XII. Labor Law

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A. The IPS *Strike*

Public Law 217[1] provides that public school employers and certificated school employees "shall have the obligation and the right to bargain collectively" and "shall enter into a contract embodying any of the matters on which they have bargained collectively."[2] It gives certificated school employees "the right to form, join or assist employee organizations"[3] and provides that it shall be unfair for a school employer[4] or a school employee organization or its agents to engage in certain acts.[5] The law also established the Indiana Education Employment Relations Board (EERB) to determine bargaining units, process unfair labor practice charges, conciliate and mediate, and research school employer-employee matters.[6]

Public Law 217 makes it unlawful for school employees to strike.[7] Nonetheless, on August 26, 1979, the teachers employed by the Indianapolis Public Schools (IPS) voted to strike when their contract with IPS expired unless IPS met the demands of the teachers' collective bargaining representative, the Indiana Education Association (IEA).

In an effort to get striking teachers back in the classroom, five parents of IPS students brought an action to enjoin the teachers' strike. The Marion County Circuit Court, in its initial hearing, concluded that the plaintiffs had standing to bring the action. In addition, the court held that the strike was unlawful and consequently ordered the teachers to return to their classrooms.[8] Furthermore, the court orally directed the school board to: 1) Offer the teachers a seven percent wage increase, 2) drop a collective bargaining proposal concerning the length of the teaching day, 3) agree to a contract with the IEA by a specific date, and 4) deliver all books and records pertaining to financial information of the school system to

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[1]Act of April 24, 1973, Pub. L. No. 217, 1973 Ind. Acts 1080 (currently codified at IND. CODE §§ 20-7.5-1-1 to -14 (1976 & Supp. 1980)). Hereinafter all references to Public Law 217 will be cited to the applicable Indiana Code provisions.

[2]IND. CODE § 20-7.5-1-3 (1976).

[3]*Id.* § 20-7.5-1-6.

[4]*Id.* § 20-7.5-1-7(a).

[5]*Id.* § 20-7.5-1-7(b).

[6]*Id.* § 20-7.5-1-9 (Supp. 1980).

[7]*Id.* § 20-7.5-1-14 (1976).

[8]Chenoweth v. Brown, No. C79-2123 (Marion County Cir. Ct., Sept. 12, 1979).

be used to resolve the strike controversies.[9] This oral directive was not included in the court's written order.[10] When no agreement was reached by the designated date, the court ordered bargaining teams for both the school board and the IEA sequestered indefinitely until an agreement was reached. The next day, the court orally directed the school board to assign all returning striking teachers to their regular assignments rather than to classrooms where the IPS felt they were most needed.

Meanwhile, the negotiators remained sequestered until they were released pursuant to an emergency order issued by the Indiana Supreme Court.[11] The school board had sought the emergency order and had filed a petition for writ of prohibition asking the supreme court to order the circuit court to expunge from its records its initial oral orders and its subsequent order to sequester. The school board also objected to the lower court's order which required it to assign all returning teachers to their regular assignments. The school board requested the supreme court to set aside each of these orders and to prohibit the circuit court from issuing further orders exceeding its jurisdiction.

In support of its petition, the school board argued that the lower court had jurisdiction to enjoin the strike under Indiana Code section 20-7.5-1-14(b),[12] but did not have jurisdiction to issue any of the orders. The school board contended that the circuit court had no jurisdiction under Public Law 217 to question the good faith bargaining of one of the parties until after a determination by the EERB on an unfair labor practice charge.[13] Because no such charge had been filed with the EERB, the school board alleged the trial court was without jurisdiction.

The school board also urged that the circuit court was without jurisdiction because of the IEA's failure to follow administrative

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[9]The school board's offer at that point in the negotiations was a one percent wage increase.

[10]These facts are taken from the assertions of the school board in its Relator's Verified Petition of Prohibition and Mandate at 3, State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., filed Sept. 21, 1979), which assertions were admitted by the circuit court in its response to that petition. Response of Respondents to Verified Petition for Writ of Prohibition and Mandate at 1.

[11]State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., Sept. 21, 1979).

[12]IND. CODE § 20-7.5-1-14(b) (1976) provides in part: "Any school corporation or school employer may, in an action at law, suit in equity, or proper other proceeding, take action against any school employee organization . . . or any person aiding or abetting in a strike, for redress of such unlawful act."

[13]The EERB, created by IND. CODE § 20-7.5-1-9 (1976), has the power to process unfair labor practice charges between school boards and teachers in Indiana.

procedures and to exhaust administrative remedies.[14] It contended that the circuit court could not create special proceedings in equity contrary to those provided for in the statute governing reviews of the EERB.[15]

The IEA opposed the petition by arguing that the court's directives relating to the specific salary increase, the proposal regarding the length of the school day, the directed time limits for reaching agreements, and reassignment of returning teachers were all oral and thus, should not be considered by the supreme court. In addition, the IEA contended that once the circuit court had properly assumed jurisdiction, it had authority under its general grant of equity jurisdiction to issue orders and take necessary remedial measures to conclude the teachers' strike. It contended that the court had found the school board guilty of failing to bargain in good faith and had "exercised its discretion in a manner intended to give the board negotiators an added incentive to perform their obligations under Public Law 217."[16] The IEA asserted that the court's orders were not inconsistent with Public Law 217[17] and that the court had the authority as a court of equity to impose reasonable terms and conditions when granting injunctive relief.[18] The IEA fur-

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[14]The school board cited Decatur REMC v. PSC, 150 Ind. App. 193, 275 N.E.2d 857 (1971), in which the appellate court stated:

> [T]his defense [the failure to exhaust administrative remedies] is available at any time before final decision and in any manner, and if not raised by a party it is our duty, *sua sponte* to raise and determine it. . . .
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> . . . It is our opinion that the parties to this appeal did not exhaust their administrative remedies and, therefore, the trial court did not have subject-matter jurisdiction to invoke permanent equity.

