RESPONDING TO CONCERTED ACTIVITIES AND LIMITED JOB ACTIONS

Ongoing negotiations which appear to be prolonged, difficult or which simply do not yield an agreement in accordance with the association's timetable frequently trigger a concerted association response. Designed to pressure the board to concede to the association's bargaining positions, these organized union activities occasionally include an illegal total work stoppage. However, more commonly, and with increasing frequency, New Jersey's school employees' unions express their discontent with the progress of negotiations by staging activities that may include: mass attendance at board meetings; informational picketing; news releases and petitions enlisting community support; demonstrations of staff unity; working to the rule of the contract; boycotts of district functions and activities; as well as other limited job actions. These organized activities, while not as crippling as illegal strikes, visibly disrupt the normal operations of a school district and can thus tend to be successful in adding pressure to the management of the district. However, the association's success in influencing the outcome of negotiations by disrupting school operations and community relations depends upon the district's response to the concerted activities.

Board members and administrators who feel intimidated by the association's "show of strength" may be tempted to abandon their negotiations goal in order to obtain a quick settlement and a welcome return to normalcy; others may be ready to accept the activities without comment in fear of aggravating an already difficult and unpleasant situation. These responses, however, ignore the district's needs and its responsibilities. Further, these responses can encourage an escalation of unchecked concerted activities until the settlement is reached and a repeat of these tactics in future negotiations.

At the other extreme, board members and administrators who are angered by the association's activities may advocate a hardening of the board's bargaining position and an unwillingness to continue to support previously established parameters; others may be ready to take retaliatory actions against the association and all employees who have participated in any concerted activity. These responses also ignore the district's needs and responsibilities. They can result in bargaining positions set by personal emotional needs rather than by a rational assessment of the issues and of the district's needs. Further, these responses may embroil the district in expensive, unnecessary and ultimately unsuccessful litigation.

Boards must respond to concerted association activities which disrupt districts' operations. However, board responses must effectively control the immediate demonstration of the union's position without creating the potential for prolonged and intensified labor and legal problems. Thus, board responses to associations' concerted activities must be marked by a balanced perspective which recognizes the rights and obligations of all parties. Boards must keep in mind that while public employees' strikes are illegal in New Jersey, other concerted activities may be legal expressions of union, and individual, positions which are protected by constitutional, statutory or contractual guarantees. Districts cannot forget their responsibility to assure the continuous delivery of a sound and safe educational program; however, they must also respect their employees' constitutional, statutory and contractual rights. Responses which ignore either parties' rights and responsibilities are likely to damage the board's position and, ultimately, enhance the association's efforts.

Therefore, a board's response must represent an appropriate balance between the employees' rights to engage in the specific concerted activity and the board's legal rights and responsibilities to manage its district. Appropriate and effective board responses must be tailored to fit the specific nature of association activities within the context of constitutional, statutory and contractual rights and obligations.

Constitutional Rights and Concerted Activities

Individuals do not surrender their constitutional rights when they become public employees. Indeed, the rights guaranteed by the First and Fourteenth Amendments have been held by the courts to guarantee all public employees' right of association and to prevent state or political subdivisions from denying public employees the right to join a labor organization.[1] Union activities and

[1] *McLaughlin v. Tilendis,* 398 *F.*2d 287 (1968); *Atkins v. City of Charlotte,* 296 *F Supp.* 1068 (1969).

individual employees' expressions are generally protected under the constitutional guarantee of free speech.

Public school employees, like other citizens, have constitutional protection to publicly express their opinions on matters of public concerns at public meetings and in the press; public school employees cannot be censured by their employers for the exercise of that right.[2] Issues involving public concerns have been seen to be those matters that relate to political, social or other concerns of the community; issues involving union activities and negotiations have traditionally been seen as matters of public concerns which are within the protection of the First Amendment.[3]

Peaceful picketing has also been equated to protected freedom of speech, as it has been perceived by the courts as a legitimate method of informing the public as to the progress of collective bargaining.[4] However, freedom of speech, whether expressed through speeches, the press or picketing, is not unlimited.

While constitutional protection of First Amendment rights is a fundamental right of all citizens, that right is not absolute and can be limited by specific circumstances. For example, while false statements expressed without malice may be constitutionally protected, statements by all citizens, including public employees, are subject to legal action for libel, slander, or invasion of privacy.[5] Further, while the content of picketing and other expressions of free speech may receive full First Amendment protection, that right may be limited by restrictions on reasonable time, place, and manner necessary to significant governmental interests.[6]

First Amendment protection of public employees and their unions is also limited by the rights of public employers. The U.S. Supreme Court has stated that First Amendment protection required a balance between "the interests of the teacher, as a citizen, on commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[7] In establishing this balance, the courts will consider the content, form, and context of the expressed opinion as well as the degree of public concern and interest in the disputed issue. For example, the court has found that a board policy or decree, which prohibits employees from expressing their free speech rights under any and all circumstances, was an overbroad and excessive governmental intrusion into constitutionally protected areas. However, the court also found that a narrow prohibition against the wearing of buttons expressing dissatisfaction with negotiations in the classroom, in front of students, was an appropriate exercise of a board's right to establish educational goals. Under these circumstances, the court found that since the restriction applied only when students were present, the board's legitimate interest in achieving its educational objective outweighed the teachers' First Amendment rights to comment on matters of public concern.[8] In general, however, there is a heavy presumption that freedom of speech is a fundamental right and courts will restrain employees' constitutionally protected freedoms of expression only under rare and narrow circumstances where a significant government interest can be demonstrated.

