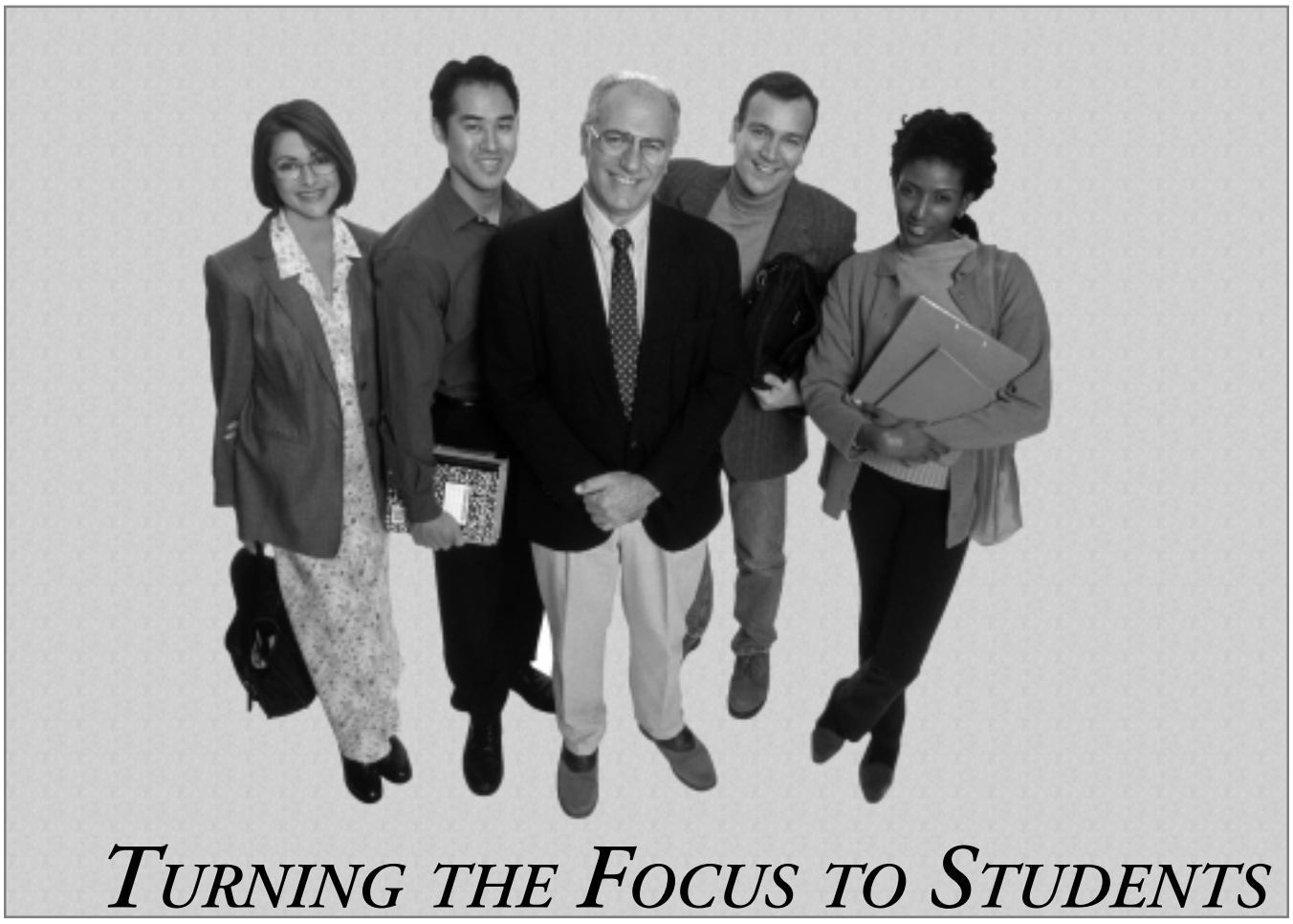
COLLECTIVE BARGAINING IN PUBLIC SCHOOLS



Turning the Focus to Students

What happens when one entity becomes the sole determiner of quality, distribution, price, *and* buyer options for an important commodity? What happens when this important commodity is public education and the controlling entity is a union?

In the great debate about how to reform education in Washington state, the overarching influence of the teacher union and the collective bargaining process has been conveniently ignored. Yet, collective bargaining affects every teacher, administrator, parent, student, legislator and taxpayer in our state.

The impact of collective bargaining extends from the obvious to the indirect, including issues such as:

- teacher evaluation
- class size
- sick leave, work rules, promotion, retirement and grievance procedures

- the number of hours and minutes worked
- how many days children will be in the classroom
- the make-up of local curriculum planning teams and site-based councils
- the use of volunteers on school campuses
- how much funding is available to hire teachers within the district

The majority of education dollars in the average school district in Washington state are spent to meet the demands of collectively bargained contracts. Large districts negotiate a dozen or more contracts with employee groups. What is in these contracts and do they facilitate or frustrate the ability to offer each student in our public school system the best possible educational opportunity? Do these contracts enhance or erode the professional preparation and satisfaction of teachers?

The collective bargaining process must change if it is to remain relevant for public education. And school board members must become as highly skilled in the *key* elements of negotiations as the union officials they face across the bargaining table. When school board members are well informed and properly prepared, collective bargaining has a better chance of being used as a tool to improve employee benefits and working conditions without sacrificing the educational progress of students. To truly reform education, we must insist on a process that will

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- untie the hands of teachers, administrators, and school boards to allow the development of quality, innovative educational programs
- re-establish the right of administrators and school boards to make critical policy decisions
- restore district accountability and the trust of parents and taxpayers in local communities by providing excellent academic results and making better use of scarce resources
- provide teachers with a less regulated work environment where innovation and excellence can be rewarded

The impact of collective bargaining

Collective bargaining is not just an abstract legal practice. It is a process that daily affects everyone with an interest in educating children. The emphasis of collective bargaining as a matter principally affecting the relationship between employees and employers obscures its critical, far-reaching influence on the entire education system. The terms of a collective bargaining agreement can even control the management of the school district. While collective bargaining can have a positive influence on the operation of the school district, all too often restrictive terms prevent the right teacher with the right training from being in the classroom where he or she is most needed.

The purpose of collective bargaining is generally perceived as a union negotiating with management for the best possible salary and benefits package for its member employees. However, attempts to protect employees often impose significant limits on the decision-making capability of management. The union may also decide it needs to create a hostile environment, since employees would have little need for a union if they believed they could sit across the table from management directly and hash out a contract fair to both sides.

