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THE 1976 AMENDMENTS TO THE ACT GOVERNING COLLECTIVE BARGAINING BETWEEN TEACHER ORGANIZATIONS AND BOARDS OF EDUCATION IN CONNECTICUT: AN APPRAISAL

by Peter Adomeit*

I. BACKGROUND

In 1976, the Connecticut General Assembly amended the Teacher Negotiation Act¹ in several significant ways. This article reviews these amendments.²

The first statute governing teacher bargaining in Connecticut, enacted in 1965,³ (this statute and its pre-1976 amendments will be referred to as the 1965 Act) borrowed several principles from the National Labor Relations Act:⁴ The right of employees to bargain collectively⁵ and to designate representatives for purposes of bargaining,⁶ the principle of exclusive representation permitting one employee organization to bargain on behalf of the entire bargaining

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1. CONN. GEN. STAT. §§ 10-153a to 153g (1975) (current version at CONN. GEN. STAT. §§ 10-153a to 153g (1977)). Although there were some revisions in 1967, 1969, and 1973, see note 3 infra, the 1965 Act remained substantially unchanged until the 1976 Amendments. When the text speaks of the 1965 Act, it is referring to the 1965 Act and its pre-1976 amendments, which have been codified in the 1975 Connecticut General Statutes. All footnote references will be to the 1975 codification and parenthetically to the current version.


5. CONN. GEN. STAT. § 10-153b(e) (1975) (current version at CONN. GEN. STAT. § 10-153b(e) (1977)).

6. CONN. GEN. STAT. § 10-153b(c) (1975) (current version at CONN. GEN. STAT. § 10-153b(c) (1977)).

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unit;\(^7\) the right to an election to determine which organization should represent the employees, with certification of the victor;\(^8\) the obligation of both labor and management to bargain in good faith;\(^9\) and a prohibition against interference with the rights afforded employees by the Act.\(^{10}\) The 1965 Act also guaranteed rival teacher organizations "equal access" to teachers and to school facilities such as mail boxes and bulletin boards.\(^{11}\)

There were four major differences between the 1965 Teacher Negotiation Act and the National Labor Relations Act. First, and perhaps foremost, teachers could not strike—at least not lawfully.\(^{12}\) To assist the parties in reaching agreement in the absence of the right to strike, the 1965 Act provided for mandatory mediation\(^{13}\) and mandatory, but nonbinding, arbitration.\(^{14}\)

Second, the administration of the 1965 Act was not given over to an administrative agency. While the United States Congress entrusted the primary responsibility for enforcing the National Labor Relations Act to the National Labor Relations Board, the Connecticut General Assembly did not entrust the 1965 Teacher Act to the Connecticut State Board of Labor Relations—a decision that was to have important consequences. Because the Connecticut State Department

\(^7\) CONN. GEN. STAT. § 10-153b(e) (1975) (current version at CONN. GEN. STAT. § 10-153b(e) (1977)).
\(^8\) CONN. GEN. STAT. § 10-153b(d) (1975) (current version at CONN. GEN. STAT. § 10-153b(d) (1977)).
\(^10\) CONN. GEN. STAT. § 10-153d (1975) (current version at CONN. GEN. STAT. § 10-153d (1977)). The provisions concerning interference with the rights afforded employees are now located at CONN. GEN. STAT. § 10-153e (1977).
\(^11\) This right was conditioned upon "the absence of any recognition or certification" of any teacher organization. See CONN. GEN. STAT. § 10-153d (1975) (current version at CONN. GEN. STAT. § 10-153d (1977)). However, § 10-153c provided unconditionally that "[e]ach organization shall have, during the election process, equal access to school mail boxes and facilities." CONN. GEN. STAT. § 10-153c (1975) (current version at CONN. GEN. STAT. § 10-153c (1977)).
\(^12\) CONN. GEN. STAT. § 10-153e (1975) (current version at CONN. GEN. STAT. § 10-153e (1977)).
\(^13\) CONN. GEN. STAT. § 10-153f (1975) (current version at CONN. GEN. STAT. § 10-153f (1977)). The same section authorized the Secretary to the State Board of Education to recommend a basis for settlement. This was a power the mediators and the Secretary rarely exercised. (In Connecticut, the positions of Secretary to the State Board of Education and Connecticut Commissioner of Education are traditionally held by the same person.)
\(^14\) "The decision of the arbitrators shall be advisory and shall not be binding upon the parties to the dispute." CONN. GEN. STAT. § 10-153f (1975) (current version at CONN. GEN. STAT. § 10-153f (1977)).
of Education was given the duty of providing mediators and arbitrators to the parties,\textsuperscript{15} it acts more like the Federal Mediation and Conciliation Service, or the American Arbitration Association, than a labor board.

Third, the Department of Education had no power whatsoever to enforce the guarantees and proscriptions of the 1965 Act.\textsuperscript{16} If labor or management committed an unfair labor practice, there was no labor board to turn to. In fact, the 1965 Act did not contain an unfair labor practice section as such.\textsuperscript{17} It guaranteed that teachers could exercise statutory rights without interference or coercion\textsuperscript{18} and it required good faith bargaining,\textsuperscript{19} but that was all. The other unfair labor practices proscribed in section 8(a) and (b) of the National Labor Relations Act\textsuperscript{20} were absent from the 1965 Teacher Act.

Fourth, the Connecticut Act simply left it to the parties to decide who would conduct their elections.\textsuperscript{21} Virtually all elections were conducted by a private organization, the American Arbitration Association, rather than by an administrative agency such as the NLRB or the Connecticut State Board of Labor Relations. Under the National Labor Relations Act, the employer does not pay for the cost of the election; nor do the municipalities under Connecticut's Municipal

\textsuperscript{15} CONN. GEN. STAT. § 10-153f (1975) (current version at CONN. GEN. STAT. § 10-153f (1977)).


\textsuperscript{16} The Secretary to the State Board of Education could force either party to mediate a dispute, and the Secretary could recommend a basis for settlement, but the powers of the office stopped there. The Secretary could not force a settlement or prevent a strike. \textit{See} CONN. GEN. STAT. § 10-153f (1975) (current version at CONN. GEN. STAT. § 10-153f (1977)).

\textsuperscript{17} In 1975, the General Assembly, by 1975 Conn. Special Act 75-91, authorized the State Board of Education to prepare and submit to the Joint Standing Committee on Education of the General Assembly "guidelines" governing good faith bargaining, scope of negotiations, and unfair labor practices. The guidelines issued were of unknown legal force, being neither statutes nor regulations. They appeared to some to be an interim political step toward placing an unfair labor practice section into the statute.

\textsuperscript{18} This first appeared in 1969 Conn. Pub. Act 811, § 1 (amending CONN. GEN. STAT. § 10-153a (1968)).

\textsuperscript{19} CONN. GEN. STAT. § 10-153d (1975) (current version at CONN. GEN. STAT. § 10-153d (1977)). The provisions concerning good faith bargaining are now located at CONN. GEN. STAT. § 10-153e (1977)).

\textsuperscript{20} National Labor Relations Act, § 8(a), (b), 29 U.S.C. § 158(a), (b).

\textsuperscript{21} CONN. GEN. STAT. § 10-153b(d) (1975) (current version at CONN. GEN. STAT. § 10-153b(d) (1977)). The overwhelming choice was the AAA. The town of Meriden once used the town clerk's office, but that choice was a clear exception.
Employee Relations Act. But under the 1965 Teacher Act, the cost of administering the elections, approximately one dollar per vote, was paid by the local board of education.

II. UNIT DETERMINATION AND ELECTIONS: THE 1965 ACT

Under the 1965 Act the bargaining unit consisted of those professionals working in positions "requiring a teaching or special services certificate." Administrators were entitled to a separate unit. Excluded from the teachers' unit were the superintendent and the assistant superintendents, board negotiators, those responsible for personnel relations or budget preparation, and "temporary substitutes and all noncertified employees." Professionals such as social workers, psychologists, librarians, and reading consultants were all required to hold a certificate and therefore were included in the teacher unit. Teachers' aides, janitors, groundskeepers, and bus drivers were not required to hold certificates and were excluded from the teachers' unit.

The 1965 Act left to the parties to decide who would conduct their election. The American Arbitration Association (AAA), a private agency that conducts bargaining unit elections, has presided over virtually every teacher election in Connecticut since the 1965 Act. The AAA maintains a position of strict neutrality, refusing to make any decision bearing on the election that may affect the outcome. For example, the AAA will not set the date of the election, or the time, or the polling places, or even the position of the parties on the ballot. Before accepting any election duty, the AAA requires the parties to sign an agreement containing a provision for a moderator.

