

THE EVOLUTION OF THE UTAH EDUCATION ASSOCIATION INTO COLLECTIVE BARGAINING IN UTAH

by

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SUMMARY.

The Utah Education Association traces its origins to the 1850s when educators, including college professors, teachers, administrators, superintendents and others interested in public education began to organize to promote education as a profession. The first annual “state” association meeting of teachers was held in Ogden, Territory of Utah in 1895. The Association was incorporated in 1910 as the “Utah Educational Association.” Most of the incorporators were administrators including presidents of the University of Utah and state and district superintendents. This paper traces the origins of the UEA as a “professional organization” to a labor union and negotiating in a right-to-work state without a collective bargaining law.

HISTORY.

Historically, the Utah “education” family organized under the Utah Educational Association. The second president of UEA was John R. Park, president of the University of Utah who had also been state superintendent of education. Other early presidents of the UEA were district and state superintendents and university professors.¹ Early membership even included active PTA members.² The first annual “state” association meeting of teachers was held in Ogden, Territory of Utah in 1895. The association was incorporated in 1910 as the “Utah Educational Association (UEA).” By 1924 the articles of incorporation changed the name to the Utah Education Association and its bylaws were amended to permit only professional educators into its membership.³ Most incorporators were administrators including presidents of the University of Utah, the state and district superintendents.⁴ UEA leaders actively encouraged members to join the NEA, which was voluntary at that time. In 1922 eighty-three percent of Utah teachers had joined the NEA and Utah had the highest percent of NEA members in the nation. Arizona was second with 45 percent and Colorado was third with 41 percent.⁵ By 1947, 96 percent of all UEA members were members of NEA.⁶ The first “life” members of NEA included Milton Bennion and LeRoy E. Cowels, both past presidents of UEA and

both college administrators. M. Lynn Bennion, superintendent of the Salt Lake City School District, 1945-1969, proudly displayed his NEA Life Membership on the wall of his home throughout his life. Although higher education membership was never high, by 1970 higher education had almost no members in UEA, but school administrators continued to play a major role. Most school administrators listed on their resumes various positions held in UEA and its local affiliates. In fact, in most districts, a good way to become an administrator was to have served as association president. The Southern Utah Teachers Association, a local affiliate of the UEA, was started in 1934 by Glenn Snow,⁷ president of Dixie College, and L. C. Miles, Sr., a principal in Iron County, to give southern Utah educators a political voice in state affairs.⁸

The Salt Lake City School District was Utah's most militant district for many years. Following World War II, teachers in Salt Lake began to demand negotiating their salaries with the board of education. Lynn Bennion was sympathetic, but was "saddled with a powerful board that let him know negation was out of the question when dealing with teachers' salaries."⁹ It was Bennion's suggestion that the Salt Lake Teachers' Association appoint a professional spokesman.¹⁰

Attorney John S. Boyden was the first person appointed to this job; many board members resented his presence as a negotiator. In Bennion's view, much of the hostility grew out of the fact that some members of the board were bishops and stake presidents in the Mormon church, used to a top-down relationship with subordinates. Now they were forced by another faithful Mormon, Boyden, to deal with their subordinates as equals.

In 1947 the Teachers Association, with Boyden as its executive secretary, demanded that the board set a pay schedule of from \$2,220 to \$3,840. The teachers were not satisfied, even when the board adjusted their offer upwards; for the first time in the history of the district the teachers refused to sign their contracts. The board stalled until pressure was exerted by groups such as the Junior Chamber of Commerce, the Salt Lake Council of the PTA, and the Salt Lake Council of Veterans of World War II to meet the last teacher offer. . . ." A strike was averted. Eventually, Bennion set up a "professional relations committee" consisting of four board members, four teachers and their executive secretary, the superintendent, and the president of the administrators' association. In time this group developed a negotiating process for salary concerns.¹¹

During the early 1960s, UEA was strongly influenced by school administrators and administrators played important roles in all operations of the organization. Most superintendents were sympathetic to members of the UEA. They actively participated in the annual UEA convention and encouraged their teachers to attend. Some even took roll and imposed penalties on teacher who did not attend. But at the national level, NEA experienced the loss of representation elections in several major cities to the American Federation of Teachers (AFT) during the early 1960s. The AFT was unabashedly a "labor union." The loss of these elections "shocked the [NEA] into action."¹² In 1962 the NEA delegate assembly formally adopted Resolution 18 insisting "on the right of

local teachers' associations to negotiate with their school boards on policies of common concern, including salaries and other conditions of professional service." The 1962 assembly was a major turning point.¹³ Immediately following the 1962 assembly, NEA produced model state collective bargaining legislation and language for model collective bargaining agreements (CBAs). At the time, most Utah administrators were members of NEA and UEA. A number of local superintendents recommended to their boards that the model NEA CBA language be adopted!¹⁴

In *A Century of Service, A History of the Utah Education Association*,¹⁵ written in 1961, John Clifton Moffitt, superintendent of the Provo City School District, did not even mention collective bargaining or strikes ("withholding services" is the Utah phrase for strike, but "withholding services" is also not mentioned). All that was to change in the next five years.

In 1962 UEA hired Daryl McCarty as director of research (and bargaining). Daryl had been a building principal in the Granite School District and a member of the UEA Board of Trustees prior to 1962.¹⁶ Daryl advised local associations about bargaining, bargaining strategies, and negotiations. Because Daryl had been a building principal, his presence in negotiations at the local level was not viewed as particularly suspect by district administrators who tended to consider the process at that time helpful.