Board Responses

Boards must recognize and respect their unions' and employees' exercise of protected constitutional rights. However, the obligation to respect employees' freedoms and constitutional rights does not prevent boards from exercising their own rights. For example, a union's first reaction to stalled negotiations may be to engage in a concerted release of information to the public. Frequently, the association's news release or public statement will be critical of the board's bargaining position; it may also include inaccuracies and partial information. Since this information has been found to be a matter of public concern which falls under the protection of the First Amendment, the board cannot censure the association for its decision to publicly express its opinion. However, boards also have the right to communicate their positions. Boards are free to correct inaccuracies; indeed, many believe that as elected representatives, boards have an obligation to correct false information that has been disseminated to the public. Boards can, therefore, draft their own press releases that clarify their employees' working conditions and the status of negotiations.

In drafting these releases, however, boards should carefully assess the impact of an escalated public information campaign on the progress of negotiations. Boards are generally best served by avoiding public comments on the union's bargaining position and by focusing their efforts on rectifying and clarifying inaccuracies. Boards must also consider the implications of publishing firm numbers and precise proposals as publicly stated positions can add pressure on a board of education. A board's published offer may be greeted enthusiastically by the public, but

[2] *Pickering v. Board of Education of Township High School,* 391 *U.S.* 563, 20 L.Ed. 2d 811 (1968).

[3] See *Connick v. Myers,* 461 *U.S.* 138, 75 *L.Ed.* 2d 708 (1983); *Smith v. Arkansas State Highway Employees' Local 1315,* 441 *U.S.* 463, 60 *L.Ed.* 2d 360 (1979).

[4] *Thornhill v. Alabama,* 310 *U.S.* 88 (1940).

[5] *Arnett v. Kennedy,* 416 *U.S.* 134 (1974).

[6] *Police Department of Chicago v. Mosely,* 408 *U.S.* 92 (1972); and *Green Township Education Association v. Rowe et al and Green Township Board of Education*, App. Div. A-2528-98T5, Feb. 28, 2000.

[7] *Pickering, supra,* at 568.

[8] See, for example, *Green Township, supra.*

when the process of negotiations results in a higher settlement, the public may perceive that the board has sold out and caved in. If news releases or advertisements publish the board's last offer, boards may also want to include a statement about their continued willingness to negotiate to reach a settlement that is fair and affordable. News releases should, of course, also include boards' positions on other issues, including teachers' workday and work year, and should correct inaccurate comparisons or partial information released by the association.

To assure consistency and control of the board's communications to the public, one board representative should be designated as the board's spokesperson. All news releases and all communications concerning negotiations should emanate from this designee, who can be the board president, the superintendent, or any other appointed individual. The identity of the district's communicator is not as important as assuring that one individual is responsible for all communications.

Another frequent form of concerted expression involves public demonstrations of the union's position. Employees may wear buttons or armbands or may engage in informational picketing to protest the fact that they are "working without a contract." While a board cannot prevent their employees from wearing buttons or armbands or from otherwise expressing their opinions on matters of public concerns in a public forum, boards can, and should, offer public clarification of the status of the "expired" contract. Very few members of the community are aware that New Jersey's public employees continue to be covered and protected by a contract which appears to have passed its expiration date. Boards can inform the public that under the PERC law, boards cannot unilaterally modify the terms of the expired contract and that its provisions continue to control school employees' terms and conditions of employment. Boards can very specifically explain that teachers continue to have access to their grievance procedures, to receive the full complement of negotiated benefits, including leaves of absence and health insurance coverage, and to enjoy all contractual protections. When applicable, boards can also stress that teachers who were not at the maximum step on the guide even obtained a salary increase in accordance with the provisions of the so-called expired contract.

Keeping the public informed may not prevent or curtail the association's expression of its dissatisfaction with the progress of negotiations. However, informing the public may affect the direction of public opinion; the presentation of factual information may also defuse the emotionalism both within the community and the school buildings that frequently results from a campaign of misinformation.

However, to be effective, factual information requires a cool and dispassionate presentation. Board members and administrators must remain calm and rational, as they face the association's expressions of free speech. While you may not like what is being said and how it is being said, you must respect your employees' right to express their opinions. Do not rise to the bait. Do not overreact. Do not get into shouting matches. Respond carefully, calmly and deliberately to present facts that are necessary to inform your community.

Respecting your employees' rights, however, does not mean that you must tolerate behavior which goes beyond the right of free speech or the right of assembly. Informational picketing which interferes with student safety or access to the school buildings can be legally restrained; association behavior at board meetings that ignores board policy and interferes with the conduct of business can be controlled in the same manner that the board uses to address any citizen's disruption of board meetings. To assure that your response recognizes the fine line that sometimes exists between appropriate and inappropriate exercise of constitutional rights, please consult your attorney *before* censuring the association or its membership.

Statutory Rights and Concerted Activities

Individual school employees have rights under the PERC law and school law. Boards of education must be familiar with, and respect, the extent of these statutory rights.

