IX. Labor Law

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A. Public Employee Representation Fee or Agency Shop Clauses

The most controversial subject of court decisions during the survey period was the collection of representation fees from nonunion public employees. In *Fort Wayne Education Association v. Goetz*,[1] the Indiana Court of Appeals for the Fourth District held that school boards can recognize a teachers' union's claim for representation fees from nonunion teachers.[2] In that case, the Fort Wayne Community Schools had recognized such a claim when it contracted with the Fort Wayne Education Association to provide for nonmandatory payroll deductions of representation fees from nonunion teachers. The contract provided that nonunion teachers' dues would be slightly less than regular membership dues to exclude amounts charged for political activities.[3] It also authorized the union to bring suit to collect its fees from teachers who refused to authorize a payroll deduction or otherwise refused to pay.[4] Pursuant to that authority, the union brought suit in small claims court against refusing teachers.[5] The teachers asserted that the representation fee requirement was an unconstitutional infringement on their first amendment right to freedom of association.[6]

The court of appeals recognized that the first and fourteenth amendments give public school teachers the right to choose whether to associate for the advancement of particular beliefs.[7] However, the court concluded that the contract did not infringe upon this right because it did not require nonunion teachers to join the union, but merely required them to "carry their financial burden in return for the benefits they receive from the Association's activities as their exclusive representative."[8]

The court also determined that the union's authority for imposing a representation fee upon nonunion teachers must originate with the state legislature. Citing *Abood v. Detroit Board of Education*[9] and equating

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[1] 443 N.E.2d 364 (Ind. Ct. App. 1982).

[2] *Id.* at 373.

[3] *Id.* at 365.

[4] *Id.* at 367.

[5] *Id.* at 365.

[6] *Id.* at 366.

[7] *Id.* at 368 (citations omitted).

[8] *Id.*

[9] 431 U.S. 209 (1977).

the imposition of such fees with the creation of agency shops, the court stated that "[t]his justification for agency shops, however, is of no avail unless authorized by statute because our General Assembly has particularly prescribed the regulation of teachers' labor relations."[10] The court noted that the Indiana General School Powers Act[11] allows school corporations to prepare rules and regulations for the governance of employees.[12] Based upon this statutory power, which must be "liberally construed to permit the governing body of school corporations to conduct its affairs in a manner consistent with sound business practice,"[13] the court concluded that the Legislature had endowed Indiana school boards with wide discretion, including the discretion to consent to the nonmandatory payroll deduction of fees.[14]

The court also examined the Certified Educational Employee Bargaining Act (CEEBA)[15] to determine its effect on the board's authority to consent to the fee requirement. In its preface CEEBA recognizes the right of school employees to organize and accepts collective bargaining as conducive to harmonious working relationships.[16] The court noted that under CEEBA, while only salary, wages, hours, and related fringe benefits are mandatory subjects of *bargaining*, working conditions are a mandatory subject of *discussion*. Acknowledging that a standard agency shop clause is a condition of employment, the court narrowly construed the CEEBA provision that declared encouraging or discouraging membership in any employee organization constitutes an unfair labor practice.[17] This provision, the court concluded, does not prohibit a school corporation from recognizing a teachers' union's right to compel payment of representation fees.

The court distinguished the Fort Wayne clause from the clause at issue in *Anderson Federation of Teachers, Local 519 v. Alexander*.[18] That clause was invalid because it conditioned employment upon payment of service fees—teachers failing to pay were subject to discharge.[19] The court noted:

> "[we do not] suggest that such agreements between schools and teachers' unions are invalid *per se*. We say only that construing

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[10]443 N.E.2d at 369. The *Goetz* court also quoted the following language from the *Abood* decision: "A union-shop arrangement has been thought to distribute fairly the cost of [representing the interests of employees] among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' . . . ." 443 N.E.2d at 369 (quoting 431 U.S. at 221-22).

[11]IND. CODE §§ 20-5-2-1 to -5 (1982).

[12]*Id.* § 20-5-2-2(17).

[13]*Id.* § 20-5-6-3.

[14]443 N.E.2d at 370.

[15]IND. CODE §§ 20-7.5-1-1 to -14 (1982).

[16]*Id.* § 20-7.5-1-1(b).

