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THE INTERPLAY OF CIVIL SERVICE LAW AND COLLECTIVE BARGAINING LAW IN PUBLIC SECTOR EMPLOYEE DISCIPLINE CASES†

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INTRODUCTION

The growth of public employee unionization, a development subject to significant popular and scholarly commentary in the decade of the seventies,[1] continued unabated in the 1980s. Recent statistics indicate that thirty-seven percent of employees in federal, state, and local government are union members,[2] and that there are 659 major collective bargaining agreements covering 2,487,000 state and local government employees.[3] Since 1980, statutory collective bargaining provisions have been enacted or expanded in ten states.[4]

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[1] *See generally* J. GRODIN & D. WOLLETT, LABOR RELATIONS AND SOCIAL PROBLEMS (2d ed. 1975); D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE (1972); H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES (1971); Edwards, *The Emerging Duty To Bargain In The Public Sector*, 71 MICH. L. REV. 885 (1973); Kneeland, *Public Job Unions Mount Counterattack for Raises*, N.Y. Times, Sept. 28, 1975, at 1, col. 2 (city ed.).

[2] *News and Background Information*, 133 Lab. Rel. Rep. (BNA) No. 7, at 143 (Feb. 19, 1990). These figures are for 1989.

[3] Davis & Sleemi, *Collective Bargaining in 1989: Negotiators Will Face Diverse Issues*, 112 MONTHLY LAB. REV. 10, 11 (Jan. 1989). These statistics include only collective bargaining agreements that cover 1000 or more employees in state and local government. *Id.* at 10. There are numerous other agreements covering fewer employees. *See* Clark, Jr., Public Sector Collective Bargaining Agreements: Contents and Enforcement, in THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 407, 407 (1985).

[4] Illinois and Ohio enacted comprehensive bargaining statutes in 1983 and 1984 respectively. *See* ILL. ANN. STAT. ch. 48, paras. 1601–1627, 1701–1720 (Smith-Hurd 1986 & Supp. 1990); OHIO REV. CODE ANN. § 4117.01–.23 (Baldwin 1983 & Supp. 1989). Delaware, Iowa, Maine, Maryland, Michigan, Minnesota, and Nebraska made significant legislative changes in their bargaining laws. In Delaware, Iowa, Maine and Maryland, the newly enacted statutory provisions covered additional classifications of employees. *See* DEL. CODE ANN. tit. 19, §§ 1601–1608 (1985) (police officers and firefighters); IOWA CODE ANN. § 602.1401(3) (West 1988) (judicial employees); ME. REV. STAT. ANN. tit. 4, §§ 31, 32 (1989) (judicial

In contrast to the private sector, collective bargaining statutes in the public sector are enacted in the context of numerous laws governing the terms and conditions of employment of public employees.[5] Foremost among these pre-existing statutes are those establishing, or authorizing the establishment of, civil service[6] or merit systems.[7] Because civil service laws, and the agencies created by such laws,[8] unilaterally set terms and conditions of employment for public employees, a statute that provides for bilateral determination of employment terms through collective bargaining poses obvious po-

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employees); MD. ANN. CODE art. 28, § 5–114.1(a)–(h) (1986) (park employees). Michigan added compulsory arbitration of labor disputes for state police. *See* MICH. COMP. LAWS ANN. § 423.271–.287 (West Supp. 1990). Nebraska enacted the State Employees Collective Bargaining Act as a supplement to the Industrial Relations Act, which covers state employees. NEB. REV. STAT. § 31.1372 (1987). The State Employees Collective Bargaining Act added significant provisions to the Industrial Relations Act, including a specification of bargaining units for state employees and a number of prohibited practices. *See id.* § 81–1369 to –1390. Minnesota enacted the Public Employment Labor Relations Act in 1984, which replaced the Public Employment Labor Relations Act of 1971. Significant changes included a provision that the employer's obligation to negotiate exists notwithstanding contrary municipal charters, ordinances, and resolutions. *See* MINN. STAT. ANN. § 179A.07(2) (West Supp. 1990). In addition, the New Mexico State Personnel Board issued rules and regulations providing for collective bargaining for state employees in 1983. *Regulations for Labor Management Relations*, 4A Lab. Rel. Rep. (BNA) No. 749, at § 41:207 (Sept. 30, 1983).

[5] *See* Rehmus, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919, 921–30 (1969).

[6] Although many statutes establish a civil service system for state and/or local government employees, *see, e.g.*, NEB. REV. STAT. § 23–2503 (1987), others simply authorize local government units to establish civil service systems, either prescribing specifics of the system to be established at the local governing body's option, *see, e.g.*, MICH. COMP. LAWS ANN. § 38.451 (West 1985), or allowing the local governmental unit to implement a system of its own choice, *see, e.g.*, OR. REV. STAT. § 241.002–.006 (1987). These differences may play a significant role in the determination of whether the collective bargaining statute or the civil service statute has priority. *See infra* note 100 and accompanying text.

[7] According to a 1970 survey by the National Civil Service League, approximately 80% of full-time government employees are covered by a merit system. *See* R. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 167 (1984). A merit or civil service system is a set of personnel administration practices. Couturier, *Public Sector Bargaining, Civil Service, Politics and the Rule of Law*, in PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 57, 64 (1979). The merit system is designed to implement the merit principle, the "concept . . . that employees should be selected and retained solely on the basis of merit." LABOR MANAGEMENT SERVICES ADMINISTRATION OF THE U.S. DEPARTMENT OF LABOR, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT AND THE MERIT SYSTEM 13 (1972) (citing National Governors' Conference, *Report of Task Force on State and Local Government Labor Relations* 18 (1967)) [hereinafter LMSA]. As noted by Professor Vaughn, among others, however, the merit principle is both more complex and less clear than the definition suggests, and the civil service system has expanded to provide many functions unrelated to the merit principle. *See* R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW 9–27 (1976).

[8] Civil service statutes generally create a board or commission to administer and enforce the law, and to promulgate rules and regulations for implementation of the law. *See* R. VAUGHN, *supra* note 7, at 9–28.

tential for conflict.[9] Commentators and practitioners vary in their views about the implications of collective bargaining for civil service and the merit principle.[10] Some commentators have stressed the incompatibility of collective bargaining and civil service, suggesting either a never-ending conflict or the doom of one of the two systems.[11] Most commentators and practitioners, however, believe that the two systems can be accommodated.[12] Indeed, a review of the existing collective bargaining statutes and the administrative and court decisions thereunder demonstrates that such accommodation is taking place currently at the state and local level.

This article undertakes such a review with respect to one aspect of the potential conflict between merit systems and collective bargaining—employee discipline and the appeal of discipline decisions.[13] Protection from arbitrary or unjust discipline is a primary

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[9] *See id.*; Aaron, *Final Report of the Assembly Advisory Council on Public Employee Relations*, in LABOR RELATIONS AND SOCIAL PROBLEMS, *supra* note 1, at 159.

[10] *Compare* Morse, *Shall We Bargain Away the Merit System*, 25 PUB. PERSONNEL REV. 239, 241–43 (1963) *with* Stanley, *What Are Unions Doing to Merit Systems*, 31 PUB. PERSONNEL REV. 108, 108–13 (1970).

[11] *See* Lewin & Horton, *The Impact of Collective Bargaining on the Merit System in Government*, 30 ARB. J. 200–01 (1975) and works cited therein; R. KEARNEY, *supra* note 7, at 170; LMSA, *supra* note 7, at 43–44 and works cited therein. Lewin and Horton attribute this view to the fact that the authors of the early literature were primarily personnel administrators. Lewin & Horton, *supra*, at 200.

[12] R. KEARNEY, *supra* note 7, at 170; *see* Lewin & Horton, *supra* note 11, at 201; LMSA, *supra* note 7, at 44–50 and works cited therein.

[13] Section I of this article provides an overview of the background and development of civil service in public employment. *See infra* notes 32–51 and accompanying text. Section II provides an overview of the background and development of collective bargaining in public employment. *See infra* notes 52–73 and accompanying text. Section III discusses the potential conflict between civil service law and collective bargaining law. *See infra* notes 74–82 and accompanying text.

Because this article focuses on the conflict between civil service and collective bargaining, it does not treat statutory provisions and case law dealing solely with certificated educational personnel (primarily teachers) unless they are covered by civil service law rather than separate statutory tenure provisions. Scope-of-bargaining cases involving teachers are often complicated by issues of the delegability of certain functions entrusted to the school board by statute. *See, e.g.*, West Irondequoit Bd. of Educ., 4 PERB ¶ 3070, *aff'd on reh'g*, 4 PERB ¶ 3089 (N.Y. Pub. Employee Relations Bd. 1971), *aff'd sub nom.* West Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46, 52, 315 N.E.2d 775, 778, 358 N.Y.S.2d 720, 724, 87 L.R.R.M. 2618, 2620 (1974). Although these issues are similar in some respects to issues of conflict with civil service, the differences in the law involved render them beyond the scope of this article. Similarly, the article omits discussion of public employees covered by the Railway Labor Act rather than state collective bargaining statutes, and transportation employees whose bargaining rights are secured by the Urban Mass Transit Act. *See* Nolan, *Public Employee Unionism in the Southeast: The Legal Parameters*, 29 S.C.L. REV. 235, 244–53 (1978) for a discussion of the applicability of these two statutes to public employee bargaining. Finally, the article has

motivation for employee unionization.[14] As a result, achieving protection from unjust disciplinary action becomes a fundamental goal of unions in collective bargaining.[15] Public sector unions in the United States are particularly interested in "discipline, grievance procedures and organizational due process."[16]

One traditional function of a civil service commission is to provide a procedure and appellate body for appeal of disciplinary decisions.[17] Union members, however, do not view the civil service commission as an impartial body for review of disciplinary decisions but rather view it as part of management's personnel system.[18] For that reason, unions increasingly have attempted to negotiate both standards for employee discipline and contractual grievance procedures for challenging such adverse actions.[19] These increasing efforts to negotiate contractual limitations on management's disciplinary authority and contractual procedures for appeal of management's disciplinary decisions have posed the issue of whether civil service standards and procedures or contractual standards and procedures should govern disciplinary decisions. The issue arises not only in contract enforcement actions, but also in contract negotiations when management resists bargaining about discipline and grievance and arbitration machinery on the basis that civil service laws prohibit negotiation over such matters.

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omitted discussion of a few other statutes that have limited employee coverage. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, §§ 1281–1294 (1988 & Supp. 1989) (judicial employees).

An attempt has been made to include relevant decisions of the state administrative agencies as well as of the courts. Because of the limited publication and distribution of administrative decisions in some states, it is possible that some relevant administrative decisions are not discussed herein. The conclusions with respect to the status of the law in each state are based on the decisions available and cited herein.

[14] *See* N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 2 (3d ed. 1986).

[15] A union is a democratic and political organization and therefore its collective bargaining goals are defined by the wants and needs of its members. *See* D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 77–79 (1970).

[16] Lewin, *Collective Bargaining Impacts on Personnel Administration in the American Public Sector*, 27 LAB. L.J. 426, 432 (1976).

[17] H. WELLINGTON & R. WINTER, *supra* note 1, at 158.

[18] Feigenbaum, *Civil Service and Collective Bargaining: Conflict or Compatibility?*, 3 PUB. PERSONNEL MGMT. 244, 250 (May/June 1974) (citing Jerry Wurf, president of the American Federation of State, County and Municipal Employees ("AFSCME")); Wurf, *Merit: A Union View*, 34 PUB. ADMIN. REV. 431, 432 (Sept./Oct. 1974). As a general purpose public sector union, AFSCME has the largest membership. R. KEARNEY, *supra* note 7, at 28. The National Education Association, which represents employees in education, has the largest membership in the public sector. *See* H. EDWARDS, R.T. CLARK, JR. & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 15–16 (3d. ed., 1985) (citing GIFFORD, DIRECTORY OF U.S. LABOR ORGANIZATIONS 3 (1984–85 ed.)).

