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SCOPE OF BARGAINING: THE MANAGEMENT PERSPECTIVE

Garry G. Mathiason,* William F. Terheyden** and Larry P. Schapiro***

INTRODUCTION

The heart of the California public school collective bargaining law lies in section 3543.2 of the Educational Employment Relations Act (the Act). That section enumerates the allowable subjects for bargaining between public school employers and exclusive representatives of public school employees. Since the Act did not become effective until January 1, 1976, there has not been time for the California Public Employment Relations Board (PERB) to render many decisions interpreting the scope of bargaining under section 3543.2. However, since the representative of the public school employer must meet and negotiate with the representative of an employee organization upon request, some insight as to the range of the matters over which they may lawfully bargain is presently needed.

This article will examine the extent of the required subjects of bargaining. In an effort to resolve the controversies over just what the bargainable subjects are, the language of the Act, the relevant California PERB and hearing officer decisions, the decisions of employment relations boards of other states, and

* B.S., 1968, Northwestern University; J.D., 1971, Stanford University; Member, State Bar of California.
** B.A., 1965, University of Santa Clara; J.D., 1968, Stanford University; Member, State Bar of California.
*** B.S., 1968, Rider College; J.D., 1972, State University of New York at Buffalo; Member, State Bars of California and New York.

1. CAL. GOV'T CODE §§ 3540-3549.3 (West Supp. 1978). This law is generally referred to as the Educational Employment Relations Act or the Rodda Act.
2. CAL. GOV'T CODE §§ 3541 and 3541.3 took effect on this date, with §§ 3543, 3543.1, 3544, 3544.1, 3544.3, 3544.5, 3544.7 and 3545 following on April 1, 1976. On July 9, 1976, §§ 3541.5, 3543.5 and 3543.6, which had become operative on July 1, 1976, were made retroactive to April 1, 1976. The remaining portions of the Act went into effect on July 1, 1976.
3. Operative Jan. 1, 1978, the Educational Employment Relations Board (EERB) was changed to its present name, the Public Employment Relations Board (PERB). CAL. GOV'T CODE § 3540.1 (West Supp. 1978).
the decisions of the National Labor Relations Board (NLRB) will serve as authorities.6

The language in the California law defining the scope of bargaining (or, as it is referred to under section 3543.2 of the Act, the scope of representation) is skeletally similar to that of the federal Labor Management Relations Act7 and to the language of many state statutes.8 It is "limited to matters relating to wages, hours of employment, and other terms and conditions of employment."9

The similarity with other states and federal law ends there,10 as the California law narrows and specifically defines the extent of the meaning of "terms and conditions of employment" to include only:

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8. E.g., PA. STAT. ANN. tit. 43, § 1101.701 (Purdon Supp. 1977) ("wages, hours and other terms and conditions of employment").


SCOPE OF BARGAINING

1. health and welfare benefits as defined by Government Code section 53200;
2. leave policy;
3. transfer policy;
4. reassignment policy;
5. safety conditions of employment;
6. class size;
7. procedures to be used for the evaluation of employees;
8. organizational security pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8 of the Act;
9. layoff of probationary certificated school district employees for Los Angeles Unified School District pursuant to Education Code section 44959.5.

"All other matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . ."

This language by the California Legislature sharply but purposefully limits the otherwise broad meaning of "terms and conditions of employment." It is purposeful in that the Act was "consensus" legislation drafted by legislative staff members. It was written, rewritten and amended to obtain general agreement so as to be acceptable to such diverse interested parties as the Association of California School Administrators, the California School Employees Association, the California Federation of Teachers, the California School Boards Association, and the California Teachers Association.

The scope of bargaining section, even as proposed to the State Senate in its original form on May 13, 1974, as Senate Bill Number 1857, contained the same definition of "terms and

12. By listing the subjects for bargaining rather than using the phrase 'terms and conditions of employment,' a legislature may mechanically and effectively limit the scope of bargaining. California's Educational Employment Relations Act is perhaps a prime example . . . With the language, removing all matters not specifically enumerated from the scope of negotiations, it is clear that no ejusdem generis principle may be used to add to the list of enumerated subjects.
 Alleyne, Statutory Restraints on the Bargaining Obligation in Public Employment, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 100, 111-12 (1977) (Reginald Alleyne is the former Chairperson of the California Educational Employment Relations Board). See also California School Employees Ass'n, Proposed Unfair Practice Decision No. SF-CE-68 (July 14, 1978), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2146.
13. Telephone interview with John Bukey, consultant with the California Senate Education Committee at the time of initial introduction and passage of the Educational Employment Relations Act (Jan. 5, 1977).
conditions of employment” as the present law, except for class size and organizational security. Through gradual amendment during the subsequent legislative session, including limited expansion of the scope of representation provision, the bill finally passed and was signed by the Governor on September 22, 1975. Various portions of the Educational Employment Relations Act have since been amended. However, except for a provision pertaining only to the Los Angeles Unified School District, attempts to widen the scope of bargaining have consistently been rejected.

The weight of all this evidence is clear. Under the California law the subject area over which the public school employer and the exclusive representative of public school employees may bargain is narrow.

