

2007

## Public Sector Employee Bargaining: Contract Negotiations and Case Law

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### Recommended Citation

Andrew Douglas, *Public Sector Employee Bargaining: Contract Negotiations and Case Law*, 55 Clev. St. L. Rev. 1 (2007)

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# THE 2006-2007 EMPLOYMENT AND LABOR LAW SPEAKERS SERIES

## PUBLIC SECTOR EMPLOYEE BARGAINING: CONTRACT NEGOTIATIONS AND CASE LAW

ANDREW DOUGLAS\*

I.	INTRODUCTION .....	2
II.	HISTORY OF PUBLIC SECTOR COLLECTIVE BARGAINING .....	4
	A. Hagerman v. City of Dayton .....	4
	B. <i>Subsequent Intermediate Appellate Court Decisions</i> .....	4
	C. Dayton Classroom Teachers Association. v. Dayton Board of Education .....	4
	D. <i>The Ferguson Act</i> .....	5
	E. <i>Public Sector Labor Relations Legislation</i> .....	5
	1. The First Attempt at Legislation (1971) .....	5
	2. Public Employee Bargaining Bill (1975).....	5
	3. Public Employee Bargaining Bill (1977).....	6
	F. <i>Public Employees' Collective Bargaining Act.</i> .....	6
	G. <i>Case Law</i> .....	7
	1. <i>Dayton Fraternal Order of Police</i> .....	7
	2. <i>Mahoning County Board of Mental Retardation</i> .....	7
	3. <i>City of Kettering</i> .....	8
	4. The Rocky River Cases.....	8
III.	CONTRACT NEGOTIATIONS .....	9
	A. <i>How and When Conducted</i> .....	9

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\*Justice, Supreme Court of Ohio, 1985-2002 (ret.); Executive Director, Ohio Civil Service Employees Association. This Article is based on a lecture delivered at the Cleveland State University, Cleveland-Marshall College of Law, on September 25, 2006. While I recognize my responsibility to give you a fair and balanced perspective, I respectfully ask that you remember that I now represent a partisan point of view with regard to the right of public employees to have the statutory right to bargain collectively to reach their just goals. I work for a 30 person board. The Ohio Civil Service Employees Association is a union representing all the state employees (nearly 37,000 state employees) and it is my job to look after them and their needs, negotiate their contracts, and to be sure that the contract is adhered to by the management of the state. Having said that, I hasten to add that my feelings and perspective have not much changed given the background from which I came and the actual experiences I have had. Accordingly, it is my hope that after reading this Article, based upon an academically defensible presentation, you will draw the conclusion that collective bargaining for employees in the public sector is a good thing and should be protected at all costs in and by the law.

B. <i>Negotiating the Current Contract</i> .....	10
C. <i>Fact Finding</i> .....	11
IV. HOW TENUOUS THE SURVIVAL CORD .....	11
A. <i>Ohio Revised Code Section 4117.01(C)</i> .....	11
B. <i>Ohio Revised Code Section 4117.14(C)</i> .....	13
V. CONCLUSION.....	14

## I. INTRODUCTION

On July 1, 1979, nearly 3,700 city employees walked off their jobs in Toledo, Ohio.<sup>1</sup> Among the striking workers were over 700 policemen and 500 fire fighters—the vast majority of these forces. With this strike, essential city services quickly came to a halt. For practical purposes, there were no police officers to patrol the streets, no fire fighters to respond to fire alarms, no sanitation crews, no drawbridge operators or even welfare personnel to serve the citizens in a city of over a third of a million people. During the next three days, the citizens of Toledo—the community where I was then serving as a city councilperson—literally feared for the loss of their homes, their personal property and even their lives as the protections of society, expected of a government by its citizens, crumbled around them.<sup>2</sup>

Before the strike was settled, many homes and businesses burned, defying the desperate efforts of civilian brigades and neighbors armed with little more than garden hoses to extinguish the blazes. Stores were looted by roving, and sometimes armed gangs, fortified with the knowledge that no patrol car would respond to the alarms. Citizens prepared to defend their homes and other property by whatever means were available as each nightfall approached.

The threat was real, not imagined. As the 203rd anniversary of the Declaration of Independence approached, the right of the people to be secure in their homes was being severely challenged. As the sky literally filled with smoke, my city was taking on the pall of a chaotic, war-torn metropolis. Toledo seemed to be consuming itself as we intensified our efforts to end the strike of our public employees.

Leaders of the city employees' unions had invoked the strike sanction when negotiations with the city had reached an impasse. Negotiations aimed at reaching a contract settlement had started weeks before but the bargaining was unfruitful and no settlement was reached. The employees were adamant in their demands for higher wages and additional benefits; however, the demands far exceeded the city's ability to pay. This was so no matter how deserving or otherwise reasonable the demands were. Most painful of all, upon reaching impasse, the law—which we all depend on to guide us in our everyday affairs—did not provide a viable means of dispute

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<sup>1</sup>See, e.g., *Toledo Workers Strike*, WASH. POST, July 2, 1979, at A5.