[19] R. KEARNEY, *supra* note 7, at 189–90.

Section IV of this article reviews the approaches of the various states that have addressed the issue, analyzing them in light of the policies underlying the two statutory schemes—collective bargaining and civil service.[20] In some states, statutory provisions address the question and resolve the conflict.[21] In others, the statute is silent, but courts have addressed the issue and reconciled the two statutes.[22] These resolutions run the gamut from giving priority to the collective bargaining agreement to precluding any negotiation of the discipline issue.[23] In many states, the issue has not been addressed directly by the legislature or the courts.[24]

Section V argues that the approach that best accommodates the policies of merit employment and collective bargaining[25] is one that allows the parties to negotiate alternatives to civil service procedures and standards that will prevail over civil service upon agreement of the parties to the negotiations.[26] Collective bargaining over disciplinary decisions and appeals procedures in no way threatens the merit

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[20] *See infra* notes 83–273 and accompanying text. In addition to providing the basis for an analysis of the most effective approach for accommodating collective bargaining and civil service, this review of state approaches to the relationship of civil service and collective bargaining collects and categorizes the law of various states on this issue for the use of both academics and practitioners. See Appendix II for a chart of these approaches by state.

[21] *See infra* notes 132–58, 174–239 and accompanying text.

[22] *See infra* notes 90–101 and accompanying text.

[23] *Compare* Hillsborough County Govtl. Employees Ass'n v. Hillsborough County Aviation Auth., 522 So. 2d 358, 363 (Fla. 1988) *with* State Employees Ass'n v. New Hampshire Pub. Employee Labor Relations Bd., 118 N.H. 885, 889–90, 397 A.2d 1035, 1037–38, 100 L.R.R.M. 2484, 2486 (1978).

[24] In some states, there is no enforceable duty to bargain. In others, there are simply no reported decisions. *See infra* notes 83, 88 and accompanying text.

[25] This approach assumes the legitimacy of the goals of both statutes—encouraging labor peace through collective bargaining and ensuring that employees in the public service are selected and retained on the basis of merit. Although there is room for disagreement about the value of these goals and the effectiveness of existing systems for achieving them, such debate is beyond the scope of this article. By enacting both collective bargaining requirements and civil service laws, the state legislatures have determined that the statutory goals are appropriate public policy for the state. The purpose of this article is to determine the legislative and decisional accommodation that maximizes the public policy underlying both statutes and avoids undue interference with either. For a criticism of civil service, see Savas & Ginsburg, *The Civil Service: A Meritless System*, 32 THE PUB. INTEREST 70, 70–80 (1973). For a criticism of the collective bargaining system, see Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 267 (1978) and works cited therein. The article notes that "it has been argued that collective bargaining has become an institutional structure not for expressing workers' needs and aspirations but for controlling and disciplining the labor force and rationalizing the labor market." *Id.*; *see also* R. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357, 1403–08 (1983) (statutory collective bargaining systems should be eliminated in favor of common law).

[26] *See infra* notes 274–350 and accompanying text.

principle or the public interest.[27] Indeed, such bargaining may strengthen the merit principle in significant ways.[28] At the same time, negotiation over discipline furthers the goals of public employee bargaining legislation. It allows employee participation in the determination of working conditions and permits the parties to determine the important issues for negotiation and the best ways to resolve such issues in light of the particular employment relationship, thereby promoting labor peace.[29]

Section VI concludes that, in most states where the law does not currently permit such negotiation, this result can be achieved easily by either appropriately interpreting existing statutes or implementing minor statutory amendments.[30] Legislatures contemplating enactment of collective bargaining statutes should anticipate this issue and address it directly, thereby avoiding the difficult issues of statutory interpretation that have plagued courts in states with no explicit statutory provision.[31]

I. Background and Development of Civil Service Law

The modern civil service system had its origins in the Civil Service Act, or Pendleton Act, which was passed by Congress in 1883.[32] After passage of the Pendleton Act, civil service reform spread rapidly to state and local government.[33] By 1970, eighty

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[27] *See infra* notes 291–350 and accompanying text.

[28] *See infra* notes 321–39 and accompanying text.

[29] *See infra* notes 340–42 and accompanying text.

[30] *See infra* notes 351–88 and accompanying text.

[31] In Michigan, for example, the statute contains no language regarding its effect on existing civil service laws. *See* Mich. Comp. Laws Ann. §§ 423.201–423.216 (West 1978 & Supp. 1990). The result of this omission has been extensive litigation over whether various matters covered by civil service laws are subject to negotiation and, where negotiated, whether the provisions are enforceable through binding arbitration or litigation. *See, e.g.*, Council 23, Local 1905, AFSCME v. Recorders' Court Judges, 399 Mich. 1, 8–9, 19, 248 N.W.2d 220, 222, 227, 94 L.R.R.M. 2392, 2397 (1976); Pontiac Police Officers Ass'n v. Pontiac, 397 Mich. 674, 676–77, 246 N.W.2d 831, 832, 94 L.R.R.M. 2175, 2175 (1976); Wayne Civil Serv. Comm'n v. Board of Supervisors, 384 Mich. 363, 368–71, 184 N.W.2d 201, 202–04, 77 L.R.R.M. 2034, 2034–36 (1971); Township of Clinton v. Contreras, 92 Mich. App. 297, 300–03, 284 N.W.2d 787, 788–89, 103 L.R.R.M. 2464, 2464–65 (1979).

[32] R. Vaughn, *supra* note 7, at 1–3. Prior to 1883, partisan political activity provided the basis for public employment decisions. Feigenbaum, *supra* note 18, at 244. The assassination of President Garfield in 1881 by a disappointed office seeker aided the civil service reform movement in its push for legislation, resulting in the Pendleton Act covering federal employees. *Id.*

[33] Couturier, *supra* note 7, at 57.

percent of state and local government employees were covered by some form of merit system.[34]

The civil service reform movement had two primary goals: (1) to remove political partisanship as a basis for employment of civil servants; and (2) to provide for selection, promotion, and retention of government employees on the basis of merit.[35] Thus, the civil service systems were designed to implement these two purposes. The typical merit system is administered by a nonpartisan board or commission that establishes rules and regulations governing personnel administration.[36] The commission ensures that the movement of personnel into, out of, and within the system is governed by merit, fitness, and competence.[37] Over the years, however, the authority of civil service commissions has expanded to many areas of employment relations beyond personnel movement.[38] Civil service commissions are not only involved in recruitment, examination, preparing lists of eligible candidates, appointment and promotion, but also assignments, demotions, transfers, layoffs and recalls, discharges, training, salary administration, attendance control, safety, grievances, pay and benefit determination, and classification of positions,[39] many of which are unrelated to the merit principle of employment.[40]

Discharge and demotion are traditionally viewed as directly related to the merit principle.[41] Nevertheless, in the initial wave of civil service reform, laws did not deal with removal of incompetent employees.[42] Reformers believed that, by requiring that appointments be based on merit, the laws removed the incentive for im-

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[34] R. KEARNEY, *supra* note 7, at 167 (citing a National Civil Service League survey of state and local government). According to the survey results, 84% of cities, 83% of counties, and 96% of states had some form of coverage under a merit system. *Id.* Federal law requires merit system coverage for all state and local employees who are paid with federal funds. *Id.*; *see* 42 U.S.C. § 4701 (1988).

[35] R. KEARNEY, *supra* note 7, at 167.

[36] *Id.*; Rehmus, *supra* note 5, at 926–27.

[37] R. KEARNEY, *supra* note 7, at 167; Helburn & Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LAB. L.J. 618, 619–20 (1972).

[38] Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826, 828 (1971); Anderson & Weitzman, *The Scope of Bargaining in the Public Sector*, in PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 173, 175 (1979).

[39] *See* Comment, *supra* note 38, at 828; Helburn & Bennett, *supra* note 37, at 620; R. KEARNEY, *supra* note 7, at 168.

[40] *See* Rehmus, *supra* note 5, at 927; Comment, *supra* note 38, at 828; Helburn & Bennett, *supra* note 37, at 623.

[41] *See* Helburn & Bennett, *supra* note 37, at 620.

[42] R. VAUGHN, *supra* note 7, at 1–17.

proper termination.[43] Thus, the Pendleton Act prohibited removal of civil service employees for political reasons but contained no other limitations on discharge and discipline.[44] Eventually, however, restrictions on discharge evolved, in accordance with the belief that employees should be terminated only for incompetence or other job-related reasons.[45]

Civil service statutes typically restrict the public employer's discretion to discharge and to impose other serious discipline, such as demotion and suspension, by limiting discipline to just cause[46] or specifying permissible reasons for termination, such as incompetence or unfitness for service.[47] In addition, most civil service statutes allow employees who are discharged or suspended for disciplinary reasons to appeal the disciplinary decision through civil service channels.[48] In most cases, the appeal to the civil service commission is the culmination of an appeals procedure that progresses from lower to higher levels of management.[49] Under some statutory schemes, lesser disciplinary penalties are appealable,[50] but the more typical provision limits appeals to severe disciplinary action, such as suspension, demotion, reduction in pay, and discharge.[51]

II. Background and Development of Collective Bargaining in Public Employment

With few exceptions, collective bargaining in public employment developed after the enactment of civil service laws.[52] The

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[43] *Id.* at 1–23.

[44] *See id.*

[45] *See, e.g.*, Neb. Rev. Stat. § 19–1832 (1987); R. Vaughn, *supra* note 7, at 5–3, 5–36 to 5–39. In addition to the statutory and administrative protections of civil service law, constitutional due process protections also evolved for public employees. *Id.* at 5–3. For a discussion of the evolution of constitutional protections, see *id.* at 5–3 to 5–35.

[46] *See, e.g.*, Ill. Ann. Stat. ch. 24, para. 10–1–18 (Smith-Hurd Supp. 1990) (employees in the classified service of a municipality may be discharged only for cause); Pa. Stat. Ann. tit. 71, § 741.807 (Purdon Supp. 1990) (employees in state classified service can be terminated only for just cause).

[47] *See, e.g.*, Neb. Rev. Stat. § 19–1832 (1987); Or. Rev. Stat. § 241.425 (1987).

[48] Stanley, *What are Unions Doing to Merit Systems?*, 31 Pub. Personnel Rev. 108, 111–12 (1970); *see, e.g.*, Wash. Rev. Code Ann. § 41.06.170(2) (Supp. 1990); Neb. Rev. Stat. § 19–1833(5) (1987).

[49] Stanley, *supra* note 48, at 111.

[50] *See, e.g.*, N.Y. Civ. Serv. Law, §§ 35.5(a)(3), 35.6(b)(2) (McKinney 1983) (unsatisfactory performance rating appealable); *id.* §§ 75.2, 75.3, 76 (McKinney 1983 & Supp. 1990) (reprimands require a pre-disciplinary hearing before imposition, and decision to reprimand is appealable); Mass. Gen. L. ch. 31, §§ 35, 41 (1988) (transfer appealable).

[51] *See, e.g.*, Neb. Rev. Stat. § 19–1833(5) (1987); Wash. Rev. Code Ann. § 41.06.170(2) (Supp. 1990).

