

# THE LAW AND POLITICS OF PAYING TEACHERS SALARY STEP INCREASES UPON EXPIRATION OF A COLLECTIVE BARGAINING AGREEMENT

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## INTRODUCTION

Vermont's recurring crisis in public education funding<sup>1</sup> has elicited extensive analysis of structural weaknesses in the existing funding system, such as over-reliance on property taxes and resulting imbalances in resources based upon local property wealth.<sup>2</sup> Related structural issues

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1. The crisis has persisted for at least 15 years and has been the subject of constant attention from the Vermont Department of Education, the Vermont Legislature, and three successive governors: Richard Snelling, Medeleine Kunin, and Howard Dean. The Legislature has dealt with the problem in recent years by enacting two major state aid-to-education statutes, the Morse-Giuliani formula in 1982, and its successor, the Foundation Aid formula, in 1987. See VT. STAT. ANN. tit. 16, §§ 3472-3476 (1982) (Morse-Giuliani), §§ 3473, 3474, 3476, *repealed by* 1987 Vt. Laws 84, § 11(2); VT. STAT. ANN. tit. 16, §§ 3491-3499 (1989 & Supp. 1995), *added* 1987 Vt. Laws 84, § 2 (Foundation Aid). Attempts to replace the Foundation Aid formula in 1994 and 1995 met with no success despite exhaustive work by the Legislature, Department of Education, and Governor's Office to create a more fair and more universally acceptable statutory scheme. In 1994, each house of the Legislature offered its own reform bill, but neither became law. See Vt. H. 541, 1994 Adj. Sess. (proposing statewide teachers contract); Vt. S. 255, 1994 Adj. Sess. (proposing education finance/property tax reform). In 1995, Vt. H. 351, 1995 Adj. Sess. (proposing sustainable and equitable educational financing), failed to pass the Senate amid considerable controversy. Thus the situation, as described in 1992 by the Vermont Department of Education, persists: "There is a significant relationship between wealth of a district and spending per student. . . . There is a great deal of inequity in resources for education on a district by district, per student, basis. . . . School tax rates and tax burden in Vermont [are], by any standard, inequitable." VERMONT DEP'T OF EDUC., EXECUTIVE SUMMARY, A SCORECARD FOR SCHOOL FINANCE: A LONGITUDINAL ANALYSIS FOR THE YEARS FY 85 THROUGH FY 92 at 2. (1992); see also VERMONT DEP'T OF EDUC., EXECUTIVE SUMMARY, A SCORECARD FOR SCHOOL FINANCE UPDATE 3 (1994).

2. See generally Linda D. Duva, Note, *Taxing Vermonters for Education: Reform of the Property Tax*, 15 VT. L. REV. 479 (1991); JOHN AUGENBLICK ET AL., EDUCATION FINANCE IN THE 1990S (1990); GOVERNOR'S SPECIAL COMM'N ON PROPERTY TAXATION, RECOMMENDATIONS AND SUMMARY OF FINDINGS (1989); JOHN AUGENBLICK, SCHOOL FINANCE IN VERMONT: ISSUES AND RECOMMENDATIONS (1986); see also PAUL E. BARTON ET AL., THE STATE OF INEQUALITY (1991); JAMES W. GUTHRIE, SCHOOL FINANCE POLICIES AND PRACTICES: THE 1980S: A DECADE OF CONFLICT (1980); WALTER I. GARMS ET AL., SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION (1978).

include the constitutional sufficiency of the current state aid system<sup>3</sup> and the state's overall ability to fairly raise sufficient funds,<sup>4</sup> particularly in a sluggish or post-recession economy. By far, most analyses of these problems have focused on the "revenue side" of local school budgets, which is where state aid payments and local tax revenues appear. Relatively unexplored in any depth have been many of the "cost issues" from the "other side of the ledger," that is, how school boards spend the funds they receive. School costs are a major cause of the political fury on the local level which has made the education crisis manifest through, for example, budget defeats.<sup>5</sup> Voter anger is often based upon a host of

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3. See generally Shari M. Jankowski, Note, *Vermont's Public School Finance System: A Constitutional Analysis*, 12 VT. L. REV. 239 (1987). The judicial branch will now have a chance to address the issue as the result of a lawsuit filed by the American Civil Liberties Union of Vermont. Fourteen individuals and two school districts (Brandon and Worcester) are challenging the constitutionality of Vermont's property tax system for funding public education. The suit alleges that inequities in the tax burden results in children in poorer towns receiving lower quality education than those in wealthier towns. *Brigham v. State*, No. 53-3-95LecV (Vt. Lamoille Super. Ct. filed Mar. 10, 1995). The comparative tax base ratio per child between the towns of Winhall and Hardwick is reported as 30 to 1. Betsy Liley, *ACLU Fights For Small Schools*, BURLINGTON FREE PRESS, Mar. 2, 1995, at B1; Ross Sneyd, *ACLU to Seek Property Tax Reform in Court*, VALLEY NEWS, Mar. 2, 1995, at A5. See generally Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. EDUC. FIN. 143 (1994); Michael Heise, *The Effect of Constitutional Litigation on Education Finance: More Preliminary Analyses and Modeling*, 21 J. EDUC. FIN. 195 (1995) (both discussing litigation outcomes and the recent trend to focus on educational "adequacy" as opposed to mere fiscal "equity" issues). See also John A. Nelson, *Adequacy in Education: An Analysis of the Constitutional Standard in Vermont*, 18 VT. L. REV. 7 (1993).

4. See generally J. Peter Gratot, *The Resident School Tax Burden in Vermont: A Different Analysis of Education Finance Problems*, 20 J. EDUC. FINANCE 410 (1995); David H. Monk, *Raising Revenues for New York's Public Schools: A Synthesis of Options for Policymakers*, 21 J. EDUC. FIN. 3 (1995).

5. Vermont has 325 Local Education Agencies (LEAs) which are eligible to receive funds and are expected to report annually to the Vermont Department of Education. These LEAs are assembled in a complex and sometimes overlapping arrangement of town, city, and incorporated school districts; unified, union, and joint contract districts; supervisory unions and districts; and single town supervisory unions. VERMONT DEP'T OF EDUC., SUMMARY OF THE ANNUAL STATISTICAL REPORT OF SCHOOLS OF 1993 at 5-6 (1993). There are 279 local and 46 supervisory union school boards in Vermont. Letter from Anne L. Montgomery, Administrative Assistant, Vermont Superintendents Association (June 15, 1995). The general public votes only on the local, not supervisory union, budget. From January 1, 1991 through December 31, 1993, there were 100 local school budget defeats statewide. The frequency of local budget defeats is increasing. There were 53 defeats of proposed 1995-96 budgets as of June 13, 1995. Some locales have a chronic problem getting a school budget approved by voters. As of June 30, 1995, the end of the 1994-95 fiscal year, the town of Benson, after nine proposed budget defeats, was still without an approved budget. As of August 30, 1995, 14 Vermont towns, including Benson, still did not have an approved 1995-96 school budget. VERMONT SUPERINTENDENTS ASS'N, 1995 BUDGET DEFEAT STATUS AS OF JUNE 13, 1995 (Vermont Superintendents Association did not keep statistics on the number of budget defeats in calendar year 1994); Susan Allen, *School Days Begin; Budgets Are Absent*, VALLEY NEWS, Aug. 29, 1995, at A1. On Nov. 14, 1995, Benson voters rejected a proposed 1995-96 school budget for the third time, for a total of 12 consecutive budget defeats in two years. *Voters in Benson Kill School Budget 12th*

perceptions and misperceptions about what forces (educational, legal, and economic) drive local school budgets.<sup>6</sup> In forming its judgment on these forces and their validity, the typical Vermont school district electorate is known to closely question virtually every aspect of every line of every version of every budget submitted in a given year.

Some expenses, such as those connected with rising enrollments and construction costs, are more easily explained to and accepted by voters than are others, such as the fine details of special education costs, or the need to have adequate supplies of updated instructional materials, or even the need for instruction in music and art.<sup>7</sup> A particularly difficult scenario occurs frequently, if not annually, in nearly every school district in which the school board is presenting a proposed budget to voters while still negotiating a new labor contract (typically taking effect on July 1 of the same year with the local teachers' union).<sup>8</sup> The board is faced with the challenge of requesting approval of a salary figure for all teachers<sup>9</sup> without

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*Straight Time*, VALLEY NEWS, Nov. 16, 1995, at A9.

6. Virtually every member of the voting and tax-paying public is included. The approximately 1382 citizens who serve as local school or supervisory union board members each year are particularly aware of the public dissatisfaction.

7. These costs are related to the powers of school boards which are set out in VT. STAT. ANN. tit. 16, § 563 (1989 & Supp. 1995). They include the duty to provide "all text books, learning materials, equipment and supplies." *Id.* § 563(14). "Education of Students With Special Needs," or special education, is governed by VT. STAT. ANN. tit. 16, §§ 2901-2973 (1989 & Supp. 1995). A substantial body of federal law also affects costs incurred by local schools in providing special education. See Individuals With Disabilities In Education Act, 20 U.S.C. §§ 1400-1485 (1995). The power to construct new facilities to meet the requirements of rising enrollments is manifest throughout Vermont law. See VT. STAT. ANN. tit. 16, §§ 552, 559, 563(2)-(3), (5), (7), (15)-(16) (1989 & Supp. 1995). The requirement to provide a course of study in the fine arts is set out at VT. STAT. ANN. tit. 16, § 906(b) (1989). There are also public school approval standards setting out the breadth and extent of fine arts and physical education requirements as well as requirements for other programs. See VERMONT DEP'T OF EDUC., REVISED STANDARDS FOR APPROVING VERMONT'S PUBLIC SCHOOLS; VT. STAT. ANN. tit. 16, §§ 164(11), (14) (1989 & Supp. 1995). These standards are the subject of endless discussion and debate at annual school district meetings, primarily because the State Board of Education is authorized to revoke or suspend approval of a school if minimum standards are not met. VT. STAT. ANN. tit. 16, § 165 (1989).

8. Generally, the annual town school district meeting is held on the date of the annual town meeting, the first Tuesday in March. However, in recent years many towns have exercised the option to move the school district meeting to a later date, in May or June, by which time final state aid-to-education figures are known. See VT. STAT. ANN. tit. 16, § 422 (1989). Negotiations for new teachers' contracts are typically underway, in a serious fashion, for only a few months by the time the district meeting is held; teacher organizations are required to request commencement of negotiations no later than 120 days prior to the school district's annual meeting. VT. STAT. ANN. tit. 16, § 2003 (1989).

9. At least 10 days before the annual meeting, or any meeting at which a sum of money is voted on by the electorate, the school board must distribute a proposed budget showing all revenues and expenses. *Id.* § 563(11). It is politically difficult, to say the least, for a board to present a proposed budget to the voters with no salary figures, pending completion of negotiations. It is also

at the same time notifying the union of the board's final salary settlement offer. But there is a larger problem: explaining to the electorate why the board has, in its budgeted salaries for teachers or some related contingency fund, "given" increases of up to one "step" on the most recent salary step scale.<sup>10</sup> Large elements of the electorate typically respond by pressuring the board to negotiate for either no salary increase or a minimal one. They demand to know why they should approve any salary increase, when (a) salaries are still under negotiation and (b) the board, when negotiating in executive session with the teachers, presumably is doing the electorate's bidding by refusing to offer the teachers an amount of salary increase even equaling a step increase. It is at this point that the board explains, usually in public information sessions prior to and at the school district annual meeting, that "state law" requires giving the teachers their step increases during negotiations. The response to this explanation is varied. Some voters nod in acceptance or understanding. Others look puzzled. Others express outrage. Because this outrage can grow over time, as negotiations drag on and budget defeats accumulate, it has a destabilizing effect upon any school district in which it occurs. The legal principle at the center of the controversy warrants examination.

Part I explores Vermont law dealing with the payment of step increases to teachers during negotiations for a new collective bargaining agreement (CBA). Part II expands the analysis to review the laws of, and practices in, other states. Part III recommends reforms for Vermont in the timing of teachers' contract negotiations and related procedures, while maintaining the framework of the current rule.

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of questionable legality. In any event, at each annual town school district meeting the electorate is to vote "such sums of money as it deems necessary for the support of schools and shall express in its vote the specific amounts voted for . . . current expenses." VT. STAT. ANN. tit. 16, § 428 (1989); see also VT. STAT. ANN. tit. 16, § 562(8) (1989). Board practices vary with respect to handling this problem. See, e.g., Kristin Bloomer, *School Budget Tax Headed Up In Town*, RUTLAND HERALD, Feb. 24, 1995, at 13, 17. In Rutland, school officials allocated an additional \$78,000 to a contingency fund for two years of salary increases. *Id.* Officials are still negotiating the increases, making the budget figures "simply the board's best guess." *Id.*

10. A salary step scale consists of a grid or chart reflecting the actual amounts of salary to be paid to individual teachers based upon their years of experience and educational attainment. Typically, vertical columns represent years of teaching experience attained prior to the school year under negotiation (e.g., 0 to 20). Horizontal rows represent different levels of educational attainment (e.g., BA, BA + 15 (graduate credits), MA, etc.). The intersection of the columns and rows yields a teacher's current annual salary. Multi-year collective bargaining agreements (CBAs) typically contain language stating that for each extra year of teaching experience, the teacher shall advance vertically one experiential step on the step scale. A similar provision usually exists allowing for horizontal movement into a new "lane" or column based upon specified additional educational attainment. Teacher contracts are often silent or ambiguous on what happens with respect to experience and education level step increases in the school year(s) following expiration of a labor contract.

## I. THE VERMONT EXPERIENCE

The Vermont rule requiring the payment of steps upon contract expiration was established in *Chester Education Ass'n v. Chester-Andover School Board of Directors*, and reaffirmed in 1992, in *Windham Southwest Education Ass'n, Vermont-NEA/NEA-Readsboro Chapter v. Readsboro Board of School Directors (Readsboro)*.<sup>11</sup> Both *Chester* and *Readsboro* were based upon the Vermont Labor Relations Board's close reading of state statutes and related federal precedent. A review of *Chester* and *Readsboro* is useful because the same fact patterns recur nationally. Many of the same legal rationales and the same or analogous legal authorities are relied upon across the country with differing results.<sup>12</sup> This Part of the Article will address the applicable law, address the public reaction, and provide an analysis of a survey which was sent to Vermont school boards, superintendents, and teachers.

A. *Applicable Law*

Vermont's Municipal Employees Labor Relations Act (MELRA)<sup>13</sup> protects teachers from unfair labor practices.<sup>14</sup> Among the employer practices deemed unfair are "[t]o interfere with, restrain or coerce employees in the exercise of their rights" and "[t]o refuse to bargain collectively in good faith."<sup>15</sup> Collective bargaining for teachers is otherwise covered in detail in the Teachers Labor Relations Act (TLRA).<sup>16</sup> This statute guarantees teachers the right to join or not join a teachers' organization<sup>17</sup> and imposes on school boards and teachers the obligation "to negotiate in good faith on all matters properly before them."<sup>18</sup> It specifies that "a request for commencement of negotiations" must be made by the teachers' organization "no later than one hundred and twenty days prior to the school district's annual meeting."<sup>19</sup> Mandatory subjects for

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11. *Chester Educ. Ass'n v. Chester-Andover Sch. Bd. of Directors*, 1 V.L.R.B. 426 (1978); *Vermont-NEA/NEA-Readsboro Chapter v. Readsboro Bd. of Sch. Directors*, 15 V.L.R.B. 268 (1992) [hereinafter *Readsboro*].

12. See discussion *infra* Part II.

13. VT. STAT. ANN. tit. 21, §§ 1721-1735 (1987 & Supp. 1995).

14. *Id.* § 1735.

15. *Id.* § 1726(a)(1), (5).

16. VT. STAT. ANN. tit. 16, §§ 1981-2027 (1989 & Supp. 1995).

17. *Id.* § 1982(a).

18. *Id.* § 2001.

19. *Id.* § 2003.

negotiation are salaries, benefits, procedures for processing complaints and grievances, and any other mutually agreed upon matters.<sup>20</sup>

Under the TLRA, if the parties cannot reach agreement, one or both may request mediation.<sup>21</sup> The parties may agree upon a mediator or a mediator may be appointed by the American Arbitration Association or its designee.<sup>22</sup> The parties are obligated to meet with the mediator and provide information.<sup>23</sup> If mediation fails, either party may request that "any and all unresolved issues" be submitted to a fact-finding committee.<sup>24</sup> The fact-finding committee has three members: one member selected by the school board; one by the teachers; and the third by the other two.<sup>25</sup> In practice, fact-finding reports are made exclusively by the third committee member, a professional arbitrator authorized by the American Arbitration Association.

The charge of the fact-finding committee is to "convene as soon as practicable" and allow for testimony and presentation of evidence by the opposing parties.<sup>26</sup> All pertinent records, papers, and information in the possession of the parties are to be made available to the committee.<sup>27</sup> A written report which recommends a reasonable basis for settlement is made by the committee and delivered to both parties within thirty days after the committee is appointed.<sup>28</sup> This deadline is rarely, if ever, met. Typically, the deadline is extended by mutual agreement of the parties. All expenses of mediation and fact-finding are shared equally by the parties.<sup>29</sup>

Upon receipt of the report, the parties have ten days to privately resolve their dispute. After this, the report can be made public by either party.<sup>30</sup> After a "cooling off period" of thirty days following receipt of the fact-finder's report,<sup>31</sup> the school board may declare "finality" regarding

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20. *Id.* § 2004.

21. *Id.* § 2006.

22. *Id.*

23. *Id.* § 2006(c).

24. *Id.*

25. *Id.* § 2007(b).

26. *Id.* § 2007(c).

27. *Id.*

28. *Id.*

29. *Id.* § 2007(e).

30. *Id.* § 2007(d).

31. This is a period imposed by the Labor Board. It also applies to the timing of any strike by teachers after fact-finding. *Rutland Educ. Ass'n v. Rutland Sch. Bd.*, 2 V.L.R.B. 250, 266-73 (1979).

"matters in dispute in negotiations."<sup>32</sup> The school board's decision becomes controlling and may be implemented.