And well it should be, as members of public school governing boards are elected to represent the interests of the community as a whole. Employee associations negotiation proposals, while they may have some limited effect on “wages, hours of employment, and other terms and conditions of employment,” can cause tremendous changes to the local district’s education process. Without the scope of bargaining being narrow and limited, one exclusive representative of a unit of employees may obtain a disproportionate amount of influence in determining educational policy to the detriment of the community.

Some arguments have been made that the introductory scope of bargaining language — “limited to matters relating to” — vastly expands the meaning of the terms that follow it. This position has no substantial basis; it is unsupported in the legislative history of the Act. Certainly the legislature

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15. Even with the later expansion of scope of bargaining to include class size, the bill still failed to garner enough support for passage that session.

16. It was re-introduced January 6, 1975, as S.B. 160. Provision for mandatory bargaining as to two enumerated forms of “organizational security” was added on June 10, 1975.


18. Cal. Gov’t Code § 3543.2 was amended to “include the reassignment of public school employees and the layoff of probationary certificated employees in a school district having an average daily attendance of 400,000 or more within the scope of representation . . . ,” Cal. Legislative Counsel’s Digest for 1977 Cal. Stats., ch. 606 (1977).


20. In fact, when dealing with the Educational Employment Relations Act’s scope of bargaining at the date of its original passage as 1975 Cal. Stat., ch. 961, the Cal. Legislative Counsel’s Digest does not even refer to the words “relating to” when explaining that the Act’s scope of representation “is limited to wages, hours of employment, and other terms and conditions of employment.”
would not logically give "terms and conditions of employment" one of the narrowest definitions in the nation and state that the scope of bargaining shall be "limited", and in the same sentence give the words an exceptionally broad meaning.

The courts and public employment relations boards of other states have considered the extent of their own scope of bargaining statutes. None have concluded that their introductory scope language materially expands the mandatory subjects of negotiations.\(^2\) The United States Court of Appeals for the Fourth Circuit, when faced with similar arguments that attempted to add great expanse to the scope of bargaining under the National Labor Relations Act, knowingly determined that:

since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a \textit{significant or material relationship} to wages, hours, or other conditions of employment.\(^2\) (Emphasis added).


Although the predecessor of the present California collective bargaining law, the Winton Act,\textsuperscript{23} contained somewhat similar language,\textsuperscript{24} little guidance can be gained from it. An appellate court found that the Winton Act’s prefacing statement to its scope of bargaining provision — “all matters relating to” — was drafted to “compensate for those disabilities” of public school employees having neither the right to bargain collectively nor to strike.\textsuperscript{25} Now, California public school employees do indeed have the right to bargain collectively. The more reasoned interpretation of the “limited to all matters relating to” language of the present Act appears to be that proposals and items of negotiation must bear significant relationship to a particular enumerated item within the scope of bargaining while not impairing the district’s responsibility to determine educational policy.

**PREPARATION FOR NEGOTIATIONS**

Whether the parties are under a duty to bargain collectively about the preliminary aspects of negotiations is presently unclear. These arrangements for negotiations involve such matters as time, place, length and frequency of bargaining sessions and caucuses, the presence of the public or media, length of release time for employee negotiations, publicity about results of the progressing negotiations, and stenographic or tape recording of the sessions.\textsuperscript{26} The Michigan Employment Relations Commission has held that ground rules or procedures to be followed in bargaining are not a mandatory topic for bargaining.\textsuperscript{27} A California PERB Hearing Officer, however, in *El Camino Community College Federation of Teachers, Local 1388*,

\begin{footnotes}
\item[23] 1965 Cal. Stats., ch. 2041, § 2, at 4660 (repealed 1975).
\item[24] “The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to wages, hours and other terms and conditions of employment.” *Id.* at 4661.
\end{footnotes}
found that "release time is a matter about which the parties must negotiate in good faith." Citing three NLRB decisions, the Hearing Officer concluded that "there is a considerable body of federal precedent that arrangements for negotiations are a mandatory subject of bargaining." A close examination of the three NLRB cases is necessary.

The oldest, St. Louis Typographical Union, No. 8, is a 1964 case where two of the five members of the NLRB vigorously disagreed with the decision "to elevate to the status of mandatory collective bargaining those disagreements involving preliminary arrangements for or the mechanics of bargaining." That portion of the National Labor Relations Board decision which pertains to pre-bargaining arrangements in the second cited case, General Electric Co., was set aside by the Second Circuit United States Court of Appeals. The third case was the 1975 NLRB decision N.C. Coastal Motor Lines, Inc. Here the employer had insisted on holding negotiations at its corporate offices in North Carolina rather than in Maryland, where the unit of employees was located. The Board in this case affirmed without much elaboration the administrative law judge's finding that "insisting on meeting in Raleigh, North Carolina, and unilaterally terminating the bargaining unit operation" were unlawful acts. This determination by the administrative law judge that it was, in the instant case, an unfair labor practice to insist upon meeting and negotiating in North Carolina, was based upon a different principle of labor law than that for which the PERB Hearing Officer cited the case.