[52] Comment, *supra* note 38, at 828. Delaware is one of the few exceptions. The Delaware

earliest collective bargaining statutes were enacted in the 1950's.[53] Since that time, collective bargaining in the public sector has rapidly increased.[54] Unions and collective bargaining "are now recognized, albeit not always accepted, facts of life in the United States."[55] Changes in the legal environment for collective bargaining in the public sector have been both a cause and an effect of increasing unionization.[56]

Several significant public policies have motivated the enactment of public sector bargaining statutes. First, as the size of government has increased, so too has the isolation of government workers.[57] In order to gain a sense of control over the work environment, these employees frequently look to collective action, and thus to unionization.[58] In the absence of the ability to engage in collective bargaining,[59] the pressures exerted by unionized employees seeking a voice in determining the work environment and demanding improved wages and benefits[60] lead inevitably to labor unrest, and often to strikes injurious to the public interest.[61] Thus, legislation requiring collective bargaining with unions that have demonstrated representation of a majority of employees furthers labor peace and minimizes disruption of public services.[62] Second, it provides em-

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collective bargaining statute was enacted in June, 1965, one year before the civil service statute. Rubenstein, *The Merit System and Collective Bargaining in Delaware*, 20 LAB. L.J. 161, 161–62 (1969).

[53] Edwards, *supra* note 1, at 886. States that enacted legislation in the 1950's included Wisconsin, New Hampshire, and Minnesota. *Id.* at 886 n.4.

[54] *Id.* at 886.

[55] *Id.*

[56] *See* R. KEARNEY, *supra* note 7, at 10–11, 14; Burton, *The Extent of Collective Bargaining in the Public Sector*, in PUBLIC-SECTOR BARGAINING 13–15 (Aaron, Grodin, Stern eds. 1979); Weber, *Prospects for the Future*, in COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 6 (J. Grodin, D. Wollett, & R. Alleyne, Jr. 3d ed. 1979).

[57] H. WELLINGTON & R. WINTER, *supra* note 1, at 12.

[58] *Id.* at 13.

[59] Even in the absence of statutory authority, courts have held that public employees have a first amendment right to join unions. *See* McLaughlin v. Tilendis, 398 F.2d 287, 288, 71 L.R.R.M. 2097, 2098 (7th Cir. 1968); Atkins v. City of Charlotte, 296 F. Supp. 1068, 1075, 70 L.R.R.M. 2732, 2736–37 (W.D.N.C. 1969).

[60] In the view of government employees, the gap between government wages and private sector wages has widened. LMSA, *supra* note 7, at 5. In addition, the traditional advantage of government employment—substantial fringe benefits—has been eroded by improvements in private sector benefits, many of which are attributable to unionization. *Id.* In recent years, government retrenchment resulting in decreased security of public sector employment may have further motivated employees to unionize. *See* R. KEARNEY, *supra* note 7, at 187–88; *see also* Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 UCLA L. REV. 867, 867–68 (1972).

[61] Edwards, *supra* note 1, at 885–86.

[62] *See id.*; H. WELLINGTON & R. WINTER, *supra* note 1, at 8; *see, e.g.*, ILL. ANN. STAT. ch. 48, para. 1701 (Smith-Hurd 1986). The Illinois statute states, in pertinent part:

ployees with a method of participating in their "own governance,"[63] i.e., determining their own terms and conditions of employment. Lastly, because unions also politically represent the employees, collective bargaining legislation increases political activism and representation, which are valued in the democratic system.[64]

Collective bargaining laws typically require negotiation about wages, hours, and working conditions or some variant thereof.[65] Under virtually any description of the subjects over which bargaining is required, unions will claim the right to negotiate the standards and procedures for discipline, as well as a procedure for challenging disciplinary decisions. This procedure most commonly is a grievance procedure culminating in binding arbitration by an impartial arbitrator.[66] In the private sector, approximately eighty-six percent of collective bargaining agreements contain a provision requiring just cause for discipline[67] and approximately ninety-eight percent con-

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> It is the public policy of this . . . Act to promote orderly and constructive relationships between all educational employees and their employers. Unresolved disputes between the educational employees and their employers are injurious to the public, and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution.

Id.; see also IOWA CODE ANN. § 20.1 (West 1989). The Iowa statute states, in pertinent part:

> The general assembly declares that it is the public policy of the state to promote harmonious and co-operative relationships between government and its employees by permitting public employees to organize and bargain collectively; to protect the citizens of this state by assuring effective and orderly operations of government in providing for their health, safety, and welfare.

Id.; see also FLA. STAT. ANN. § 447.201 (West 1981). The Florida statute states, in pertinent part:

> It is declared that the public policy of the state, and the purpose of this part, is . . . to promote harmonious and cooperative relationships between government and its employees, both collectively and individually . . . by assuring, at all times, the orderly and uninterrupted operations and functions of government . . . . These policies are best effectuated by: (1) Granting to public employees the right of organization and representation; (2) Requiring the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees.

Id.

[63] H. WELLINGTON & R. WINTER, *supra* note 1, at 8, 12–13.

[64] *Id.* at 8, 12.

[65] LMSA, *supra* note 7, at 66, 68–69; *see, e.g.*, KAN. STAT. ANN. § 75–4327(b) (1989); MICH. COMP. LAWS ANN. § 423.215 (West 1978).

[66] *See* R. KEARNEY, *supra* note 7, at 166; D. STANLEY, *supra* note 1, at 50.

[67] 2 Collective Bargaining Negot. & Cont. (BNA) § 40.1 at No. 1142 (Basic Patterns: Discharge, Discipline and Resignation) (Mar. 9, 1989). This estimate is based on a BNA survey of some 400 sample contracts. The same survey found that grounds for discipline were provided in 94% of contracts. Contractual grounds for discipline typically were of two types—for just cause or for specific offenses. Even in the absence of a just cause limitation, many arbitrators would imply such a requirement for discipline. F. ELKOURI & E.A. ELKOURI, HOW ARBITRATION WORKS 652 (4th ed. 1985).

tain an arbitration procedure for resolving disputes regarding the interpretation and application of the agreement.[68] In addition, many contracts contain procedural requirements for discipline such as notice of the charges and an opportunity to be heard.[69] Approximately twenty-six percent of grievances arbitrated in the private sector are discharge cases.[70]

Like their counterparts in the private sector, unions in the public sector have sought to negotiate both grievance and arbitration procedures and disciplinary standards.[71] The issues arbitrated in the public sector do not differ significantly from those arbitrated in the private sector.[72] Because employees and unions view civil service commissions as an arm of management, unions have sought to replace civil service procedures for challenging discipline with negotiated grievance procedures that culminate in binding arbitration by a neutral party.[73] Therein lies the potential conflict between civil service law and collective bargaining law as it relates to employee discipline.

III. The Potential Conflict Between Civil Service Law and Collective Bargaining Law

The potential conflict between statutory bargaining requirements and civil service provisions arises in two ways. First, statutory provisions regarding the required subjects for bargaining traditionally have been broadly written with few specific limitations.[74] Given the possible scope for bargaining, unions demand bargaining on all subjects arguably related to employment conditions in which their

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[68] *See* 2 Collective Bargaining Negot. & Cont. (BNA) §§ 51:1, 51:5 at No. 1140 (Basic Patterns: Grievances and Arbitration) (Feb. 9, 1989). This estimate is also based on BNA's sample of 400 contracts. All but one of the 400 contracts contained a grievance procedure. *Id.* § 51:1. In the one contract without a grievance procedure, disputes were referred directly to arbitration. *Id.*

[69] F. Elkouri & E.A. Elkouri, *supra* note 67, at 674.

[70] This estimate is based on a review of the cases reported in volumes 79 to 85 of Labor Arbitration Reports (BNA). Of 2046 reported cases, 539 were discharge cases. Many other arbitration cases involve discipline short of discharge. *See* F. Elkouri & E.A. Elkouri, *supra* note 67, at 650.

[71] *See* R. Kearney, *supra* note 7, at 189–90; Stanley, *supra* note 48, at 111–12.

[72] F. Elkouri & E.A. Elkouri, *supra* note 67, at 10 & n.39 and works cited therein.

[73] *See* Stanley, *supra* note 48, at 111–12; Hayford & Pegnetter, *Grievance Adjudication for Public Employees: A Comparison of Rights Arbitration and Civil Service Appeals Procedures*, 35 Arb. J. 22, 22–23 (Sept. 1980).

[74] *See* Seidman, *State Legislation on Collective Bargaining by Public Employees*, 22 Lab. L.J. 13, 15 (1971); Anderson & Weitzman, *supra* note 38, at 175; *see, e.g.*, Kan. Stat. Ann. § 75–4327(b) (1989); Mich. Comp. Laws Ann. § 423.215 (West 1978).

constituents—the employees—have an interest. According to one commentator, "[g]rievance procedures . . . are second only to wage and fringe benefits as an area of union concentration."[75] One of the primary reasons for the emphasis on grievance procedures is to enable employees to challenge disciplinary actions.[76]

When negotiations commence, management may refuse to negotiate restrictions on discipline and grievance procedures, claiming that bargaining is preempted by civil service law, which both governs discipline and provides the procedure for challenges. The dispute that must be resolved by reference to the two statutes—civil service and collective bargaining—is whether the subjects come within the scope of the collective bargaining requirement and, if so, whether the existence of civil service provisions on the same subjects removes them from the required scope of bargaining.[77]

Second, the conflict may arise in an alternative context. Management may agree to contract provisions governing discipline and grievances without contesting their negotiability. When the union grieves a particular disciplinary action, however, management may refuse to process and/or arbitrate the grievance, claiming that the provisions are unenforceable because of the existence of civil service provisions on the same subjects.[78] The union then must attempt to enforce the contract through legal action.[79] Although the context in which the action arises is different, the determination of the issue in a contract enforcement action is related to that arising in a refusal-to-bargain case. If discipline and grievance procedures are not within the permissible scope of bargaining under the statute

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[75] R. KEARNEY, *supra* note 7, at 189.

[76] *Id.*

[77] The dispute may be resolved by an administrative agency created by the bargaining statute, with an appeal to the courts or by the courts directly without a prior administrative determination, depending on the particulars of the statute. *Cf.* ME. REV. STAT. ANN. tit. 26, § 979–H (1988) *with* TEX. REV. CIV. STAT. ANN. art. 5154e–1, § 18 (Vernon 1987). Under many statutes, the case will be initiated with a charge by the union that the employer is engaging in an unfair or prohibited practice. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, §§ 979–C(1)(E), 979–H(2) (1988). In a few jurisdictions, the administrative agency may determine whether a matter is within the scope of negotiations without an unfair labor practice charge. *See, e.g.*, N.J. REV. STAT. § 34:13A–5.4(d) (1988).

[78] *See, e.g.*, Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh, 481 Pa. 66, 68–70, 391 A.2d 1318, 1319–20, 99 L.R.R.M. 3278, 3279–80 (1978).

[79] Again, as in the case of a refusal to negotiate, the union's case may be brought before an administrative agency or directly in court, depending on the statutory scheme. *Cf.* Board of Governors v. Illinois Educ. Labor Relations Bd., 170 Ill. App. 3d 463, 466, 524 N.E.2d 758, 759 (appeal from agency decision), *with Pittsburgh Joint Collective Bargaining Comm.*, 481 Pa. at 68–69, 391 A.2d at 1319–20, 99 L.R.R.M. at 3279–80 (appeal from decision of lower court).

because of the civil service provisions, then courts may find the existing contractual provisions unenforceable.[80] Thus, determining the appropriate scope of the statutory bargaining requirement and the impact of civil service law on that requirement is crucial.[81]

The resolution of this question depends on both the language of the two statutes at issue and the public policy underlying the statutes, as expressed by the legislature. A review of the existing state collective bargaining laws[82] reveals various ways of resolving the issue, both by statutory provisions and, where the statutes are silent, by case law. An analysis of law in various states provides guidance as to the method of deciding the priority of law that best comports with the public policy underlying both statutes.

IV. State Resolutions of the Civil Service-Collective Bargaining Conflict in Discipline Cases

The states that have addressed the issue of reconciling civil service law and bargaining requirements on employee discipline have used three basic methods.[83] One group of states[84] has specific statutory requirements with respect to the relationship of civil ser-

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[80] *See, e.g.*, Devine v. City of Des Moines, 366 N.W.2d 580, 583, 122 L.R.R.M. 3109, 3111 (Iowa 1985).

