

Limiting Ohio public employees' collective bargaining rights and its effect on public education

by Dan Wharton

I. Introduction

Faced with a budget crisis affecting nearly every government in the country, state governors and legislators have begun using creative means to trim spending. Illinois planned on firing over 30 percent of its state police officers and cutting funding for the disabled and elderly, among other measures.¹ California has decided to fire over 5,000 prison employees to help bring down its \$13 billion corrections budget.² Virginia cut over \$700 million in funding for primary education.³

Ohio lawmakers, facing the same constraints on the state budget, have decided to cut the costs of paying its employees. Many state employees in Ohio are members of unions, and are subject to collective bargaining agreements (CBAs) negotiated by their unions. As a state, Ohio negotiates with these unions on issues like wages, vacation and health-care benefits, and how disputes are settled between employees and employers.

But to cut costs, Ohio decided it was time to stop negotiating. The state passed the Public Employees' Collective Bargaining Law, better known as Senate Bill 5 ("S.B. 5"). The state has circumvented what it sees as rising costs paid to public employees through wages and benefits by eliminating the collective bargaining power of those employees.

¹ Dean Olsen and John Guidroz, *State budget cut pain shared by many*, THE STATE JOURNAL-REGISTER, March 27, 2010, <http://www.sj-r.com/top-stories/x38421208/State-budget-cut-pain-shared-by-many>

² Jon Ortiz, *California state workforce cuts would hit prisons the hardest*, THE SACRAMENTO BEE, May 17, 2011, <http://www.sacbee.com/2011/05/17/3631824/california-state-workforce-cuts.html>

³ Lauren Roth, *Virginia schools will lose \$700 million in two years*, THE VIRGINIAN-PILOT, March 19, 2010, <http://hamptonroads.com/2010/03/state-schools-will-lose-700-million-2-years>

Unfortunately, public school teachers are among those public employees. And altering the working conditions for public school teachers will have consequences for students of those teachers.

This paper will attempt to discern the consequences that students will face as a result of S.B. 5. In Section II, the specific provisions of S.B. 5 will be examined. Next, Section III will highlight four factors that contribute to “good schools,” and analyze how the specific provisions of S.B. 5 will affect those four factors. Through this exercise, it can be shown that S.B. 5 will have a negative effect on students in public schools.

II. What S.B. 5 does

Ohio lawmakers intended S.B. 5 to limit public employees’ power to collectively bargain. With this broad goal in mind, policymakers crafted a law that curtailed certain rights that public employees used to have under traditional labor law.

A. Prohibits strikes

When most people think of unions, the first issue they think of is strikes. But S.B. 5 prohibits striking by public employees.⁴ Any employee absent on the date of a strike or who refuses to perform her full duties without the employer’s permission is presumed to be part of that strike.⁵ Any employee who strikes, or causes, instigates, encourages, or condones a strike,

⁴ R.C. § 4117.15(A). R.C. § 4117.01(C) gives a full definition of public employee: “any person holding a position by appointment or employment in the service of a public employer,” with a laundry list of exceptions. None of these apply to preclude teachers from the scope of the definition, except that management and supervisory employees are not included in the definition of public employees. R.C. § 4117.01(C)(7) and (10). But § 4117.15(L) makes the entirety of § 4117.15 applicable to those excepted from the definition of “public employee” by the provisions of § 4117.01(C)(1)-(18).

⁵ R.C. § 4117.15(C) and (L).

may be fired or face monetary penalties.⁶ Furthermore, an employer can seek an injunction to end the strike, even if it has engaged in unfair labor practices as normally determined.⁷

Employees strike to end unfair labor practices. But strikes take public employees out of the workforce for extended periods of time, costing states and taxpayers money and loss of essential services. Balancing the rights of employees with the expectations of the public is one of the apparent goals of S.B. 5.

