parents, students, teachers, and taxpayers. As recognized by the United States Supreme Court, "decisionmaking by a public employer is above all a political process. . . . Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table."[95] Submission of matters of policy to the bargaining process would tip the balance of political power in favor of teachers and away from the board and its constituency of parents,

91. ALASKA STAT. § 14.20.610 (1982).

92. The Alaska Supreme Court acknowledged this threat in *Kenai,* 572 P.2d at 421.

93. *See, e.g.,* Project, *Education and the Law: State Interests and Individual Rights,* 74 MICH. L. REV. 1373, 1380 (1976).

94. ALASKA STAT. § 14.20.610 (1981). It is important to note at this juncture that in *Kenai* the court stopped short of holding that fulfillment of these duties could not be *influenced* by collective bargaining. The importance of the statutory limitation is discussed *infra* at note 117.

95. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228 (1977).

students, and taxpayers. This imbalance, in turn, would seriously impair the board of education's capacity to fulfill its duty as policymaker for the schools by allowing one interest group to have dual influences on the decisionmaking process.

The court's attempt to protect the balance of power is justified by the peculiar function of boards of education in our society. School boards, perhaps more than any other governmental entity, are involved on a daily basis in policy decisions which involve choices among intangibles on which there is adequate room for disagreement.[96] When deciding matters of policy, the school board must consider philosophies, techniques, and theories of education on the one hand and fiscal, administrative, and political factors on the other. The decisions thus arrived at are the result of both administrative expertise and training and the political process. To add a third and more powerful factor to the process by allowing matters of policy to be proper subjects of collective bargaining would distort the process and perhaps damage it beyond repair.

This is not to say, however, that teachers can have no influence on educational policy decisions. The political process remains available for this purpose. A matter that is not properly submitted to collective bargaining may be properly submitted to the public at large. Public sentiment cannot be lightly disregarded by members of a board of education who depend on the electorate to keep them in office. Thus, effective political action by teachers' groups remains a fair alternative to collective bargaining when matters of educational policy are involved.

The political process can also serve as a substitute for the right to strike. The purpose of a strike is, after all, to break an impasse in contract negotiations and compel the employer to reach agreement on the terms of the contract. The efficacy of the political process as a mode of influencing the board of education's stance in contract negotiations is not easily discounted. The political process has frequently been utilized to end strikes in the public sector.[97] There

96. An illustration of this is the debate concerning open classrooms several years ago. *See, e.g.,* Duke, *The Selling of the Open School,* EDUC. DIG., Oct. 1973, at 18. ("Despite philosophical arguments attesting to the humaneness of open education, the open school is not going to win acceptance by Boards of Education, administrators and parents by philosophical justification alone.").

97. *See* L. MCDONNELL & A. PASCAL, ORGANIZED TEACHERS IN AMERICAN SCHOOLS (1979). In 1974, strike-weary citizens found their own way to end a two-week strike by teachers in the Perry, Ohio school district. They demanded a settlement and enforced their demand by guarding the door of the room where teachers and administrators were negotiating and refusing to allow either party to leave before a settlement was reached. The settlement was reached around 6:00 a.m. and teachers returned to the classrooms that afternoon. Interview with E.E. Goodwin, Superintendent of the Perry School District in Perry, Ohio (December 28, 1983).

appears to be no persuasive reason why the after-the-fact utility of the political process in resolving public sector labor disputes cannot be translated into before-the-fact utility. The effect would be the same as that of a strike, but without its adverse consequences.[98] The impact may not be as dramatic as that of a strike, but the present state of the law dictates that the political process may be the only effective alternative by which teachers may protect their interests as employees.

B. The "Mature" Employer/Employee Relationship between Teachers and Boards of Education

The decisions in *Kenai* and *Anchorage Education Association* implicitly adopt the notion that teachers are professional employees who do not need the protections afforded to private employees under the National Labor Relations Act (NLRA)[99] and to other public employees under PERA.[100] Before an attempt is made to dismiss this notion as the rhetoric of another era, it must be remembered that the National Education Association (NEA) endorsed this position until 1967.[101] Indeed, "NEA still prides itself on the fact that it is a *professional* organization, not a union . . . . [It] describes its negotiations as professional and denies that it is engaging in collective bargaining of the type that generally characterizes the activities in private industry operating under the Taft-Hartley Act."[102] With the primary teachers' organization espousing such views about the professional nature of its members' activities, it is understandable that the court would recognize a distinction between the needs of teachers and those of blue collar workers.