However, the conflict caused by NEA supporting collective bargaining laws and negotiations could not be easily reconciled by superintendents and administrators. The AFT, following the private sector union model, took the position that only employees could vote in certification elections and to ratify a CBA. NEA had many administrator members and took the position that superintendents:

... occupied a dual role as "both the executive officer of the school board and the leader of the professional staff." The American Association of School Administrators (AASA) agreed with this definition, But as a practical matter, the NEA found that when "the chips were down," school boards disagreed. They insisted the superintendent's role be singular—executive officer of the board—and in many instances, boards instructed superintendents to withdraw from membership in the Association.¹⁷

As superintendents and administrators found themselves excluded from bargaining units nationally, they dropped their membership. In 1972, NEA adopted a requirement that NEA affiliates have a membership that included at least a 75 percent membership in the NEA. By January, 1973 the AASA, the Association of Elementary School Principals, the National School Public Relations Association, the National Association of Education Secretaries, and other affiliated organizations decided to remove their offices from the NEA headquarters.¹⁸

The decline in administrator membership in NEA traces its origins to NEA's decision to compete with the AFT as a labor organization and to exclude administrators from the bargaining unit (either practically or actually). Because Utah had no public

sector bargaining law, NEA's decision had no immediate practical impact on UEA's membership. But, the 1964 Utah statewide strike by teachers did.

In 1963 a special task force was appointed to study and make a written report on public education in Utah in response to what educators saw as a critical under funding of the Utah system of public education. The report was released in 1964. In the spring of 1964, Governor George Clyde announced that he would not accept the recommendations of the task force. In May, 1964, Utah teachers, led by UEA (and privately encouraged by most local superintendents and administrators), engaged in a two-day strike—the nation's first statewide teachers' strike. NEA was asked to and did impose sanctions on Utah. School boards asked their superintendents in particular and their administrators in general which side they were on; most elected to side with their board.¹⁹ Some boards of education obtained injunctions against striking teachers and union leaders. Superintendents dropped their NEA/UEA memberships and they, in turn, asked the same questions of their administrators. Over the next two decades most administrators dropped their NEA/UEA memberships. By 2003, fewer than ten percent of Utah's school administrators belong to UEA.²⁰

Again, in 1989, the UEA conducted a one-day walk out against the state of Utah following a contentious argument with the governor and legislature about school funding. In response to UEA's demand for better funding and lower class size, Governor Norman Bangert publicly responded by advising teachers to go home and take a couple of aspirins.²¹ Although positive results were not immediate, Utah teachers received one of their largest salary increases (7.41%) in 1991.

Since the 1964 two-day strike several local associations, notably Granite and Park City, have "withheld services," but usually only for a couple of days. Strikes in Utah at the state level or the district level are protests lasting only a day or two. A one-day strike in 1978 by the North Sanpete teachers was against the superintendent and his perceived mismanagement of the district. A Park City strike lasted longer and was about teachers' salaries, but the teachers and the board reached an accommodation after several days. A problem for the Park City teachers was that because they are the best paid in the state, there was little sympathy for the strike and many Salt Lake teachers, past and present, who lived less than thirty miles away, indicated that they would gladly work for the salaries being offered by the school board. The Juab teachers called a one-day strike in the mid-1970s over no salary increase. In thirty years, only five local strikes have occurred and those were of short duration. Strikes are a tool of last resort for teacher organizations as they deal with Utah school districts.

As of 2003, twenty of Utah's forty school districts have some sort of CBA. Some CBAs are lengthy and address most topics commonly found in a CBA; some CBAs are only a few pages and address limited subjects. Almost all school districts annually engage in some sort of bargaining between representatives of the school board and the teachers' associations about salaries and terms and conditions of employment. In twenty school districts, the board of education adopts the terms agreed to as board policy (but not as a CBA). Obviously, boards of education in a state without a collective bargaining law

are in a position to unilaterally promulgate salaries, benefits, and terms and conditions of work. Almost none do that, at least initially, but most districts have at one time or another made a “last best take it or leave it offer” leaving the association with the choice to take it, leave it (job action), or find some face saving device. For some reason, maybe peculiar to Utah and its religious traditions, most superintendents (and therefore most school boards) have elected not to drive the association into the ground. Most have accommodated the association’s need to appear to have won something. Whether the local association achieves its goals really depends on how well it planned its activities. If the issue is clearly framed, has an almost unanimous support of the members and support of the community, the objective is achieved.

Employees Right to Organize.

Collective bargaining is legal in Utah and in most other states whether or not there is a collective bargaining law. Employees have as clear a right to organize and select their own representatives, including a Professional Association, as an employer has to organize its business and select its employees and agents. The right of employees to bargain collectively was not created by the National Labor Relations Act.²² It is a fundamental right derived from the common law.²³ It is expressly recognized in the constitutions of several states, including Utah.²⁴ Additionally, the courts have held that it is a constitutional right of employees to organize. “It is settled that teachers have the right of free association, and unjustified interference with the teachers’ associational freedom violates the Due Process clause of the Fourteenth Amendment.”²⁵

Although collective bargaining is lawful, and employees have a common-law right to bargain collectively, absent a statute imposing a duty to bargain in good faith, a public employer has no correlative common-law duty to bargain with them.²⁶

Public Employment.

The National Labor-Management Relations Act (LMRA) states that the term “employee” does not include any individual employed by any person who is not an employer as defined in the Act.²⁷ State and local governments are not “employers” under the LMRA. State constitutional²⁸ and statutory provisions²⁹ granting the right to bargain collectively to employees in private industry have been held not to confer such rights on public employees.³⁰ Utah’s “*Little Norris-LaGuardia Act*,”³¹ prohibits courts from issuing injunctions against labor unions or concerted labor activities under many conditions.³² Utah’s “*Little Wagner Act*,”³³ like the NLRB, allows collective bargaining in the private sector, but excludes from the definition of employer the state or its political subdivisions.³⁴

Prior to 1993, Utah’s attorney general twice opined that Utah boards of education have the legal authority to bargain with their employees.³⁵ In 1993, a Utah circuit court ruled that the Park City Board of Education was not bound by the terms of a two-year agreement it had made with the Park City Education Association. The circuit court’s decision rested on two grounds: first, the board lacked the authority to enter into a

collective bargaining agreement which restricted the board's authority; and second, the board could not enter into a collective bargaining agreement which impinged on the right of an individual to enter into a private contract of employment with the board on terms inconsistent with the negotiated agreement. On appeal the issue was reframed as one of whether a board of education, absent enabling legislation that permits boards of education to enter into a collective bargaining agreement, can enter into a collectively bargained agreement. The Court of Appeals held that school boards have the authority to enter into CBAs and that CBAs were enforceable against the district.³⁶

PUBLIC SECTOR BARGAINING IN UTAH

Nature of Collective Bargaining Agreements (CBAs).