27. See note 21 supra and accompanying text.
28. The AAA standard election agreement reads in part: "The undersigned parties have agreed that the AAA shall be the impartial agency to administer a teacher representative election, in accordance with its election rules and the Connecticut General Statutes." The 1970 AAA Election Rules, (on file at the office of the AAA, 37 Lewis St., Hartford, Conn.) read in part:

The AAA . . . may at any time appoint an election arbitrator or arbitrators from its national panel of arbitrators . . . . The election arbitrator shall interpret and
parties cannot agree on the crucial details of the election, the decision is made by the moderator and not by the AAA. In practice, the moderator sits down with the parties to the election in an effort to mediate their differences. If mediation fails, the moderator simply decides when and where the election will occur. The moderator may also be called upon to declare when electioneering shall cease; to set the date of the runoff election, if any; and perhaps most important, to determine eligibility to vote. In a close election, eligibility decisions are crucial and may well determine the outcome. A moderator of elections makes the kinds of eligibility decisions which would be made by the NLRB or the State Board of Labor Relations.

There are some clear benefits to this system, as well as some problems. The benefits are obvious: the process is fast and inexpensive. The parties can raise objections as the ballots are being placed on the table for counting. The moderator can hold a mini-hearing on the spot, review the statutory definition of the bargaining unit, and make a decision on the eligibility of the voter. Occasionally, the moderator will know in advance of a difficult eligibility issue and request written briefs. Because the decision of the moderator is final, and because a particular eligibility decision usually will not affect the outcome of the election, the parties do not try to delay bargaining by appealing the decision.

Problems with the system are also obvious. First, not all mod-
apply these rules insofar as they relate to his powers and duties. . . . The Election Arbitrator shall rule on all challenged ballots and on any other objection to the election, and shall certify the results of the election in writing. Submitting to the moderator for decision such questions as eligibility of voters is clearly consistent with the legislative purpose. The 1965 Act required the parties to submit any eligibility dispute to arbitration. See Conn. Gen. Stat. § 10-153c (1975) (current version at Conn. Gen. Stat. § 10-153c (1977)). But the Act was unwieldy—it called for each party to appoint its arbitrator. The board of education could appoint one or two, each teachers' organization could appoint one, and those four would pick the "impartial member." It does not take five arbitrators to decide a question of who may vote. Wisely, the AAA never invoked this procedure. Instead, the AAA solved the problem by requiring the parties to agree to a single election moderator with broad powers over the conduct of the election.

29. The relative strength of the rival teacher organizations frequently varies among schools, so the question of where the teachers vote is regarded by the organizations as crucial. Mail ballots have never been favored in teacher elections in Connecticut.

30. Some elections have been extremely close. In the Dec. 3, 1975, New London election neither organization won a majority of ballots cast, so a runoff was necessary, under Conn. Gen. Stat. § 10-153b(d) (1975) (current version at Conn. Gen. Stat. § 10-153b(d) (1977)). The ultimate winner trailed in the regular election, yet won the runoff election by one vote, 147-146. This was the second time the New London election had gone to a runoff. Where the vote is so close, the eligibility of permanent substitutes to vote could determine the outcome.
erators may agree on an eligibility question. Thus, the system may not operate uniformly. Second, the moderator's decision may be wrong, but the only appeal is, "wait until next year."\(^{31}\) Third, the moderator's decision on eligibility to vote may have an impact months later at the bargaining table.

For example, a question arose in one town\(^{32}\) over whether department heads could vote. In the past, department heads had been part of the teachers' unit; they spent the majority of their time teaching. They performed administrative functions but they were not required to hold an administrative certificate. Then the local board of education changed its policy and required department heads to hold administrative certificates. By so doing, did the board remove them from the teachers' unit and place them in the administrators' unit? The two units were not the same, nor were the benefits the same; the question had practical importance to the individuals and the school system. The issue was raised during an election. It was resolved by a moderator, based in part upon the apparent wishes of the majority of department heads and upon the wording of the Act. He ruled they were not eligible to vote in the teachers' election, and as a result, the department heads moved to the administrators' unit.\(^{33}\) The moderator created the precedent which the parties then used to resolve a bargaining issue.

Another example of a moderator's decision on eligibility which had an impact beyond the election itself involved the town of Wethersfield. A question arose over whether certain substitute teachers were eligible to vote. The Act excludes, but does not define, "temporary substitutes."\(^{34}\) Is a teacher who is hired in January to

\(^{31}\) Under the AAA agreement, see note 28 supra, the moderator's decision is final and binding. The moderator is, in effect, an arbitrator. Under both the 1965 Act and the 1976 Amendments, eligibility questions are to be resolved through arbitration. **CONN. GEN. STAT.** § 10-153c (1977). The statute contemplates a panel of arbitrators; the AAA agreement only requires one. In either case, the moderator-arbitrator is deciding a statutory issue, namely, who is included as a part of the bargaining unit under **CONN. GEN. STAT.** § 10-153b(a)(2) (1977). Because none of the decisions on eligibility issues are published, or even issued in writing, how the moderators are deciding eligibility issues is known only by the teacher organizations and the AAA.

\(^{32}\) The discussion in the text is based on cases in which the author was a participant. The names of the towns are protected by the privacy of arbitration.

\(^{33}\) Whether this decision was proper is not material here. The point is, simply, that election moderators are deciding eligibility issues which have an impact far beyond the election itself. After the 1976 Amendment to the 1965 Act, a teachers' organization could have presented the same question to the State Labor Board by charging the Board of Education with refusing to bargain. See **CONN. GEN. STAT.** § 10-153e(b)(5), (e) (1977).

\(^{34}\) **CONN. GEN. STAT.** § 10-153b(b) (1977).
replace another teacher on indefinite sick leave a "temporary substitute?" What about a teacher hired in September to replace a teacher on pregnancy leave? Or a teacher who is hired to be on standby each day, and works as a substitute virtually every school day for several years? Should these kinds of issues be resolved by moderators? The question is statutory in nature: what did the General Assembly intend when it defined the teacher bargaining unit? Before the 1976 Amendments, the only other tribunal available to resolve such disputes was the courts, and neither labor nor management appeared eager to challenge a moderator's decision. So far as is known, the eligibility decisions of the moderators, while sometimes the subject of grumbling by teacher organizations or boards of education, were not appealed to the courts. Yet, moderators at virtually every election were called upon to make difficult eligibility decisions.

Another election problem under the 1965 Act was purely mechanical: the statute did not provide for much time to conduct both the main election and any required runoff election. The 1965 Act created a short election season, corresponding to the start of

35. The teacher bargaining unit is defined at CONN. GEN. STAT. § 10-153b(a)(2) (1977).

36. Once a petition requesting an election was filed, the election had to occur within 20 and 45 days. CONN. GEN. STAT. § 10-153b(d) (1975) (current version at CONN. GEN. STAT. § 10-153b(d) (1977)). The Act, in the same section, provided for a runoff election, but did not say when the runoff was to be held. Out of fear that a court might rule that the runoff had to occur within 45 days following the filing of the petition, the moderators scheduled the elections during the 45-day period. This fear was not unfounded. The election section of the 1965 Act had been construed with rigidity in Bristol Fed'n of Teachers v. Sanders, No. 179975 (Super. Ct. Feb. 13, 1973). The 1965 Act provided for an election, with certification of the organization receiving a majority of the votes cast. The most reasonable interpretation of this provision would permit a runoff election in the event that the votes for "neither" organization prevented either organization from winning a clear majority. Nevertheless, Judge Parskey ruled that because the statute mentioned one election, it only allowed one election; if neither side won, there could be no runoff. As a result of this decision, the organization that won a plurality of votes in the election, and a majority in the runoff, was denied bargaining rights. And the organization that trailed after the election and lost the runoff continued on as the bargaining representative. The court did not mention the underlying purpose of the Act, namely, to provide an orderly procedure for teachers to choose their bargaining representative. The legislature overturned this decision (1973 Conn. Pub. Acts 73-3851, but the case illustrates an unfortunate rigid view of statutory construction and a willingness to impose an unfair, impractical, and irrational procedure upon the parties. It also places the blame on the legislature: "If the failure to provide for a run-off produces an anomalous result then resort should be had to the legislature for remedial action, not to the courts." Id. at 3. This is wrong. The courts ought not abdicate their responsibility to interpret statutes in a manner that is consistent with the statute's purpose. Now that the State Board of Labor Relations has jurisdiction over the unfair labor practice sections of the 1976 Amendments, perhaps the Act will be more liberally construed.
Connecticut's winters. Because the AAA conducted virtually all elections, they frequently were forced by the tight statutory time limits to schedule runoff elections on the same day as regular elections elsewhere, overstraining their resources. In addition, the Connecticut weather frequently forced last minute cancellations of elections.

The 1965 Act did not contain a "contract bar"; and the State Department of Education did not read one into the Act. This meant that an incumbent union could sign a three-year contract, and the very next year face an election. Even though two years remained before its expiration, the contract did not bar the election. A three-year contract did not guarantee three years of labor stability. This rule, which differed from the National Labor Relations Board rule, encouraged annual elections.

Moreover, under the state practice, if the challenging union won in the middle of the contract term, as happened in several towns, the victorious union and the board of education had to face the question of what to do with the contract. As could be expected, when this scenario occurred, the newly certified union asked to tear up the old contract, and the board resisted. Because there was no administrative agency to turn to, the issue was resolved by the Connecticut Superior Court, which ruled that the old contract remained in effect until it expired, a result which is contrary to the rule under the National Labor Relations Act.

