Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities

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LEGAL ASPECTS OF PUBLIC SCHOOL TEACHER NEGOTIATING AND PARTICIPATING IN CONCERTED ACTIVITIES*

BY REYNOLDS C. SEITZ**

As a preface to the discussion in this article, it seems appropriate to comment briefly upon the status of the industrial worker as regards his effort to join labor organizations and bargain collectively. After some early struggles in England and America in the 1700's and 1800's during which such endeavors were condemned by the courts and sometimes the legislatures as illegal conspiracies and later illegal torts, the industrial worker received through statute and judicial decision very substantial support for his effort to join labor organizations and bargain collectively and to use concerted activities in support of his economic welfare. This was surely most evident at least from the middle 1930's after the impetus given by the passage of the Wagner Act creating the National Labor Relations Board. The basic philosophy supporting the sanctioning of such rights was a belief that such protection would significantly contribute to industrial peace.

The push in the public employee field to join employee organizations whose goals are the betterment of employment conditions has been gaining momentum since the end of World War II. Such employees have not, however, automatically been given the same rights as industrial workers. Hurdles have been erected by judicial decisions and in some instances by legislative attitudes.

A hurdle which exists in the form of legislation1 and judicial de-

* The author reserves the right to use this material in other publications.

cision\textsuperscript{2} but which is fast disappearing in most jurisdictions is the denial of the right to join an employee organization or Union on the ground of inconsistency with government employment. To the extent that this attitude still exists, it would seem possible to challenge it on First Amendment constitutional grounds. It is difficult to understand why such outlook is not an unconstitutional interference with the right of freedom to assemble.

A much more usual hurdle\textsuperscript{3} today is the denial of the opportunity to bargain collectively. This, of course, is a substantial obstacle because the public employee has gained little if he is merely given the right to join organizations but stopped from bargaining collectively.

Since this article is particularly concerned with the position of the public school teacher, it seems important to state that in the field of education there is often substituted for the term "collective bargaining" the expression "professional negotiations." This writer views these terms as synonymous. Professional negotiations merely connotes that people of professional standing are participating and does not convey a fundamentally different meaning than does collective bargaining. Throughout this discussion the term "collective bargaining" will be used.

The argument in support of the attitude that the public employer should not be required to bargain collectively with public employees can be briefly summarized as follows:

1. The fixing of conditions of work in the public service is a legislative function.
2. Neither the executive nor the legislative body may delegate such functions to an outside group.
3. The legislature or executive must be free to change the conditions of employment at any time.\textsuperscript{4}

In relation to teachers and school boards the basic objection to collective bargaining is probably most frequently expressed in the contention that negotiations and collective bargaining constitute a

\textsuperscript{2} Perez v. Board of Police Comm'rs., 78 Cal. App. 2d 638, 178 P. 2d 537 (1947); People ex rel Fursman v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917); King v. Priest, 357 Mo. 68, 206 S.W. 2d 547 (1947).

\textsuperscript{3} Mugford v. Mayor and City Council of Baltimore, 185 Md. 206, 44 A, 2d 745 (1945); City of Cleveland v. Division 268, Amalgamated Assoc. of Street Electric and Motor Coach Employees of Amer., 30 Ohio Op. 395 (1945); Mutter v. Santa Monica, 74 Cal. App. 2d 292, 168 P. 2d 741 (1946); Springfield v. Clouse, 356 Mo. 1239, 206 S.W. 2d 539 (1947); Miami Water Works, Local No. 654 v. Miami, 157 Fla. 445, 26 So. 2d 194 (1946); Wagner v. Milwaukee, 177 Wis. 410, 188 N.W. 487 (1922); C.I.O. v. City of Dallas, 198 S.W. 2d 143 (Tex. 1946); Wichita Public Schools Employees Union, Local 513 v. Smith, 397 P. 2d 357 (Kan. 1964); Dade County v. Amalgamated Ass'n. of Street Electric Railroad and Motor Company Employees, 157 So. 2d 176 (Fla. 1963).

\textsuperscript{4} ABA, 1958 PROCEEDINGS OF SECTION OF LABOR RELATIONS LAW, Report of the Committee on State Labor Legislation 128, 147.
serious invasion of school board authority. Those who make such objection take cognizance of certain general claims as to the meaning of the term negotiations and collective bargaining. These general claims are:

1. Collective bargaining legally requires something much different than merely providing groups an opportunity to appear before or in some fashion to present their requests to a school board—a technique that has been quite widely sanctioned for many years.

2. The concept does not permit the school board complete discretion as to what procedure to follow in reacting to requests that may be presented by teachers.

3. The concept requires the school board to react to requests from a certified representative of employees by discussing proposals and giving reasons for modification or rejection of demands.

4. The concept often requires counterproposals.

In order to react to the validity of the assertion that such a general concept of collective bargaining does constitute a serious invasion of school board authority, it seems necessary to delineate fully what is legally meant by collective bargaining. The concept of what constitutes good faith collective bargaining has been worked out to a large extent by the federal courts and the National Labor Relations Board in interpreting Section 8 (d) of the National Labor Relations Act,5 which by its specific language imposes a duty on employers and unions to “meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment” and goes on to state “such obligation does not compel either party to agree to a proposal or require the making of a concession.”

It is possible that if state statutory language differs from that of the National Labor Relations Act, there could be an interpretation of good faith bargaining somewhat different than the description which follows. It seems certain, however, that no state legislation calling for negotiating will require by way of bargaining approach more than does the National Labor Relations Act and the decisions interpreting the responsibilities imposed by the Act. It is submitted that the guidelines laid down by the National Labor Relations Board and the Federal courts establish a valid concept of good faith collective bargaining. Indeed those who indulge in voluntary bargaining may very well want to follow much the same pattern.

Good faith bargaining often does require the reacting to demands that are not acceptable by offering the reasons for rejection.

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and some counter-proposals. It requires recognition by both parties, not merely formal but real, that collective bargaining is a shared process in which each party has a right to play an active role. In this area there has been a rather recent interesting development. In December 1964 the National Labor Relations Board in the General Electric Company case dealt with what is familiarly known as the Boulwarism approach.