[81] A court or agency may find, without determining the requisite scope of bargaining, that the employer is estopped from refusing to comply with the contract it negotiated. *See, e.g., Pittsburgh Joint Collective Bargaining Comm.*, 481 Pa. at 72, 391 A.2d at 1321, 99 L.R.R.M. at 3280–81. This type of resolution is the exception rather than the rule, however.

[82] The reference to state collective bargaining laws includes laws enacted by state legislatures whether they cover state employees, local government employees, or both.

[83] Nine states have no statutory bargaining law. These include Arizona, Arkansas, Colorado, Mississippi, North Carolina, South Carolina, Utah, Virginia, and West Virginia. In several of these states, bargaining by public employers is unlawful. *See, e.g.*, N.C. Gen. Stat. §§ 95–98 (1989); Commonwealth v. County Board of Arlington County, 217 Va. 558, 581, 232 S.E.2d 30, 44 (1977). Although bargaining is permitted and, in fact, occurs in other states, *see, e.g.*, Local 598, AFSCME v. City of Huntington, 1984–86 PBC (CCH) ¶ 34,346 (W. Va. 1984), because of the absence of both statutory provisions and an enforceable duty to bargain, the conflict between civil service law and collective bargaining has not arisen in a reportable manner. Therefore, the interplay of collective bargaining and civil service law in these nine states is not further discussed herein. For discussion of the legal status of public sector unionism and collective bargaining in the southeastern states, see Nolan, *Public Employee Unionism in the Southeast: The Legal Parameters*, 29 S.C.L. Rev. 235, 235–304 (1978).

[84] Some states have different statutes governing different groups of employees and, thus, may fall into more than one category. For example, the Wisconsin law covering state employees has specific provisions regarding bargaining over disciplinary disputes, *see* Wis. Stat. Ann. § 111.91(b) (West 1988), whereas the law covering municipal employees contains no provisions regarding the relationship of civil service and bargaining over disciplinary matters. *See id.* §§ 111.70–.71.

vice disciplinary provisions and collective bargaining.[85] Another group of states has general statutory provisions dealing with the relationship of the collective bargaining requirements and other laws, but no specific provisions regarding the discipline issue.[86] In many of these states, the administrative agency, the courts, or both have applied the statutory provisions in cases involving disputes over employee discipline.[87] The third group of states has no statutory provisions relating to the issue.[88] As in the group of states with general statutory provisions, courts and agencies in some of the states without specific statutory language have addressed and resolved the issue.[89] Analysis of the statutes and decisional law in each

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[85] *See infra* notes 132–58 and accompanying text. These states include Wisconsin (state employees), Nevada (local government employees), New Mexico (state employees), New Jersey, Massachusetts, Minnesota, Delaware, Oregon (state employees), Vermont (municipal employees), Maine (public employees other than state employees), and the District of Columbia. See Appendix II for a chart categorizing the various state statutes.

[86] *See infra* notes 174–239 and accompanying text. These states include Alaska, Maine (state employees), Maryland (park employees and employees of the city of Baltimore), Vermont (state employees), Nebraska (state employees), New Hampshire, Hawaii, Connecticut, Ohio, Iowa, Illinois (state and local employees and educational employees), Washington, Pennsylvania, Texas (police and firefighters), Kansas, California (state employees and municipal employees), and Florida. In some states, the statutory provisions relate to the conflict between the statute and/or contracts negotiated pursuant to the statute and other laws in general. *See, e.g.*, VT. STAT. ANN. tit. 3, § 904 (1985). Other statutory provisions relate specifically to the relationship of civil service law and the bargaining obligation. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 5–272(c), (d) (West 1988). Some states have both types of provisions. *See, e.g.*, N.H. REV. STAT. ANN. § 273–A:1(XI), § 273–A:3(III) (1987).

[87] *See infra* notes 144, 146, 156, 185–239 and accompanying text.

[88] *See infra* notes 90–131 and accompanying text. These states include Michigan, New York, Oregon (local government employees), Rhode Island, Oklahoma, Montana, Nebraska (local government employees), and Wisconsin (municipal employees). In addition, 11 states have some collective bargaining provisions, often limited to certain categories of employees, but no statutory provisions regarding conflict with other laws, including civil service laws, and no reported cases addressing the conflict between the collective bargaining law and civil service. These states include Alabama (meet and confer for firefighters only), Georgia (firefighters only), Idaho (firefighters only), Indiana (teachers only), Kentucky (firefighters in cities over 300,000 and others may opt in), Louisiana (transit employees only), Missouri (meet and confer only with no bargaining requirement), North Dakota (public employees have the right to join unions but the only bargaining statute is for teachers), South Dakota, Tennessee (teachers only) and Wyoming. Because of the absence of both statutory and decisional law, these states are not analyzed further, but the recommendations for dealing with these issues that are contained in section VI, *infra*, are applicable to these states as well. For a discussion of the difference between meet and confer provisions, such as those in Missouri and Alabama, and bargaining requirements, see Edwards, *supra* note 1, at 893–99. As previously indicated, this article does not deal with the statutory provisions regarding teachers, transportation workers, employees covered by the Railway Labor Act, and employees covered by limited separate statutes such as judicial employees in Maine. No attempt has been made to analyze such statutes for provisions regarding conflict with other laws. *See supra* note 13.

[89] *See infra* notes 92–101 and accompanying text.

of these categories demonstrates the strengths and weaknesses of the different approaches.

A. *The Silent Statutes*

In several states,[90] the legislature did not address the relationship of the collective bargaining law to civil service statutes, leaving that task to the administrative agency and the courts. In some of these states, courts have addressed and resolved the issue; in others, the relationship of the two statutes remains unclear.[91] A review of decided cases in these states with silent statutes reveals the status of the existing law with respect to negotiation over disciplinary matters.

The Michigan courts have held that the collective bargaining law has priority over the civil service law for local government employees where the two statutes are in conflict. This resolution has been based primarily on the later enactment of the collective bargaining law and the legislative intent that it govern public employment relations.[92] Specifically, the Michigan Supreme Court has held that the Public Employment Relations Act requires negotiation over disciplinary procedures and grievance and arbitration procedures.[93]

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[90] The states with silent statutes are Michigan, New York, Oregon (local government employees), Rhode Island, Oklahoma, Montana, Nebraska (local government employees), and Wisconsin (municipal employees).

[91] This group of states differs from those listed in *supra* note 83, because, in most cases, the statutes are more comprehensive bargaining statutes and because one or more decisions on the relationship of collective bargaining and civil service is available. The issue of bargaining over disciplinary matters, however, has not been clearly resolved.

[92] *See* Pontiac Police Officers Ass'n v. City of Pontiac, 397 Mich. 674, 682, 246 N.W.2d 831, 835, 94 L.R.R.M. 2175, 2177 n.20 (1976); Wayne County Civil Serv. Comm'n v. Board of Supervisors, 384 Mich. 363, 374, 184 N.W.2d 201, 205, 77 L.R.R.M. 2034, 2036–37 (1971); Local 1383, IAFF v. City of Warren, 411 Mich. 642, 662, 311 N.W.2d 702, 709 (1981). With respect to state-classified civil service employees, however, the civil service law has priority because it was created by the state constitution. *See* Board of Control v. Labor Mediation Bd., 384 Mich. 561, 566, 184 N.W.2d 921, 923, 77 L.R.R.M. 2685, 2686–87 (1971). In addition, the Michigan Supreme Court held that the specific removal statute for probation officers prevailed over the Public Employee Relations Act and precluded an order to arbitrate the discharge of a probation officer. *See* Council #23, Local 1905, AFSCME v. Recorder's Court Judges, 399 Mich. 1, 6–7, 248 N.W.2d 220, 221–22, 94 L.R.R.M. 2392, 2392–93 (1976). The court relied, in part, on the constitutional question that would be raised by delegating to a private arbitrator decisions about the employment of persons on whom judges relied heavily in sentencing decisions. *Id.* at 15, 248 N.W.2d at 225, 94 L.R.R.M. at 2395.

[93] *Pontiac Police Officers Ass'n*, 397 Mich. at 681, 246 N.W.2d at 834, 94 L.R.R.M. at 2177. *See* Clinton v. Contrera, 92 Mich. App. 297, 312, 284 N.W.2d 787, 793, 103 L.R.R.M. 2464, 2468 (1979) (collective bargaining agreement providing for binding arbitration of suspension and discharge of police officer is enforceable).

Similarly, the New York courts have held that discipline is a mandatory subject of bargaining[94] and that unions may agree to waive the employees' rights to civil service appeals and limit the employees to challenging discipline through the grievance and arbitration procedure.[95] In reaching this conclusion, the courts have relied on the absence of any clear prohibition on negotiation of discipline in statutory or decisional law or public policy.[96] The appellate court noted in *Auburn Police Local 195, Council 82 v. Helsby*, however, that, although disciplinary procedures per se are negotiable, there might be a specific bargaining proposal regarding discipline that would impinge on the merit principle, implying that such a proposal might require a different conclusion with respect to negotiability.[97]

The Oregon collective bargaining law contains no language regarding the relationship of civil service and collective bargaining,[98] but the Oregon Supreme Court has held that the legislature intended the Public Employee Collective Bargaining Act ("PECBA") to prevail over conflicting local ordinances.[99] Even where state statute authorizes the creation of the county civil service system, the

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[94] *See* Auburn Police Local 195, Council 82 v. Helsby, 62 A.D.2d 12, 15, 404 N.Y.S.2d 396, 398, 98 L.R.R.M. 3240, 3241 (1978), *aff'd*, 46 N.Y.2d 1034, 416 N.Y.S.2d 586 (1979).

[95] *See id.* at 17, 404 N.Y.S.2d at 399, 98 L.R.R.M. at 3242; Binghamton Civil Serv. Forum v. City of Binghamton, 44 N.Y.2d 23, 28, 374 N.E.2d 380, 382, 403 N.Y.S.2d 482, 484, 90 L.R.R.M. 3070, 3072 (1978); Antinore v. State of New York, 49 A.D.2d 6, 10–11, 371 N.Y.S.2d 213, 216–17, 90 L.R.R.M. 2127, 2128–29 (1975), *aff'd*, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 94 L.R.R.M. 2224 (1976).

[96] *See, e.g.*, Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 129, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 22 (1972); *Auburn Police Local 195*, 62 A.D.2d at 15, 404 N.Y.S.2d at 399, 98 L.R.R.M. at 3241. In *Associated Teachers of Huntington*, the court addressed the negotiability of disciplinary standards and appeals procedures for teachers covered by tenure laws, but the case has been relied upon by New York courts to find that employers must negotiate these same subjects with unions representing civil service employees. *See Auburn Police Local 195*, 62 A.D.2d at 15, 404 N.Y.S.2d at 399, 98 L.R.R.M. at 3241; *Binghamton Civil Serv. Forum*, 44 N.Y.2d at 28, 403 N.Y.S.2d at 484, 374 N.E.2d at 382, 90 L.R.R.M. at 3072.

[97] *Auburn Police Local 195*, 62 A.D.2d at 17, 404 N.Y.S.2d at 399, 98 L.R.R.M. at 3242.

[98] The collective bargaining statute covers state and local employees. *See* OR. REV. STAT. § 243.650(18) (1987). The civil service statute for state employees, however, provides that the terms and conditions of employment for state employees represented by unions are to be set by the collective bargaining agreement rather than civil service law or regulations except for recruitment and selection of employees for initial appointment. *Id.* § 240.321(2),(3). The statute further specifies that grievances of represented employees are to be resolved by the collectively bargained procedure. *See id.* § 240.321(4). See *infra* notes 157–58 and accompanying text for a description of the Oregon statute.