In *Chester*, the parties had a collective bargaining agreement, effective July 1, 1976, which provided in part for automatic renewal of the agreement for one year periods, beginning each succeeding July 1, unless either party notified the other of its desire to terminate or amend the agreement pursuant to the TLRA.<sup>33</sup> In late August 1977, the teachers notified the School Board of their desire to negotiate a new agreement for the 1978-79 school year.<sup>34</sup> Despite numerous negotiation sessions, the master agreement of July 1976 terminated on June 30, 1978 without the signing a new contract. On September 5, the School Board unanimously adopted an interim operational policy dealing with teacher personnel matters.<sup>35</sup> First and foremost, the interim policy specified that "teachers were to be paid at the same salaries as they had received in 1977-78 rather than move up the salary schedule in the expired agreement which raises the teachers' salaries by incremental steps for each year taught."<sup>36</sup> Second, the interim policy provided, *inter alia*, that the School Board would make the final disposition in the grievance procedure.<sup>37</sup> In contrast to this provision, the expired master agreement provided for binding arbitration as the final stage of the grievance procedure.<sup>38</sup>

The parties next met for negotiations on September 13.<sup>39</sup> The interim policy was not discussed and the Teacher's Association declared impasse.<sup>40</sup> The Labor Relations Board found that "[g]rievance procedure [and] salaries . . . were subjects under discussion by the parties in their negotiations for a successor agreement."<sup>41</sup> The School Board denied that its interim policies were adopted pursuant to the finality provisions of the TLRA.<sup>42</sup>

The Association filed an unfair labor practice complaint against the School Board.<sup>43</sup> It alleged that the School Board's interim adoption of

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32. VT. STAT. ANN. tit. 16, § 2008. This section makes clear that finality can only be imposed by the Board "after full compliance with this chapter." *Id.*

33. *Chester*, 1 V.L.R.B. at 427.

34. *Id.*

35. *Id.* at 429.

36. *Id.* at 430.

37. *Id.*

38. *Id.*

39. *Id.* at 431.

40. *Id.*

41. *Id.* at 432.

42. *Id.* (citing VT. STAT. ANN. tit. 16, § 2008).

43. *Id.* at 426.

policies changing the existing terms and conditions of employment, before full compliance with the TLRA, violated the duty to bargain in good faith.<sup>44</sup> The crux of the Association's argument was that the School Board, while having the authority to eventually make unilateral changes after a contract had expired, could not legally do so while negotiations were still in progress and neither party had declared an impasse or invoked fact-finding.<sup>45</sup>

The School Board maintained that it had the right to adopt the policies as regulations pursuant to the general powers of Vermont school boards.<sup>46</sup> It contended that the changes were not unilateral since they were adopted in a public meeting.<sup>47</sup> In addition, the changes were necessary to regulate teacher personnel matters on an interim basis.<sup>48</sup> The School Board argued that, unless the teachers could show that it had acted from improper motive or that teachers suffered actual prejudice, no unfair labor practice was committed.<sup>49</sup>

The Labor Board agreed with the Association. It noted the similarity between the unfair labor practice and duty to bargain provisions in Vermont's statutes and those in the National Labor Relations Act (NLRA).<sup>50</sup> It further noted that "[i]n prior labor decisions involving parallel federal legislation, the Vermont Supreme Court and [the Labor] Board have consistently looked to federal decisions interpreting the [NLRA] for guidance."<sup>51</sup> The Labor Board said it was guided by the fact that, "[a]s a general principle, federal courts have upheld N.L.R.B. rulings that unilateral changes in working conditions following termination of a collective bargaining agreement and during negotiations for a successor agreement, are permitted only after the parties have reached an impasse in negotiations."<sup>52</sup> The Labor Board cited the seminal case of *NLRB v. Katz* for the proposition that unilateral imposition of terms of employment, during the time the employer is under a legal duty to bargain in good faith,

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44. *Id.* at 433. The good faith provision at issue was VT. STAT. ANN. tit. 21, § 1726(a)(5). The Association also claimed that the manner in which the policies were implemented circumvented the recognized collective bargaining agent in violation of § 1726(a)(1). VT. STAT. ANN. tit. 21, § 1726(a)(5).

45. VT. STAT. ANN. tit. 21, § 1726(a)(5).

46. *Chester*, 1 V.L.R.B. at 433-34 (citing VT. STAT. ANN. tit. 16, § 563).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 434.

51. *Id.* (citations omitted).

52. *Id.*

“is the very antithesis of bargaining and is a *per se* violation of the duty to bargain whatever the subjective good faith of the parties may be.”<sup>53</sup>

Against this basic framework, the Labor Board set forth some general principles designed to clarify “when and under what circumstances [the parties are] relieved from the statutory duty to bargain.”<sup>54</sup> First, parties are not obligated to make concessions or yield a position fairly maintained.<sup>55</sup> Second, parties who cannot agree are free to declare impasse.<sup>56</sup> Third, adopting federal precedent, if the parties are deadlocked and impasse exists “the employer is then free to unilaterally change the conditions and terms of employment.”<sup>57</sup>

In explaining how the parties can be so restricted in their freedom of action, the Labor Board pointed out that a collective bargaining agreement is not an ordinary contract:

Under ordinary contract law, the parties are relieved of their obligations to each other once the contract has expired. However, to the extent that labor law governs the actions of the parties to a collective bargaining agreement after the expiration of a contract, the parties are under an obligation to bargain in good faith over matters which are set forth in the statutes as mandatory subjects of bargaining. While this obligation does not necessarily prevent the employer from implementing decisions which change the conditions of employment as they existed under the expired contract, it does restrict how and why the employer may do so. This obligation is not derived from the survival of the old contract, but from the statutory provisions which impose on both parties a duty to bargain in good faith.<sup>58</sup>

Applying these principles and Vermont’s municipal and teacher labor relations statutes to the case at hand, the Labor Board made some initial observations on the Vermont teacher labor relations scheme. The legislative intent was “to provide for the orderly resolution of labor disputes between teachers and school boards in a manner which does not interfere with the necessity of on-going public education.”<sup>59</sup> Commenting

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53. *Id.* at 435 (citing *NLRB v. Katz*, 369 U.S. 736 (1960)). In *Katz*, the employer had, during negotiations and prior to impasse, unilaterally granted merit increases, announced a change in sick leave policy, and instituted a new system of automatic wage increases. *Katz*, 369 U.S. at 741-42.

54. *Chester*, 1 V.L.R.B. at 435.

55. *Id.*

56. *Id.*

57. *Id.* at 435-36 (citation omitted).

58. *Id.* at 436 (citations omitted).

59. *Id.* at 437.

on the labor contract negotiation timetable, the Labor Board said that the 120 day notification requirement which is imposed upon teachers

allows the union and the school board ample time to negotiate a successor contract or invoke . . . fact-finding procedures . . . and, if necessary, finality . . . prior to the school district's annual meeting. Accordingly, any budget increases resulting from the new contract can be properly approved prior to the expiration of the old contract.<sup>60</sup>

At the outset of its merits discussion, the Labor Board noted that negotiations for a new contract had dragged on unsuccessfully for over a year, and that neither side had "declared an impasse" or requested fact-finding prior to the School Board's adoption of the interim policies.<sup>61</sup> It observed that, although neither party had accused the other of subjective bad faith, "each [side], for its own reasons, has carefully avoided setting in motion the statutory machinery by which the School Board can unquestionably impose unilateral terms on the teachers."<sup>62</sup> The Labor Board then ruled that there was "no question that freezing wages [and] altering the grievance procedure . . . changed the terms and conditions of employment."<sup>63</sup> These matters, it added, were not only mandatory subjects of bargaining, they were also under negotiation prior to adoption of the interim policies.<sup>64</sup>

The Labor Board rejected the School Board's argument that, because a teacher representative was present at the School Board meeting when the vote occurred, the policies were not unilaterally adopted.<sup>65</sup> The Labor Board reasoned that the School Board had no duty to consider the views of the teacher representatives, who were, in that context, no different from the general public. "In short, the School Board is under no legal duty to bargain or negotiate in that context."<sup>66</sup> Similarly, the Labor Board found that the School Board did not have the statutory authority to make labor relations decisions through regulatory procedures once the School Board

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60. *Id.* at 437-38.

61. *Id.*

62. *Id.* at 438. The Labor Board speculated that the Association's primary reason for avoiding the statutory scheme was to avoid having its terms of employment dictated by the School Board, and the School Board's aim was to avoid animosity and disruption in the educational system. *Id.*

63. *Id.* at 439.

64. *Id.*

65. *Id.*

66. *Id.*

had recognized a collective bargaining agent.<sup>67</sup> The Labor Board found that the policies had been unilaterally adopted, but not according to statute.<sup>68</sup>

Concluding that the School Board had committed an unfair labor practice by implementing the interim policies, the Labor Board ruled that

[u]nder the Teachers Labor Relations Act, the School Board is obligated to bargain in good faith over mandatory subjects of bargaining until the parties reach impasse and invoke the fact-finding process under § 2007. By statute, it can only make unilateral decisions which affect the terms and conditions of employment after compliance with the procedures of the Teachers Labor Relations Act. Implementing unilateral changes which directly affect subjects which are being negotiated at the bargaining table while maintaining that good faith negotiations are continuing, is contradictory in fact and in law, and is a *per se* violation of the duty to bargain that action, [and] therefore, an unfair labor practice under 21 V.S.A. § 1726(a)(5).<sup>69</sup>

The Labor Board ordered the School Board to cease and desist from refusing to negotiate in good faith, and from unilaterally altering the terms and conditions of employment during negotiations, including enforcing the challenged interim policies.<sup>70</sup> It affirmatively ordered the School Board to "pay its teachers increments pursuant to the 1977-78 salary schedule" during the course of negotiations.<sup>71</sup>

*Readsboro* was a virtual reprise of the *Chester* fact pattern, except that impasse was formally declared just over three weeks before the expiration of the contract on June 30, and before the School Board unilaterally denied salary step increases for the new academic year.<sup>72</sup> The School Board requested that the Labor Board follow private sector precedent under the NLRA, allowing an employer to make unilateral changes after impasse but prior to completion of dispute resolution procedures.<sup>73</sup> The Labor Board refused to do so, pointing out that, because this was not a private sector

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67. *Id.* at 440. The School Board based its authority on VT. STAT. ANN. tit. 16, § 563, which is the "powers of school boards" section. *Id.*

68. *Id.*

69. *Id.* at 441-42. The Labor Board added that the School Board was trying to have it both ways, claiming it was bargaining in good faith while simultaneously imposing working terms. This position "not only short circuits the collective bargaining process . . . but is also the antithesis of good human relations." *Id.* at 443.

70. *Id.* at 443-44.

71. *Id.* at 444.

72. *Readsboro*, 15 V.L.R.B. at 268-70.

73. *Id.* at 269-72.

dispute, it was governed by all of the terms of the TLRA.<sup>74</sup> In explaining the Act's requirements, the Labor Board drew not only upon *Chester*, but also upon its prior decisions in *Rutland Education Ass'n v. Rutland School Board* and *Vermont State Employees' Ass'n v. State*.<sup>75</sup>

In *Readsboro*, the Labor Board resolved a significant ambiguity in *Chester* by drawing a distinction between statutory "impasse," a term it had used rather loosely in *Chester*, and genuine deadlock:

An "impasse" in the public sector, unlike the private sector, does not mean the parties have reached a deadlock, that they have irreconcilable differences. Declaration of impasse simply means a determination by either or both parties to use statutory dispute resolution procedures; it represents a realization that third-party assistance is needed to continue productive bargaining. Genuine deadlock is not reached until the parties have exhausted the statutory dispute resolution procedures and it is not appropriate for the employer to make unilateral changes until then.<sup>76</sup>

The Labor Board ordered the School Board to cease and desist "from its unfair labor practice of withholding annual step salary increases based on experience," and required payment of back pay with interest.<sup>77</sup>

Since *Readsboro*, the Vermont Supreme Court and the Labor Board have each decided a case relating to continuation of contract terms and contract imposition. In *Milton Board of School Directors v. Milton Staff Ass'n (Milton)*, the court ruled that arbitration is unavailable to resolve the issue of whether the School Board has the power to impose post-expiration contract terms (pay was held at the prior year's level and no steps were given) where the expired contract does not itself specify that arbitration authority survives contract expiration.<sup>78</sup> The court expressly rejected the union's reliance on the "status quo doctrine" as embodied in *Chester* and *Readsboro*.<sup>79</sup> The court also rejected the arbitrator's conclusion that the expired contract somehow "contractualized" the good faith bargaining duty

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74. *Id.*

75. *Readsboro*, 15 V.L.R.B. at 272-73 (citing *Chester*, 1 V.L.R.B. 426; *Rutland Educ. Ass'n* 2 V.L.R.B. 250; *Vermont State Employees' Ass'n v. State*, 5 V.L.R.B. 303 (1982)).

76. *Id.* at 272-73 (citations omitted). Once statutory dispute resolution procedures are exhausted, which occurs only after fact finding is completed, the school board may only impose contract terms relating to matters that were actually "in dispute." *Chittenden S. Educ. Ass'n v. Hinesburg Sch. Dist.*, 147 Vt. 286, 290, 514 A.2d 1065, 1068 (1986).

77. *Readsboro*, 15 V.L.R.B. at 273-74.

78. *Milton Bd. of Sch. Directors v. Milton Staff Ass'n*, 6 Vt. L. Wk. 50, 50-51, 656 A.2d 993, 994-95 (1995).

79. *Id.* at 995-96.

in section 1726(a)(5) of the MELRA and all judicial and quasi-judicial doctrines developed under the labor relations statute.<sup>80</sup> The court did not reach the underlying issue of whether or not the pay steps should have been granted.<sup>81</sup>

In *Caledonia North Education Ass'n v. Burke Board of School Directors (Burke)*, the Labor Relations Board confronted several issues of first impression related to the status quo rule, finality, and imposition of contract terms.<sup>82</sup> The Association and the School Board had a contract for 1991-93 that did not provide automatic steps for the 1991-92 or 1992-93 school years, but did provide that step movement be restored at the completion of the 1992-93 school year.<sup>83</sup> In the event that negotiations for a successor agreement were not completed by June 30, 1993, the current agreement would continue in force until a new contract was ratified.<sup>84</sup>

In March 1993, the School Board presented a proposed 1993-94 school budget to the voters, containing only a two percent increase in salaries and benefits, including health benefits—the increase was insufficient to meet teacher step salary increases for that year.<sup>85</sup> The budget was approved.<sup>86</sup> Because no new contract had been negotiated by June 30, the School Board, ostensibly following *Chester*, began to pay teachers new salaries adjusted for vertical and horizontal steps on July 1.<sup>87</sup> Payment at these rates continued throughout the full school year.<sup>88</sup>

In negotiations, impasse was declared, and the parties proceeded to mediation and fact-finding.<sup>89</sup> The Association proposed base pay increases, the addition of a step at the top of the scale, and maintenance of current health benefits.<sup>90</sup> The School Board proposed a two percent salary increase for 1993-94 and the institution of a different medical plan which included a deductible.<sup>91</sup>

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80. *Id.* (citing VT. STAT. ANN. tit. 21, § 1726(a)(5)).

81. Significantly, however, the court favorably noted in dictum the School Board's argument "that it would be illogical 'to believe that they would have failed to include language requiring "automatic" post-expiration pay scale advancement—if there truly was an agreement to that effect.'" *Id.* at 995.

82. *Caledonia N. Educ. Ass'n v. Burke Bd. of Sch. Directors*, 18 V.L.R.B. 45, 72-73 (1995) [hereinafter *Burke*].

83. *Id.* at 46.

84. *Id.* at 46-47.

85. *Id.* at 47.

86. *Id.*

87. *Id.* at 48.

88. *Id.*

89. *Id.*

90. *Id.* at 48-49.

91. *Id.* at 49.

In March 1994, the School Board presented to the voters a 1994-95 school budget which included a salary freeze for teachers; the budget proposal was defeated.<sup>92</sup> After issuance of the fact-finder's report, the parties again attempted mediation, at which time the School Board proposed a two-year pact calling for a two percent salary increase for 1993-94, with no step increases, a salary freeze for 1994-95, and a teacher co-payment of ten percent on the existing policy for both years.<sup>93</sup> In May, a revised budget proposal was again defeated.<sup>94</sup> In June, the Association, seeing no progress and fearing imposition of a two-year contract, formally requested that the School Board begin negotiations for the 1994-95 school year.<sup>95</sup>

On June 20, 1994, the School Board imposed a two-year contract for 1993-94 and 1994-95 containing the terms it had most recently proposed plus any terms to which the parties had agreed.<sup>96</sup> In addition, 1994-95 paychecks were structured to recapture the steps paid in 1993-94, less an allowance for the two percent raise given in the imposed contract.<sup>97</sup> The School Board also told teachers that they owed the ten percent health insurance premium co-payment for the entire 1993-94 year; if they did not make arrangements to pay it, their current health insurance might be cancelled.<sup>98</sup>

The Association complained to the Labor Board, alleging that the School Board violated section 1726(a)1 and (a)(5-6) of the MELRA by: (1) failing to appropriate enough money to pay for steps for 1993-94; (2) imposing salary and health insurance terms retroactively for 1993-94 without negotiating the precise terms and not negotiating in good faith; (3) threatening to cancel health insurance for teachers who did not pay the claimed insurance arrearages for 1993-94; and (4) refusing to negotiate for the 1994-95 year and unilaterally imposing terms for that year.<sup>99</sup>

The Labor Board found no violation of section 1726(a)(6), which forbids refusing to appropriate sufficient funds to implement an agreement.<sup>100</sup> It reasoned that when the School Board was negotiating and proposing a salary freeze in March 1993, impasse had not yet been

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92. *Id.*

93. *Id.* at 50.

94. *Id.* at 51.

95. *Id.* at 51-52.

96. *Id.* at 52.

97. *Id.* at 53-54.

98. *Id.* at 54.

99. *Id.* at 55-56.

100. *Id.* at 56.

declared and there was no way of knowing for sure that it would have to pay the step increases in the future:

The School Board had to develop some figure for teacher salaries . . . . It is not unusual for a lower percentage to be budgeted for salary increases for a school year than the percentage increase ultimately negotiated for that year . . . . In such circumstances, the employer makes adjustments in other budget line items to ensure that the [salary] obligation . . . is met.<sup>101</sup>

The Association's contention that the School Board failed to negotiate in good faith prior to imposing a new contract was also rejected by the Labor Board, which noted that, during negotiations, while the School Board "made minimal movement[,] the Association made even less movement."<sup>102</sup>

The key issue in the case, which the Labor Board recognized had "precedential effect and significant ramifications for teacher-school board negotiations throughout Vermont,"<sup>103</sup> was whether the School Board, in imposing finality pursuant to section 2008 of the TLRA, could do so retroactively or only prospectively.<sup>104</sup> The Labor Board noted that the School Board had timed its imposition properly and had imposed salary and health insurance contribution rates properly; the real issue was whether those rates could be imposed retroactively.<sup>105</sup> The Labor Board, relying on *Katz, Readsboro, Chester, and Burlington Fire Fighters Ass'n v. City of Burlington*, ruled that the School Board could not impose the rates retroactively.<sup>106</sup> The Labor Board explained that allowing such action would tend to inhibit discussions and discourage meaningful bargaining.<sup>107</sup> The ability to force teachers to repay salaries and benefits creates an "implied threat" with "the potential of management having a much stronger ability" to effect an agreement favorable to itself "once the parties

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101. *Id.* at 57 (citations omitted).

102. *Id.* at 59. The Labor Board further noted that it was "significant that negotiations occurred in the context of continuing fiscal difficulties." *Id.*

103. *Id.* at 60.

104. *Id.*

105. *Id.* at 61.