The fact situation showed that the employer listened to and analyzed the demands and arguments supplied by the Union and then made an offer to the Union which included everything the employer found to be warranted. Nothing was held back for later negotiations and the company took the position that the offer would not be changed unless new information or a significant development in facts indicates that adjustments are warranted. The Company justified this position on the ground that it engaged in year-around research to determine what is right for the employees, and when bargaining begins, it listens to the Union as part of its overall research and then on the basis of overall study makes an offer which includes everything it believes is warranted. The Company does not actually say "take it or leave it" but does make it clear it will not change its position unless new information is presented. It made it clear it would take a strike rather than do what it considers wrong policy.

The National Labor Relations Board condemned this type of bargaining on the ground that it was tantamount to mere formality and serves to transform the role of the employee representative from a joint participant in the bargaining process to that of an adviser. In practical effect the Board felt the position of the Company was akin to that of a party who enters into negotiations with a pre-determined resolve not to budge from an initial position—an attitude inconsistent with good faith bargaining.

In deciding the General Electric case the National Labor Relations Board also alluded to the fact that the Company mounted a campaign of communications, both before and during negotiations, for the purpose of disparaging and discrediting the Union and to seek to persuade the employees to exert pressure on the Union to submit to the will of the employer. The communications were referred to as reaching "flood" proportions. The Board felt this approach on the part of the employer overlooked the requirement of Na-

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7 East Bay Union of Machinists, Local 1304 USW v. NLRB, 322 F. 2d 411, 415 (D.C. Cir. 1963).


9 The name of an industrial relations executive at General Electric.

10 The General Electric case has reached the Federal Court of Appeals and is likely ultimately to go to the United States Supreme Court.
that the statutory representative is the one with whom the employer must deal in conducting bargaining negotiations and that he can no longer bargain directly or individually with the employees.

Collective bargaining does not mean the necessity that the public employer must ultimately capitulate to demands. It does not mean that there is a necessity to make some concessions as an outgrowth of every demand. Good faith bargaining does not sanction an administrative body or a court undertaking to exercise its wisdom to determine if a particular proposal was reasonable or unreasonable.

The United States Supreme Court in interpreting the meaning of good faith collective bargaining under the National Labor Relations Act has recognized three categories of proposals:

1. Those that are illegal and therefore cannot be bargained about.
2. Those that may be bargained about if the parties voluntarily wish to do so.
3. Those that are mandatory and must be bargained about.

Proposals that come within the category of wages, hours and other terms and conditions of employment fall within the mandatory area. Certainly falling within conditions of employment would be such things as assignments during out of school hours to supervision of extra-curricular events, class loads, class size, use of teacher assistants and rest periods.

It would appear that decisions on curriculum content could technically be viewed as remaining solely the prerogative of administration and the school board. In this respect, however, it would seem wise for the school board not to adopt a too literal approach. Many employer leaders in industrial relations adopt the attitude that it is not wise to be too technical about drawing the line on the ground that the subject-matter does not fall within the mandatory area. These leaders feel industrial peace will be best insured if the employer is willing to discuss most matters at the bargaining table. A prominent School Board member adopts the same attitude. Of course those who share this attitude realize that bargaining does not mean capitulation.

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13 White v. N.L.R.B., 255 F. 2d 564 (5th Cir. 1958); N.L.R.B. v. American Aggregate Co., 335 F. 2d 253 (5th Cir. 1964).
14 Id at 466-67; Diercks Forest, Inc., supra note 6.
16 Story in Theory Into Practice, Vol. IV, No. 2, p. 61 (1965). Published by Ohio State University.
It is very significant that the United States Supreme Court recognized that a party cannot be forced to bargain on certain matters that are illegal. This principle answers objections of those who attempt to argue that public employee bargaining is blocked by statutes which may exact budget limitations, by such things as state salary laws and by state tenure, retirement and pension laws. The principle recognizes that it would be improper to ignore the problem of public employee bargaining colliding with existing statutes. This recognition, however, requires a realistic appreciation of what it means to collide with the statute. For example, even if there is a state tenure law setting forth reasons for “for cause” discharge, it would still be possible to bargain for intermediate grievance procedure.

In facing up to whether there has been good faith bargaining, it needs to be recognized that it is necessary to evaluate the facts. This can be difficult because it requires an objective evaluation of the parties’ attitude as reflected in their course of conduct during negotiation. In this area it is significant to take account of the National Labor Relations Board language in the General Electric case. The Board commented that “in challenging the trial examiner’s finding ... General Electric argues that an employer cannot be found guilty of having violated its statutory duty where it is desirous of entering into a collective bargaining agreement, where it has met and conferred with the bargaining representative on all required subjects of bargaining as prescribed by statute and has not taken unlawful unilateral action, and where it has not demanded the inclusion in the bargaining contract of any illegal clauses or insisted to an impasse upon any non-mandatory bargaining provision. In compliance with the above General Electric further argues that an employer’s technique of bargaining is not subject to approval or disapproval by the Board.” To this argument the Board responded, “General Electric reads the statute requirement for bargaining collectively too narrowly ... An employer may still have failed to discharge its statutory obligation to bargain in good faith. As the Supreme Court has said, ‘The Board is authorized to order the secession of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching an agreement’ ... Good faith bargaining thus involves both a procedure for meeting and negotiating, which might be called the externals of collective bargaining, and a bona fide intention, the presence or absence of which must be discerned from the record.’”

17 Supra note 8 at 1499.
In connection with this statement it is significant to note the comments of the Chairman of the National Labor Relations Board. He states: "The decision does not hold that an employer may not after appropriate bargaining make a fair and final offer to the Union representing his employees. It does not hold an employer may not criticize union leaders or proposals. It does not hold that an employer may not communicate with his employees. Those who tell you differently do you a disservice. The Board simply applied accepted principles to a unique bargaining situation."

In connection with the evaluation of good faith, certain types of conduct have been held to be sufficient of themselves to establish a lack of good faith bargaining. A refusal to discuss or provide data necessary to intelligent discussion of a subject within the mandatory area of bargaining is an example. So also has insistence upon including in a contract a proposal that is outside the scope of mandatory bargaining.