Interest-based bargaining, a new strategy for approaching education-related negotiations, has been praised by some for reducing tensions between the union and administration, and for fostering teacher professionalism.[1] The idea behind interest-based bargaining is for the parties to begin by identifying common interests, and then find a solution to implement those interests. But is it a collective bargaining panacea?

Whatever its advantages, interest-based bargaining is time consuming.[2] It can involve extensive discussion on implementation of a decision that might otherwise be clearly spelled out in the contract or made by administration as a matter of course. Administrators and school boards must carefully weigh the trade-off of friendlier negotiations against protracted interference with their decision-making authority. The bottom line in any school district decision should be educating students. Where creative, mutually agreeable solutions advance this goal, they are worth the effort. On the other hand, the goal must not become subservient to the process.

That said, interest-based bargaining is certainly worth investigating. Administrators and school board members may find it, or a derivation thereof, better meets their needs.

In the private sector, some people say the collective bargaining process can improve conditions for employees without having a long-term impact on the end product. We will leave this argument to others, but in the public sector, collective bargaining has far broader effects.

Impact on school boards

In the case of collective bargaining on behalf of teachers, the management whose discretion is being limited is the elected school board. As a result, a private entity–a labor union–controls essential elements of public school policy, short-circuiting the intended democratic control of public education through elected school board members.

The impact of collective bargaining on the autonomy of school boards goes beyond the obvious. Collective bargaining in education differs radically from all private-sector and virtually all other public-sector bargaining because of one vital fact: school boards are elected. In the private sector, management may refuse to yield to union demands it believes are unreasonable. In retaliation, the union membership may make the work environment strained, but it has no legal mechanism to threaten management with replacement. Most public sector unions also have limited ability to remove management since they deal with layers of bureaucracy far removed from elected officials. In contrast, the same school board members who vote on the teacher contract could be removed at the next election.

The union's support or opposition can make all the difference in the outcome of an election. A local union that gets involved in politics may be able to select new board members it finds sympathetic, or remind those who are elected of their potential fate should they disagree.

Where binding arbitration is selected as the method of resolving disputes during negotiation, even more serious infringement on school board autonomy results. Binding arbitration means that, when either party declares an "impasse" because they cannot agree on contract terms, a third party is brought in to establish the terms. This takes governance of school district policies and budgets away from the elected boards, and gives it to an unelected, unaccountable, and as far as the general public is concerned, an unknown arbitrator.

An impasse benefits the union since the final terms and conditions will never be less than management's last, best offer.

Impact on administration

Although administrators do not face the same direct threat through elections that school board members face, they will find their ability to manage and direct the operation of the school largely determined by the terms of the collective bargaining agreement. The more aggressive local unions can use pressure tactics and negative media coverage to render an administrator ineffective—actions reinforced by the state union. During the 1999 negotiations over the Clover Park School District contract, the local union levied a "no confidence" vote against the district's superintendent. The local union president expressed the union's position: "He can change the way he does business, or he can leave."[3]

Shortly after the district signed a contract that the union proudly touted as fulfilling most of its demands, the superintendent took a job elsewhere. Whatever the connection between the two events, the message the Washington Education Association (WEA) wanted to send to other uncooperative superintendents was clear. This is how it lined up the headlines on its website:

- Clover Park schools chief loses vote of confidence 6/17/99 TNT;
- Clover Park schools chief says he won't buckle to union 8/4/99 TNT;
- Clover Park employees win big with new contracts—WEA news release 9/1/99;
- Clover Park schools chief leaving 10/29/99 TNT.[4]

Another union tactic that may be used when collective bargaining goes sour is the threatened or actual filing of unfair labor practice complaints against administrators who do not bow to the union's will. For example, one district faced claims of discrimination when it decided to transfer a ninth grade math teacher from the high school to the middle school, along with the entire ninth grade. The teacher was a union negotiator and he filed a discrimination charge at a critical time: one week before the next school board election.[5]

Too much labor unrest, too many complaints, and eventually a school board looks for another administrator—or the board itself gets replaced.[6] For administrators, the easy choice is to go along with the union, regardless of whether this requires compromising their obligation to uphold the best interests of children and the public.

Fomenting discontent

The entire collective bargaining structure would collapse if teachers believed they could be protected from

capricious or unjust administrative and legislative policies. Teachers would have no reason to pay hundreds of dollars to the union–an average of $683 annually–if they believed they would be treated fairly. Therefore, it may be in the union's interest to create antagonism (or fear) between teachers and administration. For example, many contract provisions, such as clauses requiring administrative support for teacher's discipline of students or prohibiting reprisals against teachers who file grievances, serve little legal purpose because the law already extensively covers these areas. Even though these clauses are legally unnecessary, union officials count on teachers' ignorance of legal details, so that the union's role as "protector" of the employees is reinforced.[7]

Creating antagonism between teachers and administrators may help the union, but it is certainly not in the best interests of teachers or school children. In many instances, instead of working together for education excellence, teachers, unions, and administrators become warring factions with students caught in the crossfire.

Impact on teachers

Teachers, the supposed beneficiaries of collective bargaining, also suffer negative consequences from a process that too often portrays teachers in an unprofessional light. A professional designation implies one who 1) has received the required special training for a complex field, and 2) accepts responsibility for success in the midst of responding to many factors beyond his or her control.

In contrast, the industrial model of collective bargaining covers employment that primarily requires competent adherence to standard procedures, such as assembling parts or driving trucks. In such situations, where the one-size-fits-all model of collective bargaining is more appropriate, ability to do a job is easily evaluated and established.

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> —John Stanford, former Seattle Superintendent

Teachers justly call themselves professionals. Teaching is not rote application of rules. Teaching, like law or engineering, requires both knowledge of standard principles and an ability to perceive, innovate, develop, and transmit knowledge to others. The inflexible system created by collective bargaining limits teachers in their freedom to respond to a broad variety of circumstances, and diminishes their ability to gain individual recognition for a job well done.

Collective bargaining can also distract teachers from the very job they signed a contract to do. Union meetings, union issues, negotiations (sometimes strikes) and contract provisions that increase teacher involvement in personnel decisions and workplace concerns require additional, precious time. Teachers do have a vital interest in management and workplace decisions, and they should have meaningful input, but they are hired to teach, not administrate.

Furthermore, while union officials often point out the areas in which they do bring benefits to teachers, they are, naturally enough, less eager to fight for teachers in areas where solving problems might put them (the union) out of business. Union lobbyists, for example, do not argue for increased pay for exceptionally talented teachers, particularly for educators who achieve academic success with students under difficult or out-of-the-ordinary conditions. This could potentially segment the membership—an unhealthy dilemma for a union that needs uniformity to flourish.