106. *Id.* at 61-63. In *Burlington Fire Fighters Ass'n*, the Vermont Supreme Court held that the public employer violated § 1726(a)(5) of the MELRA by unilaterally imposing rules and regulations during contract negotiations. *Burlington Fire Fighters Ass'n v. City of Burlington*, 142 Vt. 434, 435-37, 457 A.2d 642, 643-44 (1983) (citing *Katz*, 369 U.S. 736 (1962)).

107. *Burke*, 18 V.L.R.B. at 63-64.

are operating under an expired agreement."<sup>108</sup> The Labor Board also addressed the very practical result of a contrary ruling:

Management would be able effectively to get around the status quo doctrine established in such cases as *Readsboro* and *Chester*, and eviscerate the significance of maintaining the status quo until the completion of mandated dispute resolution procedures. The receiving of step salary increases and maintenance of health insurance premium contribution rates in the case before us was an entitlement of teachers . . . , and management should not be able to take action to effectively eliminate this entitlement.<sup>109</sup>

The Labor Board was careful to point out that imposition of the salary and insurance rates was effective on a prospective basis.<sup>110</sup>

### B. Public Reaction

As *Readsboro*, *Milton*, and *Burke* demonstrate, there is still great resistance in Vermont to paying post-contract expiration step increases to teachers. Contemporary comments in the press reveal the public face of the disagreement. An exchange in the pages of the *Burlington Free Press* in early 1995 contained typical pro and con views.

Arthur Woolf, an associate professor of economics at the University of Vermont and a well-known critic of spending and staff-size practices in Vermont schools, wrote that "a major contribution to rising education costs is a little-understood feature of teachers' contracts called the step system."<sup>111</sup> Likening the double pay grid movement for experience and

108. *Id.*

109. *Id.* at 64. In the balance of its decision, the Labor Board ruled that the School Board had violated § 1726(a)(1) of the MELRA, which forbids interfering with, restraining, or coercing employees in the exercise of their rights, by threatening to cancel the health insurance of teachers who did not pay alleged health insurance arrearages. *Id.* at 69. It also ruled that because the Association had made a timely request to negotiate for 1994-95, the School Board failed to satisfy the statutory good faith bargaining requirements. *See id.* at 71-72. The Labor Board reasoned that to allow a school board to impose contract terms for any period over a year violates the goal of the TLRA which is

to promote the reaching of mutual agreements. . . . A negotiated agreement is the norm and the preferred result, and a unilateral imposition and/or a strike is the exception and the disfavored result. If we were to allow school boards to implement for more than one year, we would be allowing the exception and disfavored result to take precedence over the norm and preferred result.

*Id.* at 72-73.

110. *Id.* at 66.

111. Arthur Woolf, *It's My Turn—Schools' 'step system' needs examination*, BURLINGTON FREE PRESS, Feb. 7, 1995, at 9A.

earned academic credits to simultaneous multi-directional advances on a checkerboard, Woolf estimated that a teacher "can increase her pay by an average of four or five percent per year until she hits the edge of the board" automatically, without negotiating such a raise.<sup>112</sup> Negotiated salary base level increases which occur each two to three years have the effect of pushing "up all teachers' salaries. It's as if the entire checkerboard is being lifted higher, and as it is lifted, all salaries go up."<sup>113</sup>

Although careful to say that there is nothing inherently bad about this, Woolf listed three "problems" with step raises. First, because step raises are automatic, they do not function as a reward for better teaching or better student performance.<sup>114</sup> Second, given the low levels of inflation in recent years, "the step-system leads to intense upward pressure on salaries."<sup>115</sup> Thus, with inflation under three percent in recent years, "teachers can receive an automatic salary increase greater than inflation."<sup>116</sup> Third, such raises, enhanced by base wage increases, outstrip increases earned by other Vermonters, increasing public dissatisfaction with teachers' salary demands.<sup>117</sup> Woolf's proposed that school districts should simply reduce the size of the steps, that is, the amount of salary paid at each step.<sup>118</sup>

Woolf's column provoked at least two sharp responses. Barbara Barbour, a mathematics teacher at Windsor High School, challenged several of Woolf's assertions, each of which she referred to as "the world according to Woolf."<sup>119</sup> Citing statistics compiled by Vermont-NEA Today, Barbour maintained that the average net teacher salary increase in recent years was less than three percent due to inflation and, in 1993-94, was nine-tenths of a percent less than the prior year's salary.<sup>120</sup> She also asserted that teachers' salaries should not be based on student performance.<sup>121</sup> Most important, Barbour noted that she and her Windsor

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Barbara Barbour, *It's My Turn—Column misrepresented step-system, salaries*, BURLINGTON FREE PRESS, Mar. 6, 1995, at 5A.

120. *Id.*

121. *Id.*

colleagues had not received a step increase in the last four years and only one raise in the prior three years.<sup>122</sup>

Arguments about inflation aside, Barbour and Woolf implicitly agreed on one major point: teachers and school boards can, by negotiation, eliminate the automatic post-expiration step increase practice, just as teachers apparently did in Windsor, a town badly hurt during the recessionary 1980s.<sup>123</sup> Barbour did not dispute the automatic nature of steps in the absence of a contract to the contrary; her response was limited to Windsor's unique situation.<sup>124</sup> It was left to David Schoales, a history teacher and then-Vermont-NEA vice presidential candidate, to list the equitable merits of the step system: equal treatment of men and women, rewarding additional experience and academic study, and recognizing "hard work and a job well-done."<sup>125</sup>

It is a simple matter to calculate the cost to a school district of paying automatic salary step increases. One need only know the pay-scale step structure, where each teacher is on the scale, and which teachers will return for a new academic year. In Hartland, Vermont,<sup>126</sup> the rule of thumb during teacher salary negotiations was that paying steps to each teacher would amount to about a three percent increase in base salary costs for the District for the succeeding school year, assuming identical staff and duties with no increase in the base pay.<sup>127</sup> Any voter should be able to obtain a reliable estimate of step costs from the local school board or district, supervisory union, superintendent, or business manager. Slightly complicating the picture, however, is the need to include in the cost of "Chestering" the increased cost, if any, of health/dental benefits which the school district is bound to pay under the prior contract. The *Burke* decision makes clear that these costs, like pay steps, must be paid pending completion of negotiations or imposition of finality.<sup>128</sup>

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122. *Id.*

123. *Id.*

124. *Id.*

125. David Schoales, *Step-system value*, BURLINGTON FREE PRESS, Mar. 19, 1995, at 6E.

126. The author was a member of the Hartland School Board from 1991-94 and board chairperson in 1993-94.

127. The most recently negotiated Hartland agreement is a one-year contract for 1995-96 providing for payment of steps with no base pay increase. Professional Agreement Between the Hartland Board of School Directors and Hartland Education Association for 1995-1996 (Nov. 2, 1995). Considering just the 20 full-time returning teachers who took no horizontal (experiential) row movement, the cumulative cost of paying these steps amounts to just under a 3.07% increase over those teachers' 1994-95 salaries.

128. *Burke*, 18 V.L.R.B. at 76.

As of the 1993-94 school year, there were 186 teachers contracts formally negotiated through collective bargaining in Vermont.<sup>129</sup> Joel Cook, general counsel for Vermont-NEA, estimates that between one-third and one-half (or forty-two percent) come up for review in any given year, and, of these, about twenty-five are not renewed before their expiration date, thus causing *Chester* to come into play.<sup>130</sup> As a result, about twenty-five of seventy-eight contracts, or thirty-two percent of all teachers contracts negotiated in Vermont each year, involve application of the *Chester* rule before the contracts are finally settled. Cook favors retention of the *Chester* rule because, as a practical matter, it serves as a pressure release mechanism, lessening the likelihood of teacher strikes over salary.<sup>131</sup> In addition, the predictability afforded by the rule prevents repeated and costly legal struggles.<sup>132</sup> Also, he points out that the rule is not as costly as it might first appear because most contracts, when finally settled, are retroactive and incorporate *Chester* payments as part of, and not in addition to, the coming school year's salary.<sup>133</sup>

On the other hand, the rule actually does nothing for teachers at the top of the scale who take no step movement but must await increases in base salary to get raises. In this sense, the rule is, at best, neutral to them. At worst, it pits the interests of those at the top of the scale against the interests of less experienced teachers.

The Vermont Legislature has not modified the *Chester* rule, despite the efforts of Representative Wendell Coleman (R., So. Londonderry). Each year since 1989, he has introduced a bill stating: "Upon expiration of a master contract negotiated under this chapter, salaries shall be frozen at existing levels and shall not increase or decrease according to provisions of the expired contract."<sup>134</sup> The bill regularly gains the support of the Vermont School Boards Association, but it has never been voted out of committee.<sup>135</sup> Coleman proposes the bill because he sees the current rule as providing "a pay raise for doing nothing, an incentive to not negotiate."<sup>136</sup>

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129. VERMONT DEP'T OF EDUC., CONTRACT-94, VERMONT TEACHER CONTRACT PROVISIONS 2 (Feb. 4, 1994).

130. Telephone Interview with Joel Cook, General Counsel for Vermont-NEA (Oct. 31, 1994).

131. *Id.*

132. *Id.*

133. *Id.*

134. *See, e.g.*, Vt. H. 132, 1995 Adj. Sess.

135. Vermont House Bill 132 is presently being considered by the House General and Military Affairs Committee.

136. Telephone Interview with Representative Wendell Coleman, South Londonderry (Oct. 19, 1995).

The Vermont Republican party has now stepped into the fray by seeking legislative reversal of key elements of *Chester* and *Burke*. In a recent report entitled *A Challenge to Change*, the Republican Education Finance Reform Committee recommended passage of legislation, in 1996, specifying that "no salary increase can be given after a collective bargaining agreement has expired [and] all economic terms may be imposed under finality on a retroactive basis."<sup>137</sup> It further recommends "the imposition of finality for multi-year contracts."<sup>138</sup>

On the *Chester* principle, the report echoes Representative Coleman's charge, stating that "teachers get increases they haven't bargained for . . . . It inhibits and prolongs negotiations."<sup>139</sup> On *Burke's* holding that only economic increases (i.e., neutral provisions, or provisions that do not cause economic loss to teachers) can be imposed retroactively, the report charges that it "encourages the teachers' union to prolong bargaining to avoid losing ground."<sup>140</sup> On allowing for imposition of finality for multi-year contracts, the committee's reasoning was that "[t]raditionally parties have bargained for contracts that last [one to three] years. Current law discourages meaningful bargaining and increases legal fees."<sup>141</sup>

The Vermont-NEA's response to this document is grounded upon the reasoning in the *Burke* and *Chester* decisions and policy considerations. Calling the *Chester* rule "fair," the Association notes that "[n]othing in [*Chester*] precludes a school board from negotiating to incorporate, in successor agreements, terms which obviate its effect."<sup>142</sup> In other words, the Association could explicitly agree that steps would not be payable upon contract expiration.<sup>143</sup> On the issue of retroactivity, the Vermont-NEA notes that, in *Burke*, the Labor Board's decision reflected the belief that imposing economic loss on teachers for nine prior months "didn't make legal or logical sense."<sup>144</sup> The Labor Board did not bar multi-year agreements, but it did bar multi-year one-sided impositions.<sup>145</sup> On multi-

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137. REPUBLICAN EDUC. FIN. REFORM COMM., *A CHALLENGE TO CHANGE* 22-23 (Oct. 2, 1995).

138. *Id.* Vermont Senate Bill 322, "An Act Relating to Improving Educational Cost and Quality," is presently before the Senate General Affairs Committee. Hearings on Senate Bill 322 began in March 1996.

139. REPUBLICAN EDUC. FIN. REFORM COMM., *supra* note 137, at 22.

140. *Id.* at 22-23.

141. *Id.*

142. Memorandum from Joel Cook, General Counsel, Vermont-NEA (Oct. 30, 1995).

143. *Id.*

144. *Id.*

145. *Id.*

year imposition, the Vermont-NEA notes that “[t]he Labor Board concluded that Vermont law contemplates negotiations to occur for individual years.”<sup>146</sup>

### C. Vermont School Survey

However venerable or well-grounded a rule of law may be, it is subject to change if it is universally, or even generally, seen as having outlived its usefulness. In order to gauge sentiment on this issue, a survey form was sent to all Vermont school superintendents asking whether any district under their management paid steps under the *Chester* rule for any part of the 1992-93 school year.<sup>147</sup> The Vermont *Chester* opinion survey results do not show any such rejection of the doctrine. Instead, the *Chester* survey results, though not statistically significant, show that how favorably one views the *Chester/Readsboro/Burke* line of cases depends largely, although not exclusively, upon what role one occupies—superintendent, school board chairperson, or teacher. For instance, on a substantial number (forty-four percent) of the survey propositions, supervisors and school board chairpersons lined up together on one side, and teachers lined up on the other. Initially, the supervisors and school board chairpersons agreed that the *Chester* rule should be abolished.<sup>148</sup> They also agreed that:

- Because of the *Chester* rule, most teachers will get a salary increase of at least one step on the salary scale.
- For any new contract period, the rule causes school districts to ultimately pay more to teachers than they would otherwise pay.

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146. *Id.*

147. Vermont School Survey Form on *Chester* Step Increases (Feb. 23, 1995) (on file with author). Within each affected district, one current superintendent, one school board chairperson, and one teacher familiar with labor negotiations in each affected district each received a 25 proposition survey. Responses were received from seven superintendents, eight school board chairpersons, and seven teachers. The survey states a series of affirmative propositions, for each of which the respondent could answer “strongly agree,” “agree,” “neither agree nor disagree,” “disagree,” or “strongly disagree.” “Strongly agree” and “agree” responses are aggregated and reported as indicating the level of agreement or belief in the stated proposition. Also, for readability, the option “neither agree nor disagree” is characterized as “no opinion.” This survey is obviously drawn from a very limited sample, and does not purport to represent the opinions of all Vermont superintendents, school board chairpersons, and teachers on these propositions. While statistically insignificant, the survey responses are informative as they may reflect the attitudes of other similarly situated school board chairpersons, superintendents, and teachers.

148. Statistical Analysis Vermont School Survey Form on *Chester* Step Increases (proposition 20) (on file with author).

- The rule provides inadequate protection to school districts because it forces them to pay for raises they never agreed to pay.<sup>149</sup>

Absent a repeal of the *Chester* rule, the superintendents and school board chairpersons believe the following modifications should be made:<sup>150</sup>

- The rule should be modified to protect school districts from having to pay full steps.

- The Legislature should investigate the fairness and workability of the rule.

- Negotiations would be more likely to conclude successfully, without *Chester* involvement, if the mediation process were put on a definite schedule with a maximum duration, rather than left open-ended.

Teachers believed that the *Chester* rule provides the following benefits, but superintendents and board chairpersons disagreed:

- The *Chester* rule is fair because it guarantees that the employer cannot change wages on its own before finality has been reached.

- The rule is a good one because it lets everyone know what will happen to wages once a contract expires.

- By establishing a clear and firm rule, *Chester* helps avoid labor strife when a contract expires.

- The *Chester* rule should be kept in force as it currently stands.<sup>151</sup>

Given these sharp differences of opinion on issues of fairness and workability, it is impossible to say that there is a public consensus for abolition of the rule. On six propositions, however, superintendents, board chairs and teachers were in agreement.<sup>152</sup> This agreement suggests that the parties' in any future discussions are likely to consider the following propositions to be true:

- Teachers understand the *Chester* rule.

- *Chester* is an important factor in contract negotiations.

- The rule does *not* tend to make school boards' initial salary offers higher than they would otherwise be.

- The rule does *not* tend to lower teachers' initial salary demands.

- The rule does *not* provide inadequate protection to teachers at the top of scale.

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149. *Id.* (propositions 11, 12, and 18).

150. *Id.* (propositions 22, 23, and 25).

151. *Id.* (propositions 13, 15, 16, and 19).

152. *Id.* (propositions 2, 3, 4, 7, 17, and 21).

- The rule should *not* be modified to give more protection to teachers at the top of scale.<sup>153</sup>

Responses to the remainder of the survey propositions showed, among other things, some mildly surprising areas of agreement between teachers and either the superintendents or school board chairpersons, depending upon the issue.<sup>154</sup> In sum, the survey results show strong disagreement among the parties along traditional lines on most propositions asking for perceptions of what is fair and what direction future policy decisions should take. Nevertheless, there were several areas of commonly shared perceptions among the three groups and a healthy diversity of opinion on many propositions within each group.

## II. THE PRACTICE NATIONALLY

A survey of practices nationwide on the *Chester* issue reveals major divisions among three categories of states. One group of states forbids collective bargaining and therefore does not require payment of steps in hiatus situations. Another group of states neither sanctions nor prohibits collective bargaining, and generally does not require such payment. Finally, collective bargaining states, some of which reflect the *Chester* rationale, either allow or require payment of steps with varying degrees of deference to possible employer defenses to payment.

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153. These assertions are all stated in a way which reflects what the respondents believe. Thus, where all respondents *disagreed* with the proposition that "the rule tends to make school boards' initial salary offers higher than they would otherwise be," the proposition is reworded here to show agreement: "The rule does *not* tend to make school boards' initial salary offers higher than they would otherwise be."

154. On proposition 8, most teachers and board chairs agreed that the *Chester* rule has no effect on school boards' initial salary offers. On proposition 24, nearly all teachers and a majority of board chairpersons expressing an opinion were in agreement that merely starting contract negotiations earlier than 120 days prior to the school district annual meeting would not necessarily result in a success and avoid the *Chester* problem. Superintendents strongly believed the opposite. On propositions 1 and 9, teachers disagreed with either the superintendents or board chairs, while the third group was evenly split in opinion. On proposition 14, all three groups disagreed that the *Chester* rule is fair because it guarantees a one-step wage increase in recognition of another year's service. Since the teachers, who voted two to one (with 4 no opinions) on this proposition, otherwise voted that the rule is fair, the implication is that teachers think the rule fair for the reasons stated in the other propositions, but not the reason stated in proposition 14. Proposition 10 was a key proposition asking whether teachers, because of the *Chester* rule, are not as likely to accept less than a one step increase in pay. Superintendents agreed, but board chairpersons and teachers each split evenly.

A. *States Which Either Expressly Prohibit Collective Bargaining, or Whose Lack of Authorization is Interpreted as a Prohibition*

There is either no statutorily authorized collective bargaining for public sector teachers, or there is express statutory prohibition of it in Alabama,<sup>155</sup> Georgia,<sup>156</sup> Mississippi,<sup>157</sup> Missouri,<sup>158</sup> North Carolina,<sup>159</sup> South Carolina,<sup>160</sup> Texas,<sup>161</sup> Virginia,<sup>162</sup> and West Virginia.<sup>163</sup> Accordingly, there is no requirement that teachers be paid step increases upon expiration of a contract. None of these states, except Missouri, has any type of de facto collective bargaining. As a general matter, the legislatures in these states either set minimum statewide teacher salaries or provide funds on an intermittent basis for teacher salary increases.<sup>164</sup>

The manner in which Texas and Missouri handle this issue is instructive as to practical alternatives in political climates hostile to collective bargaining. Texas law states that "[a]n official of the state or of a political subdivision of the state may not enter into a collective

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155. There is no collective bargaining statute in Alabama, and the absence of authority has been construed as a prohibition. Telephone Interview with Don Eddins, Public Relations Department (Sept. 22, 1995); Telephone Interview with Robert Hickman, Research Director, Alabama Education Association (Oct. 12, 1995).