Rights Under School Law

Title 18A establishes many employee rights; however, in the context of concerted activities, the provisions of *N.J.S.A.* 18A:25-3 are of particular importance. That section of school law grants teaching staff members the right to elect not to work on statutory holidays without losing pay. Statutory holidays, defined in *N.J.S.A.* 36:1, include the following days during the 10-month school year, which may not be part of the well-established tradition of school vacations: Columbus Day, General Election Day, Veteran's Day, Martin Luther King's Birthday, and Washington's Birthday. Regardless of the district's established calendar, teachers are legally entitled to not report to work on those days and are further entitled to not lose a day's pay for these absences.

This entitlement may be used by individual teachers. It may also become the focus of a concerted, collective action. During ongoing negotiations, an association directive to staff members to collectively exercise their statutory right becomes a "safe," legally protected way of expressing dissatisfaction with the progress of negotiations.

Board Responses Under school law, boards cannot dock pay for teaching staff members' absences on statutory holidays. While possibly unauthorized by the district's calendar, these paid absences are authorized by statute. Thus, the easiest way of avoiding disruption on those days is simply to schedule school recesses on all statutory holidays. However, for many districts, this is an unsatisfying solution, as it results in few instructional days in

November, in unacceptably shortened traditional school vacations, or in a delayed school closing in June.

Districts who choose to schedule instructional days on statutory holidays must keep in mind that *N.J.S.A.* 18A:25-3 holds the potential for a disruption in the school calendar. This potential cannot be avoided by a contractual agreement for staff attendance on designated legal holidays as individual statutory rights may not be waived through negotiations. However, a contractual definition of the number of days in the teacher work year can authorize boards to require teachers to make up days lost through absences on statutory holidays.[9] While this negotiated provision can offer prospective relief, it does not prevent a disruption in the district's scheduled and announced school calendar.

To minimize the possibilities of disruption to the students and the community, some boards have scheduled in-service days on statutory holidays. Under these circumstances, concerted absences do not affect the planned instructional schedule. However, unless the contract clearly obligates the staff to a specified number of workdays and in-service days, compensation for rescheduled in-service may be mandatorily negotiable.[10]

Other districts plan for alternative instructional programs in the event of concerted absences on legal holidays. Large group instruction, offering special programs designed to observe the reason for the holiday, may provide a contingency plan through which schools can be kept open, with minimum staffing, in the event staff decides to exercise their right of absence on statutory holidays. Again, this approach, when possible, can minimize the disruption caused by the concerted activity, but it cannot prevent teaching staff members from exercising their rights, nor can it justify the imposition of discipline for the statutorily authorized absence. However, the association's awareness that the district has a contingency plan to defuse or minimize the effect of a possible concerted activity may be sufficient to deter the union from implementing the considered activity.

Boards' only defense against teachers' statutorily authorized absences rests in being prepared for the possibility of a concerted action on legal holidays. Advance preparation for the contingency minimizes the disruption and places the control of these days in the board's hands. Given current law, boards must anticipate the union's intention well before the holiday and must consider appropriate adjustments in school operations, either by providing alternate forms of instruction, where possible, or by providing the community with timely advance notice of the board's decision to modify the published school calendar by closing schools on an upcoming legal holiday.

Rights Under the PERC Law

N.J.S.A. 34:13A-5.3 provides that:

> *public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity....*

This section of the PERC law has been interpreted to provide certain "protected rights" to public employees. Employees' protected activities generally involve union activities such as: participating in negotiations; processing or pursuing grievances; attending union meetings; engaging in unions' organizing campaigns; and other union activities aimed at improving the working conditions of the bargaining unit. Employers cannot, in any way, interfere with employees' protected activities and cannot intimidate or coerce employees in their choice to freely exercise their protected rights.

However, not all union activities are deemed to be protected activities. PERC has held that union activities cease to be protected when they interfere with the employees' job performance and responsibilities. For example, an association meeting ceased to be protected when it extended into the school day and resulted in the staff's tardiness.[11] Thus, PERC held that the board did not illegally and improperly interfere with the employees' protected activities when it reduced the pay of employees who were late for work because of their attendance at the prolonged meeting. PERC has also held that concerted activities on behalf of the union's negotiations position ceases to be protected activity when it involves the commission of an illegal strike.[12]

Boards' Responses Before censuring individual employees, boards of education and their administrators must carefully assess the questionable activity to determine if the action exceeds the limits of protected activity. Boards cannot legally interfere with or prevent union activities or individual actions on behalf of the union which are protected under the Act. Boards can, however, express their reactions to those activities as long as their expressions do not contain threats or promises of benefits[13]

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[9] *Carl W. Dohm v. Board of Education of Township of West Milford,* 1983 *S.L.D.* _____ (Jan. 6). Also see the article "The School Calendar and Statutory Holidays" in the Selected Topics Affecting Negotiations section of *The Negotiations Advisor.*

[10] *Black Horse Pike Regional Board of Education,* PERC No. 84-157, 10 *NJPER* 15200. Also note that the continuing education requirement may obligate boards to reschedule inservice programs that are part of a local district's state-approved local professional plan. For a full discussion of the requirement, please see *The Negotiations Advisor* article "The Continuing Education Requirement and Boards of Education." Consult with your attorney or labor relations resources to check on the possibility of developments that clarify this particular issue.

[11] *Sayreville Board of Education*, PERC No. 86-120, 12 *NJPER* 17145.

