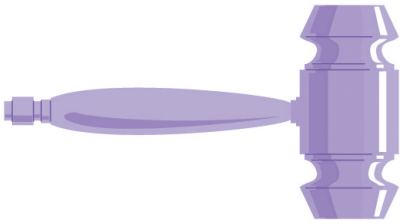
Legal Corner



By Michael I. Levin, Esq., PA Principals Association General Counsel

Not All Principals Are Created Equal

There are two classifications of principals in Pennsylvania – those who can engage in collective bargaining, and those who cannot. Principals and other administrators of the Philadelphia School District can engage in "collective bargaining." All other principals in Pennsylvania can only engage in "meet and discuss." There are significant differences between "collective bargaining" and "meet and discuss" in terms of process. However, there is no evidence that the administrators in Philadelphia have achieved anything more from "bargaining" than they would have achieved through "meet and discuss," with two exceptions – the "just cause" provision of their collective bargaining agreement and the possibility that they have *Weingarten Rights*.[1]

The law that gives principals and other administrators the right to engage in collective bargaining is Act 105 of 1996. *See* 71 P.S. § 371. In contrast, the law that applies to all principals outside of the Philadelphia School District is in Act 93 of 1984. *See* 24 P.S. § 11-1164. A chart comparing the critical features of the two laws is shown in **Figure 1** *(See page 42).*

Process: "Collective Bargaining" vs. "Meet and Discuss." In some respects, there is no difference between "collective bargaining" and "meet and discuss." Under either process, the two sides meet and talk about the issues to be addressed in the collective bargaining agreement ("CBA") or the administrative compensation plan ("ACP"). These kinds of meetings are conducted in very much the same way and have a feel about them where one is indistinguishable from the other. However, in many important respects, the two processes are significantly different. Under Act 105, the school district cannot unilaterally impose the terms and conditions of employment. In contrast, under Act 93, the school district can. Act 93 is thought of as a collaborative process within the "framework of a management team philosophy," whereas Act 105 contemplates negotiations in the usual sense of the word. One court noted "that 'meet and discuss' requirements do not impose an obligation on the [school] board to accept any recommendations made by school administrators regarding the terms and conditions of their compensation. In other words, the "meet and discuss" session [is] not a collective bargaining session." *Curley v. Bd. of Sch. Directors of Greater Johnstown Sch. Dist.*, 163 Pa. Cmwlth. 648, 661, 641 A.2d 719, 726 (1994). In *Curley*, the court said: "these "meet and discuss" sessions are advisory and are not bargaining sessions." *Id.* at 662, 641 A.2d at 726.

Although it is not certain, it is arguable that Act 105 contemplates that the body of law addressing unfair labor practices applies to the process under Act 105, whereas that body of law has no applicability to the process under Act 93. Act 105 provides that "The Pennsylvania Labor Relations Board shall resolve disputes as to the items under this subsection in the same manner as it resolves disputes under the act of July 23, 1970 (P.L. 563, No. 195),1, known as the "Public Employe Relations Act ("PERA")." Exactly how broad this provision is intended to be is uncertain. If the General Assembly intended for the Labor Board to resolve all the same kinds of disputes as it can under PERA using all of the same standards that exist under PERA, the General Assembly could have articulated that concept better. For example, under PERA, employees in a bargaining unit have a right to be represented by their union in any meeting that could reasonably lead to

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disciplinary consequences. This is called "Weingarten Rights." The question is whether the administrators in Philadelphia have Weingarten Rights under Act 105. It is not clear.

Figure 1

	Act 105	Act 93
Process	Collective Bargaining	Meet and Discuss
Selection of Representative	A majority of the administrators must select a "labor organization" or other representative	The administrators informally select a representative(s) to meet with the employer.
Administrators Covered	All supervisory and administrative employees of a school district below the rank of superintendent, district superintendent, executive director, associate superintendent, assistant superintendent or assistant executive director, but including those persons having the rank of first level supervisor.	Any employee of the school entity below the rank of district superintendent, executive director, director of vocational-technical school, assistant district superintendent or assistant executive director, but including the rank of first level supervisor, who by virtue of assigned duties is not in a bargaining unit of public employees as created under the "Public Employee Relations Act." However, this definition shall not apply to anyone who has the duties and responsibilities of the position of business manager or personnel director, but not to include principals.
Subjects Covered	The terms and conditions of their employment, including compensation, hours, working conditions and other benefits.	Salaries and fringe benefits and shall include any board decision that directly affects administrator compensation such as administrative evaluation and early retirement programs.
Final Document	Collective Bargaining Agreement	Administrative Compensation Plan
Right to Strike	No	No
Interest Arbitration[2]	Yes	No
Regulatory Authority	Pennsylvania Labor Relations Board and grievance arbitration.	Courts

Selection of Representative. Under Act 105, a majority of the administrators has the right to select a labor organization or other representative to negotiate for the group. The administrators have selected the Commonwealth Association of School Administrators, Local 502 of the Teamsters. In contrast, under Act 93, the administrators are not permitted to select a "representative" to represent them at the table. Instead, Act 93 provides that the employer must meet with the school administrators. It is my opinion that if the administrators retain a union or lawyer to "meet and discuss" for them, that the employer can say "no" and demand to meet with administrators directly.