Id. at 197-98, 275 N.E.2d at 860.

[15]IND. CODE §§ 4-22-1-1 to -30 (1976).

[16]Brief for IEA in Opposition to Verified Petition for Writ of Prohibition and Mandate at 3.

[17]In this regard, the IEA quoted IND. CODE § 20-7.5-1-2(n) (1976), which defines the obligation to bargain collectively as: "the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to negotiate in good faith . . . ." Brief for IEA in Opposition to Verified Petition for Writ of Prohibition and Mandate at 3.

[18]To support this argument the IEA cited Inland Steel Co. v. United States, 306 U.S. 53 (1939) in which the United States Supreme Court stated:

> A court of equity "in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, that has been exercised from time immemorial."

Id. at 156 (quoting Russell v. Farley, 105 U.S. 433, 438 (1881)). The IEA also cited Wabash Valley Coach Co. v. Turner, 221 Ind. 52, 46 N.E.2d 212 (1943), in which the Indiana Supreme Court stated:

ther contended that the court's action in sequestering the bargaining teams was a reasonable and necessary condition to protect the interest of the public and the parties and to enforce the mandate of Public Law 217; therefore, such action fell within the court's wide scope of equitable discretion.

Three days after its emergency order, the supreme court granted an alternative writ of prohibition and mandate ordering the circuit court to: 1) vacate all of the orders in question, 2) refrain from issuing further orders exceeding the jurisdiction granted by Public Law 217, and 3) "only provide a remedy to plaintiffs against an unlawful strike."[19] However, it gave no opinion to explain its issuance of the writ.

The litigation leading to the writ issued by the supreme court has two significant aspects. The first relates to the standing question. The second deals with the scope of the remedial power of a trial court when exercising its jurisdiction under Public Law 217.

1. Standing under Public Law 217.—The question of standing was not argued to the supreme court in this case. However, Public Law 217 specifically provides that "any school corporation or school employer may . . . take action against . . . any person aiding or abetting in a strike."[20] The explicit language of the Act provides standing only for school corporations or school employers. It grants no standing to taxpayers, members of the general public or, as were involved in this case, parents of school childen to bring such an action.

The circuit court, nevertheless, held that the plaintiffs, parents of school children at the struck schools, had standing. This decision was not questioned by the IEA, possibly because it did not wish to interfere with the court's efforts to resolve the strike, nor by the school board, which would benefit from an injunction issued to end the strike.

> The purpose of this action is not to bring about some equitable adjustment of rights between the parties, but to take advantage of a legal technicality, the effect of which would be to work an unconscionable wrong and injustice. A court of equity will not lend itself to such an enterprise. This attitude has been expressed in many ways. Courts of equity are courts of conscience which do not bind themselves by strict rules of law. Equity looks beneath the rigid rules to find substantial justice. It has power to prevent strict legal rules from working injustice.

Id. at 65, 46 N.E.2d at 217.

[19]State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., Sept. 24, 1979) (Alternative Writ of Prohibition and Mandate). The supreme court ordered the circuit court to show cause, on or before October 5, 1979, why this writ should not be made permanent. The School Board's request for a change of venue had been granted by the circuit court when the writ issued. Accordingly, no further proceedings were held pertaining to this writ.

[20]*See* note 12 *supra.*

Two principal factors must be analyzed when considering the standing question. The first is the political nature of the school board. The school board's opposition to the circuit court's action took on considerable political significance because one of the named plaintiffs in the action seeking injunctive relief was a former school board member who had not been reelected.

Another factor in the standing question is the delicate nature of the bargaining process, especially in the public sector. Strikes are not readily resolved by the issuance of an injunction. In fact, a strike may even be prolonged by an action seeking injunctive relief.[21]

These two factors are obviously interrelated. Strike issues could be aggravated and the strike prolonged by prospective candidates for the school board suing as parents, or as public representatives, seeking to embarress the existing school board and to stage a platform for future election efforts. It is a questionable practice to allow persons who are not elected and are not publicly accountable to control the labor relations decision of whether and when to seek injunctive relief. Public Law 217 does not specifically grant standing to such people and should not, therefore, be construed in this manner. If the elected school board members fail in their labor relations responsibilities, the public remedy is to exert public pressure during the strike or to oust the members in the next election. The court's construction of standing under Public Law 217 affords the public no safeguards against a plaintiff, uninformed of the details of the bargaining process, who files a court action which may aggravate rather than aid the bargaining process.

2. *Scope of the Trial Court's Remedial Power.*—The second significant area of this litigation pertains to the scope of the remedial power of a trial court in an action for injunctive relief against an illegal strike under Public Law 217. Even though this issue was litigated before the Indiana Supreme Court, the court issued no opinion in support of its writ.[22] Consequently, its action is open to several interpretations.

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[21]In a study of 22 presumably unlawful strikes in the public sectors of San Francisco and Sacramento between January 1969, and July 1972, the author concluded that even though legal relief was sought for 18 of the strikes, a court order clearly resulted in the cessation of the strike in only two cases. The author also concluded that strikes with legal sanctions lasted an average of 23 1/2 days, contrasted with an average of 11 1/2 days for strikes without such sanctions. *See* Cebulski, *An Analysis of 22 Illegal Strikes and California Law*, 18 CAL. PUB. EMPLOYEE REL. 2 (1973).