In determining whether teachers need to engage in collective bargaining, the underlying determinative factors appear to be the intimacy and civility often found in the relationship between profes-

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This is an example of how an informal political process — mobilization of public sentiment — can be utilized to solve problems that teachers and administrators cannot solve when left to their own devices.

98. See Note, *supra* note 4, at 578-79, for a discussion of the ill effects of a teachers' strike.

99. 29 U.S.C. §§ 151-69 (1976).

100. PERA covers "any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or teachers or noncertificated employees of school districts." ALASKA STAT. § 23.40.250(5) (1981).

101. *See* Engel, *Teacher Negotiation: History and Comment,* 1 J.L. & EDUC. 487, 489-91 (1972) (stating that NEA did not fully support concerted labor activities of its members until 1967, following a successful strike in the New York City Schools by members of the more radical American Federation of Teachers).

102. *Id.* at 489 (emphasis in original).

sionals and their employers.[103] In *NLRB v. Yeshiva University,*[104] the United States Supreme Court characterized the relationship between the faculty and the administration as a "mature" relationship which integrates faculty into the decisionmaking process of the university.[105] As a result of this integration, the Court deemed the Yeshiva faculty to be managerial employees and thus exempt from the coverage of the NLRA.[106]

The decision in *Yeshiva* lacks precedential value in the context of the Alaska public schools since the NLRA does not apply to public employers.[107] This case is significant, however, because the Supreme Court recognized that the traditional employer/employee adversarial relationship may cease to exist under certain circum-

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103. This notion is implicit in cases under the NLRA involving faculty in private educational institutions. When the relationship between faculty and administration is one of cooperation which integrates faculty into many aspects of the decisionmaking process, the faculty is considered managerial and is not entitled to the protections of the NLRA. *E.g.,* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). When, however, the relationship is not cooperative, the faculty is deemed to be within the class of employees entitled to the protections of the NLRA. *E.g.,* Stephens Inst. v. NLRB, 620 F.2d 720 (9th Cir. 1980).

104. 444 U.S. 672 (1980).

105. *Id.* at 680.

106. *Id.* at 682. Consider also 29 U.S.C. § 152(3) (1976) which provides:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantial equivalent employment, *but shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, *or any individual employed as a supervisor,* or any individual employed by an employer subject to the Railway Labor Act . . . as amended from time to time, or by any other person who is not an employer as herein defined.

(emphasis added). 29 U.S.C. § 164(a) (1976) further provides:

> Nothing contained herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The exclusion of supervisory employees from the coverage of the NLRA by Congress through the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136, 138 (1947) was in direct response to the Supreme Court's holding in Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947) that managerial employees were protected by the NLRA. On its face, the exclusion embraces the idea that managerial employees do not need the protections given to other employees under the NLRA.

107. *See* 29 U.S.C. § 152(2) (1976) (excluding "the United States or any wholly owned Government corporation . . . or any state or political subdivision thereof" from the definition of "employer" as used in the NLRA).

stances in institutions of higher education, thus eliminating the need for faculty members to engage in concerted activities under the auspices of the National Labor Relations Act.[108] The professional input of these employees on matters of educational policy is valued and accepted by their employer, thus transforming the relationship from that of management versus labor to a type of cooperative management relationship involving faculty and administration working toward a common goal.

The presence of the adversarial relationship distinguishes the situation in Alaska's public schools from that in *Yeshiva.* In *Yeshiva,* the university faculty and administration had a history of cooperative rather than adversarial interactions. Faculty/administration interactions in the Alaska public schools have, since collective bargaining began, been adversarial.[109] In *Yeshiva,* the existing cooperative relationship negated the need for collective bargaining to the extent that it removed the faculty from the protection of the NLRA. In Alaska's public schools, the absence of the right to strike and the presence of a very restrictive scope of bargaining diminish the chances for developing an effective collective bargaining relationship and necessitate the development of a cooperative relationship. By developing such a relationship, Alaska's public school teachers and administrators can create a substitute for the unbalanced collective bargaining relationship which now exists.

The Alaska Supreme Court has implied that such a cooperative labor/management relationship is desirable. In *Kenai,* the court concluded that fourteen topics were nonnegotiable since they involved matters of educational policy.[110] The court went on, however, to recommend discussion of these topics during contract negotiations.