[99] *See* City of Roseburg v. Roseburg Firefighters Local No. 1489, 292 Or. 266, 278–81, 639 P.2d 90, 97–99, 111 L.R.R.M. 2932, 2937–39 (1981).

collective bargaining law prevails, both because it was enacted later in time with an intent to apply uniformly to all public employees and because the civil service system is permitted, but not required, by statute.[100] Applying this reasoning, the Oregon Appellate Court held that negotiation over grievance and arbitration procedures for discipline is required.[101]

Similarly, the statutes of Montana, Oklahoma, Rhode Island, Nebraska (local government employees), and Wisconsin (municipal employees) contain no provisions addressing the conflict issue. In each state, there are some related decisions that rely on many of the same criteria as the courts in Michigan, Oregon, and New York, but the decisions do not definitively resolve the issue of whether bargaining over disciplinary matters is required where there are civil service provisions regarding discipline. Two Montana Supreme Court decisions address contractual disciplinary issues. In *AFSCME, Local 2390 v. City of Billings*, the court held that a contract that limited the right to discharge employees was binding, but no issue of conflict with civil service was raised.[102] In *City/County of Butte/Silver Bow v. Montana State Board of Personnel Appeals*, the court held that the contractual grievance procedure did not cover terminations because the contract incorporated the Metropolitan Police Act, which provided for a police commission to decide termination issues.[103] The majority opinion mentioned the possibility of conflicting decisions of the two bodies and suggested that the Metropolitan Police Act gave exclusive jurisdiction over discharges to the police commission.[104] The decision in *Butte/Silver Bow* suggests that the Montana Supreme Court would be receptive to an argument that civil service rules would prevail over the collective bargaining agreement.[105]

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[100] *See* AFSCME Council 75, Local 350 v. Clackamas County, 69 Or. App. 488, 497–98, 687 P.2d 1102, 1108–09, 117 L.R.R.M. 2447, 2451 (1984).

[101] *See id.* at 495–96, 687 P.2d at 1107, 117 L.R.R.M. at 2450.

[102] *See* Local 2390, AFSCME v. City of Billings, 171 Mont. 20, 24, 555 P.2d 507, 509, 93 L.R.R.M. 2753, 2754 (1976).

[103] *See* 225 Mont. 286, 289, 732 P.2d 835, 837, 125 L.R.R.M. 2956, 2957 (1987).

[104] *Id.* at 288–89, 732 P.2d at 837, 125 L.R.R.M. at 2957. The dissenting judge read the majority opinion as holding that the police commission has exclusive jurisdiction over discharges. *Id.* at 289, 732 P.2d at 837, 125 L.R.R.M. at 2957 (Sheehy, J., dissenting).

[105] See MONT. CODE ANN. § 7–3–4408 (1989), which authorizes local government civil service boards to adopt and enforce rules regarding appointment and employment that have the force of law. In *Brinkman v. State*, the Montana Supreme Court held that an employee could not sue the state for wrongful discharge based on an alleged violation of public policy where he had not exhausted the grievance and arbitration procedure in the collective bargaining agreement. 224 Mont. 238, 239, 245–46, 729 P.2d 1301, 1302, 1306, 124 L.R.R.M.

The Nebraska Supreme Court addressed the issue of conflict between civil service law and collective bargaining requirements in *AFSCME v. County of Lancaster*.[106] The court ruled that the civil service statute, enacted subsequent to the collective bargaining law, was controlling where the two statutes were in direct conflict.[107] To the extent that the civil service act contains "specific and mandatory" provisions regarding discipline, discharge, and the grievance procedure, the subjects are removed from the scope of negotiations.[108] Correspondingly, where the civil service provisions are not specific and mandatory, the parties are required to bargain.[109] This analysis is similar to that applied by the New York courts.[110]

The Oklahoma statute, which covers police and firefighters only, requires arbitration for disputes over the interpretation of the contract.[111] The statute also provides that all rules, regulations, fiscal procedures, working conditions, departmental practices, operations, and administration in effect on the effective date of an agreement are part of the contract unless expressly changed.[112] This provision suggests that rules and regulations may be altered by the contract, but it is not clear whether this applies to departmental rules and regulations or rules and regulations established pursuant to civil service law.[113] In the only state supreme court opinion on the issue, the court held that the parties must arbitrate whether the city must comply with an arbitration award reinstating a discharged

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2328, 3438, 2331 (1986). This decision suggests a policy favoring arbitration of disputes in the public sector and might support an argument that arbitration should prevail over civil service law if civil service law regarding appeals of terminations does not expressly provide an exclusive remedy.

[106] 200 Neb. 301, 263 N.W.2d 471, 98 L.R.R.M. 2340 (1978).

[107] *Id.* at 302–04, 263 N.W.2d at 473–74, 98 L.R.R.M. at 2341–42.

[108] *Id.* at 304–05, 263 N.W.2d at 474, 98 L.R.R.M. at 2342.

[109] *Id.* For the Nebraska civil service provisions on discipline, discharge, and grievance procedure, see NEB. REV. STAT. §§ 81–1307, - 1311(9) (Supp. 1987) (state employees); NEB. REV. STAT. §§ 19–1832, - 1833 (1987) (police officers and firefighters); NEB. REV. STAT. § 23–2510 (1987) (employees of counties over 300,000); NEB. REV. STAT. §§ 23–2517, - 2522(1), - 2522(5), - 2525(15), - 2525(18), - 2528 (1987) (employees of counties of 150,000 to 300,000).

[110] *See supra* notes 94–97 and accompanying text.

[111] *See* OKLA. STAT. ANN. tit. 11, § 51–111 (West Supp. 1989).

[112] *See id.*

[113] Oklahoma statutes governing police and firefighters limit the authority to discharge such employees and allow municipalities to create civil service or merit boards. *See* OKLA. STAT. ANN. tit. 11, § 29–104 (West 1978) (members of fire department can be removed only for good and sufficient cause as provided by applicable law or ordinance); OKLA. STAT. ANN. tit. 11, § 50–123 (West Supp. 1990) (police officers may be terminated only for cause, and municipality must create a Board of Review with appellate authority over discharges unless a civil service or merit system has been established).

employee.[114] The decision implied that a contractual arbitration award in a discharge case would be enforceable but the court did not decide the question. There was no discussion of a possible conflict with civil service.[115]

Two Rhode Island State Labor Relations Board decisions address related matters. In the first decision, the Board held that, where reclassification of civil service positions was mandated by law, the state did not commit an unfair labor practice by reclassifying without first negotiating with the union.[116] In the second decision, the Board found that a town's refusal to discuss with the union a grievance over the discharge of the police chief was an unfair labor practice.[117] These decisions suggest that the Board would find that a mandatory statutory provision would remove discipline and discharge from negotiations, but in its absence, negotiations might be required.[118]

The Wisconsin Supreme Court has construed the Municipal Employment Labor Relations Act to require enforcement of an arbitration award in a discharge case.[119] The court rejected the argument that enforcing the contract into which the city had entered was an unlawful infringement on the city's legislative power.[120] In a later decision, however, the court ruled that a contract provision that contravenes a city ordinance is void, and overturned an arbitrator's award reinstating an employee who had violated the ordinance.[121] In still another decision, the same court disclaimed any intent to set forth a broad rule that ordinances control over conflicting contracts, but reasserted the general rule that laws prevail over contracts.[122] In addition, the Wisconsin Court of Appeals held

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[114] *See* Taylor v. Johnson, 706 P.2d 896, 899, 125 L.R.R.M. 3235, 3237 (Okla. 1985).

[115] *Id.* at 898, 125 L.R.R.M. at 3237.

[116] *In re* Rhode Island State Labor Relations Board and State of Rhode Island, Case No. ULP–3538 (Oct. 16, 1980), Gov't Empl. Rel. Rep. (BNA) No. 893, at 18 (Dec. 22, 1980).

[117] *In re* Rhode Island State Labor Relations Board and Town of Foster, Case No. ULP–3612 (Oct. 24, 1980), Gov't Empl. Rel. Rep. (BNA) No. 893, at 18–19 (Dec. 22, 1980).

[118] This prediction, of course, is based on limited information. It is also noteworthy that in 1972, the Rhode Island legislature repealed a statutory provision contained in the state employees bargaining statute that exempted matters exclusively reserved to the merit system from bargaining. R.I. GEN. LAWS § 36–11–5 (repealed 1972). This repeal suggests that bargaining over matters covered by the merit system for state employees is required.

[119] *See* Local 1226, Rhinelander City Employees, AFSCME v. City of Rhinelander, 35 Wis. 2d 209, 211, 215, 151 N.W.2d 30, 31, 33, 65 L.R.R.M. 2793, 2793, 2795 (1967).

[120] *Id.* at 220, 151 N.W.2d at 36, 65 L.R.R.M. at 2797.

[121] *See* Wisconsin Employment Relations Comm'n v. Teamsters Local 563, 75 Wis. 2d 602, 612–14, 250 N.W.2d 696, 701–07, 94 L.R.R.M. 2840, 2844–45 (1977).

[122] *See* City of Madison v. Madison Professional Police Officers Ass'n, 144 Wis. 2d 576,

that the discharge of probationary police officers was not arbitrable because arbitration would improperly transfer the statutory discretion of the police chief to an arbitrator.[123]

Finally, the Wisconsin Employment Relations Commission ("WERC") ruled that arbitrators were permitted to decide grievances concerning discipline of deputy sheriffs despite the existence of a county civil service system with a grievance board established by ordinance.[124] The WERC reconciled the statute and civil service ordinance by holding that an employee dissatisfied with the decision of the county grievance board could file a grievance under the collective bargaining agreement and proceed to arbitration or appeal to the circuit court under civil service law.[125] The Wisconsin approach, like that of many other courts and boards, first attempts to reconcile the conflicting laws without doing substantial damage to the purposes of either.[126] The court determines priority only in the event of an irreconcilable conflict.

Although the Wisconsin law is not settled, these cases indicate that Wisconsin is willing to allow arbitration of discharge cases pursuant to collective bargaining agreements despite civil service appeals procedures, but is unwilling to permit the collective bargaining agreement to contradict directly laws that establish grounds

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594–95, 425 N.W.2d 8, 15 (1988). In *Madison*, the court was faced with a challenge to an arbitration award based on the same residency ordinance that was at issue in *Teamsters Local 563*. The court refused to vacate the award, finding no manifest disregard of the law particularly because the city had agreed to exceptions from the residency ordinance and the ordinance expressly contemplated exceptions. *Id.* at 594–95, 425 N.W.2d at 14–15. The court overruled *Teamsters Local 563* to the extent that it held that an ordinance always prevails over a contract but noted that it was not making a broad exception to the general rule that the law takes precedence over a contract. *Id.* at 595, 425 N.W.2d at 15.

[123] *See* Milwaukee Police Ass'n v. City of Milwaukee, 113 Wis. 2d 192, 197–98, 335 N.W.2d 417, 419–20 (1983). The court rejected the argument that the Wisconsin Supreme Court's earlier decision in Glendale Professional Policemen's Association v. Glendale, 83 Wis. 2d 90, 264 N.W.2d 594 (1978), required the opposite conclusion. *See Milwaukee Police Ass'n*, 113 Wis. 2d at 196, 335 N.W.2d at 419. The court in *Glendale* had held that a collective bargaining provision that required that promotions be made on the basis of seniority was lawful because it merely restricted the statutory discretion of the police chief. *Id.* The *Milwaukee* decision appears to be based, in part, on the purpose of the probationary period, which is to allow a trial period for the employee during which an unchallengeable right to discharge exists.

[124] *See* Dodge County and AFSCME Local 1323–B, Decision No. 21574 (WERC 1984). The decision was in response to a petition for a declaratory ruling filed by Dodge County.

[125] *See Dodge County*, Decision No. 21574, slip op. at 8.