[22]It should be recognized that the supreme court issued this writ in an expedited procedure during a period of emergency. In fact, it found that emergency matters existed regarding the sequestration of the bargaining teams and issued a temporary emergency order on September 21, 1979, just three days before the issuance of its

One possible interpretation of Public Law 217 would restrict trial courts to reviewing unfair labor practice determinations of the EERB and to issuing injunctions to enjoin teacher strikes. The courts would have no equity jurisdiction to consider remedial measures, other than injunctions, to bring the strike to an end. This interpretation is not desirable from a public policy viewpoint. The following interpretation is more realistic and more attuned to the purposes of Public Law 217.

The Marion County Circuit Court clearly exceeded its authority in this case. Most of its orders were in direct conflict with the express language of Public Law 217. Under Public Law 217, neither the EERB nor the trial court may require the school board to offer a specific increase, to withdraw from a lawful bargaining demand, or to agree to a contract by a specific time. The duty to bargain collectively under the law is defined as not including "the final approval of any contract concerning [bargainable] or any other items."[23] The definition also states: "The obligation to bargain collectively does not require the school employer or the exclusive representative to agree to a proposal of the other or to make a concession to the other."[24]

The language of the Act clearly prohibits any of the orders issued by the circuit court.[25] Similarly, it prohibits a trial court from ordering a school board to assign returning teachers in any particular way. This, in effect, would impose upon the school board a specific agreement which had not been accepted in negotiations.

Additionally, the Act precludes a trial court from sequestering the bargaining teams indefinitely. The obligation to "bargain collectively" under the Act "means the performance of the mutual obligation of the school employer and the exclusive representative to meet *at reasonable times* to negotiate in good faith . . . ."[26] It is inconsistent with this definition to order continuous bargaining for an indefinite period.

The final directive of the circuit court was the order to deliver all books and records pertaining to financial information of the school system. This may have been inconsistent with the act but its

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writ. State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., Sept. 21, 1979) (Temporary Emergency Order).

[23]IND. CODE § 20-7.5-1-2(n) (1976).

[24]*Id.*

[25]This language of the act was patterned after section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1976). In H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), the Supreme Court held that the National Labor Relations Board (NLRB) was precluded under section 8(d) from ordering an employer to agree to a specific proposal to remedy an unfair labor practice of refusing to bargain.

[26]IND. CODE § 20-7.5-1-2(n) (1976) (emphasis added).

inconsistency was not as blatant. The counterpart language of section 8(d) of the National Labor Relations Act, after which the Indiana Act was patterned, has been construed to require the production of financial information in the negotiations only when the employer raises the issue of his inability to pay.[27] If this interpretation were applied to Public Law 217, the school board could have been required to produce financial data because the school board contended that it was unable to pay the seven percent increase in teachers' salaries ordered by the circuit court. However, even if the court's order to deliver financial information was consistent with Public Law 217, the supreme court's writ compelling the court to vacate this order is explainable in terms of the school board's contention that the "failure to follow the administrative proceedings or to exhaust administrative remedies deprives a court of subject matter jurisdiction in equity."[28]

In essence, this explanation of the supreme court's action allows a trial court to retain equity jurisdiction to consider remedial measures to resolve an unlawful teachers' strike under the following conditions: The remedial measures must not be in conflict with either party's rights under the act; and, the beneficiary of the remedial relief must have pursued its administrative remedies with the EERB.

This interpretation of Public Law 217 is more desirable. To interpret the law as permitting a trial court to provide only the *legal* relief specifically authorized, ignores the statutory language which specifically authorized actions at either law *or* in equity for redress of unlawful strikes.[29]

This interpretation is also more desirable from a public policy viewpoint because the issuance of an injunction generally will not result in the immediate end of the strike.[30] A trial court should retain the flexibility necessary to seek solutions to the problems which are blocking the parties' agreement. For example, if the exclusive representative of the teachers has filed a charge with the EERB of

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[27]29 U.S.C. § 158(d) (1976) states in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

[28]Brief for Relator in Support of Verified Petition for Writ of Prohibition and Mandate at 9-10.

[29]IND. CODE § 20-7.5-1-14(b) (1976).

[30]*See* note 21 *supra*.

refusal to bargain in good faith, and it is clear that the school board has not met its statutory obligation, the trial court should be permitted to condition its grant of injunctive relief upon the school board's compliance with its duty to bargain collectively.[31]

This flexibility is essential because Public Law 217 provides no incentive for a school employer to bargain. The unfair labor practice procedures before the EERB take far too long to be effective within the duration of a single bargaining period. Under the dispute settlement procedures provided in Public Law 217, the parties continue the status quo and the employer may issue tentative contracts and prepare its budget based upon the status quo if no agreement is reached.[32] Thus, school employers have no incentive, especially during inflationary periods, to seek agreements.

B. Remedial Powers of the EERB

State ex rel. Board of Trustees v. Knox Circuit Court[33] was apparently the final appellate court opinion in the litigation involving the Worthington-Jefferson Consolidated School Corporation. In its previous opinions, the court of appeals concluded that the EERB is only a fact-finding body with power to issue interlocutory or temporary orders but without power to issue a final order of reinstatement of an unlawfully discharged teacher.[34] The court also concluded

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[31]The development of defenses to the issuance of injunctions against unlawful public strikes is traced in Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n, 114 N.H. 245, 317 A.2d 555 (1974). In that case the Supreme Court of New Hampshire stated:

> [I]t would be detrimental to the smooth operation of the collective bargaining process to declare that an injunction should automatically issue where public teachers have gone on strike. . . . The essence of the collective bargaining process is that the employer and the employees should work together in resolving problems relating to the employment.