<sup>2</sup>I specifically remember sitting in a hotel room at 2:30 in the morning, looking out the window from the eighth floor. I saw the full block on my right on fire and the full block on my left on fire. Young hoodlums were throwing concrete blocks through glass block windows and carrying out TVs. I had no firemen to send and no policeman to send. At 2:30 that morning, a note was passed to me that said, "Councilman, a public transportation bus driver just had his brains blown out in front of one of the major restaurants in Toledo"; I didn't even have a detective to send to investigate it.

resolution. With growing frustration and discontent, the unionized city employees saw no alternative but to strike.

As the strike slipped into its second and then third day, we were faced with seemingly untenable choices. Even though negotiations continued, there was no progress or settlement in sight. The law then in effect, the Ferguson Act (which regulated concerted action of governmental employees), provided the city council and the city manager with the option of firing all of the striking employees.<sup>3</sup> However, this provision, even then an archaic remnant of a bygone era, was certainly no meaningful solution at all. Who would have replaced all of the dismissed workers? Where would a city, overnight, find 1,200 trained policemen and firemen to protect its citizens? This is to say nothing of the other city employees in critical service positions.<sup>4</sup> If the discharge sanction of the Ferguson Act were invoked and the decision was subsequently made to rehire the fired workers, such rehired employees would have been precluded from receiving any benefits of a new employment agreement. Even if it had been practical, a mass firing would have only served to exacerbate the confrontation rather than to bring about a reduction of the dispute. Finally, facing a management threat to restore order through the use of the National Guard, the union employees responded to a court order. A widely respected judge of the Lucas County Court of Common Pleas ended the strike by ordering the workers to return to their jobs under threat of stiff penalties and sanctions.<sup>5</sup>

The end of this bitter strike did not, of course, mark the first nor the last public employee unrest in this state. A similarly destructive strike took place in Dayton in 1977.<sup>6</sup> Less drastic, but equally significant, strikes and work slow-downs such as the "blue flu" had become commonplace.<sup>7</sup> Between 1973 and 1980, across Ohio there were 428 public employee labor actions. In the face of such labor unrest, coupled with changing times and changing attitudes, the lawmakers of Ohio began to recognize the desperate need of the state's public employees to be granted the right to bargain collectively with their employers. It is my hope that after reading this Article, based upon an academically defensible presentation, you will draw the conclusion that collective bargaining for employees in the public sector is a good thing and should be protected at all costs in and by the law.

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<sup>3</sup>Ferguson Act of 1947, No. 148, 1947 Ohio Laws 449 (repealed 1983).

<sup>4</sup>Drawbridge operators, for instance, left the drawbridges over the river up and walked off their jobs.

<sup>5</sup>See, e.g., *Cities Grapple with Strikes*, WASH. POST, July 3, 1979, at A7; *Toledo Firemen Reject City Offer*, N.Y. TIMES, July 5, 1979, at A12; *Toledo Workers Get Pact; Possibility of Layoffs Seen*, N.Y. TIMES, July 6, 1979, at A8.

<sup>6</sup>See, e.g., *Dayton Homes, Apartments Burn as City's Firemen Continue Strike*, WASH. POST, Aug. 10, 1977, at A6; *Dayton Firemen End Strike, but the Rekindled Issue Lingers*, WASH. POST, Aug. 11, 1977, at A4.

<sup>7</sup>See, e.g., *Auto Walkout*, WASH. POST, Nov. 15, 1980, at C2; *Sixteen Teachers who Violated a Court Order to Return to Work During a Strike Against the Boardman School District Went to Jail*, WASH. POST, Oct. 19, 1980, at A9; *Johns-Manville Strike in Ohio is Ended*, N.Y. TIMES, Oct. 12, 1977; *Steel Haulers' Strike Sparks Violence*, WASH. POST, Nov. 15, 1978, at A7; *Tomato Pickers March*, WASH. POST, Sept. 5, 1978, at A15.

## II. HISTORY OF PUBLIC SECTOR COLLECTIVE BARGAINING

Collective bargaining for public employees has traveled a torturous road in Ohio. For years the courts had no legislative direction or statutory framework by which to be guided in determining public sector labor relations cases. Conflicts were dealt with on an ad hoc basis. With no guiding principles upon which employers and employees could structure their conduct, litigation and controversy were abundant.

### A. *Hagerman v. City of Dayton*

Much of the public sector labor conflict arose out of the seminal case of *Hagerman v. City of Dayton*<sup>8</sup> handed down by the Ohio Supreme Court in 1947. The court, obviously opposed to the notion of public-sector bargaining, opined that “labor unions have no function which they may discharge in connection with civil service appointees.”<sup>9</sup> The court supported this ruling by noting that

[t]he laws of this state . . . and the valid ordinances of the particular municipality cover fully all questions of wages, hours of work and conditions of employment affecting civil service appointees. . . . The law provides for the election and appointment of officials whose duties would be interfered with by the intrusion of outside organizations.<sup>10</sup>

### B. *Subsequent Intermediate Appellate Court Decisions*

Then in 1970,<sup>11</sup> 1973<sup>12</sup> and 1974,<sup>13</sup> several Courts of Appeals began to move away from the absolutist holding of *Hagerman*.<sup>14</sup> In *North Royalton Education Association v. North Royalton Board of Education*, the Court clearly rejected (without authority to do so, of course) the *Hagerman* holding.<sup>15</sup> The Court permitted a school board to enter into a collective bargaining agreement with a teachers’ association in situations where there was no statutory provision prohibiting such action.

