PUBLIC EMPLOYEES' RIGHT TO COLLECTIVE BARGAINING: THE NEED FOR LEGISLATIVE ACTION IN INDIANA

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INTRODUCTION

Since its inception in 1935, the National Labor Relations Act[1] has had a significant impact on the development of employment relations in the private sector. Employment relations in the public sector, however, have felt no such impact,[2] since public employees are excluded from the act's coverage. As a result, the states have been left free, subject to constitutional limitations, to develop their own approaches to the problems involved. Partly in response to an increase in strikes by public employees,[3] more than half of the states have now adopted legislation creating some form of collective bargaining for public employees.[4] On July 1, 1975,

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1. 49 Stat. 449 (1935), 29 U. S. C. Secs. 151 *et seq.*

2. "Public employment has become the fastest growing sector of the American economy, rising from approximately six million in 1950 to approximately 11.3 million in 1966; consisting of 2.9 million federal, 2.2 million state, and 6.4 million local employees. The total number of public employees was expected to grow to 15 million by 1975, in a projected labor force of 75 million. State and local employment has been, and is likely to remain, the most rapidly expanding portion of the public sector." Meltzov, Collective Action in the Public Labor Law, *1st,* at 996 (1975).

3. *See:* Kassalow, Trade Unionism Goes Public, 14 Public Interest 118, 122 (Winter, 1969). In the public sector, unionization has increased at an even quicker rate than has employment, rising from approximately 915,000 in 1956 to 1.7 million in 1967. That growth has been accompanied not only by a sharp increase in strikes, but also by all the other problems that surround labor representation in the private sector.

4. More than half of the states have adopted legislation expressly authorizing the voluntary use of binding interest arbitration. 64 Cal. L. Rev 678 (1976). Alaska Stat. 23.40.200 (1974); Conn. Pub. Act No. 75-570 6-7 (July 7, 1975) (West's Connecticut Legislative Service 1071); Del. Code Ann. tit. 19, 1310 (1975); Hawaii Rev. Stat. 89-11 (Supp. 1975); Ind. Stat. Ann. 22-6-4-11 (Burns Supp. 1975); Iowa Code Ann. 20.22 (Supp. 1975); Kan. Stat. Ann. 75-4332 (Supp. Pamphlet 1974); La. Rev. Stat. Ann. 23:890 (E) (West Supp. 1975); Me. Rev. Stat. Ann. tit. 26, 423.231 (Supp. 1975); Minn: Stat. Ann. 179.69 (Supp. 1975); Rev. Codes of Montana 59-1614(9) (Supp. 1974); Neb. Rev. Stat. 48-801 (1974); Nev. Rev. Stat. 288-200 (1973); N.H. Rev. Stat. Ann. 98-C:4 (Supp. 1973): N.J. Stat. Ann. 34: 13A-3(d) (Supp. 1975); N.Y. Civil Service Law 209 (4) (c) (McKinney Supp. 1974): Okla. Stat. Ann. tit. 11, 548.10 (Supp. 1974); Ore. Rev. Stat. 243.742 (1974); Pa. Stat. Ann. tit. 43 217.4 (Purdon Supp. 1975): Pa. Stat. Ann. tit. 43, 1101.805 (Purdon Supp. 1975); Pa. Stat. Ann. tit. 53, 39951(d) (Purdon Supp. 1975); Pa. Stat. Ann. tit 55, 563.2 (Purdon 1965); R.I. Gen Laws Ann. 28-9.1 to 9.4 (1968); R.I. Gen. Law Ann. 36-11-9 (Supp. 1974); S.D. Comp. Laws Ann. art. 5154c-1, 9-15 (Supp. 1974); Utah Code Ann. 34-20a-8 (Supp. 1975); Vt. Stat. Ann. tit. 21, 1733 (Supp. 1974); Rev. Code Wash. Ann. 41.56.450 (Supp. 1974); Wis. Stat. 111.77 (1974); Wyo. Stat. Ann. 27-269 (1967).

