



50 Years of Collective Bargaining in the Schools: History, Trends, and Practical Applications for the Future

Nancy Hungerford, The Hungerford Law Firm, Oregon City, OR;
Mike Julka, Boardman & Clark, Madison, WI;
Greg Guercio, Guercio & Guercio, Farmingdale, NY;
Justin Petrarca, Scariano, Himes, and Petrarca, Chicago, IL

Presented at the 2017 School Law Seminar, March 23-25, Denver, Colorado

The NSBA Council of School Attorneys is grateful for the written contributions of its members. Because Seminar papers are published without substantive review, they are not official statements of NSBA/COSA, and NSBA/COSA is not responsible for their accuracy. Opinions or positions expressed in Seminar papers are those of the author and should not be considered legal advice.

50 Years of Collective Bargaining in Schools: A Tale of Two States and History, Trends, and Practical Applications for the Future

By

Nancy Hungerford, The Hungerford Law Firm, Portland, Oregon

Michael Julka, Boardman & Clark, Madison, Wisconsin

I. INTRODUCTION

Collective bargaining in the private sector was well-established and flourishing in 1967, when COSA was founded. But the enabling legislation, the National Labor Relations Act (NLRA), excluded public employees from coverage, so legal structure and protection of collective bargaining activities for public school employees would depend on state-by-state enactment of enabling laws.

The two major national school employees' associations, the American Federation of Teachers (AFT) and the National Education Association (NEA), initially took different positions on whether and how organization and activism should occur, with the AFT taking a more aggressive, even "militant," position and the NEA desiring to maintain an identity as an organization of professional educators. Those competing visions led to competition to represent "bargaining units" of educators, but differences in philosophy and strategy largely disappeared during the 1970s when a "union" mentality became prevalent throughout the country. Beginning in the East and the industrialized Midwest, state after state passed legislation recognizing the right of public school employees to bargain with school districts, and, in some cases, the right to strike.

In Oregon, an initial public employee bargaining law was adopted in 1963, which authorized public employers, both state and local, to enter into collective bargaining agreements (CBAs) with labor organizations on matters concerning "employment relations" and to use the state Conciliation Service to resolve impasses. It also contained language protecting organizational rights of public employees against employer interference or discrimination and prohibiting strikes, but contained no provisions for enforcement or for selection of the bargaining representative. But the state and most local governments interpreted the statute to be permissive and thus the legislation had little real effect upon organization and bargaining activity.

The 1963 legislation was amended in succeeding sessions, but in 1973, the Public Employee Collective Bargaining Act (PECBA), ORS 342.650-782, was adopted, replacing "meet and confer" legislation for teachers and classified employees. The new legislation, modeled after the National Labor Relations Act (NLRA) in many respects, made collective bargaining a reality for most public employees in the state, and, unlike prior legislation, created a mandatory, equal collective bargaining relationship with a right to strike for all except police, fire and prison guard units. An effort to gather enough signatures to refer the new statute to the voters failed, and overnight the PECBA went into effect. For the

most part, school districts were not prepared for the new legal processes. Over the next decade, the Oregon Education Association consolidated its reach so that by the early 1980's, not a single AFT affiliate represented any K-12 public teachers in Oregon. Today 97% of K-12 public school teachers in the state are included in a recognized bargaining unit.

Unlike other states, Oregon has become more and more a Democratic stronghold in the past 50 years, and organized labor for public employees has not been threatened. A GOP-led attempt to make substantial revisions in the PECBA in 1995 made minimal changes, especially after the state's appellate courts interpreted the revised portions of the statute and subsequent labor-backed legislation rolled back many of the limitations, one by one. A series of ballot measures to eliminate "fair share" (in lieu of union dues) as an option to be bargained failed each time, following rancorous and costly political campaigns. Still today, most Oregon collective bargaining agreements covering education employees include a "fair share" required payment to the representative union. Political control in Oregon is held by a liberal electorate, concentrated in Portland, and collective bargaining with strong union protection is a reality for the foreseeable future.

In Wisconsin, the 1959 Legislature gave school district employees the right to self-organize, to affiliate with labor organizations of their own choosing, and the right to be represented by labor organizations of their choice "in conferences and negotiations" with school boards "on questions of wages, hours and conditions of employment." This was the first such law in the nation. In addition, school districts were prohibited from interfering with, restraining, or coercing any school district employee in the exercise of the rights granted, and from encouraging or discouraging membership in any labor organization by discrimination with regard to tenure, or the terms or conditions of employment.

By 1971, the definition of "collective bargaining" was expanded to include the obligation of school districts to meet and confer at reasonable times and in good faith, with respect to wages, hours, and conditions of employment, with the intention of reaching an agreement, or to resolve questions arising under such an agreement. Collective bargaining, however, did not compel either party to agree to a proposal or make a concession. "Fair-share agreements" were also authorized in 1971. Such an agreement was defined as being between the school district and a labor organization under which all or any of the employees in the collective bargaining unit were required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Any such agreement was required to contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by the agreement and to pay the amount so deducted to the labor organization. Among the "prohibited practices" added by the legislation was the refusal to bargain collectively with a representative of a majority of a school district's employees in an appropriate collective bargaining unit, or to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours, and conditions of employment.