> As to matters which affect educational policy and are, therefore, not negotiable, we believe that there is nevertheless implicit in our statutes the intention that the school boards meet and confer with the unions. It is desirable that the boards consider teacher proposals on such questions. This will encourage teachers to give the boards the benefit of their expertise, and to make their positions known for the board's use in establishing educational policy.[111]

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108. The Supreme Court's holding in *Yeshiva* means only that the faculty could not invoke the enforcement authority of the National Labor Relations Board to compel the administration to bargain with the faculty representative. The faculty and administration remain free to bargain voluntarily and independently of the provisions of the NLRA.

109. Collective bargaining is inherently adversarial, since each party is attempting to further its objectives without allowing the other party to attain its objectives.

110. 572 P.2d at 423.

111. *Id.*

The court made a critical assumption in urging the parties to meet and confer on nonnegotiable matters of educational policy. It assumed that administrators would actively consider teachers' views when formulating policy. As the relationship currently stands, the court may have assumed too much. This is not to say that administrators somehow cannot recognize the merit of teachers' policy views. Instead, it is to say that this approach may have little practical impact so long as the parties take adversarial stances in the employment relationship. If boards of education and teachers remain self-proclaimed adversaries, there is no incentive for the board to take its opposition's views to heart. Indeed, the nature of the relationship should cause boards to be suspicious of teacher proposals and perhaps to dismiss them as self-serving or even mutinous. Boards of education will probably not lend much credence to such proposals so long as the adversarial relationship exists.

The situation in educational institutions is quite unusual. Teachers are asking for salaries and benefits comparable to those of professionals in other fields,[112] and for an integral role in the decisionmaking process.[113] At the same time, they are asking for rights to engage in the protected concerted activities traditionally granted to private sector labor.[114] The ultimate absurdity in the situation is that teachers seek to obtain the former while using the latter. In other words, they are seeking the stature of professionals by employing blue collar tactics. An alternative exists which may produce more satisfactory results in teachers' quest for proper respect as professionals. The starting point is the court's recognition in *Kenai* of "the benefit of [teachers'] expertise" which may accrue to a school

112. *Teachers Average $12 an Hour — NEA,* Durham [N.C.] Morning Herald, Dec. 14, 1983, at 14A, col. 1 (Mary Hatwood Futrell, NEA President, issued a statement declaring: "If we are serious about attracting the best and the brightest into classrooms, then we'll have to think in terms of starting salaries of $20,000 to $25,000, well above the current $13,500."); *see also* Odden, *Financing Educational Excellence,* 65 PHI DELTA KAPPAN 311, 314 (1984); *Teachers on the Picket Line,* NEWSWEEK, Sept. 10, 1979, at 70.

113. Peterson, *supra* note 44.

114. *See, e.g.,* Poltrock, *Labor Relations in the Decade Ahead: A Union Perspective,* 10 J.L. & EDUC. 373, 377 (1981). The author states:

> Although most states have some kind of collective bargaining law for public employees, few states have laws which cover all teachers and public employees. In order to solve the problems related to salaries, reduction in force and other problems, it will be necessary that all states have extensive public sector laws which give rights to public employees similar to those rights heretofore given private sector employees.

See also Gee, *The Unionization of Mr. Chips: A Survey Analysis of Collective Bargaining in the Public Schools,* 15 WILLAMETTE L.J. 367, 374 (1979); Summers, *Public Sector Bargaining Problems of Governmental Decisionmaking,* 44 U. CIN. L. REV. 669, 669-70 (1975).

board willing to listen to teachers' input on policy decisions. Teachers' views can be invaluable in many instances, as they are shaped by years of training and experience in the classroom. Their views can add a different dimension to the ultimate decision confronting the board and broaden the informational base upon which it is made. The end result would be to increase the legitimacy of the decision ultimately made by the board.[115]

Integration of teachers' needs and perspectives into the board's decisionmaking process will necessitate some concessions by both parties. While the abandonment of unions and collective bargaining is not recommended,[116] the time has arrived to abandon any remnants of a militant approach to collective bargaining and to become more conciliatory and cooperative at the bargaining table. This is not to say that teachers should capitulate to the administration. Instead, both parties should drop their adversarial roles and attempt to respect and accommodate the constraints within which each side is operating. In short, they should strive for the type of "mature" relationship which the United States Supreme Court discussed with approval in *Yeshiva.*[117]