156. GA. CODE ANN. § 20-2-989.10 (1995) (teacher collective bargaining prohibited); Letter from Gary Wolovick, Director, Division of Legal Services, Georgia Department of Education (Nov. 22, 1994).

157. No express statutory prohibition is contained in Mississippi's statutes, but the absence of authorization traditionally has been construed as a prohibition. At least one test case on this issue is expected soon. Telephone Interview with Tom Harvey, Executive Director, Mississippi Association of Educators (Oct. 6, 1995).

158. MO. ANN. STAT. § 105.510 (Vernon 1995) (teacher collective bargaining prohibited).

159. N.C. GEN. STAT. § 95-98 (1994) (teacher collective bargaining prohibited).

160. South Carolina's statutory scheme, while not expressly prohibiting teacher collective bargaining, does not expressly allow it, and this lack of approval is construed as a prohibition. Letter from George Leventis, General Counsel, South Carolina Department of Education (Nov. 21, 1994).

161. TEX. GOV'T CODE ANN. § 617.002 (West 1995) (teacher collective bargaining prohibited).

162. VA. CODE ANN. § 40.1-57.2 (Michie 1995) (statute withholds from school districts authority to negotiate with unions); *Commonwealth v. County Bd. of Arlington County*, 232 S.E.2d 30, 44-45 (Va. 1977); Telephone Interview with Deanna Rosenkrantz, Staff Attorney, Virginia Education Association (Oct. 12, 1995).

163. The absence of authorization for collective bargaining in the West Virginia statutes has been construed as a prohibition. *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 393 S.E.2d 653, 658 (Va. 1990). See also W. VA. CODE § 18A-2-2 (1995).

164. ALA. CODE § 16-24-4 (1994); GA. CODE ANN. § 20-2-212 (Supp. 1995); MISS. CODE ANN. § 37-19-17 (Law. Co-op. 1994); MO. ANN. STAT. § 163.172 (Vernon 1991 & Supp. 1996); N.C. GEN. STAT. § 115C-302 (1994); S.C. CODE ANN. § 59-20-50 (1993); TEX. EDUC. CODE ANN. § 16.056 (West 1995); W. VA. CODE § 18A-4-2 (1995). Virginia has no statewide teacher minimum salary legislation; the state does, however, appropriate funds intermittently to improve teachers' salaries. Telephone Interview with Deanna Rosenkrantz, *supra* note 162.

bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees."<sup>165</sup> Elsewhere, the statute affords Texas public employees only the right to present grievances concerning wages, hours, or conditions either individually or through a representative who does not claim the right to strike.<sup>166</sup> A teacher dissatisfied with the results may pursue the matter with the local board of trustees, and may appeal a final decision to the Texas State Commissioner of Education.<sup>167</sup>

Missouri's public sector labor law specifically excludes "all teachers of all Missouri schools" from having "the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing."<sup>168</sup> Nevertheless, a *de facto* bargaining situation has developed for teachers in parts of the state, particularly in some suburbs of St. Louis and Kansas City, where individual school boards have unilaterally opted to negotiate and enter into contracts with teachers' associations.<sup>169</sup> These school districts handle the issue of pay during hiatus periods differently, because there is no general rule on the subject.<sup>170</sup>

#### *B. States Which Neither Formally Authorize nor Prohibit Collective Bargaining*

In seven states, Arizona, Arkansas, Colorado, Kentucky, Louisiana, Utah, and Wyoming, some form of collective bargaining occurs in contract negotiation and execution in the absence of legislation requiring, allowing, or forbidding public sector labor negotiations.<sup>171</sup> An attorney who represents school districts says flatly that Arizona "does not require or impose any sort of collective bargaining. The District Governing Board sets salar[ies] for the subsequent year and may grant or withhold a salary step as it desires."<sup>172</sup> In the absence of mandated bargaining, some collective bargaining nevertheless does exist, ranging from "full parity

165. TEX. GOV'T CODE ANN. § 617.002 (West 1995).

166. TEX. GOV'T CODE ANN. § 617.005 (West 1995).

167. Letter from Maggie H. Montelongo, Assistant Chief Counsel, Texas Education Agency (Jan. 26, 1995);

168. MO. ANN. STAT. § 105.510 (Vernon 1966 & Supp. 1996).

169. Telephone Interview with Robert Quinn, Legislative Representative, Missouri-NEA (Sept. 26, 1995).

170. *Id.*

171. See MARVIN J. LEVINE & EUGENE C. HAGBURG, PUBLIC SECTOR LABOR RELATIONS 116 (1979) (discussing right to bargain collectively absent specific authorizing legislation).

172. Letter from John Richardson (Dec. 9, 1994).

collective bargaining to zero negotiations."<sup>173</sup> Authority to bargain collectively is found in *Board of Education of the Scottsdale High School District No. 212 v. Board of Education*, where the Court of Appeals of Arizona held that the School Board had discretionary authority "to enter into 'collective bargaining' with a representative of the teacher-employees."<sup>174</sup> In districts with contracts, new contracts are usually settled before the current one expires and, if not, steps are generally not paid during the hiatus period.<sup>175</sup> A representative of the Arizona Department of Education says that many Arizona school districts employ "meet and confer" procedures with teacher associations.<sup>176</sup> Hiatus options typically exercised in these districts are: (a) extend the old contracts; (b) award a "temporary contract;" (c) award a "conditional contract" dependent upon the Legislature's approving increased funding; and (d) award an "initial contract" allowing for a supplemental amount to be added if funding is made available.<sup>177</sup> In this last case, "the employee must agree to perform additional duties in exchange for the supplemental compensation in order to avoid a 'gift of public funds,' which is contrary to . . . [the Arizona] State constitution."<sup>178</sup>

In Arkansas, there is some local union-school district negotiation.<sup>179</sup> Otherwise, there are mandated personnel policy committees made up of elected teachers in each district.<sup>180</sup> The committees recommend policy to the local boards, and local board policies are incorporated into each teacher's employment contract.<sup>181</sup> Boards cannot change policy without review by the committee.<sup>182</sup> In practice, boards do not advance teachers on any salary scale during a contract hiatus—the prior salary stays in effect.<sup>183</sup>

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173. Telephone Interview with Richard Nelson, Director of Bargaining and Research, Arizona Education Association (Sept. 25, 1995).

174. Board of Educ. of the Scottsdale High Sch. Dist. No. 212 v. Scottsdale Educ. Ass'n, 498 P.2d 578, 583 (Ariz. 1972).

175. Telephone Interview with Richard Nelson, *supra* note 173.

176. Letter from Sheila R. Breecher, Liaison, Legal Issues, Arizona Department Education (Jan. 31, 1995).

177. *Id.*

178. *Id.*

179. ARK. CODE ANN. §§ 6-17-200 to 6-17-202 (Michie 1993); Telephone Interview with Tommy Beaverson, Assistant Executive Director, Arkansas Education Association (July 26, 1995).

180. ARK. CODE ANN. §§ 6-17-200 to 6-17-202 (Michie 1993).

181. Telephone Interview with Tommy Beaverson, *supra* note 179.

182. *Id.*

183. *Id.*

Teachers in Colorado may lawfully engage in collective bargaining.<sup>184</sup> However, boards of education are prohibited from entering into any agreement which commits revenues for any period of time in excess of one year unless the agreement allows for reopening on the subjects of salaries and benefits.<sup>185</sup> Although seventy to eighty percent of Colorado teachers are covered by collective bargaining agreements, there are neither mandatory subjects of bargaining nor a duty to bargain in good faith unless required by the contract.<sup>186</sup> Steps may or may not be paid upon expiration at the discretion of the school district.<sup>187</sup>

While Kentucky does not have a teacher collective bargaining statute, approximately eighteen out of 176 school districts have collectively bargained contracts.<sup>188</sup> By statute, Kentucky does provide a minimum salary schedule based upon a teacher's "rank" (educational qualifications) and experience.<sup>189</sup> School districts must pay at least the raises mandated by statute.<sup>190</sup> Some districts follow a "bump" step-scale.<sup>191</sup> This scale involves paying cumulative salary increments as a lump sum only after a period of years (every four years) rather than every year.<sup>192</sup>

The right of Louisiana teachers to bargain collectively was settled in 1974 when the Court of Appeals of Louisiana ruled that local school boards have the power to recognize and collectively bargain with agents selected by teachers, even in the absence of statutory authority.<sup>193</sup> Minimum salaries and cost-of-living increases, based upon annual adjusted increases in the Consumer Price Index, are guaranteed by statute.<sup>194</sup> Localities may provide for annual salary supplementation through devices such as locally-voted sales tax increases.<sup>195</sup> School boards, however, may withhold increments that would otherwise be payable where tax

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184. See *Littleton Educ. Ass'n v. Arapahoe County Sch. Dist. No. 6*, 553 P.2d 793, 796 (Colo. 1976).

185. COLO. REV. STAT. § 22-32-110(5) (1994).

186. Letter from Martha R. Houser, General Counsel, Colorado Education Association (Oct. 11, 1995).

187. Telephone Interview with Martha R. Houser, General Counsel, Colorado Education Association (Feb. 22, 1996).

188. Telephone Interview with Gretchen Lampe, Research Director, Kentucky Education Association (September 26, 1995).

189. KY. REV. STAT. ANN. § 157.390 (Michie/Bobbs-Merrill 1992).

190. Telephone Interview with Gretchen Lampe, *supra* note 188.

191. *Id.*

192. *Id.*

193. *Louisiana Teachers' Ass'n v. Orleans Parish Sch. Bd.*, 303 So. 2d 564, 567 (La. 1974).

194. LA. REV. STAT. ANN. § 17:419-424 (West 1995).

195. *Louisiana Ass'n of Educators v. Iberia Parish Sch. Bd.*, 476 So. 2d 1086, 1094-95 (La. Ct. App. 1985).

propositions allow boards to discontinue paying salary increments because of inadequate revenues.<sup>196</sup>

In Utah there is collective bargaining in most districts despite language in a Utah Supreme Court case stating that "public employees in this state generally have no collective bargaining rights."<sup>197</sup> Nonetheless, collective bargaining exists because it is not prohibited by statute.<sup>198</sup> Whether steps are paid during a contract hiatus depends upon the language of the prior contract and local school district custom.<sup>199</sup> Even where steps are not paid during the hiatus, they are often paid retroactively once a contract is signed.<sup>200</sup>

In the absence of an express statutory prohibition on collective bargaining in Wyoming, most teachers in that state enter into agreements with local boards.<sup>201</sup> It appears that, of forty-nine school districts statewide, at any one time four or five have "master agreements,"<sup>202</sup> while another sixteen to twenty-five districts have less comprehensive contracts.<sup>203</sup> The remaining districts pursue "meet and confer" procedures,<sup>204</sup> with the school district deciding contract terms.<sup>205</sup> All contracts extend for one year; steps are not seen as contractual guarantees, and must be negotiated anew each year.<sup>206</sup> As a general matter, steps are not automatically paid during hiatus periods.<sup>207</sup>

### C. Collective Bargaining States

#### 1. No Payment of Steps

Four collective bargaining states, Maine, New Hampshire, Pennsylvania, and Hawaii, forbid the payment of steps after contract

196. *Id.*

197. *Pratt v. City Council of Riverton*, 639 P.2d 172, 174 (Utah 1981).

198. Telephone Interview with Michael T. McCoy, General Counsel, Utah Education Association (Aug. 28, 1995).

199. *Id.*

200. *Id.*

201. Telephone Interview with Rowena Heckert, Attorney, Wyoming Department of Education (Oct. 11, 1995); Telephone Interview with Stephen Thompson, President, Cheyenne Teachers Education Association—NEA (Oct. 18, 1995).

202. Telephone Interview with Stephen Thompson, *supra* note 201.

203. *Id.*; Telephone Interview with Rowena Heckert, *supra* note 201.

204. Telephone Interview with Rowena Heckert, *supra* note 201.

205. Telephone Interview with Paul Hickey, Attorney, Hickey, Mackey, Evans, Walker and Stewart, Cheyenne, Wyoming (Oct. 16, 1995).

206. Telephone Interview with Stephen Thompson, *supra* note 201.

207. *Id.*; Telephone Interview with Paul Hickey, *supra* note 205.

expiration. The Maine and New Hampshire rules are of recent origin, while the other two states' rules are long-standing.

Maine's rule, a reversal of previous law on the subject, was articulated in May 1995 in *Board of Trustees of the University of Maine System v. Associated COLT Staff of the University of Maine System (Board of Trustees)*.<sup>208</sup> This four to three decision from the Maine Supreme Judicial Court was unexpected because the Maine Labor Relations Board had only four years earlier reversed itself and adopted a position, known as the "dynamic" status quo, requiring payment of post-expiration steps.<sup>209</sup> The court's ruling rejects that formulation.<sup>210</sup>

The case arose after a three-year contract between the University of Maine and the Union expired on June 30, 1992.<sup>211</sup> The agreement contained an annual increase in step provision, but the University of Maine froze wages upon expiration of the contract (except for promotion-related increases).<sup>212</sup> Late that year, the Union filed a complaint with the Maine Labor Relations Board alleging violation of the University of Maine System Labor Relations Act.<sup>213</sup> The Board ruled that the discontinuance of step payments constituted a unilateral change in violation of the duty to bargain.<sup>214</sup> On review, the superior court reversed, and the Union and Labor Board appealed.<sup>215</sup>

Acknowledging at the outset that the duty to bargain in good faith includes the obligation to maintain the status quo following contract expiration, the court then highlighted the issue: "The definition of status quo at the expiration of the . . . agreement is at the crux of this case."<sup>216</sup> From 1981 until 1991 the Labor Board itself "had construed status quo to mean that wages existent at the expiration of a[n] . . . agreement were frozen. . . . [It] rejected the notion that increases in wages scheduled in the expired contract should be extended beyond the expired contract."<sup>217</sup> The supreme court had approved this application of the "static" status quo

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208. *Board of Trustees of the Univ. of Maine Sys. v. Associated COLT Staff of the Univ. of Maine Sys.* 659 A.2d 842, 843 (Me. 1995).

209. *Id.* at 845 (citing *Auburn Sch. Adm'rs Ass'n v. Auburn Sch. Comm.*, No. 91-19 (Me. L.R.B. Oct. 8, 1991), *consolidated appeals dismissed per stipulation*, No. CV-91-459 & No. CV-91-464 (Me. Apr. 24, 1992)).

210. *Id.*

211. *Id.* at 844.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

rule in *M.S.A.D. No. 43 Teachers' Ass'n v. M.S.A.D. No. 43 Board of Directors (M.S.A.D. No. 43)* in 1981.<sup>218</sup> But in 1991, the Labor Board, in *Auburn School Administrators Ass'n v. Auburn School Commission (Auburn)*, "reversed its previous position and adopted what is known as the dynamic status quo rule, thereby requiring public employers to pay their employees any annual step increases in wages included in an agreement that expired."<sup>219</sup>

In light of the fact that the contract was negotiated prior to the change of law announced in *Auburn*, the court ruled that application of the "dynamic" status quo doctrine would be "particularly unfair" because it would "place[] on the University the burden of funding wage increases not budgeted for."<sup>220</sup> The court held as a general matter that the dynamic status quo rule contravenes the express provision of Maine's labor law; the law provides that "neither party shall be compelled to agree to a proposal or be required to make a concession."<sup>221</sup> The court also based its position upon the Legislature's specific exclusion of salaries from binding arbitration.<sup>222</sup> This showed an intent "to protect the public fisc from wage increases that were neither bargained for nor approved by the public employer."<sup>223</sup> The court concluded by condemning the "dynamic" status quo rule for "dramatically alter[ing] the status and bargaining positions of the parties. It changes, rather than maintains, the status quo."<sup>224</sup>

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218. *Id.* (citing *M.S.A.D. No. 43 Teachers' Ass'n v. M.S.A.D. No. 43 Bd. of Directors*, 432 A.2d 395, 397-98 (Me. 1981)). In citing its earlier *M.S.A.D. No. 43* decision, the court included a quotation supporting the "static" status quo doctrine, drawn from *Board of Coop. Educ. Servs. v. State Pub. Employment Relations Bd.*, 363 N.E.2d 1174, 1177 (N.Y. 1977) [hereinafter *Rockland County Board of Trustees*, 659 A.2d at 844-45]. In 1982, however, the New York Legislature amended its civil service statute to require payment of steps as part of enforcement of the status quo, thus abandoning the *Rockland County* rationale. See *infra* notes 409-11 and accompanying text.

219. *Board of Trustees*, 659 A.2d at 845 (citing *Auburn No. 91-19*).

220. *Id.*

221. *Id.* (citing ME. REV. STAT. ANN. tit. 26, § 1026(1)(c)).

222. *Board of Trustees*, 659 A.2d at 845.

223. *Id.* The court relied upon legislative history surrounding enactment of the binding arbitration legislation, and specifically a report indicating that the legislative committee feared "giving the power to three persons to actually set the tax rates in cities and towns and then if the town meeting didn't approve this they would be in a real mess because they wouldn't have the funds to pay their employees." *Id.* at 845 n.5.

224. *Id.* at 846. The court did acknowledge that the "dynamic" status quo doctrine may be used in private sector labor law, and in some public sector labor law, but it held that the Maine Labor Board's adoption of it "is contrary to the intent of Maine's public employer labor statute . . . ." *Id.* The court noted prior state precedent that construction of the State Employee Labor Relations Act is governed by the language and intent of state law, as opposed to NLRB doctrine. *Id.* (citing *State v. Maine State Employees Ass'n*, 499 A.2d 1228, 1232 (Me. 1985)).

