Labor Law: Case Notes

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LABOR LAW—COLLECTIVE BARGAINING AND GRIEVANCE ARBITRATION IN OHIO PUBLIC EDUCATION. Dayton Classroom Teachers' Association v. Dayton Board of Education, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

In recent years, labor relations have been a major concern of state and local government agencies throughout the United States. While most states have chosen to legislatively define the bargaining rights of their public employees, Ohio has never done so. The regulation of public-sector bargaining has been left almost entirely to the courts, which have formulated the law in this area from statutes governing the individual government agencies and from general notions of collective bargaining in the public sector. Even though public employees have a constitutional right to organize and join unions, Ohio's lower courts have been divided on the right of a union representing such employees to bargain collectively with government agencies. The courts have also disagreed upon the validity of provisions for arbitration of grievances in collective bargaining agreements.

In Dayton Classroom Teachers' Association v. Dayton Board of Education, the question of the validity of collective bargaining and grievance arbitration agreements in public education were placed squarely before the Supreme Court of Ohio. The controversy focused upon a "master agreement" that was the result of collective bargaining between the Dayton Classroom Teachers' Association—a labor organization and collective bargaining representative of "all professional staff members" employed by the Dayton Board of Education—and the Board and the Superintendent of the Dayton Public Schools. The "master agreement" contained a four-step procedure for the resolution of grievances, which culminated in binding arbitration for those grievances that could not be resolved by the parties. The contract provided that the arbitrator would have "no power to alter, add to or subtract from the terms of . . . [the] agreement or to change official Board policies." When the Board took the position

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1 In recent federal court decisions it has been held that unless there is illegal intent teachers have the right to form unions under the first and fourteenth amendment guarantee of freedom of association. AFSCME v. Woodward, 406 F.2d 137 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968). See also Kegishian v. Board of Regents, 385 U.S. 589 (1967) (holding that teachers' freedom of association rights may not be unreasonably restricted as a condition of employment). Ohio implicitly recognizes the right of public employees to join unions in OHIO REV. CODE ANN. § 9.41 (Page 1969) which provides in part that

the state of Ohio and any of its political subdivisions or instrumentalities may check off on the wages of public employees for the payment of dues to a labor organization or other organization of public employees upon a written authorization by the public employee.

2 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).
that certain grievances filed by the D.C.T.A. were "not proper grievances" and refused to submit the matter to arbitration, the D.C.T.A. sued in the Court of Common Pleas of Montgomery County requesting the Board "be enjoined to honor the agreement's grievance procedure and proceed to arbitration."

The trial court had entered summary judgment for the Board, finding the collective bargaining agreement invalid and unenforceable. The Court of Appeals of Hamilton County held that, although the agreement was valid in principle, the grievance arbitration provision was invalid as an unlawful delegation of the Board's authority. On appeal, the Ohio Supreme Court held that both the collective bargaining agreement and the grievance arbitration clause were valid provided they had been voluntarily agreed to by the Board. In so doing, the court stabilized the law in this area and arguably set a new trend in Ohio law.

I. THE BACKGROUND

A. The Law of Other States

State legislative acceptance of collective bargaining by public employees is a fairly recent development in the United States. Even when labor unions were obtaining recognition and power in the 1930's, courts and legislatures refused to recognize union representation of public employees. President Franklin Roosevelt, considered by many to be a champion of labor, stated that there was no place for collective bargaining in public employment, apparently associating collective bargaining with strikes, coercion, and general unrest. Prior to 1959, there were only isolated court decisions permitting state agencies to bargain collectively with their employees, and there had been no state statutes of any significance expressly permitting such bargaining, primarily because of the fear of disruption of the activities of state agencies.

\[\text{References}\]

3 See generally Annot., 31 A.L.R.2d 1142 (1953), and supplemental material thereto. Note that while Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482, 31 A.L.R.2d 1133 (1951), did hold that a union of school teachers could collectively bargain with the board, very few state courts have reached similar results.  
The trend toward legislative approval began in 1959 when the Wisconsin legislature accepted the concept of collective bargaining for public employees. While other states were at first slow to follow, the majority of states now have statutes which permit collective bargaining with public employees. By the end of 1974, thirty-one states had some form of mandatory meet-and-confer or collective bargaining legislation for some or all of their public education employees. Five other states permit collective bargaining—by the authority of opinions of the attorney general—but do not require it. A sixth state is viewed as permitting collective bargaining in public education by judicial decision. By the end of 1974 there were only thirteen states that had neither mandatory nor permissive collective bargaining in public education.