A CBA is a compilation of diverse provisions, some providing objective criteria which are almost automatically applicable, some providing more or less specific standards which require reason and judgment in their application, and some doing little more than leaving problems to future consideration with an expression of hope and good faith.

A CBA is an attempt to erect a whole system of self-government. It can cover many employment relationships, but in Utah it frequently leaves areas of employment that would be included in a private sector CBA to board policy or not addressed in either the CBA or board policy. Examples include leaving hospital/medical benefits to the discretion of the board, changes of assignment, and reductions in force. RIFs in Utah are almost always decided by administrators and often include individuals the district wanted to terminate for other reasons.

While regulating or restraining the exercise of management functions, the CBA does not oust management from management functions and any effort to limit management's discretion in areas deemed "legislative" will be held to be an unconstitutional delegation of legislative authority.³⁷

In Utah, when teachers, through their local association, decide to "withhold services," the historical practice has been for the local association to: (1) collect the individual contract the district mails or delivers to the teachers during the summer, (2) have the teachers sign an "authorization card" authorizing the association to act as the teacher's bargaining representative and deliver the signed forms to the district, or (3) both collect contracts and have the teachers sign an authorization card. The authorization card informs the district that the teacher has designated the association to act as his/her bargaining agent and informs the district that he/she will sign (or "the association is authorized to sign for me") the employment contract when negotiations are complete.

Another variation and tactic of the school district is to send out an "intent to return to work" form with the teacher's name printed on it in late spring or summer. The "intent to return to work" form asks the teacher whether he/she intends to return to work the following school year. Two districts in the late 1970s sent out "intent to return to

work” forms to their teachers in anticipation of no settlement by fall. The form advised the teachers that failure to sign and return the form would be treated as grounds for termination. The association collected the “intent to return to work” forms, had the teachers sign the authorization form and delivered them to the district. The teachers in each district sued to prevent the districts from terminating their employment solely because they had not signed the “intent to return to work” form and won both times.³⁸

LIMITATIONS ON PUBLIC EMPLOYERS.

Although a Utah public employer has authority to enter into a CBA with its employees, the scope of the agreement is not unlimited. A public employer such as a board of education cannot be bound by a CBA which surrenders or delegates its legal discretionary authority to the union; such a contract is contrary to law, or is otherwise *ultra vires*.³⁹ A city transit board has been held without authority to agree to compulsory arbitration of disputes over wages, hours, or working conditions, and a school board has been held without authority to arbitrate a dispute over whether a teacher was discharged for cause. Other courts have upheld the authority of school boards to agree to arbitrate specific issues contained in the CBA. The Utah Supreme Court has held that the Utah legislature cannot require cities to enter into binding arbitration where the standards by which the arbitrator is to decide issues is not clearly defined.⁴⁰ In the *Park City* case the court noted in dicta that school boards could not enter into any contract which delegates its legislative authority or which commits it to do something beyond the scope of its authority.⁴¹

The Utah attorney general opined in 1936 that a public corporation may not make any appropriation to aid in the support of any private school or other private institution⁴² or to delegate to a teachers’ association the management, custody, or control of any of the board’s revenues.⁴³

In *Weese v. Davis County Comm*,⁴⁴ the Davis County commission had promised its employees a raise in future years if they would agree to forego a raise in the then current year. When the county commissioners failed to give the promised raise, county employees sued. The court held that the county commissioners could not be bound by their promise because, among other things, Article VIX § 3 of the Constitution of Utah prohibited political subdivisions from incurring debts in excess of revenues from the current year unless authorized by a vote of the people.

In 1948 the town of Spring City borrowed \$12,000 from the State of Utah to build a water system. The money was spent and the system installed. Then some worthy citizens sued to have the obligation to repay declared illegal. The court agreed finding that the voters had not authorized the town to obligate itself to pay more money than it had in its treasury for one year. Town officials, feeling great pangs of guilt, volunteered to repay the state anyway. The same worthy citizens again sued arguing that since the debt was unenforceable, the public officials were in effect giving away public money which was contrary to public

policy. The court agreed. Spring City obtained a public water system at no cost to its citizens!⁴⁵

Weese and *Spring City* have been modified by a constitutional amendment that now only prohibits a political subdivision from incurring debt “directly payable from and secured by ad valorem property taxes levied by the issuer . . . in excess of the taxes for the current year unless the proposition to create the debt has been submitted to a vote of qualified voters. . . .”⁴⁶ It appears that the authority of local governments to incur debt to cover current expenses has been expanded, but would be limited in an amount not to exceed four percent of the assessed value of the real property within the boundaries of the taxing district.⁴⁷ Apparently, school districts can agree to future salary increases as long as those agreements, together with all other debts, do not exceed four percent of the assessed value of the district.

Effect of Agreement on Employees.

Generally, when an employee's claim against his employer is based on breach of a CBA, he is bound by the terms of the CBA that govern the manner in which the right may be enforced. Employees may not pick the provisions which they like and avoid those which they do not like. The CBA that creates the right is the document that often governs how the right will be enforced i.e., if the CBA contains an administrative remedy such as a grievance procedure, the employee will have to use that procedure to vindicate that right *before* attempting to enforce that right in court.

Effect of Right to Work Laws and No Bargaining Statute.

Bargaining in Utah, a right-to-work state without a collective bargaining law, is somewhat unique. Thirty-nine states have public sector bargaining laws.⁴⁸ Nineteen states have right-to-work laws.⁴⁹ Obviously, some right-to-work states have bargaining laws.