### C. *Dayton Classroom Teachers Association v. Dayton Board of Education*

In 1975, the Ohio Supreme Court itself softened the position the Court had taken in *Hagerman*. Without even pausing to note or distinguish that landmark case, the Court ruled that a school board had the discretionary authority to enter into a collective bargaining agreement so long as the agreement did not abrogate the duties

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<sup>8</sup>*Hagerman v. City of Dayton*, 71 N.E.2d 246 (Ohio 1947).

<sup>9</sup>*Id.* at 254.

<sup>10</sup>*Id.*

<sup>11</sup>*Foltz v. City of Dayton*, 272 N.E.2d 169 (Ohio Ct. App. 1970).

<sup>12</sup>*Youngstown Educ. Ass’n v. Youngstown City Bd. of Educ.*, 301 N.E.2d 891 (Ohio Ct. App. 1973).

<sup>13</sup>*North Royalton Educ. Ass’n v. North Royalton Bd. of Educ.*, 325 N.E.2d 901 (Ohio Ct. App. 1974).

<sup>14</sup>*Hagerman*, 71 N.E.2d. 246.

<sup>15</sup>*North Royalton Educ. Ass’n*, 325 N.E.2d. 901.

and responsibilities imposed on the board by law.<sup>16</sup> Even with this decision, mandatory collective bargaining was still not in the picture. Thus, the illegal strikes continued.

#### *D. The Ferguson Act*

Concurrent to these developments in the courts, the state legislature was also addressing the public-sector bargaining issue. In 1947, the same year that the Ohio Supreme Court decided the *Hagerman case*, the legislature enacted the Ferguson Act.<sup>17</sup> Unequivocally, the Act prohibited public employees from striking.<sup>18</sup> Employees who did strike were subject to disciplinary action, including dismissal.<sup>19</sup> Although a fired employee could be immediately rehired under the provisions of the Act,<sup>20</sup> such a rehired employee could not be rehired at a higher rate of pay,<sup>21</sup> was not eligible for any pay raises for at least one year,<sup>22</sup> and continued employment was subject to completion of a two-year probationary period during which time the employee served at the pleasure of the appointing authority.<sup>23</sup>

#### *E. Public Sector Labor Relations Legislation*

With the Ferguson Act clearly prohibiting strikes by public employees, employees were without one of the most important bargaining tools available to their counterparts in the private sector—the right to strike is, of course, the ultimate weapon. Although during the 1960's and the 1970's, the legislature and the courts had come to implicitly recognize the role of unions in public-sector bargaining, significant reform was still needed.

##### 1. The First Attempt at Legislation (1971)

In 1971, the first comprehensive public-sector labor relations legislation was introduced in the General Assembly.<sup>24</sup> Although the bill had the support of Governor John J. Gilligan, it languished in, and was never voted out of, the Committee on Agriculture, Commerce and Labor.

##### 2. Public Employee Bargaining Bill (1975)

In 1975, a comprehensive public employee bargaining bill passed both houses of the state legislature.<sup>25</sup> Governor James Rhodes strenuously objected to an arbitration

<sup>16</sup>Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ, 323 N.E.2d 714 (Ohio 1975).

<sup>17</sup>Ferguson Act of 1947, No. 148, 1947 Ohio Laws 449 (repealed 1983); *See also* S. 261, 97th Gen. Assem., Reg. Sess., Ohio S.J. 281 (Ohio 1947).

<sup>18</sup>§ 2.

<sup>19</sup>§ 4.

<sup>20</sup>§ 5.

<sup>21</sup>§ 5(a).

<sup>22</sup>§ 5(b).

<sup>23</sup>§ 5(c).

<sup>24</sup>H.R. 881, 109th Gen. Assem., Reg. Sess., 134 Ohio H.J. 348 (1971).

<sup>25</sup>*See* S. 70, 111th Gen. Assem., Reg. Sess., 136 Ohio S.J. 1179 (1975).

provision of the bill that would have vested arbitrators with authority to make final awards binding on public employers. Governor Rhodes vetoed the bill, and an attempt to override the veto failed.<sup>26</sup>

### 3. Public Employee Bargaining Bill (1977)

In 1977, after slight modifications, a similar bill was again presented to the Governor.<sup>27</sup> This effort to gain legislative recognition of the bargaining rights for public employees also failed when Governor Rhodes, again, vetoed the bill. Thus, there was no recognition for the bargaining rights for public employees.