The majority of the states that have mandatory collective bargaining legislation for public employees do not provide for contract-formation arbitration. While a few states require binding arbitration when the parties reach an impasse in negotiations, at least with respect to some public employees, and a few others permit the parties to voluntarily agree to binding arbitration if an impasse is reached,

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9 These states are Georgia, Kentucky, New Mexico, Utah and Virginia. Gov't Emp. Rel. Rep., supra note 8, at 501-23. See the discussion under the appropriate state for a citation to these opinions and an analysis of their effect in each state.
10 Chicago Div. of Illinois Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966). The court held that a municipal board of education did not require legislative authority to enter into a collective bargaining agreement with the sole collective bargaining agency of its teachers. This case is interpreted as permitting collective bargaining in public education in Illinois in Gov't Emp. Rel. Rep. supra note 8, at 506.
12 As used in this case note, "contract-formation arbitration" means a procedure in which the arbitrator sets the terms of the contract when the parties cannot agree.
13 E.g., N.Y. Civ. Serv. Law §§ 205.3-205.9 (McKinney 1976), which provides for binding arbitration in contract disputes with police and fire fighters if an impasse still exists after all steps required by the statutes have been taken.
14 E.g., Pa. Stat. Ann. tit. 43, § 1101.804 (Purdon's Supp. 1976) provides: "Nothing in this article shall prevent the parties from submitting impasses to voluntary binding arbitration with the proviso the decisions of the arbitrator which would require legislative enactment to be effective shall be considered advisory only." See also Minn. Stat. Ann. § 179.69 (Supp. 1976), which provides for binding arbitration upon petition by the parties if other provisions have failed to resolve the impasse.
most states provide only for fact-finding or mediation by a third party who can make only nonbinding recommendations when the conflict is over the actual terms of the contract.\textsuperscript{15}

The majority of states with collective bargaining statutes do, however, provide for grievance arbitration\textsuperscript{16} in public employment. While some states have no specific provisions regarding grievances, many states require that the parties bargain about grievance procedures and even more states either permit or require binding arbitration of grievances.\textsuperscript{17}

\textsuperscript{15} E.g., \textit{Wisc. Stat. Ann.} § 111.87 (1974) provides:

The Commission may appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It is the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the commission shall have any power of compulsion in mediation proceedings.

For similar state statutes, see \textit{Gov't Emp. Rel. Rep.}, supra note 8, at 501-23, and \textit{Ross and Rafel}, supra note 8, which summarize each state's position on contract-formation arbitration.

\textsuperscript{16} As used in this case note, "grievance arbitration" means arbitration to resolve disputes arising from a contract in force; the arbitrator determines the rights of the parties from the express and implied terms of the contract.

\textsuperscript{17} E.g., \textit{Minn. Stat. Ann.} § 179.70 Sub. 1 (Supp. 1976) provides in pertinent part:

All contracts shall include a grievance procedure which shall provide compulsory binding arbitration of grievances. In the event that the parties cannot reach agreement on the grievance procedure, they shall be subject to the grievance procedure promulgated by the director pursuant to section 179.71, subdivision 5, clause (i).


The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. In the absence of such grievance procedure, binding arbitration may be ordered by the commission upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supersede any otherwise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections forty-three and forty-six G of chapter thirty-one section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one.


Parties to the dispute pertaining to the interpretation of a collective bargaining agreement may agree in writing to have the commission or any other appointing agency serve as arbitrator or may designate any other competent, impartial and disinterested persons to so serve. Such arbitration proceedings shall be governed by ch. 298.

For similar statutes, see \textit{Gov't Emp. Rel. Rep.}, supra note 8, at 501-23; \textit{Ross and Rafel}, supra note 8.
B. The Law of Ohio Before Dayton Board of Education

Ohio has no statute directly related to collective bargaining in the public sector. There have been frequent attempts in the legislature to pass a comprehensive bill covering collective bargaining by public employees, but all these attempts have failed. The most recent legislative excursion into this area was Senate Bill 70 which, although passed by both houses of the legislature on September 12, 1975, died on November 12, 1975 when the House failed by four votes to override Governor Rhodes' veto. The failure of this bill left Ohio law in collective bargaining by public employees to be determined by the courts. Thus Dayton Classroom Teachers' Association v. Dayton Board of Education gains importance, for it remains the latest interpretation and application of Ohio law in this area.