Another example is insurance. Although teachers and their families might benefit from more competitive health care plans, union officials often attempt to block this possibility, perhaps because of the hundreds of thousands of dollars in "administrative" fees they receive under the current arrangement.

The reason for the union's selective silence is understandable. For the union to remain a viable entity, its services must be viewed as indispensable by most teachers. Furthermore, the union must maintain public sympathy, which means there must be some evil remaining for it to fight. It is hard to be too enthusiastic about solving a problem whose solution would put you out of business.

The union does provide valuable resources for teachers in professional development, bargaining expertise, and legal protection. Teachers, however, need information to determine whether it costs them more than it is worth.

Impact on students and parents

In justifying the negative elements of collective bargaining, teachers' unions claim that whatever is in the best interest of teachers also must be in the best interest of students. The truth is, the collective bargaining process itself often forces dismissal of the interests of students and

parents. It is the nature of the beast. Understandably, collective bargaining is employee-oriented. That is the purpose of having a union: to protect the best interests of its members, not the best interests of the district or the children. In a widget factory, this might not be so bad, but children are not widgets.

The late Al Shanker, former president of the American Federation of Teachers, summed it up when he said, "I will begin to care about the quality of children's education in this country when they start paying union dues."[8]

Collective bargaining refocuses education policy from identifying, obtaining and administering the necessary ingredients for academic results for students to a process that too often pits teachers and administrators against each other. The consequences for children, their families and society in general are incalculable. As former Seattle Superintendent, John Stanford stated, "We lost our way when we became more interested in the employment of adults than in the education of children."[9]

Not only do students and parents have little control over the final product gained through collective bargaining, they have limited opportunity for meaningful input during the process, despite its immense effect on their lives. In one Washington high school, a revised school schedule operated successfully for three years, gaining support among students, parents, administrators, and a majority of teachers. Unfortunately, it violated a contract provision governing allocation of preparation time for teachers. The schedule had to be discontinued because super-majority approval by the teachers was required to continue waiving the contract provision. This discontinuation of the revised schedule left students and parents frustrated about their lack of input in the process.[10]

Impact on lawmakers

Collective bargaining limits the ability of lawmakers to implement policy changes, even when the changes could be advantageous to student achievement and teacher satisfaction. Worse still, by attempting to fix what ails our public schools without creating conflicts with the union, well-meaning lawmakers have spent the last twenty years micromanaging the K–12 infrastructure. They have passed regulation upon regulation in hopes of reinvigorating our schools, only to frustrate themselves and nearly everyone else in education.

The question crossing the lips of far too many lawmakers when contemplating education policy is "What does the union think?" not, "Is this good for students?" This is because the Washington Education Association is consistently one of the largest lobbying forces during each legislative session, and the union has repeatedly demonstrated its willingness to communicate through strikes and massive election activities aimed at seating or unseating particular lawmakers. Strikes, aggressive union lobbying and sophisticated electioneering encourage lawmakers to pass bills in response to the crisis of the moment, rather than giving deliberate consideration to what is best for *all* parties involved.

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Impact on taxpayers

Collective bargaining in public education affects taxpayers in two ways. First, they must subsidize the process itself. In all districts that bargain collectively, this includes the cost for the administration's time spent bargaining. In many districts, union negotiators are released from their teaching duties to bargain without loss of pay, so that both sides are subsidized by the taxpayer. Even more common are provisions subsidizing teachers' time spent on grievance proceedings or contract administration. Often negotiation costs also include the services of professional negotiators and lawyers. When labor disputes arise, taxpayers pick up the costs for the time spent in court.

In larger districts, the problem multiplies because of the increased number of unions. Many large districts have more than a dozen different unions with which they must negotiate. As more employee groups decide their concerns should be addressed individually, the administrators' duties related to bargaining become more time-consuming, expensive and frustrating. Adding to the strain are the various employee groups in the same school who find themselves either at odds with one another over contract disputes, or in need of collaborating together to establish a "unified front." Satisfying these competing interests is very costly for administrators (and school boards) who must constantly juggle and refocus funds, and it is costly for taxpayers who must foot the entire bill.

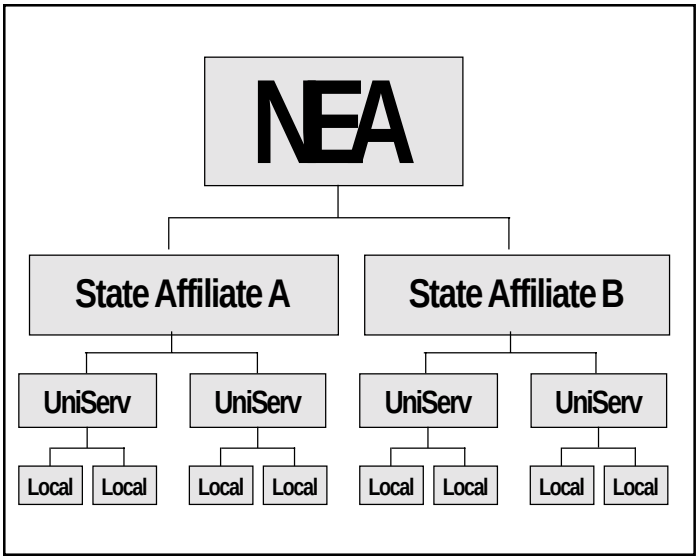
In addition to paying for the collective bargaining

process, taxpayers must pay for the benefits negotiated through collective bargaining. If a private-sector union bargains overly generous benefits for its members, the company will be forced to shut down or lay off employees. Unlike the private sector that must accommodate market forces, school districts have no such moderating influence. This does not mean the financial well is bottomless. Taxpayers voting "no" on levy requests are the closest thing to an immediate and realistic market force in public education. But schools are obligated by law to keep operating, even if unreasonable contract demands force them to cut areas vital for students. And, unlike a private-sector customer, taxpayers must keep supporting public schools even if they are frustrated with performance.

Frustrated taxpayers will often vote down school bonds and levies, but each district faced with a failed levy vote is still bound by collective bargaining contracts, requiring ever-deeper cuts in whatever areas do not place them in violation of their existing collectively bargained contracts. Only after collective bargaining obligations are fulfilled may districts evaluate how allocation of the remaining funds will provide the best educational opportunities for students.