Indiana joined that growing list by adopting its own Public Employee Labor Relations Act.[5]

Within months after the act took effect, however, it was declared unconstitutional by a Benton County Circuit Court.[6] This decision has left the future of public employee bargaining in Indiana in a state of uncertainty, since the Indiana Education Employment Relations Board (IEERB) is now enjoined from applying election and unfair labor practice procedures to public employees.[7]

At this writing, briefs have been filed with the Indiana Supreme Court to appeal the circuit court's decision. A determination should be forthcoming early this year.[8] Meanwhile, the Indiana General Assembly has been moving toward amending the act to bring it within constitutional limits.

This article will examine the provisions of Indiana's Public Employee Labor Relations Act and evaluate its expected impact on public employee bargaining in Indiana. In particular, the provisions that the circuit court held unconstitutional will be examined in light of pending action by either the Indiana Supreme Court or the General Assembly.

The act can basically be divided into five major components. The first component deals with the selection of an agent to represent the employees.[9] The second addresses itself to the process of election.[10] The third outlines the method by which complaints are to be submitted for hearing.[11] The fourth component of the act directs the required procedure for an appeal to the Circuit or Superior Court,[12] and the fifth and final component of the act deals with the various avenues available to the negotiating parties when an impasse has been reached.[13]

The purpose of the act is to promote an orderly and constructive relationship between all public employers[14] and their employees.[15] The act, however,

5. Indiana Code 22-6-4-13. Section 3 of Acts 1975, P.L. 254 declared an emergency and provided that the act take effect July 1, 1975.

6. Benton Community School Corp. v. Indiana Education Employment Relations Board, C75-141. (Benton County Cir. Ct. 1977)

7. Archer, *Survey--Labor Law,* 10 Indiana L. Rev. 257 (1976).

8. *Supra,* note 6.

9. IC 22-6-4-7.

10. IC 22-6-4-7(d).

11. IC 22-6-4-8.

12. IC 22-6-4-8(b).

13. IC 22-6-4-11.

14. IC 22-6-4(b). "Employer" means the state of Indiana or any political subdivision of the state, including without limitation, any town, city, county, public institution of higher education or vocational education, social service or welfare agency, public and quasi-public corporation, housing authority or other authority or public agency established by law, and any person or persons designated by the employer to act in its interest in dealing with the employees. *Also see* Op. Atty. Gen. 114 (1975) (the Board of County Commissioners is the proper body to represent county government in its negotiations with employee organizations).

15. IC 22-6-4-1(c). "Employee" means any employee of an employer, and shall not be limited to the employees of a particular employer, and shall include any employee of an employer, whether or not in the classified service of the employer, except officials appointed or elected pursuant to a statute to a policymaking position, and shall include any individual whose work had ceased as a consequence of, or in connection with, any unfair labor practice or concerted employee action. "Employee" does not mean policemen, firemen, professional engineers, faculty members of any university or certificated employees of school corporations or confidential employees or municipal or county health care institution employees. *Also see* Elder v. City of Jeffersonville, 329 N.E. 2d 654 (1975). *But see* Op. Atty. Gen. 110 (1975). "Plainly, 'county health care institution employees' are not employees within the definition of the act," but county health department employees are covered. Also, a deputy county auditor appointed to a policymaking position

notes that as between the need to establish an orderly and constructive relationship between public employees and employer and the need to protect the citizens of Indiana and guarantee their health, safety, welfare, and the uninterrupted operation and function of government, that the latter would take preference.

The heart of the act is Section 2, which gives employees the right to form or join an employee organization[16] whose function would be to engage in collective bargaining[17] with employers for the purpose of establishing, maintaining, or improving the employment conditions.[18]

Having thus established a principle of authority for collective bargaining, the act then articulates the means of forming an employee organization.

SELECTION OF REPRESENTATIVES

There are basically three methods by which a group of employees or employee organization can select an exclusive representative[19] to represent them in the collective bargaining process.