[12] *Weehawken Board of Education,* PERC No. 87-142, 13 *NJPER* 18180.

[13] *State of New Jersey,* PERC No. 88-147, 14 *NJPER* 19198.

and are scrupulously separated from the employees' personnel files.[14]

Thus, a board can express its dismay with an association's decision to break the parties' negotiations ground rule on joint press releases as long as the board does not threaten the union to expect negative consequences for this breach and does not include its letter in the personnel files of the members of the association leadership. It goes without saying that this association decision cannot become a factor in an employment decision affecting a union leader. Employment decisions must be based on management's assessments of the individual performance of responsibilities as an employee and cannot be tinged by management's responses to the individual's activities on behalf of the union. This does not mean that a union activist can use protected activities as a shield against the normal consequences of poor performance; it simply means that employment decisions must be based on the uniform application of district criteria and would have occurred "even in the absence" of the individual's exercise of protected activities.[15]

Boards are not legally prevented from censuring union or individual activities which exceed the limits of protected rights. Interference with normal school operations and violations of district policies and state regulations are generally indicators that the concerted activity will not be seen to be protected by the Act. For example, finding that the union's use of students as a conduit for labor relations materials is not an activity protected by the Act, PERC found that a board did not violate the Act when it censured the Association's use of students to carry communications concerning negotiations to parents.[16] This does not mean, however, that boards can censure all teachers' communications with students regarding negotiations. Prohibition against certain expressions cannot be overbroad intrusions into teachers' constitutionally protected rights. District policies limiting teachers' communications with students must establish a delicate balance between the employees' freedoms and the district's interest in promoting efficiency of the educational program. However, a board's censure of teachers' communications which is based on an inappropriately broad policy, or which is not supported by uniform district standards, may be seen as an appropriate restraint on freedom of expression.[17]

The particular procedures governing a district's normal operations and policies will have a strong influence on the board's selection of effective and legal responses to association activities. While all districts' normal operations involve an expectation that the staff will be available when the students are in attendance, other expectations of "normalcy" differ among districts. Policies, contractual agreements and past practice establish and define many different aspects of expected conduct. Therefore, before enforcing the district's perceived "normal operations," boards must carefully assess and fully understand their local employment rights and obligations.

Local Employment Rights and Concerted Activities

Within the framework established by the Constitution and by statutes, employment relationships are further defined by locally adopted policies, negotiated contracts and established practices. These locally defined conditions establish mutually understood terms of employment which place rights and obligations on both the employees and the employer. Unlike constitutional and statutory protection, which are applicable to all affected parties, local rules of employment differ among districts. However, within the variations of specific local conditions, the employer's obligation is generally understood to involve a dual responsibility: to respect the employees' defined rights and to enforce the terms of the locally defined employment relationship.

Given the differences in locally defined terms, what constitutes an enforceable obligation in one district may not be applicable to all districts. Therefore, to effectively respond to concerted activities, local boards of education and district administrators must be thoroughly familiar with the rights and obligations of their employees within the context of their local relationships.

Professional Rights and Obligations

Rules of local employment are frequently found in districts' job descriptions and policies. Job descriptions establish the professional responsibilities expected by the district, such as: conducting parent-teacher conferences; issuing reports on student progress; participating in curriculum development; and offering additional assistance to students outside the normal school day.

District policies may contain additional terms of employment and may, in the context of an educational policy statement, express additional standards of professional performance. For example, a district's policy on student homework may include teachers' responsibilities to assign and to correct homework assignments.

Local associations frequently stage limited job actions that curtail performance of professional responsibilities delineated in job descriptions and board policies.

Board Responses A board's response to the association's concerted efforts to limit delivery of professional services is related to the district's defined expectations of professional performance.

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[14] *Black Horse Pike, supra.*

[15] *Bridgewater Township*, 95 *N.J.* 235 (1984).

[16] *Manalapan-Englishtown Board of Education,* PERC No. 78-91, 4 *NJPER* 4134.

[17] *River Dell Education Association,* 122 *N.J. Super.* 350 (1973); *Green Township, supra.*

The specific contents of districts' job descriptions can guide districts' responses to concerted, limited job actions. For example, a specifically delineated responsibility of a position, such as an item in a music teacher's job description requiring the preparation and presentation of an evening concert or a component in the job description of sixth grade teachers requiring participation in the district's outdoor education program, authorizes the district to require compliance and to censure nonperformance of an established rule of employment. Non-compliance with established district standards of professional responsibilities should not be ignored by the administration or the board of education. Observed deficiencies in professional expectations should be noted in letters to the staff involved, in observations of staff performance and, if necessary, in year-end evaluations.[18]

Board responses can also be guided by the contents of district policies. For example, a clear policy on teachers' responsibilities to assign homework provides a board of education with the authority to censure a sudden interruption in the district's expected standards. In light of a clear policy, the board has valid and solid reasons to issue letters of warning or reprimands in response to the teachers' non-compliance with the district's expressed standards of professional responsibilities. The absence of a written policy may, under certain circumstances, require a different board response. When the responsibility to assign homework is not addressed in policy or in job descriptions and teachers have never been held accountable for performing, or not performing, this responsibility, it may be said that the assignment of homework has been traditionally left to teachers' sole discretion. Under these circumstances, the district's local rules of employment may not have created a teacher obligation to provide continued instruction through after-class assignments; thus, teachers' decisions to refrain from assigning homework may not violate the district's established standards. While a board in this situation may not have the authority to issue blanket sanctions, it need not, and indeed should not, ignore a district-wide cessation of homework assignments. In this setting, the administration can remind the staff of its general professional responsibility and express the district's expectations that difficulties in negotiations must not affect the students' educational program nor the staff's professional responsibilities.

