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Although the Washington State Legislature has enacted several statutes providing for collective bargaining in public employment, until recently it avoided the complex issues arising out of breakdowns in negotiations between local school boards and certificated teachers' representatives. In 1975, after considerable debate and a number of unsuccessful attempts, the legislature adopted the Educational Employment Relations Act (EERA) defining the rights and duties of parties to collective bargaining in the education sector. The measure is a response to the increasing militancy of teachers as a professional employee group, the apparent ineffectiveness of anti-strike injunctions, and the lack of inducements to bargain in good faith. These factors created the need for a more effective and comprehensive approach to the unique problems of labor relations in public education. Unfortunately, the impasse resolution procedures outlined in the statute are an inadequate response to the problems underlying dispute settlement in the education sector.

This note evaluates the impasse resolution mechanism provided in the statute and concludes that the approaches employed by the Act

1. See, e.g., WASH. REV. CODE § 41.06.010 et seq. (state employees generally); id. § 41.56.010 et seq. (police, fire, and local employees); id. § 28B.52.010 et seq. (community college academic employees). For a general discussion of the problems and theories of public employee labor relations see Symposium: Labor Relations in the Public Sector, 67 MICH. L. REV. 891 (1969).


3. Ch. 288, [1975] Wash. Laws, 1st Ex. Sess. 1227. Governor Evans exercised a partial veto as to the provision creating an educational employment relations commission (§ 4). The members of the commission were to be appointed by the governor with the consent of the senate. Governor Evans objected to a proviso in that section that would, in effect, have permitted the senate to reject an appointee to the commission by inaction. See Note (Governor's explanation of partial veto), id. at 1238. However, in a subsequent "mini-session," the legislature created a public employment [labor] relations commission. Ch. 5, [1975] Wash. Laws, 2d Ex. Sess. 6. By virtue of the proviso in § 3(3) of the Educational Employment Relations Act, this new commission effectively replaces the commission which would have been created by the EERA. See ch. 288, § 3(3), [1975] Wash. Laws, 1st Ex. Sess. 1228. Thus, the major portions of the EERA will become effective on Jan. 1, 1976, id. § 26 at 1238, while the legislation creating the commission has been effective since Sept. 8, 1975, ch. 5, § 9, [1975] Wash. Laws, 2d Ex. Sess. 9, and that prescribing certain of its duties under the EERA has been effective since Sept. 30, 1975, see ch. 288, § 26, [1975] Wash. Laws, 1st Ex. Sess. 1238.
Educational Employment Relations Act

will not substantially reduce the judicial role in resolving negotiation impasses. The judicial role in dispute settlement will be examined, particularly with regard to the issuance of injunctions against teachers’ strikes, either threatened or in progress. The underlying premise is twofold: (1) school districts should be immune to strikes only when the public health or safety are endangered; and (2) the degree of proof requisite to support injunctive relief from a teachers’ strike should reflect such a standard.

I. PREVALENT STATUTORY PATTERNS

Public employee bargaining statutes vary in coverage from one specific occupational group, such as teachers, to statutes which are gener-

4. See Note, Teachers’ Strikes—A New Militancy, 43 Notre Dame Lawyer 367 (1968). According to the Washington State Superintendent of Public Instruction, teachers’ strikes in Washington have occurred over the last four years as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>School District</th>
<th>Duration (days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>Aberdeen</td>
<td>1</td>
</tr>
<tr>
<td>1973</td>
<td>Evergreen, Vancouver</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Elma</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Edmonds</td>
<td>1</td>
</tr>
<tr>
<td>1974</td>
<td>Central Kitsap, Bremerton</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Mead, Spokane</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>Goldendale</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Yelm</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Kelso</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Mukilteo</td>
<td>2 (court delayed school opening 2 days)</td>
</tr>
<tr>
<td></td>
<td>Federal Way</td>
<td>6 (court delayed school opening 1 week)</td>
</tr>
<tr>
<td></td>
<td>Tacoma</td>
<td>3 school days (9 days total)</td>
</tr>
<tr>
<td>1975</td>
<td>Clover Park</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>South Kitsap</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>West Valley, Yakima</td>
<td>10</td>
</tr>
</tbody>
</table>

Letters from Superintendent of Public Instruction to author, October 16, 1975, on file at the offices of the Washington Law Review.

5. In most cases one of the conditions of settlement of the strike is an amnesty agreement exculpating the strikers’ illegal conduct. But see Mead School Dist. No. 354 v. Mead Educ. Ass’n, 85 Wn. 2d 278, 534 P.2d 561 (1975) (contempt citations for the violation of an injunction of a teachers’ strike survive the subsequent invalidation of the injunction).

The probable ineffectiveness of injunctions in teachers’ strikes must also be considered by trial judges. For example, “The teachers [of the Clover Park School District] stated publicly before the matter came to court that they would not comply with a court issued injunction and were ready to go to jail if necessary to secure justice.” Letter from Judge E. Albert Morrison, Pierce County Superior Court, to author, Sept. 22, 1975, on file at the offices of the Washington Law Review.
ally applicable to all state employees. Washington, like most other states, has enacted separate statutes for different public employee groups. Only five states have extended a limited strike right to public educators; however, even those jurisdictions permit such action only after statutory impasse resolution procedures have been exhausted. Those jurisdictions which have not provided a limited strike right have placed teachers in a difficult negotiating position by permitting them to unionize and participate in collective negotiations while contemporaneously prohibiting teachers' strikes. As alternatives to the strike power, most states have enacted statutes calling for mediation, factfinding, arbitration, mutually-determined voluntary systems, or some combination of these procedures, aimed at facilitating impasse resolution.