First, an employees' organization may file a petition with the Board[20] alleging that 30% of the employees in an appropriate unit wish to be represented by an exclusive representative for purposes of collective bargaining.[21]

Second, an employer may file a petition with the Board alleging that one or more employees orgainzations have presented to it a claim to be recognized as the exclusive representative in an appropriate unit.[22]

is excluded from the act. The limitation typically applies to police officers and fire fighters, e.g., Mich. Comp. Laws Ann. 423-321 (Supp. 1972); S.D. Comp. Laws Ann. ch. 9-141A (Supp. 1975); Wis. Stat. Ann. 111.77 (Supp. 1975). Some states also specify prison guards (Alaska Stat. 23.40.200 (3)(b) 1974), Pa. Stat. Ann. tit. 43 1101.805 (Purdon Supp. 1975)); hospital employees (Alaska Stat. 23.40.200 (3)(b) (1974)); public transportation workers (La. Stat. Ann. 23:890(E) (West Supp. 1975); Pa. Stat. Ann. tit. 53, 39951 (Purdon Supp. 1975)); and port authority employees (Pa. Stat. Ann. tit. 55, 563.2 (Purdon 1964)).

16. IC 22-6-4-1(e), "Employees' organizations" means any organization of any kind in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of employment.

17. IC 22-6-4-1(k), "Bargain collectively" shall mean the performance of mutual obligation of the employer through its chief executive officer or his designee and the designees of the exclusive representative to meet at reasonable times, including meetings in advance of the budget-making process, and negotiate in good faith with respect to wages, hours and other terms and conditons of employment, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

18. IC 22-6-4-2, The relationship between public sector interest arbitration and the political process may, in some states, pose substantial issues of constitutional law. So far, all but one of the courts that have considered the question have upheld the validity of interest arbitration against the contention that it involves an improper delegation of legislative authority. *Also see* 64 Cal. L. Rev. (1976) e.g., Fire Fighter Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 622 n. 13, 526 P. 2d 971 981 n. 13, 116 Cal. Rptr. 507, 517 n. 13 (1974) (dicta); City of Biddeford v. Teachers Ass'n, 304 A.2d 386 (Me. Sup. Jud. Ct. 1973); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972); City of Amsterdam v. Helsby, 37 N.Y.2d 19,332 N.Y. 2d 290,371 N.Y. S.2d 404 (1975); Harney v. Russo, 735 Pa. 183, 255 A. 2d 206 (1969); Warwick v. Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); State ex rel. Fire Fighters Local 946 v. City of Laramie, 436 P.2d 295 (Wyo. Sup. Ct. 1968). *Contra* City of Sioux Falls v. Firefighters Local 814, No. 11406, 11411, 11424 (S.D., October 9, 1975).

19. IC 22-6-4-1 (f), "Exclusive representative" means the employees' organization which has been certified for the purposes of this chapter by the Indiana education employment relations board, or recognized by an employer pursuant to the provisions of section 7(b) of this chapter, or recognized by an employer.

20. IC 22-6-4-1 (g), "Board" means the Indiana education employment relations board.

21. IC 22-6-4-7 (a) (1).

22. IC 22-6-4-7 (a) (2).

Third, an exclusive representative within an appropriate unit of an organization may present evidence to the employer that it represents a majority of the employees within the unit. The employer is then required to recognize the exclusive representative as the proper agent of the employees for the purpose of collective bargaining, provided that the employer first posts a written public notice of its intention to recognize such a representative.[23]

On the other hand, where the employees feel they no longer want to be represented by a particular agent, they may file a petition with the Board alleging that 30% of the employees assert that the designated exclusive representative is no longer the representative of the majority of the employees in the unit. The Board is then obligated to investigate the petition filed by the employees and determine for itself whether or not a question of representation exists. If the Board finds that it has reasonable cause to believe a representation question exists, it must provide for an appropriate hearing within 30 days.

The hearing will determine whether or not a question of representation does in fact exist. If the Board concludes in the affirmative, it must direct an election by secret ballot within 30 days after its determination and must certify the results of the secret election within 10 days after the election itself.[24]

ELECTIONS

The Public Employee Labor Relations Act sets forth the election procedures and places the responsibility upon the Board to determine who is eligible to vote in the elections. The statute also gives the Board the power to establish rules governing the election. However, the parameters for rules governing the number of votes required to win an election is crystalized in the act. For example, where none of the choices on the ballot receives a majority, but a majority of all votes cast are for representation by some employees' organization, a run off elction is to be conducted. Then, whichever employees' organization receives the majority of votes in the unit in an election shall be certified by the Board as the exclusive representative.[25]

