

COLLECTIVE NEGOTIATIONS IN ARIZONA'S PUBLIC SCHOOLS: THE ANOMALY OF TOLERATED ILLEGAL ACTIVITIES

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Each spring the media recounts the progress of teacher negotiations in Arizona school districts. At times the bargaining breaks down and the parties resort to a mediator. More occasionally a teachers' strike occurs. During these very public processes, there is rarely any question raised regarding the legality of bargaining. Both public officials and private citizens appear to accept teacher bargaining as a *fait accompli*. What is strange about the absence of any generalized outcry over negotiations is that no authorization exists for these practices under state law. Yet, under the common law, public sector collective bargaining was proscribed unless the legislature gave express authorization. That teacher negotiations in Arizona offend the rule of law should be sufficient grounds to call for their abrogation unless the legislature acts. Bargaining in the absence of legislative guidelines also has a demonstrable potential for capricious and unfair consequences. I hope that this Essay will contribute to reconsideration of the appropriateness of teacher negotiations until the legislature acts to sustain or prohibit them.

LACK OF LEGISLATIVE GUIDANCE

With some notable exceptions, the Arizona Legislature has delegated substantial discretion to local school districts for the operation of public schools. Local districts maintain broad authority in both employee and program decisionmaking. The Arizona State Board of Education exerts some control through certification.¹ While the legislature has codified due process principles in teacher dismissal provisions,² it has left the conditions of employment, hiring, and discharge to local discretion, subject to review primarily in the courts. As a result of this decentralized structure, terms and conditions of employment vary greatly throughout the state.

The legislature's predisposition to avoid prescriptive, statewide man-

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1. The Arizona State Board of Education has responsibility to "[s]upervise and control the certification of teachers. . . ." ARIZ. REV. STAT. ANN. § 15-203(a)(21) (1984 & Supp. 1985).

2. The provisions prescribing teacher dismissal procedures are found at ARIZ. REV. STAT. ANN. §§ 15-536 to -543 (1984 & Supp. 1985).

dates in education, and the absence of expansive regulatory powers at the state level serves Arizona school districts well.³ Arizona captures a distinctly heterogeneous population, and the light touch of the legislature permits local adaptation.⁴ Although decentralization is a virtue in program and other instructional areas, decentralization becomes a dangerous vice in another area of school operations. Arizona's education code is mute regarding employee relations and collective bargaining. Indeed, Arizona law on public sector labor relations is notable for its elusiveness.⁵ It is as though the legislature relegated the area to orally transmitted customs and practices, despite the traditional rule that school districts, as statutory creations, must conform their behavior to what the statutes explicitly permit.⁶ The legislature's careful avoidance of public sector labor relations has had catastrophic results. Local districts have suffered from the absence of legislative guidance. The state desperately needs the legislature to perform its central function—to articulate public policy.

THE EXISTING LAW

In a state where collective bargaining between school boards and teacher associations is routine,⁷ it is surprising that almost no law exists to regulate public sector negotiations. What law exists might be called "proto-law," as it is embodied primarily in an episodic flow of attorney general opinions. Given the absence of statutory language and authoritative judicial opinions, the Attorney General has little positive law from which to construct conclusions. Such opinions always have the limited effect of simulating law until the legislature or courts produce a statement of state law.⁸

3. One particularly salient form of state level control that does not exist in Arizona is administrative review of teacher dismissals by local school boards. Appeal from the decision of a local board is to a superior court. See ARIZ. REV. STAT. ANN. § 15-543(a) (1984 & Supp. 1985). In Alabama, for instance, local board decisions may be appealed to a State Tenure Commission. See ALA. CODE §§ 16-24-30 to -38 (1975 & Supp. 1986); cf., *The Vanishing Myth of Local Control*, 66 PHI DELTA KAPPAN 189 (1984).

4. The 1984 revision of the bilingual education statutes that removed a legislatively imposed ceiling on services to limited English proficient students represents a recent affirmation of the principle of local district choice. See ARIZ. REV. STAT. ANN. §§ 15-751 to -756 (1984 & Supp. 1985); cf. Sackén, *A Choice for the People to Make: The Necessity of Legislative Reform of Arizona's Bilingual Education Policy*, 26 ARIZ. L. REV. 79 (1984).

5. Arizona's law of public sector labor relations is elusive in the obvious sense that the legislature has not promulgated a public employees' bargaining law (nor a statutory ban on bargaining), but it is also elusive due to the absence of any authoritative caselaw. Essentially, public managers, including school boards, have little to work with other than a small set of attorney general opinions. See *infra* notes 6-36 and accompanying text.

6. See, e.g., *School Dist. No. One of Pima County v. Lohr*, 17 Ariz. App. 438, 438, 498 P.2d 512, 513 (1972) ("We have held that school boards have only the authority granted by statute. . . .")

7. Collective bargaining has become routine in two respects. In school districts that have institutionalized the practice, teacher negotiations have become part of the operational life of the district, associated with the assembling of the district's budget. One can follow, for instance, the progress of negotiations in newspaper articles. See *TUSD, Union Tentatively Agree on Contract*, Arizona Daily Star, Apr. 11, 1986, at A1, col. 1; *TUSD, Union Talks Enter Mediation*, Arizona Daily Star, Apr. 9, 1986, at B1, col. 4; *Houston Says TUSD-Teacher Talks Might Have to Resort to Mediation*, Arizona Daily Star, Mar. 14, 1986, at B5, col. 1; *TEA Seeks Pay Raise, Class Trim*, Arizona Daily Star, Feb. 4, 1986, at A1, col. 4.