[17]443 N.E.2d at 370-71.

[18]416 N.E.2d 1327 (Ind. Ct. App. 1981).

[19]443 N.E.2d at 372.

> the provisions of the CEEBA *in toto*, they forbid school corporations to make *any* collective bargaining agreement—for union security purposes or otherwise—in which the schools undertake the mandatory discharge of a given class of teachers."[20]

The court also examined the legislative history of CEEBA and decided that the Legislature intended to allow a school corporation to recognize representation fees. The House voted to amend the Senate Bill to make unlawful an agreement which requires a person "to become a member of or . . . *to pay money to the organization in lieu of membership as a condition of employment*,"[21] but this amendment was not made part of the law as enacted.[22]

The court thus held that the school board and the union had the power to negotiate the representation fee clause.[23] The court limited its holding to fees for bargaining unit services, noting that the nonunion teachers could not be required to pay for the union's political activities.[24]

The United States District Court for the Northern District of Indiana also addressed the legality of agency shop provisions, but for city employees, in *Perry v. City of Fort Wayne*.[25] The agency shop clause in *Perry* required all employees, including nonunion members, to pay to the union as a condition of employment an agency fee equal in amount to union dues. When the plaintiff was terminated for failing to pay this fee, she sought a temporary restraining order to enjoin the city from conditioning her employment on full payment of the agency fee. The plaintiff alleged violations of her first and fourteenth amendment rights. She argued that the agency shop clause was unconstitutional on its face, and that even if the agency fee requirement was valid, she could not be required to pay any amount not germane to collective bargaining.[26]

The court concluded that the plaintiff would probably be able to show that the agency shop provision infringed upon her first amendment rights and ordered the requested relief upon that ground.[27] The district court based its conclusion on the Supreme Court's decision in *Abood* which had permitted infringement upon first amendment rights by agency shop agreements only because the state legislature had declared that such

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[20] *Id.* (quoting Anderson Fed'n of Teachers, Local 519 v. Alexander, 416 N.E.2d 1327, 1333 (Ind. Ct. App. 1981)).

[21] 443 N.E.2d at 373 (emphasis added) (quoting Indiana House Journal, 1973 Regular Sess. 1212 (1973)).

[22] 443 N.E.2d at 373.

[23] *Id.*

[24] *Id.* The parties had stipulated to the amount of dues used for political activities.

[25] 542 F. Supp. 268 (N.D. Ind. 1982).

[26] *Id.* at 270.

[27] *Id.* at 273 n.6.

agreements furthered the state's strong and legitimate interest in peaceful labor relations. Without such a legislative determination, the court concluded, the agency shop provision would not have survived constitutional scrutiny.[28] The court noted that it had not been shown any Indiana statute that explicitly provided for agency shop agreements for city employees[29] and rejected the city's argument that the Home Rule Act[30] was such a statute. The court reasoned that the Home Rule Act does not fulfill the *Abood* requirement for a specific state determination that such agreements are important to labor relations because it does not constitute an affirmative expression of state policy.[31]

The contrast between *Goetz* and *Perry* is significant. In *Goetz* the court of appeals held that the broad powers granted to school boards under the School Powers Act and CEEBA, which authorizes bargaining for teachers and lists working conditions as a mandatory subject of discussion, constituted sufficient state endorsement of representation fee clauses under *Abood*. In *Perry*, the district court held that the broad powers granted to cities under the Home Rule Act did not fulfill the *Abood* requirements for a state level endorsement of agency shop provisions for city employees. This is a fine line to draw.

In *Abood*, the state legislature had expressly authorized agreements which required payments of agency shop fees as a condition of employment.[32] In Indiana, neither teachers nor other public employees have any such explicit legislative approval of agency shop or representation fee contractual agreements. Just what form of legislative approval *Abood* requires remains unanswered. The broad powers under the School Powers Act without doubt allow school boards to enter into agreements containing representation fee recognition, but such a delegation does not clearly fulfill whatever requirements *Abood* imposed upon state legislative approval of agency shop clauses. If the School Powers Act satisfies *Abood*,[33] then the broad authority delegated to cities under the Home Rule Act should also constitute state approval of agency shop agreements entered into by the cities.