The *Park City* case specifically states that boards of education have the authority to enter into and are bound by the terms of a collectively bargained agreement, subject to various limitations. In *Alpine School District v. Ward*⁵⁰, the court held that it was the duty of the court, not the board of education, to interpret and apply the terms of a collective bargaining agreement. Both the Constitution of Utah⁵¹ and state statute⁵² protect the right of public employees to organize. However, nothing in Utah law requires public employers to bargain with their employees. Accordingly, public employees have no statutory right to compel their employers to bargain with them.⁵³ Several local associations have successfully bargained a provision in a CBA that require the board to bargain in good faith with the association.

It is essential that those engaged in the bargaining process understand the difference between bargaining in a state with a bargaining law and one without a bargaining law.

First, there is no duty to bargain in a non-bargaining state.

Second, there are no "unfair labor practices" in non-bargaining states.

Third, case law, precedence, and practices from bargaining states may be of little value in non-bargaining states.⁵⁴

Fourth, enforcement mechanisms in non-bargaining states are not likely to exist, except by way of job actions, litigation, or arbitration. There is no public employee labor relations board (PERB) in Utah.

Fifth, because no PERB exists, local associations must resort to strikes, persuasion, or litigation to enforce whatever rights they may have under a valid agreement. Courts are notoriously slow in resolving contract disputes (except to issue injunctions against unions).

Sixth, interest arbitration may be permitted by the collective bargaining law; it would not be lawful absent enabling legislation.

Duty of Fair Representation (DFR)

There may or may not be a DFR. In one state, the court held there was not a DFR because the state had no collective bargaining law. The case is a minority decision. Where a board of education recognizes a bargaining unit as the *exclusive representative* of a defined class of employees, the recognized bargaining unit has a duty to fairly represent all members of the class within the area of authority for which it has been recognized as the exclusive representative i. e., *in bargaining*. Whether the bargaining unit has a DFR in grievances is another question. Where the bargaining unit is the *exclusive representative* to enforce the PA, there is *probably* a DFR. However, the DFR goes *only* to issues covered in the bargaining agreement. The bargaining agent has a duty to enforce the terms of the bargaining agreement. There is no DFR to represent members in disputes outside of the bargaining agreement unless the bargaining agent has exclusive authority to remedy the dispute. Where the bargaining representative *is not the exclusive representative* for handling grievances, the bargaining representative need not represent non-members in grievances. Non-members can represent themselves. The DFR does not mean that the bargaining representative must represent members or non-members in all cases through the entire grievance procedure. It is difficult for any employee to successfully sue the union for breach of a DFR in grievance administration. Essentially, all the union must do is review the grievance with some objectivity and decide on some (any) rational ground reason for not filing or appealing the grievance. If the union has an internal process for reviewing and appealing the decision not to file or appeal the grievance, the union should keep a record of what it did to show that it complied with its process. The union should never deny representation on the basis that the person requesting assistance is a non-member.

Individual Agreements v. Professional Agreements.

Historically, employers hired individual employees. Often there was no written agreement or the agreement contained a starting date, an ending date, a salary and a list of duties that almost always included the phrase, "and such other duties as assigned." Courts held that the employer and the employee were equal before the law: the employer could hire and fire on such terms as were offered; the employee could bargain his/her services on such terms as he/she could. If an employment contract contained an end date, the employment terminated at the end of the contract unless it was renewed. Most contracts of employment contained no termination date and courts have consistently held that an employment contract that was not for a specific term was terminable "at-will" by either party. Employees with skills not readily available in the general population could generally negotiate a better deal, but absent a written agreement, their employment was also "at will."

Until the 20th century, many courts held concerted action by employee organizations to be unlawful combinations. Although many Utah school districts had negotiated "continuing contract" provisions in their CBAs prior to 1972, several rural districts hired their teachers on an annual basis. In those districts teachers could be fired "at will" at the end of their annual employment contract. In 1973 UEA lobbied for and the Utah legislature enacted the Utah Orderly School Termination Procedures Act⁵⁵ (UOSTPA), Utah's continuing contract law. The law provides that teachers who work for the district three or more years acquire a reasonable expectation of continued employment i.e., they can expect their employment to continue unless terminated for some reason.⁵⁶ Unless local associations are successful in limiting the discretion of local boards, reasons for termination can be a shopping list including "conviction of a crime," "insubordination," or for "such other and good reason as the Board determines to be reasonable." Not much protection! The UOSTPA is primarily a procedures act providing only limited substantive protection to educators. Primarily the UOSTPA leaves to local boards (and in the board's discretion the opportunity to bargain some issues with its employees) the authority to decide what constitutes grounds for dismissal and the method by which "career" educators obtain due process. Several boards of education have policies permitting a third party hearing officer to conduct the termination hearing and to make recommendations to the board. In some districts the local association and the board have negotiated how the hearing is to be conducted and the process for selecting the hearing officer. Almost all school boards retain the right to review or decide whether the educator should be terminated or otherwise disciplined.⁵⁷

Many Utah school districts have bargained with their local associations a CBA that governs the terms and conditions of the educators' employment. It governs the terms and conditions of employment of individuals hired by the school district whose jobs fall within the scope of the agreement. The CBA should specifically provide that it governs the terms and conditions of employment of the class of employees for whom it was negotiated. Some districts specifically provide in the individual contract that the terms of the CBA are part of the individual agreement.

If the CBA is properly drafted, an employee becomes entitled to all of the benefits of the CBA even if the employee would have accepted less favorable terms. The individual agreement is subsidiary to the CBA. The terms of a CBA are incorporated into the separate agreement and when an employee accepts or returns to work, he/she ratifies and accepts its terms. The employee is bound by and entitled to the benefits of the CBA to the same extent as if he/she had entered into it personally.