#### *F. Public Employees' Collective Bargaining Act*

In January of 1983, following the election of November 1982, a new legislature and a new governor, Richard F. Celeste, took office.<sup>28</sup> Governor Celeste had promised during his campaign for governor that, if he were elected, a bargaining bill for public employees would be passed and that he would sign the legislation. Governor Celeste promptly made good on his campaign promise.

In March of 1983, Senate Bill 133 was introduced.<sup>29</sup> The bill, with minor changes, rapidly cleared the Senate. By the end of March, an amended version of the legislation had been passed by the House. On that same day, the Senate approved the House version, and on July 6, 1983, Governor Celeste signed the bill into law.<sup>30</sup> When that new law took effect, nearly 580,000 public employees of Ohio were finally granted the statutory right to organize, join a labor organization, and bargain collectively with their public employers without fear of dismissal or sanction. With passage of the Public Employees' Collective Bargaining Act (the Act) (as the new legislation was to be known) and the repeal of the hated Ferguson act, Ohio joined thirty-nine other states in recognizing the rights of its public employees to seek from public employers suitable agreements governing nearly all aspects of employment.

The Act is comprehensive in nature. In the first section, the legislature includes an extensive list of the terms, setting forth the respective definitions that are to be applied throughout the Act.<sup>31</sup> A state employment relations board (SERB) with attendant duties, rights and responsibilities is created.<sup>32</sup> The rights of the employees,<sup>33</sup> including a list of those subjects appropriate for collective bargaining, are

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<sup>26</sup>I debated this issue with Governor Rhodes (it seemed like endlessly) for hours while riding in the back of the vans that we used to campaign in, with him eating peanuts and listening to why collective bargaining was so necessary.

<sup>27</sup>S. 222, 112th Gen. Assem., Reg. Sess., 137 Ohio S.J. 312 (1977).

<sup>28</sup>If this Article has been uninteresting to the reader up to this point, this is where it certainly became interesting to me as I prepared, remembering the history that I lived during this period of time.

<sup>29</sup>S. 133, 115th Gen. Assem., Reg. Sess., 140 Ohio S.J. 164 (Ohio 1983).

<sup>30</sup>Public Employee's Collective Bargaining Act, No. 40, 1983 Laws of Ohio 336 (1983) (codified as amended at OHIO REV. CODE ANN. § 4117.01-.24 (LexisNexis 2007)).

<sup>31</sup>§ 4117.01.

<sup>32</sup>§ 4117.02.

<sup>33</sup>§ 4117.03.

enumerated.<sup>34</sup> Terms of the agreements,<sup>35</sup> grievance and arbitration procedures,<sup>36</sup> and unfair labor practice<sup>37</sup> and dispute settlement mechanisms<sup>38</sup> all find a favored place in the Act. Importantly, the dispute settlement procedure for situations when the parties are unable to reach an agreement is exhaustively detailed.<sup>39</sup> In the event that the procedures prove unsuccessful, public employees, other than policemen, fire fighters and other emergency safety personnel, are given the right to strike.<sup>40</sup> Although safety personnel are prohibited from striking, resolution procedures for an impasse between those forces and the public employer are in fact provided in the act.<sup>41</sup>

### G. Case Law

After the passage of the Act, the cases challenging the law, and specific provisions thereof, were filed and began working their way to the Ohio Supreme Court. When the cases arrived, I was privileged to be a member of that Court, having been elected in November of 1984.

#### 1. *Dayton Fraternal Order of Police*

In the first case, *Dayton Fraternal Order of Police v. State Employment Relations Board* (which I wrote), we held that the Public Employees Collective Bargaining Act is “a law of general nature,” and, as such, the law has “uniform operation throughout the state.”<sup>42</sup> This is because all of the attacks across the state argued that the law was not a law of general nature. Well, it clearly is under Article II, section 34 of the Ohio Constitution.

#### 2. *Mahoning County Board of Mental Retardation*

Next, in a Mahoning County case, the Court moved to dispel any doubt as to the propriety or enforceability of collective bargaining agreements between public employers and employees.<sup>43</sup> In response to an argument that public employers were somehow less constrained by their employment contract than were their private-sector counterparts, the court held that “negotiated collective bargaining agreements are just as binding upon public employers as they are upon private employers.”<sup>44</sup>

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<sup>34</sup>§ 4117.08.

<sup>35</sup>§ 4117.10.

<sup>36</sup>*Id.*

<sup>37</sup>§ 4117.11.

<sup>38</sup>§ 4117.14.

<sup>39</sup>§ 4117.14.

<sup>40</sup>§ 4117.15, .16.

<sup>41</sup>§ 4117.16(B).

<sup>42</sup>*State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Bd.*, 488 N.E.2d 181, 187 (Ohio 1986).

<sup>43</sup>*Mahoning County Bd. of Mental Retardation and Developmental Disabilities v. Mahoning County TMR Educ. Assn.*, 488 N.E.2d 872 (Ohio 1986).

<sup>44</sup>*Id.* at 876.