An appreciation of the principles set forth helps to give realistic meaning to the term good faith collective bargaining and has convinced certain courts and legislative bodies that permitting public school employees to bargain collectively does not invade school board authority. Essentially this is because even though collective bargaining does place certain responsibilities upon the employer, there is nothing in the principle stated which forces capitulation to demands. It does not, therefore, appear accurate to assert that school boards are forced to delegate away authority. Furthermore, the situation is such that the employer representatives at the bargaining sessions must seek ratification of the Board of Education. This is no different than in the case of industry representatives as respects their Board of Directors.

It is, of course, apparent that when the school board undertakes collective bargaining, as it has been defined, it undertakes burdens which it does not need to assume if it does not bargain collectively. The assumption, however, of these burdens does not mean that the board has delegated away its authority. In this respect it is interesting to recall that the history of industrial relations establishes that when the employer was first confronted with the statutory necessity of bargaining collectively, he complained that he was being forced to delegate away his authority. The courts did not agree with him. The courts recognized that he did assume additional bur-

19 McCulloch, Address delivered Oct. 28, 1965 at the annual meeting of Texas Industry, reported in 60 L.R.R.M. 145.
dens but that he still retained ultimate authority to make final decisions.

In the public employee field if legislative bodies decree or courts permit collective bargaining, it represents a decision, just as it did in the industrial field, that employee relations will be benefited. It does not appear that this decision can be logically frustrated by the argument that the provision results in forcing a school board to delegate away its authority.

It is now appropriate to turn attention to the examination of the existing status of public employee collective bargaining at the state level.

A number of states, either by judicial decision or by statute, are showing an awareness of the realities of the situation and an understanding of what collective bargaining really means and are not influenced by the arguments previously summarized as to why collective bargaining on the part of public employees should be treated as illegal.

Some states by judicial decision—entirely independent of supporting state statutes—have approved collective bargaining if two conditions exist:

1. The parties enter into it voluntarily.
2. There is no prohibitory state statute.

The leading case exhibiting this philosophy is the 1951 Connecticut Supreme Court decision of *Norwalk Teachers Association v. Board of Education.*

Some jurisdictions have not been content with the possibility that collective bargaining will be initiated through voluntary agreement as sanctioned by judicial decision. These states have passed statutes sanctioning and indeed requiring collective bargaining and in many instances laid down rather specific ground rules. The State of Wisconsin furnishes perhaps the best and most comprehensive example of a statute of such type.

The statute gives the covered employees the right to join labor organizations and to be represented by such organizations in conferences and negotiations with their employers or their representatives on questions of wages, hours and conditions of employment.

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23 ALASKA LAWS 1959, Ch. 108; MASS. ANN. LAWS 40, §46 (1960); MINN. STAT. ANN. §179.52 (Supp. 1960); NH REV. STAT. ANN. §31.13 (1956); ILL. ANN. STAT., Ch. 127, §63b109(7) (Smith-Hurd Supp. 1960); FLA. STAT. §839.22(1) (1959); R.I. GEN. LAW, §§36-11-1—36-11-5 (Supp. 1959).

24 WIS. STATS. ANN. §111.70
The employees also have the right to refrain from any and all such activities. The statute prohibits municipal employers or employees from interfering with the rights granted by the legislation through discrimination in regard to hire, tenure or other terms or conditions of employment.

The Wisconsin Employment Relations Board, which is authorized to administer the statute, has made it clear that any employee organization whose purpose is to represent municipal employees in conferences and negotiations with their employer on questions of wages, hours and conditions of employment is considered a labor organization regardless of what name the employees may use to describe their organization. For example, a local teacher association affiliated with the Wisconsin Education Association has been considered a labor organization for the purpose of the statute.

Under specific provisions of the statute the Wisconsin Employment Relations Board passes upon questions of representation and is empowered to enforce the prohibited practice section. Final orders of the Board are subject to judicial review.

The statute empowers the WERB to hold elections and determine questions of representation. The Act excludes crafts from any unit that the municipal employees may select. The WERB has determined that the term "craft" includes professional employees such as teachers. Therefore, teachers are assured of being in a separate unit. In respect to a craft the law provides that the Board shall not order an election among employees in a craft unit except upon separate petition initiating representation proceedings in such craft unit.

The Board has further determined that supervisors are agents of the municipal employer within the meaning of the statute and, therefore, cannot be included in the same collective bargaining unit with other employees. This determination has been made even though the statute does not specifically exclude supervisory employees from the definition of employees. The reasoning has been that the inclusion of supervisory employees in the same bargaining unit as the employees whom they supervise would conflict with the supervisors' responsibility in performing their management function and would, therefore, tend to interfere with protected rights of employees to organize and to be represented by organizations of their own choosing. In spite of this attitude, however, the Board has held that mere membership of supervisors in a labor organization is not prohibited by the statute. The Board has decreed that the ratio of their membership and the question as to whether supervisors hold an office or participate in the formulation of the bargaining policies and programs of the labor organization is the really significant
factor in determining whether such labor organization was dominated by the employer.

In the industrial and business field exclusive bargaining has become a way of life. Experts from both management and labor concede that it is not practical to expect an employer to bargain with any but the union that represents the majority of the employees in an appropriate unit. In the public employee field, however, the objection has been made that there is something unconstitutional about providing for exclusive bargaining on the ground that every citizen has a right to petition his government.

Although there have been some technical arguments to the effect that the Wisconsin Statute did not provide for exclusive bargaining with the organization held to represent the majority in an appropriate unit the Wisconsin Employment Relations Board has interpreted Section 111.70(4)(d) of the Act as so providing. The Milwaukee School Board25 and other municipal employers have accepted such interpretation as the state of the law and there has been no effort to upset the position by judicial decision. The Wisconsin law does, however, provide that any individual employee in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing. This proviso answers the objection of those who assert that there is something unconstitutional about providing for exclusive bargaining in the public employee field. By permitting the presentation of grievances by an individual or minority the Wisconsin Act sets up a technique which will enable the employer to learn certain facts which it may want to use when it bargains with the majority and citizens and minority groups are not denied the right to petition their government.

From the factual standpoint the indications are that almost all municipal employers clearly desire to bargain on an exclusive basis with the organization that has been selected as the representative of the majority.