Id. at 251, 317 A.2d at 558-59 (citations omitted). The court concluded: "[I]n deciding to withhold an injunction the trial court may properly consider among other factors . . . whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue." *Id.*, 317 A.2d at 559. New Hampshire, as Indiana, has no legislation requiring the issuance of an injunction against unlawful public strikes. Indiana Public Law 217 merely authorizes the school employer or corporation to "take action . . . for redress of such unlawful [strike]." IND. CODE § 20-7.5-1-14(b) (1976). The Indiana courts are not prevented from following the wisdom of the New Hampshire decision and the decisions cited therein.

[32]IND. CODE § 20-7.5-1-12(e) (1976).

[33]390 N.E.2d 232 (Ind. Ct. App. 1979).

[34]*See* Board of School Trustees v. IEERB, 380 N.E.2d 93 (Ind. Ct. App. 1978); Board of School Trustees v. IEERB, 375 N.E.2d 281 (Ind. Ct. App. 1978); IEERB v. Board of School Trustees, 355 N.E.2d 269 (Ind. Ct. App. 1976). For a discussion of prior

that when reviewing an EERB decision, a trial court had the authority to " 'fashion a remedy to cure whatever injustice has taken place.' "[35]

Assuming the *Worthington* case to be the final interpretation of the EERB's authority, the EERB cannot offer reinstatement as a remedy for a school teacher who has been discharged in violation of the Act.[36] The court's basis for this decision was a literal interpretation of Public Law 217. The EERB has explicit authority under the act to "enter such interlocutory orders after summary hearing as [the EERB] deems necessary in carrying out the intent under this chapter";[37] however, the EERB is without explicit authority to grant any other relief. The court's rationale inevitably leads to the conclusion that the EERB has no remedial power other than to issue interlocutory orders. This would not preclude the EERB from issuing recommended orders,[38] but such orders would be subject to de novo consideration in a trial court.

This procedure could cause the EERB to assume the role of an advocate rather than a decision maker. Remedies will emanate from a plurality of trial courts rather than a single agency; consequently, there will be variation and possible inconsistency in the remedies granted. Trial judges may perceive their remedial authority as like that of a private arbitrator rather than that of the NLRB under the National Labor Relations Act.[39] Arbitrators exercise much more flexibility when reinstating employees than does the NLRB. Arbitrators' remedies range from no back pay to partial or full back pay. In contrast, the NLRB customarily grants full back pay with its reinstatement orders.

Trial judges' remedies for other unfair labor practice violations may also vary from those recommended by the EERB. For example, the EERB has held that the failure to discuss the non-renewal of a teacher's contract with the exclusive bargaining representative is a breach of section 7(a)(5) of Public Law 217[40] and should be remedied by reinstatement.[41] This type of violation is difficult to remedy. An

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litigation of this case, see Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295, 307-12 (1980).

[35]390 N.E.2d at 234 (quoting Board of School Trustees v. IEERB, 380 N.E.2d 93, 95 (Ind. Ct. App. 1978)).

[36]*See* IND. CODE § 20-7.5-1-1 to -14 (1976 & Supp. 1980).

[37]*Id.* § 20-7.5-1-11 (1976).

[38]The EERB has changed its practice and now issues recommended orders of reinstatement.

[39]29 U.S.C. §§ 151-169 (1976).

[40]IND. CODE § 20-7.5-1-7(a)(5) (1976).

[41]For example, in Carroll Consol. School Corp., EERB Case No. U-78-17-0750 (June 22, 1979), the EERB adopted the hearing examiner's findings of fact and conclu-

order simply to discuss the failure to renew would not be satisfactory because the discussion occurs after the school corporation has a commitment, strengthened by litigation, not to renew the contract. On the other hand, if the school corporation had discussed the matter before deciding not to renew the contract, it would have had the right to refuse to renew that contract. Reinstatement may put the teacher in a better position than he or she would have been in had the breach not occurred. The teacher's gain would depend on the timing of the reinstatement. For example, if the teacher were reinstated early in the school year, he or she may have sufficient time to overcome the difficulties which had led to the threatened non-renewal. Reinstatement later in the school year, however, would not offer such an opportunity, and a prompt non-renewal for the next year would render the reinstatement remedy a hollow victory. On the other hand, an order of reinstatement any time after personnel contracts are made for the school year causes problems for the school corporation which must deal with the replacement teacher who is also under contract. It is predictable that trial judges could differ substantially upon the appropriate remedy for such an unfair labor practice.

These problems and others may arise because the court of appeals in *Worthington* held that the remedy questions under Public Law 217 are to be decided by the trial courts. Trial judges are likely to balance these considerations differently and come up with a variety of remedies even though the facts of the cases may be similar.

Remaining questions concern the role of the EERB staff in the remedy proceeding. Should the EERB have authority to reject settlement terms which are acceptable to the teacher representative, the teacher, and the school corporation? If a school corporation fails to appeal promptly or comply voluntarily with the EERB recommended order, does the burden fall upon the charging party or the EERB to seek enforcement of the EERB's order? If the EERB does not act, the charging party would have to obtain counsel to continue the litigation, thereby raising the question as to whether the charging party could recover attorney's fees.

In short, the narrow interpretation of the EERB's remedy power given by the court of appeals in *Worthington* substitutes for the former system, which permitted the EERB considerable discretion in determining appropriate remedies, one in which a trial court,

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sions of law that the school board had committed an unfair practice in violation of IND. CODE § 20-7.5-1-7(a)(5) (1976) when it refused to discuss the proposed non-renewal of a teacher's contract for the 1978-79 school year. However, the EERB modified the examiner's order by ordering reinstatement with full back pay plus eight percent interest which the examiner had not ordered.

after a de novo remedy hearing, exercises its discretion. The EERB's expertise and experience will no longer be controlling. A lack of uniformity certainly will result. Whether the EERB will control settlement efforts and provide counsel through judicial review proceedings will have to be resolved in future litigation.