### 3. *City of Kettering*

Then in late 1986, the Court heard and decided *City of Kettering v. State Employment Relations Board*.<sup>45</sup> This case was hailed as a fight for survival of public-employee bargaining rights.<sup>46</sup> In *Kettering*, the Court upheld the constitutionality of a section of the Act that was challenged as being in violation of the constitutional home-rule provision of municipalities.<sup>47</sup>

### 4. The Rocky River Cases

This was the case law precedent when *City of Rocky River v. State Employment Relations Board* came to the Court in 1988.<sup>48</sup> The case involved fire fighters in the City of Rocky River. Negotiations with the City had reached an impasse. Pursuant to the law, a fact-finder came in, heard both sides and issued his report. The City rejected the report, triggering the binding final offer arbitration provision of the Act. The City took the position that it would not accept any “binding mandate” because the City, through its representatives, contended there were “constitutional infirmities” with the conciliation process.<sup>49</sup>

This next point is, I believe, both interesting and important. Between the time *Kettering*<sup>50</sup> was decided by the Court in 1986—totally upholding the collective bargaining law—and *Rocky River*<sup>51</sup> arrived in 1988, there had been an election. At the 1986 election, Chief Justice Celebrezze was replaced by Chief Justice Moyer. Now (instead of me having 4 votes) Justices Locher, Holmes and Wright had their fourth vote, and after a very heated internal battle, this Court majority held that the conciliation section<sup>52</sup> was unconstitutional.<sup>53</sup> Clearly it was the prelude for the whole act to be found unconstitutional in the next cases to come. Notwithstanding the Court’s prior case law, this, many of us believed, was the beginning of the end of the Collective Bargaining Law.

Then another interesting thing happened. Again it was an election. In 1988, Justice Locher retired, and Justice Resnick was elected to replace him. Through a number of procedural maneuverings, and I plead guilty to being the mover, we kept the Rocky River case alive so that “Rocky River I”<sup>54</sup> was then followed by “Rocky

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<sup>45</sup>*City of Kettering v. State of Employment Relations Bd.*, 496 N.E.2d 983 (Ohio 1986).

<sup>46</sup>As we explained, the city’s “position ha[d] the potential to dismantle the collective bargaining rights granted to municipal employees and in large measure could defeat the laudable purposes of the Public Employees Collective Bargaining Act.” *Id.* at 985.

<sup>47</sup>*Id.* at 987-88.

<sup>48</sup>*Rocky River v. State Employment Relations Bd. (Rocky I)*, 530 N.E.2d 1 (Ohio 1988). This is where it, again, becomes particularly interesting to me recalling this history.

<sup>49</sup>*Id.* at 2.

<sup>50</sup>*Kettering*, 496 N.E.2d 983.

<sup>51</sup>*Rocky River*, 530 N.E.2d 1.

<sup>52</sup>OHIO REV. CODE ANN. § 4117.14(I) (LexisNexis 2007).

<sup>53</sup>*Rocky River*, 530 N.E.2d at 9.

<sup>54</sup>*Rocky River*, 530 N.E.2d 1.

River II”<sup>55</sup> and then (we affectionately called it) “Rocky III.”<sup>56</sup> Early in 1989, just after Justice Resnick arrived, we reconsidered or reheard Rocky River I, and I wrote what is now known as “Rocky IV.”<sup>57</sup> The holding was intentionally made broad because I wanted no mistakes this time. Thus, “the Ohio Public Employees’ Collective Bargaining Act, [Ohio Revised Code Ann. §] 4117, and specifically [Ohio Revised Code Ann. §] 4117.14(I), are constitutional as they fall within the General Assembly’s authority to enact employee welfare legislation pursuant to Section 34, Article II of the Ohio Constitution.”<sup>58</sup> We went on to say that the home-rule provision of the Ohio Constitution “may not be interposed to impair, limit or negate the Act.”<sup>59</sup> This leads us to where we are today.

### III. CONTRACT NEGOTIATIONS

#### A. *How and When Conducted*

Today we have contract negotiations. The Public Employees Collective Bargaining Act provides for recognized organizations<sup>60</sup> such as my organization, the Ohio Civil Service Employees Association (OCSEA), an affiliate of the American Federation of State, County, and Municipal Employees (AFSCME).<sup>61</sup> We are recognized as the exclusive bargaining agent for all unionized state employees other than some of the health care workers and police officers. As the executive director of that group, it is my job to negotiate, as the chief spokesperson, the contract for all those employees.<sup>62</sup> We then enter into collective bargaining.<sup>63</sup> We have a 21 person bargaining team that sits on one side, and the management sits on the other. We argue across the table, debate, and hope we can reach a conclusion. So the governmental unit, whatever it might be, generally has a recognized bargaining agent, and these are the people who end up negotiating these contracts.

Our current contract is very sizable. I have gone over every word and every page in this contract because it is amazing how words can be twisted—as lawyers we

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<sup>55</sup>Rocky River v. State Employment Relations Bd. (*Rocky II*), 533 N.E.2d 270 (Ohio 1988).