COMPLAINT PROCEDURE

The act sets down certain guidelines and procedures which must be followed by the complainant and the charged party when complaining and answering an unfair labor practice allegation.[26]

First, the aggrieved party must file a complaint with the Board or with any agent designated by the Board for such purpose. Upon receiving the complaint, the Board or its agent is to issue and cause to be served upon the charged party a copy of the complaint and a notice of hearing not less than five days after the serving of the complaint.[27] However, no notice of hearing can be issued by the Board when the complaint is filed more than three months after the occurrence

23. IC 22-6-4-7 (b).
24. IC 22-6-4-7 (a) (3).
25. IC 22-6-4-7 (e).
26. IC 6-4-5.
27. IC 22-6-4-8.

of the unfair labor practice. In other words, the statute of limitation for filing a complaint based upon unfair labor practices is three months.[28]

If the complainant has additional information to add to the original complaint, he may amend the complaint any time prior to the issuance of an order, as long as the charged party is not prejudiced unfairly.[29]

Second, the charged person[30] is required to file an answer to the original or amended complaint.[31]

Third, either or both parties involved may appear and give testimony concerning the complaint. In addition, any other interested person may be allowed to intervene in the proceeding to present testimony. And when either the complainant, the charged party, or any other person appears to give testimony, the Board is not required to follow the rules of evidence prevailing in the courts. The obvious conclusion then is that the hearing is informal in nature.[32]

After all the concerned parties have presented their views, the testimony is filed with the Board. If upon the preponderance of the testimony taken during the hearing the Board is of the opinion that the charged person is engaged in an unfair labor practice, the Board is to state its findings of fact, and will issue and cause to be served on the charged person an order requiring him to cease and desist from these unfair labor practices.[33] The order may be of such a nature that it may require the charged party to take affirmative action and reinstate the employees with or without back pay. The order may further require that the charged person make reports to the Board from time to time showing the extent to which he or she has complied with the order.[34] If, on the other hand, upon the preponderance of the testimony taken, the Board is not of the opinion that the charged party is engaged in an unfair labor practice, the Board is to state its findings of fact and shortly thereafter issue an order dismissing the complaint.[35]

The evidence need not be presented to the entire Board at all, but instead may be presented to a member of the Board or to one or more examiners. If this is the case, the hearing body will issue and cause to be served on the parties to the proceedings a proposed decision together with a recommended order which is then filed with the Board. The recommended order then becomes the order of the Board and becomes effective unless an exception is filed within 20 days after services upon the parties.[36] If in fact exceptions are filed to the proposed report, the Board will have to determine whether or not the exception raises substantial issues of fact or law. If the Board believes substantial issues have been raised it will grant a review. If, however, the Board believes that the exceptions do not raise a substantial issue of fact or law, it may refuse to grant review and the recom-

28. IC 22-6-4-8 (a) (3), This statute of limitations does not apply to an aggrieved person who was prevented from filing the complaint by reason of service in the armed forces. The limitation in cases of military service personnel is three months from the date of discharge.
29. IC 22-6-4-8 (a) (1).
30. IC 22-6-4-1 (a), "Person" includes one or more individuals, employees' organization, employees, partnerships, associations, corporations, legal representatives, trustees in bankruptcy or receivers.
31. IC 22-6-4-8 (a) (1).
32. IC 22-6-4-8 (a) (2).
33. IC 22-6-4-8 (a) (2).
34. IC 22-6-4-8 (a) (2).
35. IC 22-6-4-8 (a) (3).
36. IC 22-6-4-8 (a) (3).

mended order shall become the order of the Board and therefore become effective.[37] Of course, the Board may at any time upon giving proper notice to the parties set aside in whole or in part any finding or order made or issued by it, as long as the record has not been filed in a court of proper jurisdiction.[38]

APPEAL TO THE COURT

There may be occasions where the aggrieved party may suffer substantial and irreparable injury if he is not granted temporary and immediate relief. If a complainant is in this situation, the Board or the complainant may petition a Circuit or Superior Court for appropriate injunctive relief pending the final adjudication by the Board with respect to the original complaint. As soon as the petition for injunctive relief is filed the Court obtains jurisdiction to grant such a temporary relief or restraining order. The Court will then cause notice to be served upon the parties involved in the petition.