Conclusion

In a short period of time, collective bargaining has become an almost unquestioned part of the education process. But if public education is to have a healthy future, nothing should be left unexamined or taken for granted. The challenges collective bargaining creates for those involved in education require a serious evaluation of the entire bargaining process. Reevaluating the role of collective bargaining will take time. Since collective bargaining will probably continue as a part of education in the near future, the remainder of this study addresses what can be done in the interests of quality education within the existing system. But first, a little history.



The history of collective bargaining in Washington's public schools

Before the advent of collective bargaining legislation in the early 1960's, employment protection was guaranteed to public school employees through state civil service laws. The first one hundred years of public education provided for the employment needs of teachers and the educational needs of students without a collective representative body for either. Civil servants, particularly principals, superintendents, and other administrators, began forming "professional associations" in the mid-1800s.

Union organization at the national level

The National Education Association (NEA) was founded in 1857 as a professional association for administrators.[11] Although the NEA membership later included mostly teachers, the influence of the administrators initially led the NEA to oppose collective bargaining.

In contrast, the American Federation of Teachers (AFT) supported collective bargaining, modeling itself on unions in the industrial sector. An affiliate, the United Federation of Teachers (UFT), led the way in collective bargaining when, in 1961, it was granted the authority to collectively bargain for New York City teachers. Collective bargaining gained momentum in the early sixties as several states granted authorization for unionization of state employees. The growing acceptance of collective bargaining resulted in the AFT's membership increasing from 60,000 teacher members in 1961 to 300,000 in 1970. [12]

Meanwhile, in the late 1960's and early 1970's, school administrators, principals and superintendents separated from the NEA to form their own "professional associations." Faced with the departure of administrative personnel and the rapidly increasing teacher membership in the AFT, the NEA recognized its need to embrace collective bargaining to remain the largest teacher association in the nation. The NEA entered into this new arena by declaring it supported "professional

negotiations" as opposed to "collective bargaining." As it turned out, this was only semantics, since what the NEA affiliates called "professional negotiations" were the same activities undertaken by AFT affiliates as "collective bargaining."[13] Thus, the NEA actively embraced collective bargaining for teachers by the early 1970's and has remained adamant in that position to this day.

Union organization at the state level

The NEA's real strength comes from its state affiliates. In 1889, 124 educators formed the Washington Education Association (WEA). Today, WEA claims 73,000 members. This number includes 56,000 certificated K–12 teachers, classified employees, (secretaries, custodians, assistants, bus drivers and other education support personnel), and higher education faculty members. WEA-Retired has about 2,500 members.

In 1965, WEA lobbied the legislature for a negotiation package that resulted in the *Professional Negotiations Act*.[14] WEA officials argued that teachers were concerned about wages, hours, schedules, and the length of the academic year. This act required school boards to "meet, confer and negotiate..." with an employee organization. The first collective bargaining contract negotiated under the *Professional Negotiations Act* was completed in 1968 in Tacoma.[15] The Seattle Teachers Association followed in 1969.[16] In 1967, the legislature passed a collective bargaining law for classified and support staff.[17] The law provided these public education employees with the right to negotiate over "wages, hours and working conditions."[18]

In 1970, the National Education Association, of which WEA is a state affiliate, initiated a new field staff program now called UniServ. The UniServ program placed a staff person trained by the NEA in the field for each group of 1,200 union members. A single UniServ contains several local associations from the same geographic area. Along with paid union staff support, most UniServs have local "release time" teachers serving in various leadership positions such as President and Vice President. Release time allows educators to take time away from teaching duties to conduct union business.

The UniServ staff workers assist the local associations in contract administration such as bargaining and grievance resolution, holding workshops for teachers assigned to the bargaining committees and encouraging teacher involvement. UniServ staff aggressively organize the local associations to expand bargaining.

As unions made more and more demands, strikes ensued. School boards contended these demands usurped the board's authority and responsibility to the students, parents and communities each district served. Boards that refused to yield to union demands found themselves faced with striking teachers. The first K–12 teacher strike in Washington state occurred in Aberdeen on May 10, 1972.

In 1975, the WEA lobbied the *Education Employment Relations Act (EERA),* which explicitly provided collective bargaining rights for K-12 certified employees, through the legislature. The bill took effect January 1, 1976, only a few months after the legislature had created the Public Employment Relations Commission (PERC). PERC administers most of Washington's public employee bargaining acts, including the EERA, and provides the initial quasi-judicial hearing for most cases arising in public employee labor relations.

Following the passage of EERA, local associations throughout the state entered the bargaining process with detailed collective bargaining proposals, often created from a master template provided by the NEA. This formula continues today.

Scope of the EERA

The primary statute governing collective bargaining for educational employees is the Educational Employment Relations Act (EERA). The EERA governs employees of K-12 public schools who must receive a state-issued certificate to qualify for their jobs, and who are not administrators or confidential assistants to administrators. For the sake of simplicity, this study uses the term "teacher" interchangeably with "certificated employee," even though other employee groups, such as librarians and counselors, often bargain together with teachers under the provisions of this act.

Fundamentals of collective bargaining

For most people, including the average teacher and school board member, collective bargaining appears to be a morass of legal technicalities. Local school boards and administrators, facing complex concepts such as "duty to bargain" and "exclusive representation," may engage in something called an "unfair labor practice" by unintentionally making one wrong move. The following sections are designed to make the collective bargaining path a little clearer.

Public Employment Relations Commission

The Public Employment Relations Commission (PERC) was created by statute in 1975. Rather than enforcement of contractual provisions, PERC administers state labor statutes and seeks to facilitate positive labor relations. Although PERC may make non-binding recommendations to aid the bargaining process, it does not determine parties' rights under their collective bargaining agreement or provide a remedy for breach.

PERC's responsibilities are generally divided into the following categories: certifying an exclusive bargaining representative; determining a bargaining unit; mediating grievances; ruling on individuals' rights not to join the union; resolving impasse in contract negotiations; and processing unfair labor practice complaints.

Non-union districts

Thirty Washington districts do not bargain collectively. This means employees have no union representative and the district deals directly with employees. School board policies and individual contracts govern the employment relationship.

Certification of exclusive representative

The vast majority of Washington state teachers are represented by a union. The transition from a non-union district to a unionized district begins when a union informs the school district that it wishes to represent a particular group of employees. The school district or the union may then ask the Public Employment Relations Commission (PERC) to determine whether the union has sufficient support to be certified as the exclusive representative of that group, known as a bargaining unit.[19]

PERC conducts an election by secret ballot of the group of employees in question and certifies the union as exclusive representative if it receives a majority of the votes cast. Once the union is designated the exclusive representative, the employer may no longer bargain with its employees directly.