The vigorous dissent initially pointed out that the Labor Board consistently tracks private sector labor law regarding a school board's obligation to maintain the status quo after contract expiration.<sup>225</sup> The dissent acknowledged, as the majority suggested, that the board initially adopted the "static" status quo doctrine, and pointed out that it did so as early as 1979 in *Easton Teachers Ass'n v. Easton School Commission*.<sup>226</sup> Just over three months later, however, the Board carved out an exception and applied the "dynamic" status quo doctrine to a wage dispute occurring in the context of negotiations for an initial contract.<sup>227</sup> There were two reasons for this: first, because no contract yet existed, there could be no mutual understanding as to a date by which wages might be frozen; and second, it could take years to negotiate an initial contract, and employers could enjoy "a windfall" if automatic wage steps could be terminated every time workers selected a bargaining agent.<sup>228</sup> In 1991 the Labor Board completed the circle in *Auburn*, applying the "dynamic" status quo doctrine to all terms and conditions of employment in a post-contract hiatus situation.<sup>229</sup>

The dissenters maintained that there was no unfairness to the University on the facts of the case because its agents knew before the contract began that the rule might change.<sup>230</sup> Further, the University could have allowed for the change in the contract, and it certainly knew of the change before the contract expired, so the University could have begun negotiations on the point sooner.<sup>231</sup> Rejecting the characterization that the "dynamic" status quo doctrine would compel the University to pay a wage increase it never agreed—which would effectively extend the contract term beyond three years—Chief Justice Wathen reminded the majority that the State's labor law "places no specific time limit on the duty to bargain. The preservation of the status quo is an attribute of bargaining in good faith, and it results in neither an agreement nor concession."<sup>232</sup>

The dissent dealt directly with the policy issue it said was underlying the court's opinion, which was whether "the Labor Board should not be permitted to require a public employer 'caught in difficult economic times to continue to increase wages at rates agreed' to when times were

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225. *Board of Trustees*, 659 A.2d at 846 (Wathen, C.J., dissenting).

226. *Id.* at 847.

227. *Id.*

228. *Id.*

229. *Id.* (citing *Auburn*, No. 91-19).

230. *Id.* at 848.

231. *Id.*

232. *Id.*

better."<sup>233</sup> There is a "meaningful legal difference," said the dissenters, "between compelling an agreement, and preserving the status quo while the parties are bargaining. It is this distinction that the Act compels."<sup>234</sup> While recognizing that the effects of delay inherent in exhausting impasse resolution procedures and maintaining the status quo, "whether dynamic or static, are most pronounced in times of financial crisis," the dissent noted that "such policy concerns are properly matters for legislative consideration rather than a judicially-crafted hardship exception to the duty to bargain."<sup>235</sup>

The New Hampshire rule was announced in *Appeal of Milton School District*.<sup>236</sup> The case arose from a contract dispute in the Town of Milton, where the School District and Teachers' Association had an agreement that included annual steps.<sup>237</sup> During the life of the agreement the parties executed an amendment which provided that the contract would "automatically renew itself for successive terms of one year or until a successor agreement has been ratified."<sup>238</sup> This amendment was never submitted to Milton voters for approval.<sup>239</sup> When the contract expired, the District, beset by a taxpayer revolt, refused to pay steps for the next school year.<sup>240</sup>

The New Hampshire Public Employee Labor Relations Board (PELRB) ruled for the Association, citing the existence of the "automatic renewal," or "evergreen," clause and relying on its own prior decisions in cases where it did not require steps because the contracts did not have evergreen clauses.<sup>241</sup> The New Hampshire Supreme Court reversed, relying upon the New Hampshire statutory scheme by which "cost items" must be submitted to the legislative body of the public employer for approval.<sup>242</sup> The court held that the automatic renewal clause was a cost

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233. *Id.* at 849.

234. *Id.*

235. *See also* Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1274 (1985) (Public sector bargaining is not "an aberration that need be tolerated only when convenient or when its results are not too painful.").

236. *Appeal of Milton Sch. Dist.*, 625 A.2d 1056 (N.H. 1993).

237. *Id.* at 1057.

238. *Id.* at 1058.

239. *Id.*

240. Brief for Milton School District at 3, *Appeal of Milton School District* (No. 92-212); Brief for Appellee Milton Education Association, NEA-New Hampshire at 7, 34-35, *Appeal of Milton School District* (No.92-212)

241. *Appeal of Milton Sch. Dist.*, 625 A.2d at 1058.

242. *Id.* at 1058-59.

item, and was unenforceable because the town (in this case, the citizens at the town meeting) never approved it.<sup>243</sup>

Relying upon the plain meaning of the statutory language and its prior decision in *Appeal of Sanborn Regional School Board*,<sup>244</sup> the court made clear that the political import of the statute in question,<sup>245</sup> "in essence divests the school [district] of its authority to bind the town to future appropriations without action by the school district voters."<sup>246</sup>

Pennsylvania's prohibition on payment of steps derives from the state supreme court's 1982 decision in the *Fairview School District v. Commonwealth Unemployment Compensation Board of Review (Fairview)*.<sup>247</sup> *Fairview* involved teacher claims for unemployment benefits based upon a work stoppage begun in response to the employer's failure to pay post-expiration steps during negotiations.<sup>248</sup> Reversing the decision below, the court ruled that failure to pay the steps did not constitute a disruption of the status quo and therefore "the work stoppage [in these cases] resulted from a 'strike' rather than a 'lockout,'" thus disqualifying the teachers from receiving benefits under the statute.<sup>249</sup> The court expressly relied upon the authority of teacher labor law precedent from Maine (which was later reversed by the Maine Labor Relations Board in

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243. *Id.* at 1059.

244. *Appeal of Sanborn Regional Sch. Bd.*, 579 A.2d 282 (N.H. 1990).

245. N.H. REV. STAT. ANN. § 273-A:3, II(b) (1987).

246. *Appeal of Milton Sch. Dist.*, 625 A.2d at 1059 (alteration in original) (quoting *Appeal of Sanborn Regional Sch. Bd.*, 579 A.2d at 285). On the question of the policy underlying its decision, the court noted that both parties to the case agreed that "maintaining the status during collective bargaining after a previous CBA has expired is essential to preserving the 'balance of power'" guaranteed by New Hampshire statutory law. *Id.* at 1060. The court was of the opinion, however, that the PELRB had itself "consistently defined 'status quo' to include the past year's salary levels, not the past year's CBA and any salary schedules contained within it." *Id.* The court upheld the PELRB and ruled for the Association, on the question of whether the District should be prohibited from requiring teachers to perform mandatory lunch supervisory duties, where the expired CBA stated that such supervision was not part of teachers' regular duties and they would not have to perform them beginning with the final contract year (teachers doing this duty were to be paid \$10 per duty). *Id.* at 1061. The District had forced teachers to supervise in the hiatus period without extra pay; the court reasoned that the CBA's lunch period supervision provision was not a cost item and therefore did not require approval by the voters. *Id.* Further, the PELRB's order that the District reimburse teachers for the periods they were illegally forced to work was upheld, but on a quantum meruit basis, not on the basis that public funds could be spent contractually in the absence of express voter approval. *Id.* Two justices vigorously dissented to the full decision, pointing out the majority's inconsistency in allowing all salary and benefits terms, clearly cost items, to continue in the absence of express voter approval, while singling out the salary step renewal clause as unenforceable. *Id.* at 1062-65 (Brock, C.J., dissenting).

247. *Fairview Sch. Dist. v. Commonwealth Unemployment Compensation Bd. of Review*, 454 A.2d 517 (Pa. 1982).

248. *Id.*

249. *Id.* at 521.

*Auburn* and which was in turn reversed by the Maine Supreme Judicial Court in 1995 in *Board of Trustees*) and New York (which was legislatively reversed by the New York Legislature that same year).<sup>250</sup> The *Fairview* rule is still governing in Pennsylvania; there is no Pennsylvania Labor Relations Board decision on point.<sup>251</sup>

Hawaii statutory law prohibits payment of steps to teachers during negotiations for a successor contract.<sup>252</sup> This rule is consistent with the Hawaii Public Employment Relations Board's 1976 decision in *State of Hawaii and Hawaii Government Employees' Ass'n, Local 152*, in which the Board, interpreting the purpose of earlier versions of sections 77-12 and 89-9(d)(7) of the applicable statute, ruled that "incremental and longevity increases . . . should not be given in any fiscal year . . . so long as there remains the possibility that the . . . [parties] may negotiate a wage increase to be effected at sometime [sic] during . . . [the] fiscal year."<sup>253</sup> The Board reasoned that the Legislature intended the two sections to interact to ensure "that no employee got both a normal incremental or longevity increase and a negotiated increase in the same fiscal year."<sup>254</sup>

## 2. No Statute or Judicial/Labor Board Precedent on Point

Eleven states and the District of Columbia, while allowing collective bargaining in the public sector, have no definite rule governing treatment of teacher salaries between contract periods.<sup>255</sup> The District of Columbia's comprehensive Merit System Personnel Act, while silent on status quo maintenance of payments, has a good faith negotiation requirement.<sup>256</sup> While there is no post-expiration case law on point, in practice teachers

250. *Id.* at 520-21 (discussing *M.S.A.D. No. 43*, 432 A.2d 395; *Easton Teacher's Assoc. v. Easton Sch. Comm.*, No. 79-14 (Me. L.R.B. 1979); *Rockland County*, 363 N.E.2d 1174). For subsequent treatment of the Maine cases, see *supra* notes 208-35 and accompanying text. For treatment of the New York cases, see *infra* notes 409-13 and accompanying text.

251. Letter from Patricia Crawford, Secretary, Pennsylvania Labor Relations Board (Oct. 26, 1994); Telephone Interview with Chris Rupnow, Assistant Director of Research, Pennsylvania-NEA (Oct. 5, 1995).

252. HAW. REV. STAT. § 89-9(d) (1993); see also 77-1 Haw. Legal Rep. 76-55. Chapter 89 governs collective bargaining in public employment. Telephone Interview with Irene Igawa, Negotiations Specialist, Hawaii Education Association (Sept. 25, 1995).

253. *In re State*, No. DR-01-18, at 60 (Haw. P.E.R.B. Sept. 15, 1976).

254. *Id.* at 59-60.

255. In addition to the District of Columbia, Idaho, Kansas, Maryland, Minnesota, Nebraska, New Mexico, Nevada, North Dakota, Ohio, South Dakota, and Washington have no time definite rule governing treatment of teacher salaries between contract periods.

256. D.C. CODE ANN. § 1-618.4(5) (1992 & Supp. 1994). The collective bargaining act is codified at D.C. CODE ANN. §§ 1-618.1 to 1-618.17 (1992 & Supp. 1994) and unfair labor practices are set out at § 1-618.4.

are given step increases on the basis of the last salary schedule assuming they are still engaged in negotiations.<sup>257</sup>

Idaho's statute requiring local school districts to negotiate in good faith with teachers is silent on treatment of salaries and benefits after expiration.<sup>258</sup> Districts have varying types of agreements, including some that terminate on mutual agreement, others that begin anew each year, and some that have non-expiring procedural provisions.<sup>259</sup> Whether steps are awarded "is a local matter . . . not subject to state statute or review."<sup>260</sup> The Idaho statutory scheme does allow for mediation,<sup>261</sup> and case law establishes that Idaho courts will take jurisdiction to decide whether the parties bargained in good faith.<sup>262</sup> The state supreme court's 1980 decision in *Buhl Education Ass'n v. Joint School District No. 412* states that school boards may send out binding individual employment contracts during negotiations or mediation.<sup>263</sup> Those contracts, however, "become and are modified by applicable provisions of the agreement which thereafter results."<sup>264</sup>

Kansas has a collective negotiations law which defines "professional negotiation" as "meeting, conferring, consulting and discussing in a good faith effort by both parties to reach agreement."<sup>265</sup> Kansas also has a "Continuing Contract Law," which provides that teacher contracts of employment continue into the next succeeding school year unless written notice of intention to terminate is given by the school board on or before April 10, or by the teachers on or before May 10.<sup>266</sup> By mutual consent, terms of a contract can be changed by the parties during the life of the contract.<sup>267</sup> The Kansas Supreme Court has held that "[a]bsent such a collectively negotiated agreement properly ratified, the individual teacher has the option of accepting the unilateral contract offered by the board of education or of proceeding under the Continuing Contract Law."<sup>268</sup> In that case, the parties had a two-year contract, and unsuccessfully attempted to

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257. Telephone Interview with Don Kuehn, National Representative, American Federation of Teachers (Oct. 3, 1995).

258. IDAHO CODE § 33-1271 (1995).

259. Letter from Jerry L. Evans, Idaho Superintendent of Public Instruction (Nov. 9, 1994).

260. *Id.*

261. IDAHO CODE § 33-1274 (1995).

262. *Gilbert v. Nampa Sch. Dist. No. 131*, 657 P.2d 1 (Idaho 1983).

263. *Buhl Educ. Ass'n v. Joint Sch. Dist. No. 412*, 607 P.2d 1070, 1076 (Idaho 1980).

264. *Id.*

265. KAN. STAT. ANN. § 72-5413(g) (1992).

266. *Id.* at § 72-5411 (1992).

267. *Id.*

268. *National Educ. Ass'n—Wichita v. Board. of Educ.*, 592 P.2d 80, 85 (Kan. 1979).

renegotiate salaries after one year.<sup>269</sup> The School Board thereupon issued unilateral contracts for the second year without step increases; 2,891 teachers accepted these and twenty-five objected.<sup>270</sup> The court, in upholding the rights of the objecting teachers to proceed under the Continuing Contract Law and receive their steps, distinguished the case from a situation in which it would be required to construe the rights of parties after, and not during, the life of a collective bargaining agreement.<sup>271</sup> The court was careful to state that it was expressing no opinion on how it would decide a post-expiration steps controversy.<sup>272</sup>

Nevada, like Idaho, statutorily mandates that public employers negotiate in good faith with public employees but does not address post-expiration salaries.<sup>273</sup> Nevada case law also fails to address this issue. The outcome is contract-specific, with most districts holding wages constant while those with evergreen clauses pay step increases.<sup>274</sup> The situations in Maryland, Minnesota and North Dakota are similar. In each of these states, there is a collective bargaining statute, and steps are normally paid upon contract expiration if the contract has a clause that expressly allows it.<sup>275</sup> The issue is not controlled by statute or case law.<sup>276</sup>

Ohio teachers, similarly situated with authority to bargain but without legal precedent on this point, generally do not receive steps in the post-expiration situation.<sup>277</sup> When their CBAs expire, their union typically attempts to have later-negotiated raises applied retroactively.<sup>278</sup> However, some school districts refuse this retroactive application.<sup>279</sup>

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269. *Id.* at 82.

270. *Id.*

271. *Id.* at 86.

272. *Id.*

273. NEV. REV. STAT. ANN. § 288.033 (Michie 1995).

274. Telephone Interview with Al Bellister, Research Assistant, Nevada Education Association (August 4, 1995).

275. MD. CODE ANN., EDUC. §§ 6-401 to 6-411 (1995 & Supp. 1995); MINN. STAT. ANN. § 179A.20(6) (1993); N.D. CENT. CODE §§ 15-38.1-01 to 15-38.1-15 (1993 & Supp. 1995).

276. Telephone Interview with Maxine Woodland, Managing Director for Collective Bargaining and Research, Maryland Education Association (Sept. 26, 1995); Telephone Interview with Charles Kerbert, Program Specialist, Minnesota Education Association (Aug. 8, 1995); Telephone Interview with Nancy Sands, Director of Advocacy Programs, North Dakota Education Association (Sept. 26, 1995).

277. OHIO REV. CODE ANN. § 4117 (Anderson 1995).

278. Telephone Interview with Pat Turner, Education Research Development Consultant, Ohio Education Association (Oct. 2, 1995).

279. *Id.*

The situation in Nebraska is somewhat similar. Although there is authority for collective bargaining,<sup>280</sup> there is neither case law nor a statutory mandate as to payment or withholding of salary increments after contract expiration.<sup>281</sup> Districts may advance teachers along the step increase scale, but most do not.<sup>282</sup> Teachers who do not receive post-expiration steps generally receive them retroactively after a contract is signed.<sup>283</sup> Nebraska case law does make clear that in cases of actual labor dispute, there can be no change in the status quo once a case is filed with the state labor commission by one of the parties.<sup>284</sup> The Nebraska Supreme Court interpreted status quo to embrace wages, fringe benefits, and conditions of employment.<sup>285</sup>

New Mexico's mandatory public sector bargaining statute has been in effect for only three years, and most districts are operating with new contracts.<sup>286</sup> Post-expiration issues have not yet arisen, although the dependence of the contracts upon the Legislature's annual funding process makes payment of steps after expiration unlikely.<sup>287</sup>

South Dakota also has public sector bargaining.<sup>288</sup> School districts may issue interim contracts while negotiations are continuing.<sup>289</sup> These contracts must include the same terms and conditions as the prior contract.<sup>290</sup> If the parties cannot agree on a new contract and labor department intervention is unsuccessful, "the board shall implement, as a minimum, the provision of its last offer, including tentative agreements."<sup>291</sup> In practice, if an expired contract contains "evergreen" language authorizing payment of steps, they are paid; otherwise, school

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280. Elementary, middle, and secondary teachers are guaranteed collective bargaining rights under Nebraska law. NEB. REV. STAT. §§ 81-1369 to 81-1373(1994).

281. Telephone Interview with Thomas Tonack, Collective Bargaining and Research Program Director, Nebraska Education Association (Oct. 25, 1995); Letter from Jacqueline Triole, Clerk/Administrator, Nebraska Commission of Industries Relations (Nov. 3, 1994).

282. Telephone Interview with Thomas Tonack, *supra* note 281.

283. *Id.*

284. Letter from Jacqueline Triole, *supra* note 281; NEB. REV. STAT. § 48-811 (1993); *Transport Workers Union of Am. Local 223 v. Transit Auth. of Omaha*, 344 N.W.2d 459, 462 (Neb. 1984).

285. *Transport Workers Union of Am. Local 223*, 344 N.W.2d at 462.

286. N.M. STAT. ANN. § 10-7D-1 to 10-7D-26 (Michie Supp. 1995).

287. Telephone Interview with Steve Limpkin, Communications Director, New Mexico Education Association (Sept. 20, 1995).

288. S.D. CODIFIED LAWS ANN. §§ 3-18-1 to 3-18-17 (1994).

289. *Id.* § 3-18-8.2.

290. *Id.*

291. *Id.*

boards generally implement the former contract and, once a new contract is settled, pay any steps or base increases retroactively.<sup>292</sup>

A roughly similar practice is followed in the State of Washington. While its public sector bargaining statute is silent on this issue,<sup>293</sup> decisions of the Public Employment Relations Commission establish that salary increment schedules are mandatory subjects of bargaining.<sup>294</sup> Further, the decisions establish that an employer commits a "circumvention" violation by issuing individual contracts containing its last, best offer in the absence of a disclaimer that the final salary would be established by the collective bargaining agreement eventually signed by the employer and union.<sup>295</sup> The Washington Legislature funds teacher salaries under the Legislative Evaluation and Accountability Program.<sup>296</sup> The terms of the program provide that teacher salaries are a combination of state and local funds.<sup>297</sup> Because teacher contracts generally expire on August 31, the last day of the State's fiscal year, districts tend automatically and without delay to pass through to teachers whatever salary hikes the Legislature has voted (to avoid labor confrontation at the start of the school year), leaving to negotiations the question of what the actual contract for the year will be, retroactive to September 1.<sup>298</sup>

### 3. Steps Paid

In addition to Vermont, there are eleven states which, as a general rule, require steps to be paid during a contract hiatus in order to preserve the status quo.<sup>299</sup> Connecticut was the first state to confront head-on an attempt by a school district to freeze salaries upon the expiration of a collective bargaining agreement and while negotiations were still in progress. In *Ledyard Board of Education v. Ledyard Education Ass'n*

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292. Telephone Interview with Lona Lewis, Executive Director, South Dakota Education Association (Sept. 26, 1995).