III. CONDUCT OF ELECTIONS UNDER 1976 ACT AND RECOMMENDATIONS FOR IMPROVEMENTS

The 1976 Amendments did not change the definition of the bargaining unit, and it left the election mechanism virtually intact. The opposing teachers' organizations decide who is to conduct the elec-

37. The season to petition for elections opened on October 1 and closed on November 30. The season to vote opened 20 days after the first petition and closed 45 days after the last petition. See Conn. Gen. Stat. § 10-153b(d) (1975) (current version at Conn. Gen. Stat. § 10-153b(d) (1977)). Many elections had to be scheduled around the holidays.


39. Waterford Fed'n of Teachers v. Waterford Bd. of Educ., No. 043553 (Super. Ct. Nov. 12, 1974). At the time of the decision, the statute contained no contract bar. Consequently, teachers could change bargaining representatives immediately after the signing of a new contract. The court ruled that the new bargaining agent inherits the old collective bargaining contract.

tion,\textsuperscript{41} which as a practical matter means that the elections will continue to be conducted by the AAA. Moderators will continue to make crucial decisions concerning elections, including eligibility. The election season was moved from winter to early spring,\textsuperscript{42} and the time limits were eased to allow ten days for runoffs.\textsuperscript{43} The cost of the elections was shifted from the boards of education to the teacher organizations.\textsuperscript{44} And the boards are no longer party to election ground rules or to the agreement with the AAA appointing the moderator, which may raise some unforeseen practical problems.

Previously, when representatives of the school administration attended the ground rule meetings, the moderator would obtain their written consent to provide lists of eligible voters. Now, these representatives no longer attend the meetings; nor are they parties to the agreement appointing the moderator. Previously, whatever power the moderators had over the boards originated from the board's agreement with the AAA. While no board has flatly refused to furnish eligibility lists, disputes have arisen over the timing and cost of compiling such lists. If persuasion fails to resolve such disputes, the moderator can no longer order a resolution. And should a board of education ever fail to produce the eligibility list, the moderator is powerless to act.

The moderator's powers are limited in other ways. Consider the problem of campaign electioneering. Frequently, the ground rules which the parties either agree to, or which the parties are forced to adhere to by decision of the moderator, provide for an end to electioneering on the day before the voting. If one organization accuses the other of passing out election material or stuffing teachers' mail boxes on the day of election, there is little the moderator can do. Or, if one organization accuses the other of passing out false or misleading material, in theory, perhaps, the moderator can declare an election void, but that has never been done, and the moderator's power to do so has not been tested.\textsuperscript{45}

\begin{footnotesize}
\textsuperscript{41} Local boards of education no longer contract with the agency conducting the election. Section 10-153b(d), after the 1976 Amendments now omits the words "town or regional board" from the same section of the 1965 Act. As a result, the town or regional board is no longer a party to the agreement appointing the election agency. \textsc{Conn. Gen. Stat.} § 10-153b(d) (1977).

\textsuperscript{42} The petitioning season opens up March 1 and closes on April 30. The election season remains from 20 to 45 days thereafter. \textsc{Conn. Gen. Stat.} § 10-153b(d) (1977).

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} The Act requires the election to be held on or before the forty-fifth day following the petition. \textsc{Conn. Gen. Stat.} § 10-153b(d) (1977). If the election were held on the
If either teacher organization accuses the administration of favoring the rival organization by giving it advantages not given to the other, the moderator is again powerless to act effectively. School buildings are within the control of the administration, not the moderator. If a principal decides to bar organizers from the outside union, while allowing representatives of the incumbent union to enter the schools to discuss grievances, the moderator cannot respond. The administration is beyond the moderator's jurisdiction because the administration no longer signs the agreement with the AAA requiring the use of the moderator to resolve election disputes.

The moderators in Connecticut thus perform the same function as the National Labor Relations Board in conducting elections, except that the National Labor Relations Board has the power effectively to police election abuse. The moderators lack that power.

Now that the State Board of Labor Relations has jurisdiction over unfair labor practices in education,46 the Labor Board’s decisions and the decisions of the moderators as to which teachers are a part of the bargaining unit may conflict. Assume one organization questions the eligibility of teacher X, a substitute, to vote. A moderator’s decision that teacher X may vote leaves the question of whether the board of education must bargain over the salary of teacher X unresolved. Just because the moderator allowed teacher X to vote is no guarantee that the board of education will acquiesce and permit the union to bargain on behalf of that teacher. Thus, if the board of education resists, a second hearing before the State Board of Labor Relations over whether the teacher may be part of the unit is required.

In a recent election in Wethersfield, the moderator ruled that a long-term substitute who was asked to be on call every school day, and who taught as a substitute virtually every school day, and who had been doing so for several years, was eligible to vote. This decision did not bind the board of education because it was not a party to the AAA agreement appointing the moderator, and because the moderator had no power to determine the unit for purposes of bargaining. At the time of the election the question of whether this substitute was part of the bargaining unit was pending before the State Board of Labor Relations on a refusal to bargain charge. Following the election, the Labor Board’s decision came down in favor of the teacher.47

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46. See note 122 infra and accompanying text.
The board of education had to bargain over her salary.

In the Wethersfield case the State Labor Board and the moderator agreed. But what if they had reached conflicting results? What if the moderator had ruled her eligible, the election had been won by one vote, and thereafter the State Labor Board had ruled that she was not part of the bargaining unit? Or, what if a moderator were to rule that five substitutes were eligible to vote because their employment, while perhaps lasting only a few months, was of indefinite duration, and the election is won by four votes? Assume that the Labor Board later determines that the board of education need not bargain over these employees because they are not within the bargaining unit. What then? Is the election void?

Clearly the decisions ought to be the same in both cases, but under the present system they may very well be different. The potential for disagreement between the moderator and the Labor Board is always present. Some of these issues are close questions, and to have the moderators deciding them during elections, and the Labor Board afterwards, duplicates effort and may lead to inconsistent results.

For the above reasons, the Act should be amended to place the duty of conducting elections before the State Board of Labor Relations, where questions of eligibility, access to schools, and alleged false and misleading campaign materials may be resolved in a manner that is consistent from school system to school system. The State Labor Board already conducts elections among other public employees,48 including other employees of boards of education;49 adding teacher elections would simply conform to the pattern.

The 1976 Amendments added a contract bar rule50 which operates to prevent elections during the first two years of any multiple-year contract. If a contract is for three years, an election may take place during the third year,51 but even if the rival organization wins, the statute provides that the old contract terms remain in effect.52

49. See note 151 infra.
50. "Whenever a multiple year contract is in effect, no representative election shall be held until two years of such contract have elapsed or until less than one year remains prior to the expiration date of such contract, whichever is sooner." CONN. GEN. STAT. § 10-153b(e) (1977).
51. Id.
52. CONN. GEN. STAT. § 10-153b(e) (1977) provides in part: "The terms of any existing contract shall not be abrogated by the election or designation of a new representative." The rule in the private sector is the opposite. See note 40 supra and accompanying text.
The only drawback of the rule is the possibility, although a remote one, that the incumbent may sign a contract with a duration of five years or more and thereby bind the teachers to an agreement which if signed in the private sector could be challenged after the third year.\(^{53}\)

IV. IMPASSE RESOLUTION: THE 1965 ACT

Under the 1965 Act contracts between boards of education and teacher organizations were subject to town nullification, either by the town council or (depending upon local law) the town meeting, or even by referendum.\(^{54}\) And while the fiscal authority had the final word over the contract, that authority was not involved in the actual bargaining. All too frequently, after months and months of bargaining, the parties would finally reach an agreement, only to see it thrown out by the town council\(^{55}\) or voters.\(^{56}\) While the power to

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53. See note 40 supra and accompanying text.

54. See CONN. GEN. STAT. § 10-153d (1975) (current version at CONN. GEN. STAT. § 10-153d (1977)) providing in part:

The terms of such contract shall be binding on the legislative body of the town or regional school district, unless such body rejects such contract at a regular or special meeting called for such purpose within thirty days of the filing of the contract. Any regional board of education shall call a district meeting to consider such contract within such thirty-day period if the chief executive officer of any member town so requests in writing within fifteen days of the receipt of the signed copy of the contract by the town clerk in such town. . . . If the legislative body rejects such contract within such period, the parties shall renegotiate the terms of the contract in accordance with the procedure in this section.

55. The New York Times reported the events leading up to the 1976 Meriden teacher strike as follows:

As this city’s 580 striking teachers marched on picket lines for the sixth day today, some said they felt they were pawns in a complex game of power politics that did not concern them.

The teachers went on strike April 7 after the city’s Court of Common Council twice rejected a two-year contract, approved by the Board of Education, that called for a wage increase of 2.4 percent.

The Meriden Federation of Teachers later agreed to a settlement of a total of $25 less for the two years, which was accepted by the Common Council, the legislative body in this industrial city south of Hartford.