<sup>56</sup>Rocky River v. State Employment Relations Bd. (*Rocky III*), 535 N.E.2d 657 (Ohio 1989).

<sup>57</sup>Rocky River v. State Employment Relations Bd. (*Rocky IV*), 539 N.E.2d 103 (Ohio 1989).

<sup>58</sup>*Id.* at 119-20.

<sup>59</sup>*Id.* at 120.

<sup>60</sup>See OHIO REV. CODE ANN. § 4117.03-.06 (LexisNexis 2007).

<sup>61</sup>See Ohio Civil Service Employees Association, About Us, <http://www.ocsea.org/myocsea/aboutus/default.asp> (Last Visited May 1, 2007).

<sup>62</sup>On the other side happens to be a lawyer from Cleveland that Bob Taft paid \$360,000 to negotiate our contract and several other contracts.

<sup>63</sup>This is what goes on all over the state (only on a far smaller scale) in Toledo, Cleveland, or wherever it might be.

know this—and one has to watch what happens.<sup>64</sup> We began negotiating this contract early in December 2005 and finally concluded it just before March 1, 2006, when it went into effect.

*B. Negotiating the Current Contract*

I will expand upon the kinds of incidents that occur during negotiations. Some might say I'm telling stories out of school; but this is what happened, cold, unvarnished, and straight to the point. I was in the middle of negotiating this contract. I had my bargaining team, and I was moving them step-by-step to a conclusion. All of the preliminaries had gone on, and I finally was getting them to the point where we were going to say "yes" to a particular proposal. The fact finder, Dr. Harry Graham, and I had met, and we had spent a considerable amount of time on it. All of a sudden, while I am in front of my 21-member group and a whole assemblage of staff people, I felt a tap on my shoulder and looked around; it was Dr. Graham. Harry said to me, "Andy, you gotta come out." I responded, "Dr. Graham, don't you see that I'm busy? I have been working on this for four months, I finally have them to the point where they are ready to say yes or no, and we are going to decide upon this thing." "You've gotta come out," said Graham, "the governor's on the phone." I said, "I don't want to talk to the governor; he's got a lawyer, he doesn't need me, and besides that, he and I are going to think differently about this." He said, "No, you've gotta come out, and bring the president." So I got the president of the union, the vice president, and the secretary-treasurer. The president and I went into a room (they prohibited the secretary-treasurer and the vice president from being in the room), and the governor and/or his chief of staff were on the phone, and they said "Well, we're not going to give you what you've been asking for, but we can do it a different way. We'll agree to your demand." They were giving us one, one, and one percent for each of the three years, and my bottom line was double digits over three years. I knew exactly where the state was hiding the money because, as a councilman for the city of Toledo, I used to hide money. I had laid that all out for Dr. Graham, and so we were moving in the right direction; we had it done, and the governor, through his chief of staff, said "Ok. We'll settle everything else, take the wages to fact-finding, we'll nod to the fact finder to give you what you want, and it'll be over." I thought about that for a little while, walked out of the room, and I said, "Let me think about this."

I went to the lawyer on the other side and I said "You know, I don't think that's ethical." I said, "We have the case decided between us, the judge knew what the decision was going to be, and you want me to stand up and argue—put on a show for my people—that in fact this case hasn't been decided." I said, "I don't think that's ethical, and I don't want to do it." My counterpart explained, "We do it all the time." I said, "Well, you're not doing it this time, and I want you to know I called disciplinary council." "You did what?" I said, "Yes, I called disciplinary council, and he doesn't think it is very ethical either." I finally agreed to submit the case on briefs, which we did, and avoided the oral argument. This is the kind of thing one goes through in negotiations.

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<sup>64</sup>CONTRACT BETWEEN THE STATE OF OHIO AND THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, MARCH 1, 2006–FEBRUARY 28, 2009 (2006), available at [http://www.ocsea.org/Toolbox/files/Contract\\_2006.pdf](http://www.ocsea.org/Toolbox/files/Contract_2006.pdf) [hereinafter 2006-09 CONTRACT].