In an effort to take care of a bargaining impasse or refusal to negotiate the Wisconsin Statute introduced a provision for fact-finding. If an employer or a union fails or refuses to meet or negotiate in good faith at reasonable times in a bona fide effort to arrive at settlement or if after a reasonable period of negotiations the parties are deadlocked, the WERB is empowered to appoint a fact finder when it is satisfied that a deadlock exists. The fact finder is authorized to hold hearings and must make written findings and recommendations which are to be made public. The fact finder has no power to enforce his recommendations. The WERB has held

25 Supra, note 16.
that the statute does not impose any limitations on recommend-
tations for the solution of the dispute. The Board has said "that to
imply a prohibition against making recommendations to be applied
in the future would hamstring and nullify the fact finding proce-
dure." The hope is that the promulgation of recommendations will
enlist the support of public opinion in finding a solution. The cost of
fact finding is to be shared by the parties.

The WERB is directed not to initiate fact-finding proceedings
in any case when the municipal employer, through ordinance or
otherwise, has established fact finding techniques substantially in
compliance with the statute.

Collective bargaining has as an end product the objective of an
employer-employee contract. The Federal law recognizes this. The
Wisconsin Statute specifically states that upon the completion of
negotiations with an employee organization representing a majority
of the employees in a collective unit if a settlement is reached, the
employer shall reduce the same to writing either in the form of an
ordinance, resolution or agreement. It is stated that the term for
which a contract shall remain in effect shall not exceed one year.

Although it appears that the Wisconsin Statute pertaining to
public employee bargaining is the most comprehensive to date
there is other current legislation. Legislation particularly restricted
in operation to teachers was passed in 1965 in Connecticut, Oregon,
Washington, and California.

The California provision which became effective in September
1965 is particularly interesting. The statute was passed for the
specific purpose of removing education personnel from the impact
of the Government Code which controlled general public employee
relations.

The history of the legislation reveals clearly that it does not re-
quire good faith bargaining as this article has defined it. It does re-
quire a governing Board or such administrative officer as the Board
may designate to meet and confer with representatives of employee
organizations upon request with regard to all matters relating to
employment conditions and employer-employee relations . . . all
matters relating to the definition of educational objectives, the de-
termination of the context of courses and curricula, the selection of
text books and other aspects of the instructional program to the
extent such matters are within the discretion of the Board.

The California statute makes clear that it does not adopt the
theory of bargaining with an exclusive representative. The Act says
that "in the event there is more than one employee organization

27 Amendment to 3501 of Government Code and Addition Art. 5 (commencing
with §13080) to Chap. 1 of Division 10 of Part 2 of Education Code.
representing certified employees, the public school employer . . . shall meet and confer with the representatives of such employee organizations through a negotiating council . . . provided that nothing herein shall prohibit any employee from appearing in his own behalf . . .” It is provided that “the negotiating council shall have not more than nine nor less than five members and shall be composed of representatives of those employee organizations who are entitled to representation on the negotiating council. An employee organization representing certified employees shall be entitled to appoint such number of members of the negotiating council as bears as nearly as practicable the same ratio to the total number of members of the negotiating council as the number of members of the employee organization bears to the total number of certified employees of the public school employer who are members of the employee organizations representing certified employees.”

The Connecticut Statute\(^2^8\) has some interesting provisions. It expressly recognizes that a bargaining unit may be appropriate which includes supervisory (other than the superintendent) and non-supervisory employees. Or there may be two separate units—one for all employees in positions requiring a teaching certificate and the other for all employees in positions requiring a supervisory certificate. The legislation provides that when 20% of either the teaching or supervisory employees file a petition with the state commissioner of education for separate representation separate units will be set up. The representative selected is to be the exclusive representative in the unit with a proviso similar to that in Wisconsin as to the right of individual employees to present grievances. The statute sets up a technique for determining the question of representation.

The Michigan Act\(^2^9\) applies to all public employees. It authorizes the Michigan Labor Mediation Board to determine the appropriate unit and to conduct a representation election. It requires public employers to negotiate in good faith with the designated exclusive representative on “rates of pay, wages, hours of employment or other conditions of employment.”

The existence of a statute in the field of public employee bargaining is of major significance. As has been indicated, courts may sanction voluntary bargaining in the absence of statute but this will not always insure the desired result. For instance, a statute can spell out election procedure to be used in the determination of a majority representative in an appropriate unit. It can make clear that bargaining is to be on an exclusive basis with the organization

\(^{2^8}\) Public Law 298 (1965).
\(^{2^9}\) Public Law 379 (1965).
that represents the majority of the employees in an appropriate unit. It can express other intents. If there is no statute, whatever attempts are made at bargaining may break down in arguments over procedure and over such questions as exclusive representation.

Since the Wisconsin Statute was used as an example, it perhaps should be said that the statute does present some language which has resulted in arguments as to intent of meaning. There will undoubtedly be amendments by way of clarification and additions. In the field of public employee bargaining—still somewhat of an experimental area—it may in some jurisdictions be difficult to pass a statute which is a model of clarity. Most statutory efforts, however, will produce a better result than to depend upon voluntary arrangement if the community feels that employee relations will be fostered by stimulating collective bargaining.

In some states, including Wisconsin, there is a provision aimed at assisting in connection with negotiations between the public employer and employees. It is the provision for mediation when such help is requested by both parties. In Wisconsin when such request is made, the Wisconsin Employment Relations Board may function.

There are a number of additional matters that merit discussion if public employee bargaining is approved in a particular jurisdiction either by judicial decision or through legislation.

One is the question of whether a public employer can enter into a Union Security Agreement with a majority union requiring that all employees in an appropriate unit must within a set period of time after employment (commonly thirty days) join the Union which is recognized as representing the employees in the appropriate unit. Unless outlawed by right to work laws, this term can be incorporated and enforced in labor contracts and in industry. To date there has been no decision which has sanctioned such a provision in the public employer-employee area. Indeed, a 1959 Montana case has come out forcibly against the validity of the Union Security Clause.

Two other questions are whether a negotiated contract could provide for the agency shop or check-off of dues.