1. Collective Bargaining

Ohio has been very slow to accept the idea of public employee collective bargaining. In 1947 the Ohio Supreme Court dealt public employee bargaining a severe blow in its first major decision in the area, Hagerman v. City of Dayton. At issue in that case was the legality of a Dayton city ordinance which authorized the city to implement a dues checkoff system by which the city could directly deduct union dues from the wages of any civil employee if authorized to do so in writing by that employee. In striking down the ordinance, however, the court did not limit itself to the narrow issue involved in the case. Stating that "labor unions have no function which they may discharge in connection with civil service appointees" and that there was "no authority for the delegation of any functions of either a municipality or its civil service appointees to any organization of any kind," the court seized upon the occasion to make a sweeping

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18 While Revised Code § 9.41 necessarily implies that public employees may form and join labor organizations, the express terms of the statute do not deal with the subject of collective bargaining, so only inferences can be made in this area. OHIO REV. CODE ANN. § 9.41 (Page 1969).
19 Senate Bill 70 would have (1) guaranteed Ohio public employees the right to negotiate through recognized units of their own choosing; (2) set up procedures for bargaining; (3) outlined procedures for resolving an impasse; (4) permitted adoption of agreements mandating grievance procedures; (5) repealed the Ferguson Act; and (6) permitted the public employees to strike after the exhaustion of all bargaining steps. See OHIO SCHOOLS, February 28, 1975, at 5-6.
20 For a more complete discussion of this topic see Green, Concerted Public Employee Activity in Absence of State Statutory Authorization: II, 2 J. LAW AND EDUC. 419 (1973).
21 147 Ohio St. 313, 71 N.E.2d 246 (1947).
22 Id. at 328-29, 71 N.E.2d at 254.
23 Id. at 329, 71 N.E.2d at 254.
denunciation of unionization in public employment. This decision came to be read as holding that any contract made between a public agency and a union representing its employees would be an unlawful delegation of the agency's authority. Some lower courts in Ohio have relied on \textit{Hagerman} in holding collective bargaining agreements in public employment invalid,\textsuperscript{24} and other courts which have allowed collective bargaining have been prevented from making broader holdings because of this case.\textsuperscript{25}

The primary reason that collective bargaining agreements in the public sector have been ruled invalid is the belief that such agreements are an invalid delegation of the government agency's authority.\textsuperscript{26} This belief is based on the legal doctrine that a public agency has only the authority expressly given it by statute or necessarily implied from its statutory power.\textsuperscript{27} Therefore, the argument goes, since there is no specific provision in the Revised Code providing that a board of education can make a collective bargaining agreement with a teachers' organization, and since §§ 3313.20 and 3313.47 of the Revised Code give the board of education the responsibility and duty to govern, manage, and control public education, any collective bargaining agreement between the two parties is an unauthorized delegation of the board's government, management, and control of the school system because any such collective bargaining agreement would restrict the actions of the board by binding it to the agreement. Perhaps another reason influencing courts to invalidate such agreements is a belief, shared by many, that collective bargaining is a form of coercion by which a union representing public employees can force a board into an undesirable position and inhibit the board from freely exercising its own judgment.

Although \textit{Hagerman} was a deterrent to the judicial acceptance of public employee collective bargaining agreements, decisions up-


\textsuperscript{25} E.g., Foltz v. City of Dayton, 27 Ohio App. 2d 35, 272 N.E.2d 169 (Ct. App. 1970). The court recognized the right of civil service employees to bargain collectively with the city respecting wages, hour and working conditions, and to have a union represent them, but held that an agency shop agreement in a collective bargaining agreement between the parties was invalid because of \textit{Hagerman}. \textit{See also} the concurring opinions of Justices Crawford and Kerns. 27 Ohio App. 2d at 43-44, 272 N.E.2d at 174-75.

\textsuperscript{26} \textit{See} City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); Mugford v. Mayor and City Council, 185 Md. 266, 44 A.2d 745 (1945).