8. The Attorney General's office described its opinions as basically "advisory" and its function in rendering them much "as a private law firm." Further, it notes that "[o]n occasion, our opinions are disregarded by our clients. . . ." Op. Ariz. Att'y Gen. 70-7 (R-41) (1970). Perhaps the most

Both the legislature and the courts have conspicuously avoided confronting the issue of public sector bargaining, leaving the Attorney General to issue opinions couched in the most general terms.⁹ These general statements provide little informative guidance; however, the opinions remain the presumed law of the state.

The Attorney General first discussed public sector collective bargaining in a 1974 opinion requested by State Senator Sam Lena.¹⁰ The Senator asked whether a county government could enter into a binding agreement with a union regarding a range of issues, including exclusive representation and terms and conditions of employment. The Attorney General's response relied primarily on law taken from other states. The conclusion was predictable: no collective bargaining without express statutory authorization.

The Attorney General reasoned that the historical doctrine of "unlawful delegation" prevented bargaining absent express legislative authorization.¹¹ Delegation occurs when public officials, such as a board of education, voluntarily surrender their unilateral policymaking authority by agreeing to bargain with employees. The doctrine considers the bargaining process unlawful, as an usurpation of the public employer's policymaking duties.

The opinion includes a potpourri of quotations from the Iowa and Colorado Supreme Courts, as well as citations to supportive holdings in other jurisdictions. The opinion also refers to a 1972 Arizona Court of Appeals decision, *Communication Workers of America v. Arizona Board of Regents*,¹² concluding that employee organizations could not compel the Arizona Board of Regents to bargain.¹³ The court, however, did not address the Board's power to voluntarily undertake such negotiations. Thus, the Attorney General's basis for prohibiting all bargaining was derived from the general unlawful delegation principle and by comparison to judicial resolutions in other states.

Before reaching this conclusion the opinion introduced a bit of mischief that became responsible for the current situation. While prohibiting collec-

important function of these opinions is to insulate from personal liability school board members who rely on them. ARIZ. REV. STAT. ANN. § 15-381(B) (1984 & Supp. 1985).

9. The attorney general opinions will be discussed *infra*, but overall, the opinions have little positive Arizona law, statutory or judicial, from which to reach conclusions. A connective thread in the opinions is the doctrine of improper delegation, a common law principle. See *infra* note 11 and accompanying text. The Attorney General introduced this doctrine as a bar to collective bargaining practices in his first opinion on the issue. The application of the doctrine was justified by reference to holdings from other states' courts. See Op. Ariz. Att'y Gen. 74-11 (R-24) (1974). In subsequent opinions, the Attorney General justified application of the doctrine of improper delegation by reference to his earlier opinions.

10. Op. Ariz. Att'y Gen. 74-11 (R-24) (1974).

11. The Arizona Attorney General quoted the Iowa Supreme Court: "There must be some statutory provision authorizing collective bargaining . . . the public employer cannot abdicate or bargain away continuing legislative discretion and is not authorized to enter into collective bargaining agreements without specific authority." Op. Ariz. Att'y Gen. 74-11 (R-24) (1974) (citing *State Bd. of Regents v. United Packing House*, 175 N.W.2d 110, 115 (Iowa 1970)). For contrary conclusions, see *Littleton Educ. Ass'n v. Arapahoe County School Dist.*, 191 Colo. 411, 553 P.2d 793 (1976), and *IBEW v. Town of Farmington*, 75 N.M. 393, 405 P.2d 233 (1965). Cf. Finch & Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 Wis. L. REV. 1573, 1578-87.

12. 17 Ariz. App. 398, 498 P.2d 472 (1972).

13. *Id.* at 401, 498 P.2d at 475.

tive bargaining as used in the private or industrial context, the Attorney General opined that counties may enter into agreements "to consult and confer" with employee unions, so long as exclusive representation is not granted nor any governmental authority improperly delegated to the unions.¹⁴ Meeting and conferring would serve merely as a "vehicle to insure informed governmental action."¹⁵ This proposition became the school districts' justification for current bargaining practices, which proceed under the monumental misnomer of "meet and confer."¹⁶

During the next decade, the Attorney General reiterated and, to some extent, refined these basic propositions in a series of opinions involving various aspects of the rapidly evolving collective bargaining practices in the public schools. In 1979, the Attorney General addressed the potential conflict between the state's open meeting law and district negotiations with teachers.¹⁷ Specifically, the central question addressed was whether negotiations could occur in executive session. Due to a peculiar phrase in the prior open meeting law,¹⁸ the Attorney General concluded that a school board and representative of employee organizations could hold executive sessions to discuss salaries, salary schedules, or compensation paid in the form of fringe benefits.¹⁹ The Attorney General carefully warned that if the negotiations extended beyond these specified topics, open meeting requirements attached. Although the union sought elections to determine the major source of employee input, the opinion noted that this union's particular proposal did not abridge the exclusive representation prohibition.²⁰ Thus, the proposal

14. Op. Ariz. Att'y Gen. 74-11 (R-24) (1974).

15. *Id.*

16. There is undoubtedly variability across Arizona's school districts in the nature of discussions conducted between school boards and teachers' organizations. It is illustrative, however, that the term "meet and confer" is not the pervasive descriptor of these processes. For instance, the Arizona Daily Star newspaper characterizes the meetings in Tucson Unified School District No. 1 as "contract negotiations." Arizona Daily Star, December 31, 1985, at B1, col. 4. The Arizona Education Association uses the term "bargaining" in its publication, the AEA Advocate. See, e.g., AEA ADVOCATE, May 1985, at 7-8.