### C. Fact Finding

Now I will illustrate some other things. I mentioned fact finding. Here is how it works. Article 26 of our contract, which deals with “Holidays,” is an example of the kind of thing that can be tried. In our previous contract, section “26.03 - Eligibility for holiday pay,” read as follows: “Employees who are scheduled to work and call off sick the day of a holiday shall forfeit their right to holiday pay for that day.”<sup>65</sup> That seemed, to me, to be very unfair. What if an employee was scheduled to work on a holiday, suddenly had an attack of appendicitis, and was in the hospital on the operating table having his or her appendix removed? They were not going to be paid holiday pay. I would not settle for that section. I wanted the contract to include a provision whereby employees would get their holiday pay if there are extenuating circumstances that can be shown. The management finally agreed but also wanted additional language. Some of our people (and we have experts in this contract—37,000 people who, as you can imagine, know the contract as well as I know it) say “Oh, holiday. Labor Day is on Monday. Fine, I think I just won’t come in the Friday before, or I’ll take Tuesday off and I’ll have a long vacation.” Thus, the management decided that they wanted to do something about this. I sent this matter off to a subcommittee—all I wanted was the “extenuating circumstances.” In the new contract, 26.03 is now numbered 26.04 and reads as follows: “Employees who are scheduled to work and call off sick the day before, the day of, or the day after a holiday shall forfeit their right to holiday pay for that day, unless there is documented extenuating circumstances which prohibit the employee from reporting for duty.”<sup>66</sup> It is the last part that I wanted included, but the state wanted the “day before” and “day after a holiday” language to be sure that everybody showed up for work. Well, what’s the day before Monday? Sunday, obviously. The literal language there says “the day before” and “the day after.” “Oh no,” said the management, “We don’t mean that, we mean their last scheduled work day.” Thus, people who choose to read the contract literally call off on Friday and are, thus, off on Friday, Saturday, Sunday, and Monday.

This matter is going to arbitration shortly. One well known legal postulate is that the language is construed against the drafter.<sup>67</sup> Thus, I will be arguing this to the arbitrator, because the management drafted that language, and everyone in their right mind in this room knows that the day before Monday is Sunday, not Friday. So, this is the kind of thing that happens with the contract and illustrates why the act was so important: to provide a mechanism for us to settle these kinds of problems.

## IV. HOW TENUOUS THE SURVIVAL CORD

### A. Ohio Revised Code Section 4117.01(C)

Another challenge that occurs with public employee collective bargaining involves insidious changes to statutory law.<sup>68</sup> The first illustration is section

<sup>65</sup>CONTRACT BETWEEN THE STATE OF OHIO AND THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, MARCH 1, 2003–FEBRUARY 28, 2006 § 26.03 (2003).

<sup>66</sup>2006-09 CONTRACT, *supra* note 64, § 26.04.

<sup>67</sup>*See, e.g.*, 18 OH. JUR. 3D *Contracts* § 131 (2006).

<sup>68</sup>I was on the other side for a long time so I recognize the tricks!

4117.01(C)<sup>69</sup> of the Act, a section consisting of definitions. An earlier version of this law explained that “[p]ublic employee’ means any person . . . except” eighteen specially excepted categories of individuals.<sup>70</sup> (There were eighteen total subsections).<sup>71</sup> A version of the Act from one year later looks the same, except for seventeen new words that were added under a brand new nineteenth subsection: “‘Public employee’ means any person except . . . (19) Employees who must be licensed to practice law in this state to perform their duties as employees.”<sup>72</sup> Individuals falling into this category were no longer public employees for purposes of collective bargaining. This change in the law took 209 employees out of our bargaining unit. Most of them were hearing officers for the industrial commission—they were judges. They make the decision at the first level as to whether or not someone is entitled to worker’s compensation. The authority to appoint, hire, and fire these officers lies with a three person appointed board, the three person appointed board being appointed by the governor. One can just imagine sitting as a hearing officer, hearing a serious case regarding an employee who has the right to worker’s compensation, and the boss standing in the back of the room, saying “You’re going to decide how? Well, I’m gonna call the industrial commission!” They can then be fired by the industrial commission.

We could not live with this situation. I believe it was bad public policy. By this point in time, I had already left the Court, and the union had come to me asking whether I saw any way around it. After researching the issue, I found that it was a violation of the one subject rule.<sup>73</sup> They had buried this provision in the middle of a bill that was hundreds of pages long.<sup>74</sup> Thus, I prepared the lawsuit. As a matter of courtesy, I delivered it to the Governor’s chief of staff, Brian Hicks, whom I had known for a long time. I made an appointment, went in and said, “Brian, I’m here to tell you I’m going to sue you tomorrow.” He said, “Well, that’s nice, why are you going to do that?” And so I explained the situation to him, and he said, “Well, I did that.” When I asked him why, his reason was that he is “philosophically opposed to lawyers being in a bargaining unit.” This is how we made public policy in the State of Ohio (and that is why elections are very important). So what happened in this case? I had it held unconstitutional,<sup>75</sup> and the court ordered all of these people—by this time 257 employees—back into the bargaining unit. Then I negotiated a settlement, which became very expensive for the state. I obtained a \$200,000 check for the union for damages. We’re all taxpayers, and I should apologize; but it did not bother me at all, frankly, to not only take all of these people back into the bargaining unit, but to get this check for damages.

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<sup>69</sup>OHIO REV. CODE ANN. § 4117.01(C) (LexisNexis 2007).

<sup>70</sup>*Id.* (Anderson 2003).

<sup>71</sup>§ 4117.01(C)(1)-(18) (Anderson 2003).

<sup>72</sup>§ 4117.01(C)(19) (LexisNexis 2004).

<sup>73</sup>OHIO CONST. art. II, § 15(D).

<sup>74</sup>H.R. 675, 124th Gen. Assem., Reg. Sess. (Ohio 2002).