B. Removes certain items from scope of collective bargaining

S.B. 5 had originally intended for no government employee to be able to bargain collectively over “wages, hours, and terms and conditions of employment.”⁸ But the bill was amended in committee to allow public employees to continue to bargain over wages, hours, terms and conditions of employment and to collectively bargain.⁹ S.B. 5 did change the scope of collective bargaining though. Public employees no longer have the right to bargain for the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.¹⁰ This means that any provision that would normally be a mandatory subject of collective bargaining negotiations because of its inclusion in a previous CBA is not a proper subject of collective bargaining if it does not relate specifically to wages, hours, and terms and conditions of employment.

⁶ R.C. § 4117.15(B) and (G).

⁷ R.C. § 4117.15(A) and (J). If an employee violates an injunction granted by the court, the employee will be (1) for a first offense, fined not more than \$250 or jailed not more than 30 days, or both; (2) for a second offense, fined not more than \$500 or jailed not more than 60 days, or both; and (3) for a third offense, fined not more than \$1,000 or jailed not more than 90 days, or both.

⁸ See *Public workers should not have right to strike*, SALEM NEWS, March 2, 2011, <http://www.salemnews.net/page/content.detail/id/539900/Public-workers-should-not-have-right-to-strike.html?nav=5003>

⁹ *Id.*; see also R.C. § 4117.03(4), and R.C. § 4117.08(A).

¹⁰ R.C. § 4117.08(A).

There are more subjects specifically listed in the bill as inappropriate subjects in collective bargaining. Employees may not bargain over employer-paid contributions to the employee retirement system.¹¹ They may not bargain over employers paying any more than 85 percent of the costs of the employees' health insurance premiums.¹² Employees may not bargain over any provision relating to the privatization or contracting out of the employee's work.¹³ And the number of employees required to be employed in any particular department of the employer may not be bargained over.¹⁴ Furthermore, a CBA must specifically contain provisions waiving the right of a public employer to do certain actions in order for those actions to be forbidden to the employer.¹⁵

The legislature also passed section 4117.081, which relates specifically to school districts, educational service centers, community schools and STEM schools. These entities may not enter into a CBA that establishes a minimum number of school personnel or restricts management from designating the responsibilities and workloads of personnel in that building.¹⁶ Importantly, a CBA may not establish a maximum number of students who can be assigned to a classroom or teacher.¹⁷ Under this law, the CBA cannot stop the employer from determining which employees are fired first in a reduction-in-force.¹⁸ Also, the employer is free to bid for

¹¹ R.C. § 4117.08(B)(3).

¹² R.C. § 4117.08(B)(2); more on this in subsection D below.

¹³ R.C. § 4117.08(B)(4).

¹⁴ R.C. § 4117.08(B)(5).

¹⁵ R.C. § 4117.08(C). The list includes: hiring, discharging, transferring, suspending, or disciplining employees; determining the number of persons required to be employed or laid off; determining the qualifications of employees; determining the starting and quitting time and the number of hours to be worked by employees; making rules and regulations; determining work assignments for its employees; determining the basis for selection, retention, and promotion of employees; and terminating or eliminating any part of its work or facilities.

¹⁶ R.C. § 4117.081(B)(1) and (2).

¹⁷ R.C. § 4117.081(B)(3).

¹⁸ R.C. § 4117.081(B)(5).

non-educational services through private employers for personnel like janitorial staff and bus drivers.¹⁹ A public employer may offer benefits less than or equal to the requirements of these laws, but is not allowed to offer benefits greater than these laws.²⁰

C. Requires performance pay for teachers

Under the former law, teachers were paid according to salary schedules and steps—teachers were paid more money based on how many years they had worked. These steps were eliminated by S.B. 5, and teachers are required to receive performance-based pay.²¹ The pay is to be determined by the board of education, and the level of pay must consider:

- 1) The level of license the teachers holds;²²
- 2) Whether the teacher is “highly qualified”;²³
- 3) A value-added measure the board uses to determine the performance of the students assigned to the teachers’ classroom;²⁴
- 4) The results of the teacher’s performance evaluations or a peer review board;²⁵ and
- 5) Any other criteria established by the board.²⁶

¹⁹ See R.C. § 4117.081(B)(6).