The test for determining whether or not an injunction will issue is whether the action complained of poses a clear and present danger to the public health or safety which, in light of all relevant circumstances, is in the public interest to prevent. The injunction will remain in effect for as long as the clear and present danger exists.[39]

In addition to obtaining injuctive relief either the Board or the complaining party has the power under the act to petition the Circuit or Superior Court for the enforcement of an order. They may also petition the court to set aside the final order in whole or in part[40] provided that the aggrieved person files an appeal in the proper court within 60 days from the date the order is granted by the Board.[41] And, furthermore, the court is encouraged by the act to hear the petition expeditiously and, if possible, within 60 days after it has been docketed. In any event, the petition shall take precedence over all civil matters except earlier matters of the same character.[42] Upon receiving the petition, the court will take jurisdiction and will cause notice to be served upon the proper person. Having taken jurisdiction and given proper notice, the court may make and enter a decree enforcing or modifying in whole or in part the Board's order.

37. IC 22-6-4-8 (a) (4).
38. IC 22-6-4-8 (c).
39. IC 22-6-4-8 (b).
40. IC 22-6-4-8 (d).
41. IC 22-6-4-8 (g), A majority of statutes are silent on the question of appeal from an award. *See* McAvoy, "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector," 72 Colum. L. Rev. 1192, 1204 (1972). The Maine statute provides that the award is binding on questions of fact in the absence of fraud, but subject to affirmation, reversal, or modification "based upon erroneous ruling or finding of law." Me. Rev. Stat. Ann. tit. 26, 972 (1974). In Michigan, an award is binding "if supported by competent, material, and substantial evidence on the whole record." Mich. Comp. Laws Ann. 423.242 (Supp. 1975). Oregon uses the same terminology, but adds the qualification that the award be "based upon the factors" set forth in the statute as citeria for decision. Ore. Rev. Stat. 243.752 (1974). South Dakota provides for appeal de novo. S.D. Comp. Laws Ann. 9-14A-19 (Supp. 1975). Washington provides for review solely upon the question whether the decision was arbitrary or capricious. Rev. Code Wash. Ann. 41.56.450 (Supp. 1974). The Pennsylvania Supreme Court has held that review of the arbitrator's jurisdiction may be had through extraordinary writ, even though the legislature precluded appeal. In re City of Washington, 436 Pa. 168, 259 A.2d 437 (1969). *Cf.* Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 493, 260 N.E.2d 508,311 N.Y.S.2d 863 (1970) (holding that due process requires limited judicial review of awards rendered pursuant to a statute providing for compulsory arbitration of disputes between nonprofit hospitals and their employees). *See also* 64 Cal. L. Rev. 698 (1976).
42. IC 22-6-4-8 (j).

There is one exception to the right of appeal to the Circuit or Superior Court. The act states that where a determination has been made by the Board that an employee organization has been chosen by a majority of the employees in an appropriate unit that determination is not reviewable by the court.[43]

It is this one exception that has brought enforcement of the entire act to a standstill. In 1976, the Benton Community School Corporation brought suit against the Indiana Education Employment Relations Board seeking to prevent the Board from conducting an appropriate unit/exclusive representative hearing requested by a local union trying to organize some School Corporation employees. On February 4, 1976, Judge R. Perry Shipman ruled that the act's provisions prohibiting judicial review of appropriate unit and exclusive representative determinations were unconstitutional.[44] And because severance of that provision would have created a broader judicial review than the legislature intended, Judge Shipman concluded that the entire act was unconstitutional, and ordered enforcement of the act enjoined.

The circuit court's decision was based primarily on settled Indiana case law holding that the right of a part to judicial review of state administrative action is not subject to the grace of the legislature, but is a matter of constitutional guarantee.[45] Comparing Indiana's act to similar provisions in the National Labor Relations Act, the court found that the federal act did not entirely exclude review of the NLRB's appropriate unit/exclusive representative determinations, but merely precluded review of those determinations until a final order from the Board.[46] Finding that the acts were essentially parallel, except for that one part, the court concluded that the legislature intended completely to pre-empt judicial review of appropriate unit/exclusive representative determinations. The Indiana Supreme Court is now reviewing the circuit court's ruling; it is very likely that the Court will agree that the act is unconstitutional.