Finally, the 1971 legislation specifically and expressly prohibited strikes and provided for penalties for school district employees engaged in a strike “after an injunction against such a strike has been issued.” Each day of continued violation was deemed to constitute a separate offense and made the striking employee subject to a fine of \$10.

Despite the strike prohibition, strikes occurred with increasing frequency in Wisconsin school districts in the early 1970s. That, however, changed dramatically with the U.S. Supreme Court decision in *Hortonville School District v. Hortonville Education Association*, 426 U.S. 482 (1976), wherein the Court held that the prohibition of strikes by teachers does not deny teachers equal protection.

Effective in 1978, upon a determination that the parties engaged in collective bargaining were at impasse, final and binding interest arbitration of the final offers of the parties was mandated as the dispute resolution procedure in Wisconsin. Although there were multiple criteria for an arbitrator to apply in making a final arbitration determination, “comparability” became the dominant criterion. The Wisconsin Education Association Council (WEAC) became very sophisticated at targeting school districts for voluntary settlements that would then be used as comparables for arbitration cases, which then caused many school districts to desire to avoid arbitration and to settle disputes, including agreeing to unfavorable terms. Those unfavorable terms then became “comparables” in the final arbitration cases involving other districts.

In addition, since the arbitrators were generally labor professionals, “fair-share agreements” proposed by WEAC in final offers were looked upon favorably and added weight to the acceptance of the union’s final offer. This development of the imposition of “fair-share agreements” on a state-wide basis clearly caused the demise of the minority unions in school districts, such as the AFT. School district employees were simply not willing to pay minority union dues to an organization, but at the same time to be compelled to pay the “equivalency” of union dues to the certified bargaining representative. In addition, the “fair-share agreements” institutionalized the exclusive bargaining representative with additional “dues” used for purposes of collective bargaining, challenges to contact administration, and political activity.

Final and binding interest arbitration contributed to increased costs of Wisconsin settlements. Based on data from the Wisconsin Association of School Boards, Inc., from 1984-1985 to 1992-1993, the average per teacher settlement total package increase for districts which recorded data ranged from 6.9% to 8.4%.

During that period of time, the Wisconsin Employment Relations Commission (WERC) also determined that certain controversial subjects of bargaining were to be mandatory, such as the identity of a specific insurance carrier. *Madison Metropolitan School District v. WERC*, Case No. 84CV6920, Dec. No. 22125 and 22130 (Dane Co. Cir. Ct. 1985). Two other decisions by the WERC were also illustrative of the times. First, the WERC determined that the decision to subcontract is a mandatory subject of bargaining if that decision is based on economic reasons. In addition, the impact of the decision to subcontract was also determined to be a mandatory subject of bargaining. *School District*

No. 1 of Racine County, Dec. No. 12055-A (WERC, 1974). Second, the WERC determined that the duty to maintain the “status quo” applies when there is a duty to bargain, including periods between the expiration of the existing contract and the execution of its successor. During this “hiatus,” the WERC required the employer to maintain the existing wages, hours, and conditions of employment until the new contract was finalized. *Green County*, Dec. No. 10208-B (WERC, 1984).

Teacher salaries in Wisconsin jumped to the top fifteen among states. Wisconsin per-pupil spending, comprised largely of salary and benefits, rose to the twelfth highest nationally. Spending on employees’ benefits ranked fifth on a per-pupil basis, 50% over the U.S. average. Finally, by 1985, the average public school teacher’s salary in Wisconsin had risen to 6% above the national average.

Fearing a taxpayer revolt, in 1993 the legislature approved a “Qualified Economic Offer” (QEO) law which provided school boards with a mechanism to avoid interest arbitration over economics with teachers. In effect, if a school board made an offer to a bargaining unit comprised of teachers of a minimum “total package” amount, the school board could implement its offer regardless of the response by the certified bargaining representative. Given the escalating costs of benefits in the 1990s and early 2000s, much of the “total package” offer was comprised of costs to maintain benefits and little went to salaries for teachers. The QEO became the standard for settlements; if the union representing a teacher bargaining unit desired to make a political statement, it would not typically agree to the QEO, but rather push the school board to impose the offer pursuant to the procedures of the law.

In addition to the adoption of the “Qualified Economic Offer” legislation, laws also passed that capped revenue that could be raised by school districts. The effect of the QEO law and the revenue cap law was that average teachers’ salaries fell to 6% below the U.S. average by 2008.

However, the most recent Wisconsin experience will be addressed later in this paper.

In the South and Great Plains, state legislation fostering unionization of public school employees never gained sufficient support to gain legislative approval. But school employees, particularly public school teachers, have been successful in many of those states in gaining legislative passage of statutory protection piecemeal – in areas such as layoff or termination rights, leave provisions, input into curriculum and textbooks, or health and safety protections.