A cooperative relationship like that between the faculty and administration in *Yeshiva* will not simply happen in the Alaska public schools. Attaining a "mature" relationship between teachers and administrators is a substantial departure from the norm heretofore known for labor relations and will require concessions from both sides. Each side must abandon its collective bargaining weapons and tactics. Although the concessions required may be difficult for both parties to make, the *Yeshiva* model cannot be implemented without them. The incentives for implementing the model are strong

115. *See generally* Project, *supra* note 93, at 1380. *But see* F. WIRT & M. KIRST, POLITICAL AND SOCIAL FOUNDATIONS OF EDUCATION (1975) (the authors condemn the movement for community involvement and control of the schools as an ineffectual method of governance and decisionmaking).

116. *But see* Lieberman, *Eggs That I Have Laid: Teacher Bargaining Reconsidered,* 60 PHI DELTA KAPPAN 415 (1979) ("The differences [between public and private sector employment] are real and important, and they justify this conclusion: Providing public sector employees collective bargaining rights similar to those provided private sector employees is undesirable public policy."). It should be noted here that Mr. Lieberman was a strong advocate for collective bargaining by teachers who abandoned that role after realizing that the political influence of public employees was an adequate substitute for bargaining rights.

117. The extent to which the *Yeshiva* model can be implemented is, however, limited by the nondelegable nature of the duties vested in boards of education. *See, e.g.,* ALASKA STAT. § 14.20.610 (1982) (stating that the bargaining provisions of Title 14 shall not be construed as an abrogation or delegation of the board's statutory duties). Hence, teachers' participation in personnel and similar decisions would be highly restricted. Their input in matters of curriculum, educational policy, and other such matters could nevertheless be received and considered.

and counsel in favor of making the concessions, however difficult they may be.

For teachers, the incentive is readily apparent. Stripped of the right to strike and given only a limited scope of bargaining, they are in a weak position vis-à-vis the board of education at the bargaining table. Their chances of obtaining their goals through collective bargaining are greatly diminished from their chances of success if given the right to strike and a broader scope of bargaining. The *Yeshiva* model is a workable alternative to teachers' limited bargaining rights. With a cooperative relationship, teachers can attain what they cannot attain through collective bargaining.

Under existing law, boards of education are in a superior position at the bargaining table. Their superiority, however, is not conducive to the ultimate task of providing quality education for the children of Alaska. Indeed, the bargaining strength of boards may interfere with that task by diverting teachers' efforts away from the classroom and toward devising methods of overcoming the board's bargaining strength. The board's power cannot create labor harmony and, in fact, may cause serious labor discord. If boards of education are to fulfill their appointed tasks, labor strife cannot be allowed to exist. Implementation of the *Yeshiva* model will eliminate labor discord, thus freeing teachers to concentrate on teaching and enabling administrators and boards of education to concentrate on creating and maintaining quality schools.

The public, although not a party to the employment relationship, has a strong interest in this relationship. The public's primary interest is in the quality of the education offered by its schools. The public also has an interest in the management of the schools, including the fiscal and political accountability of those in charge. To the extent that an unequal bargaining relationship channels resources away from education and management, the public is disserved. If the public interest is to be served, the present adversarial relationship cannot be maintained.

Citizens provide what is perhaps the most powerful vehicle for implementation of the *Yeshiva* model. Through the political process, they can compel teachers and school boards to replace the adversarial collective bargaining relationship with a cooperative effort. By demanding that both sides abandon the heretofore accepted adversarial relationship and replace it with a cooperative relationship, the public can help to insure that its interest in the public schools will be vindicated. The consequences of a failure to heed such a public demand are obvious. If board members desire to remain in office and teachers and administrators desire to remain employed, they cannot take such a public demand lightly. In short, through the

political process, the public holds the strongest incentive for teachers and boards of education to attempt to implement the *Yeshiva* model.

Although a relationship between a school board and its teachers similar to that existing at Yeshiva University is a substantial departure from the norm, the status quo is not worth preserving if it impairs the quality of public educational institutions. The very limited rights of Alaska's public school teachers as employees can only engender labor discord. The decisions in *Kenai* and *Anchorage Education Association* can legitimately be viewed as giving lip-service rather than substance to the rights of teachers under Title 14 and PERA. In the wake of these decisions, collective bargaining can prove frustrating to teachers and their representatives. The struggle to get the most out of these meager rights will certainly divert the parties' attention from the primary business of education and toward the subsidiary task of labor relations. In the end, everyone will suffer.