But late Saturday night, in a special session that ended only 10 minutes before midnight, when the settlement would have become irrevocable by law, the Common Council rejected the plan again.

Mayor Grossman declined to talk about the strike.

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Other city officials said the underlying dispute in the strike was a disagreement between the Common Council and the Board of Education over the amount and disposition of surplus school funds.

N.Y. Times, Apr. 15, 1976, at 37, col. 3.

56. For example, in 1976, the contract between the Cromwell Education Association
nullify was used with some responsibility in many towns, others saw repeated taxpayer rejections of even modest contracts. For example, in Regional District #16, the teachers tried four times to reach an agreement with the town, finally succeeding after three arbitration sessions and months of negotiations. 57

Bargaining under the 1965 Act was conducted against no real deadline. Negotiations frequently began in November and lasted until the following October or later. This meant that the municipal budget had to be set before the contract was settled. Once the budget was firm, it became politically difficult for boards to settle for anything more than what was in the budget. Strikes were illegal, 58 but a part of the landscape.

If negotiations failed, the 1965 Act required the parties to negotiate with the aid of a state-appointed mediator. 59 If the mediator was unable to assist the parties in coming to an agreement, the Act called for mandatory arbitration—but the arbitration award was not binding. The parties could—and frequently did—reject the award. Once these impasse procedures had run their course, and failed, and the teachers went on strike, the statute did not give the State Board of Education clear authority to intervene through mediation. 60 In fact, if arbitration failed, the statute did not appear to require any further proceedings whatsoever. 61 In practice, however, most boards of education and teacher organizations consented to a second round of mediation, followed by a second round of nonbinding arbitration.

Mediators under the 1965 Act were appointed by the Secretary to the State Board of Education. While the parties had no direct control over who mediated their dispute, if the parties preferred a particular mediator their wishes were usually granted. None of the mediators served full time, none received formal training, 62 and their

and the Cromwell Board of Education was rejected by referendum. The Hartford Courant, Feb. 7, 1976, at 6, col. 1.
57. See The Hartford Courant, May 9, 1977, at 17, col. 1.
58. See CONN. GEN. STAT. § 10-153e (1975) (current version at CONN. GEN. STAT. § 10-153e (1977)).
59. CONN. GEN. STAT. § 10-153f (1975) (current version at CONN. GEN. STAT. § 10-153f (1977)).
60. CONN. GEN. STAT. § 10-153d (1975) (current version at CONN. GEN. STAT. § 10-153d (1977)) required more negotiations if the fiscal authority rejected a contract. But if the board and teacher organization could not reach agreement, even after advisory arbitration, the statute contained no clear guidance. In practice, the parties usually went back into negotiations, sometimes with reluctance.
61. Id.
62. According to the Secretary, the State Department of Education intends to give all
effectiveness varied.

Arbitration under the 1965 Act was conducted before either a panel of three arbitrators or a single arbitrator—the parties could choose.\(^63\) If the parties desired three arbitrators, each side would appoint an advocate arbitrator, who would in turn select a neutral third arbitrator. If the advocate arbitrators could not agree upon a neutral arbitrator, the Secretary appointed the neutral from a panel.\(^64\) Members of this panel were all chosen by the Governor.\(^65\) They apparently were not screened for neutrality.\(^66\) Some panel members were regarded as unacceptable by either the teacher organizations or boards of education. With a change in governors, some panel members were not reappointed, including some with established reputations for neutrality.

V. IMPASSE RESOLUTION: THE 1976 AMENDMENTS

A bill to require final and binding arbitration of all teacher disputes failed in 1975.\(^67\) The 1976 Act as introduced contained a form of final offer arbitration,\(^68\) but the provision was dropped as the bill mediators formal training through a program with the Federal Mediation and Conciliation Service and the AAA.

\(^63\) "Unless the parties have agreed to submit their dispute to one arbitrator, their designated arbitrators shall select a third arbitrator." CONN. GEN. STAT. § 10-153f(c) (1975) (current version at CONN. GEN. STAT. § 10-153f(c) (1977)).

\(^64\) CONN. GEN. STAT. § 10-153f(c) (1975) (current version at CONN. GEN. STAT. § 10-153f(c) (1977)). According to the same section of the statute, if a party failed to appoint its arbitrator, the Secretary would appoint that arbitrator, too.

\(^65\) CONN. GEN. STAT. § 10-153f(a) (1975) (current version at CONN. GEN. STAT. § 10-153f(a) (1977)).

\(^66\) The AAA will not place anyone on its labor panels who concurrently represents participants in labor disputes. A person who makes a living representing either labor or management while at the same time serving as a neutral arbitrator will, regardless of actual integrity and fairness, be perceived as biased. Governor Grasso did appoint to the governor's panel a person who represents participants in labor disputes. This is most unfortunate, for if advocates for labor or management appear on the panel, either of two things will happen: the panel will be challenged in court because the third arbitrator is not impartial; or the process will not be taken seriously by those who are intended to be served, and instead of resolving disputes, the panel of arbitrators will simply alienate the parties and eventually the public. The arbitration panel has only the power to persuade. Its recommendations are not binding. Therefore, it is of utmost importance that the impartial arbitrator not be chosen from the active labor relations bar.


\(^68\) An Act Concerning School Board-Teacher Negotiations, H.B. No. 5117, LCO No. 719 (1976). Under this proposal the arbitrators would decide the dispute issue by issue, choosing between the final position of either party. The theory behind the proposal is
neared passage. The impasse procedures in the final bill remain essentially the same as under the 1965 Act, with some changes in details. For example, the new amendments attempt to provide a deadline for negotiations: bargaining must begin 180 days in advance of the budget submission date, which may vary from town to town. In addition, to lessen the chances of town nullification, the 1976 Amendments require communication between the fiscal authority and the board of education before bargaining.

In theory, the new system was designed to require agreement before the budget was set, and to lessen the chance of rejection by the municipality’s fiscal authority by including it in the bargaining process. However, fiscal authorities continue to reject teacher contracts. In Berlin, for example, a taxpayer group successfully fought two teacher contracts by forcing a referendum, causing a job action by the teachers, which in turn led the taxpayer group to launch a third referendum against a contract calling for a four and one-half percent salary increase. The new amendments cannot change the fact that the real political power may lie outside of the finance committee or the city council and may be lodged with some other political figure, or with the voters, or even with the political parties. Long,
drawn-out negotiations still occur.\textsuperscript{75}

In the opinion of some, the new law has not had much impact on the way the various participants in the negotiation process behave. But with the new deadlines, the arbitration season has been lengthened.\textsuperscript{76}

\begin{table}[h]
\begin{tabular}{|l|l|}
\hline
\textbf{Negotiations Chronology} & \\
\hline
September 21, 1976 & Opening of Negotiations \\
October 12, 1976 & Exchange Proposals \\
October 13, & " " \\
November 2, 1976 & Negotiation Sessions \\
November 3, & " " \\
November 9, & " " \\
November 10, & " " \\
November 16, & " " \\
November 17, & " " \\
November 22, & " " \\
November 23, & " " \\
November 29, & " " \\
November 30, & " " \\
December 14, 1976 & Mediation Session \\
March 21, 1977 & Negotiations \\
March 22, & Board of Education Budget Hearing with Town Council \\
March 25, & Negotiations \\
March 30, & Public Budget Hearing \\
April 6, 1977 & Negotiations \\
April 13, & Negotiations \\
April 19, & Budget Hearing with Town Council \\
May 2, 1977 & Annual Town Budget Meeting \\
May 4, & Negotiations \\
May 9, & Mediation \\
May 23, & Mediation \\
Aug. 2, 1977 & Arbitration Hearing \\
\hline
\end{tabular}
\end{table}

75. Consider, for example, the negotiation history of the 1977-78 contract in North Branford:

This information is taken from the brief submitted by the Branford Board of Education to the Board of Arbitrators. The author served as the neutral arbitrator on this panel.

As of August 15, 1977, the parties had not yet reached agreement, although the budget for the 1977-78 fiscal year had been fixed for some time.

76. Because only a few engage in teacher-board arbitration sessions as advocates, and fewer still as arbitrators, arranging mutually convenient hearing dates is frequently difficult. Spreading the arbitrations over more months has eased the problem.
The 1976 Amendments give to the Secretary to the State Board of Education the power to appoint arbitrators from the governor’s panel or from any other panel. The obvious purpose was to blunt the criticism directed at the arbitrators, and to insulate their selection from the political process. How the Secretary chooses to exercise this new power is crucial. The number of arbitrators acting in this field is quite small. Presently, the Secretary continues to make single appointments if the parties cannot agree. The AAA, on the other hand, provides the parties with lists of five or seven names, and appoints a single arbitrator only after the parties repeatedly fail to make a selection from the lists. The AAA system gives the parties greater control over the selection of the arbitrator. On the other hand, the system used by the Secretary only comes into play if the parties cannot agree among themselves on the neutral arbitrator.