The General Assembly has already begun to act to head off this eventuality. Several bills have been introduced that would make appropriate amendments to the existing law; if such an amendment were passed, it would render unnecessary any decision from the Supreme Court.

The bill that has proceeded the furthest in the legislative process is S.B. 61, which, if enacted, would amend IC 22-6 by adding IC 22-6-4.1, reenacting the public employee collective bargaining law and bringing the Indiana law in line with the provisions for judicial review found in the National Labor Relations Act.

S. B. 61 was introduced by State Senators Robert J. Fair and Robert D. Garton on January 5, 1977, read for the first time, and referred to the Committee on Labor and Pensions. The bill was reported favorably by the committee on January 15, 1977, "with the recommendation that said bill do pass." Senator William

43. IC 22-6-4-8 (d).

44. Benton Community School Corp. v. Indiana Education Employment Relations, C75-141. (Benton County Cir. Ct. 1977).

45. That case law was interpreting Article 1, Sec. 12 of the Constitution of the State of Indiana, which provides that: "All Courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily and without delay."

46. The court cited specifically to 29 U.S.C. 159 (d) and 160 (f) (1973) as well as American Federation of Labor v. NLRB, 308 U.S. 401 (1940), for support of that point.

Christy, chairman of the Senate Committee on Labor and Pensions, was added as a co-author of the bill on January 14, 1977.

On February 1, 1977, several technical and procedural amendments were made by Senator Fair, as well as by Senators Joseph G. Bruggenschmidt, Joseph Harrison and Merton Stanley. The bill was read for the second time, and engrossed.

S. B. 61, by providing a basis for judical review comparable to the provisions of the National Labor Relations Act, would allow court review of appropriate unit and exclusive representation determinations. Judicial review could, per S. B. 61, take place only in conjunction with a review of a final order by the Board.

If this bill is enacted into law, it appears that the constitutional infirmity in Indiana's existing law would be removed.

THE IMPASSE

The method that the parties are to follow in respect to obtaining a negotiated agreement are explicitly set out in Section 2 of the act. The parties must notify the Board as to the status of the negotiations 60 days prior to the expiration date of any collective bargaining agreement.

During the course of the negotiations, either an employer or an exclusive representative may declare to the Board that an impasse has been reached between them in the collective bargaining process and may request that the Board appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. A mediator will then be appointed by the Board no later than five days after receipt of the request, if the Board determines that an impasse exists. Also, the Board on its volition may declare that an impasse has been reached in the negotiations and appoint a mediator notwithstanding the fact that a mediator has not been requested by either party.[47]

The function of the mediator is to meet with the parties either separately or jointly and attempt to persuade the parties involved in the labor dispute[48] to resolve their differences and effect a mutually acceptable agreement. The mediator, however, is not allowed to make any findings of fact or recommend any terms of settlement.[49] What happens in the event the mediator is unable to effectuate a compromise between the parties? Under the act the mediator has 30 days from the date of his appointment to effectuate a settlement. If he is unable to do so, either party may, by written notification to the other, request that their differences be submitted to a "fact finder" who will submit to the parties several recommendations for settlement. The fact finder's recommendations will be advisory only, unless within five days after giving or receiving the written notification, one party notifies the other that he desires the recommendations of the fact finder to be binding.[50]

47. IC 22-6-4-11 (b).
48. IC 22-6-4-1 (i), "Labor dispute: includes any controversy concerning terms or conditions of employment, or concerning the associate on or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment."
49. IC 22-6-4-11 (b).
50. IC 22-6-4-11 (c).

After a request for a fact finder, the parties have 10 days within which to select a person to serve as a fact finder and to obtain a commitment from him. If the parties are unable to agree on a fact finder or obtain a commitment, either party may request the Board to designate a fact finder. The Board then has to appoint a fact finder within five days after receipt of such a request.