A chronological examination of the above NLRB cases does not suggest that the National Labor Relations Board con-

28. EERB Decision HO-U-18 (Dec. 16, 1977) [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2005, at 28. It should be noted that a PERB Hearing Officer Decision which, such as this one, is not appealed to the three-member Board itself, is of questionable precedential value beyond the school district to which it pertains.
29. Id.
30. 149 N.L.R.B. 750.
31. Id. at 753.
34. 219 N.L.R.B. 1009 (1975).
35. Id.
36. The Administrative Law Judge concluded: "This conduct by Respondent . . . displays a lack of serious attention to the labor relations phase of its operations, sufficient to establish a violation of Section 8(a)(1) and (5) of the Act. Insulating Fabricators, Inc., 144 N.L.R.B. 1325 (1963); General Motors Acceptance Corp., 196 N.L.R.B. 137 (1972); Gulf Concrete Co., 165 N.L.R.B. 627 (1967)." Id. at 1013.
siders arrangements for negotiations to be a mandatory subject of bargaining. Indeed, we conclude that there was an erosion from the opinion expressed by the majority of the NLRB in 1964 to that given in the 1975 N.C. Coastal Motor Lines, Inc. case, where the Board now supports the aforementioned concurring opinion in *St. Louis Typographical Union* that preliminary arrangements for bargaining are outside the scope of mandatory bargaining. This concurring opinion by National Labor Relations Board members Fanning and Brown expresses some of the inherent disadvantages of having arrangements for negotiations mandatory items for negotiation:

By holding that these matters are to be solved by the same method used to resolve differences relating to substantive contract terms, our colleagues permit negotiations to flounder before they even begin. This holding would also place another tool of avoidance in the hands of those who would use all available means to thwart the collective bargaining process.

... Any difficulties encountered in arranging the procedures and particulars under which the parties meet and confer are completely subordinate [sic] to the obligation to bargain. The proposal to utilize a reporter in all bargaining sessions which was advanced by the employer as a precondition to discussion of substantive matters certainly 'settles no terms or conditions of employment' and does not qualify under the Act as a subject which a party is privileged to force to impasse . . . . Since the Employer in the instant case would not even consider the Union's reasons for opposing the proposed method, insistence upon this arrangement effectively precluded any collective bargaining and thereby left no solution available other than complete capitulation.

... To appreciate the immediate impact of the instant holding, one need only observe that the first problem that will face the parties as a result of this decision is whether a stenographer shall be present at the conferences which must be held to resolve the preliminary question of whether a stenographer will be used to record the regular bargaining sessions.37

Another problem which appears in the school district setting is whether, or to what extent, agreements by the parties concerning preliminary matters must be reduced to writing or

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37. *St. Louis Typographical Union*, 149 N.L.R.B. at 753.
contained in the final collective bargaining agreement. Additionally, if the employer must meet and negotiate under section 3543.1(c) about "reasonable periods of released time . . . when meeting and negotiating," must there be collective bargaining about the rest of section 3543.1 or other parts of the Act, even though none of these are mentioned in section 3543.2 as being within the scope of bargaining?

The state of the law is clearer regarding selection of one's own representatives at the bargaining table. This is not a negotiable item. A party's negotiating team may generally be composed of anyone whom the public school employer and exclusive representative individually choose. So, for example, an international union representative can negotiate for a local union, or a teachers' association can appoint an attorney to its bargaining team.

The authors conclude that there certainly should be consultation between the public school employer and the exclusive representative on preliminary arrangements for negotiations; however, a decision by the PERB to upgrade these to the level of mandatory bargaining would only injure and delay the process. If, for example, an employer denies reasonable release time, the exclusive representative has an adequate remedy through the unfair practice provisions of the Act to obtain a

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38. "Negotiating parties are free to select whomever they desire to represent them at the negotiating table. This is an internal decision for both the employer and employee organization." California School Employees Ass'n, PERB Decision No. 39, at 2 (July 14, 1977), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2146, at 388. See AMF Inc., 219 N.L.R.B. 903 (1975). However, PERB has not yet expressed its opinion on whether an employer must bargain jointly with a number of exclusive representatives. Compare Wagner, Multi-Union Bargaining: A Legal Analysis, 19 LAB. L.J. 731 (1968) and Note, Is Coalition Bargaining Legal?, 18 W. RES. L. REV. 575 (1967), with Asker, Pattern Bargaining, Antitrust Laws and the National Labor Relations Act, 19 N.Y.U. ANN. CONF. ON LABOR 81 (1967).

39. "There have been exceptions to the general rule that each side can choose its bargaining representatives freely, but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical . . . . Thus, the freedom to select representatives is not absolute . . . ." General Electric Co. v. NLRB, 412 F.2d 512, 517 (2d Cir. 1969). In NLRB v. Kentucky Utilities Co., 182 F.2d 810 (6th Cir. 1950), it was found to be a proper defense by an employer to a refusal to bargain charge where the union negotiator had expressed great personal animosity towards the Company. But a similar argument was rejected in NLRB v. Signal Manufacturing Co., 351 F.2d 471 (1st Cir. 1965), cert. denied, 382 U.S. 985 (1966).


cease and desist order and/or a back pay award. But by expanding the scope of representation provisions in this manner, the parties may all too frequently become stalled and reach impasse before ever getting to the critical issues of "wages, hours of employment, and other terms and conditions of employment."