The 2003 Utah legislature enacted a law prohibiting local boards of education from entering into a CBA that prevented the board from hiring individuals at a salary or with benefits only as provided in the negotiated salary schedule.⁵⁸ The legislature made such CBA *ultra vires*. See above.

Board Policy v. Professional Agreement.

In 1973, UEA began to seriously challenge teacher terminations. Often, teachers were terminated based on policies that were alleged to exist, but could not be found. Superintendents testified that the board had adopted such and such a policy, it was long established, but no record of the board having ever adopted the policy could be found. In response, the UEA requested the legislature to enact a law requiring that all school board rules and policies be in writing, filed, and referenced for public access.⁵⁹ Additionally, boards are also authorized to enter into CBAs with their employees and with associations of employees.⁶⁰ These CBAs become the personnel policies of the district and, if properly drawn, supercede board policy. There are two fundamental differences between board policy and a PA.

First, boards can modify board policy virtually at will, subject only to compliance with the open and public meetings law, while a professionally negotiated agreement during its term requires the consent of both parties to modify its terms. Board policy is the property of the board and is binding on all those over whom school boards have authority, except school boards cannot make conduct criminal.⁶¹ It can and has been argued that when a teacher executes an individual employment agreement (or returns to work) the personnel policies of the district in effect on that date become the terms and conditions of employment and that the teacher has a right to rely on those terms throughout the terms of the school year. A professional agreement is not subject to such controversy. It clearly (hopefully) states the terms and conditions of employment, the duration of the agreement, who is entitled to rely on the provisions of the agreement, and that the agreement cannot be changed without the consent of both parties.

Second, because the law requires that personnel policies be in writing, boards of education may not fire an employee unless the employee fails to perform duties prescribed by board policy or engages in conduct proscribed by board policy. It is not clear under Utah law as to how precise the written board policies must be in describing the proscribed conduct. For example, is the language "*for such other and good reason as the Board deems just*" a sufficient written description of the reason for termination? If it is, then the requirement that personnel policies be in writing becomes almost meaningless. Conversely, Utah courts have traditionally granted school boards broad

discretion when acting within their scope of authority.⁶² Several Utah courts have upheld conditions imposed by city and county planning commissions on builders where the written basis in the ordinance was "compatible with surrounding uses."⁶³ One Utah district court judge held that a board of education can interpret its policies any way it wants as long as the interpretation is not arbitrary. The rationale is based on the premise that the courts will not substitute their judgment for that of experts statutorily charged with performing their duties. A CBA avoids the interpretation question suggested. Boards of education may have the authority to interpret their policies; they do not have the authority to interpret their own agreements. Courts and juries construe agreements. Imagine a construction contractor bidding a school building under a contract that allows the board of education to interpret it! While Utah courts are less likely than their counterparts in other states to overrule school boards, they are not inclined to allow boards of education to interpret their own contracts. Utah courts have yet to rule on whether boards of education can interpret policies that are part of the employment contract. However, the courts have ruled in a slightly different context:

While the existence of an agreement which forms the basis of an implied-in-fact contract provision is a question of fact, not all issues relating to implied employment contract provisions are factual questions. Indeed, we have held that when terms of an employee manual constitute an employment contract, the proper interpretation of the unambiguous terms of the manual is an issue for the court. *Caldwell*, 777 P.2d at 485-86. If it is determined that an agreement exists between an employee and an employer, the same legal question (i.e., interpretation of unambiguous terms) and the same factual questions (i.e., interpretation of ambiguous terms) may arise under the implied contract as may arise under any agreement that is alleged to form an express contract.⁶⁴

Associations have other reasons for negotiating CBAs. School districts are inclined to use escape clauses and weasel words in their policies. If the language is vague as to whether the teacher has the right they assert, the courts will usually rule against the teacher on the basis that it is up to the teacher to prove that he/she has the right or that boards of education have the right to construe ambiguous policies. Ambiguities are construed against the teacher. Escape clauses allow boards to create or assert the very act which it will then claim creates the conditions which allows or prevents it from following its policy or agreement. For example, teachers will have due process "except in emergencies." The board may decide what is and what is not an emergency leaving it to the teachers to try to convince a judge or jury that there was no real emergency. CBAs should be negotiated using language that avoids these problems.

Public Policy Considerations.

Contracts must not contravene principles of law or public policy. In the public sector, public policy and legal constraints are far greater than in the private sector. A contract that might easily be enforced against a private employer may very well be unlawful in the public sector. Thus a multi-year employment contract in the private sector (even a 50-year employment agreement) is lawful and enforceable, but in the

public sector such contracts are unlawful.⁶⁵ While private sector employers can contract with their employees to permit them to participate in management decisions, boards of education may not contract away fundamental operating decisions of the district.

. . . the general rule is that a municipal corporation, or a quasi-municipal corporation such as the district, may delegate to subordinate officers and boards powers and functions which are ministerial or administrative in nature, where there is a fixed and certain standard or rule which leaves little or nothing to the judgment or discretion of the subordinate. However, legislative or judicial powers involving judgment and discretion on the part of the municipal body, which have been vested by statute in a municipal corporation may not be delegated unless such has been expressly authorized by the legislature Some statutes confer on the designated officer or body exclusive power to appoint teachers and other school employees. Such power, when conferred on a particular body, cannot be delegated, and an applicant for appointment is chargeable with knowledge of such fact. Accordingly, the duty of the board to make the selection cannot be delegated to the superintendent, even though the statute makes it obligatory on the board to select teachers from nominations made by him In short, by statute the school board is empowered to hire teachers and while it may well want to act on the recommendation of its superintendent, it cannot escape this statutory duty by completely shifting the responsibility to its superintendent.⁶⁶

Agreements to Arbitrate.

