

Primer on Act 93

Every so often it seems prudent to revisit important legal subjects for administrators. It has been some time since I've written an article on Act 93. Over the years, we have entertained numerous questions, given advice, filed lawsuits, and presented workshops with regard to Act 93. The Q & A that follows attempts to answer some of the questions that have been frequently asked. If there are any questions that you would like answered in future publications, please forward them to Joseph Acri at acri@paessp.org and, in future publications, I will answer those questions.

1. **What is the difference between collective bargaining and meet and discuss under Act 93?**

Collective bargaining ultimately results in an agreement between the union and district. Although collective bargaining does not require either side to agree to a particular term, the agreement may not be finalized or cannot be effective until after the employees agree to its terms. Absent the willingness of the parties to agree, the status quo is the expired agreement. Under Act 93 (Section 1164 of the School Code), the board may adopt the administrator compensation plan (ACP) without the concurrence of the administrators. There is no obligation to accept a particular recommendation made by administrators.

One practical impact is that there should not be a period between ACP's when the status quo is the previous plan. The administrators set the time table by the request for meet and discuss. If the meet and discuss sessions occur, then the board can adopt the ACP, provided that the board members have acted in good faith in the negotiations. Unlike the process in collective bargaining, the administrators cannot delay the adoption of the ACP by refusing to agree to its terms and conditions.

Another practical consideration is that the administrators should trigger the procedures by the majority of administrators requesting meet and discuss. By failing to make this request early enough to permit enough sessions to discuss the issues thoroughly, administrators may injure themselves. It's difficult to argue that there has been insufficient time to discuss if the complaining party has initiated the time table too late in the game. On the other hand, by requesting meet and discuss early enough to schedule multiple meetings, the board's refusal to meet, delays in meeting, or hasty adoption of the ACP may constitute "bad faith" by the board.

2. **Must the members of the local association vote before the ACP may become effective?**

No. As indicated in Question 1, the adoption by the board of an ACP does not require agreement by the local administrators' association. Therefore, there is no need or requirement to vote.

3. **What is "meet and discuss" under PERA?**

The definitions under the Public Employee Relations Act (PERA) that establish the model for Act 93 are:

- *"Meet and discuss" means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employees: Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised. (43 P.S. §1101.301(17)).*

- *Section 704 of Act 196. Public employers shall not be required to bargain with units of first level supervisors or their representatives but shall be required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employes covered by this act.* [ii](#) (43 P.S. §1101.704).

4. What is "meet and discuss" under Act 93?

"Meet and discuss in good faith" under Act 93 is a hybrid between collective bargaining and meet and discuss under PERA. Act 93 creates the employer's duty of adopting a plan on specified items of compensation for a specified period. After that plan is adopted, it has the same binding effect as a collective bargaining agreement.

The intent of Act 93 was to permit upper level managers to resolve employment matters in a collegial, problem solving atmosphere as distinguished from the more adversarial climate of other labor negotiations. The process is based on interactions evidencing mutual respect.

5. What are the primary mandates or right created by Act 93?

- *The board may not change the terms or conditions of the ACP during the life of the Plan without the agreement of the local administrator unit.*
- *Meet and discuss sessions conducted in good faith are a prerequisite to the adoption of a mandatory written ACP.*
- *The Plan must contain, at a minimum, a description of the program determining administrative salaries; salary amounts or a salary schedule; and fringe benefits.*
- *These terms must continue in effect until a time specified in the ACP, or, at a minimum, one year. The board may not alter an adopted plan by scheduling a meet and discuss session to revise the plan. Once adopted, the terms and conditions are binding for the life of the plan.*

The legislative purpose of enacting Act 93 was to eliminate the administrators' insecurity over compensation problems. The court in the Curley case (discussed in Question 8) determined that a non-binding plan would not accomplish this intent.