C. Teacher Bargaining Act

Just as *Worthington* involved a series of appellate decisions, the case of *Evansville-Vanderburgh School Corp. v. Roberts*[42] involved a great deal of appellate activity within a single year. The Evansville Teachers Association (ETA)[43] filed unfair labor practice charges alleging that the Evansville-Vanderburgh School Corporation (EVSC) had implemented a teacher evaluation plan without any discussion with the ETA. The ETA also charged that the plan was promulgated by a committee of non-member school teachers chosen by the administration without consultation with the ETA. The EERB found that the EVSC had committed an unfair labor practice. The EVSC sought review of this decision.

The trial court found for the ETA, and this judgment was sustained by the court of appeals[44] and by the Indiana Supreme Court.[45] All three appellate decisions were issued within one year. The supreme court adopted the court of appeals' decision that the EVSC had violated section 7(a)(5) of Public Law 217[46] by failing to discuss the teacher evaluation plan with the ETA before it was implemented. Public Law 217 includes "working conditions" in the list of topics for discussion.[47] The court held that the teacher evaluation plan was such a "working condition" by noting that " '[t]he "philosophy" of the plan is to maintain high teacher competence by means of self-evaluation forms, classroom observation by "evaluators," and an evaluation conference' " and that the plan could " 'result in a recommendation for a change of assignment or dismissal.' "[48] The court concluded that the factors which were to be

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[42]395 N.E.2d 291 (Ind. Ct. App. 1979).

[43]The ETA was the exclusive bargaining representative of the Evansville-Vanderburgh School Corporation teachers.

[44]392 N.E.2d 810 (Ind. Ct. App. 1979), *vacated*, 395 N.E.2d 291 (Ind. Ct. App. 1979).

[45]The supreme court found no reversible error in the judgment of the trial court and, therefore, affirmed its opinion. Evansville-Vanderburgh School Corp. v. Roberts, 405 N.E.2d 895 (Ind. 1980).

[46]IND. CODE § 20-7.5-1-7(a)(5) (1976) provides in part that it is "an unfair practice for a school employer to . . . (5) refuse to bargain collectively or discuss with an exclusive representative . . . ."

[47]*See* IND. CODE § 20-7.5-1-5 (1976).

[48]405 N.E.2d at 898 (quoting 395 N.E.2d at 294).

considered under the plan " 'significantly touch and concern everyday activities of school teachers, and, therefore, are within the ordinary understanding of "working conditions." ' "[49]

The EVSC had raised a defense of good faith by arguing that the superintendent was merely under a misapprehension of what constituted discussable topics. The court rejected this argument by distinguishing between the process of discussion, which it concluded was " 'governed only by the somewhat elastic standard of good faith,' "[50] and a total failure to discuss a discussable topic. The failure to discuss a discussable topic is not subject to a defense of good faith because " 'the good or bad faith of the parties is irrelevant as to whether an unfair [labor] practice has occurred.' "[51]

This distinction is sound. The court's holding closely parallels the United States Supreme Court decision in *NLRB v. Katz*,[52] in which the Court held that good faith was not a defense to a refusal-to-bargain charge under the NLRA when an employer was charged with unilaterally changing terms and conditions of employment. The Supreme Court concluded that "the duty [to bargain] may be violated without a general failure of subjective good faith . . . if a party has refused even to negotiate *in fact*—'to meet . . . and confer'—about any of the mandatory subjects."[53] Even though the EVSC sought committee assistance and thus did not act *unilaterally*, the committee was *independent* of the ETA; consequently, the EVSC violated its statutory obligation to discuss the teacher evaluation plan with the ETA.

The court next considered whether the EVSC had violated section 7(a)(1) of Public Law 217[54] by selecting an evaluation committee without consultation with, or membership from, the ETA. The court recognized that this question was more sensitive because the school board had set up numerous committees including school employees

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[49]*Id.* 405 N.E.2d at 898-99 (quoting 395 N.E.2d at 294). The factors to which the court referred included teaching methods, methods of correspondence with parents, written lesson plans, and communication skills, all of which were "working conditions" to the court.

[50]405 N.E.2d at 900 (quoting 395 N.E.2d at 295).

[51]405 N.E.2d at 900 (quoting 395 N.E.2d at 296) (footnote omitted).

[52]369 U.S. 736 (1962).

[53]*Id.* at 743 (footnote omitted).

[54]IND. CODE § 20-7.5-1-7(a)(1) (1976) states in part that it is an unfair labor practice to "interfere with, restrain or coerce school employees in the exercise of the rights guaranteed in Section 6 of this chapter." Section 6 provides: "(a) School employees shall have the right to form, join or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits and other matters . . . ." *Id.* § 20-7.5-1-6.

through its administrative staff for the purpose of working on many items that are discussable under section 5(a) of the law.[55] The court sustained the finding of a violation by listing the following factors in support of the trial court's decision:

> "(1. [T]he ETA was the exclusive representative as defined in section 2(l)[i] (2. the evaluation committee was the instrumentality in the drafting and proposal of a discussable matter[;] (3. the ETA was unaware of the plan's promulgation, and (4. no ETA participation was involved in the appointment of members to the evaluation committee."[56]

The court's notation of these factors raises some question about the future application of *Evansville-Vanderburgh.* For example, would there have been a violation of section 7(a) if the ETA was represented on the committee or if the ETA was involved in appointing the committee? If ETA participation on the committee or in the selection of the committee is sufficient to avoid a section 7(a) violation, would it also fulfill section 5(a)'s discussion requirements?