17. Op. Ariz. Att'y Gen. 179-126 (R79-066) (1979). The State's open meeting law is located at ARIZ. REV. STAT. ANN. §§ 38-431 to -431.09 (1984 & Supp. 1985).

18. Until 1982, the open meeting statute permitted executive sessions for "[d]iscussion or consultations with representatives of employee organizations regarding the salaries, salary schedules, or compensation. . . ." ARIZ. REV. STAT. ANN. § 38-431.03(A)(4) (1984). The current provision permits executive sessions with "designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations. . . ." ARIZ. REV. STAT. ANN. § 38-431.03(A)(5) (1984 & Supp. 1985). One might ask *what* negotiations this provision anticipates. Presumably, one could argue that this language constitutes tacit legislative approval of collective bargaining. An inadvertent, *sub silentio* restructuring of public employment practices, however, is unlikely. A more reasonable conclusion is that the provision refers to "meet and confer" negotiations.

19. Op. Ariz. Att'y Gen. 179-126 (R79-066) (1979).

20. The union proposed that the school district should hold an election to determine the "major source of employee input." The proposal cautiously noted that "nothing in this policy is to be construed to preclude the personal appearance before the board by any employee on his/her own behalf." Op. Ariz. Att'y Gen. 179-126 (R79-066) (1979). This proviso saved the proposal from violating the "no exclusive representation" prohibition articulated by the Attorney General in 1974. See Op. Ariz. Att'y Gen. 74-11 (R-24) (1974) ("However, the union may not be regarded as the exclusive representative of the union's members. . . ."). One might question whether the school board would permit a disenchanted, nonunion teacher to attend the executive session or, if not, whether the board would extend comparable time and energy to meeting and conferring with nonunion teachers individually or collectively. Both prospects appear unlikely.

seemed facially compliant with the requirements stated in the 1974 opinion.²¹

The next pair of Attorney General opinions laid bare the euphemistic character of meet and confer procedures. In 1980, the Attorney General reviewed an extensive opinion drafted by a private law firm in response to a school district's request.²² The law firm's opinion letter evaluated a proposed agreement between the school board and the local teacher association.²³ After a long introductory segment covering the underlying principles of state constitutional, statutory and case law that the agreement was likely to offend, the opinion letter proceeded to analyze the proposed agreement and to identify the improper provisions. The violations were legion; the Board had designated the association as exclusive representative and also agreed to multiple improper delegations and subsidizations of the association. Indeed, little in the document appeared lawful.

The Coconino County Attorney transmitted the law firm's opinion letter, along with a copy of the entire agreement, to the Attorney General. The County Attorney added his concurrence with the law firm's opinion and encouraged the Attorney General to study the matter. The County Attorney explained that he understood that local teacher associations had presented this same agreement to other school boards; therefore, "an opinion from the Attorney General would create unanimity within the state."²⁴ Whatever the County Attorney's hopes, the Attorney General's response was unambitious. The Attorney General merely reiterated its position on open meetings and teacher negotiations. Relying on the "longstanding policy" to decline comment on the specific employment policies of local districts, the Attorney General refused further comment.²⁵

The Attorney General again invoked this same longstanding policy in a 1981 opinion on school grievance processes.²⁶ In that instance, a rival teachers' union contested the exclusive right of the elected bargaining representative to participate in grievance proceedings against the district. The rival union argued that its exclusion was inconsistent with state law. The attor-

21. See *supra* note 10 and accompanying text.

22. Op. Ariz. Att'y Gen. I80-146 (R80-132) (1980).

23. Many Arizona school districts are represented by the county attorney. See ARIZ. REV. STAT. ANN. § 11-532(A)(10) (1977 & Supp. 1985). Districts may elect to employ a private attorney to represent them if the county attorney consents. ARIZ. REV. STAT. ANN. § 15-343(B) (1984). When a district's counsel issues an opinion letter, he must promptly transmit it to the Attorney General who shall concur, revise, or decline to review. See ARIZ. REV. STAT. ANN. § 15-253(B) (1984). The Superintendent of Public Instruction is obligated to distribute the Attorney General's opinions, along with the opinion of the school district's attorney, to all county attorneys, county superintendents, and to other interested persons who request a copy. See ARIZ. REV. STAT. ANN. § 15-253(A) (1984). In this essay, I discuss both Attorney General opinions and the opinions of school district attorneys to which the Attorney General is responding. The latter documents are *part* of the referenced Attorney General opinions and are available wherever Attorney General opinions are collected, such as in county law libraries. They are not, however, usually included in the bound volumes of the Attorney General's opinions. Often, the short formal statement from the Attorney General concerning these documents is itself not included in the bound volume of Attorney General opinions. For these reasons, references herein are to the more complete unbound materials.