Historically, strikes by public employees have been prohibited in most jurisdictions either by statute or case law. Jurisdictions which

7. See statutes cited in note 1 supra.
8. See ALASKA STAT. § 23.40.200 (1972) (granting the right to strike to certain semi- and nonessential public employees if not detrimental to the public health, safety, and welfare); HAWAII REV. STAT. § 89–12 (Supp. 1974) (permitting strikes by public employees, including teachers, if there is no danger to the public health and safety; strike prohibited for sixty days after factfinding report is issued); ORE. REV. STAT. § 243.726 (1974) (granting a limited right to strike for employees for which final and binding arbitration is not provided; injunctive relief granted where the strike presents clear danger to the public health, safety, and welfare); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon's Supp. 1975) (authorizing strikes by public employees if there is no clear or present danger to public health and safety and if the collective bargaining process is exhausted); VT. STAT. ANN. tit. 16, § 2010 (Supp. 1975) (allowing teachers to strike unless there is a "clear and present danger to a sound program of education").
9. See, e.g., ALASKA STAT. § 23.40.200 (a)(3)(c) (1972) (providing that strike action is permitted only after employee organizations and public employers have engaged in mediation); ORE. REV. STAT. § 243.726 (1974) (providing that mediation, factfinding, and other statutory resolution procedures must have been exhausted before the strike prohibition is removed).
10. Although the prohibition of certificated teacher-employee strikes is not the central concern of this note, a discussion of the issue is important for two reasons: (1) injunctions of teachers' strikes have tended to follow as a matter of course once the court has determined the strike to be illegal; and (2) the strength of the rationale supporting the illegality of public employee strikes may influence the equitable context in which courts determine whether injunctions should be granted to avert threatened teachers' strikes. See Part III-B infra.
prohibit strikes by teachers have developed a variety of justifications for the strike prohibition. Early cases relied on what has been labeled the "sovereignty" doctrine, the notion that a strike by teachers constitutes a direct affront to the government's authority. Recent decisions, however, have disregarded the sovereignty doctrine and formulated justifications which relate more closely to protection of the public welfare. The rationale of these decisions is that disruption of certain governmental functions impairs the public health and safety; strikes by public employees that provide essential services are therefore intolerable. Other justifications offered in support of the teachers' strike prohibition include claims that: (1) the lack of a profit motive on the part of the school district results in inherently equal bargaining relationships and makes the strike right unnecessary; (2) an exten-
sion of the strike right to public educators is impermissable because school districts must negotiate within legislatively determined budgetary constraints; if teachers were permitted to strike, the decline in prestige suffered by government as a result of the coercive delegation of power might undermine the school district's authority; and notable distinctions between private and public employment, such as the absence of market mechanisms to restrict public employees' demands, make granting the strike right to teachers imprudent.

II. THE WASHINGTON SCHEME

A. Statutory Analysis

The new statute repeals the Professional Negotiations Act—the first Washington statute to specifically extend to certificated teachers the right to "meet, confer, and negotiate" with their school boards in order to communicate their professional judgment regarding proposed school policy matters. The EERA extends those rights to all certificated employees of a school district and imposes the duty of good faith bargaining at reasonable times with respect to wages, hours, and terms and conditions of employment on both district directors and

16. Taylor, Public Employment: Strikes or Procedures?, 20 IND. & LAB. REL. REV. 617, 619 (1967). One commentator has criticized this justification on the grounds that potential budgetary problems could be alleviated by the passage of statutes requiring statutory impasse procedures to be exhausted prior to strike and prescribing time limitations on the negotiations. See Note, supra note 6, at 453. See also Ch. 288, § 3(2), [1975] Wash. Laws, 1st Ex. Sess. 1228, which mandates that bargaining meetings take place "at reasonable times in light of the time limitations of the budget-making process ...


18. See id. at 186, 243 N.E.2d at 133-34, 295 N.Y.S.2d at 909, where the court stated:

[T]he necessity for preventing goods or services being priced out of the market may have a deterrent effect upon collective bargaining negotiations in the private sector, whereas, in the public sector, the market place has no such restraining effect upon the negotiations ....

Although the market restraints in the public sector are different from those influencing private employees, public employees are subject to various equivalent restraints: (1) the individual striker must be able to withstand the loss of wages accompanying the strike; (2) the potential of antagonizing the public (the "ultimate" employer) may restrict strike activity; and (3) in certain public services there is market competition from private contractors providing the same services.


190
Educational Employment Relations Act

teacher bargaining representatives. The EERA does not define the scope of bargaining, permitting the commission created to administer the Act to decide disputes as to which items are mandatory subjects of bargaining.

As with most state collective bargaining statutes, the substance of the EERA is contained in the impasse resolution procedure. Central to the operation of the Act is a three-member employment relations commission which, among other duties, administers mediation and factfinding with recommendations. The parties to an agreement may provide for binding arbitration of disputes which arise over the operation of the agreement. The EERA also provides for flexible procedural mechanisms allowing districts and teachers' representatives to

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20. The right to collectively bargain with the school board should not be taken to imply a concomitant right to strike. Port of Seattle v. ILWU, 52 Wn. 2d 317, 321, 324 P.2d 1099, 1102 (1958). But see Local 266, IBEW v. Salt River Proj. Agric. Improvement & Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954) (collective bargaining and the strike right held to be inseparable). See also Clover Park School Dist. 400 v. Clover Park Educ. Ass'n, No. 238348 (Wash. Super. Ct., Pierce County, Sept. 16, 1975) (implying that unless the right of teachers to strike is expressly denied, it is always available).

21. Ch. 288, § 3(2), [1975] Wash. Laws, 1st Ex. Sess. 1228. The EERA does provide, however, "[t]hat prior law, practice or interpretation shall be neither restrictive, expansive, nor determinative with respect to the scope of bargaining." Id.


23. The legislative evolution of the commission is discussed in note 3 supra.


25. Ch. 288, § 13(2), [1975] Wash. Laws, 1st Ex. Sess. 1234. If mediation proves unsuccessful in effectuating settlement of the controversy, either party may request factfinding with advisory recommendations which can be made public by any party to the dispute if settlement is not reached within five days after the recommendations are received. Id. § 13. Presumably the potential release to the public of the recommendations and subsequent public pressure for settlement of the dispute will foster good faith consideration of the recommendations by the disputants.