6. What questions can be asked to evaluate whether the process has been conducted in good faith?

- *Did the board convey the factual basis for its decisions?*
- *Is the ACP complete – term, salaries, benefits, administrative evaluation (if it affects compensation) and early retirement incentive programs, program determining salary?*
- *Is the language of the plan clear so that administrators understand, for example, the amount of salary increases for each individual or the pool of revenue set aside for salary increases?*
- *Did the board adopt a written plan at a public meeting?*
- *Would a rational man have proposed the plan submitted by the board?*
- *Is there a reasonable factual basis or explanation for the decisions made by the board during the sessions?*
- *Were any of the board decisions contrary to the law or Board policy or the facts?*
- *Did the board discriminate against administrators as compared to teachers or classified employees?*
- *Were meetings held regularly and in a timely fashion?*
- *Was there ample opportunity for a free and full exchange of ideas?*

- *Did the board propose a plan that set forth the major provisions under discussion?*
- *Did the board adopt a plan with provisions that were never discussed?*

Depending upon the answers to any of these questions, then the adopted ACP is subject to attack for failure to comply with Act 93.

7. What is the term of an ACP?

As stated in the Question 5, an ACP may not have a term less than one (1) school year. PAESSP, on behalf of the local administrators in Chichester Area School District, successfully defended the binding nature of a plan of five (5) years. Our rationale was that a plan that is no longer than the term of a superintendent under the School Code is presumptively valid as a reasonable term.

8. What are the remedies for the board's failure to comply with its duties under Act 93?

In Curley v. Greater Johnstown S.D.^[iii], the courts recognized the breach of statutory duties under Act 93 as a basis for an action in mandamus. The following actions by the board may lead to the filing of a complaint in county court:

- *If the board refuses to meet and discuss after a request by the majority of the administrators;*
- *If the board unilaterally changes the salary, benefits or other terms of the ACP during its term;*
- *If the board refuses to implement or breaches terms and conditions of an ACP during its life;*
- *If the board unilaterally changes the term (number of years) of the ACP*
- *If the board does not act in good faith;*
- *If the board refuses to include an administrator in the ACP or unilaterally adds an administrative position or individually negotiates a salary outside the salaries in the ACP.*

9. What positions are excluded from the ACP Group?

*District Superintendent
Executive Director
Director of AVTS
Assistant District Superintendent
Assistant Executive Director
Rank and File Members of Bargaining Unit
Under PERA
Business Manager
Personnel Director*

10. What positions are included in the ACP Group?

First level supervisors under PERA; managers under PERA up to the level below assistant superintendent and assistant executive director; administrators who are not supervisors. Ironically, the meaning of "administrators" under Act 93 is determined by reference to PERA. The intent of Act 93 was to include administrators who were historically excluded from bargaining units under PERA.

11. Who are managers under PERA?

Section 301(16) of PERA defines managerial employees:

(16) "Management level employee" means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employees above the first level of supervision.

Principals and Assistant Principals are managers. (Employees of Carlynton v. Carlynton School District, 377 A.2d 1033 (1977)). Not all employment functions must be within statutory definition to qualify as manager. In case of principals, it does not matter that decisions are subject to rejection, change, approval, or acceptance by the superintendent or board.

Indicia of manager under PERA and, as a result, eligibility for the ACP unit, are: acting upon employee grievances; sitting with management team at collective bargaining sessions; involvement in hiring, room and course assignments; preparation of master schedules; evaluation of teachers; determining and updating Building Policy Manual; integral role in budgetary process; responsibility for insuring compliance with federal and state regulations governing operations.

12. Who is a supervisor under PERA?

Section 301(6) of PERA defines a "supervisor" as follows:

(6) "Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

The PLRB has stated that "the right to order the work force and the ability to effect reward or sanction are what distinguish a 'supervisor' from a 'task leader'." Danville Area School District, 8 PPER ¶ 195 (Order, 1977). Moreover, the PLRB held that administering performance evaluations alone, without evidence that such evaluations have an impact in rewarding or disciplining employees, is insufficient to prove supervisory status. Pennsylvania State University, 9 PPER ¶ 19156 (Final Order, 1988).