The agency shop is designed to meet the argument that no individual should be compelled to join a Union (and become subject to its discipline) against his will as a condition of getting or keeping

30 ALASKA LAWS 1959, Ch. 108; FLA. STAT. §839.22(1) (1959); ILL. STAT. ANN., Ch. 127, §63b109(7) (Smith-Hurd Supp. 1960); MASS. ANN. LAWS, Ch. 40, §4c (1960); MICH. COMP. LAWS, §§422-201—423-208 (148); MINN. STAT. ANN. §179.52 (Supp. 1960); N.H. REV. STAT. ANN. §31.3 (1955); N.D. LAWS, Ch. 219 (1951); ORE. REV. STAT. §662 (1953); R.I. GEN. LAW §§36-11-1—36-11-5 (Supp. 1959); Wis. STATS. §11.70 (1959).

a job, and the counter-argument for eliminating an employee who is willing to accept the benefits of collective bargaining without paying his fair share of the cost of the bargaining process. The opponents of the agency shop contend that it is unfair to require an employee who is unwilling to join a union to pay money into its treasury.

It would appear that if the legislature of a state so decreed, language looking toward the permission to include a union shop clause or check off of dues provision in a contract would be found lawful in some jurisdictions. If the legislature did wish to grant such permission, it would undoubtedly require a more than just simple majority vote of the employees. Politically it might be quite difficult to induce a legislature to sanction an agency shop clause in a contract involving public employees. Certainly if the legislature was disposed to act in respect to approving the agency shop, it should put up a barrier against money paid in by non-union men being used for political or other purposes not germane to the collective bargaining process.

Even if legislatures did make the union shop, check-off dues and agency shop permissive clauses in contracts in the public employee field, it seems reasonable to predict that many state courts would find the provisions improper. It would be quite likely that such courts would find applicable the basic philosophy that the Montana Supreme Court expressed in dealing with the problem of insertion of a Union Security Clause into a contract when no statute existed. The Court concluded that agreements by the board to hire only union members would be illegal discrimination. An Ohio Court found a provision for check-off of dues invalid on the reasoning that the laws of this state and the regulations of the civil service commission cover fully all questions of wages, hours of work and conditions of employment affecting civil service opportunities. There is, said the Court, no authority for delegation.

Another significant question is whether a negotiated contract can provide for binding arbitration of grievances arising under a contract. Many attacks on this kind of provision manifest a failure to discern that the proposal is limited to the arbitration of grievances arising under a contract. The assumption that induces many to object appears to be that an arbitration proposal involves calling in an outsider to write a term into a contract if the parties cannot agree. No one is presently seriously making such proposal.

32 For a review of the problem see the late Senator Taft's comments in Senate Labor Committee Report, 80th Congress, First Session, Report No. 105, April 17, 1947.
33 Supra, note 31.
34 Hagerman v. Dayton, 147 Ohio St. 313, 71 N.E. 2d 246 (1947).
Numerous courts, however, have given consideration to the matter of arbitration of grievances under a contract. Those who oppose the clause as invalid reason that it constitutes a complete abdication of school board authority. The Ohio Court, for example, has indicated that it would be a vain and futile thing for a board to refer issues to an arbitrator who with the best intentions might make an award which because of conflicting statutes it would be legally impossible for the board to accept.

This is essentially the same argument outlined in this article in connection with some objections that have been made to collective bargaining. In facing up to the argument it was pointed out that it is always necessary in the field of public employee bargaining to be aware of the problem of colliding with statutes. So, too, in the arbitration area it is obvious that an arbitrator could not render a binding decision which would collide with some existing statutes. Some statutes would, indeed, stand as a barrier against referring matters to an arbitrator. For example, if a tenure statute specifically sets up the procedure in respect to discharge for cause, the statute must be followed and the matter cannot simply be referred to an arbitrator.

A recently signed contract between a union and the City of Milwaukee, Wisconsin, furnishes an illustration of what can be done to avoid conflict with statutes by way of providing for arbitration in a labor agreement. In Milwaukee the law imposes responsibility on the Civil Service Commission to decide disciplinary disputes. The labor contract, therefore, makes provision that such disputes will be referred to an arbitrator for an advisory opinion. This opinion will be sent to the Civil Service Commission for ultimate decision. Under the contract the Civil Service Commission is still allowed sole authority to arbitrate grievances on promotion and job evaluation. Disputes on seniority rights and the application of the contract's terms on wages, hours and working conditions are to be referred to binding arbitration. The arbitrator is to be selected from a panel supplied by the Wisconsin Employment Relations Board.

The New York City Board of Education agreement with its teachers—perhaps the most comprehensive teacher contract that has been negotiated to date—shows a voluntary effort to incorporate the kind of arbitration clause that is legal. Under the New York contract the recourse to an arbitrator is available only for grievances involving the application or interpretation of the agreement.


36 Although the Wisconsin Statute makes no provision for introducing an arbitration clause into any agreement that may be reached, the legality of such provision is supported by City of Madison v. Frank Lloyd Wright Foundation, 20 Wis. 2d 361, 122 N.W. 2d 409 (1963).
The arbitrator is specifically prohibited from making any decision which is contrary to or inconsistent with the terms of the agreement or which involves the exercise of discretion by the Board or limits or interferes in any way with the powers, duties and responsibilities of the Board under law. It is quite obvious that the arbitrator is not put in a position to write in contractual terms.

Indeed a recent decision of an arbitrator under the New York City contract reveals one individual attitude as to just how narrow the arbitration power can be viewed.\(^{37}\)

Under the grievance procedure provided in the New York contract the Superintendent of Schools in step 3 ruled that a teacher by reason of terms in the contract was entitled to a duty free lunch period "at the earliest possible date." The teacher brought the matter to arbitration on the ground that the Superintendent's decision did not provide him and "other employees similarly situated" with compensatory time off equivalent to the amount of duty free lunch time that they failed to receive during approximately 36 weeks of the 1963-64 school year.

Both parties requested the arbitrator to limit his decision in the first instance to the arbitrability of the narrow issue presented by the teacher; that is, the right to compensatory time off.

The decision was that the question as presented was not arbitrable.

The reasoning of the arbitrator was as follows: The history of negotiations showed that the independent opinion of an arbitrator was to be sought only as to the meaning of the agreement's substantive provisions regarding working conditions. (In other words it did not envision award of a remedy which would cost money.)

It was felt that the arbitrator could not make an award which would cost money because the Education Law in New York clearly showed that the Board could not delegate its responsibility for use of available funds. The arbitrator also commented that the Education Law dictated that the Board could not delegate its authority as regards extent of needed instruction.