Factfinding is generally more investigative than is mediation. The factfinder is usually empowered to call hearings, issue subpoenas, hear oral argument, and employ other judicial methods of discovery. Under the Act, the factfinder will hear proposals and argument from both parties after which he or she will suggest modifications and make recommendations as to terms of settlement. For a general discussion of factfinding in public employment see Davey, The Use of Neutrals in the Public Sector, 20 LAB. L.J. 529 (1969); Gould, Public Employment: Mediation, Factfinding and Arbitration, 55 A.B.A.J. 835 (1969); Jossen, Factfinding: Is It Adjudication or Adjustment?, 24 ARB. J. 106 (1969); McKelvey, Fact Finding in Public Employment Disputes: Promise or Illusion?, 22 IND. & LAB. REL. REV. 528 (1969).

substitute their own mutually-determined methods of impasse resolution which will control over conflicting statutory procedures. 27

The practical effect of the EERA's repeal of prior law is minimized by the similarity the new impasse mechanism bears to the old. However, one significant change has been made. Prior law provided for nonbinding recommendations by an ad hoc committee appointed by the State Superintendent of Public Instruction. If those recommendations were rejected by either party to the dispute, statutory alternatives were unavailable 28 and strikes often resulted. From the teachers' viewpoint, the Superintendent's interest in maintaining the continued availability of public education biased the negotiations in favor of the district. Ideally, employees should be able to participate in selecting the neutral third parties to mediate the controversy. Under the new statute, either the district directors or the teachers' representative may declare that an impasse has been reached and request mediation assistance from the public employment relations commission. 29 The parties have the opportunity to mutually select mediators or factfinders; if they are unable to agree on a mediator, the commission will appoint one. 30 Shifting the selection process to an impartial agency should do much to eliminate teachers' fears that the mediator appointed will have a school district bias.

B. Shortcomings and Potential Problems

Perhaps the most frequent criticism of settlement procedures which rely on neutral third parties to resolve negotiation impasses is that such procedures, particularly factfinding and arbitration, undermine good faith bargaining in the initial stages of negotiation. 31 This result is to be expected where the relative bargaining strength of the parties is grossly disproportionate, where a government-appointed mediator is unacceptable to one of the disputants because of a perceived bias, or where prior bargaining experience indicates that there are advantages

27. Id., § 13(5).
30. Id.
Educational Employment Relations Act

to be gained by pushing negotiations to the factfinding or arbitration stage.\textsuperscript{32}

Mediation has generally been recognized as an effective means of dispute settlement in the early stages of a controversy,\textsuperscript{33} yet many difficult substantive issues may not be resolved solely by mediation because the process is dependent entirely upon the willingness of the bargaining agents to voluntarily resolve conflicts. Anticipating the limited effectiveness of mediation, parties to the dispute may thus withhold concessions during mediation in the hope that factfinding or arbitration will result in a more favorable settlement.\textsuperscript{34} There is consequently a very real possibility that "factfinding may become . . . an addictive habit, the first and not the final step in collective negotiations."\textsuperscript{35} Despite its limited effectiveness, however, mediation appears to be the most reasonable method of initiating further communication between disputants.

Recognizing that mediation, while successful in narrowing the parties' differences and encouraging further negotiations, would be inadequate to resolve difficult bargaining questions, the Washington Legislature included factfinding as a further step in resolving negotiation impasses. Factfinding bears a strong procedural resemblance to arbitration, but the process lacks the finality of either voluntary or compulsory arbitration.\textsuperscript{36} In addition, factfinding and mediation are interdependent processes, thereby clouding an assessment of the value of each process independent of the other.\textsuperscript{37} For this and other reasons, the combination of mediation and factfinding has been adopted in some form in most jurisdictions.\textsuperscript{38}

\textsuperscript{32} Bernstein, \textit{supra} note 31, at 467, suggests that arbitration generally results in more favorable settlements for the public employee groups. He reasons that arbitrators generally fix equitable salaries for the employees; public officials then determine the amount of public service to be purchased at this price. However, curtailment of services generally does not occur. Thus, Bernstein concludes that "the wage decision and the resource allocation decision are inevitably linked." \textit{Id.}

\textsuperscript{33} See Note, \textit{supra} note 6, at 453; Stutz, \textit{The Resolution of Impasses in the Public Sector}, 1 \textit{Urban Lawyer} 320 (1969).


\textsuperscript{36} See note 25 supra.

\textsuperscript{37} Dep't of Labor, \textit{Dispute Settlement in the Public Sector: The State-of-the-Art} 57 (1972). Because mediation and factfinding are consecutive processes, it is difficult to ascertain, after the fact, which process was most instrumental in achieving settlement.

\textsuperscript{38} See Note, \textit{supra} note 6, at 449.
The most attractive feature of factfinding as a mechanism to facilitate dispute resolution is its success in resolving disputes short of strike in the public sector generally.\textsuperscript{39} There are, however, three shortcomings of an impasse resolution mechanism employing mediation followed by factfinding. First, the processes are dependent upon voluntary settlement of complex bargaining issues. If the bargaining representatives are inexperienced in effectively utilizing the resolution procedures, settlement may not result from either mediation or factfinding, and the possibility of a strike will be presented.\textsuperscript{40} Depending on the public service involved, an interruption may or may not be tolerable.\textsuperscript{41} A second problem of mediation-factfinding is the possible failure of the members of the represented group to ratify the bargaining representative's acceptance of a factfinder's recommendations: because the recommendations are not binding on the disputants, there is no assurance that they will, even if accepted, be implemented by the parties.\textsuperscript{42} Finally, mediation and factfinding are inadequate to stimulate good faith negotiations because neither procedure imposes sufficient social and economic costs upon the disputants.\textsuperscript{43}

The most serious deficiency of the EERA, however, is that the mediation-factfinding impasse resolution mechanism, as a purely voluntary procedure, is an inadequate alternative to the strike power.\textsuperscript{44} The authorization of voluntary settlement procedures as alternatives to those provided for in the Act\textsuperscript{45} is commendable. Nevertheless, it is unlikely that the parties to a negotiations impasse will mutually agree to submit the dispute to, for example, binding arbitration, in view of the continued availability to the employer of anti-strike injunctions.

