Teacher Collective Bargaining

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During the past year, two courts of separate jurisdiction focused attention on teacher bargaining questions arising out of unfair practices in the Union County School Corporation. In *Union County School Corporation Board of School Trustees v. Indiana Education Employment Relations Board*,[1] the Indiana Court of Appeals addressed the substantive issues of whether a school corporation is required to discuss or bargain about make-up school days for teachers and the adoption of a school policy concerning school closings. The first issue had been addressed by the court of appeals in *Eastbrook Community School Corporation v. Indiana Education Employment Relations Board*.[2] In *Eastbrook*, the court held that school calendars are nonnegotiable matters of educational policy, not mandatory subjects of bargaining under the Certified Educational Employee Bargaining Act ["CEEBA"], and that a contingency clause in the parties' collective bargaining agreement did not have such a direct and substantial impact upon salary, wages, hours, and related benefits as to mandate bargaining.[3] Because the school board in *Eastbrook* had discussed the issue of make-up school days with the exclusive representative, the court did not address the issue of whether requiring teachers to provide services on days other than those contemplated within the normal school year constituted a working condition which would require discussion under the CEEBA.

Union County dealt not only with the question of bargaining but also with discussion relating to making up school days. The facts in *Union County* are unique in that Union Elementary School is located on the Indiana and Ohio state line with part of the building in Indiana and part of the building in Ohio. Students who attend the school are residents of either Indiana or Ohio.[4] Union County and College Corner,

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[1]471 N.E.2d 1191 (Ind. Ct. App. 1984).

[2]446 N.E.2d 1007 (Ind. Ct. App. 1983).

[3]*Id.* at 1013.

[4]OHIO REV. CODE § 3313.42 and IND. CODE § 20-4-56-1, both enacted in 1921, provided for the establishment of a joint school between a school corporation in the state and an adjacent school corporation in another state. On August 14, 1961, the Boards of Education for Union County and the College Corner Local School District held a joint meeting at which policies were adopted which had the effect of establishing a formal Joint Board of Education. Again on July 21, 1964, the parties entered into another written agreement recognizing the Joint Board and reiterating the policies as adopted at the 1961 joint meeting. In College Corner Local School Dist. v. Union County School Corp., No. 64-2994 (S.D. Ohio Nov. 3, 1964), the district court recognized the Joint Board as a legal

the two school corporations involved, pay a proportionate share of the teachers' salaries based on the respective percentages of students from Indiana and Ohio who are enrolled in Union Elementary. During the 1977-78 school year, Union Elementary was closed for nineteen days because of inclement weather. Teachers were required to make up seven days, and the students were required to make up eleven days.[5] The teachers at Union Elementary received no additional pay from Union County for the additional days, and they were the only teachers in the Union County School Corporation who were required to make up school days. In the past, the Union County School Corporation had issued supplemental contracts to the teachers who had been required to work additional contract days at Union Elementary School. Teachers had been provided payments in an amount equal to the Indiana share of the total daily rate for each of the make-up days.[6]

At a meeting of the Joint Union School Board in December 1978, the Board adopted a school closing policy whereby Union Elementary School would remain open as long as the Ohio school buses were operating. During the 1978-79 school year, Union County schools were closed for six days because of inclement weather, except for Union Elementary, which remained open on these days in accordance with the school closing policy as adopted by the Joint Union School Board in December 1978.

The president of the National Education Association-Union County filed a complaint for unfair practice with the Indiana Education Employment Relations Board ("IEERB"), alleging that the Indiana and Ohio local school corporations had unilaterally changed the pay procedures for the make-up of snow days in Union Elementary School and had unilaterally implemented a new school closing policy. The hearing examiner concluded that the Joint Union School Board and the Union County School Corporation committed unfair practices under the CEEBA[7] by failing to bargain or discuss the scheduling of make-up days and the school closing plan. Accordingly, the examiner recommended an order that the two employers cease and desist from refusing to bargain about these wages[8] and from refusing to discuss with the teachers' exclusive representative changes in the school calendar.[9] In addition, the examiner

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entity; however, the court held that one local school district could not change the operation and procedure without the consent and agreement of the other local school district. *Union County*, 471 N.E.2d at 1194 n.1.

[5]Ohio law requires 182 student days, OHIO REV. CODE § 3313.48 (1980), for funding eligibility from the state of Ohio unless waived by the Ohio Superintendent of Public Instruction. *See* OHIO REV. CODE § 3317.01 (1980).