Under the 1965 Act, mediators were hired and paid by the State Department of Education. Under the 1976 Amendments, the mediators are chosen by the parties from a state list, and are paid by the parties. This practice is a departure from the federal pattern. The Federal Mediation and Conciliation Service provides mediators, paid by the government, to parties in the private sector. The Connecticut Department of Labor maintains several full-time mediators, who are used in the private and public sectors without cost to the parties. The practice of maintaining full-time mediators appears superior to the present system used in education. All of the

77. See Conn. Gen. Stat. § 10-153f(c)(1) (1977). By implication, this section allows the Secretary to create another panel of arbitrators, or to use arbitrators from the AAA panel. Appointments need no longer be from the governor’s panel.

78. Knowing that the Secretary will appoint a single arbitrator may, in some cases, inspire the parties to choose a neutral arbitrator.


80. Conn. Gen. Stat. § 10-153f(b) (1977). This section also allows the parties to choose the mediator from “any other panel of qualified mediators.” The same section also authorizes the Secretary to designate a mediator.

81. Conn. Gen. Stat. § 10-153f(b) (1977). Despite the language in the above statute, not all teacher mediators are paid by the parties. In the event of a strike, the Secretary may send in an intervenor, who performs a mediation function, but who is not paid by the parties. In a strike, one side or the other or both may not enter mediation with much enthusiasm. To require that they pay for the peacemaker may have psychological disadvantages, and handicap the mediator. The statute should probably be amended so that the state provides the mediator as a service to the public. To do so would conform to the practice of federal and Connecticut mediation services.


mediators used in educational disputes have other, full-time jobs. In the event of a strike, the Secretary must run through the list to determine who, if anyone, is available. The state might do better with a full-time mediator in education. Recognizing some of these problems, the Department of Education has begun to implement a formal system for training its part-time mediators, a valuable step.

Both the 1976 Amendments and the 1965 Act allow the parties to choose between a single arbitrator and a tripartite arbitration panel to conduct the advisory arbitration. In practice, the overwhelming majority of deadlocks have been referred to tripartite panels comprised of one arbitrator chosen by the board of education, one by the teacher organization, and a third arbitrator chosen either by the other two arbitrators or by the Secretary to the State Board of Education. The chairperson of the arbitration panel is impartial; the other two are advocate arbitrators.

VI. IMPASSE RESOLUTION: THE NATURE OF ARBITRATION

Arbitration under the Connecticut statute may not be fully understood by the public. The process is called arbitration by the statute, but that does not mean that the process is as judicial in nature as the arbitration of an uninsured motorist claim, or the arbitration of a breach of contract claim. Following a recent arbitration, an advocate arbitrator came under public criticism for having contacted

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84. On occasion, none of the mediators has been available, at least not immediately.
86. CONN. GEN. STAT. § 10-153f(c) (1975) (current version at CONN. GEN. STAT. § 10-153f(c)(1) (1977)).
87. Before 1969, § 10-153f(b) of the Connecticut General Statutes spoke of “an impartial board of three arbitrators.” Although the Act also stated that each party was to appoint an arbitrator, who would then join in selecting the third, and despite the fact that such tripartite boards are commonly used in labor arbitration with no one expecting anyone but the neutral arbitrator to be truly neutral, a superior court ruled in 1968 that all three arbitrators should be neutral because, thought the court, without citing any authority whatsoever, “An advisory decision by three impartial arbitrators is more helpful and beneficial to the public than a decision by a board containing just one impartial arbitrator.” West Hartford Educ. Ass’n v. West Hartford Bd. of Educ., 27 Conn. Supp. 421, 427, 241 A.2d 780, 783 (Super. Ct. 1968). The judge failed to understand that advisory arbitration is one step in the negotiation process, one more method of placing pressure on both sides to settle. It contains elements of both arbitration and negotiation. The above decision, if allowed to stand, would have removed the element of negotiation from the arbitration process. In 1969, the legislature overturned this decision by removing the reference to “an impartial board of three arbitrators,” making it clear that the parties may appoint advocate arbitrators to the panel. 1969 Conn. Pub. Acts 811 (codified at CONN. GEN. STAT. § 10-153f(c) (1977)). The current Act simply refers to the three arbitrators as the “panel.” CONN. GEN. STAT. § 10-153f(c)(1), (2) (1977).
during the deliberations the party who appointed him. In ordinary arbitration, such contact would not be proper, but in “interest arbitration” as practiced in Connecticut under the Teacher Negotiation Act, such contact is common, and may be invaluable.

What are these three arbitrators supposed to be doing? Are they negotiators pure and simple, creatures and extensions of the parties who appointed them, with the neutral arbitrator there to serve as a mediator? Or are they independent, answering only to a personal sense of what is “fair”? In answering these questions, it should be kept in mind that the arbitration awards are not binding. Either side may reject even a unanimous award. Rejection means failure, continued negotiations, heightened tensions, possible job actions, and perhaps even a teacher strike. However, a unanimous award does create public pressure for settlement which may be otherwise absent. A party that rejects a unanimous award is, in effect, rejecting the recommendations of its own representatives on the arbitration panel. The other side of the dispute can argue to the public, in effect, “Their own arbitrator thought this settlement was reasonable—why don’t they?”

Thus, although the arbitrators are appointed because bargaining has failed, the process of arbitrating the terms of a new contract is an extension of the bargaining process itself. Teacher organizations and boards of education recognize this fact in the careful way they select their advocate arbitrators. Does this mean that the party arbitrators are simply extensions of the parties? Do they have any independence? In theory, they are independent; in practice, they are as independent as the individuals playing those roles choose. Because the award is not binding, “independent” advocate arbitrators may be more willing to agree to a settlement which is less (if from labor) or more (if from management) than their side may have liked. Because the arbitrator’s decision is not binding, an advocate arbitrator has more independence than a party negotiator (i.e., the person doing the actual collective bargaining for the party), who goes beyond instructions at considerable peril.

89. “The decision of the arbitrators or the single arbitrator shall be advisory and shall not be binding upon the parties to the dispute.” CONN. GEN. STAT. § 10-153f(c)(4) (1977).
90. This, in a nutshell, is why two advocate arbitrators plus one neutral are superior to three neutral arbitrators in advisory arbitration over teacher contracts.
91. In many cases, the advocate arbitrators are more important to the process than the neutral. Unless all three agree, the award may be worthless, and usually agreement is only possible through compromise.
Thus, the advocate arbitrators are of crucial importance. In fact, their participation in the arbitration of new contracts is sufficiently valuable to warrant amending the statute so as to make the tripartite panel mandatory. Several factors support such an amendment. First, because the result is nonbinding, the award of a single arbitrator often carries no practical weight whatsoever. Second, in the event of a conflict between what is "fair and equitable" and what is "possible," however those terms may be defined, the advocate arbitrators are indispensable. They may have a much better "feel" of the situation than the neutral. They may be able to determine which of the issues are important, which crucial, and which interesting but not significant. Frequently, what to the neutral may appear significant may not be so to the parties, and at times the issue that most divides the parties may not appear to be of much importance to an outsider. Third, the advocate arbitrators enable each party to have its position argued yet another time. In a complicated arbitration, no matter how ably presented, questions frequently arise about certain facts or evidence. Having two persons responsible not only to the parties but to the process of resolving the dispute makes it all the more probable that all points will be thoroughly debated and considered. Thus, the quality of the work and the value of the arbitration award would be significantly enhanced by requiring tripartite arbitration panels to hear disputes over new contract terms.92

Because the arbitration process is both an extension of the bargaining process and a hearing before two semi-independent souls and one fully neutral member, the party negotiators presenting arguments to the arbitration panel may be tempted to under-present their case, and rely instead upon the negotiation skills of their advocate arbitrator. In other words, party negotiators may choose to have the "real" negotiation done in the arbitration setting rather than at the collective bargaining table. When the parties bring seventy or eighty issues to the arbitrators, as has happened, something has gone seriously awry during bargaining. One or both sides has been unreasonably stubborn, or, because of internal dissension, has been unable to unite behind a bargaining position and is solving the problem by allowing each point of view to be expressed at the arbitration hearing. There may be no solution to this problem. Limit the number of issues that may be arbitrated, and you may encourage the parties to refuse to bargain effectively on any more than the "magic number." Fail to

92. Grievance arbitration is a different institution with different assumptions, procedures, and purposes. The discussion in the text is limited to "interest" arbitration.
limit the number, and you invite four days of hearings concerning eighty issues. Bringing a multitude of issues before the arbitrators increases the probability that the arbitrators will disagree among themselves, and guarantees that the cost of the arbitration process will rise.