\textsuperscript{39} See Dept. of Labor, \textit{Dispute Settlement in the Public Sector: The State-of-the-Art} 60 (1972), and sources cited therein.
\textsuperscript{40} Cf. Zack, \textit{supra} note 34, at 113.
\textsuperscript{41} See Part III-B-3 infra.
\textsuperscript{42} See note 25 supra.
\textsuperscript{43} A strike by the public employee group places the cost of the disagreement on both disputants. The employer may anticipate public pressure as a result of the interruption of services that he is expected to provide. The employee, on the other hand, must anticipate at least a temporary lowering of his income. Neither mediation nor factfinding impose such social and economic pressures.
\textsuperscript{44} The shortcomings of statutes employing mediation-factfinding resolution procedures are succinctly stated in Lev, \textit{supra} note 22, at 774:

\begin{quote}
In the main, the statutes have not worked because they merely postpone the eventual strike confrontation by creating factfinding commissions or compulsory arbitration tribunals in which the employees have no trust. All contain pious statements about the virtues of good faith bargaining which barely conceal the real legislative hope that the problems will disappear.
\end{quote}
Obtaining an injunction against a threatened strike would not only be more advantageous to the district from the standpoint of time and convenience, but would also allow it to avoid the problems typically associated with binding arbitration in public employment negotiations.  

If a balance is to be achieved between the bargaining positions of school districts and teachers, it would be advisable to allow the teachers' representatives to unilaterally select binding arbitration as the mode of dispute settlement. Such an approach would eliminate the control, reinforced by the anti-strike injunction, currently exercised by districts in setting wages, hours, and working conditions and yet provide a viable alternative to the strike power. Inasmuch as the EERA allows, but does not require, such a resolution process, it does not supply an adequate substitute for the strike power. The absence in the EERA of an adequate quid pro quo for restraint in exercise of the strike power may cause teachers to continue to rely on the threat of strike to buttress their collective bargaining position. Consequently, the judicial role in resolving disputes that remain unresolved by the Act's impasse procedures will continue undiminished.

III. THE PUBLIC EMPLOYEE STRIKE PROHIBITION IN WASHINGTON

A. The Problem—Port of Seattle

In the absence of dispositive impasse resolution procedures, school boards typically have invoked the equity powers of the judicial system to avoid the potentially harmful effects of collective work stoppages

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46. Various criticisms of arbitration as a settlement mechanism have been made: (1) availability of the arbitral process may have a chilling impact upon preliminary negotiations; (2) arbitration arguably constitutes an impermissible delegation of legislative discretion; (3) in anticipation of a compromise solution, the parties may adopt extreme positions during initial bargaining efforts. See Note, supra note 6, at 460–63.

47. See Zack, Dispute Settlement in the Public Sector, 14 N.Y.L.F. 249, 268 (1968). Even with the strike option, teachers are at a substantial bargaining disadvantage in light of the ready availability of anti-strike injunctions. Although violation of injunctions by teachers' groups usually results in the issuance of contempt citations, final settlements often contain amnesty agreements exculpating violators of the injunction. Nevertheless, the possibility of substantial fines for contempt (in the event that the court ignores the amnesty agreement) exerts pressure on the teachers' bargaining agents, causing them to moderate their demands.

48. The EERA neither expressly permits nor prohibits strikes by public school teachers. See note 71 infra.
by certificated teachers. In *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, the court stated that "the primary reason for the modern day vitality of the principle that the government is immune to strikes is to safeguard and protect public health and safety." Following this decision, Washington courts have, with one exception, held that strikes by certificated teachers are intolerable. *Port of Seattle* originated when plaintiff municipal corporation sought to enjoin defendant union from striking and picketing. The trial court concluded that the threatened strike was illegal, and enjoined it because the port was suffering "immediate, substantial, and irreparable loss and damage." On appeal, the court rejected the union's argument that the maintenance of the port was merely a proprietary function of the municipality, and that as such the traditional governmental strike immunity should not preclude a strike by port employees against proprietary activities. Although justifying the public employer's strike immunity as necessary to protect public health and safety, the court deemed itself unable to accurately determine the effect on public health and safety of a strike against a particular municipal function. It asserted that the legislature should make that de-

49. 52 Wn. 2d 317, 324 P.2d 1099 (1958).
50. Id. at 322, 324 P.2d at 1102.
51. The exception is Clover Park School Dist. 400 v. Clover Park Educ. Ass'n, No. 238548 (Wash. Super. Ct., Pierce County, Sept. 16, 1975), discussed in text accompanying notes 83-88 infra. In most cases prior to *Clover Park*, the courts did more than issue an injunction against the strike. In addition, judges often attempted to minimize the teachers' reduction in bargaining power by invoking WASH. REV. CODE § 7.40.070 (1974) (allowing the court to impose terms and conditions upon party obtaining injunction), requiring the parties to submit the dispute to mediation as a condition to the issuance of a permanent injunction.
52. That school districts are municipal or quasi-municipal corporations was reaffirmed in *Noe v. Edmonds School Dist.* 15, 83 Wn. 2d 97, 515 P.2d 977 (1973) (upholding school board's discretionary power to discipline teachers).
53. 52 Wn. 2d 317, 319, 324 P.2d 1099, 1101 (1958). Although the state supreme court upheld the injunction despite the absence of evidence in the trial court record regarding the strike's effect on the public health and safety, it is important to note that the injunction was proper only because "the resultant damage to the port" was substantial. Id. at 323, 324 P.2d at 1103 (emphasis added). The court's use of that language raises the question of whether the court simply presumed harm to the public health and safety as a result of the strike and used "damage to the port" as a justification for the desired result. In light of the skeletal record below, the conclusion seems inescapable that the *Port of Seattle* decision necessarily rested on the assumption that, as a matter of public policy, a strike by port workers could not be tolerated.
54. Brief for Appellant at 17-18, *Port of Seattle*, 52 Wn. 2d 317, 324 P.2d 1099 (1958). The court indicated that the distinction between "governmental" and "proprietary" functions related primarily to the erosion of sovereign immunity in tort law and declared the policy factors to be inapplicable to the case at hand. 52 Wn. 2d at 320, 324 P.2d at 1101.
55. 52 Wn. 2d at 322, 324 P.2d at 1104.
Educational Employment Relations Act
termination and address the complex public policy issues involved in strikes against governmental employers. Accordingly, the court concluded that in the absence of legislation extending the strike right to public employees it was compelled to uphold the trial court's injunction.