24. Op. Ariz. Att'y Gen. I80-146 (R80-132) (1980).

25. *Id.*

26. Op. Ariz. Att'y Gen. I81-041 (R81-017) (1981).

ney for the school district skillfully interpreted the tiny corpus of state law to permit both exclusive representation and judicial enforcement of a collective bargaining agreement between a school district and a teachers' association. The school district's attorney sent the opinion letter to the Attorney General for review, along with a copy of the grievance procedure and the collective bargaining agreement's exclusive recognition provisions. The Attorney General's office declined to review the opinion letter, but laconically suggested that the school district's attorney ponder the legality of the enclosed provisions in light of previous Attorney General opinions.²⁷

In its next two opportunities to comment on public school bargaining, the Attorney General identified two clearly impermissible practices. In the first instance, the Attorney General admonished a district for extending the term of its teacher contract until "altered by mutual agreement of the parties."²⁸ The provision prevented the school board from changing policies without the consent of the teachers' association, thus contravening the doctrine of improper delegation.²⁹ The Attorney General pointed out that its previous opinions proscribed employee agreements that in any way attempted to restrict a board's control over policy matters.³⁰

The second opinion involved binding arbitration.³¹ The Superintendent of the Flagstaff School District requested an opinion letter from the district's counsel on the permissibility of binding arbitration for disputed interpretations of the district's bargaining agreement. Concurrently, the teachers' association asked its counsel for a similar opinion letter. The two opinion letters, unsurprisingly, came to diametrically opposed conclusions. The Coconino County Attorney forwarded both letters to the Attorney General. The County Attorney explained that he enclosed the association's opinion letter because of the importance of the issue to both parties. The Attorney General issued a brief concurrence with the district counsel's opinion that binding arbitration was impermissible because it was not expressly authorized by state law.³²

In 1983, the Attorney General retreated to noninvolvement in a matter concerning the revision of a longstanding collective bargaining agreement.³³ In February 1983, the Superintendent of Window Rock Unified School District No. 8 requested the Apache County Attorney to determine whether the agreement with the teachers' association that had existed for a number of years bound the district. After careful description and analysis, the County Attorney concluded that major portions of the agreement were improper and illegal. The Attorney General declined to review the County Attorney's opinion letter.

27. *Id.*

28. Op. Ariz. Att'y Gen. I81-119 (R81-126) (1981).

29. Other problems created by the provision included improperly binding successor boards, exceeding the statutory limit of one-year contracts, and excessive vagueness.

30. Op. Ariz. Att'y Gen. I81-119 (R81-126) (1981). The Attorney General cited Op. Ariz. Att'y Gen. 74-11 (R-24) (1974) and Op. Ariz. Att'y Gen. I79-126 (R79-066) (1979).

31. Op. Ariz. Att'y Gen. I82-042 (R92-008) (1982).

32. *Id.* The gravaman of the Attorney General's conclusion was that the Board could delegate such authority only when the legislature expressly authorized.

33. Op. Ariz. Att'y Gen. I83-059 (R83-054) (1983).

After the Board revoked the old agreement, the Superintendent submitted a new agreement developed by district administrators and the teachers' union. The County Attorney praised the new draft as "a commendable effort to comply with the applicable Arizona law,"³⁴ and then made some minor, corrective suggestions. One rather interesting recommendation was that the agreement's title should be changed from a "Professional Employee *Negotiation* Agreement" to a "Professional Employee *Conference* Agreement." By this expedient alteration, the County Attorney indicated the district would avoid "any shadows of illegality" cast by the original title.³⁵ One is reminded of the Shakesperian query: "What is in a name? A rose by any other name. . . ." As with the previous question, the Attorney General eschewed comment on the County Attorney's opinion concerning the new "conference agreement."³⁶

It is clear from the Attorney General's opinion that traditional collective bargaining, as found in the private or industrial context, is being conducted between school boards and teachers' associations. The Attorney General, which initially stated that such activities violate the law, has retreated to a relatively passive posture. Occasionally, the Attorney General has reminded local officials of the clear boundaries of obvious illegality, such as binding arbitration, but these admonitions have done little to deter the development of collective bargaining in the public school setting.

THE COURTS' FAILURE TO CONFRONT THE SITUATION

What then of the courts, the oft-chosen arena for contesting such issues of public policy? In 1972, it appeared that the courts might quickly foreclose the debate on school districts' discretion to negotiate. In *Board of Education v. Scottsdale Education Association*,³⁷ the Scottsdale Education Association brought suit in Maricopa County Superior Court, seeking to enforce a collective bargaining agreement against the boards of Scottsdale High School District No. 212 and Scottsdale Elementary District No. 48. In 1971, both school boards signed the districts' first collective bargaining agreement. The agreement included procedures for resolving impasses in negotiations for future contracts. During negotiations the following year, the parties reached an impasse on the issue of salaries, but the boards disavowed the prescribed impasse procedures and unilaterally set teachers' salaries. The superior court entered an order directing the school boards to fulfill their contractual obligations.

The boards appealed and the court of appeals reversed.³⁸ Relying primarily on holdings from other jurisdictions, the court declared the contract an improper delegation of authority.³⁹ The court voided the contract, stating

34. Op. Ariz. Att'y Gen. I83-078 (R83-062) (1983).

35. *Id.*

36. *Id.* The County Attorney's evaluation is part of the Attorney General opinion. See *supra* note 25.

37. 17 Ariz. App. 504, 498 P.2d 578 (1972), *vacated on other grounds*, 109 Ariz. 342, 509 P.2d 612 (1973).

38. *Id.* at 512, 498 P.2d at 586.