\textsuperscript{27} \textit{See} Schwing v. McClure, 120 Ohio St. 335, 166 N.E. 230 (1929), in which the court held that a board of education could not convey to any party a school built with public funds even though the land on which the building was located had reverted to the grantor, because no statute authorized the board to do so.
holding such agreements began to arise after 1959 when the legislature enacted Ohio Revised Code § 9.41.28 It provides that a government agency may, upon written authorization from an employee, deduct a portion of his wages and pay that amount as dues to an organization of its employees. Some courts have viewed this section as a recognition of teachers' associations and an implicit grant to these associations of the right to contract with the boards of education.29 Moreover, since the boards of education are required to enter into written contracts for employment and reemployment of teachers,30 and are capable of contracting and being contracted with,31 it has been reasoned that the boards may contract not only with the individual teachers but also with the representatives of such teachers. Thus before Dayton Board of Education lower courts were split over the validity of collective bargaining agreements in public employment.

2. Grievance Arbitration

The validity of grievance arbitration provisions in public employment contracts has rarely been considered by Ohio courts. Of course, those courts which have held collective bargaining agreements invalid did not have to discuss grievance arbitration provisions specifically if they were part of the invalid contract. When such provisions have been considered, the courts have not agreed on their validity.

The arguments opposing the validity of grievance arbitration in public employment are well articulated in Opinion 74-016,32 in which the Ohio Attorney General advised that the board of trustees of a state university could not subject itself to binding arbitration in a written agreement with an organization representing its unclassified civil service employees. Although there is a general arbitration statute in Ohio, the opinion noted, the rule is that the State is not included in a statute of general application unless expressly referred to therein. Also, the Attorney General determined that Revised Code § 3356.03,

which provides that the trustees have the duty to employ, remove, and
determine the compensation of employees,\textsuperscript{33} takes precedence over
the general arbitration statute because § 3356.03 is a statute of spe-
cific application. The Attorney General went on to state that the
binding arbitration provision was an unlawful delegation of authority. The lower courts that have held such provisions invalid have
relied on similar lines of reasoning.\textsuperscript{34}

There are Ohio cases, however, in which arbitration agreements
entered into by school boards have been upheld. While they did not
deal specifically with agreements between school boards and organi-
zations of their employees, three Ohio appellate court decisions have
validated arbitration between a school board and a contractor to
determine whether the contractor had performed extra work within
the terms of the contract,\textsuperscript{35} whether the work done under the contract
was performed correctly,\textsuperscript{36} and whether the product met contractual
standards.\textsuperscript{37} These cases might be distinguished because the contract
was with an independent contractor rather than an organization of
public employees;\textsuperscript{38} but in North Royalton Education Association v.
North Royalton Board of Education,\textsuperscript{39} the court expressly held that
one of these decisions, Goldman v. Board of Education,\textsuperscript{40} was applicable
to grievance arbitration agreements between a board of educa-
tion and its employees.

Thus, when Dayton Board of Education reached the Ohio Su-
preme Court, the lower courts were split on both major issues—the
validity of collective bargaining agreements between school boards

\textsuperscript{33} Ohio Rev. Code Ann. § 3356.03 (Page 1974). This statute applies only to certain
government agencies; similar statutory provisions set forth the rights and duties of the other
agencies.

\textsuperscript{34} See Youngstown Educ. Ass'n v. Youngstown Board of Educ., 36 Ohio App. 2d 35, 301
N.E.2d 891 (Ct. App. 1973); Dayton Classroom Teachers' Ass'n v. Dayton Board of Educ.,

\textsuperscript{35} Goldman v. Board of Educ., 5 Ohio App. 2d 49, 213 N.E.2d 826 (Ct. App. 1965).


\textsuperscript{37} Gies Constr. Co. v. Board of Educ., 71 Ohio L. Abs. 539 (C.P. Franklin Cty. 1955).

\textsuperscript{38} See Brief for Appellee at 28-30, Dayton Classroom Teachers' Ass'n v. Dayton Board
of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975). The Board argued that Goldman, Nolte
Tillar, and Gies could be distinguished because the contracts were between the board and an
independent contractor rather than between the board and its own employees, and the arbitra-
tion involved only the amount of money owed, not the wide-reaching provisions contained in a
collective bargaining agreement. Apparently, some lower courts have accepted this or similar
reasoning because they have ignored these cases in holding grievance arbitration clauses in
contracts with public employees invalid. See Youngstown Educ. Ass'n v. Youngstown Board
of Educ., 36 Ohio App. 2d 35, 301 N.E.2d 891 (Ct. App. 1973); Dayton Classroom Teachers' Ass'n v. Dayton Board of Educ., (Ct. App. 1965) (unreported) aff'd in part and rev'd in part,
41 Ohio St. 2d 127, 323 N.E.2d 714 (1975).