The EVSC argued that it did not need to confer with the ETA. EVSC relied on section 2(o), which states that the obligation to bargain or to discuss any matter shall not "prevent the school employer or the superintendent from conferring with any citizen, taxpayer, student, school employee or other person considering the operation of the schools and the school corporation."[57] It also noted[58] the section 6 right of school employers to "manage . . . the operations and activities of the school corporation," which includes the right to "(1) direct the work of its employees [and] (2) establish policy."[59]

The court was thus required to interrelate the school employer's duty to bargain and discuss matters with employee representatives, with its general right to manage the school corporation, direct its employees, and establish policy. The difficulty in interrelating these factors is evidenced by the court of appeals vacating its original decision and the supreme court's supplementing the final court of appeals decision.

In each of these decisions the courts found the conduct of the EVSC in appointing a committee without consulting the ETA to be a violation of section 6(a). Thus, the variations in these decisions relate not to the finding of a violation but to the general interrelationship of these statutory provisions.

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[55]*Id.* § 20-7.5-1-5.

[56]405 N.E.2d at 901 (quoting 395 N.E.2d at 295-96).

[57]IND. CODE § 20-7.5-1-2(o) (1976).

[58]395 N.E. at 297.

[59]IND. CODE § 20-7.5-1-6 (1976).

In its initial opinion, the court of appeals stated that: "[D]iscussable topics trigger affirmative rights upon school employees and duties upon school employers. In order for such affirmative rights and duties to be given effect, the employer's rights unilaterally to confer and establish policy can only refer to matters that are not discussable or bargainable."[60] In its second opinion, the court retracted the latter sentence and stated instead: "In order for such affirmative rights and duties to be given effect, the employer's rights unilaterally to confer and establish policy can not be construed as an *ipso facto* excuse for an otherwise established unfair practice."[61]

The first position was properly withdrawn. If expansively applied, it could have required all school employer discussions concerning bargainable or discussable topics to be with the exclusive teacher representative, thereby eliminating school employees, citizens, taxpayers, and parents from these discussions. It also would have precluded unilateral establishment of policy regarding discussable issues by the school employer. These results could not reasonably have been the intent of the legislature. For example, section 2(o) specifically states that no agreement to a proposal or concession is required regarding discussable items.[62] Clearly after meaningful discussion is completed, the school corporation can unilaterally proceed to implement its final proposal relating to a discussable subject. Also, section 2(n) provides that the obligation to bargain collectively does not require an agreement or concession by either party to a proposal.[63]

The language of section 2(n) closely parallels section 8(d) of the National Labor Relations Act (NLRA) which has long been construed to permit a private employer unilaterally to change even mandatory subjects of bargaining as long as it has first bargained in good faith to an impasse and the change is one which was offered to, but rejected by, the union.[64]

Whether this is the interpretation the legislature intended for the language of section 2(n) is unclear. However, in view of the unambiguous language of section 2(o) and the long-standing NLRA precedent, it is not likely that the legislature intended to preclude all school corporation action regarding bargainable or discussable topics absent agreement with the teacher representative.

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[60]Evansville-Vanderburgh School Corp. v. Roberts, 392 N.E.2d 810, 816 (Ind. Ct. App. 1979).

[61]395 N.E.2d 291, 297 (Ind. Ct. App. 1979).

[62]IND. CODE § 20-7.5-1-2 (1976).

[63]*Id.* § 20-7.5-1-2(n).

[64]*See* NLRB v. Katz, 369 U.S. 736 (1962).

Therefore, the court of appeals properly withdrew from its original position. However, its second position provided no guidance concerning the interrelationship between a school employer's duties to bargain and discuss with the teachers' representative and its rights to manage and confer with other persons. This question was answered in part by the Indiana Supreme Court. The supreme court noted that "[b]oth the 'duty to discuss' and the 'right to confer' are in the statute and both must be given effect insofar as possible,"[65] and that "nothing in the statute or in this opinion would prohibit school employers from conferring with any persons they wish in order to gather and receive information."[66] Furthermore, a school employer is not prohibited from creating committees to assist in this process.[67] In addition, the court noted that the "committees may be composed of any concerned parents, students, teachers, experts, consultants or other concerned citizens" or even "entirely of school employees who are not members of the exclusive representative organization as long as the committee is gathering or receiving information which is only a partial input into the final formulation of policy."[68]

This seems a reasonable balance among the rights of the exclusive representative, the school corporation, and the general public to have opportunities for input into school decisions. It leaves largely unsettled the interrelationship of the school corporation's duty to bargain collectively and discuss appropriate topics with the exclusive representative, and its rights to manage the school corporation and establish policy. However, the court did establish that these rights of a school corporation do not relieve it of its duty to bargain collectively or to discuss appropriate issues. The questions regarding the issue of the school corporation's right to manage and to establish policy after fulfilling its duties to bargain or discuss were not before the court in this case; consequently, that issue may have to be litigated.

D. Interrelationship of the Teacher Contract Act, General Powers Act, and Teacher Bargaining Act

In *Brown v. Board of School Trustees*,[69] the Indiana Court of Appeals construed the limitations of a school corporation's power to make rules and regulations governing reappointment of non-tenured

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[65]405 N.E.2d at 901.
[66]*Id.*
[67]*Id.* at 901-02.
[68]*Id.* at 902.
[69]398 N.E.2d 1359 (Ind. Ct. App. 1980).

teachers in conjunction with the Teacher Tenure Act.[70] The plaintiff in *Brown* had been hired as an industrial arts teacher for three successive years. In April of the third year, the plaintiff was given a written evaluation by his principal which stated that it would be recommended that his contract not be renewed. Later that month the plaintiff was given written notice that he was not being rehired for the next year. The plaintiff sued the school corporation claiming it had not followed its own rules concerning the non-renewal of his contract.