V. CONCLUSION: A SUGGESTED MODEL FOR EMPLOYMENT RELATIONS IN THE PUBLIC SCHOOLS FOLLOWING *ANCHORAGE EDUCATION ASSOCIATION*

In *Anchorage Education Association,* the court could have provided assistance to teachers seeking to vindicate their bargaining rights under PERA. Had the court reached the opposite conclusion on either the issue of statutory construction or that of equal protection,[118] the collective bargaining relationship between teachers and their employers would have retained some balance. The court, however, did not reach that conclusion and it is doubtful that teachers can look to the court in the future for reversal of the *Anchorage Education Association* decision.

Legislative action is one alternative for clarifying employment relations between teachers and boards of education. The legislature could rectify the judicially created imbalance by expressly defining the scope of bargaining and/or stating definitively whether the teachers' impasse resolution mechanism is to remain advisory mediation as it exists under Title 14 or become more coercive, as are the PERA mechanisms. This does not appear likely, however, since the legislature has not responded to the court's plea in *Kenai* for "more specific guidance on a number of the items which the unions seek to

118. If the court had held that the statute violated equal protection, the logical legislative response would have been to amend the statute to give teachers the right either to strike or to engage in binding interest arbitration, thereby preserving the statutory bargaining rights of other public employees. Such an amendment would restore the balance of bargaining power between teachers and their employers.

negotiate."[119] Nor has the legislature responded to the decision in *Anchorage Education Association.* Thus, the situation must be addressed by teachers, school boards, and their counsel in adjusting their relationship in the wake of these decisions.

In addressing the problems following *Anchorage Education Association,* teachers and school boards have two options of self-help which may blunt the impact of the decision. The first option is to resort to the political process for resolution of problems following the decision. The second option is for teachers and school boards to work together in an attempt to achieve a "mature" relationship similar to that which existed between the faculty and administration in *Yeshiva.*

By resorting to the political process, teachers might find an adequate substitute for a broad scope of mandatory bargaining topics and the right to strike.[120] Political pressure, particularly on behalf of teachers, may influence the legislature to provide some means of equalizing the bargaining positions of the parties. The political process may also be used to force boards of education not to exert their full powers at the bargaining table. Two risks inhere in this tactic. First, the public may not sympathize with the teachers' position. Second, resort to the political process may divide community sentiment, thus making it difficult for teachers to teach and for school boards to administer without encountering the difficult obstacles attendant in such division. These risks make the political process an unreliable, hence undesirable, option.

The better option is the second option. Teachers and school boards should abandon the traditional weapons, games, and roles of the private sector experience. They should strive for the "mature" relationship shown to exist in *Yeshiva.* The Alaska Supreme Court, aided in part by the Alaska legislature, has made it clear that public school teachers in Alaska will not enjoy the right to strike, the most powerful weapon available to private sector labor. Nor will they be able to insist on bargaining on many subjects during contract negotiations. The court has virtually removed teachers from the employer/employee game by finding that teachers have very few rights and only one weapon — advisory mediation — with which to enforce those rights.[121] The efficacy of this weapon is highly suspect.[122] The court's consistently restrictive reading of teachers' rights as employees brings to mind the maxim "if you can't beat 'em, join 'em"

119. 572 P.2d at 423.
120. *See supra* text accompanying notes 91-98.
121. *See* ALASKA STAT. § 14.20.570 (1981).
122. *See* Note, *supra* note 4, at 581.

as a possible philosophy for teachers' future collective bargaining efforts.

A cooperative relationship of the type in *Yeshiva* is a viable option for both teachers and school boards when approaching contract negotiations. Teachers, on the one hand, will gain recognition of their professional training and expertise if allowed to interject their views into the policymaking process. Boards of education, on the other hand, will be relieved of those aspects of the adversarial relationship which impair the operation of the schools. The problems inherent in the situation as it now exists will, to a large extent, be alleviated. In the future, then, boards of education should be more willing to listen to any input offered by teachers on matters affecting educational policy. They should accept such input as the product of professional training and experience which has a proper position in the policymaking process. Teachers should continue to offer input in a professional manner, not to gain clout in the collective bargaining process, but to contribute to the ultimate policy decision. Teachers should not feel chagrined if their input does not control the decision. Instead, they must recognize that the board has the interests of various groups in mind and must attempt to accommodate each of these interests.