<sup>75</sup>*See State ex rel. Ohio AFL-CIO v. Ohio State Governor*, No. 04CVH02, 2005 WL 3964730 (Ohio C.P. July 13, 2005).

*B. Ohio Revised Code Section 4117.14(C)*

The story of section 4117.14(C)<sup>76</sup> of the act is an example of the insidiousness that can be involved in these actions, and another example of why I am endeavoring to make an academically defensible plea—nonetheless, I feel quite strongly about it. Section 4117.14(C) reads as follows: “In the event the parties are unable to reach an agreement, they may submit, at any time prior to forty-five days before the expiration date of the collective bargaining agreement, [their] dispute to any mutually agreed upon settlement procedure . . . .”<sup>77</sup> The settlement procedure happens to be the fact finding process. The fact-finder is called in, makes a report, and the fact-finding panel has an obligation to submit it to the labor organization, in this case us, and to the legislative body. Prior to amendment, section 4117.14(C)(6)<sup>78</sup> provided that “[n]ot later than seven days after the findings and recommendations are sent, the legislative body, by a three-fifths vote of its total membership, and in the case of the public employee organization, the membership, by a three-fifths vote of the total membership, may reject the recommendations.” Thus, we could reject, there will be no contract, and then would have the right to strike. This has proven to be a very interesting provision, however. Obviously, I know what three-fifths of the total membership is in my union, and I must get three-fifths to reject. When I helped write this act in some of its early stages, we built this provision in so we could prevent most public employee strikes; but we also wanted to provide a mechanism to settle the disputes. What did they do here? The interesting part of the language involves the words “three-fifths” of “the legislative body.”<sup>79</sup> Few would not think that the legislative body of the state of Ohio is the General Assembly. Obviously we know it is the General Assembly. Guess what they did—in the amended version of this same statute, the language at the beginning of subsection C is the same;<sup>80</sup> but 4117.14(C)(6) was, interestingly, divided into two subsections: (6)(a),<sup>81</sup> which is the same as old subsection (6),<sup>82</sup> and a new subsection (6)(b).<sup>83</sup> And with another 22 well defined insidious words, they said: “As used in division (C)(6)(a) of this section, ‘legislative body’ means the controlling board when the state or any of its agencies, authorities, commissions, boards, or other branch of public employment is party to the fact-finding process.”<sup>84</sup> Few people have heard of the controlling board. The controlling board is 7 people.<sup>85</sup> All the

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<sup>76</sup>§ 4117.14(C) (LexisNexis 2007).

<sup>77</sup>*Id.*

<sup>78</sup>§ 4117.14(C)(6) (Anderson 2003).

<sup>79</sup>*Id.*

<sup>80</sup>§ 4117.14(C) (LexisNexis 2004).

<sup>81</sup>§ 4117.14(C)(6)(a) (LexisNexis 2004).

<sup>82</sup>§ 4117.14(C)(6) (Anderson 2003).

<sup>83</sup>§ 4117.14(C)(6)(b) (LexisNexis 2004).

<sup>84</sup>*Id.*

<sup>85</sup>*See* OHIO REV. CODE ANN. § 127.12 (LexisNexis 2007):

There is hereby created a controlling board consisting of the director of budget and management or an employee of the office of budget and management designated by

management has to do is take the matter to the controlling board where they have 5 votes, and 5 of 7 is the necessary three-fifths. In arguing the case, I said to the judge, "That's not the way the system is supposed to work; and besides, they didn't follow the law because they didn't follow the one subject rule." He said "I think that's bad too," and Judge Bessey threw this out too.<sup>86</sup> Unfortunately, this provision is still in the law because they re-passed the section.<sup>87</sup> I explain all of this to show what I believe is really important with regard to the act.

#### V. CONCLUSION

I have endeavored to be objective in my presentation to you. Just know, however, I am not a neutral on the subject of collective bargaining for public employees. I am persuaded to my point of view not just because of my current vested interest, but also because I sincerely believe the Act to be good public policy, soundly supported by Constitutional dictates, and implemented by fair and balanced legislation.

Thomas Fuller, a seventeenth century English clergyman, once said: "Policy consists in serving God in such a manner as not to offend the devil."<sup>88</sup> I follow this admonition in my everyday work, and I have tried to follow it in this Article.

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the director, the chairman of the finance-appropriations committee of the house of representatives, the chairman of the finance committee of the senate, two members of the house of representatives appointed by the speaker, one from the majority party and one from the minority party, and two members of the senate appointed by the president, one from the majority party and one from the minority party.

*Id.*

<sup>86</sup>See *State ex rel. Ohio AFL-CIO v. Ohio State Governor*, No. 04CVH02, 2005 WL 3964730 (Ohio C.P. July 13, 2005).

<sup>87</sup>§ 4117.14(C)(6)(b) (LexisNexis 2007).

<sup>88</sup>Thomas Fuller, *quoted in* THE INTERNATIONAL DICTIONARY OF THOUGHTS 562 (John P. Bradley et al. eds., J.G. Ferguson Publ'g Co. 1969).