**WAGES**

The extent of the bargaining proposals dealing with "wages" that fall within the scope of bargaining is perhaps the most settled area of the terms that constitute the scope of representation definition under the California Educational Employment Relations Act. The NLRB and the courts have found rates of pay, pensions and insurance benefits, severance pay, overtime, merit increases, bonuses, shift differentials, paid holidays, and paid vacations all to be "wages." As for automatic step increases, the California Court of Appeal held, under the "meet and confer" process of the California Meyers-Milias-Brown Act that "the timing of eligibility for a prospective if not automatic, salary increase — pertains directly to the affected employees' 'wages.'"

Labor relations boards of other states have included under the purview of "wages" such areas as starting salary, salary schedule, salary schedule conditions, pay for performing ex-

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42. CAL. GOV'T CODE § 3541.3 (West Supp. 1978); Magnolia Educators Ass'n, EERB Decision No. 19, (June 27, 1977), [1976-1977 Transfer Binder] 1 PUB. EMPLOYEE REP. CAL. (LRP) 258.
44. Inland Steel Co., 77 N.L.R.B. 1, enforced, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 969 (1949).
48. Intermountain Equipment Co. v. NLRB, 234 F.2d 480 (9th Cir. 1956).
tracurricular activities, work beyond the regular calendar year, work beyond the regular work day, extra pay for teacher experience, and special salary adjustment for the final year of service.

HOURS

The area of "hours" is of special concern to the public school employer, as well as to the employee. Many of the bargaining proposals by exclusive representatives range into areas previously considered to be within the educational policy domain of the elected governing board of each school district. Such proposals deal with length of instructional time, school calendar, teacher rest time, staff training days and preparation time.

For most school districts throughout California the future holds extensive financial restriction. Realizing this, some employee organizations may curtail high wage demands in exchange for a decrease in teacher instructional time with students. Recent studies have shown that student academic performance is closely related to the amount of time spent in the classroom. Therefore, all citizens have a stake in how widely the PERB will interpret the term "hours".

To determine the extent of the meaning of "hours", one must begin with the basic realization that although, with a little imagination, "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of em-

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57. Canon-McMillan School Bd., 2 Pa. PER 22 (Pa. Lab. Rel. Bd. 1972), enforced, 12 Pa. Commw. Ct. 323, 316 A.2d 114 (1974); West Hartford Educ. Ass'n, Inc. v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972). "Although teacher assignments may not be subject to the provisions of the [Educational Employment Relations] Act, the questions of the wages that should be paid to teachers who coach after-school sports and how many hours after school they may be required to work are matters that are subject to negotiation." 60 CAL. OPS. ATTY. GEN. 365, 369 (1977). Stipends for department chairpersons were found to be a mandatory subject of negotiation in Mount San Antonio College Faculty Ass'n., Proposed Unfair Practice Decision No. LA-CE-133 (May 19, 1978).
58. Somers Faculty Ass'n, 9 N.Y. PERB ¶ 3022 (1976).
60. Somers Faculty Ass'n, 9 N.Y. PERB ¶ 3014 (1976).
ployment," this generous interpretation is not what the legislature intended. Second, "[e]xamining that list of negotiable subjects in the Rodda Act, it seems evident that the legislature intended to exclude matters of educational policy from the allowable scope of negotiations . . . ." As the Nebraska Supreme Court noted, "boards should not be required to enter negotiations on matters which are predominantly matters of educational policy, management prerogatives, or statutory duties of the board of education." Third, the California education collective bargaining law was drafted with one of the narrowest scope of bargaining provisions in the nation. Fourth, mandatory requirements of the Education Code are non-negotiable. For example, there are certain minimum lengths of the school day requirements which the parties to negotiations may not change.

Considering the factors above, we cannot agree with the wide interpretation given "hours" in some of the initial scope of bargaining decisions of PERB hearing officers. In Palos Verdes Faculty Association, the Hearing Officer concluded that the school calendar is a mandatory subject of bargaining.

The District must negotiate . . . over the total number of hours in a day and days in the year that teachers are to

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64. See text accompanying notes 12-20 supra. The Public Employment Relations Board has noted that the Educational Employment Relations Act "requires a relationship to an item specifically enumerated in the definition of 'terms and conditions of employment' or wages or hours" for a matter to be a mandatory subject of negotiations. Fullerton Union High School Dist. Personnel and Guidance Ass'n, supra n. 21, at 3. PERB has not yet specifically stated what that relationship is, nor has it defined the introductory terms to scope of bargaining: "limited to matters related to." One part, "limited to," appears to narrow the terms that constitute scope of representation, while "matters relating to" can be construed as expanding it.
68. Kindergarten and Elementary Schools, CAL. EDUC. CODE §§ 46110-46119 (West Spec. Pamphlet 1978); Junior High School and High School, id. §§ 46140-46147; and Community Colleges, id. §§ 76300-76342.
render service, the distribution of those hours and days (i.e., which hours in the day and which days in the year), including the start and end dates of the school year and vacation periods; and days that teachers are required to work extra hours beyond the normal workday such as Back-to-School Night and Open House nights.69