1. Alternative interpretations

Although a broad interpretation of Port of Seattle warrants a per se prohibition of all strikes by public employees, the facts of the case militate strongly in favor of a more restrictive interpretation: only those strikes that are potentially detrimental to the public health and safety should be enjoined. Thus, Washington courts are potentially confronted with two problems in strike injunction cases. First, a court must determine whether Port of Seattle prohibits all strikes by public employees or only those strikes adversely affecting the public health and safety. Second, if the court accepts the latter interpretation, it must ascertain whether the school district's showing of harm is sufficient to justify injunctive relief under the Port of Seattle requirements, that is, whether the strike constitutes a threat to the public health and safety. The second problem is particularly complex in the case of a teachers' strike because the injuries alleged by school district officials in support of petitions for injunction are generally intangible.

Trial courts have not utilized this two-part analysis when deciding teacher strike injunction suits simply because they have interpreted Port of Seattle too broadly. Once it is assumed that that case dictates a blanket prohibition of strikes by public employees, it follows as a matter of course that an injunction must be issued in every case. Such a truncated approach does not give adequate deference to the relative equities of the parties, nor does it require the complainant school district to provide the degree of proof typically required to support a petition for injunctive relief.

56. Id. at 323, 324 P.2d at 1103.
57. Id.
58. See Mead School Dist. 354 v. Mead Educ. Ass'n, 85 Wn. 2d 140, 530 P.2d 302 (1975) (teachers' strike “disrupting” the operations of the school district and “dislocating” the plans of students and parents held not to create an “emergency” under the language of the Open Public Meetings Act of 1971).
59. See text accompanying notes 75–79 infra.
60. See notes 78–79 and accompanying text infra.
2. Port of Seattle's progeny

Although the court in Port of Seattle correctly concluded that the modern justification for governmental strike immunity is protection of the public health and safety, such protection does not require a per se prohibition of public employee strikes, nor can a judicially-formulated prohibition of these strikes be justified by the ambiguous language of Port of Seattle. To expand governmental immunity beyond situations where a threat to the public health and safety exists and judicially prohibit all public employee strikes has the same effect as "legislating" against those strikes, a function that the Port of Seattle court expressly disclaimed.

Unfortunately, the Washington Supreme Court has perpetuated the uncertainty it created in Port of Seattle. At issue in Roza Irrigation District v. State was whether the statute governing collective bargaining for general public employees applies to the employees of irrigation districts, a question the court unanimously answered in the affirmative. In dictum, however, citing only Port of Seattle for authority, Justice Rosellini stated for the court: "The legislature must have been aware that this court had held that public employees, while they have the right to organize, do not have the right to strike." The Roza court thus interpreted Port of Seattle as having established a per se rule against strikes by public employees.

Two years after Roza the court buttressed the argument for a public health and safety limitation on the prohibition of public employee strikes. In Operating Engineers Local 286 v. Sand Point

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61. See Parts III-B-2 & -3 infra.
62. The Washington Supreme Court has never expressly or implicitly held that public employee strikes are illegal. In Port of Seattle the court held only that the trial judge did not abuse his discretion when he enjoined the strike by longshoremen. 52 Wn. 2d at 323, 324 P.2d at 1103. See Clover Park School Dist. 400 v. Clover Park Educ. Ass'n, No. 238548, at 14 (Wash. Super. Ct., Pierce County, Sept. 16, 1975).
63. 52 Wn. 2d at 323, 324 P.2d at 1103. Regarding the hazards of judicial legislation in the field of labor law see Peck, Judicial Creativity and State Labor Law, 40 WASH. L. REV. 743 (1965).
64. 80 Wn. 2d 633, 497 P.2d 166 (1972).
65. The statute under consideration in Roza was WASH. REV. CODE ch. 41.56 (1974), in which the legislature expressly disavowed any grant of the right to strike, id. § 41.56.120, though it permitted public employees to organize, id. §§ 41.56.010 & .040. However, teachers are not within the class of public employees covered by id. ch. 41.56. See id. § 41.56.020, the Reviser's Note which follows it, and sections cross-referenced therein; Roza, 80 Wn. 2d at 640, 497 P.2d at 170.
66. 80 Wn. 2d at 640, 497 P.2d at 170.
67. Id. at 638, 497 P.2d at 169 (emphasis added).
Educational Employment Relations Act

Country Club,68 Justice Rosellini, again writing for the majority and again in dictum, stated:69

In 1967, after this court had handed down its decision in Port of Seattle . . . holding that public employees may not strike if the public health and safety are involved, the legislature enacted RCW 41.56, governing public employees' collective bargaining, and imposing upon the employer, in RCW 41.56.100, a duty of engaging in such bargaining. At the same time it expressly refrained from granting the right to strike.

The stipulation that public employee strikes are unlawful if the public health and safety are “involved” is perplexing. Most notably, the court did not purport to establish a requirement that the public health and safety be harmed before the strike is held impermissible. In virtually all strikes, in the private as well as the public sector, the public health and safety are affected to some degree. Taken at face value, then, the application of such a broad standard to preclude strikes by public employees is tantamount to a per se prohibition of public employee strikes. As with the earlier decision in Port of Seattle, however, the “involved” language of Operating Engineers can be construed so that it qualifies, rather than merely restates, the general prohibition.