²⁰ R.C. § 4117.081(C)(2).

²¹ R.C. § 3317.13(B).

²² R.C. § 3317.13(C)(1).

²³ R.C. § 3317.13(C)(2). Section 3319.22 defines the term “highly qualified” as a teacher who (a) holds a bachelor’s degree; (b) is fully licensed, or participating in an alternative route to licensure, (c) fulfills additional requirements depending on the grade level to teach, including passing a test on subject matter appropriate for the grade level, attainment of a master’s or advanced teaching certificate, a 100-point score on the Ohio qualified teaching rubric administered by the Ohio Department of Education, and completion of an individual professional development program that incorporates teaching, skills, and state academic content standards.

²⁴ R.C. § 3317.13(C)(3).

²⁵ R.C. § 3317.13(C)(4).

²⁶ R.C. § 3317.13(C)(5).

In mandating performance pay, the state is going against the interests of the teachers' unions.²⁷ In fact, Ohio teachers have started a ballot initiative opposing S.B. 5 largely in response to the performance-based-pay issue.²⁸

D. Limits health care benefits provided by employer

Under S.B. 5, public employees must be responsible for at least 15 percent of the cost of health care benefits.²⁹ Health care benefits include hospitalization, surgical, major medical, dental, vision, and medical care, disability, hearing aids, and prescription drugs benefits.³⁰ Under older CBAs, workers typically paid much less than 15 percent of the cost of health care benefits.³¹

E. Abolishes continuing contracts for teachers

S.B. 5 also eliminates continuing contracts for teachers.³² The term of these teachers' employments would be until the teacher resigned or retired.³³ Although S.B. 5 allowed teachers currently teaching under continuing contracts to keep those contracts, and teachers under continuing contracts are not subject to the reduction-in-force rules that were applied to other

²⁷ See David N. Bass, *Merit-Based Pay Miffs Teachers' Unions*, CAROLINA JOURNAL, December 8, 2008, http://www.carolinajournal.com/exclusives/display_exclusive.html?id=5137

²⁸ See Ben DeGrow, *Teachers Union Prepares Ballot Campaign Against Ohio Merit Pay Law*, SCHOOL REFORM NEWS, May 15, 2011, http://www.heartland.org/schoolreform-news.org/Article/29932/Teachers_Union_Prepares_Ballot_Campaign_Against_Ohio_Merit_Pay_Law.html

²⁹ R.C. § 124.81(I).

³⁰ R.C. § 124.81(A)(2) and (3).

³¹ Cf. Tami Lubhy, *Unions under fire as states try to curtail benefits*, CNNMONEY.COM, February 18, 2011, http://money.cnn.com/2011/02/18/news/economy/union_protest/index.htm (estimating that Wisconsin workers under a similar mandate in their state typically pay around 6 percent of health care benefits).

³² R.C. § 3319.11.

³³ R.C. § 3319.08.

teachers,³⁴ no school district can award a teacher a continuing contract. Instead, all contracts have a limited term. This provision ends the system of “tenure” in Ohio. Tenured teachers proved more difficult to fire and replace than non-tenured teachers.³⁵ Teachers generally support tenure because (besides inherent job stability) it insulates them from political and financial decisions of school boards.³⁶

III. How SB5 affects the quality of Ohio’s public schools

S.B. 5 will have some impact on schools in Ohio—it changes the terms and conditions through which teachers are employed in the state. But what kinds of effects will the law have on the end product of educating children is up for debate. To try to analyze this question, factors affecting education must be determined.

Researchers have identified four factors that are present in good schools: “(1) a qualified, skilled and effective faculty...(2) relatively small classes in relatively small schools...(3) a diverse student population...and (4) an actively involved parent community.”³⁷ From a cursory analysis, it appears that S.B. 5 will only affect two of those considerations: (A) a qualified, skilled and effective faculty, and (B) the size of classes and schools. Those two issues will be discussed in turn.

A. Qualified, skilled, and effective faculty

³⁴ See R.C. § 3319.11, where the only consideration school boards can make in choosing which teachers to keep in a reduction-in-force is the performance of the teacher.