39. *Id.* at 509-511, 498 P.2d at 583-85. The court pointed out: "All of the cases brought to our attention or located by this court, with one exception, hold that in the absence of legislative author-

that it was beyond the power of the board. This judicial statement could have precluded subsequent negotiations in Arizona schools, but the Arizona Supreme Court vacated the opinion.⁴⁰ The supreme court sustained the reversal but held that because the teachers' association sought an inappropriate remedy, the court of appeals should have simply dismissed the claim. As the court of appeals should not have addressed the question of improper delegation, the supreme court vacated the appellate opinion as gratuitous.⁴¹

For over a decade, no case presented a comparable opportunity for addressing the legality of collective bargaining in public schools. Moreover, in subsequent opinions, the courts, like the Attorney General, appeared to acquiesce to the collective bargaining process. For example, in 1981, the court of appeals enforced a sick-leave procedure contained in a collective bargaining agreement against a superintendent and board.⁴²

The situation is interesting. During difficult negotiations for a successor contract, teachers "engaged in a work action in the nature of a 'sick-in'."⁴³ The superintendent issued an order requiring absent teachers to provide a doctor's certificate; failure to provide this verification would result in the loss of pay for that day. This new requirement essentially was an addition to the sick leave procedures contained in the current contract. The court concluded that the superintendent lacked the power to issue the order without prior board approval.⁴⁴ Although the board quickly adopted the order as district policy and applied it retroactively to the sick-in period, the court held that the contract created a vested entitlement. The court found that the employees were entitled to the contractually-prescribed sick leave procedure, one free from medical verification. Thus, the board's attempt to apply the superintendent's verification policy retroactively was "tantamount to an impairment of already vested contractual rights."⁴⁵

The outcome is consistent with traditional contract law; nevertheless the notable fact remains that the court explicitly acknowledged the district's contract as a collective bargaining agreement⁴⁶ and enforced the agreement

ity, a governmental body may not enter into such a binding collective bargaining agreement. . . ." *Id.* at 510, 498 P.2d at 584.

40. Board of Educ. v. Scottsdale Educ. Ass'n, 109 Ariz. 342, 509 P.2d 612 (1973).

41. *Id.* at 344, 509 P.2d at 614.

42. *Godbey v. Roosevelt School Dist. No. 66*, 131 Ariz. 13, 638 P.2d 235 (Ct. App. 1981). The court begins its factual description with: "A collective bargaining agreement . . . was entered into on July 1, 1972, covering the terms and conditions of employment of appellees and other . . . district teachers for the period extending from July 1, 1972 to June 30, 1975." *Id.* at 14, 638 P.2d at 236. The court noted, in a footnote, that the parties to this three-year contract were the district board and the classroom teacher's association, "which was recognized as the teachers' representative for collective bargaining purposes." *Id.* at 14 n.1, 638 P.2d at 236 n.1.

43. *Id.* at 15, 638 P.2d at 237.

44. *Id.* at 20, 638 P.2d at 242.

45. *Id.* at 21, 638 P.2d at 243. Ironically, in reaching its conclusion that the superintendent could not act without prior board approval, the court of appeals relied on its own opinion in *Board of Educ. v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578 (1972) *vacated on other grounds* 109 Ariz. 342, 509 P.2d 612 (1973). Citing *Scottsdale*, the court of appeals concluded that the board could not delegate the power to create the disputed policy to the superintendent without legislative authorization. *Godbey*, 131 Ariz. at 19-20, 638 P.2d at 241-42. This argument may strike one as anomalous in the context of a decision enforcing a collective bargaining agreement against a school board, especially because this same court of appeals expressly held such agreements to be improper delegations in *Scottsdale*. See *supra* notes 37-39 and accompanying text.

46. See *supra* note 42.

against the school board's unilateral attempt to modify its policy. Indeed, the court's enforcement of the contract frustrated the board's attempt to respond to the "work action" taken during the collective bargaining processes, although both activities presumably were illegal.⁴⁷

The Arizona Supreme Court again avoided the collective bargaining issue when it recently decided *Wistuber v. Paradise Valley Unified School District*.⁴⁸ The case involved a school board's decision to release the president of the teachers association from teaching duties although the board continued to pay most of her salary. In return, the association president promised to pursue duties that would benefit the district. Predictably, this arrangement became part of the district's new collective bargaining agreement. The suit, filed by a group of district taxpayers, claimed that the arrangement constituted a gift of public monies to a private association in violation of the Arizona Constitution.⁴⁹

The primary issue in the case was whether the school board's payments to the association president represented a disbursement of funds for a public purpose. The school district analogized the president's new duties to those of a director of employee relations. Most of her new responsibilities, as described in the bargaining agreement, involved serving as the association's liaison in the administration of the agreement.⁵⁰ The majority observed that "it still seems obvious that the duties . . . are substantial, and the relatively modest sums required . . . [are] not so disproportionate as to invoke the constitutional prohibition."⁵¹

Justice Cameron dissented, arguing that the association was the primary beneficiary, not the district. He offered an explanation for the arrangement, "What has happened here is that the board has 'bought its peace' by paying the president . . . for duties which benefit the [teacher association] at the expense of the board and [nonassociation] member teachers."⁵² One could argue that the benefit of employee peace is valuable to the public. The school board, however, purchased peace by disbursing funds to the president of the designated exclusive bargaining unit, as a result of collective bargaining negotiations. One wonders how both the majority and dissenting opinions avoided the doctrine of improper delegation.

47. The "sick-in" was a voluntary withholding of services by the teachers, essentially constituting a strike. Unsurprisingly, authority for the proposition that strikes by public employees are illegal must be taken from Attorney General opinions. See Op. Ariz. Att'y Gen. 71-12 (R-40) (1971). For an extended discussion of a proposed "District Staff Job Action Policy," see the opinion letter from the Pinal County Attorney to the Superintendent of Casa Grande Elementary School District (June 22, 1979) filed with Op. Ariz. Att'y Gen. 180-039 (R80-012) (1980).

48. 141 Ariz. 346, 687 P.2d 354 (1984).