However, the number and distribution of pre-school service, conference, and pupil-free workdays were found to be outside the scope of bargaining.70 The Hearing Officer in *San Mateo Elementary Teachers Ass'n* concluded that the instructional day and teacher preparation time are matters relating to hours of employment and, therefore, negotiable items within the scope of representation.71

The decisions of the Indiana Education Employment Relations Board as to school calendar and preparation time appear to be better reasoned. After reviewing scope of bargaining decisions throughout the country, the Indiana Board concluded that "[d]aily hours and the total number of days to be worked" are the only negotiable school calendar items.72 Likewise, the Indiana EERB concluded that preparation time for

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69. Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula United School Dist., Hearing Officer Decision, Case No. S-CE-29 (Mar. 8, 1978), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2061. The District was still not found to have committed an unfair practice by unilaterally adopting a school calendar as "qualified unilateral action," combined with the defense of necessity, is sufficient to negate the unfair practice charge." Id. at 94. See also Lincoln Unified Teachers Ass'n Hearing Officer Decision, Case No. LA-CE-122-77/78 (Jan. 31, 1978), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2041, at 94 (on school calendar) and Natomas Teachers Ass'n Hearing Officer Decision, Case No. S-CE-73 (Apr. 25, 1978), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2088 (the number of work days).

70. Once the total number and distribution of workdays are agreed upon, then the particular duty that a teacher performs on those days—either teaching, meeting with parents, preparing materials, etc., cannot be said to be a matter so closely related to hours of employment or wages to render it negotiable under the EERA. It is no longer a matter of scheduling but of curriculum planning.


71. *San Mateo Elementary Teachers Ass'n*, Recommended Hearing Officer Decision, Case No. SF-CE-36 (Jan. 10, 1978), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2025. On the other hand, the Hearing Officer stated that "in this case the evidence is insufficient to show how the amount of rest time for teachers might be related to hours of employment." Id. at 59.

teachers is outside the scope of bargaining.73

The Indiana John Rouch decision reviewed some of the problems in having the school calendar a negotiable item:

Counsel for the respondent . . . contends that teachers only constitute a minority, albeit an important one, when compared to the non-unit employees, students, parents, and citizens whose lives are directly affected by the adoption of a school calendar . . . . He also points to the 1600 students and their families who are directly and deeply involved with the school calendar. Their number is many times the number of bargaining unit employees. Counsel further adds that the scheduling of school vacations is just as crucial to these people in planning their vacations and employment and especially when the number of families in which both parents are working is increasing, the school schedule becomes a matter of important economic interest to many families in the community. Counsel for the respondent argues that the collective bargaining process is inappropriate for the formulation of the school calendar in that teachers should not have the only input into this important community decision.

Respondent's brief states that not only is there a concern as to the substance of the school calendar but there is considerable pressure to finalize the formulation of the school calendar as soon as possible. The calendar must be set at an early date so that numerous school-related activities may be scheduled and planned in advance such as maintenance and repairs, athletic events, physical examinations and the letting of contracts. Also, there is public pressure from the citizens of the community since so many community decisions revolve around the school calendar. Respondent argues that expeditious scheduling is inherently incompatible with the collective bargaining process in which the great majority of agreements are reached in the late summer or the "eleventh hour."

Respondent also points to the increasing frequency of participation by school corporations in joint education problems which is illustrated by respondent's membership in a Vocational Cooperative School Project with three other school corporations and membership with six other school corporations in a Joint Special Education Program. Counsel then argues that these joint programs are essential

to modern education in that they provide programs of a quality which individual school corporations could not provide and which require coordination among the participating school corporations to accommodate such joint programs. He further asserts that the necessary coordination among participating school corporations is inherently incompatible with the compromise aspect of the collective bargaining process. 74

In addition to these obvious concerns, school districts face the problem of signing a collective bargaining agreement that includes a negotiated school calendar with one unit of employees, and then having to bargain with other units over the same school calendar. Any logic in allowing bargaining about the school calendar is eroded by the fact that the California Education Code requires student attendance during certain hours, 75 which the process of negotiations cannot change. 76

Jurisdictions other than Indiana similarly define “hours” in a more limited fashion than the California PERB hearing officer decisions. The Alaska Supreme Court finds the calendar to be outside the scope of bargaining. 77 In Maine, “the commencement and termination of the school year and the scheduling and length of intermediate vacation during the school year” are not mandatory subjects of negotiations. 78 Work assignment is not bargainable in New Jersey, 79 nor is the length of the school day. 80 Preparation time in Pennsyl-