\textsuperscript{39} 41 Ohio App. 2d 209, 325 N.E.2d 901, 905 (Ct. App. 1974).

\textsuperscript{40} 5 Ohio App. 2d 49, 213 N.E.2d 826 (1965).
and teachers’ organizations, and the validity of grievance arbitration provisions contained in these agreements.

II. THE COURT’S DECISION

In Dayton Board of Education the Ohio Supreme Court held in favor of the Teachers’ Association on both issues. It considered the question to be “whether a board’s attempt to bind itself to a written collective bargaining agreement exceeds statutory limitations placed upon its contractual power.”\(^4\) Noting four different sections of the Ohio Revised Code, the court concluded “that a board of education has been granted broad discretionary powers in its dual role of manager of schools and employer of teachers.”\(^4\) The court found that this case could not be distinguished from State ex rel. Ohio High School Athletic Association v. Judges of the Court of Common Pleas,\(^3\) in which the court held that a board may authorize entry into a pact and that decisions of the tribunal administering the pact are binding on the board of education. Thus the court considered itself compelled to conclude that “a board of education is vested with discretionary authority to negotiate and enter into a collective bargaining agreement with its employees.”\(^4\)

The court then turned its attention to the binding grievance arbitration clause. It first noted that it is the policy of the law to favor arbitration. While recognizing teacher strikes to be illegal, the court noted that they do exist and stated “that the availability of arbitration may contribute to more harmonious relations between a school board and its employees, and that factor fosters the public policy of keeping the schools open.”\(^5\) Relying heavily on an opinion of the Supreme Court of Wisconsin\(^6\) which distinguished between contract-formation

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\(^4\) 41 Ohio St. 2d at 131, 323 N.E.2d at 717.

\(^5\) Id. at 131, 323 N.E.2d at 717. The court relied on § 3313.47, which provides that the board of education shall have management and control of all public schools within its district; § 3313.17, which provides that “the board of education . . . shall be . . . capable of . . . contracting and being contracted with”; § 3319.08, which requires that the board “shall enter into written contracts for the employment and reemployment of all teachers”; and § 3313.20, which requires the board to “make such rules and regulations as are necessary for its government and the government of its employees.”

\(^6\) 173 Ohio St. 239, 181 N.E.2d 261 (1962). This was not a collective bargaining case and had never been cited as authority in this area. The court held that a board had discretionary authority to become a member of the Ohio High School Athletic Association and to agree to abide by and conform to the Association’s constitution and rules, bylaws, interpretations, and decisions, and that once such an agreement had been entered into, the board was bound by the decisions of the Association’s tribunals.

\(^4\) 41 Ohio St. 2d at 132, 323 N.E.2d at 717.

\(^5\) Id. at 133, 323 N.E.2d at 718.

\(^6\) Local 1226, AFSCME v. City of Rhinelander, 35 Wisc. 2d 209, 220, 151 N.W.2d 30
arbitration and grievance arbitration in an existing agreement—holding the latter to be valid—the Ohio Supreme Court concluded:

It is the judgment of this court that the agreement herein is a valid and enforceable contract, and that the board is obligated to arbitrate any grievance arising thereunder where the grievance involves the application or interpretation of a valid contractual term and the arbitrator is specifically prohibited from making any decision which is inconsistent with the terms of the agreement or contrary to law. 47

Since the lower courts were divided on the permissibility of public-sector collective bargaining and grievance arbitration in Ohio, if Dayton Board of Education did nothing else it put an end to the dispute in these two areas. The case overrules by implication the holding in Hagerman that had been used by some lower courts to prohibit such agreements. Also, since authorities had previously viewed Ohio as a state with not even permissive coverage in these two areas, 48 Dayton Board of Education must be viewed as a new development, placing Ohio among those states that allow boards of education to voluntarily submit to collective bargaining and grievance arbitration with their employees.