Inasmuch as the grant of injunctive relief in Port of Seattle was based on protection of the public health and safety, the involvement of the public health and safety contemplated in Operating Engineers should be construed to mean that before a teachers' strike is enjoined, the complainant must demonstrate specific potential harm to the public health and safety. A requirement that the complainant merely show “involvement” of the public health and safety would be equivalent to, and therefore subject to the same criticisms as, a judicially-formulated per se strike prohibition.70 Unless injunctive relief in teachers' strikes is predicated on a showing that the public health and safety are suffering, or are about to suffer, substantial and irreparable injury as a result of the strike, Washington trial courts must, largely on the basis of a single ambiguous supreme court opinion, continue to

68. 83 Wn. 2d 498, 519 P. 2d 985 (1974).
69. Id. at 502, 519 P. 2d at 988 (emphasis added). See also note 65 supra. Operating Engineers involved the efforts of golf course maintenance workers to organize and engage in collective bargaining.
70. See Parts III-B-2 & -3 infra. Cf. notes 15 & 16 supra.
abdicate their traditional role in considering petitions for the injunction of teachers' strikes.\(^7\)

B. Injunctive Relief in Certificated Teacher-Employee Strikes

1. Standard for injunctive relief in Washington

Assuming that a trial court correctly decides that teachers' strikes are not per se unlawful, the degree of proof necessary to justify the issuance of an injunction is of crucial importance. In injunction suits generally, the complainant must show that irreparable and substantial injury is occurring or will occur in the near future if relief is not granted\(^7\) and that other legal remedies are inadequate.\(^3\) In teachers' strike cases, however, most Washington trial courts have required

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\(^1\) The legislature's inability to resolve the politically volatile strike issue coupled with the judicial ambiguity discussed in the text has left to the superior courts the application of a discretionary standard without guiding criteria. The word "strike" does not appear in the EERA, and the fate of predecessor proposals strongly suggests that the inclusion of strike language was a primary reason for their demise. In view of the absence of strike language in the new EERA, lower courts should no longer be constrained by the legislature's inactivity and should reassess the meaning of Port of Seattle in the context of teachers' strikes. See, e.g., Clover Park School Dist. 400 v. Clover Park Educ. Ass'n, No. 238548, at 13–14 (Wash. Super. Ct., Pierce County, Sept. 16, 1975), discussed in text accompanying notes 83–88 infra.

\(^2\) Port of Seattle, 52 Wn. 2d at 319, 324 P.2d at 1100.

\(^3\) See note 78 infra. Evidence in support of the complaint usually consists of affidavits, testimony or other verified statements by school board officials or teacher representatives relating to the character and degree of the alleged impending harm. Cf. WASH. REV. CODE § 7.40.060 (1974) (parties may read affidavits at a hearing on injunction). Although the character and degree of harm requisite to invoke equity powers of the court are in large measure left to the trial judge's discretion, id. § 7.40.020 (the general injunction statute) sets forth certain guidelines to which the judge must conform when he makes that decision:

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's right respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion.

The statute's requirement that the activity, or threatened activity, complained of must "produce great injury to the plaintiff" appears to be equivalent to Port of Seattle's "actual and substantial" injury standard. It has long been established that injunctive relief is an exceptional remedy, to be granted only in "a clear case of irreparable injury," and only when the court has no doubt as to the necessity of the remedy. Morse v. O'Connell, 7 Wash. 117, 34 P. 426 (1893). See also Isthmian S.S. Co. v. 200
school districts to demonstrate little more than that a strike is imminent or in progress and that schools would be or are closed due to the strike. This approach is similar to the application of a conclusive presumption that teachers' strikes are per se harmful to the public health and safety and therefore unlawful, and has the same practical effect as a flat judicial prohibition.

The opinions of Washington superior courts in several recent teachers' strike injunction suits illustrate the application of this approach. In both *Tacoma School District 10 v. Tacoma Alliance of Educators* and *Federal Way School District 210 v. Federal Way Education Association* the courts understandably found that if the defendant teacher organization was allowed to implement its strike plan the school district would not be able to operate its system effectively and thereby provide an adequate education for students. However, there was no evaluation of the nature of the alleged harm that would be caused by a delay in the provision of educational services; rather than requiring the school district to demonstrate the threat of substantial, immediate and irreparable injury in order to obtain an injunction, the courts presumed that a delay in the opening of school would cause harm to the students and parents sufficient to warrant injunctive relief. In failing to look beyond the allegations of substantial and irreparable harm in these cases, the courts failed to
give consideration to the relative equities of the litigants and exercise the discretionary power characteristic of equity.

In contrast, the court in *Mukilteo School District v. Thompson* found that a short delay in the opening of school would not cause specific harm to the school district. Although the court enjoined the threatened strike, it also ordered a two-day delay in the opening of school and its order was predicated on protection of the school children and their parents. The rationale of the opinion was a departure, albeit slight, from the presumption of harm approach taken in earlier superior court decisions. The *Mukilteo* decision thus came close to a recognition that allegations of intangible injury to the district by virtue of a short delay in the opening of school do not constitute an adequate showing of irreparable harm under the *Port of Seattle* standard for injunctive relief.

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In bringing suit, (d) the misconduct of the plaintiff, if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interest of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment.


79. In *United Steelworkers of America v. United States*, 361 U.S. 39 (1959), Justice Douglas (dissenting) characterized the equity tradition as follows: If [a] court is to be merely an automaton stamping the papers [a government officer] presents, the judicial function rises to no higher level than an IBM machine. Those who grew up with equity and know its great history should never tolerate that mechanical conception. *Id.* at 71.


81. *Id.* at 3. Presumably any interruption in an essential public service such as police or fire protection could not be tolerated, regardless of the duration of the work stoppage even under a narrow interpretation of *Port of Seattle*. The *Mukilteo* court's suggestion that short-term teachers' strikes are not intolerable supports the view that although teachers' services may be essential over the long run, they are nonessential in the short run.