There are no statutory standards for teacher contract arbitration in Connecticut. Neither the old statute nor the 1976 Amendments dictates standards to guide the arbitrators, but the absence of statutory standards makes little practical difference. The types of standards used in interests arbitration are well known. The basic notion is comparison. Whether a teacher is worth X dollars or Y dollars depends upon a comparison with what others are making at the same time—other teachers in the area, in comparable towns in Connecticut, and in the region. Wages in other fields are also cited with frequency. The cost of living is argued about as often as the town's ability to pay. Applying these standards is frequently difficult, but when they absolutely conflict, as happens when a town must lay off

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93. A 1975 bill, introduced but never passed, contained five standards to guide the arbitrators, whose decision was, under the bill, final and binding. Those standards were:

(A) The recommendation of the Secretary for settlement as provided for in subsection (b) of this section and the bargaining between the parties prior to the submission of the issues to arbitration; (B) Comparison of the salaries and other conditions of employment of the certified professional employees involved in the arbitration with salaries and other conditions of employment of other employees performing similar services in comparable communities or in comparable jobs in private employment; (C) The public interest and the financial ability of the municipality or school district to pay the cost of the arbitrators' award; (D) Changes in the cost of living since the last agreement between the parties on salary schedules; (E) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of salaries and other conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.


The first bill introduced in the 1976 session on teacher bargaining, H.B. 5117, LCO No. 719, before it was amended, provided for the following criteria:

In deciding each question, the panel shall take into account (A) The negotiation between the parties prior to arbitration and the recommendation of the Secretary . . . . (B) The public interest and financial capability of the school district; (C) The salaries, hours and other conditions of employment prevailing in the state labor market; (D) Changes in the cost of living; and (E) The interests and welfare of the certified professional employee.

When binding arbitration was deleted from the proposed act, so were the standards. The laws of some states include a statement of standards. See generally McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector, 72 Colum. L. Rev. 1192 (1972).

94. See generally F. Elkouri & E. Elkouri, supra note 15, at 745-96.
teachers for lack of funds while inflation chews away at the pay of those who remain, arbitration is not equipped to resolve the dispute. It then serves merely to delay the day of the crunch, when the teachers either accept far less than their counterparts in more fortunate towns, or engage in an illegal work stoppage.

When an impending strike presents itself in arbitration, the question for the arbitrators, and especially the neutral, is how to react. Should the neutral be guided by the strength of the union to strike or by the power of the community to resist? Should bargaining power ever be a factor in such a situation? This writer argued to the contrary as chairman of the panel in the arbitration that preceded the New Haven teacher strike of 1975, in which teachers were bussed off to jail for defying an injunction. The opinion, in which neither the union nor the management arbitrator joined, but which is a public document and therefore not subject to the usual rules governing confidentiality of arbitrators’ awards, made the following points:

The Board and the Dissent contend, with obvious conviction, that we should abandon the traditional criteria for setting wages and recommend that there be no increases and no increments. They contend that the budget contains no funds for any increases; that any request for additional funds would be futile; and that the politics of the situation call for the first no increase, no increment adjustment since 1936. Having no hope whatsoever for any additional infusion of funds, they contend that the money for any increases would have to come from within the existing budget, an obvious impossibility, unless the Board decides to lay off hundreds of teachers. Faced with a choice of massive layoffs on the one hand or no increments and no increases on the other hand, the Board and Dissent contend that the lesser of the two evils is no increases. They contend that massive layoffs will impair education, destroy morale, and hurt the students’ education.

The Union Arbitrator argued, with equal vigor and sincerity, that New Haven will fund any additional increases

95. Ninety teachers were held in contempt and confined at Camp Hartell in Windsor Locks. See New Haven Journal-Courier, Nov. 19, 1975, at 1, col. 1. On Monday, Nov. 24, 1975, the strike was settled. According to the New Haven Journal-Courier, Nov. 24, 1975, at 42, col. 2, “A sympathy strike by the school employees last week forced the closing of schools and a citywide coalition of labor unions has threatened a half-day strike for Tuesday if the 90 [jailed teachers] are still in jail.”
without layoffs. And therein lies the problem of using as a criterion for wage determination the politics of the situation. Each side makes conflicting predictions as to what the City will or won’t pay. Each side may be relying on inside information, hunches, statements by political leaders, or newspaper editorials. Each side gives a different reading of the political winds. These winds are usually strong but never steady. A Board wind may shift into a breeze favoring the teachers, and shift back again. The Chairman believes that the only way to discover what will or won’t be accepted is to make an effort to arrive at a fair wage figure, using traditional wage arguments. Otherwise, the Arbitrators are reduced to weathervanes, being blown first this way and then that way as the political currents swirl around them. Were the Chairman to follow the implied suggestion of the Board, so that the will of the City to resist funding would become the main issue, the wage setting process would turn away from an inquiry into what is a fair and equitable wage increase. The panel would then be asking about the will of the City to resist payment; and inquiring into the will of the teachers to wrest payment. This would lead us down a road that ends abruptly at the precipice of power. The Chairman rejects as a criterion for setting wages the argument of relative power. That one side or the other has the power to force capitulation does not make the exercise of that power right. Power does not necessarily make for a fair criterion, and power can be a two-edged sword. Once we concede in this case that New Haven has the power to offer nothing, then the next time we may have to concede that the Union has the power to force payment. Once we admit that because the City has cut the Board’s budget, nothing further can be done, we virtually invite the use of countervailing power from the other side. Whether the teachers could force the Board to capitulate, or whether the Board has the power to force the teachers to capitulate, is irrelevant to this inquiry of what is a fair settlement. The Chairman believes that it is not fair for the City to be forced into paying the teachers’ demands, nor is it fair for the City to force the teachers into accepting nothing.\textsuperscript{96}

\textsuperscript{96.} Opinion of the Neutral Arbitrator in dispute between the City of New Haven Bd.
This essay into the use of power as a criterion in wage arbitration was, of course, utterly ineffective. Shortly after it was issued, the teachers struck. The arbitration process was, in that dispute, irrelevant.

VII. IMPASSE RESOLUTION: TEACHER STRIKES

The old act prohibited teacher strikes, but could not prevent them. While continuing the prohibition against such strikes, the 1976 Amendments outlaw the ex parte injunction. This means as a

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97. CONN. GEN. STAT. § 10-153e (1975) (current version at CONN. GEN. STAT. § 10-153e (1977)).

98. The reasons for teachers' strikes are varied. Perhaps some insight into the motivation may be provided by the teachers themselves. Thomas P. Mondani of the Connecticut Education Association explained the reasons why teachers strike in an article reprinted in the New Haven Register, Nov. 23, 1975, at 3B, col. 5. In that article, he states:

Watertown, East Haven, Cromwell, Bristol, Shelton—towns which in normal classifications such as population, geographic location, student population, or economic rankings have little in common, except that the teachers were on strike this year.

Why do teachers strike? Teachers strike because of a deep frustration with a system which refuses to recognize and resolve the real problems teachers continue to face. Overcrowded classroom, lack of supplies, lack of programs, inadequate grievance procedures to settle disputes, salary gains severely eroded by inflation, and job insecurity due to unfair layoff procedures are among the list in nearly every town.

... [T]eachers, realizing that they and they alone may bear tremendous personal risk since political leaders will not, that all reasonable efforts to produce agreements and provide solutions have failed, that no other meaningful alternatives resolve disputes are available, that they then must make the painful moral decision whether or not to strike.

Others hold that teachers strike for the same reason as any other employees—"more."


100. Before the 1976 Amendments, CONN. GEN. STAT. § 10-153e (1975), after stating that strikes were illegal, continued as follows: "This provision may be enforced in the superior court for any county in which said board of education is located by an ex parte temporary injunction." The quoted language was deleted in 1976. See CONN. GEN. STAT. § 10-153e (1977). The new enforcement language reads: "This provision may be enforced in the superior court for any county in which said board of education is located by an injunction issued by said court or a judge thereof pursuant to sections 52-471 to 52-479 inclusive." The legislative intent, therefore, would appear to require notice and hearing before a teachers' strike is enjoined. Although CONN. GEN. STAT. § 52-473 (1977) permits an ex parte injunction if "it clearly appears that irreparable loss or damage will result," apparently the General Assembly found that at least the first day or two of a teachers' strike does not cause irreparable injury.
practical matter that striking teachers are not enjoined until the second or third day of the strike, and they are not called up on contempt charges until the fourth or fifth day. The change allows the teachers an extra day or two until the law lands on them. Once teachers strike, psychology becomes more important than law. Some judges, recognizing this, attempt to mediate the dispute themselves, in their chambers, all the while holding on to the power to hold the teachers in contempt. Other judges have taken a different tack. When the New Haven teachers struck in 1975, Judge Saden held them in contempt and jailed all of the leaders and seventy-eight of the strikers. While the judge was certainly following the letter of

101. Judge Hill, upon enjoining the Greenwich teachers' strike of 1976, said he would fine the teachers $100 and their organization $10,000 per day if the strike continued. He declined to jail the teachers, but said he would leave that option open, and offered to mediate the dispute. The parties accepted the offer, and bargained in the Fairfield County Superior Court Building. See The Hartford Courant, Nov. 24, 1976, at 30, col. 5.

102. The New Haven Journal-Courier, Nov. 19, 1975, at 1, col. 1, Judge Saden's comments to the striking teachers were reported in the New Haven papers:

THE COURT: I think what some of you ladies and gentlemen don't seem to understand is that you have placed yourselves in the category of being lawbreakers.