While the teachers' associations did win this one concession, that seems to be the extent of their victory in this area. The decision only "permits" the boards to voluntarily enter into collective bargaining agreements with teachers' associations. The board is given total discretion, as a matter of law, to negotiate or refuse to negotiate with a teachers' union. Although some lower courts have ordered school boards to negotiate with the appropriate teachers' union, 49 the duty to negotiate was in all cases found to have arisen from the terms of a prior contract entered into voluntarily by both parties. Thus, while this decision does expand public employees' rights in this area, they remain far short of those enjoyed by employees in the private sector. 50

47 41 Ohio St. 2d at 134-35, 323 N.E.2d at 719.
48 See note 11 supra.
50 It is now well established that the National Labor Relations Act created three distinct categories into which the various subjects of collective bargaining are divided. There are mandatory subjects of bargaining over which the parties must negotiate before an impasse can be
Also, this decision has no effect upon the Ferguson Act, which prohibits strikes by public employees in Ohio. While it is true that strikes by public employees do occur in Ohio, any such strike may be made illegal by proper invocation of the Ferguson Act, under which the employees who do strike are not protected from disciplinary action and may be fined for participating. Public employees may resort to demonstrations or other combined efforts short of a strike in order to assert their demands upon a government agency; but it is the strike, or threat thereof, which is a labor organization's most effective means of pressuring employers. Thus the rights of public employees again fall short of those enjoyed by employees in the private sector.

There is one question not discussed in this decision that may cause litigation in the future—the validity of a collective bargaining agreement which is achieved by means of an illegal strike by public employees. In a Connecticut case, Norwalk Teachers' Association v. Board of Education, the court stated that, "absent the threat of a teachers' strike," a collective bargaining agreement between a board and a teachers' association would be valid. This statement gives rise to the negative implication that agreements entered into during or as a result of a strike are invalid. The justification for such a holding would be that a strike is a form of coercion depriving the board of its ability to exercise total discretion in the area of government, management, and control of the school system. The strength of this argument would depend upon the degree to which the strike was in fact coercive. Since public employee strikes are illegal in Ohio, and striking public employees are not protected from disciplinary action, a school board faced with a teachers' strike either can resort to the courts for injunctive relief or can simply discipline or fire the
strikers. Thus in theory a school board should not be forced into signing any agreement with a teachers' union in order to avoid a strike. Reality and theory often turn out to be very different, however, and the school boards may be forced to bind themselves in some areas in order to open the schools. Absent new legislation, the determination of this question will be left to the courts, and the outcome will probably depend on the courts' views on the coercive power of an illegal strike.

The probable effect of the decision in the area of grievance arbitration is similar to the effect it will have on collective bargaining. While the court did hold that the boards are bound to enter into grievance arbitration and abide by the arbitrator's decision when they have voluntarily entered into an agreement to that effect, it remained silent on the question of whether the boards are required to agree to such a provision, or to any grievance procedure whatsoever. Thus it is likely that the public agency can refuse to agree to a grievance arbitration provision in its contracts.

It is also important to note that the decision permits only grievance arbitration, not binding arbitration in the process of forming contracts. The fact that the court went to great pains to distinguish between the two strongly implies that contract-formation arbitration is forbidden in agreements with public employees.

III. THE SOUNDNESS OF THE COURT'S DECISION

The supreme court in Dayton Board of Education appears to have dropped the old notion that collective bargaining is a form of coercion by which an unwilling employer is forced to agree to the demands of an all-powerful union of its employees. Such a decision appears sound. Since public employees do not have the right to strike, it is doubtful that they can exert enough pressure to coerce a school board; indeed, some commentators believe that without the right to strike collective bargaining gives the employees no power whatsoever. This decision merely holds that a board of education is bound by agreements it has voluntarily made, and this holding can have little effect on the relative economic positions of the parties to these agreements.

By permitting collective bargaining agreements in public education, the court has taken a step in the right direction. Collective bargaining in the private sector has been accepted in the United

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\(^{54}\) See 41 Ohio St. 2d at 133-34, 323 N.E.2d at 718.