While cooperative employment relationships are a departure from the norm in the public schools, such cooperative relationships do exist. As an example, two ventures in the public schools that necessitate cooperation between teachers and administration have proved highly successful.[123] Both teachers' centers[124] and inservice

123. In at least one community, the development of a federally-funded teacher center has been so successful that its "effect on what has been a seriously divided community seems a little short of miraculous." Rosenblatt, *The East Ramapo Teachers' Center,* TODAY'S EDUCATION, April-May, 1979, at 36. (See *infra* note 124 for an explanation of teacher centers.). Indeed, there is evidence that teacher isolation from the administration is a strong obstacle to attaining the goal of quality education; therefore, communication and cooperation between teachers and administrators should be increased. Tye & Tye, *Teacher Isolation and School Reform,* 65 PHI DELTA KAPPAN 319, 320-22 (1984). But see Fahrlander, *How to Get Your Ideas Approved,* 64 PHI DELTA KAPPAN 278 (1983) in which the author concludes that cooperation in the public schools is difficult to attain:

> Sir Isaac Newton once stated that each action has an equal and opposite reaction. He could have been talking about the organization of a school system. It seems that teachers who try to do their best to educate children are discouraged by administrators and policy makers who are supposed to share that goal. This is especially true of the development and implementation of new ideas — ideas for the improvement of course content, teaching methods, resources, teaching aids, and the like.

124. The concept of teacher centers is borrowed from the British, who conceived the idea in 1964. Reference to the British experience will, therefore, help to define the concept as American educators attempt to implement it.

training programs[125] involve cooperation between teachers and administrators in order to enhance the professional ability of teachers and the quality of education they provide. Thus, cooperation is not unheard of in the public schools. That it has been used in the context of professional training would indicate that it can be used in the employment relationship. Although the context may be different, the content of such a relationship is not. Teachers and school boards should attempt to use the cooperation they have learned in the context of professional training to enhance the employment relationship.

This type of give-and-take relationship between teachers and school boards cannot be achieved overnight. The scars of the collective bargaining wars of years past run deep. Both sides must work at developing a cooperative, "mature" relationship. If efforts in this direction prove effective, the end result will be the amelioration of the effects of *Kenai* and *Anchorage Education Association* on teachers

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> Today British centers serve three basic purposes: 1) inservice training that will further the growth of fundamental knowledge relevant to educational problems, 2) social gathering and interaction, and 3) curriculum development. The curriculum development function is particularly important and is generated from three main bases: national curriculum projects, colleges and universities, and the teachers themselves.

Caldwell, *Transplanting the British Teacher Center in the U.S.,* 60 PHI DELTA KAPPAN 517, 518 (1979). See also Rosenblatt, *supra* note 123, for a full explanation of how one center operates. Teacher centers may now receive federal funding pursuant to the Teacher Center Law, Pub. L. No. 94-482, § 532, 90 Stat. 2081, 2154-55 (1976), which requires that the centers be governed by a board composed of teachers, administrators, and university representatives. Federal support for this innovation increases the promise of success for this cooperative venture of school boards, university officials, and teachers. *See* McComb, *So You're Interested in Teaching Centers . . . ,* TODAY'S EDUCATION, April-May, 1978, at 69.

125. Inservice training is a method of furthering the professional development of teachers through school-sponsored workshops. The need for inservice training has been summarized in one comment as follows:

> Learning is a lifelong process that does not end with certification; certification is only a minimal statement of acceptance. [It has been] suggest[ed] that inservice education should be viewed as a means of narrowing the differences between preservice and inservice education. "Learning to teach and teaching to learn" better exemplifies the image of the professional educator.

Burrello & Orbaugh, *Reducing the Discrepancy Between the Known and the Unknown in Inservice Education,* 63 PHI DELTA KAPPAN 385, 386 (1982). It appears that the success of inservice training depends directly on the degree of control teachers have in the development of the program. *See* Andrew, *Teacher-Directed Inservice Education in Southern Indiana,* 64 PHI DELTA KAPPAN 504 (1983); Sharma, *Inservicing the Teachers,* 63 PHI DELTA KAPPAN 403 (1982).

vis-à-vis their employers. It will also create harmonious labor relations and promote continuity of governmental services. The purposes of PERA will not be vindicated by legislative action or judicial decision, but by the actions of the parties themselves.

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