The plaintiff argued that the Teacher Tenure Act provides for automatic renewal of non-tenured teachers unless written notice is given by the first of May.[71] The plaintiff also argued that the school corporation had made a rule under the General Powers Act,[72] which gave a teacher in its employ:

> [The] right to be warned in case his work is not satisfactory or up to expectations. The teacher will have a reasonable probationary period to correct the situation. The warning should deal with specific items and state consequences if improvement does not follow. This warning should be in writing for the record so that there can be no misquotation or later misunderstanding.[73]

The regulation also stressed the obligation of the school corporation to help teachers by providing close supervision and frequent visits and conferences during the probationary period. The school corporation did not dispute that the plaintiff had been afforded no written warning, probationary period, or assistance as the school corporation's rules required.[74]

The court, citing *School City of Lafayette v. Highley*,[75] held that the purpose of the Tenure Act was:

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[70]IND. CODE § 20-6-13-1 (1971) (currently codified at IND. CODE § 20-6.1-4-11 (Supp. 1980)).

[71]IND. CODE § 20-6-13-1 (1971) (currently codified at IND. CODE § 20-6.1-4-11 (Supp. 1980)).

[72]IND. CODE §§ 20-5-2-1 to -3 (1971) (currently codified at IND. CODE §§ 20-5-2-1 to -5 (1976 & Supp. 1980)). In particular, IND. CODE § 20-5-2-2(17) (1971) (currently codified at IND. CODE § 20-5-5-2(17) (Supp. 1980)) provided that a school corporation shall have the power

> [t]o prepare, make enforce, amend and/or repeal rules, regulations and procedures for the government and management of the schools, property, facilities and activities of the school corporation, its agents, employees and pupils and for the operation of its governing body, which rules, regulations, and procedures may be designated by any appropriate title such as "policy handbook," "by laws," "rules and regulations."

[73]398 N.E.2d at 1360.

[74]*Id.*

[75]213 Ind. 369, 12 N.E.2d 927 (1938).

> [t]o protect the educational interest of the state by the establishment of a uniform system of permanent contracts. It is not its purpose to foster the interests of, or to create special privileges to, any teacher or class of teachers. The policy of the law is to establish a uniform tenure system for all the schools of the state, and must be construed liberally with that aim and end in view.[76]

In addition, the court of appeals noted that the General Powers Act, which authorized the promulgation of regulations, also provided that the "discharge of teachers shall, however, be subject to and governed by the laws relating to employment . . . and discharge of teachers."[77] The court concluded that the school corporation rule which established a condition precedent to the non-renewal of a teacher's contract at the end of the term was contrary to the statutory scheme. Thus, the school corporation's regulation was void; therefore, the school corporation was not required to follow its own regulation. Accordingly, the court sustained the non-renewal of the plaintiff's contract.

The Tenure Act applied in *Brown* was subsequently repealed.[78] Under the current law, the Teacher Contract Act,[79] teachers who are under contract in a public school corporation for two consecutive years and then contract for future services to be rendered to the school corporation are "semipermanent teachers."[80] Those serving five or more consecutive years are "permanent teachers."[81] Permanent and semipermanent teachers are entitled to indefinite contracts which can be cancelled only for specifically authorized reasons.[82] Furthermore, specific procedures, such as providing the teacher with written notice, must be followed before cancellation. The teacher has the right to request a hearing at which he is given a full statement of the reasons for

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[76]398 N.E.2d at 1361 (citing School City of Lafayette v. Highley, 213 Ind. at 376-77, 12 N.E.2d at 930).

[77]IND. CODE § 20-5-2-2(7) (1976) (currently codified at IND. CODE § 20-5-2-2(7) (Supp. 1980)).

[78]IND. CODE § 20-6-12-1 (1971) was repealed by Act of Feb. 18, 1976, Pub. L. No. 100, § 4, 1976 Ind. Acts 409.

[79]IND. CODE §§ 20-6.1-4-1 to -20 (1976 & Supp. 1980).

[80]*Id.* § 20-6.1-4-9.5 (Supp. 1980).

[81]*Id.* § 20-6.1-4-9.

[82]*Id.* § 20-6.1-1-10 (1976) provides that an indefinite contract with a permanent teacher may be cancelled for immorality, insubordination, neglect of duty, incompetence, a justifiable decrease in the number of teaching positions or "other good and just cause." *Id.* § 20-6.1-4-10.5 (Supp. 1980) provides that an indefinite contract with a semi-permanent teacher may be cancelled for immorality, insubordination, neglect of duty, substantial inability to perform teaching duties, justifiable decrease in the number of teaching positions, good and just cause, or if in the best interest of the school corporation.

cancellation and an opportunity to present testimony and other evidence on his behalf.[83] Therefore, the means of removing a teacher by simply not renewing his or her contract at the end of a term is no longer available for those who have taught at least two consecutive years.