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74. John Rouch v. Bd. of School Trustees of the Fairfield Community Schools, supra note 72, at 407-408.
76. CAL. GOV'T CODE § 3540 (West Supp. 1978) states that “[n]othing contained herein shall be deemed to supersede other provisions of the Education Code . . . .” Dealing with a similar issue, the Wisconsin Supreme Court has held that “items and restrictions in the school calendar established by statutes may not be changed by negotiation.” Joint School Dist. No. 8 v. Wisconsin Employment Relations Bd., 37 Wis. 2d 483, 155 N.W.2d 78 (1967).
79. Dunellen Bd. of Educ. v. Dunellen Educ. Ass’n, 64 N.J. 17, 311 A.2d 737 (1973). The work schedule and assignments have been found by the Nebraska Supreme Court to be non-bargainable. School Dist. of Seward Educ. Ass’n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972).
80. Fixing the hours of the school day without increasing the time teachers are required to work is a managerial prerogative reserved to the Board of Education. It is concerned with educational policy, with the welfare and convenience of the pupils, with bus schedules and other factors. Its effect on individual teachers is purely incidental and insignificant.
vania is outside the scope of bargaining. Although the number of months constituting the length of the work year for administrators in New York has been found to be negotiable, workload for teachers has not. In Wisconsin, hours of teacher-student contact and the number of daily preparation periods are outside the scope of bargaining.

Much of the reasoning of the hearing officer in Palos Verdes Faculty Ass'n to support making the calendar a negotiable item for kindergarten through twelfth grade public schools does not apply to community colleges. For example, schedules of college faculty need not closely parallel the schedules of the college or of the students.

**TERMS AND CONDITIONS OF EMPLOYMENT**

To date, there have been few California PERB or Hearing Officer decisions dealing with any of the seven areas that constitute the definition of "terms and conditions of employment" under the Educational Employment Relations Act. Furthermore, as the narrow definition of the meaning of "terms and conditions" is unique to California, there are few decisions of

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83. Somers Faculty Ass'n, 9 N.Y. PERB ¶ 3022 (1976).
84. "The Association proposals relate to the allocation of a teacher's work day. The allocation of the time and energies of its teachers is a consequence of basic educational policy decisions on the part of the District." Oak Creek Educ. Ass'n v. Wisc. Employment Relations Comm'n, 91 L.R.R.M. 2821, 2824 (Wis. Cir. Ct. 1975).
85. In concluding that the board of trustees of a community college is not required to bargain as to the establishment of the college calendar, a New Jersey court stated: "While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members of their workloads or their compensation." Burlington County College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 311 A.2d 733, 734 (1973).
86. "Terms and conditions of employment' mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8.

CAL. GOV'T CODE § 3543.2 (West Supp. 1978). The most extensive reviews of this section have been in Jefferson Classroom Teachers Ass'n, Proposed Unfair Practice Decision, Cases No. SF-CE-33 and CO-6 (July 13, 1978), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2145; and in California School Employees Ass'n, Proposed Unfair Practice Decision, Case No. SF-CE-68 (July 14, 1978), [1977-1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) ¶ 2146.
the National Labor Relations Board or labor relations boards of other states that make useful comparisons. Yet, some analysis can be made. Four of the seven terms are examined below.

Health and Welfare Benefits

The only type of health and welfare benefits that the Legislature has sanctioned as bargainable are: "hospital, medical, surgical, disability, legal expenses or related benefits including, but not limited to, medical, dental, life, legal expense, and income protection insurance or benefits, whether provided on an insurance or a service basis, and including group life insurance as defined in subdivision (b) of this section." Since the term "health and welfare" has been specifically limited to only the above types of benefits, and even though additional health and welfare plans might normally be sanctioned under the relatively broad definition of "wages," it is obvious that the legislature did not intend to permit bargaining beyond the extent of this definition.

Over the years, the federal courts have considered whether the identity of the insurance carrier of a health and welfare plan should be a mandatory subject of negotiations. Generally, where there are no differences in coverage, levels, or administration of the plan, the choice of the particular insurance carrier is non-negotiable. If, however, the identity of the carrier is inseparable from the benefits, the employer must bargain about the particular insurance company that will provide the coverage. The California PERB General Counsel's office appears to have decided to obfuscate this distinction articulated by the federal courts to establish what in essence provides for mandatory bargaining in practically all situations on the identity of the carrier.

88. Connecticut Light and Power Co. v. NLRB, 476 F.2d 1079 (2d Cir. 1973). The court determined that the identity of an insurance carrier will become a mandatory subject for bargaining only where its identity "vitaly affects 'terms and conditions' of employment." Id. at 1082.
90. Franklin-McKinley Educ. Ass'n EERB Decision No. HO-U-6 (June 24, 1977), (1976-1977 Transfer Binder) 1 PUB. EMPLOYEE REP. CAL. 307. As to CAL. GOV'T CODE § 53202, which has been interpreted in 43 CAL. OP. ATTY. GEN. 14 (1984), to allow the public school employer to choose the carrier, the Hearing Officer concluded that with the enactment of the Educational Employment Relations Act, this provision of the Government Code no longer applied in a bargaining context. See also Oakland Educ. Ass'n, Proposed Unfair Practice Decision No. SF-CE-143 (1978).
Although health and welfare benefits for present employees are within the scope of representation under section 3543.2 of the Act, the United States Supreme Court has held that retirees are not employees whose ongoing benefits are embraced by an employer's duty to bargain. Retirement benefits for present employees, however, have been held to be within the scope of bargaining. One Iowa court has addressed the issue of health and welfare benefits for an employee's family and categorized them as a non-mandatory subject of negotiations.