The decision stated that an arbitrator cannot intrude upon important areas of the Board's "discretion" and "policy making" function as set forth in Education Law. If the legislature had intended to make it possible for arbitrator to substitute his judgment in such areas it could have and would have made such intent clear, the arbitrator reasoned.

\(^{37}\) Board of Education of City of N.Y. and United Federation of Teachers, 44 LA 929 (1965).
The arbitrator talked about compensatory time off adding up to as much as $7,000,000 to $8,000,000 or a school closing of approximately 12 days. It is surely obvious that this had an affect on the arbitrator although he states that potential liability makes no difference. He said that even if it were $10 "the basic conclusion must be and is that the Board cannot delegate to the arbitrator its responsibility for determining how to allocate its funds."

This attitude it needs be repeated is because of the way the arbitrator read the New York Education Law Section 2554(9), 2576(5) and 2576(7).

The arbitrator took occasion to warn that even if the Education Law did not stand in the way of the arbitrator a contract would have to be very clear as to intent before the arbitrator could disburse funds by way of remedy.

After concluding as he did the arbitrator undertook to set forth some observations. He felt that there was still merit in the arbitration provisions in the New York contract. He said "in the present situation the Union has been able to achieve significant gains in connection with the resolution of grievances in that under Article VI (which deals with grievance procedure and arbitration) of the contract the Board has committed itself to arbitration of a broad range of substantive issues that may arise concerning working conditions, especially since supervisors are understandably reluctant to be brought to the attention of those in authority above them on charges of unfairness to teachers under them."

The arbitrator went on to say: "A large complex educational system inevitably lends itself to situations where there may be an abuse of power by those in supervisory positions. The recognition of this possibility by the Board and the Union with their resultant agreement on the beneficial provisions of Article VI is an important step forward in the area of improving working conditions and undoubtedly has an influence on those in direct authority with recognition by them of the contractual rights as well as the dignity and respect due a person who as a result of years of preparation has attained professional status."

In view of such observation it should be remembered that in the arbitration matter just discussed in step 3 of the grievance the teacher received a ruling that she was to be given duty free lunch periods "at the earliest possible date." It was not too long after such decision that additional personnel were assigned to the school and duty free lunch periods were provided.

All that the arbitrator concluded was that he had no jurisdiction to award compensatory time off to make whole for free time lost in the past.
The *Norwalk* case exhibits judicial approval of an arbitration clause.\(^{38}\)

No discussion concerning the right of teachers to engage in collective bargaining ought to terminate without some mention of the legality of public employee use of certain concerted activities intended to exert pressure on school boards with the objective of attaining certain contract goals.

The activity that suggests itself for analysis in the first instance is the right to strike. In the field of industrial relations the right is largely preserved by statutes and courts. In the field of government the right has been found not to exist. To date the judicial attitude in this respect is uniform. All courts and authorities\(^{39}\) agree that the right does not exist. The philosophy which supports the conclusion has been variously expressed. The Attorney General of Minnesota told the Board of Regents of the University of Minnesota that "should we accept the doctrine permitting strikes, we would in effect transfer to such employees all legislative, executive and judicial powers now vested in the duly elected public officers." Woodrow Wilson called strikes by public employees "an interminable crime against civilization."\(^{40}\) The *Norwalk*\(^{41}\) case quotes Franklin D. Roosevelt, whom it identifies as certainly no enemy of labor, as saying, "A strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operation of government, and such action is unthinkable and interminable." *Norwalk* goes on to say, "Under our system, the government is established by and run for all the people, not for the benefit of any person or group. The profit motive is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of a union of government employees is in direct contravention of this principle."

As far as striking against school boards is concerned, there is an additional good argument. Teachers cannot forget that they work in a delicate area where it is of the utmost importance that young people be encouraged to respect the legitimate authority of school personnel. It is submitted that teachers risk such respect when they go on strike. Even granted that sometimes they may have a very good cause, it appears that immature young people in school may not be able to appreciate the fact and may very likely feel that auth-

\(^{38}\) 138 Conn. 269, 83 A. 2d 482 (1951).


\(^{40}\) These attitudes are quoted by Vogel in *What About the Right of the Public Employee*, 1 Lab. L.J. 604 (1950).

\(^{41}\) *Supra*, note 31.
ority has been flaunted. Certainly it seems very disconcerting when teachers and teachers' unions openly defy existing law and assert that regardless of the law, they will strike.

It would seem that teacher picketing of the schools may have very much the same effect on young minds as the strike effort. Although the courts have continued to recognize that there is much free speech in picketing, they have also clearly acknowledged that picketing contains elements other than free speech. It may very well be, therefore, that a state by statute may adopt a policy against picketing of schools by teachers. If such policy is enunciated, courts could very well sustain the statute.

Those who argue that teachers should have a right to strike assert basically that without the right, teachers have no realistic way of advancing their cause against an adamant school board. They further contend that the general language condemning strikes on the part of public employees should not be applied to all employees but that the decision should be realistically grounded on the emergency created. Those who make this argument would grant that police and firemen should have no right to strike but they would, for example, not give the same support to a law forbidding street maintenance employees from striking. Even on the assumption that there might be some merit in such distinctions, it is by no means clear that courts would or should conclude that teachers have the right to strike. It does not seem unrealistic to recognize extreme interference with public welfare when the education of a child is affected by the absence of teachers from the classroom.

In connection with the effect that striking and picketing may have upon children it is interesting to note the recent language of George Watson, former long time State Superintendent of Public Instruction in the State of Wisconsin. The Milwaukee Journal and Sentinel in the Spring of 1965 quote him as saying about picketing on behalf of civil rights in alleged de facto segregation situations, "School children should not be used as weapons in philosophical or political disputes and given dramatic examples of law violation. Education based on law violation is poor education." If the language is applicable to civil rights endeavors it is surely also applicable to similar pressure on behalf of wages, hours and conditions of employment where the state of the law outlaws strikes. While it is true that school children are not likely to be on picket lines in support of a teacher strike, the children are given an example of teachers ignoring the law prohibiting strikes.