Administrators Covered. The two acts define the administrators to be covered by the CBA or ACP differently because of the differences in the size and organizational structure of the Philadelphia School District as compared to all other school districts. However, although not contemplated by Act 93, many school districts have through time decided to have two or more administrative groups with separate ACP's. That is not required by law and if any school district decides to do away with multiple ACP's in the future, utilizing just one ACP covering all eligible administrators, it can do so.

Subjects to Be Negotiated or Discussed. Acts 93 and 105 are significantly different in terms of the subject matter that is to be discussed and agreed upon. Under Act 105, the parties are required to negotiate the "terms and conditions of their employment, including compensation, hours, working conditions and other benefits." This can include job security, such as "just cause," as well as such things as grievance and arbitration provisions. In contrast, under Act 93, the only subjects that the parties are required to discuss at meet and discuss are "salaries and fringe benefits," including "any board decision that directly affects administrator compensation such as administrative evaluation and early retirement programs."

Final Document. The document that is contemplated under Act 105 is a "collective bargaining agreement." The document that is contemplated under Act 93 is a "compensation plan." The differences between the two kinds of documents is generally in terms of the content and the means of enforcement. Because the subjects of negotiations under Act 105 are broader, the collective bargaining agreement is significantly longer than any administrative compensation plan under Act 93. Further, the means of resolving disputes arising under the collective bargaining agreement under Act 105 is different than the means of resolving disputes under Act 93. Under Act 93, the administrators must go to court to resolve any dispute. In contrast, under the CBA in Act 105, the administrators can file a grievance, leading to arbitration.

Although there are the foregoing differences, both documents are legally binding during the term of the document. Describing the binding nature of administrative compensation plans, the court said:

> We hold that it is binding for a variety of reasons. First, it has been suggested that one of the objectives of the Legislature in enacting Section 1164 was to eliminate the administrators' insecurity over compensation matters. *Fritz, supra*, at 501. Surely, a non-binding plan would do little to eliminate this insecurity. More significantly, Section 1164 provides that school employers are required to adopt a written ACP, "which shall continue in effect until a time specified in the compensation plan, but in no event for less than one school year." *Id.* This language implies that an ACP is binding, for

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> “Under Act 93, there are no provisions for coming to an agreement if the administrators and school board cannot agree among themselves after going through the meet and discuss process.”

> if it were not, it would not be possible for it to continue “in effect” for the time specified in the plan. The General Assembly, in enacting a statute, does not intend a result that is absurd, impossible of execution or unreasonable. 1 Pa.C.S. § 1922(1). Therefore, given all these considerations, we must conclude that an ACP is a binding document once adopted.

Curley v. Bd. of Sch. Directors of Greater Johnstown Sch. Dist., 163 Pa.Cmwlth. 648, 662–63, 641 A.2d 719, 726 (1994).

Right to Strike. Administrators are not permitted to strike under both Act 105 and Act 93.

Interest Arbitration. Under Act 93, there are no provisions for coming to an agreement if the administrators and school board cannot agree among themselves after going through the meet and discuss process. Instead, the school board is free to adopt whatever compensation plan it desires – with or without agreement of the administrators. In contrast, under Act 105, if the labor organization representing the administrators and the school district cannot reach an agreement, there is a mandatory “interest arbitration” process that is required. There is one significant difference between most interest arbitration processes and the interest arbitration process under Act 105. Under Act 105, the decision of the arbitrators is not binding with regard to any issue that requires school board approval. It is binding only with respect to matters that can be agreed upon and implemented administratively by the superintendent.

Suit was filed by the Pennsylvania School Boards Association and the Philadelphia School District against the Teamsters arguing that the mandatory interest provisions of Act 105 violated the non-delegation clause of the Pennsylvania Constitution. That clause provides:

> The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

Pa. Const. art. 3, § 31.

In a prior case, *Erie Firefighters Local No. 293 v. Gardner*, 26 Pa. D. & C.2d 327, *aff’d per curiam*, 406 Pa. 395, 178 A.2d 691 (1962), the Pennsylvania Supreme Court had ruled that an arbitration panel in connection with binding interest arbitration with regard to wages and benefits under a collective bargaining agreement violated the non-delegation clause. As a result, a constitutional amendment had to be adopted to allow interest arbitration in the case of firemen and policemen.