49. ARIZ. CONST. art. IX, § 7 ("neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever . . . make any donation . . . by subsidy or otherwise, to any individual, association or corporation. . . .").

50. The association president's duties included attending board meetings as a spokesperson for the teachers, assisting teachers in developing their awareness and insuring compliance with contract procedures, and representing members of the bargaining unit at hearings. *Wistuber*, 141 Ariz. at 348 n.3, 687 P.2d at 356 n. 3.

51. *Id.* at 350, 687 P.2d at 358.

52. *Id.* at 353, 687 P.2d at 361 (Cameron, J., dissenting).

AVOIDING THE QUESTION

Two recent lawsuits illustrate the degree of uncertainty and the potential for capriciousness created by the present situation. In September 1981, John Williams, a teacher at Tucson High School in Tucson Unified School District No. 1 (TUSD), filed suit against his employers and the Tucson Education Association (TEA).⁵³ Williams complained that TUSD violated its obligations with regard to grievance procedures under the collective bargaining agreement known as the "Consensus Agreement." Williams also charged that TEA, the bargaining representative, failed to fulfill its duty of fair representation by refusing to demand binding arbitration on Williams' grievances, as permitted in the Consensus Agreement. Williams also argued, in the alternative, that the Consensus Agreement constituted an illegal delegation of authority. The superior court granted summary judgment for the defendants, holding in part that the "consensus agreement did not violate either constitutions or statutes."⁵⁴

Williams appealed arguing that the entire Consensus Agreement was illegal or alternatively, that including binding arbitration in the grievance process was illegal. Williams premised both arguments primarily on the doctrine of illegal delegation.⁵⁵ TUSD's attorneys replied that the Consensus Agreement's arbitration procedures were permissible under state law, but even if the court found the procedures impermissible, Williams was not entitled to relief.⁵⁶ That is, if the court found the grievance procedures illegal, Williams' complaint that the TEA unlawfully denied him access to those procedures became moot.

The court of appeals, in an unpublished, memorandum decision, affirmed the superior court's ruling describing Williams' appeal as "frivolous."⁵⁷ Focusing on the nature of the teacher's grievances, the court dismissed the alleged wrongs with the legal maxim *de minimus non curat lex*.⁵⁸ The court agreed with TEA's refusal to take Williams' grievances to binding arbitration. Having dismissed Williams' grievances as inconsequential, the court tersely explained why it did not need to address the legality of the Consensus Agreement: "Assuming, arguendo, that there is something illegal about the consensus agreement, we are unable to find any theory upon which the appellant [Williams] could recover in any event."⁵⁹ The court of appeals denied Williams' motion for reconsideration.⁶⁰ Subsequently, both the Arizona Supreme Court and the United States Supreme Court denied

53. Williams v. Tucson Unified School Dist. No. 1, No. 196770 (Super. Ct. Pima County, April 8, 1983) (minute entry order).

54. *Id.*

55. Appellant's Opening Brief at 18, 31, Williams v. Tucson Unified School Dist. No. 1, No. 2 CA-CIV 4927 (Ct. App. 1983), *cert. denied*, 105 S. Ct. 1188 (1985).

56. [Appellee's] Answering Brief at 40, Williams v. Tucson Unified School Dist. No. 1, No. 2 CA-CIV 4927 (Ct. App. 1983), *cert. denied*, 105 S. Ct. 1188 (1985).

57. Williams v. Tucson Unified School Dist. No. 1, No. 2 CA-CIV 4927 (Ct. App. March 22, 1984).

58. Slip Opinion at 6. The chosen legal maxim is that the law does not concern itself with trifles.

59. *Id.* at 11.

60. Williams v. Tucson Unified School Dist. No. 1, No. 2 CA-CIV 4927 (Ct. App. May 2, 1984).

Williams' petitions for review.⁶¹

During the Williams' case TUSD argued that the binding arbitration procedures in the Consensus Agreement were legal. This was a peculiar stance given the district's virtually concurrent position that a binding arbitration provision is its contract with white collar and food-service workers was illegal.⁶² This conflicting posture, however, augured a change in the district's negotiating stance with teachers. In December, 1985, TUSD filed a declaratory judgment action against TEA,⁶³ arguing that the binding arbitration provisions in the Consensus Agreement constituted an unlawful delegation of authority.⁶⁴ One must marvel at the district's philosophical flexibility.⁶⁵ It is unseemly to have one's attorney vigorously defend the legality of arbitration vis-a-vis one employee group, then publicly disclaim the legality of the same procedure vis-a-vis a different group of employees. This sequence of events epitomizes the degree of uncertainty and potential for capriciousness inherent in the current state of the law.

WHAT TO DO AND WHY

Even though banned by law, pervasive collective bargaining takes place in Arizona school districts. It is a matter of public knowledge that formal collective bargaining occurs, not some pallid substitute like "meet and confer." The organs of public enforcement, particularly the courts, alternately have ignored and enforced collective bargaining agreements. Given the traditional view that such negotiations are illegal, the official silence during the annual negotiations is particularly inexplicable.

Some would dispute the desirability, as well as the necessity, of public sector bargaining.⁶⁶ Legislative attempts to authorize collective bargaining have not fared well in the Arizona Legislature.⁶⁷ Yet, this policy matter of

61. *Williams v. Tucson Unified School Dist. No. 1*, No. 17608-PR, *petition for review denied*, Arizona Supreme Court, Sept. 14, 1984, *cert. denied*, 105 S. Ct. 1188 (1985).