II. HOW THE PROCESS OF COLLECTIVE BARGAINING HAS CHANGED AND OPTIONS FOR TODAY

A. The Role of the School District's Attorney in Negotiations

While school attorneys can serve as outside advisers to a school board-administrator bargaining team, in many cases attorneys, either in-house or outside counsel, continue to serve as spokespersons for the school district board in collective bargaining. After the increasing interest, beginning in the 1980's, in more collaborative approaches such as Interest-Based Bargaining (IBB), the role of the attorney in some negotiations processes evolved into that of a resource person and "member of the team." A variety of "hybrid" models have emerged, and as school boards, superintendents, and union leadership changes over time, the bargaining approach may swing back and forth between more formal "traditional" bargaining (with written proposals for deletions and additions to the CBA preformed) to more "collaborative" styles. Some admonitions:

- Collaborative approaches may not mesh with existing state law on collective bargaining, and may require more detailed ground rules agreements. For instance, Oregon's PECBA allows either side to unilaterally move the process to mediation with a state-appointed mediator after 150 days of bargaining from the date when each party makes its initial proposals. But in IBB and other collaborative processes, the parties do not begin by presenting proposals, but rather present lists of problems to be resolved. Thus, the parties need to identify in their ground rules when the 150-day period begins because the Employment Relations Board (ERB) has stated that it takes a "hands off" approach if the parties craft their own bargaining process separate from the PECBA.
- Collaborative approaches generally require more time at the bargaining table, and this may rule out certain individuals as bargaining team members (for example, board members who have traditionally been part of a bargaining team in some districts, but who oftentimes can't be absent from their jobs or childcare responsibilities that much).
- The district's attorney may need more time up front with the district's bargaining team members to sort out what really needs to be bargained. Oftentimes issues that are more appropriately dealt with in another forum are brought to the bargaining table, especially in a collaborative process. To cite one memorable example from bargaining with support staff, concerns about school lunch menus and the amount of food waste occurring is not an issue school districts should be addressing at the bargaining table. Facilitators of collaborative bargaining often attempt to have the parties agree that permissive subjects of bargaining may not be objected to on that basis. Such a "ground rule" certainly tends to favor the unions and their initiatives at the table.

- The district’s attorney needs to be involved in decision-making about the district’s response to permissive issues brought to the table by the union team. In some states, identifying what the labor relations board or courts will determine to be “permissive” versus “mandatory” is difficult, and refusal to bargain over an issue ultimately determined to be mandatory (or even to have an impact on a mandatory term or condition of employment) will be an unfair labor practice. An alternative is the conventional “Just Say No” when a proposal would intrude on management rights or interfere when the school board might need to unilaterally make tough decisions.

B. The Effect of the Enactment and Accumulation of State and Federal Law Governing or Affecting Traditional Bargaining Topics

Legislation establishing the right of public employees to organize and bargain generally preceded much of the legislation that established for all workers such benefits as guaranteed leaves, state minimum wage and overtime provisions, health and safety regulations, and other controls over working conditions. As the half-century since 1967 unfolded, many such protections were enacted or enhanced by the federal government, including the Americans with Disabilities Act (ADA) (accommodation and non-discrimination on the basis of disabilities); extensions of the Fair Labor Standards Act (FLSA) (minimum wage, overtime); and the Family Medical Leave Act (FMLA) (guaranteed leave in case of illness/injury of the employee or family members). State legislatures added overlapping and sometimes more generous family medical leave, minimum wage, non-discrimination laws, and occupational health and safety protections.

For the most part, the enactment of state and/or federal protections or benefits did not lead to elimination of CBA provisions covering the same territory. An example is ORS 653.601-.661, Oregon’s new “across the board” sick time statute for all employees, both public and private sector, which delivers a lesser number of leave hours (one per 30 hours worked) than that already existing in most school district CBAs, but with some additional allowable usage. For example, school employees had typically bargained, years before, for 5 days of paid bereavement leave per family death, separate from any sick leave. The new Oregon sick leave statute allows usage of up to 10 days of paid leave for bereavement purposes, doubling the amount available, but drawn from the employee’s sick leave accumulation. Labor unions are not willing to delete the pre-existing and slightly different CBA benefit, so school districts may, in the end, have to deliver on both.

There are numerous other instances where unions propose to include in CBAs the same protections as already exist in state statutes in the areas of non-discrimination and unsafe working conditions. Such CBA provisions provide the “two bites at the apple” that allows individual members to grieve alleged violations of these CBA provisions within the typically short time frames (10 to 20 days after the alleged violation) and then, even if losing before an arbitrator, to pursue the same claim

with a regulatory agency or in federal or state court. Oregon's Employment Relations Board has concluded that prohibiting members who have filed grievances from pursuing the same alleged violations in other litigation is an impermissible violation of the state's collective bargaining law.