293. WASH. REV. CODE ANN. §§ 41.59.060 to 41.59.950 (West 1991).

294. *Federal Way Educ. Ass'n v. Board of Directors*, Fed. Way Sch. Dist. No. 210, No. 232-EDUC, at 3, 11, 13 (Wash. P.E.R.C. May 27, 1977).

295. *Ridgefield Educ. Ass'n v. Ridgefield Sch. Dist. No. 122*, No. 102-B-EDUC, 6-8 (Wash. P.E.R.C. Aug 15, 1977); Letter from Marvin Schurke, Executive Director, Washington Public Employment Relations Commission (Mar. 13, 1995).

296. Telephone Interview with Marvin L. Schurke, Executive Director, Washington Public Employment Relations Commission (Oct. 19, 1995).

297. *Id.*

298. *Id.*

299. The states in addition to Vermont that require steps to be paid during contract hiatus are: Connecticut, New Jersey, California, Montana, Indiana, Delaware, Wisconsin, Oregon, Michigan, Rhode Island, and Alaska.

(*Ledyard*) the parties had held thirteen productive negotiation sessions when, in mid-June, 1976, they reached impasse on salary issues and called in a mediator.<sup>300</sup> Mediation was unsuccessful, and on August 25, just six days before the parties' contract was to expire, the District voted to terminate annual salary increments for the following year, even though they were provided for in the contract made the prior year.<sup>301</sup> Although the increments were "defeasible" upon a showing of unsatisfactory performance, the employer made no such claim as to any of the teachers and had not even proposed during negotiations to eliminate increments.<sup>302</sup>

The Labor Board, in deciding that the District's actions violated Section 10-153e(b)(4) of Connecticut's Act Concerning School Board-Teacher Negotiations because they constituted a refusal to bargain in good faith, expressly relied upon federal court, NLRB and its own prior precedent in reaching its conclusions.<sup>303</sup> Following *Katz*, the Labor Board ruled that "[a]n employer's unilateral change in existing wages and conditions of employment made during negotiations constitutes a . . . violation of the Act."<sup>304</sup> The Labor Board reasoned that "[r]egular annual salary increments payable under existing policies or practice constitute an existing condition of employment whether or not the increment was mandated by contract," and a discontinuance of those increments amounts to a change.<sup>305</sup> The Labor Board rejected District's defense that the change was timed appropriately.<sup>306</sup> The Labor Board ruled that no true impasse existed in late August and, even if it had, the School District could not implement the change because the District had "never proposed to eliminate increments during negotiations."<sup>307</sup> Similarly, the Labor Board found that the issue was not moot merely because the parties eventually reached agreement providing for payment of salary increments retroactive to September 1.<sup>308</sup>

Seven years later, the Labor Board followed *Ledyard* in *Branford Board of Education v. Branford Education Ass'n*, a virtually identical fact situation, in which the District argued that freezing wages was permissible because the parties reached the arbitration stage in the statutory impasse-

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300. *Ledyard Bd. of Educ. v. Ledyard Educ. Ass'n*, No. 1564, at 1-2 (Conn. L.R.B. Aug 15, 1977).

301. *Id.* at 2.

302. *Id.*

303. *Id.* at 2-3.

304. *Id.* at 2.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 2, 5.

resolution procedure.<sup>309</sup> The Labor Board disagreed. Noting that the District cited no authority for its argument and that it had failed to develop the argument to any degree, the Labor Board found the position "incredible" because, "if that were the law, some employers would be provided with a powerful incentive to avoid reaching a negotiated agreement and instead force negotiation into the arbitration stage."<sup>310</sup>

The New Jersey Supreme Court reached a similar conclusion by a different route in its 1978 decision in *Galloway Township Board of Education v. Galloway Township Education Ass'n*.<sup>311</sup> After the parties' contract expired and negotiators completed mediation and were about to begin fact-finding, the District imposed a wage freeze at the start of the new school year.<sup>312</sup> The court was required to interpret the language of New Jersey Statutes Annotated section 34:13A-5.3, which provided that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated . . . before they are established."<sup>313</sup> The court further stated that "[i]f a scheduled annual step increment in an employee's salary is an 'existing rul[e] governing working conditions,' the unilateral denial of that increment would constitute a modification thereof without the negotiation mandated by N.J.S.A. 34:13A-5.3."<sup>314</sup> The denial would thus violate the good faith negotiation requirement of the statute.<sup>315</sup> It would also, said the court, "have the effect of coercing its employees in their exercise of organizational rights . . . because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative."<sup>316</sup>

The court next addressed the question of whether payment of the step increase constituted an element of the status quo which could not be disrupted unilaterally. Resolution of this question turned, for the court, on whether annual step increments were paid automatically, in which case they would be part of the status quo, or were discretionary, in which case

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309. *Branford Bd. of Educ. v. Branford Educ. Ass'n*, No. 2274, 9 (Conn. L.R.B. Feb. 17, 1984).

310. *Id.* at 7. Connecticut also has a statutory solution designed to avoid contract hiatus situations. This is discussed at *infra* notes 443-452 and accompanying text.

311. *Galloway Township Bd. of Educ. v. Galloway Township Educ. Ass'n*, 393 A.2d 218 (N.J. 1978).

312. *Id.* at 221.

313. *Id.* at 230.

314. *Id.*

315. N.J. STAT. ANN. § 34:13A-5.4(a)(5) (1988).

316. *Galloway Township*, 393 A.2d at 230.

their payment would have to be resolved in negotiations.<sup>317</sup> However, the court did not reach this issue because it held that a state statute then in effect (and since wholly modified on this point), New Jersey Statutes Annotated section 18A:29-4.1, required school teacher salary schedules to remain in effect for two years, thus making the freeze illegal.<sup>318</sup>

In 1994, the New Jersey Public Employment Relations Commission addressed the effect of the modification of section 18A:29-4.1 in the *Evesham Township Board of Education v. Evesham Township Education Ass'n* case,<sup>319</sup> which featured similar facts and a school district challenge to the continued authority of *Galloway Township* based on the effective repeal of section 18A:29-4.1 and the "economic reality confronting boards" based upon "changing economic times."<sup>320</sup> The Commission, reaffirming its support for the *Galloway Township* analysis, stated that current section 18A:29-4.1 "does not prohibit the creation of a contractual obligation to pay automatic increments."<sup>321</sup> After rejecting the "changing times" argument, the Commission ruled that "[t]he very act of unilaterally modifying a particular term and condition of employment contradicts the meaning of collective negotiations, since ordinarily (before impasse) one cannot unilaterally act and still collectively negotiate about the same subject."<sup>322</sup> Finding a per se refusal to negotiate in good faith, the Commission ordered the District to pay two years' worth of back step and column movement wages.<sup>323</sup>

In *California School Employees Ass'n v. Davis Unified School District* the California Public Employment Relations Board (PERB) was confronted with five cases raising the right of school districts to freeze step and column salary increases during negotiations after contract expiration.<sup>324</sup> In each case, the hearing officer found that the freeze was a unilateral change in employment conditions which constituted an unlawful refusal to negotiate and interfered with the employees' exercise of their rights under the California Educational Employment Relations Act (EERA).<sup>325</sup> PERB

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317. *Id.* at 231.

318. *Id.* at 231-32.

319. *Evesham Township Bd. of Educ. v. Evesham Township Educ. Ass'n*, No. CO-95-30, 1-2, 6 (N.J. P.E.R.C. Oct. 28, 1994).

320. *Id.*

321. *Id.* at 6.

322. *Id.*

323. *Id.* at 6-7.

324. *California Sch. Employees Ass'n v. Davis Unified Sch. Dist.*, No. 116, at 3 (Cal. P.E.R.B. Feb. 2, 1980).

325. *Id.* at 3; CAL. GOV'T CODE §§ 3540-3549.3 (West 1995).

reached the same conclusion, but along the way had to address a series of traditional arguments advanced by the Districts.

The Districts first contended that PERB should not follow federal precedent that a unilateral freeze may be a failure to negotiate, but should follow specified public sector precedent which allows such a freeze.<sup>326</sup> Even if the cited public sector precedent was not followed, they urged, it would be immaterial if there was no change in the status quo in their respective situations.<sup>327</sup> The status quo, said the Districts, was for the parties to reach agreements on salary increments before implementation.<sup>328</sup> In any event, past practices cannot be established by evidence of conduct prior to implementation of EERA.<sup>329</sup> Two related arguments were that, because California case law indicates that salaries cannot be reduced after July 1, the freeze was justified by fiscal necessity and by the need to preserve the negotiating positions of the Districts, as well as by the Districts' desire to maintain flexibility in negotiations.<sup>330</sup>

PERB rejected the federal private/public law distinction, instead relying upon its own precedent.<sup>331</sup> It also rejected the Districts' related arguments that the freeze was not a unilateral change, but a device designed to preserve the status quo.<sup>332</sup> PERB relied on federal precedent stating that the status quo embraces regular and consistent past patterns of changes in the conditions of employment.<sup>333</sup> PERB expressly found that "[t]he status quo was not the dollar amount paid to each employee on July 1 . . . . The status quo was that employees would obtain salary increases each fall if they met certain requirements."<sup>334</sup>

PERB took seriously the Districts' arguments that they had to freeze salaries before July 1, since under California law they could not change salaries after that date, which statutorily marked the start of the school year. This position was rejected, however, on two grounds. First, case law established that the EERA authorizes a district to negotiate a wage schedule after July 1, as long as the contract is completed (or, presumably, a contract is imposed, if negotiations fail) prior to the adoption of a final

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326. *California Sch. Employees Ass'n*, at 6.

327. *Id.*

328. *Id.* at 7.

329. *Id.*

330. *Id.* at 7-8.

331. *Id.* at 8.

332. *Id.*

333. *Id.* at 18 (citing *NLRB v. Katz*, 369 U.S. 736, 742 (1962)); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 652 (6th Cir. 1977).

334. *Id.* at 11.

budget, which is statutorily required to be done in early August.<sup>335</sup> Second, case law relied upon by the Districts suggesting that unilateral salary modification was permissible had been superseded by the EERA.<sup>336</sup> Under the provisions of the EERA, once the employees have a representative, "that representative has the right to negotiate with the district about wages, hours of employment, and other terms and conditions of employment. The District cannot change employment conditions without first meeting and negotiating with the exclusive representative."<sup>337</sup>

The PERB decision did acknowledge the existence of two possible defenses to a charge of unlawful unilateral change. Either the employer's action must be consistent with an established practice or the employee's representative must have waived his right to negotiate.<sup>338</sup> In reviewing the cases before it, however, PERB found no valid defense, and made the following rulings:

1. Davis District—The Union, having agreed to a prior contract with a limited duration, did not waive the right to negotiate changes in the status quo after the expiration of that agreement. Additionally, the School District's subjective good faith in negotiations was not a defense to a finding of a statutory violation.<sup>339</sup>

2. State Center District—The fact that the Union rejected salary proposals providing retroactive increments did not settle the controversy and moot the issue of the District's freezing the salary in the first instance.<sup>340</sup>

3. Centinela District—The fact that in the parties' most recently completed round of negotiations they allegedly negotiated and actually reached agreement on step and column increments did not establish the negotiation and agreement as the new status quo, that is, as a precondition to granting step movement. Historically, the parties' practice before that agreement involved payment of steps without any negotiated settlement.<sup>341</sup> Therefore, in paying steps

the District was merely agreeing to do what it was already obligated to do—pay salary increments pending the negotiation of a new agreement. An agreement to maintain the status quo does not demonstrate a change

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335. *Id.* at 12 (citing *County and City of San Francisco v. Cooper*, 534 P.2d 403 (Cal. 1975)).

336. *Id.* at 13.

337. *Id.*

338. *Id.* at 15.

339. *Id.* at 19.

340. *Id.* at 22-23.

341. *Id.*

in the status quo; thus the alleged agreement to pay salary increments does not indicate a new practice of withholding increments until such an agreement is reached.<sup>342</sup>

PERB concluded by noting that, while "[a]n employer may change negotiable terms and conditions of employment when no contract is in effect . . . , [it] must first provide an opportunity to negotiate and, if negotiations are requested, must negotiate in a good faith attempt to reach agreement before making changes."<sup>343</sup> This is so whether or not the district claims it does not have enough money to pay for step and column movement. In that circumstance, the District still has "an obligation to negotiate proposed changes in employment conditions before implementing them."<sup>344</sup>

The remaining eight states, Montana, Indiana, Delaware, Wisconsin, Oregon, Michigan, Rhode Island, and Alaska, have all explicitly followed *Katz* or state statutes and precedent that compel similar results.<sup>345</sup>

In *Forsyth Education Ass'n v. Rosebud County School District (Forsyth)* the Montana Board of Personnel Appeals declined to follow the public sector labor decisions of other states and instead looked to "private sector federal precedent."<sup>346</sup> Its statement of reasons is one of the most complete of all the reported decisions, and explains what many other cases only allude to without much comment. Montana's Public Employee Collective Bargaining Act<sup>347</sup> was modelled on federal labor statutes and the Montana Supreme Court therefore consistently turned to NLRB precedent for guidance.<sup>348</sup> Conversely, the public sector collective bargaining statutes of other states were dissimilar to Montana's, particularly on the issue of strikes among public employees, which Montana allows but most other states do not.<sup>349</sup> The Board noted that the NLRB and federal courts reviewing NLRB decisions constituted "a better area of law to draw precedent from" because of the federal sector's greater number of cases, experience, and consistency.<sup>350</sup> Further, following state law presented two additional problems: (1) which state's law to follow in light of differing

342. *Id.* at 24.

343. *Id.* at 27-28.

344. *Id.* at 28.

345. See *infra* notes 346-389 and accompanying text.

346. *Forsyth Educ. Ass'n v. Rosebud County Sch. Dist.* No. 14, No. 37-81, 3 (Mont. P.A.B. May 17, 1982).

347. MONT. CODE ANN. §§ 39-31-101 to 39-31-409 (1995).

348. *Forsyth*, No. 37-81 at 3.

349. *Id.* at 4.

350. *Id.*

state rules; and (2) having once followed a state's judicial interpretation of state law, the need to continue to follow that state's subsequent rulings on this issue.<sup>351</sup> The Board's decision then extensively analyzed federal precedent, freely quoting the *Galloway Township* analysis of *Katz*, before it issued its ruling based thereon. In closing, the Board noted that the Montana Legislature, in its most recent session, had killed in committee two bills which not only would have outlawed payment of steps upon contract expiration but also would have mandated that the Board follow only public sector precedent in interpreting the collective bargaining act.<sup>352</sup>

One month prior to Montana's *Forsyth* decision, the Indiana Supreme Court decided *Indiana Education Employment Relations Board v. Mill Creek Classroom Teachers Ass'n* based, not upon *Katz* or federal labor law precedent, but on an interpretation of a state labor statute.<sup>353</sup> The statute explicitly mandates that, if there is no new contract fourteen days prior to the date the school board must submit its budget, "the parties shall continue the status quo . . . [and] the employer may not unilaterally change the terms or conditions of employment that are issues in dispute."<sup>354</sup> In determining what constitutes the status quo, the Labor Board looked to what the teachers reasonably expected, based upon the District's prior practice, and upon the negative policy that would result from adopting the district's position. School boards could penalize employees for exercising their rights by keeping part of their wages from them, and the districts would be encouraged "to prolong negotiations past the expiration of the existing agreement to gain bargaining leverage."<sup>355</sup>

The Delaware Public Employment Relations Board faced the unilateral imposition issue in its 1984 decision in *Appoquinimink Education Ass'n v. Board of Education of Appoquinimink School District*, in which the School District, following expiration of the parties' CBA, froze salaries and its health care contributions at their 1982-83 levels for the 1983-84 year.<sup>356</sup> The Union alleged coercion and good faith bargaining violations of the Public School Employment Relations Act.<sup>357</sup> The Labor Board noted at the outset that the state already followed the *Katz* rule in other contexts, which

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351. *Id.* at 5.

352. *Id.* at 17-18.

353. *Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n*, 456 N.E.2d 709, 711 (Ind. 1983) (citing IND. CODE § 20-7.5-1-12(e)).

354. *Id.*

355. *Indiana Educ. Employment Relations Bd.*, 456 N.E.2d at 712.

356. *Appoquinimink Educ. Ass'n v. Bd. of Educ. of Appoquinimink Sch. Dist.*, No. 1-2-84A (Del. P.E.R.B. July 28, 1984).

357. The alleged violations were of §§ 4007(a)(1) and 4007(a)(5) of the Act, codified at DEL. CODE ANN. tit. 14, §§ 4001-4018 (Supp. 1982).

the District did not dispute.<sup>358</sup> The Labor Board explained that its ruling that unfair labor practices occurred was based upon the violation of the underlying *Katz* policy that unilateral disruptions of the status quo frustrate the statutory objective of establishing working conditions through collective bargaining.<sup>359</sup> The Labor Board explicitly denied that the rule required enforcement of any expired contract clause; rather, it required "maintenance of the relationship which existed at the time of the expiration of the agreement."<sup>360</sup> However, the former agreement's provision on any point in contention "may provide insight into the relationship which existed."<sup>361</sup> The expired contract's language that "[i]n each year of the contract, teachers shall advance one step on the salary schedule(s) in the traditional manner" cannot be read to limit the parties' obligations only to the contract year; this principle is based upon "unique and special principles" that have evolved over the years in the field of labor law.<sup>362</sup>

The Labor Board rejected the District's assertion that a retroactive award of salary would make the teachers whole.<sup>363</sup> It was not cash, but the "stability of the status quo and therefore the environment in which collective bargaining is undertaken [that] is crucial to assuring the equal status of the parties."<sup>364</sup>

The leading Wisconsin case, *Hartmann v. School District*, dealt with wage freezes and vacation length increases during negotiations for a first-time contract with non-professional employees.<sup>365</sup> In this case, the School District refused to conduct negotiations on these issues.<sup>366</sup> The Commission found that the District committed a "unilateral change" by its refusal to bargain and "derivatively interfered with [employees'] exercise of their . . . right to bargain collectively."<sup>367</sup> This well-reasoned and

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358. *Appoquinimink*, No. 1-2-84A, at 26.

359. *Id.* at 27.

360. *Id.*

361. *Id.*

362. *Id.* at 28.

363. *Id.* at 29.

364. *Id.* The Board did note the existence of DEL. CODE ANN. tit. 14, § 4013(a) which provides that an obligation shall not be enforceable against a public school employer if the obligation would be inconsistent with any statutory limitation on the funds, spending, or budget of the employer. *Id.* It stated pointedly that its function was not "to provide for the conservation of district funds through the destruction of the bargaining environment and relationship but rather to administer the provisions of the Public School Employment Relations Act." *Id.* at 29-30. The Board further noted that its order was not in violation of § 4006(h)(2) of the statute, which precludes the Board from mandating an action "which involves an economic cost to the public school employer." *Id.* at 34.