62. *See Asbestos found in TUSD despite reports to contrary*, Arizona Daily Star, May 29, 1985, at B2, col. 4. ("TUSD attorney Ron Curry said he has an Attorney General's Opinion stating that binding arbitration is illegal.")

63. *Tucson Unified School Dist. v. Tucson Educ. Ass'n*, No. 229938 (Super. Ct. Pima County, Dec. 27, 1985).

64. *Ariz. Daily Star*, Dec. 31, 1985, at B1, col. 4.

65. The board's explanation for its policy shift was "legal advice" that binding arbitration is illegal. "They cite a 1982 state attorney general's opinion." *Id.* This reference is undoubtedly to *Op. Ariz. Att'y Gen. 182-042 (R82-008)* (1982), discussed *supra* at note 31. Ironically, in February, 1986, the teachers' union requested dismissal of the lawsuit on the basis of the *Williams* litigation that had "already decided the legality of binding arbitration." *Arizona Daily Star*, Feb. 13, 1986, at B4, col. 4. Both parties are embarking on this new sea of litigation in frail vessels.

66. On the other hand, it is possible to see collective bargaining with teachers as essential. At one point in the *Williams* litigation, a judge asked a revealing, rhetorical question: How can a school district be expected to operate without collective negotiations? Telephone interview with Catherine M. McCracken, attorney for John W. Williams (June 26, 1985). That is a sound, pragmatic question of educational policy; it is not a legitimate or relevant consideration in a lawsuit claiming that this practice is illegal. Such a question becomes relevant only if the court, believing that the improper delegation doctrine is anachronistic in this context, holds that the doctrine is no longer a bar to public sector collective negotiations.

67. Legislation authorizing collective bargaining has been unsuccessfully introduced in the past. *See S.B. 1177*, 31st Leg., 2d Sess. (1974); *S.B. 1158*, 32d Leg., 1st Sess. (1975); *S.B. 1086*, 32d Leg., 2d Sess. (1976); *H.B. 2026*, 33d Leg., 2d Sess. (1978).

statewide interest is now resolved on a district-by-district basis, completely without legislative guidance.

In the vacuum surrounding negotiations, no one can publicly acknowledge collective bargaining; therefore many important substantive issues are merely ignored or resolved ad hoc. A good example is the issue of the rights of rival unions versus those of the exclusive bargaining representative. An Attorney General opinion on the subject stated that a school board cannot select an exclusive representative.⁶⁸ This hardly helps to assure a fair division of the spoils between the elected representative union and the aspiring rival unions.

In the *Wistuber* dissent,⁶⁹ Justice Cameron points out the anomaly of calling a union's president the district's employee relations director. There is an inherent conflict of interest in having the union president represent the interests of both members and nonmember teachers. Neither the courts nor the school board address the problem because they cannot acknowledge the president officially as the representative of the exclusive bargaining unit, because such an entity cannot exist legally.

The absence of any policy guidelines and the need to preserve the myth of non-negotiation enhances the inherent potential for ill-advised negotiations. The teacher associations demonstrate much less fidelity to this central myth of non-negotiation. The newspaper of Arizona's largest teachers' association, the *AEA Advocate*, bluntly promotes traditional collective bargaining.⁷⁰ Moreover, the Arizona Education Association, as an affiliate of the National Education Association, draws sustenance and expertise from its national parent organization.⁷¹ That perhaps explains a county attorney's observation that a local association's contract proposal had been presented to other school districts in the state.⁷² Greater isolation of local boards and ad hoc responses to bargaining are unlikely to result in a unanimous or competent statewide response to teacher association proposals. One might anticipate convergence of practice by both sides as experience in negotiations grows, but it is unclear whether this end should be achieved by continuing to participate in presumptively illegal acts.

Both sides have acted abusively while operating without legislative guidance. For example, following extensive negotiations a school district recently signed a two-year collective bargaining agreement with its teachers. After suffering a financial shortfall, the district disavowed its promised salary increments for the second year.⁷³ In court, the district successfully ar-

68. Op. Ariz. Atty Gen. 74-11 (R24) (1974).

69. *Wistuber*, 141 Ariz. 346, 350, 687 P.2d 354, 358 (1984) (Cameron, J., dissenting). See *supra* notes 48-52 and accompanying text.

70. See, e.g., *AEA ADVOCATE*, May 1985, at 8-9 (discussing bargaining activities and strategies in various local units around the state).

71. An example of this relationship is a jointly developed and funded bargaining project, intended to increase local affiliate bargaining activity in Arizona. See *AEA/NEA Launch Bargaining Project*, *AEA ADVOCATE*, April 1985, at 10.

72. Letter from John H. Grace, Coconino County Attorney, to Bob Corbin, Arizona Attorney General (June 9, 1980) (filed with the Attorney General Op. Ariz. Att'y Gen. 180-146 (R80-132) (1980)).

73. *Marana Board Suspends Teacher Pact*, *Arizona Daily Star*, June 1, 1984, at B1, col. 1.

gued that state law prohibited the two-year contract.⁷⁴

Lack of legislative guidance has also cost the taxpayers money. During a two and a half year period, one school district paid over \$1.7 million to settle grievances with teachers. The county attorney's office investigated these extraordinary expenditures and issued a report recommending an audit by the State Department of Education or the Auditor General.⁷⁵ One year later, the district sought a budget override election. The override might have been necessary under other circumstances, but it is clear that payment of almost two million dollars in teacher grievances during the previous three years did not assist the district in its instructional mission. To offer a cliché, the taxpayers and parents appear the losers.