In ruling that the interest arbitration provisions under Act 105 were not unconstitutional, the Supreme Court found that the only administrative decisions by the arbitrators were binding. The court said:

> Applying this law to the instant case, we find no improper delegation of legislative power. Simply put, the power the legislature delegated in Act 105 is administrative power possessed by the school district, as opposed to legislative power reserved by the General Assembly. The nature of the power delegated as well as the legal characterization of the entity affected by the arbitration, i.e., the school district, distinguishes this case from *Erie Firefighters*. In *Erie Firefighters*, the action requested could only have been executed by the enactment of an ordinance, a function clearly reserved for the legislature. The Association persuasively argues that, to the contrary, Act 105 specifically states that the arbitrator’s determination is “a mandate to the superintendent of schools ... with respect to matters which can be remedied by administrative action, to take action necessary to carry out the determination of the Board of Arbitrators.” 71 P.S. § 371(h) (emphasis added). Thus, the lower court erroneously concluded that there was no provision in Act 105 that distinguishes arbitration decisions requiring legislative action from other types of decisions. As Act 105 can be interpreted in a manner that delegates purely administrative decision-making, it does not clearly, palpably and plainly violate the Article III, Section 31 prohibition against the delegation of legislative power and shall be upheld in this regard.

Pennsylvania Sch. Boards Ass’n, Inc. v. Commonwealth Ass’n of Sch. Adm’rs, Teamsters Local 502, 569 Pa. 436, 447-48, 805 A.2d 476, 482-83 (2002).

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Regulatory Authority. Although Act 105 is not clear in all instances and with regard to all kinds of disputes that may arise, it appears that both the Labor Board and grievance arbitrators have the authority to resolve most disputes that may arise between the union and the school district. On the other hand, if there is a dispute by the administrators of all school districts other than the Philadelphia School District, as to the school district's compliance with Act 93 or an ACP, the administrators have to go to court. *See, e.g., Curley v. Bd. of Sch. Directors of Greater Johnstown Sch. Dist.,* 163 Pa.Cmwlth. 648, 641 A.2d 719 (1994) (addressing disputes as to administrators subject to inclusion in an ACP and binding nature of ACP).

Conclusion

The differences between the statutory treatment of administrators employed by the Philadelphia School District under Act 105 and the administrators employed by all other school districts under Act 93 are, in some instances, minor, but in other instances significant. It is a matter of the General Assembly responding to different practical and political realities, as well as an effort to comply with constitutional requirements.

End Notes

[1] *Weingarten* rights are the rights that the United States Supreme Court ruled employees who are in a union have to be represented by the union in any meeting where the employee reasonably believed that discipline may occur. *See N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975).

[2] There are generally two different kinds of arbitration in labor relations – "interest arbitration" and "grievance arbitration." "Interest arbitration" is a unique kind of arbitration where the arbitrator(s) actually write the terms and conditions of the collective bargaining agreement. Interest arbitration is usually created by statute – although employers and unions may agree to submit a contract to interest arbitration. In Pennsylvania, interest arbitration has been required for decades with respect to police and firemen. Grievance arbitration, on the other hand, is a type of arbitration to resolve a dispute under a collective bargaining agreement that already has been written and that exists between the parties. Said simply, "interest arbitration" writes the contract, "grievance arbitration" interprets the contract.

WOW! That's Why I Became a Principal

A Feature in The Pennsylvania Administrator Magazine

Pursuing a career in school administration may not be as appealing these days as it once seemed, if you believe all the negative images or controversy over issues related to our public schools. Many influences such as changing demographics, the economy and limited resources, accountability demands and the constant change of politically-driven initiatives impact not only public perception, but the daily operations of our schools. Yet, despite constant changes and public scrutiny of our educational system, educators rise to the challenge of providing all children a quality program for learning and personal growth.

Effective principals take the criticisms and changes in stride as they focus on providing the best services possible for all students. Some days are harder than others to maintain the enthusiasm and stamina needed to be a school leader, but more often than not, something occurs that triggers the heart and mind, reminding us "why I became a principal."

We are seeking short, humorous or uplifting stories that relate to some telling aspect of a school administrator's work life for our feature, *"Wow! That's Why I Became a Principal."* Let's share our stories to encourage, cheer and support each other...lest we forget why we followed this career path.

Articles should be no more than 350-400 words (less if you include a photo and a brief caption). Please include a high resolution head shot (300 dpi) as a JPEG, PNG or TIFF file, to accompany your article. Articles and photos should be sent to Sheri Thompson at **sherit@paprincipals.org**.

If time is your obstacle, consider contacting Sheri to set up a phone interview to "tell your story." Then, we will format the article for you. **The deadline for submitting an article for the Spring 2018 issue is March 2, 2018.**