C. The Options/Restrictions on Bargaining Compensation Given Limitations on Ability to Fund, Especially from State Resources

The last 50 years have seen the enactment of limitations on local property tax collections, previously the mainstay of school district funding. California's property tax limitation measure was replicated in other states, including Oregon by initiative in 1990. The result has been to shift to the state government the burden of providing most resources for local K-12 school district expenditures. In other instances, the shift to state funding was designed to equalize resources available to school districts, despite differences in local property valuation.

Given the responsibility for funding the K-12 school system, not surprisingly state legislatures looked at ways to control spending at the local level, including salaries and benefits negotiated by local school boards. In Washington state, for instance, by the early 1980's the legislature had dictated a uniform amount of state funding to be sent to each local school district for teacher salaries, depending on each staff member's years of experience and credit hours/degrees beyond the bachelor degree, for a 180-day contract. The result was a kind of "base salary schedule," or rather a "basic funding schedule," with year-to-year increases dependent on legislative willingness to commit funds. When the Washington legislature didn't come through with satisfactory increases, the Washington Education Association (WEA) declared a one-day statewide strike, to little avail.

But labor unions and school districts soon found other ways to enhance the true salary amount by bargaining for extra salary for extra, non-student contract days (some of which did not require reporting to the school site). Districts that refused to bargain as many such extra days as their neighbors were the targets of strikes. A similar result occurred in recent years when some districts agreed to add local dollars to the state payments for insurance premiums, but other districts refused or lacked the means. Over the years, Washington school districts were given the opportunity to supplement state resources with local levies, now to fund up to 25% of annual expenditures. Collective bargaining in Washington state is still greatly affected by these locally-approved revenues.

Through the many recessionary periods of the past 50 years, unions and local school boards have negotiated wage freezes or reductions as a means of reducing the number of layoffs or reductions in hours for school employees. In the depth of the "Great Recession" of 2008-13, Oregon teacher unions negotiated reductions in the number of work days, including student days, to forestall reductions in the "salary schedule," and to continue annual "step increases" for teachers who were not at the maximums. With few other alternatives except massive layoffs and corresponding

increases in class size, Oregon school boards agreed to reduce student days to as few as 160 per year for several years in a row. School employees, of course, suffered the loss of income although they worked less.

It is not uncommon for unions to “sacrifice” bargaining unit positions if it is necessary to achieve their salary and benefit objectives. That, of course, puts school boards in the position of advocating for the maintaining of positions (and the costs that go with maintaining positions) as an alternative, in many cases, to the salary and benefit increases preferred by the union.

Other states have addressed the inevitable fiscal ups and downs in different ways:

For example, beginning with the 1997-1999 state budget, the Wisconsin Legislative Fiscal Bureau began calculating the “structural deficit,” a projection that measures the future imbalance between spending and revenue as laid out in state law. For the 2009-2011 state budget, the structural deficit was \$1.682 billion, the third highest deficit since the Legislative Fiscal Bureau began its calculations.

On January 3, 2011, Scott Walker took office as the Governor of Wisconsin. Governor Walker was elected as a Republican; in addition, the Senate and Assembly had a Republican majority. On February 11, 2011, Governor Walker introduced a Budget Repair Bill (Act 10) which included substantial changes to collective bargaining affecting school districts. On March 1, 2011, Governor Walker’s Budget Bill (Act 32) was introduced. Under that Bill, schools were to receive an 8% reduction in state aid. The Bill also included a limitation on the revenue cap increase which limits school district spending. Shortly thereafter, the legislature passed Act 10, and on March 11, 2011, Governor Walker signed the Bill into law.

The changes affecting collective bargaining in school districts were substantive and substantial. First, prior to Act 10, wages, hours and conditions of employment (including the obligation to engage in bargaining over the impact of non-bargainable decisions) were mandatory subjects of bargaining. Under Act 10/Act 32, bargaining was prohibited with respect to any factor or condition of employment except total base wages (which excluded any other compensation such as overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progression).

Unless approved by a referendum, Act 10/Act 32 prohibits any change in the total base wages that exceeds the percentage change in the Consumer Price Index (CPI).

Also, under Act 10/Act 32, there are no longer “permissive subjects of bargaining;” all subjects other than total base wages are “prohibited subjects of bargaining.”

Pre-Act 10/Act 32, bargaining impasses were resolved through final and binding interest arbitration, with the arbitrator selecting the final offer of one party or the

other in its entirety. Under Act 10/Act 32, there are no longer any binding impasse resolution procedures contained in the statutes. Parties may voluntarily seek mediation if they are at impasse. It is commonly accepted that the repeal of interest arbitration means an employer may unilaterally implement its final offer at the point of impasse.

In addition, under Act 10/Act 32, every collective bargaining agreement shall be for a term of one year (and may not be extended), school districts are prohibited from deducting labor organization dues from its employees, and “fair-share agreements” between districts and labor organizations are prohibited.