In reviewing annotations, I found the following have been held by the PLRB to be indicative of a supervisor: assigning work, scheduling employees and implementing overtime, having subordinates.

13. What is the practical usefulness of these definitions to determine who is an eligible administrator?

If someone is not an eligible administrator and instead would qualify as a rank and file member of a bargaining unit, there is probably not a community of interest that is necessary in the negotiation process. In Curley, the plaintiffs successfully argued that the school board may not exclude an eligible administrator, in this case, a school psychologist. The reverse is also true. The board could not include an individual who is not eligible under the law. However, I would emphasize that the only reason to object is if the inclusion or exclusion is detrimental to the negotiating process. Many districts have ACP's with separate salary schedules for different categories of administrators. Because the process of requesting meet and discuss and negotiating is a majority process, the size

of the unit may become important in formulating meet and discuss strategies and in determining whether the ACP will be challenged.

14. Who may request "meet and discuss" under Act 93?

The duty of the board to meet and discuss in good faith may be triggered by a written request of the majority of school administrators. If a majority of the administrators do not agree to request and form a meet and discuss unit, there is no obligation on the part of the board to meet. Under Act 93, there is no such animal as a minority or individually negotiated plan or salaries. Such a plan PAESSP would argue is ultra vires, that is, without any statutory authority. The board should not be meeting with one individual to set his/her salary separately from the plan.

15. With whom do the administrators meet?

Act 93 defines "school employer" to mean:

"A board of school directors, the area vocational-technical school board of directors, or the intermediate unit board of school districts as defined in this Act."

If the administrators choose to push the point, I believe that they have a right to meet with, at a minimum, a delegated committee of the board. However, "if it ain't broken, don't fix it," pertains. As a matter of practice, many units simply meet with the superintendent. PAESSP would not encourage you to challenge the process of meeting with the Superintendent unless that process is broken because there is a disconnection between the superintendent and board or you are not being given an opportunity to air affectively your requests.

16. What requires agreement of the majority of administrators during the life of the plan?

- *Deletion of an occupied position in the plan;*
- *Change in salary or benefits under the plan;*
- *Change in the term of the plan.*

17. What requires meet and discuss during the life of the plan?

- *Addition of a new position in the plan*

18. Can the board reduce the benefits when adopting a new plan?

Yes. The benefits are only frozen during the term of the plan and the board can, for example, create a co-pay, increase the deductible amounts, or change medical insurance coverage assuming they explain the change as part of the meet and discuss process. This is no different than what occurs in collective bargaining when, for example, co-payment or deductibles are added to a new collective bargaining agreement. There is an argument that benefits are part of compensation and if compensation is reduced without consent, the employee may argue a demotion has occurred and may request a demotion hearing. It's important to note, however, that in contesting a demotion, the employee has the burden of proving there is no rational explanation

for the change. The board may also change the retiree benefits when adopting a new ACP.

19. Are the benefits of retirees frozen in place?

Not necessarily. The ACP may be written so that the retirees continue with the same medical benefits as active employees. Unless it is clearly provided that upon retirement the medical benefits will remain the same as contained in the plan under which the administrator retired, there is no duty to continue the identical medical benefit package.

Absent specific language freezing the benefits at the current level at the time of retirement, the retiree will probably not prevail.

20. What process does PAESSP use in representing a local association that wishes to file a complaint?

Because meet and discuss is a majority process, PAESSP uses a majority process before challenging the board's violation of Act 93. PAESSP evaluates the underlying merits of the claim and if the challenge has merit, we will file on behalf of the majority of the members of the local a complaint. The individual members who become plaintiffs must agree that they will abide by the decision of the majority if a settlement agreement is offered.

[\[i\]](#) Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession. (43 P.S. § 1101.701).

[\[ii\]](#) 163 Pa. Cmwlth. 648 A.2d 719 (1994).