The fact finding process provided in the Wisconsin Statute previously described is designed to give public employees help in lieu of the right to strike. It must be remembered, however, that the fact finder under the Wisconsin Statute has no power to enforce his decision. Fact
finding is grounded upon the hope that the sympathy of public opinion will be enlisted behind a fact finding conclusion.

It will be necessary to wait for experience under the Wisconsin Statute to determine if public opinion will so respond when a response to a fact finding holding may require an increase in taxes. The answer will not always appear as a result of action taken immediately after a fact finding decision has been rendered. Current budget problems may force postponement of implementation of a fact finding decision. Ultimately, however, information can be gathered on the efficacy of fact finding decisions.

If it should be finally discovered that the fact finding is not in reality influencing public opinion and in turn inducing a change in the position of the public employer or a union, the fact finding is really not much of a substitute for the right to strike. If this were found to be the result, the writer suggests the possibility of further experimentation with the fact finding process. If fact finding is not implemented at the local level, provision could be made for the decision to be reviewed by an impartial out-of-state fact finding board made up of a leading professional educator, a civic leader and impartial chairman. Provision could be made to permit teacher strikes if the review fact finding body supported the initial findings and the board remained adamant. If this happened, it would appear that school personnel ought to be able to convince pupils and the general public that such a strike does not flaunt legitimate law and authority.

There presently remains the question as to whether, other than fact finding, there is any effective pressure that teachers can use in place of the strike. The National Education Association has proposed sanctions. Under this suggestion teacher organizations encourage teachers not to return a signed contract and advise teachers not to accept jobs in the area. It is true that if effective sanctions have the same result as a strike in the sense that teachers are not in the classrooms. The great difference, however, is that teachers are not leaving their posts during a contract term.

It is hard to find any illegality in the sanction which is sparked only by an appeal to teachers not to sign contracts or take jobs in an area. This sort of appeal is surely free speech and the individual certainly has a constitutional right to determine if he will work. Illegality would appear only if the organization induced some kind of boycott pressure which resulted in teachers who did not heed the call to sanction losing job opportunities.

In spite of the fact that strikes by public employees and teachers are held to be illegal, they have occurred and are likely to take place again. From a purely practical viewpoint teachers en masse cannot be discharged even though their conduct is treated as illegal. Efforts have
been made to attack the strike problem. One is to aim legislation at
the union treasury if the union calls the strike. Another approach is
to pass legislation similar to the Condon-Wadlin Law in New York.42
Under 1963 amendments to the New York Act provision was made for
penalties against those who strike in the form of no salary increases
for six months, probation with loss of tenure for one year and salary
deduction to twice the daily compensation. Prior to the time the amend-
ments were passed, harsher penalties in the New York law were not
enforced. The amended Act was to remain in effect until July 1, 1965.
Any taxpayer could initiate the action. The amendments have expired
and the law has reverted to the harsher Condon-Wadlin penalties.

A complete analysis of experience under the Condon-Wadlin Act
is presented in a recent issue of ILR RESEARCH43 published by the
New York State School of Industrial and Labor Relations of Cornell
University, New York. The author concludes that the Act has been used
update to stop strikes but asserts this is probably because of the lack
of politically powerful employee organizations in the areas. The facts,
it is stated, indicate that the act has never been fully invoked against a
large group when that group was a strong union.

Since the amendments to Condon-Wadlin adopted on April 23, 1963,
there have been four strikes of public employees in New York City.

On January 31, 1965 the largest strike of public employees in New
York City's history was ended. After 28 days the striking welfare
workers, members of a Union, voted to accept the recommendation of
a citizen's committee appointed by Mayor Wagner. The major stumbling
block to settlement of the strike had been the Condon-Wadlin Act and
the committee recommended that the city delay imposing penalties under
the Act until their constitutionality could be tested by the Unions.

In July 1964 the Act was invoked in New York City against a
one-day wildcat strike of 648 ferry worker members of National Mari-
time Union. The workers did sign waiver of three days pay—one day
for their absence from work and two days as a penalty under Condon-
Wadlin. But, in spite of the fact that the Act provided that strikers
were not to receive pay increases for six months, the workers got an
immediate increase won by the Union of fifty cents an hour over a
three year period.

In August 1964 the New York City day camp teachers, members
UFT, staged a "mass resignation" for six days. They won salary in-
creases and other benefits. It is not clear whether the Condon-Wadlin
Act was actually invoked. The Superintendent of Schools stated, "Since

discussion involving the constitutionality of the Act.
43 Rosenzweig, The Condon-Wadlin Act Re-examined, ILR Research, Vol. XI,
No. 1, pp. 3-8 (1965).
settlement has been reached I am sure that the Board of Education will want to exercise every bit of leniency within the provisions of the law.”

The 1965 New York City transit strike furnished another example of a settlement without invocation of Condon Wadlin.

After analyzing the Condon-Wadlin experience, the author of the article in ILR RESEARCH recommends repeal of the Act and passage of the bill proposed in the 1962 Staff Report to the New York Joint Legislative Committee on Industrial and Labor Conditions. Among the recommendations are (1) Greater flexibility in penalties by replacing the Condon-Wadlin penalties with those for misconduct as contained in the State Civil Service Law, permitting choice between reprimand, fine of not more than $100, suspension without pay for not more than two months, demotion or dismissal. (2) Addition of a requirement that the State Attorney seek an injunction immediately when the law has been violated.

And most fundamental of all, the suggestion is made that the law guarantee the right of public workers to join or not join employee organizations, that there be provisions for collective dealing and grievance processing so that some of the causes of strikes will be eliminated and that further there be provisions for mediation and binding arbitration of disputes arising under the collective agreement.

Another way of dealing with strikes is through clauses negotiated in the labor agreement. The contract could provide that a strike called by the union would entitle the employer to recover specific named damages. The contract could further provide that employees taking part in an unauthorized strike would be subject to discharge or loss of pay and certain benefits. In the case of such a strike the union could be obligated to immediately order strikers back to work.

The most effective way of curbing strikes is for both parties to strive to make collective bargaining work. Furthermore, many responsible leaders in the labor movement recognize that strikes in the field of public employment are most often not in the public interest. There is hope that these labor leaders will cooperate with public employers and agree on the best way to prevent the public employee strike.