Bargaining unit determination

PERC is responsible for determining which employees should be grouped together as a bargaining unit.[20] A bargaining unit is defined as a group of employees with similar interests such as common duties, skills, or working conditions, among other factors.[21] For example, education associations typically represent certificated employees, including substitute teachers that have worked with the district for a specified period of time. Classified employees would be members of different bargaining units.

The union is obligated to represent all the members of the bargaining unit. In return for representation, each employee within a bargaining unit is generally required to join the union or pay an *agency shop fee*. (See side bar.)

The law provides a process whereby either the employer or the union may petition for clarification or a change of the unit definition.[22]

Bargaining process

Labor: The union conducts its district-level bargaining through its local education association, which, in turn, receives support from its regional WEA UniServ council. As previously mentioned, UniServ representatives typically provide advice and support to local associations during bargaining.

Management: Many school districts hire a professional negotiator to represent their interests in the bargaining process. Although the superintendent, school board president, or other district personnel may be involved at various stages of bargaining, the contract is generally not presented to the school board for consideration until the terms have been thoroughly discussed and most elements of a preliminary agreement have been hammered out.

Duty to bargain

Once a group of teachers has unionized, both the school districts and the union have a duty to bargain collectively under the requirements established in the Educational Employment Relations Act (EERA).[23] However, the scope of that duty is not the same for all subjects of negotiation. Subjects of collective bargaining are classified as mandatory or permissive. The more impact a subject has on terms and conditions of employment, the more likely it is to be classified as mandatory. The more a subject requires management discretion, the more likely it is to be classified as permissive. Some subjects are classified as prohibited and removed from the bargaining table altogether.

Mandatory subjects of bargaining are simply those that *must* be bargained. An employer may not make unilateral changes to a mandatory subject without providing the union with notice and an opportunity to bargain on the proposed changes. *Permissive subjects*, on the other hand, *may* be bargained, but the employer would not be subject to an unfair labor practice when

Agency Shop

Under an agency shop provision, employees who do not wish to join the union are still required to pay a "representational fee." This requirement is based on the idea that, as part of the bargaining unit, agency fee employees are still benefiting from the collective bargaining agreement and should pay their share for negotiating the agreement.

An agency shop fee and union dues are not the same thing. By law, agency fee payers may be compelled to pay only for union expenses that are essential (or chargeable) union functions such as contract administration, collective bargaining, and grievance adjustment.[1] The union must also provide agency fee payers with an adequate explanation of the basis for the fee (i.e., what expenses are supposedly "chargeable"), a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow account for any amounts that are reasonably in dispute.[2]

1. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)
2. See *Chicago Teachers' Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986)

making a unilateral change if the contract did not address the subject. *Prohibited subjects*, even if bargained, would be unenforceable as a matter of law.

Mandatory subjects of bargaining

Under the EERA, both parties have a duty to bargain in good faith in an effort to reach an agreement regarding wages, hours, and the terms and conditions of employment.[24] Even topics that do not clearly fall within these three categories *may* be mandatory subjects of bargaining. When conflict arises over whether a particular subject is mandatory or permissive, PERC decides the issue. In doing so, PERC balances the relationship of the subject in question to wages, hours, or the conditions of employment against the extent the subject is a management prerogative. Where a subject relates to the conditions of employment *and* is a management prerogative, the question to be answered is which of these characteristics is dominant.

Through court battles and PERC proceedings, mandatory subjects of bargaining have been held to include not only salary and length of the work day, but also these subjects:

- payment for after-hours parent conferences[25]
- leaves[26]
- insurance benefits[27]
- school calendar changes[28]
- discipline, promotions, and seniority preferences[29]
- just cause for dismissal standards and job security provisions[30]
- grievance procedures[31]
- union security provisions[32]
- employee evaluation criteria and procedures[33]
- management rights clauses[34] and
- safety and health rules and standards for employee conduct[35]

The fact that a particular subject falls within the mandatory category does not mean that the employer must agree to a union's proposal. So long as the employer meets with the bargaining representative and bargains in good faith, the employer is not required to make concessions or agree to any provision that might be detrimental to its academic program.[36] Instead, classification as a mandatory subject of bargaining means that neither party may unilaterally change the provision or the conduct at issue until an impasse is reached.

An employer may make unilateral changes in a mandatory subject of bargaining if the union waives its right to bargain on the subject. According to PERC, a waiver may occur where the language of a collective bargaining agreement gives the employer the right to make changes concerning one or more mandatory subjects while the contract is in effect, without providing the union with notice or the opportunity to bargain.[37] A contractual waiver must be knowingly and clearly made in order to be effective.[38]

PERC has held that an employer must maintain the *status quo* on mandatory subjects–wages, hours, and working conditions–after a collective bargaining agreement expires. If an employer wishes to make changes, it must notify the union before it makes the changes, and

Impasse

Impasse exists where, after a reasonable period of good faith negotiation, the parties have reached their final positions but remain at odds over one or more subjects of bargaining.

Once parties are at an impasse, any duty to bargain is temporarily suspended. Parties may seek resolution through a PERC appointed mediator, who will try to help the parties reach a mutually acceptable agreement. If mediation does not produce a settlement the parties may select a fact-finder, who will issue recommendations on terms of settlement. The parties are also free to agree on their own method of impasse resolution.

then bargain with the union in good faith.[39] The union will waive its right to bargain a mandatory subject if it has been notified of a proposed change and given the opportunity to bargain, but fails to negotiate the change or communicate its opposition.[40] For example, where a school district is forced to schedule a make-up day and the union has notice of the proposed date, it waives its right to bargain if it makes no objection to the selected make-up day until after the fact.[41]

Permissive subjects of bargaining

Management decisions that only remotely affect "personnel matters," and decisions that are primarily "managerial prerogatives," are permissive subjects of bargaining.[42] There is no duty to bargain over permissive subjects. Some districts, however, surrender their managerial discretion by bargaining in these areas. For example, decisions concerning curriculum and basic educational policy are to be reserved to the employer, and there is no statutory requirement for notice or bargaining.[43] The educational budget, including allocation of unexpected funds, is another permissive subject.[44] Because permissive subjects have significant impact on school management, districts should protect their authority to make educational policy decisions in these areas.

Even if a particular issue is a permissive subject, the employer may be required to bargain if the decision affects wages, hours, or terms and conditions of employment.[45] In such a case, the employer would have the right to make a unilateral decision, but must give the union an opportunity to bargain over the impact upon timely request.[46] For example, a school district is not required to bargain its decision not to rehire certain certificated employees following a levy failure.[47] However, the district will probably be required to negotiate how layoffs are to take place.[48]

Even if a particular issue is a permissive subject, the employer may be required to bargain if the decision affects wages, hours, or terms and conditions of employment.