Frequently, however, aspects of professional responsibilities remain unstated expectations that are assumed to be "part of the territory" of the profession. Probably the most common example of unwritten expectations is the assumption that teachers will be available to students outside the classroom for instructional or personal assistance, including writing recommendations for college applicants. The absence of written statements of these commonly expected aspects of professional responsibilities does not, in and of itself, prevent boards of education from expressing their expectations for continued performance of these tasks. If the district's practice has consistently reflected a mutual acceptance of these teachers' responsibilities, boards can require that teachers continue to meet these implicit obligations of employment. However, before boards demand compliance with unwritten expectations, boards should assure that their understanding of the employment relationship is in accordance with the terms of their negotiated agreements.

Contractual Rights and Obligations

Terms of the local employment relationship are primarily defined by the provisions of the negotiated agreement. The negotiated contract addresses, and controls, most aspects of employees' working conditions. Boards of education are legally bound to observe the terms of the agreement and cannot unilaterally modify negotiated terms of employment.

While contents of job descriptions that specifically define responsibilities of employment are nonnegotiable matters of educational policy, aspects of the job description that affect employees' work hours and work load are mandatorily negotiable terms and conditions of employment that cannot be unilaterally set or changed by local boards. Thus, before a board of education can require teachers to remain after school hours to meet their implicit responsibilities to be available to students, boards should check the negotiated length of their teachers' workday. A board directive cannot modify the teachers' contractual right to have a workday that extends 20 minutes before and after the students' day. The board's directive, however, can enforce the teachers' contractual obligation to be available during the negotiated workday to perform their traditional duties.

A negotiated agreement establishes employees' and employers' rights and obligations. Boards are implicitly authorized to enforce the terms of the agreement, and unions are authorized to challenge the board's action through the grievance procedure. Boards and their administrators must, therefore, carefully assess their contractual provisions to avoid misinterpretations of respective rights and obligations.

Express Contract Terms The specific language of negotiated provisions over the same employment issue can create different working conditions. For example, compare these two contractual clauses concerning staff attendance at the respective districts' back-to-school night:

District A

Teachers shall attend four evening meetings each school year, including Back-to-School Night and evening parent conferences.

District B

Teachers shall be expected to conduct parent confer-

[18] Boards must, however, be prepared for challenges of these determinations, which are likely to be alleged to constitute discipline. See discussion on "Board Responses" later in this article.

ences on three evenings as scheduled by the district, but teachers' attendance at Back-to-School Night and evening concerts shall not be required.

In District A, teachers have a contractual *obligation* to attend the listed evening activities; in District B, however, the decision to attend or not to attend back-to-school night is an employee *right* guaranteed by the negotiated agreement. Differences in the locally negotiated provisions create different employment responsibilities in different districts; board members and administrators must, therefore, be very familiar with the specific requirements of their negotiated agreements.

Identification of local contractual obligations requires an understanding of the rules of contract language interpretation.[19] However, not all contractual terms and conditions of employment can be found within the express terms of the negotiated contract.

Binding Past Practices Negotiated agreements sometimes contain ambiguous or unclear provisions and may not address all terms of employment. Under these contractual conditions, districts' long-standing practices may establish and govern terms of employment. These past practices may, depending on their nature and duration, be as binding upon the parties as the printed pages of the negotiated agreement.[20] Thus, board members and administrators must be able to identify the specific impact of their practices on their employees' rights and obligations.

Identifying the existence of a binding past practice requires an examination of each district's historical methods of operation. Obviously, practices will vary tremendously among districts. For example, consider two districts whose contracts guarantee a defined period for preparation time to their teachers; neither contract, however, defines the purpose of teacher prep time or its intended use. In the absence of a contractual definition, the districts' practice regarding prep time will need to be examined to identify the implicit understanding in the employment relationship. In the first district, the administration has, without challenge from the union, scheduled conferences, meetings and other professional duties as the need arose during the teachers' prep time. This long-standing practice can create an employee *obligation* to continue to attend to these activities during prep time. The other district's administration has never required teachers to attend conferences or to any other duties during the scheduled prep time. This practice can create an employee *right* to continue to expect to have a scheduled period free from any administrative assignments.

Contractual rights and obligations, whether defined by written contractual provisions or binding past practices, define the administration's authority to respond to concerted activities which disrupts the district's normal operations.

Board Responses Boards of education are authorized to enforce contractual obligations; however, boards are also required to respect contractual rights and are not permitted to unilaterally change terms of employment without negotiations. Boards' obligations to the terms of the employment relationship, established by contract or by binding past practice, extend beyond the expiration date of the negotiated agreement: boards are required to maintain the ***status quo*** established in the expired contract until those terms are changed by a newly negotiated agreement.[21] Thus, to be supported by an arbitrator, PERC or the courts, boards' responses to their association's concerted activities must be based on the rights and obligations contained in the expired contract and in the district's practices.