Finally, under Act 10, the Wisconsin Employment Relations Commission is required to conduct an annual election to certify that the representative of collective bargaining unit continues to have majority support, i.e., at least 51% of the votes of the entire bargaining unit. If no representative receives at least 51% of the votes of all of the school district employees in the collective bargaining unit, by the expiration of the collective bargaining agreement, the WERC shall de-certify the current representative and the school district employees shall be non-represented. If a union becomes decertified, the affected employees may not be included in a substantially similar collective bargaining unit for twelve months from the date of decertification. If a decertified bargaining representative petitions for recertification following the year hiatus, it must receive at least 51% of the votes of the entire bargaining unit to achieve certified status, as well.

D. Political Action by Public School Employees and Their Unions to Shape the Position of the Board on Bargaining Issues and Litigation to Create Greater Resources for Member Compensation

Even in states where collective bargaining laws continue to support a robust right to bargain and even strike, over economic and non-economic issues, teachers and other education employees have employed other means of influencing resources and pay/benefits and especially enhancing control over working conditions. The most common means used, especially in small districts, is political action to elect retired teachers, teachers employed by other districts, and/or spouses or friends of teachers to the local school board. Because school board elections in small or medium-sized districts are often not contested, a union-backed candidate with a minimum of labor contributions of time and money can oust even a veteran board member relying on his/her past record. Shifts of a few board seats can result in votes to replace the superintendent – or the negotiator.

In the years since 1967, public sector labor unions have also funded litigation and ballot measures to obtain statewide benefits that could not be obtained at the bargaining table. In Washington state, for example, labor unions financed the campaigns for several ballot measures that resulted in constitutional guarantees of “adequate” funding for schools – enforced by the State Supreme Court--which ultimately found the legislature in contempt for failing to meet that target over

multiple legislative sessions. In Oregon, labor-financed litigation successfully challenged most of the legislature's last decade of attempted changes in the Public Employee Retirement System (PERS) benefit structure for current and former employees, resulting in mandated school district employer payments to the PERS of as much as 25-30% of annual payroll.

Of course, unions can lose in the political game, as well as win. In Ohio in 2010-11, election of a Republican legislature and governor led to Wisconsin-type limitations on the scope of bargaining by unions. But because Ohio's law would have impacted police and fire units as well as other governmental employees (including school employees), pro-labor forces were able to roll back these changes in a special election.

In Wisconsin, on the other hand, challenges to the anti-bargaining legislative changes did not succeed, despite multiple state and federal court challenges to Wisconsin Act 10/Act 32. On June 15, 2011, seven of Wisconsin's largest public sector unions filed a lawsuit in federal district court alleging that Act 10 and Act 32 violate general municipal employees' rights to equal protection and freedom of speech under the U.S. and Wisconsin Constitutions. On July 6, 2011, two public employee unions that represent city and county employees filed a lawsuit in federal district court alleging that Act 10 and Act 32 violate employees' right to equal protection and freedom of association under the U.S. Constitution. On August 18, 2011, unions representing school district and city employees filed a lawsuit in state court alleging that Act 10 and Act 32 violate the municipal employees' rights to equal protection and freedom of association under the U.S. and Wisconsin Constitutions. On January 18, 2013, a three-judge panel of the Seventh Circuit Court of Appeals upheld Act 10 in its entirety, finding no violation of employees' equal protection or free speech rights. *Wisconsin Education Association Council v. Walker*, 705 F.3d 640 (7th Cir. 2013). On September 11, 2013, a federal district judge issued a decision upholding Act 10 and Act 32 and finding that they do not violate employees' equal protection or freedom of association rights under the U.S. Constitution. *Laborers' Local 236, AFL-CIO v. Walker*, 2013 U.S. Dist. LEXIS 129341 (W.D. Wis. September 11, 2013).

On November 11, 2013, the Wisconsin Supreme Court heard oral arguments in the pending state case. The arguments, scheduled for only 90 minutes, lasted more than four hours. On April 18, 2014, a three-judge panel of the Seventh Circuit Court of Appeals upheld the federal district decision in *Laborers' Local* holding that Act 10 does not violate employees' equal protection or freedom of association rights under the U.S. Constitution. *Laborers' Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014). Finally, on July 31, 2014, in a 5-2 decision, the Wisconsin Supreme Court issued a decision in the state case upholding Act 10 and Act 32 in their entirety. The Court found no violation of equal protection or freedom of association rights under the U.S. or Wisconsin Constitutions. Justice Crooks wrote a concurrence agreeing with the majority's conclusion and legal analysis but expressing his displeasure at the "unnecessary" damage Act 10 has caused to public

employee unions in Wisconsin. *Madison Teachers Incorporated v. Walker*, 2014 WI 99.

For the immediate future, Wisconsin, the cradle and once the bastion of collective bargaining rights for public employees, has severely curtailed those rights. A move to recall Gov. Walker failed, leaving political power in the hands of anti-union forces. The Wisconsin experience, in contrast to Oregon's, demonstrates that ultimately bargaining rights of public employees depend upon the support of that very public.