The employer or the union may initiate negotiations of a permissive subject, but the other party is not obligated to bargain to impasse on the subject. In fact, it is an unfair labor practice for either party to bargain a permissive subject to the point of impasse.[49]

Once the collective bargaining agreement expires, employers are not required, to maintain the *status quo* on an employment practice that is a permissive subject of bargaining.[50] Rather, contractual provisions addressing permissive subjects expire with the contract that contains them. Significantly, if a contract contains a waiver of a mandatory subject, that waiver is itself a permissive subject.[51] For example, if a contract contained a clause that waived the union's right to bargain over the school calendar, that waiver would only be good for as long as the contract remained in effect. Once the contract expired, the district would again have to bargain any changes in the school calendar, unless it was able to negotiate a similar provision in the next contract.

Prohibited subjects of bargaining

Prohibited, or illegal, subjects of bargaining are "those matters which neither the employer nor the union have the authority to negotiate, because agreement would contravene applicable statutes or court decisions."[52] A party should not even propose that a prohibited subject be included in the contract.[53] PERC may order a party who has advanced a prohibited proposal to withdraw its proposal and to post notice that it will not make any further prohibited proposals.[54]

Few topics have been expressly prohibited from the collective bargaining process. One example of a prohibited provision is negotiation of a salary schedule that exceeds the amount authorized by the legislature.[55] (This is why "creative" methods are used to enhance salaries, such as supplemental contracts for more than 90 percent of Washington state teachers.) Another prohibited subject of bargaining involves contributions from the employer to the union, such as school district funding of a members' attendance at union functions without union reimbursement.[56] This type of financial arrangement is illegal. A union shop or closed shop agreement, in which every employee in the bargaining unit *must* join the union, would also be a prohibited subject of bargaining.[57] However, an agency shop, in which every employee in the bargaining unit must financially support the union even if not a member, is permissible.

Grievance

A grievance is usually defined as a misinterpretation or misapplication of contractual provisions or school district policy. This definition may be diminished or enlarged by the parties' collective bargaining agreement.

Some contracts define "grievance" broadly enough to include any dispute or disagreement, while others limit the term to violations or misapplications of contractual provisions.

The process by which grievances are aired and resolved differs by contract. Typically, a contract provides for an employee, group of employees, or union to furnish written notice of their grievance to the employer. The employer is required to respond within a given time frame. The grievant may appeal to another level of the employer's hierarchical structure if the response is not satisfactory. The grievance procedure may allow more than one appeal on a particular issue.

If the grievance is not resolved within the employer's authority structure, the parties may submit their dispute to third-party mediation or arbitration. A specific mediation or arbitration procedure is often included in the terms of the collective bargaining agreement.

Mediation

Mediation is the process that permits the employer and grievant to present the facts of their position to a neutral third party. In mediation, the suggestions of the third-party mediator are not binding. Rather, the mediator's role is to facilitate communication between the parties in order to resolve their dispute.

Binding arbitration

Unlike recommendations from a mediator, an arbitrator's decisions generally are binding upon the employer and the union.[58] Arbitration produces a binding settlement of the dispute instead of facilitating further discussion between the parties. An arbitrator may also provide an appropriate remedy, if a contractual violation has occurred.[59]

Unfair labor practices

An employee, union, or employer who believes another party has engaged in an unfair labor practice may file a complaint with the Public Employment Relations Commission (PERC).[60] If the facts as alleged in the complaint constitute an unfair labor practice, the case will be referred to a PERC examiner for a hearing.[61]

Unfair labor practices by employer

It is an unfair labor practice for employers to interfere with employees' rights to form a union, to join or refuse to join a union, or to bargain collectively. The employer may not encourage or discourage union membership by discrimination in hiring, granting of tenure, or employment conditions. It is standard practice to require employees to pay union dues or agency fees as a condition of employment, although requiring membership itself is forbidden.[62]

Employers may not interfere with the creation or management of a labor union. This includes contributing financially to the union,[63] even indirectly such as by paying for leave to attend union activities. A union and district are allowed to negotiate district payment for union leave as a part of their collective bargaining agreement.[64] Even if openly negotiated, the activities paid for by the employer should be limited to those involving that particular employer, and the union should reimburse the employer.[65] PERC may find a technical violation even where it merely appears the district has made an illegal contribution.[66] Therefore, a contract that provides leave for union activities should clearly state how the union will reimburse the district.

It is also an unfair labor practice for an employer to discriminate against an employee because he has filed charges against the district or given testimony under the Educational Employment Relations Act.[67] Where an employee can show that his involvement in protected activity was a motivating factor in his termination, the employer must then prove that the employee would have been terminated regardless of his activities.[68]

Unfair labor practices by union

Like the employer, the union may not interfere with employees exercising their rights to unionize or bargain collectively. Unions may, however, establish membership rules. In addition, a union may not restrain or coerce an employer in the employer's selection of its representatives for collective bargaining or grievance procedures.[69]

Further, a union may not cause or attempt to cause an employer to discriminate against an employee because of union membership or non-membership.[70]

Joint obligations

It is an unfair labor practice for either party to refuse to bargain collectively.[71] The duty to bargain in good faith requires both the employer and any exclusive representative to submit a written statement of any proposed language changes to the collective bargaining agreement, with a written or oral explanation of the proposal. Both the district and the union must also submit at least one written response to the opposing side's proposal.

Following the initial proposal and response, the parties' duties vary depending on whether the subject of the proposal is a mandatory or permissive subject of

bargaining. If a union proposal addresses a permissive subject the district may assert in writing that the subject is permissive. The district is required to receive proposals on the permissive subject, but is not required to make proposals in response after it objects. Although the district cannot demand that the proposal be removed from the bargaining table until a legal impasse is reached, it does not have to agree to negotiate or discuss the subject.[72]

Common contractual provisions

Almost all collective bargaining agreements contain particular standard contract clauses, as well as language addressing unique circumstances of each district and its employees. Standard clauses usually cover at least the following subjects:

- **Union Recognition**: Contracts commonly recognize an exclusive bargaining representative and describe the representative unit.
- **Union Security:** Generally, contracts contain an *agency shop* provision, requiring all members of the bargaining unit to pay dues or an agency fee to the union. The districts' obligation to deduct dues or agency fees on behalf of the union will often be referenced in this clause.
- **No Strike:** Some contracts contain provisions prohibiting or limiting teacher strikes and providing remedies for any violation.
- **Management Rights:** Most contracts guarantee certain rights to the school district, such as control over establishment of educational policies and goals.
- **Association Rights:** Association rights clauses spell out the local union's right to use school facilities or equipment. Many contracts also provide teachers with leave for union business or release time for union officials.
- **Workday/Length of Academic Year:** In addition to stating the length of teachers' workday and academic year, these sections often provide for supplemental workdays.
- **Salary:** District salary provisions are tied to the state salary schedule, which is based on teachers' seniority and degree of educational training. The district may not spend more on teacher salaries in basic education than is provided through the state schedule, but districts typically increase compensation through separate contracts for additional time or activities. For example, districts often provide extra pay for a number of "supplemental days" outside the normal school year. Districts may also provide teachers with extra leave or paid professional training.
- **Conditions of Employment:** Contracts typically contain clauses that define employment conditions including hours of preparation time, condition of school facilities, and other matters of general employee concern.
- **Leave and Fringe Benefits:** Leave and benefits clauses will cover insurance benefits and various types of emergency and professional leave and may also contain association leave for union members.
- **Grievance Procedures**: These sections specify how grievances are processed within the employer's hierarchical structure. The parties may also contractually select a mediation or arbitration procedure for unresolved grievances.
- **Employee Evaluation**: These sections lay out the procedures and criteria for evaluating employee job performance. They may also discuss probation, non-renewal of employment contracts, evaluation files, and other related topics.
- **Just Cause**: Contracts may provide that discipline or discharge is permitted only for *just cause*. This places procedural requirements on a district's decision to discipline or discharge a teacher.
- **Voluntary and Involuntary Transfer**: The basis for the voluntary or involuntary transfer of a teacher may be specified by contract. These clauses will establish the terms for transfer such as seniority and notice requirements, and specify circumstances under which a transfer may occur.
- **Assignment and Reassignment of Duties**: These clauses provide the criteria and procedure for teacher assignment and reassignment. Such clauses generally provide reassigned teachers release time to prepare for their new assignments.
- **Layoff and Recall Procedures**: Layoff or reduction in force provisions usually call for employees to be selected according to the date of hire, with the last employee hired as the first to be laid off. Under contractual recall procedures, employees who are laid off are generally placed in a recall pool and given preference in later hiring decisions.
- **Vacancies**: A vacancy clause specifies procedures for announcement and filling of vacancies.
- **Academic Freedom**: Contracts may guarantee

academic freedom to teachers. Some contracts also specifically address teachers' introduction of a controversial topic and may reserve to the district the right to review the introduction of such topics.

- **Curriculum Selection**: Curriculum provisions specify who will select the district's curriculum, what selection criteria will be used, and how the selection may be challenged.
- **Class Size**: When contracts address class size, they define the size of classes allowed and may also provide for additional preparation, classroom staff, or compensation for classes that exceed the contractually defined standard.

Conclusion

The current collective bargaining process in our public schools has helped create a hostile environment among parents, teachers, administrators and lawmakers. In addition, the uniform treatment of all personnel required by the collective bargaining process too often saps teachers' creativity and productivity. It unnecessarily hamstrings administrators.

Reconsidering the role and content of collective bargaining is a necessary part of the reform efforts that must be implemented in order to deliver quality education opportunities to every student in our public schools.

Recommendations

A collective bargaining contract is just that: a legally binding contract. It should clearly state the rights and responsibilities of the parties involved. It is not a treatise on broad-based policy issues, nor should it contain vague goals or clauses intended to have no real effect. Every word and phrase should be examined carefully, remembering that it must stand up under the scrutiny of an independent arbitrator or judge.

The ultimate goal of school board members, administrators and their representatives must be to ensure that students are provided the best possible educational opportunities. To accomplish this, they must preserve necessary authority while adequately supporting employees. The union's interest is to ensure that employees' wages and hours are protected from arbitrary changes and that the terms and conditions of employment will enable the employees to work effectively. An effective contract will attempt to protect the respective interests of both parties, while allowing the district to achieve the ultimate goal of excellent education. It is always better to err on the side of providing and protecting excellent academic opportunities for students.

Changes in contract language must come about through the collective bargaining process. Because the process requires give and take from both sides, a school board wishing to remove a contract provision should carefully weigh the benefits and consequences of bringing up the subject. The trade-offs the union might demand for giving up its control in one area might be worse than the original situation. A school boardmay need to concentrate its efforts on those areas most detrimental to the education process, and compromise in other areas. The best course is prevention-an informed school board can guard against inserting detrimental contract language far more easily than it can get it removed.

The following criteria can be applied to any contract provision:

- Does the contract provision accurately reflect the applicable law? If the law allows flexibility, does any variation in the contract remain within the range allowed by law?
- Does the contract provision improve or hinder student learning by any modifications it makes to the rights and responsibilities of the parties?
- Does the contract provision prevent the school board from fulfilling its statutory responsibilities to the public, teachers, administrators, and students?
- Does the provision safeguard the individual rights of teachers as well as the rights of the Association?
- Does the provision support flexibility in seeking educational solutions and accountability for educational results?

For a full discussion of specific recommendations for contract language, please see the report, *Collective Bargaining in Public Schools: Turning the Focus to Students*, published by Evergreen Freedom Foundation. Recommendations include:

- The adoption of strong management rights clauses that explicitly list the rights reserved to the district.
- Protecting the right of qualified individuals to teach in the state of Washington without being forced to support a union and its policies.
- Providing clear protection for teachers' rights

against compulsory support of union politics.
- Limiting the use of *just cause* exclusively to discharge or nonrenewal of tenured teachers.
- Limiting the procedural barriers to effective teacher evaluation.
- Allowing teachers to be considered for retention or transfer based on their skill, experience, and education, rather than simply on seniority.
- Ensuring teachers and other employees have maximum flexibility and cost-effectiveness in their insurance carrier and plan.
- Instituting no-strike clauses with penalties for failure to comply.
- Making class-size decisions based on individual classroom needs, not on a one-size-fits-all plan.
- Eliminating contract provisions that relinquish school board authority over curriculum, education policy, and student discipline.