Except in two districts (out of 40), Utah's teachers have no arbitration. Accordingly, for the most part Utah teachers' associations need not pay particular attention to the problem of arbitration. There are two types of arbitration clauses: *legislative* or *interest* arbitration and *contract* arbitration. In legislative arbitration the parties agree to submit to arbitration the issues in dispute that parties were unable to resolve in their negotiations. The legislative arbitrator writes the contract for the issues the parties could not resolve. Legislative arbitration in the public sector in Utah is unlawful.⁶⁷

Agreements to submit a dispute arising under the terms of a collective bargaining agreement to arbitration (contract arbitration) are legal if the issue is not a "legislative power" of the board. Generally, the operations of the district are legislative. The terms and conditions of employment generally are not legislative. Broad policy questions are legislative. Seniority and involuntary transfers are not legislative (except that a school board that limits its ability to transfer teachers to a new school may be found to have delegated too much of its authority if the contract impairs the ability of the district to operate its schools). Therefore, transfers and terminations can be made the subject of contract arbitration. Where to build schools and the expenditure of school funds cannot be made subject to concurrence or approval of the bargaining unit. The Utah attorney general has held that a board of education cannot enter into an agreement with a teachers' association about which programs will or will not be funded.

UTAH'S DISPUTE RESOLUTION LAW (Utah's version of a collective bargaining law).

In 1993 the UEA drafted a scaled down model of a collective bargaining bill we had on the shelf for a decade deleting provisions requiring bargaining in good faith, a labor board, and representation elections. The Utah legislature enacted our Dispute Resolution Act⁶⁸ (DRA) for public schools. The DRA requires local boards of education to participate in mediation and fact-finding if there is an impasse between the local education association (LEA) and the board arising out of negotiations. Unfortunately, there is no penalty for failing to participate and the fact-finder could only find that the board failed to participate. To date, the threat of the negative publicity that would follow refusing to participate in mediation and fact-finding has been sufficient to bring the board to the table.

For many years the majority of Utah's school districts have engaged in professional negotiations with LEAs. Many of the CBAs contain dispute resolution procedures; some do not. This section discusses mediation and fact-finding in districts which have or do not have mediation and fact-finding.

Where Mediation/Fact-Finding Exists.

Where no language is agreed on by the board and the local, the provisions of the DRA become the procedure for mediation and fact-finding. The DRA allows the LEA and the board to negotiate a dispute resolution procedure other than that set forth in the DRA.

Where There Is No CBA.

Where there is no CBA containing mediation and fact-finding provisions, local school boards have two ways to proceed.

First, school boards may try to implement the DRA through board policy rather than a CBA. The DRA contemplates, but does not require that there will be negotiations. The DRA does not require that the board agrees to a CBA, but it does require that the board participates in mediation and fact-finding. Mediation and fact-finding extend to all areas of possible labor/ management disputes *including whether or not there should be a CBA*. Were a party to the dispute to refuse to participate, the mediator would have nothing to mediate and the fact finder could only issue a finding that the party had failed to mediate or negotiate the dispute. There are no penalties for refusing to participate in the dispute resolution procedure. The success of the process is based on the locals' organizational strength, not the courts.

Second, at minimum, the CBA should include a provision encompassing the terms of the DRA. Because the DRA contemplates a broad range of negotiations, locals

should request boards of education to adopt comprehensive CBAs, including most terms and conditions of employment.

UNRESOLVED PROBLEMS IN A STATE WITHOUT A CBA

Without a collective bargaining law, public employers have a free hand to deal with their employees. They may recognize or not recognize the employee union. The employer may dictate the bargaining agenda or approach it very much like the private sector model. In Utah, school boards have traditionally recognized the local affiliate of the UEA and the issue of majority status has not been raised. Even in Iron County, where the association has less than 50% of the eligible teachers, the district negotiates with the association. Iron County has never had a CBA.

Even without a collective bargaining law, school districts are not entirely free to do as they please with the association. Districts are still subject to state and federal constitutional law and various other laws. Districts may not lawfully negotiate provisions in a CBA inconsistent with civil rights laws. Retirement benefits must not violate age discrimination laws. Districts must comply with First Amendment rights and due process and equal protection of the laws. Associations that enter into CBAs that violate these laws may find themselves defendants in litigation brought by members whose rights are alleged to be violated.

Of immediate concern in Utah is the question of exclusive bargaining and representation rights. In *Perry Local Education Association v. Perry Education Association*⁶⁹ in which the minority union contested the right of the school district to permit the majority union exclusive use of the district's internal mail system, a closely divided court held that neither the First Amendment or Equal Protection precluded the board from granting to the majority union exclusive use of the district's internal mail system *because* there was a compelling government interest in allowing the recognized bargaining agent access to administer the CBA.

At least three problems arise under the *Perry* rationale. First, in states without a collective bargaining law, can a school district show a compelling governmental interest in granting exclusive rights to a particular union? In *Perry* the state had a collective bargaining law that required the district to bargain with the certified bargaining agent.

Second, how is an appropriate bargaining unit determined in a state without a collective bargaining law? In Utah some units have administrator member, some do not. No UEA affiliate bargains for administrators who bargain for themselves. Some of these administrator units are recognized by their boards, others are not. There are, of course, employees that do not fit comfortably into either unit and there is no objective means of placing them in the teachers' bargaining unit or the administrators.' On the other hand, in Utah you can put anybody into any unit and there is no unfair labor practice.

Finally, what kinds of problems result from a school board arbitrarily deciding that some unit is an appropriate bargaining unit, but that various individuals or classes of

individuals do not belong in the unit? The question is one of equal protection. Has an individual or class of individuals been denied equal protection because the board of education refused to permit him/her to belong to a bargaining unit? As long as the board can advance a rationale basis for the classification, it probably passes constitutional muster.

More problematic is the recognition of a bargaining unit that has less than a majority of the members of the class i.e., teachers. May a board of education recognize a teachers' union that has fewer than half the possible members of the class? Had a bargaining election been held, the problem would be resolved. The employees did not want a union representing them. Negotiations occur with whatever group or groups management elects to negotiate; or the board can simply promulgate the terms and conditions of employment. But where the board continues to grant exclusive bargaining rights and representation to a minority union, does it violate the First Amendment rights of other minority unions (or more specifically, splinter groups of one or two individuals claiming to be unions)? *Perry* suggests that the board may not pick and chose which unions and unions' point of view it approves. Boards of education may disapprove all speakers at a school forum, but once it opens the forum to discussion, it may not decide which view points it approves.⁷⁰

In San Juan County, the classified employees lost their majority status several years ago. The board of education responded by refusing to deal with the union. It thus avoided the problem of whether it had to treat other unions equally.