Leave and Transfer Policies

The most controversial area in California public school negotiations in the area of leave and transfer policies has been the extent of the meaning of transfer. Some exclusive representatives are seeking to have temporary assignment classified as a transfer for purposes of the collective bargaining agreement. Most public school employers are resisting this inclusion.

There are as of yet no PERB cases dealing squarely with this area of temporary assignments. The California Attorney General has concluded, however, that "teacher assignments may not be subject to the provisions of the [Educational Employment Relations] act." The California Education Code, in fact, vests the superintendent with the power, subject to the approval of the governing board, to assign employees of the district. The California courts have further said that the welfare of school districts demands that they have broad discretion to assign their teachers in the best interest of the school sys-

94. Chapter 606 of 1977 California Statutes was enacted to permit bargaining by only the Los Angeles Unified School District on the additional subjects of reassignment and the layoff of probationary certificated employees. LEGISLATIVE COUNSEL'S DIGEST; Mar. 9, 1978 telephone interview with Richard Budnick, Administrative Assistant to Assemblyman Teresa Hughes, author of the law introduced as AB No. 676; Mar. 15, 1978 telephone interview with Charles H. Newcomb, Director of Personnel Research, Los Angeles Unified School District. Whomever the amendment was intended to include, it reads literally that all school districts in California must bargain about reassignment policies.
95. 60 CAL. OP. ATT'Y GEN. 365, 369 (1977).
96. E.g., CAL. EDUC. CODE § 35035(c) (West Spec. Pamphlet 1978).
SCOPE OF BARGAINING

Therefore, it appears clear that temporary assignment changes are not transfers but are rather in the non-negotiable realm of assignments.

There have been few serious disputes as to the extent of the scope of bargaining on leave policies. Management has generally been ready to deal with employee association leave proposals in such areas as bereavement leave, maternity leave, and sick leave. Innovative employee proposals such as sick leave pools, where some or all of the unit employees' sick leave days would be pooled into one fund, will no doubt be found to be mandatory subjects of negotiations in California, as they have been elsewhere. There will be some limits to leave proposals. For example, one Illinois appellate court has found that a school board may not delegate its discretionary power to grant leave to a contractually established committee.

Class Size

There has been a split of opinion in other states as to whether "class size" comes within "terms and conditions" of employment. However, in California the public school bargaining law has specifically enumerated class size as a term and condition of employment.

Although it is the public school employers' prerogative to permanently eliminate certificated positions, the exclusive

99. Id. §§ 44965, 45193, 87766, 88193.
100. Id. §§ 44978, 45191, 87781, 88191.
103. Compare Boston Teachers Union, Local 66 v. School Comm. of Boston, 350 N.E.2d 707 (Mass. 1976), where the size of classes was found to be a proper subject of negotiations with Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 215 N.W.2d 837 (Sup. Ct. S.D. 1974), where the South Dakota Supreme Court held that a Board of Education does not have to bargain about class size.
105. "Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees." City School Dist. of the City of New Rochelle, 4 N.Y. PERB 3704, 3706 (1971). See Mathiason, Tenheyden & Schapiro, THE PUBLIC SCHOOL EMPLOYER AND COLLECTIVE BARGAINING: A GUIDE
representative for certificated personnel is in a position to indirectly demand the employees’ retention through a request to reduce class sizes. Smaller class sizes generally necessitate maintaining a larger teacher staff.

PERB has given the term “class size” an expansive meaning, well beyond the intent of the legislation, to include psychologist and counselor caseload. The actual definition of class size used in the field of education, however, includes only “the number of students assigned to and enrolled in a specific class under the direction of a specific teacher.”

Organizational Security

The Educational Employment Relations Act allows bargaining as to “organizational security.” Section 3540.1(i) of the Act defines organizational security to mean either maintenance of membership or agency shop. The use of the word “or” appears to indicate that either one or the other, not both maintenance of membership and agency shop clauses, may be placed in the same collective bargaining contract. Although the public school employer must bargain with the exclusive representative about an organizational security provision, the employer may unilaterally require that the employees in the unit vote as to whether a majority favor such an arrangement.

The United States Supreme Court in Abood v. Detroit Board of Education reviewed the constitutionality of a Michigan

TO THE CALIFORNIA EDUCATIONAL EMPLOYMENT RELATIONS ACT 182-84 (1977) for an analysis of the extent of the duty to bargain regarding the elimination of jobs.


107. 2 ENCYCLOPEDIA OF EDUCATION 157 (L. Deighton, ed.).

108. “Maintenance of Membership. A form of organizational security whereby employees who are union members on a specified date and those who elect to become members after that date are required to remain members in good standing as a condition of employment during the term of the contract.” ANNUAL REPORT OF THE EDUCATIONAL EMPLOYMENT RELATIONS BOARD TO THE LEGISLATURE 36 (1976).