[126] *See, e.g.*, Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 175, 624 P.2d 1215, 1218, 172 Cal. Rptr. 487, 490, 109 L.R.R.M. 2674, 2676 (1981); Wayne County Civil Serv. Comm'n v. Board of Supervisors, 384 Mich. 363, 373–74, 184 N.W.2d 201, 204–05, 77 L.R.R.M. 2034, 2036–37 (1971).

for discharge. Thus, Wisconsin appears to distinguish between negotiation of disciplinary standards, which is not permitted where a statute providing standards or employer discretion to set standards exists, and negotiation of appeal procedures, which is permissible despite alternative avenues of appeal.

States with silent statutes that have resolved the civil service/collective bargaining conflict by permitting collective bargaining have relied on several factors. First, where the state later enacted the collective bargaining statute, some courts have presumed that the legislature had knowledge of the potential conflict created with the civil service law, and intended the collective bargaining statute to prevail.[127] Second, some courts have reasoned that the comprehensiveness of the collective bargaining statute suggests that the legislature intended it to govern uniformly employer-employee relationships, thus precluding interference with the statutory scheme by civil service law, which covers only a portion of the public employees.[128] Third, where the civil service system is permitted but not required, some courts have concluded that the legislature could not have intended it to prevail over a mandatory bargaining requirement.[129] Finally, where there is no clear legal prohibition on negotiation of disciplinary matters or grievance procedures in the civil service statute or decisions thereunder, bargaining has been permitted.[130] Courts have used similar factors in decisions in those states where no definitive resolution of the conflict has been reached.[131]

These decisions provide useful guidance for determining legislative intent in the absence of statutory language, but they are not an adequate substitute for specific language addressing the problem. Because the conflict is common to most states, legislatures enacting collective bargaining laws should address the problem in the statute. A review of state statutory provisions dealing with the relationship of civil service and collective bargaining law provides useful guidance regarding the appropriate accommodation of the two laws.

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[127] *See, e.g.*, Local 1383, IAFF v. City of Warren, 411 Mich. 642, 655–62, 311 N.W.2d 702, 706–09 (1981); *Wayne County Civil Serv. Comm'n*, 384 Mich. at 373–74, 184 N.W.2d at 204–05, 77 L.R.R.M. at 2036–37.

[128] *See supra* notes 92, 100 and accompanying text.

[129] *See supra* note 100 and accompanying text.

[130] *See supra* note 96 and accompanying text.

[131] *See supra* notes 104, 106–09, 119–26 and accompanying text.

B. *Specific Statutory Provisions Regarding Employee Discipline*

1. State Statutes that Expressly Address the Negotiation or Enforcement of Contract Provisions Regarding Employee Discipline

Statutory provisions specifically directed at employee discipline take two basic forms. The first type addresses the negotiability of disciplinary issues; the second contains provisions directed at whether civil service or contractual procedures govern disciplinary disputes. The Wisconsin statute covering state employees provides an example of both types.[132] The statute requires negotiation regarding a procedure for the adjustment of grievances or disputes arising out of any type of disciplinary action.[133] In addition to requiring negotiation about grievance procedures for discipline, the bargaining law further specifies that no negotiation is required about policies and procedures of the civil service commission relating to either specific subjects,[134] or certain types of disciplinary actions specified in one section of the civil service law—removal, suspension, discharge, reduction in pay, or demotion—except as provided in the civil service law.[135] The statutory civil service sections specify both that just cause is required for any of the above-mentioned disciplinary actions and that the determination of just cause is governed by the collective bargaining agreement and the appeal procedure required to be negotiated therein.[136] Thus, although bargaining over standards for serious disciplinary action is precluded, the statute effectively incorporates into the contract a just-cause requirement for such discipline, the requirement that typically would be negotiated by the union.[137] Further, the law specifies that the contractual grievance procedure governs in lieu of any civil service appeals procedure.[138]

The Nevada Local Government Employee-Management Relations Act provides another example of a specific provision on dis-

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[132] *See* WIS. STAT. ANN. § 111.91 (West 1988).
[133] *See id.* § 111.91(1)(b).
[134] *See id.* § 111.91(2)(b).
[135] *See id.* § 111.91(2)(c).
[136] *See id.* §§ 230.34(1)(a), (am), (ar), 230.44.
[137] *See supra* note 67 and accompanying text.
[138] *See* WIS. STAT. ANN. § 230.34(1)(ar).

cipline negotiation.[139] That statute expressly enumerates mandatory bargaining subjects, including discipline and discharge procedures, and grievance and arbitration procedures.[140] In New Mexico, collective bargaining is authorized not directly by statute but by rules of the State Personnel Board, a creature of statute with authority to establish employment rules.[141] These rules prohibit negotiation of any agreement contrary to Board rules that govern, *inter alia*, dismissal and demotion procedure,[142] and further specify that the contractual grievance procedure cannot provide for arbitration of dismissals, demotions, or suspensions.[143] Furthermore, the New Mexico Supreme Court stated in *AFSCME, Local 2238 v. Stratton* that the Board cannot delegate to unions and agencies the authority to agree on matters, including termination of employees, that are expressly committed to the Board's rulemaking authority.[144] Thus, Nevada and New Mexico have express provisions with opposite results.

The New Jersey law explicitly requires negotiation of a written grievance and disciplinary review procedure, which may provide

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[139] *See* NEV. REV. STAT. § 288.010–.280 (1990). Notably, the statute specifies that negotiation over such matters is required but does not specifically address the issue of possibly conflicting civil service provisions on discipline or any other subject. Thus, the statute might be equally well classified as one that is silent with respect to the relationship between civil service and collective bargaining. *See* Helburn & Bennett, *supra* note 37, at 626. The Nevada Supreme Court has held, however, that the statutory requirement for negotiation of discipline and discharge procedures supersedes a contrary city charter. City of Reno v. Reno Police Protective Ass'n, 98 Nev. 472, 475, 653 P.2d 156, 158, 112 L.R.R.M. (BNA) 3424, 3426 (1982).

[140] *See* NEV. REV. STAT. § 288.150(i), (o) (1990). In *City of Reno*, the Nevada Supreme Court held that the city must bargain with the union about discipline and discharge procedures despite the fact that the city's charter declared them nonnegotiable. 98 Nev. at 475, 653 P.2d at 158, 112 L.R.R.M. at 3426. The court based its decision on the priority of the statute over contrary charter provisions, relying on a prior decision to that effect. Notably, the statute does not list disciplinary standards as a negotiable bargaining subject.

[141] *See* State Personnel Board, *Regulations for Labor-Management Relations* (1983), 4A Lab. Rel. Rep. (BNA) (Lab. Arb. No. 749, at 41:207) (Jan. 15, 1990). The State Personnel Board's authority to permit bargaining has withstood legal challenge. Local 2238, AFSCME v. Stratton, 108 N.M. 163, 171, 769 P.2d 76, 84, 131 L.R.R.M. 2424, 2431 (1989).

[142] *See Stratton*, 108 N.M. at 169, 769 P.2d at 82, 131 L.R.R.M. at 2429.

[143] *See* State Personnel Board, *Regulations for Labor-Management Relations*, at 41:208c. The New Mexico rules are a hybrid in a sense because they contain both the cited specific prohibition on negotiability of discharge arbitration, and a general prohibition on negotiation of any proposal inconsistent with a Board rule. *See supra* note 141–42 and accompanying text. These rules would place New Mexico in the category of states with general provisions about conflict of laws as well. *See infra* notes 174–239 and accompanying text.

[144] 108 N.M. at 169, 769 P.2d at 82, 131 L.R.R.M. at 2429. The court also stated, however, that collective bargaining is not incompatible with the merit system. *Id.* at 170, 769 P.2d at 83, 131 L.R.R.M. at 2431.

for binding arbitration, but further specifies that the procedure can neither replace nor be inconsistent with any statutory appeal procedure, nor can it provide for binding arbitration of disciplinary disputes where the employees have protection under civil service or tenure laws.[145] Courts and the New Jersey Public Employee Relations Commission have interpreted this provision to preclude negotiation over any proposal relating to discipline that is covered by the Civil Service Act or regulations of the Civil Service Commission, including both arbitration of discipline and standards for discipline.[146]

The second type of express statutory provision addressing the discipline issues specifies whether the collective bargaining agreement or the civil service provisions govern disciplinary disputes.[147]

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[145] *See* N.J. REV. STAT. ANN. § 34:13A–5.3 (West 1988).

[146] *See* State v. State Supervisory Employees Ass'n, 78 N.J. 54, 89–90, 393 A.2d 233, 246, 98 L.R.R.M. 3267, 3277–78 (1978) (negotiation of matters set by statute or regulation is precluded, as is negotiation of proposals that would interfere with the discretion of the civil service commission); State v. Local 195, IFPTE, 179 N.J. Super. 146, 153–54, 430 A.2d 966, 970 (1981) (the Civil Service Act has preempted the disciplinary determinations of state employees and neither the standards for discipline nor a grievance and arbitration procedure for challenging discipline is negotiable); City of Newark, 12 NJPER ¶ 17010 (1985) (a proposed grievance provision that would permit firefighters to elect binding arbitration to challenge disciplinary decisions where statutory civil service remedies are available is not negotiable). See Comment, *After* Ridgefield Park *and* State Supervisory Employees*: The Scope of Collective Negotiations in the Public Sector of New Jersey*, 10 SETON HALL L. REV. 558, 571–84 (1980), for a discussion of the New Jersey Supreme Court's decision in *State Supervisory Employees Association*, and its effect on the scope of bargaining in New Jersey. Legislation other than civil service also may preempt negotiation of disciplinary matters in New Jersey. *See* City of Jersey City v. Jersey City Police Officers' Benevolent Ass'n, 179 N.J. Super. 137, 138, 430 A.2d 961, 962 (1981) (disciplinary penalties for police officers are not negotiable or arbitrable because the legislature has delegated disciplinary discretion to the municipality).

It is not altogether clear whether minor disciplinary actions that are not covered by civil service or delegated to a municipality by statute are negotiable. *Compare Local 195*, 179 N.J. Super. at 152, 430 A.2d at 969 (discipline is a managerial prerogative that is not negotiable) *with* City of Newark, 12 NJPER ¶ 17010, slip op. at 28 (a proposal that would allow firefighters to choose binding arbitration to challenge discipline where no civil service procedure is available is negotiable) *and* State of New Jersey, 11 NJPER ¶ 16026 (1984) (minor disciplinary decision not appealable to the Civil Service Commission may be submitted to binding arbitration).

[147] In addition to the states mentioned in the discussion below—Massachusetts, Minnesota, Delaware, and Oregon—other states have statutory provisions of this type. *See, e.g.*, VT. STAT. ANN. tit. 21, § 1734(b) (1987) (for municipal employees, if an employer and employee organization voluntarily submit a grievance over tenure of employment to binding arbitration, with or without a collective bargaining agreement, binding arbitration is the exclusive method of resolution regardless of contrary statutory provisions). In all other situations, state laws, municipal charters, and special acts prevail over conflicting provisions of collective bargaining agreements. *Id.* tit. 6, § 1725(c). This latter provision would appear to govern disputes over discipline that do not affect tenure of employment, to the extent that such laws cover lesser discipline. *See also* ME. REV. STAT. ANN. tit. 26, § 969 (1988) (for public employees other than

The Massachusetts labor relations statute permits the parties to negotiate a grievance procedure ending in binding arbitration.[148] If an employee elects to use such a procedure, it is the exclusive method for resolving any dispute over suspension and dismissal notwithstanding the existing civil service procedure.[149] Minnesota not only permits but requires the parties to negotiate such a procedure for all disciplinary actions.[150] Employees who have other appeals procedures available, including civil service appeals, may opt for the contractual procedure or the appeals procedure but cannot pursue both.[151]

Delaware addresses the issue in the civil service statute rather than the collective bargaining statute, listing certain rules of the Civil Service Commission that apply to employees covered by collective bargaining agreements, regardless of the provisions of the agreement,[152] and other rules that may be preempted by contractual clauses on the subject.[153] Rules adopted pursuant to the statutory provisions on discharge and reduction in rank or grade for just cause[154] and grievances[155] are in the latter category, and thus negotiations about those subjects are required.[156] The Oregon civil service statute covering state employees addresses this issue in a similar manner. It states that, notwithstanding certain statutory provisions, one of which addresses discipline of civil service employees, the terms and conditions of employment for employees in bargain-

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state employees if the contract provides for arbitration of disciplinary actions, such provisions are controlling in the event of conflict with civil service. Civil service jurisdiction is reserved with respect to other subjects such as conduct and grading of exams, rating of candidates, and establishment of lists); D.C. CODE ANN. §§ 1–617.3(d), 1–617.1(b) (1981) (the grievance procedure in the collective bargaining agreement takes precedence over the civil service grievance procedure and any adverse action under the collective bargaining agreement may only be for cause).