Looking Toward The Future

It seems appropriate by way of conclusion to make some comments looking toward the future. In this respect it is logical to return directly to thinking about the issue of public employee bargaining versus school board authority. This article has had the intent of establishing that school board authority will not be undermined just because collective bargaining is decreed by law. It is submitted that the tide is running in favor of giving public employees more bargaining rights. It does not appear that the trend can be stopped for long by school boards. It seems that boards will have no more success in this respect than the industrial
employers of the 1930's who, as has been previously commented upon, tried to halt the movement to give the laborer increased bargaining rights with very much the same kind of arguments that some boards of education are using today. The principal contention was that of improper delegation of authority.

It is submitted that boards of education might very well stop trying to label provisions for collective bargaining illegal and turn their attention toward working out procedures which will make of public employees bargaining something which is practical and expeditious. There definitely are problems in the procedure area. Budget dates, for example, suggest setting up an intelligent time table for bargaining. Boards will undoubtely want to give consideration to the question of who should represent them at the bargaining table. The board will want to face up to whether it might be unwise to have the superintendent the constant negotiator. Some limitations on size of the bargaining teams may be in order. If provisions are to be made for fact finding, the matter of consideration of time tables becomes even more necessary.

It is particularly important to consider the role of the Superintendent of School. He holds the position of executive officer of the Board and is also charged with providing professional leadership and administrative direction to the teaching staff. He cannot avoid playing a key role in negotiations but it does seem unwise to have the Superintendent personally participate at the bargaining table or elsewhere in the actual mechanics of bargaining. Because of his intimate knowledge of all aspects of administration, including budget making, he can give realistic guidance to the bargaining committee. He should, however not be cast in any role which would deter employees from candidly seeking his advice.

The composition of a bargaining committee seems all important. Many school administrators assert that a Board of Education should not be larger than 5 to 7 members. It has been further suggested by some school administrators that if the Board is of such size the entire body should sit at the bargaining table. This may work in communities that are not too large and where the issues are not complex. It seems that in larger communities, where problems tend to become more complex, the entire Board will not be able to contribute time to attend all bargaining sessions. Then, too, some Boards are larger than 5 to 7 members. Certainly bargaining tends to become too unwieldy if a large Board sits constantly during negotiations. If it is not feasible time wise or size wise for the entire Board to sit throughout all bargaining sessions it will be necessary to work out some kind of bargaining committee arrangement whose membership may shift from time to time. The committee should seek the services of a negotiator skilled in collective bargaining and could very well include a lawyer experienced in the area of employee relations.
Discussions by some educators seem to indicate that there will be no need for such specialists because unless bargaining is to take on the nature of "horse trading" the Board and the employees should honestly exchange facts and arrive at decisions in very short order. It is true that bargaining should not be "horse trading." Even though it is not it does, however, take time and expertise of high order to resolve issues and positions honestly assumed by both sides of the bargaining table. The experience of those who have actually participated in negotiating sessions induces this realistic conclusion. The bargaining committees on both sides should have the benefit of advice of the specialists in substantive areas under consideration.

Most importantly there needs at all times to be realistic communication between any negotiating committee (if the full Board does not sit) and the Board of Education.

A problem requiring the most careful thinking is the procedure relative to open bargaining sessions. It is unrealistic to carry on collective bargaining entirely through open meetings. On the other hand in the public employee field the people have a significant right to know. At appropriate intervals the public must be given the position of the parties.

Many states have statutes requiring open meetings of governmental bodies. Wisconsin is illustrative. The Act provides that no formal action of any kind shall be introduced, deliberated upon or adopted at any closed executive session or closed meeting of any state and local governing and administrative bodies. Certain exceptions are set forth. A 1965 opinion of the Wisconsin Attorney General finds the exception broad enough to cover the negotiations of a municipality and a labor organization. However, it is made clear that the formal introduction, deliberation and adoption by the elected body of the bargaining recommendations must be at open meetings.

For reasons indicated in the body of this article, it seems expeditious to guide collective bargaining through specific statutory provisions. Collective bargaining is not an evil. There are, of course, legitimate pressures in collective bargaining. Although the pressure does not require capitulation, it is intended to create an atmosphere which will insure a give and take in the form of responses to demands and will often result in counter-proposals and full explanations when demands are rejected. This process is calculated to produce some sane and logical compromises. By a succession of free choices each party determines the order of importance of his bargaining proposals. As these proposals are presented, each party balances what is desired against known costs of unresolved disagreement. These costs on the one side may be such things as loss of competent employees and the fostering of a general low morale, and

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on the other side the loss of community support if unreasonable demands are made.

Finally, it seems important to draw to the attention of those school boards that feel that collective bargaining means capitulation the philosophy expressed by the United States Supreme Court in a December 1964 decision. The Court clearly revealed that collective bargaining does not connote capitulation and that it has a very important function. The Court expressed the philosophy that, even though it is not possible to say whether a satisfactory solution can be reached if bargaining takes place the National Labor Policy is founded upon a determination that the chances are good enough to warrant subjecting issues to the process of collective bargaining.

If Boards of Education will engage in good faith collective bargaining and work out satisfactory procedures, there is every reason to believe that there will be created a situation which will ultimately result in a climate that will produce better education for children.

AUTHOR'S NOTE: In March 1966, after this article was written and set in type, the Wisconsin Employment Relations Board enunciated a ruling of significance by way of interpreting the duty to negotiate under Wisconsin Statute 111.70. Two members of the WERB stated that the statute did not actually compel negotiations. The philosophy supporting this viewpoint was that if the legislature had intended to make negotiating compulsory it would have made failure to do so an unfair labor practice. The WERB majority did stress, however, that if the parties did fail to meet and negotiate in good faith the statute provides for referring the matter to fact finding. Arvid Anderson, the dissenting member of the WERB, argued most convincingly that the language of 111.70 clearly implied a requirement to negotiate. The split on the WERB illustrates the need for careful statutory drafting if it is the intent to impose upon the parties the requirement of good faith negotiations as that term has been delineated in this discussion.

In spite of the WERB attitude it would seem that most municipal employers will continue to negotiate. In view of the basic intent of the Wisconsin Statute it would appear that most employers would not desire to have a fact finder present to public opinion his condemnation of an employer who refused to negotiate in good faith.

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