E. Labor's Agenda of Expansion to Include Formerly Unrepresented Groups and Opposition to the Elimination of "Fair Share" Provisions or Other Threats to Union Dues Collections

Whereas the percentage of private sector workers represented by unions has declined precipitously during the past 50 years, public sector labor unions in many states continue to represent the vast majority of teachers and other school employees. A large majority of those members pay substantial union dues or are required to pay, "in lieu of dues," "fair share" payments. Some unions representing education employees have also expanded their coverage to include preschool teachers, allied health personnel such as school nurses, psychologists, and social workers.

But Wisconsin's experience shows that even in a traditionally very pro-union and highly unionized state, shifts in political power and public persuasion can have a dramatic impact on union membership and revenues, and, consequently, an impact upon political power. During the 2014-2015 school year, Wisconsin's National Education Association Affiliate, the Wisconsin Education Association Council (WEAC), had 36,074 active members, a number that reflected almost a 60% reduction when compared to the active members in the 2009-2010 school year. Nationally, NEA active membership was down 9.9% over the same five-year period.

Facing the reduced membership and the resulting reductions in revenue, WEAC and the American Federation of Teachers - Wisconsin considered merger into a new organization called Wisconsin Together in 2014. At the time, there were five other states that had merged teacher unions: Minnesota, Florida, North Dakota, Montana, and New York. Ultimately, however, the unions never consummated the merger in Wisconsin.

Focusing on finances, the total revenue of WEAC went from roughly \$21.5 million in 2011-2012 to just over \$13 million in 2013-2014. WEAC's lobbying dollars dropped dramatically, as well. During the 2005-2006 legislative session, records show that WEAC spent \$1.5 million on lobbying. During the two legislative sessions immediately preceding the passage of Act 10/Act 32, WEAC spent \$2.5 million and \$2.3 million, respectively. In contrast, following the implementation

of Act 10/Act 32, WEAC spent just \$175,540, and, for the first time in at least ten years, was not among the State's top twelve lobbying spenders, according to the Government Accountability Board. Moreover, in what is widely recognized as an attempt to address its diminishing funds and assets since the passage of Act 10/Act 32, WEAC placed its headquarters consisting of a 51,000 square foot building and nearly 40 acres of property for sale with an asking of price of \$6.9 million.

Finally, recognizing that the environment surrounding public education, its educators, and the organizations that represent them has changed drastically in the last decade, an NEA analysis highlighted how political, legal, and economic threats, coupled with an institutionalized education reform agenda that favors a corporate model, have created an environment that minimized educator voice and involvement in decisions about teaching and learning and prompted membership losses for the education associations. As a result, two main issues emerged from that analysis: First, the need to win the race to capture the hearts and minds of parents, communities, and educators, with the other being the importance of rebuilding the Association's strength - NEA's vast network of members at all levels of the public education system. These principles guided the development of the NEA 2016-2018 Strategic Plan and Budget. That Strategic Plan and Budget resulted in the following 2016-2018 NEA strategic goals and core functions.

Strategic Goals

- Goal One: Strong affiliates for educator voice and empowerment.
- Goal Two: Empowered educators for successful students.

Core Functions

- Research, policy, and practice for great public schools.
- Organizing.
- Advocacy and outreach.
- Communications.
- Business Operations.
- Governance.

Of particular focus by the NEA as early as 2014 was the union's anticipation of an adverse ruling in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), an agency shop ("fair-share") case. Planning for the worst result, the NEA fashioned a "Toolkit" designed to convert fair-share bargaining unit employees to members. The focus was to strategize and implement a plan whereby existing members would be mobilized to contact those covered by fair share and thereby convert them into full members. The *Harris* decision by the Supreme Court, although narrowing the holding in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), rested its opinion upon the fact that home healthcare personal assistants were not public employees and thus could not be compelled to subsidize the third party speech of a union through an agency shop arrangement. In dicta, the Court sharply criticized the ruling in *Abood*,

thereby potentially signaling that the Court might, in the future, revisit *Abood* and agency shop arrangements in general.

Five months later, the Ninth Circuit Court of Appeals upheld agency shop fees applicable to a group of teachers in California who had resigned their union membership. *Friedrichs v. California Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014). However, on June 30, 2015, the U.S. Supreme Court granted certiorari in the case on the two questions presented:

- Whether *Abood* should be overruled and public-sector “agency shop” arrangements invalidated under the First Amendment.
- Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

Oral argument in the case was held on January 11, 2016. On February 13, 2016, Justice Scalia passed away, leaving the court with only 8 justices.

On March 29, 2016, the judgment of the Ninth Circuit Court of Appeals was affirmed by an equally divided Court; 4 votes to 4 votes. *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016).