States since the 1930's and nearly everyone agrees that it is effective. The right of collective bargaining in public employment appears to be both workable and desirable, as evidenced by the number of states which have adopted legislation permitting public-sector collective bargaining.60

The decision in Dayton Board of Education also protects the expectations of the parties to these agreements. Local boards have been contracting with teachers' associations and signing collective bargaining agreements in the majority of Ohio school districts.61 A decision in this case holding such agreements void would have caused a great deal of confusion and unrest. By making these voluntary agreements enforceable, the court has provided for greater stability in an area in which stability is a primary concern.

The decision to permit grievance arbitration is also sound. There is no illegal delegation of authority in grievance arbitration of disputes involving the interpretation or application of the terms of the agreement itself. Once the terms of an agreement are set, such questions are not matters of the board's discretion, but are questions of contract law that would normally be resolved by the courts. This type of arbitration does not give the arbitrator the authority to make or create new policy or a new agreement that was not voluntarily agreed to by the parties.62

The reason for grievance arbitration is clear—it is the most efficient and least costly way to settle disputes between two parties. The only alternative means of settling contract disputes are strikes and litigation. A strike is the least desirable alternative, particularly in this area, for not only is it illegal, but it also fosters discord, causes loss of time and money to both sides of the dispute, and injures many innocent third parties as well.

Arbitration is preferable to litigation for many reasons. First, the costs of litigation in time and money greatly exceed those of arbitration. Second, the arbitrator would probably be an expert in the field, while the judge might be wholly unfamiliar with it. Third, arbitrators work more closely with the parties in a dispute than do judges, and can be more aware of the particular problems involved in each case.

60 See text accompanying note 8 supra.
62 Indeed, the court's decision appears to hold that in order for the grievance arbitration provision to be valid it must specifically prohibit the arbitrator from making any decision which is inconsistent with the terms of the agreement or contrary to law. 41 Ohio St. 2d at 134-35, 323 N.E.2d at 719. This provision, along with limited judicial review of the arbitrator's decision, should insure against any abuse in this area.
Finally, the arbitrator is usually less restricted in his choice of remedies and is therefore better able to work out a solution that would be agreeable to all parties involved. Arbitrators do no more than interpret an existing agreement, something which judges have always done, and since the arbitrator's decision is subject to limited review by the courts, the chances of an arbitrator abusing his authority are minimal.

The advantages of arbitration have been well summarized by the late Dean of the Yale Law School, Harry Shulman:

To consider . . . arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both—but in the sense in which a transport plane is a substitute for a stagecoach. The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees.43

Grievance arbitration can be a valuable asset in public as well as in private employment, and it is wise to permit it in this area.

IV. CONCLUSION

Dayton Board of Education is an important decision, for it validates collective bargaining and grievance arbitration agreements between boards of education and teachers' associations and, by analogy, approves such agreements in all areas of public employment. Prior to this decision Ohio had been considered a state that did not permit collective bargaining in public education.44 Thus this holding represents at least a partial victory for public employees.

However, it is equally significant that the court did not extend the holding to provide for mandatory bargaining or for voluntary contract-formation arbitration between the parties, and these issues remain open. Those opposed to mandatory collective bargaining in public education most frequently base their objections on the theory that forced bargaining would be an invasion of the board's authority, apparently in the belief that collective bargaining requires forced concessions.45 But this view is considered by many to be inaccurate,

44 The last Ohio Supreme Court case dealing with this subject was Hagerman, which had been applied by some lower courts to prohibit collective bargaining and grievance arbitration in the public sector. See note 11 supra and accompanying text.
and the opposing view has been recognized in federal court decisions dealing with mandatory bargaining in the private sector; moreover, public employees in Ohio may not force concessions by strikes. Thus there is no good reason to prohibit mandatory collective bargaining. However, it is the legislature and not the courts that should determine whether a duty of affirmative action should be placed on the boards of education.

Contract-formation arbitration, on the other hand, does involve a delegation of authority. Giving the arbitrator the power to set the actual terms of an agreement, rather than the limited power to interpret terms voluntarily agreed upon, would effectively delegate some of the school board's statutory power. The board is required by law to make these decisions; hence any delegation would be improper and would not be tolerated by the courts.

Thus it appears that the court in *Dayton Board of Education* has gone as far as it can or should go in the area of collective bargaining and arbitration in the public sector. Any further action in this area will have to come from the legislature.

*Dale T. Brinkman*

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68 E.g., NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); White v. NLRB, 255 F.2d 564 (5th Cir. 1958).