[6]471 N.E.2d at 1194.

[7]*See* IND. CODE § 20-7.5-1-7(a)(1), (a)(5), and (a)(6) (1982).

[8]*See id.* § 20-7.5-1-4 (1982).

[9]*Id.* § 20-7.5-1-5(a) (1982).

recommended that the two employers be ordered to pay the teachers supplemental wages. The IEERB subsequently issued its decision and order, which adopted the hearing examiner's findings of fact and conclusions of law. The trial court then affirmed the decision and order.[10]

In determining whether the school employer had a duty to bargain about make-up school days and the school closing plan adopted in December 1978, the *Union County* court was guided by the decision in *Eastbrook*.[11] It concluded, as had the court in *Eastbrook*, that "make-up days which do not change the amount of time the teachers agreed to teach '[do] not have such a direct and substantial impact upon salary, wages, hours and salary and wage related benefits' as to mandate bargaining."[12] The court rejected the teachers' argument that the school employer's past practice of issuing supplemental contracts to the teachers in Union Elementary for make-up school days elevated the issue to a mandatory subject of bargaining.[13] In reaching that conclusion, the court reasoned that both the scheduling of the make-up days in the 1977-78 school year and the adoption of the school closing policy were within the school employer's management prerogative[14] as well as the *Eastbrook* decision.[15]

Because the exclusive representatives and the school employers in *Eastbrook* and *Union County* did not have grandfathered collective bargaining agreements,[16] neither court considered what effect, if any, a grandfathered calendar would have on bargaining about make-up school days.

Union County expanded the *Eastbrook* decision because the question of whether the school employer had a duty to discuss the scheduling of make-up school days had not been before the *Eastbrook* court. The court in *Union County*, after concluding that the scheduling of make-up days and the school closing plan were "working conditions" for which the statute mandates discussion,[17] held that "the existence of the past practice of issuing supplemental contracts to the [Union Elementary School] teachers during the 1976-77 school year placed the duty to initiate discussion as to the issue of make-up days of 1977-78 on the Em-

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[10]471 N.E.2d at 1195.

[11]446 N.E.2d at 1007.

[12]471 N.E.2d at 1197 (quoting *Eastbrook*, 446 N.E.2d at 1013).

[13]*Id.* at 1198.

[14]*Id.*

[15]*See* IND. CODE § 20-7.5-1-6(b) (1982).

[16]The proviso in IND. CODE § 20-7.5-1-5(a) (1982) states, "[A]ny items included in the 1972-73 agreements between any employer school corporation and the employee organization shall continue to be bargainable." Grandfathered agreements are those which remain in effect and permit the parties to continue acting as agreed despite a subsequent law or regulation which normally would restrict such actions.

[17]IND. CODE § 20-7.5-1-5(a) (1982).

ployers."[18] Consequently, the duty to initiate discussion concerning the scheduling of make-up school days lay with the school employers because it was reasonable for the teachers to rely on the past practice of receiving pay for the additional days.

On the other hand, the court reached a different conclusion with respect to the school closing plan and the school employers' duty to initiate discussion. Regarding this issue, the court held that the school employers did not act unfairly when the school closing plan for inclement weather during the 1978-79 school year was enacted without prior discussion with the exclusive representative.[19] Thus, the burden of initiating or requesting discussion is on the exclusive representative whenever policy changes concern matters of general interest to the school community as a whole.

The court in *Union County* noted that fifty-two days had transpired between the time the school closing policy had been adopted and its implementation.[20] Yet, from the time of adoption to the time of implementation, the teachers had never requested discussion. Certainly, notice was a key consideration in the court's holding. However, a more practical consideration might have been that the Union Elementary School teachers had worked a regular school day for which they had contracted. A contrary decision could have ultimately resulted in teachers being paid twice for the same day's work whenever a school employer had to close a portion of the school district for emergency reasons.

The question of whether the IEERB had jurisdiction over the Joint Union School Board of Education in *Union County* was considered by both the Indiana Court of Appeals[21] and United States District Court for the Southern District of Ohio.[22] The Indiana court found that both the Union County School Corporation and the Joint Union School Board were employers within the CEEBA.[23] In arriving at this determination, the Indiana court recognized that section 11 of the CEEBA provided the basis for the IEERB's jurisdiction over complaints of unfair practices[24] and concluded that the jurisdiction of the IEERB concerned disputes between school employers and school employees. Section 2(c) of the CEEBA defines a school employer as "the governing body of each school

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[18]471 N.E.2d at 1199.