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[28]542 F. Supp. at 273 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

[29]524 F. Supp. at 273.

[30]IND. CODE §§ 36-1-3-1 to -9 (1982).

[31]*Id.* (citing Community Communications Corp. v. City of Boulder, 455 U.S. 40 (1982)). The court's reliance on *City of Boulder* here may be questionable. In *City of Boulder* the United States Supreme Court merely held that cities are not exempt from federal antitrust laws under Congress' "state action" exemption even though they have acted under home rule powers. *Id.* at 56-57. This holding is somewhat remote from the question in *Perry* and could be restricted in future litigation to a mere holding relating to Congress' intent regarding the enforcement of antitrust laws.

[32]431 U.S. at 214 (1977) (citing MICH. COMP. LAWS § 423.210(1)(c) (1978)).

[33]Because the contract in *Goetz* did not condition employment upon payment of the representation fee, this issue has not been decided. However, the reliance upon *Abood* in the court's opinion, *see* 443 N.E.2d at 369, would tend to indicate that the School Powers Act does provide such a legislative approval.

B. Teacher Bargaining Limitations Under CEEBA

1. Nonrenewal of Individual Teacher Contracts.—In *Indiana Education Employment Relations Board v. Carroll Consolidated School Corp.*,[34] the Indiana Court of Appeals for the Second District addressed the teacher bargaining representative's right to discuss a school board's refusal to renew an individual teacher's contract. Unfortunately, it followed the misguided precedent of *Indiana Education Employment Relations Board v. Board of School Trustees*.[35]

In *Carroll*, the court adopted the *Board of School Trustees* rule that the bargaining representative has no right under CEEBA to discuss a school board's failure to renew an individual teacher's contract.[36] The court avoided the question of whether the general guidelines governing renewal of a teacher's contract would fall within the discussible topic of working conditions under section 5 of CEEBA.[37]

As was thoroughly explained in the 1979 survey,[38] this hypertechnical interpretation of CEEBA unnecessarily leads to undesirable results. In addition, the *Carroll* decision unduly confuses teacher labor relations.

The court in *Carroll* concluded that individual grievances, including failures to renew teacher contracts, should be addressed in a grievance procedure[39] for which the law makes ample provision.[40] This conclusion raises several questions. Must this grievance procedure be negotiated or is it authorized without negotiation by section 2(o) of CEEBA, which provides in pertinent part:

> Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of his grievances either individually or through the exclusive representative . . . .[41]

This section appears to specify the grievance procedure, yet the court interpreted it as a "provision in the law for the establishment of a grievance procedure."[42]

The court in *Carroll* also supported its decision with the section 6(b)(4) right of a school to "suspend or discharge its employees in accordance

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[34]439 N.E.2d 737 (Ind. Ct. App. 1982).

[35]174 Ind. App. 481, 368 N.E.2d 1163 (1977).

[36]439 N.E.2d at 739-40.

[37]*Id.* at 739 n.1.

[38]Archer, *Labor Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 212, 215-20 (1979).

[39]439 N.E.2d at 740.

[40]*Id.* at 739 (citing IND. CODE §§ 20-7.5-1-2(o), -4 (1976)).

[41]IND. CODE § 20-7.5-1-2(o) (1982).

[42]439 N.E.2d at 739.

with applicable law"[43] and identified "applicable law" as the since repealed Teacher Tenure Act.[44] That statute required school corporations to notify a non-permanent teacher in writing on or before May 1 that the teacher's contract would not be renewed and afforded teachers an opportunity to request a written explanation for the dismissal.[45] The *Carroll* school board met those requirements.[46]

The *Carroll* court's failure to decide whether general guidelines for renewals are discussible raises the serious question of what substantive standards would be applied if a grievance procedure were adopted. If the parties adopted a set of general guidelines, there is no certainty that they would be enforceable.

Even if such general guidelines for nonrenewals were discussible under section 5 of CEEBA,[47] that section further provides that a school employer "shall not be required to bargain collectively, negotiate or enter into a written contract" concerning any discussible topic.[48] A school corporation would not be required to enter into a contract providing general guidelines for renewals unless they were a subject of bargaining under section 4 of CEEBA.[49]

Section 4 expressly provides for grievance procedures culminating in final and binding arbitration, but it also provides that binding arbitration "shall have no power to amend, add to, subtract from or supplement provisions of the contract."[50] Absent an enforceable contractual limitation on a school employer's right to renew, the grievance and arbitration procedures would merely be procedures with no enforceable substantive rights. These hollow procedures are what the *Carroll* court intended.