Responses to Employee Rights: Boards of education have limited authority to prevent concerted activities which are based upon employees' organized utilization of their employment rights. For example, an association boycott of back-to-school night cannot result in sustainable disciplinary action against teachers who did not attend *if* the district's contract or past practice establishes that attendance is voluntary. Similarly, a board does not have the contractual authority to require attendance at an upcoming district event if the contract or past practice establishes employees' rights to individually and voluntarily determine their level of participation in that activity. To impose a new, nonnegotiated requirement would constitute an illegal unilateral change in the district's terms of employment or a contractual violation.

However, boards do have the authority to assign staff to duties which contractually require volunteers' participation when the assignment involves issues of student safety, control, and supervision. Thus, a concerted activity, which results in a lack of volunteers normally available to supervise the playgrounds and cafeteria, authorizes the board to make involuntary assignments to assure proper supervision of students; *however,* compensation for the assignment's increase in work load and pupil contact time may be a severable negotiable issue.

Similarly, even in the absence of a contractual right to make involuntary assignments to extracurricular activities, boards may ultimately assign staff to cover these activities if the association's concerted activities result in a lack of volunteers to staff the district's program. In accordance

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[19]For a complete discussion of rules of contract language interpretation, please see *Administering the Negotiated Agreement,* Volume 7 of the NJSBA's Board Members' Library Series.

[20]Please see the article on "The Meaning and Relevance of Past Practice" in the Selected Topics Affecting Negotiations section in *The Negotiations Advisor.*

[21]See, for example, *Galloway Township Board of Education,* 78 *N.J.* 25 (1978).

with *N.J.S.A.* 34:13A-23, a board has the authority to assign non-volunteers when the district's negotiated selection procedure and a subsequent external search fail to produce a qualified volunteer. Thus, if external postings of extracurricular positions do not result in a sufficient number of qualified individuals to staff the district's program, the board has the statutory authority to involuntarily assign qualified staff to assure the continuity of the district's program.

Responses to Employees' Obligations: Boards' authority to respond to concerted activities which involve abrogations of contractual obligations is implicit to the labor relationship. Specific contract language, or a clear binding past practice, provides boards with the authority to demand, and to expect, continued compliance with employees' contractual obligations. Contractual obligations also authorize boards of education to take disciplinary action against employees who fail to meet their explicit employment responsibilities.

Disciplinary actions, however, must also be in accordance with contractual provisions. A negotiated just cause clause[22] imposes certain standards on the administration's imposition of discipline; if those standards are not met by the administration, the otherwise justified disciplinary action may be overturned or modified by an arbitrator on procedural grounds. Administering a district's negotiated agreement and enforcing employment obligations must, therefore, be based on a sound understanding of the rules of contract interpretation.

Boards' responses to their associations' limited job actions will vary depending upon the rights and obligations of the local employment relationship. Some boards will have the contractual authority to issue directives demanding a resumption of specifically boycotted activities and to discipline employees for violating the explicit obligations of their employment; other boards will have a limited ability to require their employees to cease exercising their rights within the employment relationship. However, all boards can, in various ways, respond to associations' pressure tactics to discourage disruptions in their district's educational program.

Effective Board Responses to Concerted Activities

Concerted activities are visible to the school community and, to various degrees, to the public at-large. The board's and the administration's reaction to the association's efforts will be perceived as a response to the concerted activity; thus, silence or a lack of reaction are, in and of themselves, responses—but responses that can signal acquiescence, apathy, or powerlessness, and that can encourage an escalation of association activities. At the other extreme, an impulsive reaction to the association's bargaining tactics can result in an illegal abrogation of the union's and employees' rights, which can embroil the district in prolonged litigation, escalate the labor dispute, and ultimately support the association's position that the board is acting irresponsibly and illegally in its conduct of negotiations. Therefore, boards' responses should be carefully prepared to effectively defuse the association's activities and to protect the district's normal efficient delivery of its educational program.

Identifying the Parties' Rights

The first step in preparing an effective district response is to recognize the rights and obligations of the union and its employees under the Constitution, the laws of New Jersey, and the local employment relationship. Individual district's responses should be designed to permit the board to meet its responsibilities as a public employer without abrogating or interfering with employees' rights. Communications with the public, the union and the employees must, therefore, be rational, rather than emotional, and must comply with governing legal requirements and good personnel practices.

Preventing Concerted Activities

Boards of education do not need to wait for a limited job action to begin to address the possibility of concerted disruptions to school activities. Early communications to the staff as to the district's expectations for a "business as usual" conduct of the schools during difficult or prolonged negotiations can be very helpful. When the new school year opens without a new contract in place, it may be advisable for the superintendent to include recognition of that situation in the traditional welcome speech on the teachers' first day of work. A calm and positive comment that the respective bargaining teams' continued good faith negotiations will eventually yield a mutually acceptable agreement can be followed by a similarly positive statement of expectations that ongoing negotiations will not interfere with the staff's and the administration's commitment to a successful instructional year for all the district's students. The superintendent's expectations, expressed verbally or in writing, can set the tone for the year and may be successful in focusing the staff on its educational, rather than its labor, relationship with the district.