You are supposed to inspire the young, impressionable minds that you teach and your credibility with your students has been seriously impaired by your conduct in violating the law. You, above all other types of persons, should have been aware of this long ago.

What can you say to your students when you return to school and they point—

A VOICE: I would like to answer—

THE COURT: Don't be a wise guy.

A VOICE: I am not, but I volunteer to answer that question.

THE COURT: These are rhetorical questions, and don't get too smart or you'll wind up in further trouble.

Of course, it is not a matter of concern for me in pronouncing sentence upon you for this civil contempt, but I merely point out to you that as law breakers, it would seem to me that the Board of Education would have the right to dismiss you from your jobs, if they saw fit to do so.

But if you think it is smart to violate the law, if you think it is smart to decide for yourselves what you think is right, regardless of what the Legislature has said is right, then you have taken the first step toward what amounts to anarchy. If everyone of us is free to decide for himself what he will do or won’t do and completely disregard the law, we no longer have the kind of democracy this country is supposed to be. It is all well and good to talk about freedom and we all believe in it, but freedom abused is no freedom at all.

The course of violating the law in the fashion that you have chosen to do is purely self-defeating, it is one in which you cannot possibly prevail because it is a confrontation not with the Board of Education—you are not here fighting
the law, some observers believed that he actually increased the resolve\textsuperscript{103} and the relative bargaining power of the strikers.\textsuperscript{104} One can never know for certain, and no one advocates running a controlled experiment with another strike in New Haven. Nonetheless, some management lawyers believe that the jailing of teachers only serves to increase their bargaining power, while others hold that the jailing of union leaders, such as happened in Shelton,\textsuperscript{105} may bring a strike to an abrupt end. Since both sides may point to strikes in Connecticut to prove their point, the matter remains unresolved. However, it is the exception, not the rule, for the judiciary to jail striking teachers. The New Haven experience is atypical.

The 1976 Amendments have not solved the problem of impasse resolution. Whether the state will see fewer strikes under the changes remains to be seen. Where strikes are caused by the lack of funds, no change in the bargaining laws can make a difference. Now that the present system of funding school education has been declared unconstitutional by \textit{Horton v. Meskill},\textsuperscript{106} more state funds must be made available to the poorer communities. However, not all teacher strikes have occurred in poverty pockets, as proven by the recent strike in Greenwich.

When a town is forced for lack of funds to lay off tenured teachers, as is happening now in Connecticut, bargaining over increases in pay for those teachers who remain is difficult. Whether teachers ought to have the right to strike, or whether impasses should be broken by binding arbitration, are questions which are at bottom political. Both methods present problems. A strike cannot produce money where none exists, although a strike may produce

\begin{quote}

the Board of Education this morning—you are fighting a court order, and the confrontation is between the courts and you.

... 

The court has no alternative in this case but to send all of you to jail, and to impose a fine on each of you, per diem, of $250.

I find you all in contempt. I impose a jail sentence upon each one of you. I impose a fine of $250, per diem, on each one of you.


\textsuperscript{103} According to one account, "[A]s the mass jailing grew more imminent, teachers seemed firmer than ever in their resolve to 'go it all the way.' " \textit{The New Haven Register}, Nov. 18, 1975, at 1, col. 7.

\textsuperscript{104} As the strike progressed, other school employees engaged in a sympathy strike, and "[a] citywide coalition of labor unions . . . threatened a half-day [general] strike for Tuesday if the 90 were still in jail." \textit{The New Haven Journal-Courier}, Nov. 24, 1975, at 42, col. 2.

\textsuperscript{105} \textit{The Hartford Courant}, Nov. 14, 1975, at 37, col. 3.

\textsuperscript{106} 172 Conn. 615, 376 A.2d 359 (1977).
money which was only in hiding. Final offer arbitration may induce better bargaining, more compromise by both sides, but it may also produce contracts that neither side can live with. It would appear that so long as the two major teacher organizations in Connecticut maintain different points of view over which ought to replace the present system, final offer arbitration or the right to strike, the General Assembly will do nothing.

VIII. UNFAIR LABOR PRACTICES

The 1965 Act contained no unfair labor practice sections. The Act did require both labor and management to bargain in good faith;107 and it required boards of education to give rival teacher organizations “equal access” to teachers and school facilities.108 The Act also prohibited the employer from interfering with teachers who exercised their rights of self-organization.109 But that was all. The 1965 Act did not contain the equivalent of subsection 8(a) or 8(b) of the National Labor Relations Act.110 In addition, the 1965 Connecticut Act did not give to an administrative agency the power to remedy violations of the duty of good faith bargaining, or the duty not to interfere with teachers’ rights, or the duty to give equal access. No labor board enforced these rights. If a dispute arose concerning them, the only recourse was litigation, a costly and time-consuming procedure.

All of this changed in 1976. The Amendments111 prohibit certain conduct by both labor and management. Management is prohibited from 1) interfering with the exercise of rights under the Act;112 2) dominating or interfering with a teacher organization;113 3) discriminating against a teacher who invokes the Act;114 4) refusing to
bargain in good faith;\textsuperscript{115} and 5) refusing to participate in good faith in mediation or arbitration.\textsuperscript{116} As will be seen, the most important of these, and the one which will probably involve the most litigation, is the refusal to bargain in good faith. The union unfair labor practice provisions track management provisions (except that labor cannot be charged with domination or interference)\textsuperscript{117} and add a new one: “soliciting or advocating support from public school students.”\textsuperscript{118}

“Good faith bargaining” is defined by the 1976 Amendments just as it is in the National Labor Relations Act:\textsuperscript{119} the duty to meet, and attempt to reach agreement, and the executing of a written contract incorporating any agreement. Like the National Labor Relations Act\textsuperscript{120} the Amendments provide that “such obligation shall not compel either party to agree to a proposal or require the making of a concession.”\textsuperscript{121} And, in a most significant decision, the General Assembly in 1976 gave the power to remedy unfair labor practices to the State Board of Labor Relations.\textsuperscript{122} Now, for the first time in Connecticut, teachers and boards of education have an administrative agency, with expertise in labor relations, to resolve the difficult and sensitive questions that arise during bargaining.

Adding unfair labor practices to the Labor Board’s jurisdiction will probably prove to be a mixed blessing. Boards and teacher organizations with honest differences of opinion over what is bargainable may now resolve those differences in an orderly way. But incorporation of the language of the National Labor Relations Act cannot help but make teacher bargaining more complicated. Regulation of activity by law inevitably invites lawyers into the process. What may have been informal and flexible may now become rigid and technical. And now that the Labor Board is available to enforce the unfair labor practice provisions in the Act, one side or the other invariably will attempt to use the Labor Board as a bargaining lever.

Perhaps the most immediate and dramatic effect of the Amendments will be to require management to bargain before making changes in working conditions. Does the employer have the right

\begin{itemize}
    \item \textsuperscript{117} Conn. Gen. Stat. § 10-153e(c)(1)-(5) (1977).
    \item \textsuperscript{120} National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1970).
    \item \textsuperscript{121} Conn. Gen. Stat. § 10-153e(d) (1977).
\end{itemize}
during the life of the agreement to make changes in conditions which are not covered by the agreement? Professors Cox and Dunlop answered this question with a qualified "no," in an article written about the private sector almost thirty years ago. Before an employer may make changes in major conditions not covered by the contract, it must first bargain with the union. The unilateral change in a condition of employment is a refusal to bargain. This is elementary labor law. The rule applies with equal vigor after the expiration of the contract.

The State Board of Labor Relations has adopted the Cox-Dunlop view. For example, the Shelton Board of Education stopped paying wage increments to nonteachers after the contract expired, and was ordered to resume payments because the reduction took place without bargaining to an impasse. Before this decision, some boards of education refused to grant increments after the contract expired, in order to pressure the employees to come to an agreement. This can no longer be done prior to impasse. By making the refusal to bargain an unfair labor practice, and by placing enforcement power in the Labor Board, the General Assembly has incorporated the theories that prevail in the private sector governing unilateral changes in conditions.

The 1976 Amendments also mean that the state now has an efficient method for resolving disputes over what is bargainable. Under the 1965 Act, when the parties had an honest difference of opinion on

123. Cox & Dunlop, The Duty to Bargain Collectively During the Term of An Existing Agreement, 63 Harv. L. Rev. 1097 (1950).
125. Once the parties have reached an impasse, however, the employer is free to make unilateral changes. AAA Motor Lines, 215 N.L.R.B. 793, 88 L.R.R.M. 1253 (1974). See also NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949).
the matter, they had no choice but to litigate. The 1972 Connecticut Supreme Court decision of *West Hartford Education Association, Inc. v. DeCourcy*\(^{129}\) was an effort to find guidance on the question of which subjects are mandatory subjects of bargaining. *DeCourcy* ruled that hours of employment were not a mandatory subject of negotiation.\(^{130}\) The court determined that the length or schedule of the work day was not included in the statutory language “conditions of employment.” The result has never been overturned.\(^{131}\)

There remain a number of issues regarding the duty to bargain which will now be resolved by the Labor Board: Does the duty to bargain include issues such as summer school?\(^{132}\) part-time teachers? substitutes? medical benefits for retired teachers? early retirement? selection of coaches? adult education? hiring of teacher aides? the selection of projects for federal funding? The Labor Board will have to develop an approach, using for guidance the statute, the unique nature of public education, and precedents from the private sector.\(^{134}\) The important point is this: the participants in teacher bargaining now have a place to go to resolve questions of what is negoti-
able. Before 1976, as a practical matter, they had nowhere to go.