[19]*Id.* at 1200.

[20]*Id.* at 1199.

[21]*Id.* at 1195-96.

[22]College Corner Local School Dist. v. Union County School Corp., No. 81-2994 (S.D. Ohio May 31, 1985).

[23]471 N.E.2d at 1195.

[24]IND. CODE § 20-7.5-1-11 (1982) provides:

(a) Any school employer or any school employee who believes he is aggrieved by an unfair practice may file a complaint . . . .

corporation and any person or persons authorized to act for the governing body of the school employer in dealing with its employees."[25]

Both the Union County School Corporation in Indiana and the College Corner Local School District in Ohio had jointly formed Union Elementary School. Those two entities organized and established the Joint Union School Board to operate Union Elementary School. Particularly significant is the Indiana court's finding that the Joint Union School Board fell within the statutory definition of "school employer." The court concluded that the Board was given its authority by the local school corporations in Indiana and Ohio. As such, it was a "person or persons authorized to act for the school employer in dealing with employees."[26]

At the same time that both school employers were seeking judicial review in Indiana, the College Corner Local School District filed an amended supplemental complaint in the United States District Court for the Southern District of Ohio joining the IEERB as a party defendant. The plaintiff prayed for relief against the IEERB in the form of a preliminary and permanent injunction, restraining the IEERB from purporting to exercise jurisdiction over the Joint Union School Board of Education and the College Corner School, *i.e.*, Union Elementary School, and from proceeding with the unfair practice complaints, which were then pending before the IEERB, involving the College Corner Board.

From the outset, the IEERB had contested subject matter jurisdiction, as well as all other grounds upon which it had been joined as a party defendant. Upon the motion of the district court, the parties to the litigation were asked to submit briefs on application of the eleventh amendment.[27] Later, the district court agreed with the IEERB and held that the litigation was barred by the eleventh amendment,[28] recommending that the amended supplemental complaint be dismissed with prejudice as to the IEERB. The district court noted that although the state of Indiana was not a named defendant, federal courts usually hold that the eleventh amendment

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[25] *Id.* § 20-7.5-1-2(c) (1982).

[26] 471 N.E.2d at 1196 (quoting IND. CODE § 20-7.5-1-2(c) (1982)). *See supra* note 25 and accompanying text.

[27] The eleventh amendment to the United States Constitution provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

[28] College Corner Local School Dist. v. Union County School Corp., No. 81-2994 (S.D. Ohio May 31, 1985). The District Court rejected the *Ex parte Young*, 209 U.S. 123 (1908), exception to the eleventh amendment bar. The plaintiff had not alleged that any IEERB individuals had acted in an unconstitutional manner. Under the recent holding in Pennhurst State School and Hosp. v. Halderman, 104 S. Ct. 900 (1984), the plaintiff must allege a violation of the United States Constitution because *Ex parte Young* does not apply to violation of state constitutions.

bars suit against a state agency which is the alter ego of the state.[29] The key element in determining the question of alter ego is the degree of autonomy that the state entity has. The court found that the IEERB was not at all independent of the state of Indiana and that the IEERB was created, operated, and treated as a state agency, meaning that the IEERB is nothing more than an arm of the state.

The district court also pointed out that "[w]hile the Eleventh Amendment on its face only bars suits by citizens of one State against another State, the Supreme Court has long held that the Amendment also bars suits of a citizen against his own state."[30] The court therefore concluded that the IEERB was also immune from the cross-claim of the defendant Union County School Corporation (of Indiana) and the party defendant Joint Union School Board (of both Indiana and Ohio).

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[29]Judgment in the original complaint, College Corner Local School District v. Union County School Corp., No. 2994 (S.D. Ohio), had been filed on November 3, 1984. In the original complaint, subject matter jurisdiction was apparently grounded on diversity of citizenship although the question of subject matter jurisdiction was not litigated at that time. Moreover, the IEERB was not a party to the original litigation. The IEERB was joined as a new party defendant when the supplemental amended complaint was filed in 1981.

[30]According Pennhurst State School and Hosp. v. Halderman, 104 S. Ct. 900, 908, if the IEERB could be classified as an alter ego of the state of Indiana, suit against it would be proscribed by the eleventh amendment and the jurisdictional bar would apply regardless of the nature of the relief sought. Therefore, requesting injunctive relief would not exempt the lawsuit from the prohibitions of the eleventh amendment.