The administration can also distribute the district's calendar of events and can remind staff of upcoming activities as the events approach. These communications can be very important when rumors of possible boycotts are circulating. However, reminders of activities must not change the district's practice or alter contractual provisions on attendance. When supported by the district's employment relationship, staff reminders can clearly

[22] See article on "The Meaning of Just Cause" in the Selected Contract Clauses section of *The Negotiations Advisor*.

refer to the obligatory attendance policy or practice; when attendance is voluntary, reminders can simply be an invitation to attend that includes a recognition of how much staff presence in the past has contributed to the program and has been appreciated by the parents. A simple reminder that does not change the district's practice by requiring attendance, but includes a warm invitation without threats, can encourage staff participation in the activity rather than participation in the boycott. A follow-up memo thanking staff for its contribution to the success of the program (hopefully a traditional response in any district) can go a long way in preventing boycotts of other voluntary activities planned for the year.

Preventive approaches also need to be considered as information is received through the district's grapevine. Districts can avoid a last-minute disruption of concerted absences on a legal holiday by having a contingency plan. Similarly, rumors of planned interruptions in staff's normal duties can be addressed by letters from the administration which remind staff of their obligations under their job descriptions or negotiated contract. Where district policies or practices establish a clear employee obligation, the consequences of non-compliance can be mentioned. Threats of sanctions are not appropriate, however, when participation has been left to the teachers' individual discretion; but, once again, in those instances, teachers can be reminded that the district's daily focus needs to be based on the progress of students' educational program and not on the progress of negotiations. Reminders of district expectations have been successful in averting implementation of planned concerted activities.

Responding to Concerted Activities

Swift administrative responses are also effective in curtailing staged association activities. In one situation, the association organized a boycott of the district's many year-end activities, beginning in early June and ending with graduation. When teachers failed to appear at the first scheduled event, the district's superintendent immediately sent a letter to the association president and to all teachers, reminding them of their obligations under the contract and the district's practice and indicating that further absences would be seen as a contractual violation. The high school principal then sent a memo to all teachers scheduled to cover the next event, ordering their presence at the function. Teachers resumed their coverage of the district's activities; a potentially prolonged boycott that could have disrupted the district's plans and disturbed the senior class was averted.

Teacher boycotts of extracurricular activities and other obligations can be similarly curtailed by administrative responses. The response, however, must reflect the district's expectations and standard operating procedures. For example, a district may be faced with teachers' concerted exercise of their rights under the contract or past practice to volunteer for extracurricular positions and find that it has no applicants for its extracurricular program. Given its procedures, this district cannot require teachers to apply for these duties; however, the district can inform the association and the staff of its intention to implement the extracurricular program by posting the positions externally and, in the absence of qualified applicants, by involuntarily assigning qualified staff. The district can also express its expected standards for the performance of assigned extracurricular duties. An understanding that the boycott will not deter the district from continuing with the program can well induce qualified staff to apply for the posted positions and can end the planned boycott.

However, when faced with a concerted refusal to perform extracurricular duties by teachers who have, in accordance with the district's procedures, been previously assigned to staff the program, a district can require the affected teachers to meet their obligations. Good personnel practices, and the possible presence of a contractual just cause provision, may require a progressive approach to the district's response.

A progressive response begins with notice to the staff of the district's expectations and intentions. This notice can also include the consequences of non-compliance with district standards. The imposition of the consequences must be reasonably related to the offense and must be in accordance with district rules for the imposition of discipline. Finally, the consequences must be uniformly imposed on all who proceed to ignore the district's work rule.

A response to the staff's refusal to perform assigned duties, extracurricular or otherwise, would thus involve the following steps:

- ascertain the existence of the problem. Evidence of the violation is necessary to trigger discipline (if the board is responding to a rumored job action, the following steps can be adapted to simply *inform* the association and the affected teachers of the district's intent to enforce teachers' obligations);
- clear identification of the rights and obligations of the assigned staff under contract or binding past practice. If consultation with the board's attorney or labor relations resources indicates that the district has the authority to require performance, the administration can proceed to enforce the employment relationship;
- notice of the rule of employment sent to the association president and all staff. This restatement of the district's rule may be particularly important if the obligation is based upon an unwritten but binding past practice. This notice should include a statement of the administration's intent to enforce compliance of the district's expectations;
- a letter to the specific teachers who have refused to perform their assignments. Citing the authority (contractual provisions, individual employment contract, etc.), the administration can order the teacher to report for the assignment on a given date and warn teachers of

the consequences of non-compliance. The threatened sanction should be in accordance with the district's rules and practices for imposing discipline. For example, the first offense may require a letter of reprimand; continued offenses may involve withholdings of salary or the withholding of increments. This letter can be placed in the teacher's personnel file;

• monitoring of compliance with the administration's order. Generally, most teachers will respond by resuming their expected functions. The administration, however, must have evidence of the teachers' individual responses;

• uniform imposition of discipline, as required by the district's rules, for teachers who fail to comply. However, care must be taken to assure the reasons for the teacher's continued absence. Absences due to illness, utilization of personal leave, or other excused reasons unconnected with the concerted activity would not warrant discipline. All continued concerted absences should receive the same level of discipline;

• continued monitoring of attendance and progressive discipline for continued non-compliance.

Initiating this planned response does not take a great deal of time. In most situations, a letter to the staff is sufficient to restore normalcy to coverage of the district's activities. While some districts seem to prefer appeals to outside agencies, a carefully designed administrative response is the fastest, most reliable, and most effective method of ending a boycott.