[148] *See* MASS. GEN. L. ch.150E, § 8 (1988).

[149] *Id.*

[150] *See* MINN. STAT. ANN. § 179A.20 (West Supp. 1990).

[151] *Id.*

[152] *See* DEL. CODE ANN. tit. 29, § 5938(c) (1983).

[153] *See id.* § 5938(d). The provisions probably are contained in the civil service law rather than the collective bargaining law because, in contrast to most states, the civil service law in Delaware was enacted after the collective bargaining law. *See supra* note 52 and accompanying text.

[154] *See* DEL. CODE ANN. tit. 29, § 5930 (1983).

[155] *See id.* § 5931.

[156] *See id.* § 5938(b); Sullivan v. Local Union 1726, AFSCME, 464 A.2d 899, 901–03, 115 L.R.R.M. 3179, 3181–82 (Del. 1983); Laborers' Int'l Union of North America, Local 1029 v. State Dep't of Health & Social Services, 310 A.2d 664, 666–67, 84 L.R.R.M. 2417, 2417–19 (Del. Ch. 1973), *aff'd*, 314 A.2d 919, 85 L.R.R.M. 2303 (Del. 1974).

ing units with a recognized or certified union representative will be determined by the collective bargaining agreement, not by civil service law or regulations.[157] The Oregon statute also states that employment disputes for these employees will be resolved using the contractual grievance procedure.[158]

2. Strengths and Weaknesses of Express Statutory Provisions Regarding Employee Discipline

The above-mentioned statutory provisions illustrate several methods of reconciling civil service and bargaining requirements. Addressing the negotiability of disciplinary matters using specific statutory language offers the advantage of clarity of purpose, thereby minimizing the necessity for litigation. Litigation over bargaining subjects delays negotiations and the salutary effects of peaceful resolution of disputes between the bargaining parties, one of the primary goals of bargaining laws.[159] Where uncertainty exists over whether negotiation is required, a recalcitrant negotiator, or a negotiator legitimately concerned about potential infringement on civil service prerogatives, may use the uncertainty to prolong negotiations through disputes over bargainability.[160] The result may well be a time-consuming and expensive round of litigation,[161] followed by court-ordered bargaining between parties embittered by an unnecessary court battle.[162]

Express statutory provisions, however, do not always provide the expected certainty. For example, the Nevada statute requires negotiation about discipline and discharge procedures, and grievance and arbitration procedures.[163] It does not indicate whether the standards for discipline are negotiable. An employee organization could argue plausibly that negotiation of procedures implies negotiation of standards because an arbitrator limited to interpreting the contract in deciding a grievance challenging discipline must have contractual standards to apply. The employer could argue with equal force that legislative enumeration of the subjects of negotia-

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[157] *See* OR. REV. STAT. § 240.321(2), (3) (1987).

[158] *See id.* § 240.321(4).

[159] See *supra* notes 57–64 and accompanying text for a description of goals of bargaining laws.

[160] *See* Edwards, *supra* note 1, at 914.

[161] *Id.*

[162] Negotiations may be further complicated by the frustrations of employees whose expected gains from collective bargaining have been long delayed.

[163] *See supra* notes 139–40 and accompanying text.

tion requires the conclusion that bargaining is not required with respect to subjects not mentioned, relying on the axiom of statutory interpretation, *expressio unius est exclusio alterius*.[164] The employer could contend that standards under the civil service statute apply; the union could argue with substantial scholarly support that an arbitrator may not be permitted to consider civil service rules that are not incorporated in the contract because the arbitrator's authority is limited to interpreting and applying the collective bargaining agreement.[165]

Other statutory provisions discussed above, such as those of Minnesota and Massachusetts,[166] pose similar problems by specifying negotiation over procedure. The Wisconsin and District of Columbia statutes avoid this problem by imposing a just-cause limitation in the contract by statute.[167] Although statutory imposition of standards interferes with the goal of giving the parties the freedom to determine terms and conditions of employment through bargaining, the interference is probably slight because the just-cause limitation is common where standards are negotiated.[168]

Similar problems of interpretation have occurred in Delaware where the law defines negotiability by reference to rules derived from sections of the civil service statute. In *Sullivan v. Local 1726, AFSCME*, the Delaware Supreme Court was required to decide the statutory derivation of a particular civil service rule regarding employment transfers in order to determine whether the issue was negotiable.[169] Although this may not pose a problem with disciplinary actions where the statutory derivation is clear, it does create difficulty for other areas of civil service/collective bargaining conflict. Thus, express statutory language offers certain advantages but also may create problems.

If the legislature specifies that bargaining over a particular topic is or is not required, it creates an inference regarding the negotiability of subjects not mentioned. A party desiring to avoid negotia-

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[164] To express one thing is to exclude others. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 67, at 355. For examples of application of this rule of construction, *see* People *ex rel.* Difanis v. Barr, 83 Ill. 2d 191, 199, 414 N.E.2d 731, 734 (1980); *In re* Estate of Leichtenberg, 7 Ill. 2d 545, 552, 131 N.E.2d 487, 490 (1956).

[165] *See* F. ELKOURI & E.A. ELKOURI, *supra* note 67, at 214, 366–80; O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION, 436–68 (2d ed. 1983).

[166] *See supra* notes 148–51 and accompanying text.

[167] *See* D.C. CODE ANN. §§ 1–617.1, 1–617.3(d) (1981); WIS. STAT. §§ 111.91, 230.34(1)(a), (am), (ar) (1988 & Supp. 1989).

[168] *See supra* notes 67–68 and accompanying text.

[169] 464 A.2d 899, 901, 115 L.R.R.M. 3179, 3181 (Del. 1983).

tions may reasonably argue that a statutory mandate to bargain about discipline indicates a legislative intent to preclude bargaining on subjects not discussed in the statute. Similarly, statutory preclusion of disciplinary bargaining lends itself to a contention that it is the only subject excluded from negotiations. Statutory recitation of bargaining subjects is workable only in the unlikely event that the legislature can be certain that all possible subjects are enumerated and placed in the desired category. Even in that event, statutory enumeration of bargaining subjects has the considerable disadvantage of restricting the flexibility of both the parties and the agency administering the statute to adjust the subjects negotiated to the changing demands of the work place over time.[170]

The two different statutory approaches discussed above address different but related aspects of the conflict problem. The first method deals with the scope of negotiability, i.e., whether the law requires the parties to bargain about discipline standards and procedures. The second deals with the enforceability question, i.e., assuming that the parties have negotiated contract language dealing with discipline, whether the contract is enforceable. The two issues are interrelated, but a statute that does not address both may give rise to litigation. Where the collective bargaining statute clearly requires bargaining, an employer or a union may negotiate a provision and later claim that it is unenforceable because of a conflict with civil service law.[171] If the statute contains no language indicating whether the contract or the civil service law has priority, a court might find the contract to be unenforceable. A court might well conclude that, although negotiation was permissible, enforcing the provision over the objection of one of the parties would deprive the party of rights under the civil service law. The better view, however, absent direct legislative history to the contrary, is that, by authorizing negotiation over the subject, the legislature empowered the parties to agree to an enforceable contract notwithstanding civil service law. Where bargaining over discipline is prohibited by the statute, there is a strong argument against enforceability of contracts negotiated contrary to the prohibition. The legislature's probable motivation in that instance is to preserve the jurisdiction of civil service over the matter.

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[170] Edwards, *supra* note 1, at 916–17 (quoting NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342, 358–59 (1957)).

[171] *See, e.g.*, Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh, 481 Pa. 66, 69, 391 A.2d 1318, 3120, 99 L.R.R.M. 3278, 3279 (1978).

Similarly, where the statute contains a rule of precedence, but no express requirement that the parties negotiate over the issue, one party may refuse to negotiate based on the coverage of the subject by civil service law because a rule of precedence does not directly mandate or prohibit bargaining.[172] In theory, a legislature could provide that the collective bargaining agreement takes precedence over civil service, while permitting but not requiring negotiation regarding subjects covered by civil service. Where the description of bargainable subjects is broad,[173] however, and no limitation based on civil service is suggested in the statutory language or legislative history, the logical conclusion is that the legislature intended to require bargaining over subjects covered by civil service. Similarly, if the legislature provides that civil service laws supersede the collective bargaining agreement, the argument that bargaining over civil service subjects is required but that the agreement is unenforceable is a weak one.

To avoid these problems of interpretation, the legislature should address both the scope of bargaining and the enforceability of the agreement as they relate to civil service laws. This may be done either by explicit provisions regarding particular subjects as in the states discussed above, or by more general provisions regarding the relationship of collective bargaining requirements and other existing laws.

C. *Statutory Provisions Regarding the Relationship of Collective Bargaining to Other Laws*

1. State Statutes with Language Directed to the Relationship of Collective Bargaining to Other Laws

In contrast to the state laws discussed above, which contain specific provisions regarding the negotiability and/or enforceability of discipline issues, many state laws contain broader provisions. Some states directly address the relationship of civil service law to

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[172] *See* Edwards, *supra* note 1, at 910–11.

[173] Most public sector statutes use broad language to describe bargainable subjects. *See, e.g.*, ILL. ANN. STAT. ch. 48, para. 1607 (Smith-Hurd 1986); MASS. GEN. L. ch. 150E, § 6 (1988). Indeed, many are patterned after the National Labor Relations Act, which requires bargaining over "wages, hours and other terms and conditions of employment," 29 U.S.C. § 158(d) (1988), language that has been broadly interpreted. *See* Inland Steel Co. v. NLRB, 170 F.2d 247, 253–54 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

collective bargaining;[174] others contain general language about the relationship of other laws to collective bargaining.[175] In order to determine whether the parties can negotiate discipline and enforce contract language relating to disciplinary issues, this general language must be applied to specific situations. In many states, agency and/or court decisions have addressed and decided the negotiability and enforceability of contractual disciplinary provisions based on the general language of the statute.

As in the case of laws with specific language regarding discipline, statutes in this second category address the relationship of collective bargaining to other laws using different language. Certain states address the question in terms of the scope of required bargaining; others contain provisions that deal with enforceability of contracts.[176] In addition, some states in this category have incorporated language dealing with both negotiability and enforceability.[177]

The Vermont State Employees Labor Relations Act offers an example of a provision directed at bargaining subjects. The law requires bargaining on all aspects of the relationship of the employer and employees except matters prescribed or controlled by statute.[178] The act further states that it shall not be construed to "be in derogation of, or to contravene the spirit and intent of the merit system principles and personnel laws,"[179] and requires the management bargaining representative to ensure the compatibility of collective bargaining with the merit system.[180] The Vermont statute also expressly prohibits the state police from negotiating about matters of discipline, but contains no such prohibition for other state employees.[181] Thus, the Vermont state employees statute contains both general conflict provisions and specific provisions regarding

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[174] *See infra* notes 178–82, 185–91, 194–96, 198, 207, 220–21, 223–25, 227–28, 233–35 and accompanying text.