On April 8, 2016, the petitioners requested that the Supreme Court rehear the case once it obtained a full complement of justices. On June 28, 2016, the Supreme Court denied the petition to rehear the case. *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 2545 (2016). As a result, the decision of the Ninth Circuit Court of Appeals stands, and *Abood* continues to control the issue of agency shop arrangements in the public sector.

Although dodging consecutive bullets in *Harris* and *Friedrichs*, given the opportunity for President Trump to appoint the ninth justice to the Supreme Court, the NEA “Toolkit” would appear to be a continuing active strategy, nonetheless, to combat reductions in union membership throughout the nation and the potentially inevitable ruling declaring agency shop arrangements (“fair-share” agreements) unconstitutional in school districts.

III. TODAY’S HOT ISSUES IN BARGAINING AND OPTIONS FOR NEGOTIATORS

A. Flexibility in Bargaining Total Compensation to Recognize “Merit” and Respond to Individual Teacher Needs and Desires

For 50 years, unions representing educators have adhered to the principle of uniform salaries for all teachers, differentiated only by objectively-determined differences in years of experience and degrees/credit hours of professional training. These criteria produced a “salary grid” that rewarded the longest-serving teachers

with salaries usually twice as great as beginning teachers' pay for the same assignment. Thus, teacher bargaining has traditionally protected the interests of senior members of the unit – who form the bulk of union leadership and bargaining team membership. For example, in some cases locally-bargained additional retirement benefits absorbed significant resources that would otherwise have been available to hire more teachers, or pay beginning teachers more.

Differences in time required for out-of-school grading and preparation, depending on subject matter and grade-level assignment, are not recognized in most pay structures. Market factors, such as the scarcity of special education teachers, are usually not allowed to influence basic salary offers. And differences in effectiveness in producing student growth are not allowed to result in different salaries – not even bonuses that might advantage some but create internal unit squabbling among haves and have-nots.

But in a time of scarcity of teachers with specialized degrees or preparation, school districts see the need to tailor and enhance compensation to compete for desirable candidates. And calls for more pay to keep the best teachers in the profession, or to pay teachers willing to teach in more challenging environments, are on the increase.

Some school districts have found ways to produce differentiated compensation structures that address these needs, but not by dismantling the traditional “salary grid,” in most cases. Instead, these ideas have proved acceptable additions to the existing salary schedule:

- Pay some teachers more for mandated “extra” work and extra time. Just as teachers who serve as coaches have traditionally been paid “stipends” for the extra hours of practice and competitions, some school districts pay “stipends” or “add-ons” for special education teachers to compensate for after-school-hours holding IEP meetings with parents and drafting complex IEPs to meet legal requirements (7% additional in the Salem-Keizer (Oregon) school district, for instance).
- Allow newer teachers to advance through the salary schedule more quickly by meeting certain quality measurements. The Bend-LaPine (Oregon) school district has pioneered this approach recently, with the approval of the local association.
- Bargain “signing bonuses” for teachers hired into positions where applicants are scarce, or bargain payment of student loan debt for every year continuing with the same district.
- Bargain for the ability to reach individual agreements with teachers, who agree to guaranteed years of service in the district in exchange for payment of the cost of additional training and college coursework to obtain

certification in advanced math/science or special education or English as a Second Language (ESL).

- Bargain the ability to pay teachers who qualify for National Board Certification. If a board does propose such “premium pay,” it should be certain to negotiate the clause in such a way that the teacher loses the stipend if he/she does not maintain the Certification.

B. Balancing the Union Desire for Union Control Over Time and Work Load with the District’s Need for Teacher Involvement with Joint Improvement Efforts, Curriculum Development, and Parent Communication

Many teachers have reacted enthusiastically to changes in the way the work of planning, assessment, and curriculum development gets done in today’s school environment. For the most part, these changes involve more group work and sharing -- unfamiliar and even uncomfortable for teachers whose careers began 30, 20, or even 10 years ago. The extra time involved in these joint efforts cuts into individual teacher planning time, and some teachers perceive no offsetting benefit (i.e., the ability to use a group-planned unit of instruction, with corresponding materials and activities). Typically, union leaders (themselves usually drawn from the more experienced and senior members of the staff) go to battle on behalf of those opposing such changes, rather than on behalf of the enthusiastic proponents and supporters of such change. The way forward:

- School boards can use their authority to schedule the school day to carve out time on a regular basis for Professional Learning Communities (PLCs) or similar planning groups to meet. Typically, this is done after involvement of teachers in each building in planning and selecting options for institutionalizing group work. And typically school boards must carve this time out of the student day, not out of individual teacher contractually-guaranteed “prep time,” resulting in “early release” or “late arrival” days for students. Districts must resist subsequent efforts by union bargaining teams to seize control over some of this freed-up time through bargaining. Further, the reduced student-contact time cannot be allowed to become the “status quo” that must be reclaimed through bargaining – since not all experiments in group planning end up working. Thus, Memorandums of Agreement (MOAs) that are limited in duration are the best way to preserve district flexibility in the future.
- Involving union leaders in the early study of alternatives to the traditional schedule may be helpful, but beware of creating “governance” structures that are written into the CBA, which in some cases create additional barriers to change, not facilitation for change.
- Where necessary and financially feasible, bargain for changes by paying, on a short-term basis, for the training and planning time to get ready to

institute new practices. Or “buy” extra work days, at a pro-rata rate, through collective bargaining, but maintain district control over when and if such days are scheduled, and for what purpose. Again, MOAs are easier to negotiate than permanent changes in a CBA.