In *Clover Park School Dist. 400 v. Clover Park Educ. Ass'n*, Judge Morrison expressly recognized a distinction based on the essentiality of the public service involved:

Some public employees perform services that are so essential that they cannot be discontinued for even a brief period of time without seriously threatening the public health and safety. Teachers do not normally come under this category. Although entrusted with a serious responsibility to a community, they do not perform functions directly affecting the public health, safety or welfare. As a result, temporary disruption of their services do not generally have as serious an effect on the public as, for example would the withholding of services by employees of fire and police departments, publicly-operated hospitals or municipally-owned utilities.


Finally, in *Clover Park School District 400 v. Clover Park Education Association*, the superior court held that a school district seeking injunction of a teachers' strike must demonstrate "that the public health and safety is being seriously threatened, that the district would be irreparably harmed and that the district was not a contributor to the cause of the strike, *i.e.* had clean hands." The court pointed to the availability of make-up time, the year-round operation of other school districts with no apparent adverse effects and the "dirty hands" of the district in finding that there had been no showing of substantial and irreparable harm resulting from the strike. As in *Mukilteo*, however, the court qualified its position and noted that the strike situation was highly undesirable and that if the strike continued "for many more days" irreparable harm might result.

The approach employed by the *Mukilteo* and *Clover Park* courts is preferable to that of earlier Washington cases from an equity standpoint because it focuses on balancing the competing interests of the litigants. Moreover, if the grant or denial of injunctive relief bears a direct relationship to the good faith bargaining efforts of the parties during mediation and factfinding, the effectiveness of the impasse resolution mechanism provided by the EERA will be enhanced. The desirability of such an approach is reinforced by an examination of teachers' strike cases in other jurisdictions.

2. **Proper treatment of teachers' strike injunctions in other jurisdictions**

A well-reasoned minority view has evolved as courts in other jurisdictions conclude that injunctive relief from teachers' strikes

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83. No. 238548 (Wash. Super. Ct., Pierce County, Sept. 16, 1975). In *Clover Park* the school board and teachers' union had negotiated nearly six and one-half months prior to the strike and the subsequent litigation.
84. *Id.* at 16.
85. *Id.* at 3–10. The court outlined a pattern of behavior evidencing the school district's failure to bargain in good faith and its efforts aimed at frustrating negotiations.
86. *Id.* at 11.
87. *Id.*
88. *See* note 78 *supra.*
89. The rationales underlying the decisions discussed in this section of the text are in substantial accord with the weight of scholarly authority regarding the public employee strike issue. *See*, e.g., Baldwin, *Have Public Employees the Right to Strike?—Yes*, 30 Nat'l Munic. Rev. 515 (1960); Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 Yale L.J. 418 (1970); Foegen, *A Quali-
cannot be obtained merely on allegations that irreparable harm to students and parents will result from short delays in school openings. Initially, the Michigan Supreme Court in School District v. Holland Education Association, held that a mere showing that the schools would be unable to open as scheduled if a teachers' strike were not enjoined was insufficient to support a petition for injunction. Interpreting a statute prohibiting strikes by public employees, the court noted that it was contrary to the general policy of the state to issue injunctions in labor disputes "absent a showing of violence, irreparable injury, or breach of the peace."  

Approving the Holland decision, the Rhode Island Supreme Court in School Committee v. Westerly Teachers Association, although holding the teachers' strike in issue illegal, ordered the trial court to review the pretrial negotiations and determine whether an injunction should be issued. The decision was restricted to ex parte proceedings, but the court's conclusion that irreparable harm does not automatically result from the failure of schools to open as scheduled parallels the conclusion reached by the Mukilteo and Clover Park courts.


92. 157 N.W.2d at 210.
93. 111 R.I. 96, 299 A.2d 441 (1973). At issue was the legality of strikes by public educators and the validity of an ex parte restraining order that enjoined the striking teachers and ordered them to return to work.
94. 299 A.2d at 446.
95. Compare the court's language in the Mukilteo dispute: [W]hile there are certainly inconveniences . . . to all concerned in an interruption
Relying on *Holland* and *Westerly*, the New Hampshire Supreme Court in *Timberlane Regional School District v. Timberlane Regional Education Association* upheld the trial court's denial of injunction of an illegal teachers' strike, reasoning that mere automatic issuance of the injunction would be detrimental to the collective bargaining process. Asserting that judicial intervention should occur only when alternative methods of dispute settlement have clearly failed, the court listed several factors to assist the trial court in identifying this crucial phase. These factors include, *inter alia*, whether either agreed-upon or statutory dispute settlement procedures have failed, whether the parties to the dispute have negotiated in good faith, and whether the public health, safety and welfare would be substantially impaired by the continuance of the strike. Though recognizing that it is improper for courts to comment on the propriety of granting public employees the right to strike, the court justified its decision on the basis of legislative inaction, stating that "courts are necessarily compelled to consider the problems inherent in labor relations between the government and public employees when called upon to issue an injunction to prevent an illegal strike." The *Holland* line of decisions represents a realistic view of the courts' role in public employee dispute settlement. If judicial intervention is permitted only where the public health and safety will be substantially and irreparably harmed, the bargaining process will be less influenced by the anticipation of court interference and good faith or dislocation of schedules, to the administration, to the teachers themselves ... the function of schools and the reason for their existence is not for the convenience of the administration nor for the convenience of the instructional staff, it is there for the purpose of the school patrons, primarily the children and of course, indirectly their parents. If this [strike] did harm to them, that ... justifies the law ... that a public employees' strike is illegal.


This court will give assistance but only on terms which it considers, after hearing all the evidence, to be just to all the parties involved. The teachers have rights as [do] all citizens. We are not concerned solely with the students, their parents and the taxpayers. After all this is a court of justice not a club which the board can use at will to beat its employees into submission as it here sought to do.