365. *Hartmann v. School Dist.* No. 28629 MP-1251 (Wis. E.R.C. Mar. 22, 1985).

366. *Id.* at 9.

367. *Id.*

thorough opinion reviews the federal law on the subject, as well as the leading decisions from California, New Jersey, Pennsylvania, Connecticut, Montana, Oregon, Michigan, New York, and Florida.<sup>368</sup> It breaks new ground by adopting a "dynamic view of the status quo" for Wisconsin employees in both initial contract and contract hiatus situations.<sup>369</sup> The rule, carefully drawn to consider all of the factors contributing to the status quo at any given time, states:

Where the expired compensation plan or schedule, including any related language—by its terms or as historically applied or as clarified by bargaining history, if any—provides for changes in compensation during its term and/or after its expiration upon employee attainment of specified levels of experience, education, licensure, etc., the employer is permitted and required to continue to grant such changes in compensation upon the specified attainments after expiration of the compensation schedule involved.<sup>370</sup>

In 1986, Oregon's Employment Relations Board overturned its 1978 decision in *Blue Mountain Faculty Ass'n v. Blue Mountain Community College*. The Employment Relations Board, in *In re Portland Community College*, wholly adopted the federal status quo doctrine in interpreting its Public Employee Collective Bargaining Act (PECBA).<sup>371</sup> In *Blue Mountain*, the majority had created a relative balance of power exception to the per se rule it adopted in 1977.<sup>372</sup> The exception allowed an employer to unilaterally depart from the status quo if the change would maintain the relative balance of bargaining power between the parties.<sup>373</sup> In *Portland*, the Board abandoned this exception because of its clear contravention of "the general principle explicated in Katz,"<sup>374</sup> to wit, that "[u]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of

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368. *Id.* at 17.

369. *Id.*

370. *Id.*

371. *In re Portland Community College*, 9 PECBR 9018, 9023 (Or. 1986) (citing *Blue Mountain Faculty Ass'n v. Blue Mountain Community College*, 3 PECBR 2025 (Or. 1978)). The PECBR is codified at OR. REV. STAT. §§ 243.650 to 243.782 (1993). The mandate that employers bargain in good faith is found at § 243.672(1)(e).

372. *Blue Mountain Faculty*, 3 PECBR at 2032.

373. *Portland Community College*, 9 PECBR at 9023. See *Blue Mountain Faculty*, 3 PECBR at 2031-32.

374. *Portland Community College*, 9 PECBR at 9023.

employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy."<sup>375</sup>

In 1991 the Court of Appeals of Michigan affirmed a ruling of the Michigan Employment Relations Commission that the unilateral imposition of a post-contract salary freeze prior to impasse violated a Michigan statute prohibiting unilateral changes in mandatory subjects of bargaining.<sup>376</sup>

Teachers in Rhode Island negotiated with the Warwick School Committee for a contract to succeed one that expired on August 31, 1991.<sup>377</sup> Believing they had a contract, the teachers reported to work on September 10; subsequently, a dispute erupted over certain terms of employment, and the School Committee disavowed the agreement.<sup>378</sup> The Union filed an unfair labor practice charge.<sup>379</sup> When no contract was in place in late August 1992, the teachers refused to report to work for the start of the 1992-93 school year.<sup>380</sup> An injunction issued by the superior court ordering them to return to work was overturned by the supreme court, which ruled that the Rhode Island Labor Relations Board had exclusive jurisdiction to determine the basic contractual issues between the parties.<sup>381</sup>

The Labor Board ruled that the School Committee committed an unfair labor practice by unilaterally implementing terms and conditions of employment, with or without impasse, pending execution of a new agreement.<sup>382</sup> Items imposed by the School Committee included abolition of extra pay for excess student loads, changes of personal days from the parties' tentative agreement, cessation of processing teacher grievances, and abrogation of a 1988 agreement on reductions in force.<sup>383</sup> Declining to follow the federal private line of cases, the Labor Board simply relied upon Rhode Island's own statutory scheme promoting good relations between teachers and employers.<sup>384</sup> The statute prohibits strikes, promotes

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375. *Id.* (quoting *Katz*, 369 U.S. at 747).

376. *Jackson Community College Classified & Technical Ass'n v. Jackson Community College*, 468 N.W.2d 61 (Mich. App. 1991).

377. *Labor Relations Bd. v. Warwick Sch. Comm.*, No. ULP-4647, at 2-3 (R.I. L.R.B. Nov. 10, 1992).

378. *Id.*

379. *Id.* at 1.

380. *Warwick Sch. Comm. v. Warwick Teachers Union Local 15*, 613 A.2d 1273, 1274 (R.I. 1992).

381. *Id.* at 1276.

382. *Warwick Sch. Comm.*, No. ULP-4647 at 7.

383. *Id.* at 8-9.

384. *Id.* at 12-13.

equality of bargaining power, and is to be interpreted liberally.<sup>385</sup> Put another way, "[l]egislative denial of the right to strike should not be allowed to reduce collective bargaining to collective begging."<sup>386</sup> Interpreting the statute's good faith bargaining requirement, the Labor Board found the School Committee's refusal to recognize the terms of the expired 1988 CBA to be a violation of three statutory subsections.<sup>387</sup>

The Alaska rule<sup>388</sup> appears to be grounded in traditional statutory notions of duty to bargain in good faith. The leading case, *Mid-Kuskokwim Education Ass'n v. Kuspuk School District*, holds without further analysis that

[a]s part of the duty to bargain under [Alaska Statute] 23.40.110, parties negotiating the successor to an expired agreement are under an obligation to maintain the status quo until they reach impasse and satisfy any conditions to exercising the economic weapons of unilateral action or strike under [Alaska Statute] 23.400.200.<sup>389</sup>

#### 4. Payment of Steps Only if Contract History Supports Payment as Status Quo

The rules of many states refer to contract history and the parties' past course of conduct as being highly relevant in determining the status quo. Decisions from Illinois and Massachusetts demonstrate how these factors play out when closely considered.

In 1984, the Illinois Legislature enacted the Illinois Educational Labor Relations Act.<sup>390</sup> In September 1984, teachers in the Vienna School District and District officials entered into their first CBA under the Act, for a one year period; the contract provided for incremental step increases, a contract provision used for the past ten years in the District.<sup>391</sup> At the beginning of the 1985-86 school year, the District froze salaries at their

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385. *Id.* at 13.

386. *Id.* at 16.

387. *Id.* at 7.

388. ALASKA STAT. § 23.40.110(a)(5) (1990).

389. *Mid-Kuskokwim Educ. Ass'n v. Kuspuk Sch. Dist.*, Nos. 93-149-ULP & 93-162-ULP (Consolidated) at 7 (Alaska L.R.B. Feb. 22, 1993). Because the employer unilaterally remedied its refusal to pay steps before the labor agency could issue its decision, the Union's complaint was dismissed as moot. *Id.* at 8.

390. ILL. ANN. STAT. ch. 115, paras. 5/1 - 5/21 (Smith-Hurd 1993).

391. *Vienna Sch. Dist. No. 55 v. Illinois Educ. Labor Relations Bd.*, 515 N.E.2d 476 (Ill. App. Ct. 1987).

1984-85 level, refusing to implement annual step increments.<sup>392</sup> In 1987, the Illinois Court of Appeals for the Fourth District decided the hiatus freeze issue as a matter of first impression.<sup>393</sup> The issue before the Educational Labor Relations Board, and the court, was whether status quo meant "the actual dollar amount paid under the terms of the existing contract [or] the salary structure."<sup>394</sup>

In affirming the Labor Board's decision, the court defined status quo as "a teacher's reasonable expectations deemed [sic] from the express provisions of the expired agreement and any relevant bargaining history and past practice."<sup>395</sup> Reviewing New Jersey's *Galloway Township* decision, *Katz*, and NLRB precedent, the court concluded that a "term or condition of employment must be an established practice to constitute the status quo."<sup>396</sup> The test is "whether the status quo would have been clearly apparent to an objectively reasonable employer at the time in question."<sup>397</sup> Based upon this test, the employees' legitimate expectations, and the employer's limited discretion in paying post-expiration steps, the court found violations by the employer of the following portions of the statute: good faith bargaining, prohibition on interference, and restraint and coercion.<sup>398</sup> The court concluded by noting that the determination of status quo must always be made on a case-by-case basis.<sup>399</sup>

This scrutiny was applied in a decision handed down the following year by the Labor Board, which held that the Wilmette School District did not violate the Act by refusing to pay steps during a hiatus period.<sup>400</sup> The Labor Board found that the District had consistently withheld salary increments during past hiatus periods, and that the teachers had no reasonable expectation of receiving them once their contract expired.<sup>401</sup>

The same result occurred in a 1995 Massachusetts Labor Relations Commission decision interpreting a contract that ran until June 30, 1992,

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392. *Id.* at 477-78.

393. *Id.*

394. *Id.* at 477.

395. *Id.* at 478.

396. *Id.* at 479 (citation omitted).

397. *Id.* (citation omitted).

398. *Id.* at 478. The statutory sections violated were ILL. REV. STAT. ch. 48, paras. 1714(a)(1) and (5)(1985). *Id.*

399. *Id.* at 480.

400. *Wilmette Educ. Ass'n, IEA-NEA v. Wilmette Sch. Dist. No. 39*, No. 86-CA-0073-C, at VI (Ill. E.L.R.B. May 17, 1988).

401. *Id.*

“but in no event thereafter.”<sup>402</sup> Under this contract, employees received step movement on the anniversary dates of employment, and a longevity benefit annually on each June 15.<sup>403</sup> The freeze occurred prior to impasse.<sup>404</sup>

In analyzing whether the step and benefit provisions were part of the terms and conditions of employment and therefore the status quo, the Commission reviewed decisions from New Hampshire (*Milton*) and New York which reached opposite results.<sup>405</sup> Relying upon *Katz* and prior Massachusetts precedent, the Commission reaffirmed the rule that “expired contract rights affecting mandatory bargaining issues . . . have no efficacy unless the rights have become a part of the established operational pattern and thus become a part of the *status quo* of the entire plant operation.”<sup>406</sup> Because the fact stipulation submitted by the parties contained no information on the frequency or pattern of payment of past step increases, or of bargaining history on this point, the Commission ruled that it could not conclude that step increases had become terms and conditions of employment.<sup>407</sup>

#### 5. Payment of Steps With Close Attention to Possible Employer Defenses

Of all states which generally require payment of incremental increases during a contract hiatus, New York, Florida, and Tennessee give employers the most effective defenses to payment. The laws of New York and Florida have changed significantly over the last two decades, and each state’s law has often been cited in the decisions of other state labor boards during those years.<sup>408</sup>

New York’s initial rule was handed down in 1977 in *Board of Cooperative Educational Services v. State Public Employment Relations Board (Rockland County)*, which held that withholding annual salary increments did not constitute an unfair labor practice.<sup>409</sup> In 1982, the New

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402. *Town of Chatham v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 59*, No. MUP-9186, at 3 (Mass. L.R.C. Jan. 5, 1995).

403. *Id.*

404. *Id.*

405. *Id.* at 5 nn.2, 3.

406. *Id.* at 6 (citation omitted).

407. *Id.* at 7-8. The complaint was dismissed upon the Commission’s finding that, on the state of the record before it, the employer had not violated the coercion and good faith bargaining provisions of Massachusetts General Laws ch. 150E, §§ 10(a)(1) and (5). *Id.* at 1, 9.

408. See *infra* notes 409-17 and accompanying text.

409. *Rockland County*, 363 N.E.2d at 1175.

York Legislature amended its civil service statute to reverse the ruling.<sup>410</sup> In *Cobleskill Central School District v. Newman* in 1984, the New York Court of Appeals found that the Legislature intended to alter the court's holding by embracing step movements during contract negotiations.<sup>411</sup>

A major sunset clause exception to the general *Cobleskill* rule was applied the next year in *Suffolk County v. Faculty Ass'n of Suffolk County Community College*, in which the Board held that a contractual reference to salaries being determined for the four academic years covered by the Agreement "clearly and unambiguously expresses the intent of the parties that the salary grid be limited to the four academic years covered by the contract."<sup>412</sup> Under those circumstances, the employer's withholding of step increments was not actionable. The same result was reached in 1994, in *Waterford Teachers Ass'n v. Waterford-Halfmoon Union Free School District*, when the Director of Public Employment Practices and Representation found a sunset clause in contract language describing the salary schedule as existing "[f]or the period September 1, 1989 to August 31, 1992."<sup>413</sup>

Florida's case law has also evolved substantially over the past decade and a half. In 1982, the Public Employment Relations Commission, in *Nassau Teachers Ass'n FTP-NEA v. School Board of Nassau County*, "expressly recede[d] from all previous case law" and, based upon "[t]he objective expectation of employees in the continuance of existing terms and conditions of their employment," found a refusal to maintain the status quo to be a violation of Florida Statutes section 447.501(1)(a) and (c).<sup>414</sup> Its interpretation of the status quo required payment of steps during a hiatus.<sup>415</sup> Three years later the Commission identified three affirmative defenses available to employers to defend against charges of unilateral changes of mandatory subjects of bargaining: (1) clear and unmistakable waiver by employees; (2) exigent circumstance requiring immediate action;

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410. See N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 1983). The amendment provided that it was illegal for an employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated." *Id.*

411. *Cobleskill Cent. Sch. Dist. v. Newman*, 481 N.Y.S.2d 795, 796-97 (N.Y. App. Div. 1984), *appeal denied*, 479 N.E.2d 248 (1985).

412. *Suffolk County v. Faculty Ass'n of Suffolk County Community College*, 18 PERB ¶ 3030 (N.Y. P.E.R.B. 1985), *appeal dismissed as moot sub nom. Faculty Ass'n of Suffolk Community College v. State Public Employment Relations Bd.*, 18 PERB ¶ 7016 (N.Y. P.E.R.B. 1985), *aff'd*, 508 N.Y.S.2d 591 (N.Y. App. Div. 1986).

413. *Waterford Teachers Ass'n v. Waterford-Halfmoon Union Free Sch. Dist.*, 27 PERB ¶ 4540 (N.Y. P.E.R.B. Apr. 11, 1994).

414. *Nassau Teachers Ass'n, FTP-NEA v. School Bd. of Nassau County*, 8 FPER 13206 (Fla. P.E.R.C. Apr. 30, 1982).

415. *Id.*

and (3) legislative action taken pursuant to section 447.403(4)(d).<sup>416</sup> Legislative action involves imposition of a contract after exhaustion of statutory impasse procedures.<sup>417</sup>

Since 1992, the Commission and the Florida courts have been at loggerheads; each has interpreted the state's statutory collective bargaining provisions differently. The statute states that failure of a legislative body to appropriate sufficient money to fund an agreement does not constitute an unfair labor practice.<sup>418</sup> The question is whether this provision can constitute a defense to failure to pay scheduled salary increases during a hiatus. While the Commission has ruled that section 447.309(2) requires a school board to "fund" step increases during a hiatus, two Florida courts have ruled otherwise.<sup>419</sup>

Tennessee also authorizes collective bargaining.<sup>420</sup> The Tennessee Court of Appeals has construed the statute to require that agreements to pay salary increases are wholly subject to the approval of the local legislative body and a failure to vote or even request such funds provides the school district with a defense to payment.<sup>421</sup> Absent such a defense, the general rule adopts the NLRB precedent and finds unilateral changes during negotiation to constitute a refusal to bargain in good faith.<sup>422</sup> In Tennessee, teacher salaries are a combination of state and local revenues.<sup>423</sup> "Salary negotiations apply only to the local supplement;" the

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416. Florida Sch. for the Deaf and Blind Teachers United FTP-NEA v. Florida Sch. for the Deaf and Blind, 11 FPER ¶ 16080 (Fla. P.E.R.C. Feb. 19, 1985), *aff'd*, 483 So. 2d 58 (Fla. Dist. Ct. App. 1986).

417. See FLA. STAT. ANN. § 447.403(4)(d) (West 1995).

418. FLA. STAT. ANN. § 447.309(2) (West 1995).

419. See Martin County Educ. Ass'n v. School Bd. of Martin County, 18 FPER. ¶ 23061 (Fla. P.E.R.C. Jan. 17, 1992), *recon. denied*, 18 FPER ¶ 23108 (Fla. P.E.R.C. 1992), *rev'd*, 613 So. 2d 521 (Fla. Dist. Ct. App. 1993); Sarasota Classified-Teachers Ass'n v. Sarasota County Sch. Dist., 18 FPER. ¶ 23069 (Fla. P.E.R.C. Jan. 29, 1992), *recon. denied*, 18 FPER ¶ 23119 (Fla. P.E.R.C. Mar. 16, 1992), *rev'd*, 614 So. 2d 1143 (Fla. Dist. Ct. 1993). See also Letter from Jack E. Ruby, Assistant General Counsel, Florida Public Employees Relations Commission (Dec. 9, 1994).

420. TENN. CODE ANN. §§ 49-5-601 to 49-5-613 (1990). The State has authorized collective bargaining since 1978. TENN. CODE ANN. § 49-5-601(1990).

421. Carter County Bd. of Educ. Comm'rs v. American Fed'n of Teachers, 609 S.W.2d 512, 517 (Tenn. Ct. App. 1980) (construing TENN. CODE ANN. § 49-5512, part of the Education Professional Negotiations Act, which provides that "[a]ny items negotiated . . . which require funding shall not be considered binding until . . . the [legislative] body . . . has approved such appropriation").

422. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328, 338-39 (Tenn. 1984). The Tennessee Court of Appeals recently ruled that an early retirement incentive program is a mandatory subject of negotiation and the school board's unilateral adoption and implementation of such a program during negotiations for a new contract violated the collective bargaining statute. Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d 428 (Tenn. Ct. App. 1994) (construing TENN. CODE ANN. § 49-5-609).

423. Letter from Wayne Qualls, Tennessee Commissioner of Education (Nov. 14, 1994).

State Board of Education and the State Legislature set and fund the basic salary.<sup>424</sup> A 1978 opinion of the Tennessee Attorney General asserts that any state-funded salary increase must be passed on to teachers and would not be subject to negotiation with the local school district.<sup>425</sup>

## 6. Statutory Solutions

Iowa's collective bargaining statute features useful provisions designed to avoid contract hiatus situations.<sup>426</sup> Connecticut's Teacher Negotiation Act has a specific time schedule that requires parties to complete the negotiation process well in advance of the existing contract's expiration.<sup>427</sup> Oklahoma has addressed the hiatus problem through issue-specific legislation.<sup>428</sup> Finally, Nebraska's collective bargaining law governing state college and university teachers has a comprehensive negotiation timetable that pressures parties to negotiate efficiently and avoid protracted standoffs.