C. Recovering Management Control and Options that are Foreclosed Because of CBA Language Bargained in the Past, Particularly “Maintenance of Standards” Guarantees

Language bargained in the past, which may have seemed “no big deal” at the time, has a way of haunting future choices for school districts as conditions (and legal interpretations) change. A major impediment to change are general CBA provisions such as “maintenance of standards” language that may be interpreted by arbitrators in a variety of ways never intended by the school boards that ratified these provisions in years past. To avoid or correct these “millstones”:

- Make sure all contract proposals, your own and the opposing team’s, are reviewed by an attorney with sufficient experience to spot “grievance breeders” and “terms of art” that will likely mean something different to an arbitrator than is apparent to the lay person. School boards in small districts, particularly, may not understand the impact of “just cause” protections added to the CBA, or language providing that “unit members shall not have to continue work in unsafe environments.”
- Utilize legal advice to understand the process(es) in state law by which school boards can unilaterally implement a change in a working condition that is not currently addressed in the CBA. In many cases, labor law will require notice to the union and bargaining upon demand, although perhaps through an expedited process. See, for instance, Oregon’s PECBA at ORS 243.698.
- Where the CBA contains a number of provisions that significantly hinder management from making needed changes, develop a multi-year plan to address needed changes in language, in priority order. Lay the groundwork with the public as to why a change is necessary before the proposed changes trigger an “impasse” or pressure on parents and community members to take sides.

D. Bargaining Concessions and “Roll Backs” Where Insurance Benefits, Leaves, Release Time, etc. have Become Unsustainable

Ideally, frank talk at the bargaining table, especially in a more collaborative process, would result in union willingness, albeit reluctantly, to make necessary changes in the CBA that will be unpopular for some of the unit members. But district negotiators have to be able to put themselves in the place of employee

bargaining team members and appreciate the pressure and acrimony their advocacy for an unpopular change will produce from some colleagues. Some suggestions:

- Phase-outs or phase-ins over a period of years may be necessary to get a change adopted. In Oregon, many school districts negotiated “early retirement” benefits in the early 1980’s, at a time when the economy was contracting, as a way of encouraging turnover to make room for new teachers. Over time, these became sacred and counted-on benefits at the end of a teaching career, but the cost became prohibitive, particularly if the benefit was years of insurance benefits to bridge the gap from retirement to Medicare eligibility. Districts ultimately were able to eliminate these costly additional retirement benefits by either specifying that no new hires would ever be eligible (a long phase-in), or setting a future date for the expiration of such benefits (5 to 15 years, typically). In one collaborative bargaining process, some modest and declining alternative benefits were negotiated for those employees who wouldn’t retire soon enough to qualify for the “early retirement” dollar benefit.
- Sometimes it’s possible to make a change voluntary, or optional, for a certain group or based on personal choice. For example, additional in-service training during the summer break, perhaps at a reduced daily rate, can attract a sufficient core of teachers that a new program or new effort can go forward and the content can become part of the expected skill set for all teachers at the end of an introductory year.
- Being mindful of your state’s doctrines relating to “evaporation of permissive subjects of bargaining” and “repudiation of past practices,” upon the expiration of a collective bargaining agreement, provides management with mechanisms to address “contractual” provisions that may be interpreted as binding during the term of the collective bargaining agreement, but are susceptible to unilateral change through the appropriate process upon the expiration of the collective bargaining agreement.
- Create a study committee that involves bargaining unit members (including union officers) and bring in outside experts to educate all committee members on problems with the status quo, and options for the future. Identify undesirable outcomes if a change is not made (for example, insurance cost increases, unless new plans with higher deductibles are chosen, will absorb all additional available dollars and result in minimal or no cost-of-living adjustments over the lifetime of the CBA).

IV. CONCLUSION

At a time of considerable uncertainty about changes to come out of Washington D.C., predicting the future of public sector bargaining for education employees and school

districts is perhaps less complicated because it is based on state law, although Wisconsin-type upheavals are obviously possible. However, a vast expansion in federal funding for vouchers, or federally-mandated charter school options, could change the landscape for collective bargaining. And changes in the makeup of the U.S. Supreme Court, leading to a reversal on the legality of “fair share” or “union shop” provisions, could decimate the finances and membership numbers of unions, as happened in Wisconsin after 2010. But whatever the legal landscape, school attorneys will need to provide guidance for their client districts in maintaining sound employment relations practices in the next 50 years.

f:\docs\wd\98000\221\2685106.docx