97. 317 A.2d at 559.
98. Id. at 558–59.
99. Id. at 559.
100. Id.
101. Id. at 558.
participation during the initial stages of negotiation will be encouraged.  

At the same time, the public interest will be protected. The approach taken in *Holland, Westerly,* and *Timberlane* is consistent with modern approaches to public employee dispute settlement and should be adopted by the Washington courts.

### 3. Protection of the public health and safety

The length of time that a teachers' strike can be tolerated depends on the strike's impact upon the public health and safety. In strikes by police, fire, or sanitation workers there is little dispute over whether the strike will endanger the public health and safety; on the other hand, there is usually little public furor when park maintenance workers strike. However, the determination of when the public health and safety is adversely affected is uniquely complex in the public education sector. Generally, the decision on alleged danger to the public health and safety created by a teachers' strike is within the trial judge's discretion; however, jurisdictions which permit a limited right to strike often establish procedural guidelines to govern the issuance and scope of injunctions in teachers' strikes.

In the strictest sense, teachers do not provide a service that is essential, *i.e.*, one that directly affects the public health and safety. Nevertheless, there is a direct relationship between the continuing availability of public education and the public welfare. A teachers' strike consequently may be tolerable for a certain length of time and yet

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During the three days following my decision more issues were settled than had been settled in the six and one-half months of previous negotiations. The teachers and the board agreed voluntarily that the teachers would return to work and the parties would negotiate the remaining issues.

Letter to author, at 1, Sept. 22, 1975, on file at the offices of the *Washington Law Review.*

103. See Part II-B-3 infra.

104. The approach suggested by the *Holland* line of cases was adopted by Judge Morrison in *Clover Park.* The author suggests that future suits for injunctive relief from teachers' strikes be accorded the same careful consideration given in *Clover Park,* namely that of balancing the equities of the litigants to determine whether an injunction should be issued.


106. See note 81 supra.
Educational Employment Relations Act

become intolerably detrimental to the public interest as it is pro-
longed.107 Some commentators have indicated that teachers’ strikes of
short duration should be tolerable because school districts are typi-
cally closed during holidays and summer vacations with no apparent
adverse affect on the public health or safety.108 Moreover, school
schedules are usually sufficiently flexible to permit rescheduling to
compensate for time lost as a result of a teachers’ strike.109 Perhaps
the most likely pitfall for trial court judges faced with determining the
impact of a teachers’ strike on the public health and safety is the
temptation to equate public or administrative inconvenience with
public detriment. If the inconvenience resulting from the strike is only
such as would be expected to accompany any strike, by private or
public employees, then clearly the strike should not be enjoined.

The “public” need not be viewed in the aggregate in determining
whether the harm is sufficient to warrant an injunction and what form
an injunction, if granted, should take. For example, one court granted
an injunction where a teachers’ strike resulted in increased gang activ-
ity, the need for increased police protection, and an irreparable ad-
verse educational impact on slower students.110 Where the strike has

107. This appeared to be the view of the Clover Park court. Judge Morrison’s
admonition that if the strike continued “for many more days” evidences such a per-
spective of the harm caused by the strike. See note 87 and accompanying text supra.

108. See Note, Striking a Balance in Bargaining with Public School Teachers, 56
IOWA L. REV. 598, 610–11 (1971); WOLLETT & CHANIN, supra note 13, at 6:142.

Super. Ct., Pierce County, Sept. 16, 1975), plaintiff school board’s evidence indicated
that “there [was] a possibility that the school district [would] lose approximately
$54,000 per day for each day of the strike. . . .” Id. at 10. The court minimized the
value of this contention by pointing out that by operating the schools during the
Christmas and spring vacations a potential of 21 make-up days were available. See also
120 (1972) (holiday dates available, permitting school district to make up enough
instructional days to meet state subsidy requirement; teachers’ strike therefore not a
clear and present danger to the health, safety, or welfare of the public).

One potential source of tangible injury to the school district is the expense of
employing janitorial, maintenance, and transportation personnel during the strike
period; however, in many instances such employees operate on an 11-month per year
contract and would be required to report to work on make-up days in any event. If
overtime pay were required during holiday periods being used to make up days lost
due to the strike, many of these services could be reduced in order to minimize the
cost to the district. Interview with Mr. William Radcliffe, Office of the Supt. of Public

(1968); Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass’n, 114
N.H. 245, 317 A.2d 555 (1974); School Comm. v. Westerly Teachers Ass’n, 111 R.I.
96, 299 A.2d 441 (1973); Clover Park School Dist. 400 v. Clover Park Educ. Ass’n,

110. Philadelphia Federation of Teachers v. Ross, GOV’T EMPLOYEE RELATIONS
an intolerably detrimental effect on a specific group of students, e.g., graduating seniors or special education pupils, it may be appropriate to require only their teachers to return to the classroom.\textsuperscript{111}

IV. CONCLUSION

Enactment of the Education Employment Relations Act may reduce the frequency of teachers' strikes in Washington. However, the lack of finality inherent in a mediation-factfinding impasse resolution procedure casts doubt upon the effectiveness of the EERA in resolving impasses where the disputants are highly polarized. Hence the judiciary's role in impasse resolution is likely to remain integral to the entire process of collective bargaining in the education sector. The most equitable and practical approach for the courts to take is to encourage "hard bargaining" under the EERA by enjoining teachers' strikes only upon a clear showing that the strike in issue will cause immediate, actual and substantial injury to the public health and safety. The resultant uncertainty of whether injunctive relief will be granted should encourage good faith bargaining by the parties and persuade them to fully utilize the Act's impasse procedures.

Certainly no general rule can be formulated for determining when a teachers' strike will cause irreparable harm to the public health and safety; that decision turns on the facts and circumstances of each case. However, in exercising the full extent of their discretionary equity powers, the courts can remain vigilant in protecting the public interest without imposing an inequitable and unjustifiable per se strike prohibition upon public school teachers.

Richard Alcorn