Had the district continued to recognize the minority union, would it have had to recognize other unions? What would the composition of the bargain team been? Would it have to be proportionate to union membership? Would the teachers who refused to join any union have been entitled to representation?

Fortunately, in Utah we have not had to address these questions, but they may not be far off. We have several districts that presently do bargain, grant exclusive bargaining rights and representation rights, have a CBA **and have a membership dipping precariously below 60%.**

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¹ J. C. Moffitt, *A Century of Service, A History of the Utah Education Association*, Deseret News Press, Salt Lake City, Utah 1961, pp. 50-54.

² *Id.* at 59.

³ *Id.*

⁴ *Id.* at 53.

⁵ *Id.* at 113.

⁶ *Id.* at 114.

⁷ Glenn Snow became president of NEA in 1954.

⁸ Jack Walters, UniServ Director, Southern UniServ in Utah 1970-1997, interviewed by Michael McCoy, November 3, 2003.

⁹ Buchanan, Frederick S., *Culture Class and Accommodation, Public Schooling in Salt Lake City, 1890-1994*, Smith Research Associates, Salt Lake City, 1996, p. 185.

¹⁰ *Id.*

¹¹ *Id.* p. 184.

¹² West, Allen, *The National Education Association*, The Free Press, New York, p. 57, 1980. Mr. West was the executive secretary of the Utah Education Association from 1943 through 1962 when he was employed by the NEA. He held several NEA positions, including Associate Director of Membership, Deputy, and Acting Executive Secretary.

¹³ *Id.* at 70.

¹⁴ *Op. Cit.*, en 7. Jack Walters.

¹⁵ *Op. Cit.*, en 1.

¹⁶ The Board of Trustees became the Board of Directors.

¹⁷ *Id.* West at 60.

¹⁸ *Id.* at 84.

¹⁹ Daryl McCarty, UEA Research Director 1963-1969 and UEA Executive Secretary 1969-1982, interviewed by Michael McCoy November 3, 2003.

²⁰ This is only a rough approximation as it is difficult to find actual numbers of administrators employed by Utah school districts due to no uniform method of determining who is an administrator and UEA relies on voluntary self-identification which is not entirely accurate.

²¹ There was serious conflict within the UEA staff about the merits of calling a statewide strike. On Thursday and Friday, September 21 and 22, 1989 following the governor's comments, sporadic strikes occurred in several Davis County and Jordan schools. It was apparent to some UEA staff that there would be a walk out the following Monday and UEA could either lead the parade or follow it. Betty Condie, temporary acting executive director, decided to lead the parade. Friday afternoon she called an emergency meeting of local presidents for the next day, Saturday, September 23, 1989. After considerable discussion, the local presidents voted to withhold services the following Monday. Following the meeting, most local presidents went to the telephones in the UEA building to "inform" their superintendents of the action and ask their opinion about the action. All but two superintendents "hinted" that the action was acceptable, that they understood and that they would close the schools in the district the following Monday. In two districts where the superintendent did not agree to close schools, schools were open and teachers conducted classes.

²² 29 USC §§ 151 et seq.

²³ *Bogni v. Perotti*, 224 Mass. 152, 112 NE 853 (1916); *Cornellier v. Haverhill Shoe Mfrs. 'Ass'n.*, 221 Mass 554, 109 NE 643 (1915).

²⁴ Constitution of Utah, Art. XV, §§ 34-19-1 et seq.

²⁵ *AFSME, AFL-CIO v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 187 (7th Cir. 1968); *Orr v. Thorp*, 308 F. Supp. 1369 (D. Fla. 1969).

²⁶ *Pratt v. Riverton City Council*, 639 P.2d 172 (Utah 1981) (holding that public employees in Utah generally have no collective bargaining rights); *Chief of Police v. Town of Dracut*, 357 Mass. 492, 258 N.E. 2d 531 (1970).

²⁷ *Id.* § 152(2).

²⁸ *Op. Cit.* en. 24.

²⁹ Sections 34-19-1 et seq. and 34-20-1 et seq., Utah Code Annotated 1953. All statutes cited are the Utah Code Annotated 1953, unless otherwise indicated.

³⁰ *Westly v. Board of City Commr's*, 573 P.2d 1279 (Utah 1978) (holding that in the absence of explicit legislative language, statutes governing labor relations between employers and employees apply only to private industry and not to the sovereign or its political subdivisions); *Op. Cit. Pratt*, en. 26.

³¹ Sections 34-19-1 et seq.

³² Section 34-19-5.

³³ Sections 34-20-1 et seq.

³⁴ *Id.* § 34-20-2(5)(a); *Op. Cit. Pratt*, en. 26.

³⁵ Utah Attorney General Opinions Nos. 535 (May 21, 1970) and 538a (October 26, 1970).

³⁶ *Park City Education Association v. Board of Education of the Park City School District*, 879 P.2d 267 (Utah App. 1994), *cert. den.* 890 P.2d 1034.

³⁷ *Id.* en. 36.

³⁸ The reason in both cases was that the districts had not, in their causes for termination, included refusing to sign an “intent to return to work” form.

³⁹ *Weese v. Davis County Comm.*, 834 P.2d 1 (Utah 1992), held that a political subdivision has only those rights and powers specifically granted or implied by the state constitution and enabling acts, and that any act in excess of that authority, or forbidden by the constitution or legislation, is null and void as ultra vires.

⁴⁰ *Salt Lake City et al., v. International Association of Firefighters*, 558 P.2d 786 (Utah 1977).