Although such questions may not be as crucial in teacher bargaining as in the private sector—a union under the National Labor Relations Act may strike over a mandatory subject of bargaining, but not over a permissive one, whereas teachers may not strike at all—all there are cases in which the scope of bargaining is well worth litigating. In one of the first cases involving teachers decided by the State Board of Labor Relations, the West Hartford Board of Education was ordered to bargain over summer school. And in another case, the Wethersfield Board of Education was ordered to bargain over the salary of a long-term substitute.

X. MISCELLANEOUS

Among the other 1976 changes which are by no means minor in nature are these: The agency shop appears to have been outlawed; mediators cannot be forced to testify about negotiations; the teacher organizations must designate an agent for service of process; and impasse arbitrators and mediators are entitled to receive the prevailing fee for such service.

The General Assembly has required university professors at state institutions to join the union or pay the equivalent in dues; state

135. The guidelines of the State Department of Education defined the scope of bargaining, but could not coerce unwilling parties into compliance.


138. This was done by adding to the right not to "join" a teacher organization, the right not to "assist" one. Compare CONN. GEN. STAT. § 10-153a (1975) with CONN. GEN. STAT. § 10-153a (1977).

139. CONN. GEN. STAT. § 10-153f (1977). ("In any civil or criminal case, any proceeding preliminary thereto, or in any legislative or administrative proceeding, a mediator shall not disclose any confidential communication made to him in the course of his duties unless the party making such communication waives such privilege.")


141. CONN. GEN. STAT. § 10-153f(b), (c)(1) (1977). Before the Amendments, arbitrators were entitled to $60 per day. See CONN. GEN. STAT. § 10-153f (1975) (current version at CONN. GEN. STAT. § 10-153f (1977)), setting the fee at the CONN. GEN. STAT. § 31-94 (1975) (current version at CONN. GEN. STAT. § 31-94 (1977)) rate, or $60, perhaps a fair sum when first enacted, but today only one-fifth the prevailing rates for nationally recognized arbitrators.


If an exclusive representative has been designated for the employees in an appropriate collective bargaining unit, each employee in such unit who is not a
policy with respect to public school teachers is precisely the opposite: the 1976 Amendments appear to have outlawed the agency shop.\textsuperscript{143} The reason for this difference in policy appears to be political. Now that the United States Supreme Court has ruled that the Constitution does not outlaw the agency shop in public schools,\textsuperscript{144} the teacher organizations may attempt to change the Teacher Act.

The 1976 Amendments prohibit mediators from revealing confidential information.\textsuperscript{145} This amendment was prompted by a subpoena issued to one of the state mediators\textsuperscript{146} in a dispute over whether an impasse was reached during bargaining. The mediator never testified. But the unresolved legal issue remained.\textsuperscript{147} Mediation depends upon the integrity of the mediator, and the absolute confidentiality of communications.\textsuperscript{148} If a party knew that the other side could subpoena the mediator and force that person to testify about what was said, mediation would no longer be effective. The Federal Mediation and Conciliation Service will not permit its mediators to testify in any

member of the exclusive representative shall be required, as a condition of continued employment, to pay to such organization for the period that it is the exclusive representative, an amount equal to the regular dues, fees and assessments that a member is charged.


143. See note 138 supra.

144. Abood v. Detroit Bd. of Educ., 97 S. Ct. 1782 (1977). However, the Court also ruled that public employees could not be compelled to pay for "ideological activities unrelated to collective bargaining." 97 S. Ct. at 1800. That portion of the dues spent for political purposes must, upon demand, be returned to the protesting employee. 97 S. Ct. at 1802-03.

145. See note 139 supra.

146. Professor Cornelius J. Scanlon of the University of Connecticut School of Law.

147. Professor Scanlon thereby lost the opportunity to test his legal opinion that mediators could not be forced to testify. Connecticut mediators employed by the State Board of Mediation and Arbitration were already protected. See Conn. Gen. Stat. § 31-100 (1977).

148. These assertions should be self-evident. See generally on the subject of mediator confidentiality W. Maggioilo, Techniques of Mediation in Labor Disputes 35-37 (1971):

As previously mentioned the policy of the United States is to rely on collective bargaining and mediation as the principal means of resolving industrial conflicts. To effectuate that policy mediators must not only be impartial but must be considered so by both parties to a labor dispute. In addition, the parties must be free to talk without risking subsequent disclosure of their confidence. Such confidence and disclosures are wholly voluntary and cannot be compelled by a mediator, but without them mediation would cease to be effective in settling labor disputes.

Id. at 35.
proceeding.\textsuperscript{149} However, until 1976, it was not clear whether Connecticut teacher mediators had the same privilege.

\textbf{CONCLUSION}

The 1976 Amendments to the Connecticut Teacher Negotiation Act left the basic structure of teacher collective bargaining intact. The most significant changes were the addition of statutory prohibitions of unfair labor practices and the granting of jurisdiction over unfair labor practice disputes to the State Board of Labor Relations. While the timetable for bargaining was altered, with bargaining now to commence 180 days before a municipality’s budget submission date, it remains to be seen whether this will affect the way negotiators behave. Including the fiscal authority in the negotiation process appears frankly to be experimental, and it is too early to determine whether the change is a success.\textsuperscript{150}

Now that the State Board of Labor Relations has jurisdiction over a part of the teacher negotiation process, the General Assembly may well consider shifting to the Labor Board the power to conduct elections.\textsuperscript{151} This would allow the Labor Board to make final decisions over the bargaining unit during the election. It would eliminate

\begin{itemize}
\item \textsuperscript{149} 29 C.F.R. § 1401.2 (1976) provides in part:
No officer, employee, or other person officially connected in any capacity with the Service, shall produce or present any confidential records of the Service or testify on behalf of any party to any cause pending in any arbitration or other proceedings or court or before any board, commission, committee, tribunal, investigatory body, or administrative agency of the United States or of any State, Territory, The District of Columbia or any municipality with respect to facts or other matters coming to his knowledge in his official capacity or with respect to the contents of any confidential records of the Service, whether in answer to an order, subpoena, subpoena duces tecum, or otherwise, without the prior written consent of the Director.

Connecticut State Mediators were protected by CONN. GEN. STAT. § 31-100 (1977). The Code of Professional Conduct for Labor Mediators, adopted jointly by the Federal Mediation and Conciliation Service and the several state agencies represented by the Association of Labor Mediation Agencies is explicit: “Confidential information required by the mediator should not be disclosed to others for any purpose or in a legal proceeding,...” See \textit{W. Simkin, supra} note 82, at 392.

\item \textsuperscript{150} As of mid-August of 1977, 16 municipalities did not have teacher contracts, compared to 70 a year ago. \textit{See} The Hartford Courant, Aug. 22, 1977, at 30, col. 7.

\item \textsuperscript{151} The State Board of Labor Relations currently conducts all elections among non-certified employees of boards of education, under CONN. GEN. STAT. § 7-471 (1977). \textit{See}, e.g., Norwalk Bd. of Educ., State Bd. of Labor Relations Dec. No. 1559 (July 22, 1977) (whether school monitors should be added to unit of custodians, drivers, and maintenance workers); East Haddam Bd. of Educ., State Bd. of Labor Relations Dec. No. 1519 (March 30, 1977) (secretaries, library clerks, teacher aides, and custodians).
\end{itemize}
the ever-present possibility that a moderator will allow a person to vote and the Labor Board will thereafter declare that person outside of the bargaining unit (or vice versa). Giving the elections over to the Labor Board would enable it to resolve differences between teacher organizations and boards of education over election campaign practices and would make possible formal post-election challenges. This change would not be without costs. The present use of the AAA is fast and efficient. The decisions of the moderators, right or wrong, are final. Bargaining is not delayed by post-election challenges. The choice, as always, is between speed and efficiency on the one hand, and consistency on the other.

The largest unknown is the impact of *Horton v. Meskill*.\(^{152}\) It is always easier to reach an agreement when there is money in the till. How much money this decision will bring to some of the hard-pressed school districts is the question that the state will be facing during the next few years. It may ultimately have a greater impact on bargaining than the 1976 Amendments. Until the state money begins to flow, however, negotiators will continue to struggle with the problems of taxes, inflation, town nullification, and teacher strikes. The 1976 Amendments have, on balance, improved the Act, but further improvements are warranted.

\(^{152}\) 172 Conn. 615, 376 A.2d 359 (1977).