Iowa's system is "designed in such a way as to minimize the chance that the [post-contract hiatus salary freeze] fact pattern . . . will actually occur."<sup>429</sup> The Iowa Public Employment Relations Act mandates that public school teachers complete negotiations for a successor contract by May 31, either by voluntary agreement or by virtue of the completion of impasse-resolution devices, such as binding arbitration.<sup>430</sup> Absent a voluntary agreement, teachers and employers must agree on impasse procedures and upon a schedule for them to be implemented, as necessary, no later than 120 days prior to May 31 of the year the new contract is to take effect.<sup>431</sup> If the parties cannot agree on such procedures, either party may request the Public Employees Relations Board (PERB) to appoint a mediator.<sup>432</sup> If mediation is unsuccessful, the PERB will appoint a fact-finder.<sup>433</sup> If the parties are still unable to agree, after the fact-finding and

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424. *Id.*

425. Tenn. Op. Atty. Gen. No. 78-312 (July 31, 1978) (citing TENN. CODE ANN. § 49-605(e), *recodified and amended* at TENN. CODE ANN. § 49-3-306 (1990)); Letter from Wayne Quallis, *supra* note 423.

426. IOWA CODE ANN. §§ 20.1 to 20.30 (West 1995).

427. CONN. GEN. STAT. ANN. §§ 10-153a to 10-153r (West 1996).

428. OKLA. STAT. ANN. tit. 70, § 18-114.8 (West 1989 & Supp. 1996).

429. Letter from Jan V. Berry, General Counsel, Iowa Public Employment Relations Board (Nov. 7, 1994).

430. *Id.*; IOWA CODE ANN. §§ 20.2, 20.9, 20.17.11(a), 20.19 (West 1995).

431. IOWA CODE ANN. § 20.19.

432. *Id.* § 20.20.

433. *Id.* § 20.21.

recommendations for resolution of the dispute are made public, either party may request binding arbitration.<sup>434</sup> A panel of arbitrators, or, as is more common, a single arbitrator, has fifteen days from the first meeting to select the most reasonable offer on each disputed item.<sup>435</sup> Because decisions issued later than this are not binding,<sup>436</sup> the parties may agree to lift or extend the time-frame for decision by the panel.

Under the Iowa system, the entire dispute resolution process commencing with mediation is initiated only upon the affirmative action of one of the parties.<sup>437</sup> It is therefore possible, either through total inaction by the parties or action taken too close to the statutory deadline, that a successor contract might not be in place before the existing contract expires.<sup>438</sup> Because the statute contemplates a definite end to bargaining for a successor contract, once the designated date arrives the school district has no duty to bargain further.<sup>439</sup> Therefore, it is possible that no new contract would be settled on during the entire one-year period following the current contract's expiration.<sup>440</sup> While the PERB believes this has occurred in a few cases, it has never resulted in the filing of any complaints by employees.<sup>441</sup> The most likely employer actions in such a circumstance were that the employer either maintained the salary dollar figure status quo or implemented its final offer.<sup>442</sup>

Connecticut's Teacher Negotiation Act requires parties to adhere to a strict time line for completing contract negotiations.<sup>443</sup> Parties proceed first by way of local negotiation, then by mediation and finally by arbitration.<sup>444</sup> Negotiation must begin at least two hundred and ten days prior to the local school budget submission date.<sup>445</sup>

If the parties cannot agree on a contract by the one hundred and sixtieth day prior to budget submission, and have not voluntarily entered

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434. *Id.* § 20.22. Arbitration must be formally requested no later than April 16 in order for it to be available to either party. IOWA ADMIN. CODE r. 621-7.5(1) (1995).

435. IOWA CODE ANN. § 20.22.11.

436. *Maquoketa Valley Community Sch. Dist. v. Maquoketa Valley Educ. Ass'n*, 279 N.W.2d 510, 515-16 (Iowa 1979).

437. IOWA CODE ANN § 20.20.

438. Letter from Jan V. Berry, *supra* note 429.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. CONN. GEN STAT. ANN. §§ 10-153a to 10-153r.

444. *Id.* §§ 10-153d to 10-153f.

445. *Id.* § 10-153d(b). If the parties agree on a contract, the local legislative body may still reject it. In that event, the parties automatically move to the arbitration stage, which may, however, be preceded by mediation if either party so requests. *Id.* §§ 10-153d(b)-(c).

mediation, they are required to report to the Commissioner of Education, and begin mandatory mediation.<sup>446</sup> If there is no mediated settlement by the one hundred and thirty-fifth day prior to budget submission, the parties move to mandatory arbitration.<sup>447</sup>

The arbitration hearing process is to last no longer than twenty-five days,<sup>448</sup> and the arbitration decision is due within twenty days after hearing based upon the last best offers of the parties.<sup>449</sup> Within twenty-five days thereafter the legislative body of the school district may reject the arbitrator's decision by a two-thirds majority vote.<sup>450</sup> If that occurs, the Commissioner appoints a three person arbitration panel.<sup>451</sup> Within twenty-five days, the panel is to review the arbitrator's decision and render a final and binding decision, which is subject to judicial review.<sup>452</sup>

Oklahoma's Legislature addressed the issue specifically in 1994 when it provided that school districts may not reduce "wages, hours, fringe benefits or other terms and conditions of employment" during the twelve months following expiration of a contract.<sup>453</sup> The only allowable exceptions are agreement upon a new contract within the twelve month period, or imposition of contract terms following "exhaustion of the negotiations impasse process."<sup>454</sup> Teachers otherwise come within the protection of the overall collective bargaining statute.<sup>455</sup>

The Nebraska State Employees Collective Bargaining Act features a useful framework for resolving contract disputes on a tight timeline.<sup>456</sup> State employees, including college and university faculty, are divided into

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446. *Id.* § 10-153f(b).

447. *Id.* § 10-153f(c)(1).

448. *Id.* § 10-153f(c)(3).

449. *Id.* § 10-153f(c)(4).

450. *Id.* § 10-153f(c)(7).

451. *Id.* The parties may agree to have the panel's function performed by a single arbitrator.  
*Id.*

452. *Id.* § 10-153f(c)(7)-(8).

453. OKLA. STAT. ANN. tit. 70, § 18-114.8 (West 1989 & Supp. 1996). This provision was proposed to the Legislature by the Oklahoma Education Association (OEA) after some school boards, faced with teachers seeking to renew their contracts via evergreen clauses in difficult economic times, countered with attempts to lower wages and benefits. Telephone Interview with David Duvall, Associate Executive Director, Oklahoma Education Association (Oct. 13, 1995).

454. OKLA. STAT. ANN. tit. 70, § 18-114.8. As a defense against reduction of wages via imposition following exhaustion of the impasse process, the OEA successfully proposed legislation providing that the 1995-96 salaries of teachers employed in the same school district could not be reduced below those of 1994-95, unless hours or duties were reduced proportionately. Okla. H. 1764, § 32 (1995 Sess.). Similar legislation will likely be introduced as part of the education funding bill each year. Telephone Interview with David Duvall, *supra* note 453.

455. OKLA. STAT. ANN. tit. 70, §§ 509.1 to 509.10 (West 1989 & Supp. 1996).

456. NEB. REV. STAT. §§ 81-1369 to 81-1390 (1994).

twelve bargaining units, based upon job function and community of interest.<sup>457</sup> The Governor appoints a "Chief Negotiator" whose duties include negotiating and administering CBAs and consulting with agency and department heads about contract matters.<sup>458</sup> Contracts are to be negotiated in good faith and must last for two-year periods to coincide with the biennial state budget.<sup>459</sup>

The Chief Negotiator and union representatives must commence contract negotiations on or before the second Wednesday in September of the year preceding the contract period.<sup>460</sup> All negotiations must be completed by March 15 of the following year.<sup>461</sup> No later than December 15, all parties must choose a single fact-finder, known as a "Special Master."<sup>462</sup> Selection is by mutual agreement or through a procedure of striking names from a list.<sup>463</sup> If there is no agreement by January 1, a mediator is appointed.<sup>464</sup> Mediation may continue indefinitely, even after the exchange of final offers.<sup>465</sup> By January 10, the parties must reduce to writing all agreed-upon issues and exchange final offers on all unresolved issues.<sup>466</sup> By January 15, all unresolved issues are submitted to the Special Master, who conducts a hearing and chooses the most reasonable final offer on each issue still in dispute.<sup>467</sup> Parties may appeal the Special Master's rulings until March 15.<sup>468</sup> The Commission must show "significant deference" to such rulings, or set them aside only upon a finding of significant disparity from prevalent rates of pay or conditions of employment.<sup>469</sup> On March 16, the Chief Negotiator must report to the Governor and Legislature on the status of negotiations.<sup>470</sup> "The [G]overnor may amend his or her budget recommendations accordingly."<sup>471</sup> The Legislature, by a three-fifths vote, may direct the Chief Negotiator to withdraw any appeal made by the state and accept the

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457. *Id.* § 81-1373.

458. *Id.* § 81-1376.

459. *Id.* § 81-1377.

460. *Id.* § 81-1379.

461. *Id.*

462. *Id.* § 81-1380.

463. *Id.*

464. *Id.* § 81-1381.

465. *Id.*

466. *Id.* § 81-1382(1).

467. *Id.* § 81-1382(2).

468. *Id.* § 81-1383.

469. *Id.*

470. *Id.* § 81-1384(1).

471. *Id.*

Special Master's ruling.<sup>472</sup> Pending resolution of appeals, there shall be no change in terms or conditions of employment.<sup>473</sup> The Commission must complete its deliberations and issue appropriate orders by July 1, or as soon thereafter as possible.<sup>474</sup>

#### CONCLUSION AND RECOMMENDATIONS

The *Chester/Readsboro/Burke* line of cases is not an anomaly. About a quarter of the states (twelve, including Vermont) have adopted the *Katz* rule or a local variation, mandating payment of steps to preserve the status quo in contract hiatus situations.<sup>475</sup> Five more states generally require that steps be paid but give very close attention to contract history and employer defenses.<sup>476</sup> Another eight states leave the matter to local discretion, allowing such payments if the districts choose to pay and requiring them if the contracts contain clauses supporting payments.<sup>477</sup> With no explicit statute or case law on point, the practice in the District of Columbia is for steps to be paid during negotiations.<sup>478</sup> Assuming a contract history of steps being paid, these seventeen states and the District of Columbia generally require step payment during contract hiatus situations while another eight states appear to allow such payment. In sum, the practice, is either followed or allowed in half of the states (twenty-five) and the District of Columbia.

The principles set forth in the *Chester/Readsboro/Burke* line are most definitely not derived from the concept that teachers are entitled to automatic salary step increases simply because they have completed an extra year of service. Instead, they are based upon traditional labor law conventions, designed to ensure that the status quo is maintained so that parties to labor negotiations carry out their talks on a level playing field. The principles restrict teachers and school boards from deviating from the status quo on mandatory subjects of bargaining, until mandatory impasse resolution procedures have been completed. If the parties have contractually recognized that teachers will be advanced at the conclusion

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472. *Id.* § 81-1384(2).

473. *Id.* § 81-1385(1).

474. *Id.* § 81-1383(6).

475. *See supra* notes 299-389 and accompanying text.

476. *See supra* notes 390-407 and accompanying text.

477. These states are Idaho, Nevada, Maryland, Minnesota, North Dakota, Nebraska, South Dakota, and Washington. *See supra* Part II.C.2.

478. *See supra* notes 256-57 and accompanying text.

of each year of service, this practice will be maintained under the *Chester* rule.

The *Chester* rule should not be changed by labor board or court decisions based upon the existence of a school district fiscal crisis, real or imagined, permanent or temporary. The principle of labor law at issue is too important, and the Vermont precedent too well established, to be discarded based upon the perceived exigencies of the moment. If the Legislature wishes to abolish the rule, it should realize that it will be replacing one set of problems with another.

Indeed, given the fact that bargained-for raises are generally paid retroactively to the expiration date of the prior contract, the actual out-of-pocket cost to the school district is not as great as might first appear. For the individual taxpayer, the equity, or lack thereof, of the overall statewide funding formula for public education is of far greater consequence. The rule serves the public interest by ensuring that negotiations occur in an atmosphere free of coercion and manipulation by either side. In any event, boards are free to propose to association bargainers that they reduce the size of steps to be paid, or even explicitly waive any right to post-expiration step movement as part of any future contract. As *Burke* makes very clear, boards retain power to impose contract terms after finality, a power so significant that the Labor Board has referred to it as "the hammer."<sup>479</sup>

There can be no doubt that the operation of the *Chester* rule, in the particular context of any community's teacher-board contract standoff, can be an irritant to the body politic. Payment of salary steps after contract expiration creates the impression that matters have slipped out of control, that the board is paying salaries it did not negotiate and did not want to pay. While the standoff lingers, the likelihood of voter discontent and political instability increases. Those who seek to drastically curtail spending for public school program and staffing levels, as well as teachers' salaries, can successfully exploit such a standoff. The *Chester* rule can be a valuable arrow in the quiver of both the school board (during periods of high inflation) and the teachers' association (during low inflation), but it has a high cost.

However well-grounded in sound public policy the *Chester* rule may be, its use may well contribute to the tendency of Vermont school labor negotiations to drag on interminably. The price of extended disagreement is high for all involved: additional administrative and legal costs, and an increase in emotional and social tension.

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479. *Chittenden S. Educ. Ass'n v. Hinesburg Sch. Dist.*, 8 V.L.R.B. 219, 247 (1985).

The Vermont Legislature, and other interested public and private parties, would do well to consider changing the schedule by which boards and teachers negotiate. The sooner negotiations are completed, the less need there would be for the *Chester* rule to be invoked. Here are six suggestions:

1. Negotiations should be required to begin much earlier than many now do. Although the *Chester* decision states that the 120-day rule affords ample time, the Labor Board also recognized that each party engaged in delay for its own purposes. In fact, the 120-day rule only obligates the parties to request commencement of negotiations by that time, not to actually begin such negotiations by then. The Labor Board in *Burke* called the negotiations that occurred "a classic example of a negotiations process which simply has not worked as well as intended by the Legislature."<sup>480</sup> The Labor Board recommended that future negotiations be "more expeditious."<sup>481</sup> According to the Vermont-NEA, the incidence of school boards imposing contracts under finality appears to have increased in recent years,<sup>482</sup> and this, by definition, comes after very protracted negotiations.

2. The Vermont Department of Education, Vermont-NEA and the Vermont School Boards Association should attempt to reach agreement on workable negotiation and impasse resolution schedules. They should then jointly recommend that the Legislature enact these into law.

3. Recommended legislation should provide at a minimum for mandatory mediation and binding arbitration, to be completed within a specific time prior to expiration of the current contract.<sup>483</sup> This approach would be similar to the Iowa and Connecticut systems that culminate in binding arbitration designed to be completed well before the existing labor contract expires.<sup>484</sup> In an efficient system, 210 days should be sufficient for these impasse resolution procedures to be completed. Should the parties need to extend the impasse resolution period past the date the existing contract expires (as has infrequently occurred under the Iowa scheme), the *Chester* rule would define the parties' responsibilities until the arbitration panel makes its decision.

4. In the alternative, Vermont should consider a system similar to that in Nebraska now applicable to state college and university teachers.

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480. *Burke*, 18 V.L.R.B. 45, 65-66 (1995).

481. *Id.*

482. Telephone Interview with Joel Cook, General Counsel, Vermont-NEA, (Oct. 26, 1995).

483. VT. STAT. ANN. tit. 16, §§ 2021-2027 (1989 & Supp. 1995) ("Binding interest arbitration" is now a voluntary option in Vermont if both sides agree.).

484. See *supra* notes 429-52 and accompanying text.

It would have to be modified to be made applicable to local, as opposed to statewide, labor disputes. Under the Nebraska system, negotiations commence by September 15 and must be completed by March 15.<sup>485</sup> A mediator is appointed if there is no agreement by January 1, and by January 15 all issues are submitted to the single fact-finder, known as a Special Master.

5. The Legislature should enact fixed timelines for negotiations. Current statutes are inadequate for the task. The State Employees Labor Relations Act leaves it up to the parties, "after a reasonable period of negotiation," to petition the board to begin the mediation process.<sup>486</sup> Also, the state Labor Relations Board is obviously not the appropriate body to resolve the labor disputes inherent in almost 200 contracts arising out of 325 local education agencies. The lack of timelines is also a problem in the Municipal Employee Labor Relations Act,<sup>487</sup> which is closer in structure to the TLRA than the State Employees Labor Relations Act. Also, this would reduce the cost of negotiation and promote efficient, broadly applicable, impasse resolution procedures.

6. Several major roadblocks to implementing teacher negotiation/impasse resolution reforms in Vermont need to be resolved. First, school districts often do not know their state aid figures until May or even June, at which time the corrected figures are sometimes announced. Also, school districts must announce teacher reductions in force no later than April 15.<sup>488</sup> The Legislature must inform school districts earlier of the state funding level to which they will be entitled. Finally, towns may need to reschedule school district meetings to June to allow the electorate to consider not only late state aid figures, but also budgets that incorporate arbitration awards handed down by the proposed May 31 deadline.

Communities should be prepared to address the uncertainties inherent in any of the proposed solutions, several of which raise as many questions as they resolve. For instance, is current law adequate to ensure that school districts must honor any arbitration decision? What happens if the electorate refuses to approve a budget, including salary/insurance amounts, contained in an arbitrator's ruling? Also, if binding arbitration is adopted, is there anything left of the right to strike for teachers? Finally, any scheme of binding arbitration and regional negotiations cuts against the

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485. See *supra* notes 456-74 and accompanying text.

486. VT. STAT. ANN. tit. 3, § 925 (1995).

487. See VT. STAT. ANN. tit. 21, §§ 1731-1733 (1987 & Supp. 1995) (dealing with mediation, arbitration, and fact-finding).

488. VT. STAT. ANN. tit. 16, § 1752(b) (1989 & Supp. 1995).

grain of a valuable and revered Vermont tradition—local control. Communities may not be prepared to give up their ultimate control of the negotiation process.<sup>489</sup>

If education administrators and teachers cannot agree on a system of binding arbitration, and the Legislature does not wish to mandate it, it is still critically important that the entire negotiation/impasse resolution process be put on a much tighter timeline. While this might result in more contracts being imposed earlier by way of finality, it should also result in more negotiated settlements being reached more quickly than at present. The overall benefit is that there would be a predictable end to the process, allowing communities to focus more energy on improving the quality of education offered in their schools, and less on resolving labor strife.

As the Vermont Legislature moves to resolve the pressing statewide problem of funding public education, it would do well to reform the system by which teachers and the communities they serve negotiate and resolve labor disputes. If that system can be improved, a major irritant to relations between school districts and teachers will be removed.

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489. The right to impose a contract upon finality recognizes not only the individual employer's interests, but also "the public interest in preserving local control over educational policy." R. Bruce Freeman, *The Negotiating Impasse In Labor Relations for Teachers*, 5 VT. L. REV. 39, 63 (1980) (discussing the tension between the community's interest in resolving school labor disputes through contract imposition via finality and teachers' right to strike at the conclusion of impasse resolution procedures).