Since a partial work stoppage is an illegal act, some districts consider seeking a court injunction or filing unfair practice charges with PERC. The judiciary retains a great deal of latitude in responding to boards' requests for injunctive relief from illegal strikes. While some judges may issue immediate back-to-work orders to end extracurricular or other limited boycotts, others may find that the activity does not meet the required "irreparable harm" standard generally required for the issuance of an injunction. Unfair practice proceedings before PERC take a long time; when the Commission finally hears the case, it may find that a subsequently negotiated settlement has rendered the dispute moot and the charges may be dismissed. Therefore, neither forum can be relied upon to sanction the association's action and to bring immediate relief to the district's operations. The first and the most effective approach in dealing with concerted activities, thus, rests with the district's own exercise of its authority to enforce the terms of the local employment relationship.

Anticipating Challenges to the Board's Response

Under the PERC law, school employees may seek binding arbitration of disciplinary determinations. Thus, boards must be prepared that their responses to concerted activities may be the subject of arbitration, as their imposition of discipline, as well as threats of discipline, are challenged by the association. The potential for the challenges should not deter boards from taking the appropriate action necessary to curtail disruptions in the schools' operations; rather, the potential for a challenge should encourage boards to proceed carefully and appropriately in accordance with their districts' rules of employment. Responses which are based upon the board's clear contractual authority, which involve progressive notice of employees' obligations and which do not violate employees' employment or procedural rights, are likely to be sustained in any forum. The potential of an association challenge simply requires boards to act knowledgeably and reasonably as they meet their responsibilities to provide a continuous, efficient and effective educational program within their local labor relationship.

In concluding prolonged and adversarial negotiations, it is not unusual for the association to seek agreement to a non-reprisal clause in the settlement that includes the deletion of all documents and the abandonment of all pending actions stemming from the conduct of negotiations. While this clause can also apply to the association's pending requests for arbitration, some board members may feel that agreement to this provision negates all their efforts to censure the association's and the staff's unacceptable negotiations tactics. Before letting the non-reprisal clause become the only impediment to settlement, keep in mind that your decision to exercise your authority under your district's employment relationship defused the association's concerted activities, restored the continuity of your educational program, and demonstrated your resolve to manage your district's operations. Your commitment to enforcing the terms of your local employment relationship is likely to influence your association's future conduct of negotiations.

Looking Ahead

Preparing to respond to an association's actual or potential concerted activity may identify certain problems in a district's employment relationship. Boards may find that their policies are lacking in providing sufficient guidance and protection. For example, a policy on the district's dress code may not be sufficiently clear as to preclude the wearing of "Settle Now" buttons in the classroom. A board may thus wish to consider the adoption of a new policy that would ensure better administrative control in the future. This issue is a nonnegotiable matter of educational policy that can be unilaterally determined by a local board and, in accordance with the *Green Township* court decision discussed earlier in this article, would be enforceable as long as the restriction is narrowly limited to students' exposure.

Further, boards may find that their practices or contractual provisions may include too many instances of teachers' rights and too few opportunities for the exercise of administrative controls. Under these circumstances, the board's ability to effectively prevent disruptions in the

district's normal operations may have been limited, as the existing terms of the employment relationship cannot be legally changed by a board's unilateral action. However, boards can seek to negotiate changes in obstructive binding practices and contractual provisions; terms of the labor relationship which have been identified as preventing administrative directives and limiting administrative responses should be a source of board proposals in the next round of negotiations.

Boards may also wish to seek the association's agreement to a "no strike clause." A clause which provides that:

> *the association shall refrain from strikes, work stoppages, boycotts, job actions, sanctions, or any other concerted activities against the board or the district*

cannot guarantee the future absence of job actions and limited work stoppages. However, the inclusion of this provision in the negotiated agreement can provide further, and beneficial, contractual authority to guide a board's appropriate responses to concerted activities.

Boards may also identify a need to strengthen the expression of their district's goals and objectives. Additional policies and updated job descriptions may be required to establish a clear definition of the district's direction. Boards may also wish to consider their available mechanisms, such as a district employee handbook, to keep staff well informed of the district's expectations. Be careful, however, that your unilaterally established policies and the contents of your handbook do not contradict provisions of your negotiated agreement.

Engaging in concerted activities and staging limited job actions are established union bargaining tactics that can be expected to increase in frequency during difficult economic times. Boards of education should prepare for this possibility, no matter how unlikely, by reviewing their rights and obligations within their existing employment relationship. An assessment of the extent of the board's current authority to respond to potential association job actions can identify a need for policy revision as well as bargaining proposals that may result in improvements in boards' ability to manage their districts.

Additional contractual provisions may provide boards with the authority to issue directives ordering compliance with established district standards and to impose sanctions for noncompliance. However, pursuing additional negotiated authority may not be indicated for districts who are not enforcing their existing authority or who would be reluctant to insist on full enforcement of new administrative rights. Contractual authority that is not exercised will not prevent or curtail associations' disruptions of school operations. However, districts' decisions to utilize their available authority, no matter how limited by the terms of the local employment relationship, can contain and diminish the effect of concerted activities. Ultimately, the most important factor in effective board responses to concerted activities and limited job actions is the board's underlying commitment to take all appropriate actions to prevent the association's disruption of normal school operations. Effective board responses depend upon local boards' identification of the extent of their authority and their commitment to fully exercise their authority, in accordance with the law and their local employment relationship, to assure their communities of a continuous, safe and sound educational program.