The function of the fact finder is to meet with the parties within 10 days of his appointment and make inquiries, investigate, and hold hearings. In order for the fact finder to be effective, the statute gives him the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. If the dispute is not settled within 30 days ater his appointment, the fact finder shall make findings of facts and recommend terms of settlement. The recommendation shall be advisory only, unless one of the parties has requested otherwise.[51]

It must be noted that there is nothing in the act that prohibits the parties from voluntarily agreeing between themselves[52] or from submitting any or all of the issues in dispute to final and binding arbitration.[53] But suppose, further, that the parties still have not come to an agreement, what alternatives are open for the negotiating parties? The parties may then agree that where no agreement is reached one will submit a final offer to the other and that offer will then be submitted to the board. Each party shall, at the same time, submit one alternative final offer. The final offers are to be submitted within three days after the request to submit final offers.[54] The content of the final offers cannot contain any issues that were not issues at the time of the final dispute or impasse.[55]

As soon as the offer is received by one of the parties, the negotiation will commence and they shall continue for a period of not longer than five days. If the parties still cannot come to an agreement by the end of five days a panel will be selected.[56] A three-member panel to act as the final offer selector will be selected by the parties on the seventh day after the offer is received by one of the parties where the parties have not agreed by the fifth day. And if the parties are unable to agree on the composition of the panel, the board shall submit to the parties a list of 11 persons. The parties are to strike eight names from the panel alternatively,[57] and the three remaining persons will comprise the panel.

The function of the panel is to conduct an informal hearing[58] and ultimately to select the most reasonable of the final offers submitted by the parties. This final offer, as determined by the panel, shall be the binding contract between the parties.[59] The panel is not allowed to compromise or alter the final offer that it selects. Selection of the final offer shall be based solely on the content of the final offers submitted by the parties.[60]

51. IC 22-6-4-11 (c).
52. IC 22-6-4-11 (b).
53. IC 22-6-4-11 (h).
54. IC 22-6-4-12.
55. IC 22-6-4-12(z).
56. IC 22-6-4-12(4).
57. IC 22-6-4-12(4).
58. IC 22-6-4-12(5).
59. IC 22-6-4-12(9).
60. IC 22-6-4-12(10).

CONCLUSION

Parties having gone through the entire process of statutory arbitration are then bound by the decision of the panel. But suppose the employees are still unsatisfied with the final decision, can they go out and strike?[61] The answer is in the negative. The act not only prohibits strikes but also provides for damages[62] against employees who violate the statute by striking. The question then arises as to what leverage the employee has in order to force the employer to negotiate. Clearly, the employee's options are limited. However, the act does require the public employer to negotiate with the employees and states that the public employer has a duty to bargain collectively as of January 1, 1976.[63]

Furthermore, it is difficult to understand why Indiana's Public Employee Labor Relations Act was enacted with provisions precluding judicial review of certain board determinations.

The National Labor Relations Act, after which Indiana's law was modeled, has no similar restrictions. Clearly, Indiana's non-review provisions were inserted with a particular purpose in mind, but the legislative history, which provides no statements of debates or discussions about this matter, indicates none of the reasons for this legislative determination.

Regardless of the legislative intent, however, the effect of this restriction has been a lengthy delay in securing for public employees the right to collectively bargain.

The burden is now upon the Indiana General Assembly to pass appropriate legislation to end this court-centered constitutional battle. The enactment of S. B. 61 would effectively solve the problem now before Indiana's Supreme Court. Most important, the enactment of this bill would provide public employees with the right to collectively bargain, a right which should have been theirs for the past two years.

61. IC 22-6-4-1(m), a strike is defined as a concerted failure to report for duty, willful absence from one's position, stoppage of work, or abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment without the lawful approval of the employer, or in any concerted manner interfering with the operation of the employer.

62. IC 22-6-4-6(c) provides that "Where any exclusive representative engages in a strike, or aids or abets therein, it shall lose its dues deduction privilege for a period of one (1) year." *But see:* Alaska Stat. 23.40.200(3)(c) (1974) (permits public utility, snow removal, sanitation, school and certain other educational employees to strike, subject to mandatory injunction if their strike imperils public health, safety or welfare). It has become academic, in the public sector, to speak of the "right to strike," since strikes may and frequently do occur without effective legal sanction.

63. IC 22-6-4-13.