Unauthorized, unguided collective bargaining is offensive to the rule of law and often detrimental to the interests of the educators and citizens of a district. One alternative is to wait for the courts to resolve the issue. It is conceivable that the Arizona Supreme Court could conclude that the improper delegation principle does not bar these negotiations. Obviously, the current lawsuit by Tucson Unified School District offers that opportunity.⁷⁶ Such a decision would remove the stigma of illegality, an important symbolic effect, but the dysfunctional consequences of completely decentralized policymaking would remain. Even if the court legitimizes collective bargaining, districts and associations still would have to forge ad hoc policy on essential issues such as the scope of bargaining, binding arbitration, and service fees for nonmembers. Merely to recite these issues is to illustrate their statewide impact, and to illumine the need for legislative guidance.⁷⁷

Relying on the courts as policymakers of default has another pernicious consequence. Were the courts to ease this dilemma by removing the bar of the improper delegation doctrine, "the people [would] thus lose the political experience and stimulus that come from fighting the question out in the ordi-

74. *Marana Educ. Ass'n v. Marana Unified School Dist.* No. 6, No. 217263 (Super. Ct. Pima County, Nov. 2, 1984). In 1979, the Attorney General opined that contracts for all school employees other than superintendents and principals must be limited to a single year of duration. *Op. Ariz. Att'y Gen.* 179-053 (R78-331) (1979). The term of employment for superintendents and principals may extend to three years. *ARIZ. REV. STAT. ANN.* § 15-503(B) (1984 & Supp. 1985). One reason that two year contracts are not permitted for teachers is that a school board may not bind its successor boards. *See School Dist. No. 69 v. Altherr*, 10 Ariz. App. 333, 458 P.2d 537 (1969).

75. Pima County Attorney's Office, Report to the School Board of the Tucson Unified School District 12 (Dec. 1984).

76. *See supra* note 62 and accompanying text. A decision legitimizing collective bargaining by teachers is not inconceivable. Arizona's courts have certainly countenanced public sector collective negotiations and enforced agreements without questioning their validity. Moreover, the doctrine of illegal delegation has not barred officially-sanctioned public sector collective negotiations in other states. *See D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* Part I (1970). Yet, as *Godbey v. Roosevelt School Dist.* No. 66, 131 Ariz. 13, 638 P.2d 235 (Ct. App. 1981) shows, the Arizona courts are still willing to utilize the doctrine in public labor-relations matters. Ironically, the court invoked the doctrine to enforce the collective negotiations agreement against a superintendent and board. *See supra* note 42 and accompanying text.

77. The legislature might choose to legitimize bargaining, but permit broad local discretion in shaping the process. Such a decision would be contrary to the legislative response in virtually all states that have authorized public sector negotiations. *See generally* J. GRODIN, D. WOLLETT & R. ALLEYNE, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* (3d ed. 1979). Nevertheless, at least the policy decision to retain decentralized processes would come from the appropriate governmental body.

nary way, and correcting their own errors."⁷⁸ Public sector employment relations is a matter of public policy; it becomes a matter of interpretation and application for the courts after the legislature has made those fundamental policy judgments. The responsibility for addressing this issue belongs rightfully to the state legislature. Under the Arizona Constitution, the legislature has responsibility for the establishment and maintenance of public schools.⁷⁹ In the past, the legislature developed statewide policies for employment and dismissal of teachers.⁸⁰ While some educational decisions are undoubtedly best left to local discretion,⁸¹ collective bargaining practices are normally authorized and guided by legislative policymaking.⁸² Unless the court completely abandons the doctrine of improper delegation, general principles of public law demand that the legislature codify its preferences and direct school district action.

And what to do? The logic of this argument does not compel me to urge either a comprehensive bargaining statute or a statutory prohibition of all bargaining.⁸³ To perpetuate the arrant fiction that collective bargaining is not occurring is detrimental to virtually all involved interests. Important educational policymaking is taking place. Through legislative default, however, this matter of crucial statewide importance is diffused to local levels and allowed to develop idiosyncratically. The Arizona Legislature must assume responsibility for this aspect of public school operation.

78. *Plyler v. Doe*, 457 U.S. 202, 253 n.15 (1982) (Burger, C.J., dissenting) (quoting J.B. THAYER, JOHN MARSHALL 106-107 (1901), as quoted by A. BICKEL, *THE LEAST DANGEROUS BRANCH* 22 (1962)).

79. ARIZ. CONST. art. XI, § 1, ("The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform school system. . .").

80. ARIZ. REV. STAT. ANN. §§ 15-531 to -550 (1984 & Supp. 1985).

81. See generally Sacken, *supra* note 4.

82. The doctrine of improper delegation normally requires legislative action prior to public sector collective bargaining. See generally D. WOLLETT & R. CHANIN, *supra* note 76. Commentators, however, have asserted that collective bargaining "is often an accepted practice" in states that lack authorizing statutes or even prohibit the practice. See *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1679 (1984). Arizona's experience is consistent with this general proposition.

83. An attempt to eradicate all bargaining by statutory ban is perhaps precluded by the *status quo*. The legislature would have to ensure enforcement of a prohibition, because, as the Attorney General discovered, a mere emphatic "no" may not stem the practice. To some degree, a prohibition might be an attempt to call back the tide, but that is a policy judgment and a determination for the legislature. Two states currently have statutory bans on public sector bargaining. See N.C. GEN. STAT. §§ 95-98 (1959); TEX. STAT. ANN. art. 5154C (Vernon 1947).