109. “Agency Shop. An organizational security arrangement that may require the employee to join or pay a service fee to the exclusive representative of the negotiating unit as a condition of employment.” ANNUAL REPORT OF THE EDUCATIONAL EMPLOYMENT RELATIONS BOARD TO THE LEGISLATURE 29 (1976).

gan law authorizing unions and local governments to agree to an agency shop arrangement, whereby every employee, if not a union member, must pay a service fee in the amount of union dues as a condition of employment. A majority of the Court held that this provision for an agency shop did not violate the United States Constitution. The Court did say that the use of service charges for political and ideological purposes unrelated to collective bargaining and to which the employee objected was unconstitutional. The California Attorney General has recently concluded that if a collective bargaining agreement requires payment of a service fee as a condition of continued employment, a public school employer may terminate a district employee who refuses to pay the service fee.

OTHER RESTRICTIONS UPON BARGAINING

Even as to those matters specifically within the scope of representation, the Educational Employment Relations Act places some additional restrictions. The Act states:

Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

It appears clear from this language that when the Act and a provision of the Education Code are in conflict, the Education Code will prevail. Thus, in districts that have adopted a


112. 60 CAL. OP'S ATT'Y GEN. 370 (1977). The district, however, may not withhold the money from the employee's paycheck without the employee's authorization, the Attorney General's Opinion stated.

113. CAL. GOV'T CODE § 3540 (West Supp. 1978). The use of the word "other" in this section, in reference to "other provisions of the Education Code," was included when the original SB No. 160 was introduced to become a part of the Education Code. When the bill was amended on August 4, 1975, to make it a part of the Government Code, the word "other" was not removed, as it presumably should have been.

114. "Read literally, that appears to mean that the negotiable subjects on the Rodda Act's list of negotiable subjects are not really negotiable if the Education Code already provides how they are to be administered." Speech by Reginald Alleyne, Annual CSEA Conference, Sacramento, California (Aug. 3, 1976).
merit system under the Education Code,\textsuperscript{115} those provisions of the state law limit the scope of bargaining.\textsuperscript{116}

The public school employer may not bargain with an employee organization as to wages, hours of employment and other terms and conditions of employment for management and confidential employees.\textsuperscript{117} Additionally, a party need not negotiate about a proposal dealing with employees outside the unit.\textsuperscript{118} To the extent that negotiation proposals are in conflict with state law, they are illegal subjects for bargaining.\textsuperscript{119} The New York State Employment Relations Board ruled that including statutory provisions in a collective bargaining agreement is redundant and, therefore, not a mandatory subject of negotiations.\textsuperscript{120}

Section 3544.9 of the Act provides: "The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."\textsuperscript{121} Therefore, a union cannot discriminate in bargaining, for example, between those employees who are members of the union and those who are not.\textsuperscript{122}

**CONCLUSION**

The collective bargaining process, if properly utilized, can

\textsuperscript{115} CAL. EDUC. CODE §§ 45240-45320 (West Spec. Pamphlet 1978) for K-12; id. §§ 88060-88139 for community colleges.

\textsuperscript{116} Sonoma County Organization of Public Employees, EERB Decision No. 40 (Nov. 23, 1977), [1976-1977 Transfer Binder] 1 PUB. EMPLOYEE REP. CAL. (LRP) 588. As to a school board's restriction negotiating wages in a merit system district, PERB held therein that "the governing board can increase or decrease the salaries of particular job classifications, so long as such changes do not lift a classification which formerly was lower paid above one which formerly was higher paid within the same 'occupational group.'" Id. at 3. See City of Albany, 7 N.Y. PERB 3132 (1974); Laborers Int'l Union of North America, Local 1029 v. State Dep't of Health and Social Services, 310 A.2d 664 (Ct. Ch. Del. 1973), aff'd, 314 A.2d 919 (Del. 1974).

\textsuperscript{117} CAL. Gov't Code § 3543.4 (West Supp. 1978).

\textsuperscript{118} United Mine Workers v. Pennington, 381 U.S. 657 (1964); Dauphin County Technical School Joint Operating Comm., 3 Pa. PER 46 (Pa. Lab. Rel. Bd. 1973) (summer school workers were outside the unit); Somers Faculty Ass'n, 9 N.Y. PERB ¶ 3022 (1976) (teachers could not negotiate about non-unit teachers' aides).


\textsuperscript{120} Village of Scarsdale, 8 N.Y. PERB 3131 (1975).

\textsuperscript{121} CAL. Gov't Code § 3544.9 (West Supp. 1978).

\textsuperscript{122} Radio Officers Union v. NLRB, 347 U.S. 17 (1954); Somers Faculty Ass'n, 9 N.Y. PERB ¶ 3022 (1976) (union sought a provision that would make non-union members ineligible for extra-pay positions).
be an advantage to all parties. Yet, its relative newness to the California educational community argues strongly for the scope of bargaining to be narrow, at least initially, until its impact can be determined.