In future litigation, the courts should specifically address the interrelationship between the Teacher Contract Act, the School Powers Act, CEEBA, and grievance and arbitration procedures apparently authorized

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[43] *Id.* (quoting IND. CODE § 20-7.5-1-6(b)(4) (1976)).

[44] 439 N.E.2d at 739 (citing IND. CODE § 20-6.1-4-14 (1976), *amended by* Act of Mar. 3, 1978, Pub. L. No. 110, § 6, 1978 Ind. Acts 1085, 1088). If a grievance procedure could be established, its relationship to the Teacher Tenure Act or its successor, the Teacher Contract Act, remains unclear. The interrelationship of the Teacher Contract Act, the General Powers Act, and CEEBA was previously discussed in the 1981 survey, Archer, *Labor Law, 1981 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 413, 427-32 (1981), with reference to Brown v. Board of School Trustees, 398 N.E.2d 1359 (Ind. Ct. App. 1980). In *Brown*, the Indiana Court of Appeals concluded that the school corporation could not supplement the Teacher Tenure Act's procedural safeguards. *Id.* at 1361. Under *Brown*, therefore, the parties could not negotiate any grievance procedure which differed procedurally from the Teacher Tenure Act or its successor, the Teacher Contract Act.

[45] IND. CODE § 20-6.1-4-14 (1976), *amended by* Act of Mar. 3, 1978, Pub. L. No. 110, 1978 Ind. Acts 1085.

[46] 439 N.E.2d at 739.

[47] IND. CODE § 20-7.5-1-5(a) (1982).

[48] *Id.*

[49] *Id.*

[50] *Id.* § 20-7.5-1-4.

or created by CEEBA, particularly as these various provisions apply to teacher discharges or nonrenewal of individual teacher contracts.

2. School Calendar.—In *Eastbrook Community Schools Corp. v. Indiana Education Employment Relations Board*,[51] the court of appeals addressed whether a school corporation was required to bargain before extending the school calendar to make up excessive snow or emergency days. Although the Eastbrook school board had discussed the school calendar with the teachers' union, it unilaterally provided that days in excess of five to a maximum of ten during which the school was forced to close could be rescheduled at the end of the school calendar and that the teachers would be required to work without additional compensation on such rescheduled days.

The union filed an unfair labor practice complaint, contending that the school board had violated CEEBA by not bargaining about this possible extension of the school calendar. The IEERB affirmed the hearing examiner's finding that the number of teacher work days, including make-up days caused by snow or emergency closings, and the pay for such make-up days were mandatory bargainable items under section 4 of CEEBA because make-up days could affect the number of hours worked and the salary of teachers. Therefore, the IEERB found that Eastbrook's unilateral change concerning a mandatory subject of bargaining constituted an unfair labor practice.[52]

The court of appeals rejected this finding.[53] Section 4 of CEEBA requires a school employer to bargain collectively with the exclusive representative on "salary, wages, hours, and salary and wage related fringe benefits."[54] However, section 6(b) lists as school employer rights the authority to manage and direct the activities of the school corporation, to establish policy, and to implement the mission of the public schools as provided by law.[55]

Indiana's statutory law requires that individual teacher contracts contain "the beginning date of the school term as determined annually by the school corporation"[56] and "the number of days in the school term as determined annually by the school corporation."[57] The court reasoned that:

> To conclude that the school board has the exclusive authority to decide both the actual number of days in the school term and the commencement date of this term, but *not* the ending date

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[51]446 N.E.2d 1007 (Ind. Ct. App. 1983).
[52]*Id.* at 1009.
[53]*Id.* at 1012.
[54]IND. CODE § 20-7.5-1-4 (1982).
[55]*Id.* § 20-7.5-1-6(b).
[56]*Id.* § 20-6.1-4-3(a)(3)(A).
[57]*Id.* § 20-6.1-4-3(a)(3)(B).