³⁵ See M.J. Stephey, *A Brief History of Tenure*, TIME, November 17, 2008, <http://www.time.com/time/nation/article/0,8599,1859505,00.html>

³⁶ See *The Pros and Cons of Tenure for Teachers*, LAWYERS.COM, <http://education-law.lawyers.com/school-law/The-Pros-and-Cons-of-Tenure-for-Teachers.html>

³⁷ Michael J. Kaufman and Sherelyn R. Kaufman, EDUCATION LAW, POLICY AND PRACTICE: CASES AND MATERIALS 3-4 (2d ed. 2009).

Attracting high-quality teachers is one of the main goals a school district should have. There is strong evidence that teacher quality is highly correlated to student success.³⁸ As an end to that goal, schools need to provide attractive compensation to teachers to entice them to take on the demands of teaching.³⁹

S.B. 5 affects teacher compensation in two ways. First, the law provides for performance pay—antithetical to the popular system of salary schedules. Second, S.B. 5 requires a teacher to pay at least 15 percent of her salary in health care benefits.

1. Performance Pay

S.B. 5 mandates performance pay for teachers. Part of the evaluation of performance is the level of license that the teacher holds—already a part of the classic salary schedule for teachers. But other factors in the calculation of the teacher’s performance exceed the bounds of the classic salary schedule. For example, whether or not a teacher was classified as “highly qualified” per section 3319.22 used to have no bearing on the teacher’s salary, outside of their certification level. But that status will be used in determining the level of teacher compensation under S.B. 5.⁴⁰ So, too, will performance evaluations and peer review boards,⁴¹ which analyze teacher output—the work product that a teacher produces. S.B. 5 further purports to analyze teacher performance through student output—the change in educational ability shown by a

³⁸ See Eric A. Hanushek and Steven G. Rivkin, *How to Improve the Supply of High Quality Teachers*, BROOKINGS PAPERS ON EDUCATION POLICY, May 21-22, 2003 (“[A]ttention on teacher quality is warranted, because it is an important determinant in student outcomes.”); Dan Goldhaber, *Teacher Pay Reforms: The Political Implications of Recent Research*, CENTER FOR AMERICAN PROGRESS, May 2009 (originally published December 2006) (“Education research convincingly shows that teacher quality is the most important *schooling* factor influencing student achievement.”) (emphasis in original).

³⁹ See Goldhaber at 1 (“[R]esearch shows that teachers are responsible to monetary incentives.”).

⁴⁰ R.C. § 3317.13(B).

⁴¹ R.C. § 3317.13(C)(4).

teacher's students—through “value-added” assessments at the school board level.⁴² And school boards can issue whatever other type of performance factors they wish in constructing formulas for teacher performance pay.⁴³

The larger question looms: how does performance pay affect teacher quality? Some studies have shown that merit pay in schools has not been particularly effective in attracting high quality teachers.⁴⁴ Other studies suggest that school-based systems where administrators are free to award performance pay based on their intimate knowledge of teachers (as in charter and private schools) have a positive impact on teacher quality.⁴⁵

From the conflicting data, it is difficult to determine whether mandated state-wide performance pay will have a positive or negative impact on teacher quality across Ohio. But it is a part of a broader experiment to possibly see if the idea has merit.

2. Required health care benefit expenditures

S.B. 5 also requires teachers to pay 15 percent of the cost of obtaining health insurance. While not every school district required its teachers to pay part of their health insurance before the passage of S.B. 5, some did. Therefore, the potential impact on teachers' salaries ranges from zero, in some cases, to a 15 percent reduction, in the most extreme.

If, as noted above, higher teacher salaries attract higher quality teachers, then lower teacher salaries will not attract higher quality teachers. The 15 percent penalty on teacher

⁴² R.C. § 3317.13(C)(3).

⁴³ R.C. § 3317.13(C)(5).