⁴¹ *Op Cit. Park City*, en. 36; *Weese v. Davis County Commission*, 834 P.2d 1 (Utah 1992), the court held that a political subdivision has only those rights and powers specifically granted or implied by the state constitution and enabling acts and that any act in excess of that authority, or forbidden by the constitution or legislation, is null and void as ultra vires.

⁴² Utah Attorney General Opinion No. 162 (May 12, 1936).

⁴³ *Id.*No. 546 (July 15, 1971).

⁴⁴ *Op Cit.*, en 39.

⁴⁵ *State v. Spring City*, 260 P.2d 527 (Utah 1953).

⁴⁶ Article XIV, § 3 reads:

(1) No debt issued by a county, city, town, school district, or other political subdivision of the State and directly payable from and secured by ad valorem property taxes levied by the issuer of the debt may be created in excess of the taxes for the current year unless the proposition to create the debt has been submitted to a vote of qualified voters at the time and in the manner provided by statute, and a majority of those voting thereon has voted in favor of incurring the debt.

(2) No part of the indebtedness allowed in this section may be incurred for other than strictly county, city, town, school district, or other political subdivision purposes respectively.

⁴⁷ Constitution of Utah, Article XIV, § 4 (1)(b).

⁴⁸ The number of states with public sector bargaining laws changes from time to time, but at the time this article was written the number was thirty-nine.

⁴⁹ Right to work is something of a misnomer. It really means that a person does not have to join a union to work for an employer who must recognize and bargain with the bargaining representative. In states without a right to work law, the union can agree with the employer that only union members can be hired by the employer.

⁵⁰ 1999 UT 17, 974 P.2d 829.

⁵¹ *Op cit.*, en 24.

⁵² Sections 34-34-1, et seq.

⁵³ *Op cit.*, *Pratt* at en. 26.

⁵⁴ For example, federal courts have ruled that under the NLRD, an employer, about to discipline an employee for a work-rule violation, must advise an employee that the employee has a right to have a union representative present at the time the violation is discussed. *NLRB v. Weingarten*, 420 U.S. 251 (1975). Nevada has a public sector collective bargaining law and its state labor board has adopted the *Weingarten* rule. However, Utah has no public sector bargaining law and the state labor board cannot enforce a *Weingarten* right against a public employer because it has no jurisdiction over public employers.

⁵⁵ Sections 53A-8-101 et seq.

⁵⁶ Since this article was written, the Utah legislature has created several significant exceptions including a provision allowing districts to hire temporary employees on an annual basis. Temporary employees can be “nonrenewed” for any reason or no reason. Some districts now hire temporary employees annually for more than four years.

⁵⁷ The standard of judicial review of the board’s decision is whether or not the decision was arbitrary, unreasonable or capricious. *Brough v. Board of Ed. Of Millard County School Dist.*, 23 Utah 2d 353, 463 P.2d 567 (Utah 1970). Recently, Utah courts have “refined” the “arbitrary, unreasonable or capricious” standard. When acting in a legislative capacity, the court’s standard of review of the policy is whether the public body’s policies could be reasonably debatable (broad discretion given to the legislative body), however, “[w]hen a...decision is made as an exercise of administrative or quasi-judicial powers, however, we have held that such decisions are not arbitrary and capricious if they are supported by ‘substantial evidence.’” *Bradley v. Payson City Corp.*, 2003 UT 16, 70 P.3d 47, ¶ 10.

⁵⁸ S. B. 154, 2003 General Session, Utah Legislature, codified at section 53A-3-411.

⁵⁹ Section 53A-3-402 (14)(b).

⁶⁰ See § 53A-8-104 (authorizing boards of education to negotiate termination procedures) and *Park City Op. Cit. en 36* (upholding the right of board of education to enter into CBAs and of the right of the teachers' association to enforce the CBA).

⁶¹ Cities and counties have the authority to enact ordinances imposing criminal penalties for the violation of the ordinance; school boards have no authority to impose criminal penalties, but may terminate employees who fail or refuse to perform their duties.

⁶² *E. M. Through S. M. v. Briggs*, 922 P.2d 754 (Utah 1996).

⁶³ See *Cottonwood Heights Citizens Ass'n v. Board of Comm'rs*, 593 P.2d 138 (Utah 1991) (holding that in matters involving the judicial review of the actions of administrative bodies, it should be assumed that those charged with the responsibility have specialized knowledge and that they should be allowed comparatively wide latitude in interpreting their rules; their actions would be endowed with a presumption of correctness and validity which the courts should not interfere with unless it is shown that there is no reasonable basis to justify the action taken). *Id.* at 140.

⁶⁴ *Brehandy v. Nordstrom, Inc. et al*, 812 P.2d 49 at 57; See *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 387 (Utah 1989); *Berube v. Fashion Center, Ltd., et al*, 771 P.2d 1033 at 1044 (Durham, J., joined by Stewart, J.), at 1052 (Zimmerman, J., concurring in the result).

⁶⁵ See § 53A-3-411 limiting school boards' authority to enter into employment contracts but for not more than five years and authorizing the termination of employment contracts "for cause" at any time; and *Op Cit. Weese en 41* (Utah 1992) (holding that a contract promising county employees salary increases in the years following the first year of the contract violated the provisions and purposes of Article XIV, § 3 of the Constitution of Utah).

⁶⁶ *Big Sandy School Dist. v. Carroll*, 433 P.2d 325 (Colo. 1967); see also *School Dist. No. 8 of Sherman County v. State Bd. Of Educ.*, 176 Neb. 722, 127 N.W. 2d 458 (1964).

⁶⁷ *Op Cit.*, en 39.

⁶⁸ Section 53A-7-101.

⁶⁹ 460 U.S. 37 (1983).

⁷⁰ *Board of Education of Island Trees Union Free School Dist. V. Pico*, 457 U.S. 853, 870-82, 102 S.Ct. 2799, 2810 (1982) (plurality opinion) ([School boards] rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.)