Endnotes

1. Bruce Zarahdnik, Tahoma School District, telephone conversation with Corrie White, EFF Research Analyst, 24 April 2000.
2. *Ibid.* Interest based bargaining generally requires the training of facilitators and others involved in the bargaining process. Due to employee turnover, this would be a continuous process. One school district that has recently begun using the interest based bargaining model stated that their initial negotiations of the plan took 25–30 days. Now that an interest based bargaining agreement is in place, the parties must still meet monthly and have regular contract support meetings.
3. Quoted by Tim Connelly, "Unions slap no confidence vote on CPSD boss," *Lakewood Journal*, 18 June 1999.
4. Taken from "Info for Journalists," http://www.wa.nea.org/NWSRM/ClvrPrk.htm, November 24, 1999. Printed copy on file with EFF. On the web site, these headlines appeared in reverse chronological order. They have been placed in chronological order for this study, as chronological order is standard for printed publications. Some duplicative headlines have been omitted.
5. The district administration pointed out that teacher placement decisions were made before the union negotiator was elected to his position. Colleen Pohlig, "Teacher Takes on Selah Schools Chief," *Yakima Herald–Republic*, 27 October 1999.
6. In the school board race mentioned above, one of the incumbent members lost his position to a candidate who had criticized the board for backing up district administration. Colleen Pohlig, "Selah School Board Incumbent Falls," *Yakima Herald–Republic*, 3 November 1999.
7. G. Gregory Moo, *Power Grab: How the National Education Association is Betraying our Children* (1999), p. 6
8. Quoted by John Fund, "Politics, Economics, and Education in the 21st Century," *Imprimis,* May 1998, p.5.
9. Quoted by Damon Darlin, "To whom do our schools belong?" *Forbes*, September 23, 1996, p. 66.
10. Debby Abe, "Wilson High School Drops 3-Period-Per-Day Schedule," *The News Tribune*, 6 June 1998; Debby Abe, "Wilson likely to drop 110-minute classes," *The News Tribune*, 17 May 1998.
11. Myron Lieberman, Charlene K. Haar, and Leo Troy. *The NEA & AFT: Teacher Unions in Power and Politics*, p.10.
12. *Ibid.,* p. 12.
13. *Ibid.*
14. See National Education Association, "Legacy," <http://www.wa.nea.org/Publicat/COMMUNIC/LEGACY.HTM>, p. 2
15. *Ibid.,* p. 3.
16. *Ibid.*
17. RCW 41.56.
18. RCW 41.56.030.
19. RCW 41.59.070. If employees are already represented by a union, only the union or the employees may file a petition concerning exclusive representation. The employer may not do so. See WAC 391-25-012 and 391-25-090.
20. RCW 41.59.080.
21. *Ibid.*
22. *Ibid.* See also WAC 391-35-010.
23. RCW 41.59.140.
24. *Ibid*. See also RCW 41.59.020(2).
25. *Clover Park School District*, Decision 6072-A (EDUC 1998).
26. *City of Clarkston*, Decision 3286 (PECB 1989).
27. *City of Dayton*, Decision 1990 (PECB 1984).
28. *Mukilteo School District*, Decision 3795-A (PECB 1992).
29. *City of Yakima*, Decisions 3503 and 3504 (PECB 1990).
30. *Peninsula School District No. 401 v. Public School Employees of Peninsula,* 130 Wn.2d 401, 924 P.2d 13 (1996).
31. *Clark County*, Decision 3451 (PECB 1990).
32. *Ibid.*
33. RCW 28A.405.100
34. *Pasco Police Officers' Ass'n v. Pasco,* 132 Wn.2d 450, 938 P.2d 827 (1997).
35. *City of Olympia*, Decision 3194 (PECB 1989).
36. RCW 41.59.020(2). Good faith involves a sincere desire to reach an agreement. *Pasco Police Officers' Ass'n v. Pasco,* 938 P.2d 27 (1997).
37. *Mukilteo School District,* Decision 3795-A (PECB 1992).
38. *Pasco Police Officers' Ass'n v. Pasco,* 938 P.2d 827.
39. *Clark County,* Decision 3194 (PECB 1990).
40. *City of Sumner,* Decision 1839-A (PECB 1839).
41. *Mukilteo School District*, Decision 3795-A (PECB 1992).
42. *International Association of Fire Fighters, Local 1052* v. *PERC*, 113 Wn.2d 196, 776 P.2d 1346 (1989).
43. *Wenatchee School District*, Decision 3240-A (PECB 1990).
44. *Federal Way School District No. 210*, Decision 232-A (EDUC 1977), *aff'd* King County Superior Court Cause No. 830404 1978).
45. *International Association of Fire Fighters, Local 1052,* 776 P.2d 1346.
46. *City of Clarkston*, Decision 3286 (PECB 1989).
47. *Spokane Education Ass'n v. Barnes,* 83 Wn.2d 366, 517 P.2d 1362 (1974).

48. *International Ass'n of Fire Fighters, Local 1052,* 776 P.2d 1346.
49. *Pasco Police Officers' Ass'n v. Pasco,* 132 Wn.2d 450, 938 P.2d 827 (1997).
50. *Seattle School District,* Decision 2079 (PECB 1984), *rev'd on other grounds, Seattle School District*, Decision 2079-C (PECB 1986).
51. *Ibid.*
52. *City of Burlington*, Decisions 5840, 5841, 5842, and 5843 (PECB 1997).
53. *Ibid.*
54. *Ibid.*
55. RCW 41.59.935.
56. *City of Burlington,* Decisions 5840, 5841, 5842 and 5843.
57. RCW 41.59.100.
58. *Yaw v. Walla Walla School District No. 140,* 106 Wn.2d 408, 722 P.2d 803 (1986).
59. *North Beach Education Ass'n v. North Beach School District No. 64*, 31 Wn.App. 77, 639 P.2d 821 (1982).
60. WAC 391-45-010.
61. WAC 391-45-110; 391-45-130 and 391-45-270.
62. RCW 41.59.140(1)(a), (c).
63. RCW 41.59.140(1)(b).
64. *State ex rel Graham v. Northshore School District,* 99 Wn.2d 232, 662 P.2d 38 (1983). Employers may also permit employees to confer with the employer during work hours without loss of time or pay. See RCW 41.59.140(1)(b).
65. *City of Burlington,* Decisions 5840, 5841, 5842, and 5843 (PECB 1997).
66. *North Thurston School District,* Decision 4765-B (EDUC 1995).
67. RCW 41.59.140(1)(d).
68. *International Ass'n of Fire Fighters, Local 1445 v. Kelso,* 57 Wn.App 721, 790 P.2d 185 (1990).
69. RCW 41.59.140(a).
70. RCW 41.59.140(2)(b).
71. RCW 41.59.140(1)(e), (2)(c).
72. WAC 391-45-552. This does not mean that the parties are required to bargain permissive subjects to impasse. No further response needs to be made to the proposal addressing the permissive subject of bargaining.