⁴⁴ Hanushek and Rivkin at 19, citing David K. Cohen and Richard J. Murnane, *The merits of merit pay*, 80 PUBLIC INTEREST 3-30. But the paper also notes that the experiments were too limited in the magnitude and character of the incentive scheme for a proper determination of the effectiveness of merit pay to be discovered.

⁴⁵ Julie Kowal, Emily Ayscue Hassel, and Bryan C. Hassel, *Teacher Compensation in Private and Charter Schools: Snapshots and Lessons for District Public Schools*, CENTER FOR AMERICAN PROGRESS, February 6, 2007.

salaries would be a major disincentive for some teachers to enter the job market. This marginal effect would cause some potential teachers with better alternatives—in jobs relating to math, sciences, engineering and business—to leave teaching for different fields where their potential for compensation is greater. Since one of the benefits of teacher is their relative skill in a specific skill set,⁴⁶ losing teachers in specific fields like math and science results in a lower-quality teacher set.

In short, teachers, like all employees, defer compensation in favor of benefits. If a teacher is required to pay for 15 percent of her health insurance, without a corresponding hike in pay, then it is in essence a pay cut. And since all pay in Ohio, under S.B. 5, is determined strictly by performance, the possibility of making up for a 15 percent cut in pay is minimal.

So the expected effect of requiring teachers to pay at least 15 percent of their health insurance is a resulting decline in the quality of teachers. Together with the ambiguous effect of performance pay for teachers, S.B. 5 seems as if it will have a resulting negative impact on the expected quality of the teacher labor market.

3. Continuing contracts for teachers

Removing continuing contracts for teachers puts an onus on the teacher to deliver high quality performance.⁴⁷ Tenure protects bad teachers from achieving tenured status, and then sitting and waiting for retirement to come instead of teaching children. However, if the intended effect of performance pay for teachers is to make bad teachers voluntarily leave the market, and good teachers come in, then the problem of tenure is less obvious—tenured teachers will still resign if they do not receive the compensation they desire. So the overall effect of removing tenure, in the face of performance pay, is ambiguous.

⁴⁶ Hanushek and Rivkin at 5.

⁴⁷ *Pros and Cons of Tenure for Teachers*.

B. The size of classes and schools

Smaller schools and classes mean smarter students. Not only do students perform better in classes with more individualized attention and interaction,⁴⁸ but students do better when administrators know them and their needs.

S.B. 5 makes capping the number of students for each teacher an impermissible subject of collective bargaining. School districts are free to retain as many teachers as they desire, without taking into account the number of students the district must teach.⁴⁹ Under this rule, and facing budget constraints, school districts are likely to retain less teachers and raise class sizes. Since reductions-in-force will be made easier by a declining number of teachers under continuing contracts, class sizes will likely keep expanding. As small class sizes are an important part of good schools, growing class sizes hurt students.

IV. Conclusion

S.B. 5 stems from a desire of a Ohio's state legislature to deal with a budget deficit. It's frontal attack is on organized labor, not on Ohio's children. But in placing additional burdens on teachers and allowing school boards to cut corners, S.B. 5 poses a threat to education in the state of Ohio. The law's provision requiring teachers to pay additional health care benefits will lower teacher quality. Granting school boards the ability to uncap class sizes will likely lead to expanding classes and lower-quality education. And, although provisions requiring performance pay and eliminating continuing contracts for teachers could have positive effects, it is unclear

⁴⁸ See *An alternative vote: Applying science to the teaching of science*, THE ECONOMIST, May 12, 2011, <http://www.economist.com/node/18678925>. When scientists at the University of British Columbia used undergraduate engineering students in a controlled study, the group that used small, interactive teaching groups scored 74 percent on its exams, compared to 41 percent for the control group.

⁴⁹ In fact, the only factor available for teachers' unions and districts to consider while bargaining is the overall financial state of the school at the time of the bargain, without taking into consideration any future revenues that may be gained through levies. R.C. § 4117.08(D)(1).

whether these will help or hurt efforts to attract high-quality teachers. In sum, S.B. 5 will have unintended consequences for children in Ohio who require high-quality teacher and small schools to keep up in the race for education.