> would be illogical. Therefore, although the legislature may not have clearly stated so, the school board must be held to have the corollary authority to determine when the school session ends.[58]

Buttressing its decision with out-of-state precedent, the court held that school calendars were nonnegotiable matters of educational policy, not mandatory subjects of bargaining under CEEBA, and that the contingency clause in this case did not have enough impact upon salary, wages, hours, and related benefits to mandate bargaining.[59]

The court reserved judgment as to whether requiring teachers to provide services on days other than those contemplated within the normal school year were working conditions which would require discussion because the school board in this case had discussed the provision with the teachers.[60] Consequently, under *Eastbrook*, school calendars and related matters are not bargainable subjects under section 4 of CEEBA.

3. Deficit Financing.—In *South Bend Community School Corp. v. National Education Association—South Bend*,[61] the tip of the iceberg appeared revealing problems which may arise in applying section 3 of CEEBA, which provides in part:

> It shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent.[62]

Section 2(q) of CEEBA defines " 'deficit financing' with respect to any budget year" as meaning "expenditures in excess of money legally available to the employer."[63]

The South Bend Community School Corporation entered a collective bargaining agreement with the National Education Association-South Bend (NEA-SB) in 1980 which was to terminate at the end of the 1982-83 school year. In the summer of 1981, school officials realized that the corporation was heading for a $6.8 million deficit. Additional funding narrowed the deficit to $3.8 million.[64]

In July of 1981, the school superintendent asked the NEA-SB to renegotiate the collective bargaining agreement. When the NEA-SB refused, the school corporation sought a court order declaring that the collective

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[58]446 N.E.2d at 1012.
[59]*Id.* at 1013.
[60]*Id.* at 1013-14.
[61]444 N.E.2d 348 (Ind. Ct. App. 1983).
[62]IND. CODE § 20-7.5-1-3 (1982).
[63]*Id.* § 20-7.5-1-2(q).
[64]444 N.E.2d at 349.

bargaining agreement and individual teacher contracts under that agreement were void under section 3 of CEEBA.[65] Thereafter, the school corporation unilaterally changed the collective bargaining agreement, reducing teachers' wages and cancelling a dental plan. The NEA-SB counterclaimed for a preliminary injunction to prevent the school corporation from implementing these changes. The circuit court granted the injunction and held that the original collective bargaining agreements were valid and binding.[66]

On appeal, the school corporation cited a Pennsylvania case which held that a statute requiring schools to operate within a balanced budget subjected collective bargaining agreements to a condition precedent that funding would be forthcoming from the legislature.[67] The Indiana court distinguished this case by noting that

> [u]nlike the Philadelphia school board the Board of Trustees for the South Bend school did not clearly establish where its budget cuts were implemented. The Trustees made nothing more than a bald statement that they had made all feasible budget cuts, and the only expense remaining to be cut was the teachers' salaries.[68]

The court noted that numerous other expenses were involved in the school budget and concluded that the school corporation had not proven that "the teachers' contract was *the expense* within the general fund which 'provides for deficit financing.' "[69]

The court also rejected the contention that section 3 of CEEBA was an unconstitutional impairment of the freedom of teachers to enter contracts, noting that "the Legislature may prohibit contracts against public policy so long as it does not impair previously existing legal contracts after rights have vested"[70] and that "parties entering a contract with a public officer bear the risk of loss if that contract is beyond the scope of the officer's authority."[71]

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[65] *Id.*

[66] *Id.* at 350.

[67] *Id.* at 351-52 (citing Philadelphia Fed'n of Teachers, Local No. 3 v. Thomas, 62 Pa. Commw. 286, 436 A.2d 1228 (1981)).

[68] 444 N.E.2d at 352.

[69] *Id.*

[70] *Id.* at 352 (citing Gonser v. C.I.T. Fin. Serv., Inc., 16 Bankr. 555 (S.D. Ind. 1981); Pulos v. James, 261 Ind. 279, 302 N.E.2d 768 (1973)).

[71] 444 N.E.2d at 353 (citing Board of School Comm'rs v. State *ex rel.* Wolfolk, 209 Ind. 498, 199 N.E. 569 (1936); Honey Creek School Township v. Barnes, 119 Ind. 213, 21 N.E. 747 (1889)).