Brown remains significant because it raises the question of the relationship of the Teacher Contract Act,[84] the School Powers Act[85] and the Teacher Bargaining Act.[86]

The relationship of the Teacher Contract Act and the Teacher Bargaining Act may be better understood after an examination of *Reidenbach v. Board of School Trustees.*[87] In *Reidenbach*, a teacher brought an action against a school corporation for the alleged wrongful refusal to renew his teaching contract. In February, 1975, the school board terminated Reidenbach's contract. In April, 1975, the parties agreed to arbitrate Reidenbach's discharge. Nonetheless, six days after the agreement, the school board notified Reidenbach that his contract would not be renewed for the 1975-76 school year regardless of the outcome of the arbitration. Thereafter, the arbitrator found the school board's reasons for terminating Reidenbach were arbitrary and capricious and awarded him the balance of his 1974-75 salary.[88]

Nevertheless, the trial court found that Reidenbach had failed to exhaust his administrative remedies by failing to request the written reasons for the non-renewal of his contract as required by the collective bargaining agreement, and refused to enforce the arbitrator's decision. The court of appeals agreed with the trial court and rejected Reidenbach's contention that exhaustion of those remedies would have been futile because he already knew the school board's position on the issue. The court concluded that it would not assume that the reasons for Reidenbach's non-renewal were the same as the reasons for his wrongful discharge. Thus, it would have been premature for a court to consider the matter.[89]

The court's decision on the merits seems weak. The school board had discharged Reidenbach and had put him on notice that regardless of the outcome of the arbitration his contract would not be renewed. Reidenbach won the arbitration case, but the school board

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[83]*Id.* § 20-6.1-4-11 (Supp. 1980).

[84]*Id.* §§ 20-6.1-4-1 to -20 (1976 & Supp. 1980).

[85]*Id.* §§ 20-5-1 to -54.

[86]*Id.* §§ 20-7.5-1-1 to -14.

[87]398 N.E.2d 1372 (Ind. Ct. App. 1980).

[88]The collective bargaining agreement between the parties provided that the reasons for the nonrenewal of a teacher's contract "shall not be arbitrary or capricious." *Id.* at 1373.

[89]*Id.* at 1374.

adhered to its prearbitration position. It seems highly unlikely that the school board would have reconsidered its decision not to renew Reidenbach's contract even if he had requested the reasons for his non-renewal. The request would clearly have been futile.

Nevertheless, the court rejected Reidenbach's argument. The court buttressed its position by stating that such a request would have made a record of the school board's actions which could be reviewed by the trial court.[90]

The court apparently erroneously analogized the school board's actions to the quasi judicial actions of an administrative agency which are only subject to review on the administrative record. However, the school board was not acting as an independent administrative agency reviewing the action of an unrelated employer. Rather, it was the employer. The trial court's function should have been to hear the case de novo and determine if the school board employer had wrongfully refused to renew Reidenbach's contract. In the absence of a full record, the trial court could have admitted any "evidence" the school board wished to present regarding its reasons for not renewing Reidenbach's contract. The court of appeals, therefore, totally misapplied the doctrine of exhaustion of administrative remedies by requiring Reidenbach to request the reasons for his non-renewal.

Viewing *Brown*,[91] *Evansville-Vanderburgh*,[92] and *Reidenbach*[93] together, the complex interrelationship between the Teacher Contract Act,[94] the General Powers Act,[95] and the Teacher Bargaining Act[96] is illustrated. In *Evansville-Vanderburgh*, the Indiana Supreme Court held that a teacher evaluation plan was a discussable subject under the Teacher Bargaining Act. The court reasoned that the implementation of such a plan could result in a recommendation for the change of a teacher's assignment or even dismissal. Furthermore, the factors considered under the plan significantly affected the daily activities of school teachers.

In *Brown*, the court held that the procedures of the Teacher Tenure Act governing the non-renewal of a teacher's contract could not be supplemented by a school corporation's regulations promulgated under the General Powers Act. In fact, the supplementation was declared void because it created a condition precedent to the non-renewal of a teacher's contract.

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[90] *Id.*

[91] 398 N.E.2d 1359 (Ind. Ct. App. 1980).

[92] 395 N.E.2d 291 (Ind. Ct. App. 1979).

[93] 398 N.E.2d 1372 (Ind. Ct. App. 1980).

[94] IND. CODE §§ 20-6.1-4-1 to -20 (1976 & Supp. 1980).

[95] *Id.* §§ 20-5-1 to -60.

[96] *Id.* §§ 20-7.5-1-1 to -14.

In *Reidenbach*, a school board and the teachers' exclusive representative had negotiated procedural safeguards which had to be followed before the non-renewal of a teacher's contract. The court held that such procedures had to be exhausted before relief was sought from the courts.

These cases do not mesh well. If *Brown* is correct, it would appear that the former Teacher Tenure Act or the current Teacher Contract Act sets forth the sole procedures available to challenge the failure to renew a teacher contract. Even additional safeguards would be void.

How would *Evansville-Vanderburgh* affect the discussion of procedural safeguards for the non-renewal of teacher contracts? A teacher evaluation plan would appear to be a procedural safeguard assuring that the best teachers are retained and that evidence is collected fairly to determine which teachers should be terminated. In this sense, it guards against arbitrary non-renewal of teachers' contracts. Under *Evansville-Vanderburgh*, a teacher evaluation plan is a discussable topic under the Teacher Bargaining Act. Yet, if no safeguards can supplement those in the Teacher Contract Act, no purpose is served by discussing these issues.

If *Brown* is correct, then *Reidenbach* cannot be. The court in *Brown* held that safeguards negotiated by the teacher representative to prevent arbitrary non-renewal of teachers contracts are void. If the *Brown* holding was applied to the facts of *Reidenbach*, Reidenbach should not have been precluded from seeking court review merely because he failed to exhaust remedies which, in fact, were void under *Brown*.

The interrelationship of the three acts has not been clearly determined in any of these cases. However, a resolution of this interrelationship is essential to consistent and reasonable interpretation of all of these acts. Initially, it seems reasonable to suggest that the Teacher Contract Act should be construed to define the minimum procedures which cannot be waived for teacher contract renewal. The Teacher Bargaining Act should provide the parties the opportunity to supplement, but not defeat, the procedures of the Teacher Contract Act. Finally, the General Powers Act should permit a school corporation to effectuate supplemental procedures after it has fulfilled its responsibility to discuss them with the teachers' exclusive representative. Whether the acts will be so construed is up to the courts to decide.