[175] *See infra* notes 178, 183, 195–96, 199–200, 204–05, 214 and accompanying text.

[176] *Compare* CONN. GEN. STAT. ANN. § 5–272(d) (West 1988) *with* TEX. REV. CIV. STAT. ANN. art. 5154e–1, § 20 (Vernon 1987). Alaska fits in neither category. The Alaska Public Employment Relations Act ("PERA") refers to civil service law only in the initial policy section, stating that the policy of the bargaining law is to strengthen the merit principle where civil service is in effect, and further provides that the policies of the PERA are to be effectuated by maintaining merit system principles. *See* ALASKA STAT. § 23.40.070 (1984).

[177] *See infra* notes 188–223 and accompanying text.

[178] *See* VT. STAT. ANN. tit. 3, § 904 (1985).

[179] *Id.*

[180] *See id.* § 905.

[181] *See id.* § 1004.

civil service, both in the context of subjects for bargaining.[182] Like the Vermont law, the Nebraska statute covering state employees requires bargaining over terms and conditions of employment, including those that may otherwise be provided by law, unless negotiation is specifically prohibited.[183] There are no published court decisions officially interpreting the Vermont or Nebraska laws as they apply to discipline.[184]

The Connecticut statute covering state employees also addresses the issue in terms of bargaining subjects, but specifically directs its provisions at conflict with civil service law. The statute requires bargaining about wages, hours, and other conditions of employment with an express reservation regarding certain civil service subjects.[185] Specifically, no bargaining is required about the "establishment, conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examination and the appointments from such lists," and the enumerated matters are reserved expressly for the civil service agencies established by law.[186] By expressly excluding these matters of civil service, the legislature has indicated that bargaining over other subjects covered by civil service law is permitted. In New Hamp-

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[182] The Maine statute governing state employees has provisions very similar to those of the Vermont State Employees Labor Relations Act. *See* ME. REV. STAT. ANN. tit. 26, § 979–D (West 1988 & 1989 Special Pamphlet). The Maine statute further provides that, if the parties negotiate a grievance procedure with binding arbitration, it is exclusive and supersedes any grievance procedure otherwise provided by law. *Id.* § 979–K. In *Department of Education and Cultural Service v. Maine State Employees Association*, the Maine Supreme Court held that this statutory provision and the collective bargaining agreement required binding arbitration of a discharge grievance, and precluded submission of the grievance to the State Employees' Appeals Board. 433 A.2d 415, 419, 1112 L.R.R.M. 3162, 3165 (1981).

[183] *See* NEB. REV. STAT. § 81–1371(8) (1987).

[184] In In re *Brooks*, however, the Vermont Supreme Court reviewed a decision by the Vermont Labor Relations Board ("VLRB") on a grievance filed by a discharged state employee. 135 Vt. 563, 564, 382 A.2d 204, 205, 97 L.R.R.M. 2432, 2433 (1977). Under the Vermont statute, the VLRB makes the final determination on grievances of state employees. VT. STAT. ANN. tit. 3, § 926 (Supp. 1989). The court in *Brooks* overturned the VLRB's decision reinstating the employee, but stated that the union and the employer could alter the definition of just cause in their collective bargaining agreement. 135 Vt. at 569, 382 A.2d at 208, 97 L.R.R.M. at 2435. Clearly, the court has recognized that state employers and unions can negotiate about disciplinary standards and procedures. The court has limited the VLRB's review of employer disciplinary decisions. *See, e.g.*, Grievance of Byrne, 147 Vt. 265, 268, 514 A.2d 709, 711 (1986). For a thorough discussion of the VLRB's role in grievance proceedings for state employees and the Vermont Supreme Court's limitations on that role, see Note, *The Vermont Labor Relations Board's Role in Grievance Proceedings: Let's Make This Process Work*, 12 VT. L. REV. 429, 429–48 (1987).

[185] *See* CONN. GEN. STAT. ANN. § 5–272(c), (d) (West 1988).

[186] *Id.* § 5–272(d).

shire, however, which has very similar statutory language, the statute has been construed to preclude negotiation over employee discipline and removal.[187]

Other state statutes contain similar provisions regarding subjects for negotiation and, in addition, language regarding enforceability of the contract. For example, the Hawaii bargaining law excludes certain subjects from negotiation altogether and prohibits agreement to any proposal inconsistent with the merit principle.[188] The statute further specifies that existing civil service regulations not contrary to the bargaining law remain applicable, but provides that the collective bargaining agreement prevails over inconsistent rules and regulations as long as the agreement is consistent with merit principles.[189]

The Connecticut municipal employees bargaining law contains the same language as the Connecticut state employees law regarding subjects for negotiation.[190] It also provides that the collective bargaining agreement has precedence over charters, special acts, ordinances, and rules or regulations of the civil service commission or the employer, provided that the appropriate legislative body of the employer has approved the agreement.[191] The Connecticut Supreme Court has interpreted these provisions of the law to require negotiation over a proposal for binding arbitration of discharge grievances of police officers and to permit enforcement of such a clause, despite a city charter provision that authorized the police commissioners to discharge employees for cause in accordance with

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[187] *See* State Employees' Ass'n v. New Hampshire Pub. Employee Labor Relations Bd., 118 N.H. 885, 889–90, 397 A.2d 1035, 1037–38, 100 L.R.R.M. 2484, 2486 (1978) (interpreting N.H. REV. STAT. ANN. § 273–A:3.III (1987)). The court based its decision on both the merit system exclusion, which was contained in language very similar to that in the Connecticut statute, and the statutory management rights clause. *Id.* at 889–90, 397 A.2d at 1038, 100 L.R.R.M. at 2486.

[188] *See* HAW. REV. STAT. § 89–9(d) (1988). Excluded from bargaining are classification and reclassification, retirement benefits, and salary ranges and steps.

[189] *See id.* § 89–10(d). In Matter of Yamaguchi and Malapit, Decision No. 145 (Haw. Pub. Emp. Relations Bd. 1981), the Board held that the Mayor of the County of Kauai and the Public Workers Union violated the statute by settling a promotion grievance in a manner that had no contractual basis and was inconsistent with civil service law. The effect of the settlement was to deprive the complainant of a job to which he was entitled on the basis of civil service law. The Board's decision was based on the settlement's inconsistency with merit principles.

[190] *See supra* notes 185–86 and accompanying text. The municipal law also contains additional limitations on negotiation of the promotional process and charter provisions concerning employee political activity. *See* CONN. GEN. STAT. ANN. § 7–474(g) (West 1989).

[191] *See id.* § 7–474(b).

civil service rules.[192] The court correctly noted that there might well be no conflict with the charter because the charter did not prohibit additional proceedings to challenge discharges but, in any event, the law gave the contract priority over the charter if any conflict existed.[193]

Ohio has exclusions in subjects for negotiation similar to those of Connecticut[194] and further provides that the bargaining law and agreements negotiated thereunder prevail over other laws, except as otherwise specified by the legislature.[195] Neither the bargaining statute nor the civil service statute precludes negotiation over discipline, and indeed, the bargaining law states that the civil service commission has no jurisdiction over a grievance if a contract provides for final and binding arbitration of the matter that is the subject of the grievance.[196] Thus, the civil service commission may not entertain appeals regarding such grievances.[197]

The Iowa Public Employment Relations Act has provisions regarding both negotiability and enforceability, but the courts have reached a different result with respect to bargaining over disciplinary issues than the Connecticut courts. Like Connecticut, Iowa confirms that nothing in the statute "shall diminish the authority and power" of any civil service commission to recruit, prepare, conduct and grade examinations, to rate candidates for appointment and promotion, to classify employees, and to provide appeal

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[192] *See* Board of Police Comm'rs v. White, 171 Conn. 553, 563–65, 370 A.2d 1070, 1075–76, 93 L.R.R.M. 2637, 2640–41 (1976).

[193] *Id.* at 563–64, 370 A.2d at 1075, 93 L.R.R.M. at 2640.

[194] *See* OHIO REV. CODE ANN. § 4117.08(B) (Baldwin 1983) ("The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining."). The language of the statute suggests that the legislature intended to allow broad scope for negotiations. W. Celley, *Scope of Bargaining Issues in Ohio's Public Sector*, 14 OHIO N.U.L. REV. 21, 27 (1987).

[195] *See* OHIO REV. CODE ANN. § 4117.10 (Baldwin Supp. 1989). In *State* ex rel. *Rolins v. Board of Education*, the Ohio Supreme Court, interpreting this section of the statute, held that the collective bargaining agreement prevailed over the conflicting statute governing teacher tenure. 40 Ohio St. 3d 123, 124–25, 532 N.E.2d 1289, 1291 (1988). The decision narrowly interprets the exceptions to preemption of other laws by the collective bargaining agreement, indicating substantial deference to the collective bargaining process. *See id.* at 126–27, 532 N.E.2d at 1292–93.

[196] *See* OHIO REV. CODE ANN. § 4117.10 (Baldwin Supp. 1989).

[197] *See id.* In *Richards v. State Personnel Board of Review*, an Ohio appeals court affirmed the dismissal of an appeal to the State Personnel Board of Review of a probationary employee's discharge on the ground that the Ohio Public Employees Collective Bargaining Act deprived the Board of jurisdiction where a negotiated arbitration procedure existed. CA–3393 (Ohio Ct. App. Jan. 20, 1989) (LEXIS 463).

rights.[198] Unlike Ohio and Connecticut, however, which give the collective bargaining law (Ohio) or contracts negotiated thereunder (Connecticut) priority, Iowa law provides that no collective bargaining agreement or arbitration decision is enforceable if enforcement would "substantially impair or limit performance of any statutory duty of the employer,"[199] and further specifies that the state statutes prevail over conflicting contract language.[200] Although the statute also provides that the grievance procedure of a contract should be followed rather than the existing statutory appeals procedures,[201] the Iowa Supreme Court held in *Devine v. City of Des Moines* that the statutory priority language and the civil service law that states, in pertinent part, "[n]o person holding civil service rights as provided in this chapter shall be removed, demoted, or suspended arbitrarily, except as otherwise provided in this chapter," required the conclusion that the civil service commission has exclusive jurisdiction over discharges, and a contractual arbitration provision was deemed unenforceable.[202]

Like the Connecticut and Ohio statutes, the Illinois Public Labor Relations Act ("IPLRA")[203] has provisions on both negotiability and enforceability. The IPLRA provisions are more similar to those in the Nebraska state employees law, however, because they are directed at conflict of law in general, rather than civil service law in particular. The IPLRA imposes an obligation to bargain over any condition of employment not specifically provided for in any other law and not specifically in violation of any other law.[204] The statute further provides that both the IPLRA and collective bargaining agreements negotiated thereunder supersede conflicting laws.[205] The Illinois Supreme Court has interpreted the statute to require bargaining over a proposal that would allow employees to arbitrate

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[198] IOWA CODE ANN. § 20.9 (West 1989).

[199] *Id.* § 20.17.

[200] *Id.* § 20.28. See City of Davenport and AFSCME Council 61, Case No. 2535 (Iowa Pub. Emp. Relations Bd. 1983) for a discussion by the Iowa Public Employment Relations Board of the applicability of this provision to the conflict between civil service and bargaining requirements.

[201] *See* IOWA CODE ANN. § 20.18 (West 1989).

[202] 366 N.W.2d 580, 582–83, 122 L.R.R.M. 3109, 3110–11 (Iowa 1985).

[203] ILL. ANN. STAT. ch. 48, paras. 1601–27 (Smith-Hurd 1986 & Supp. 1990). The Illinois Public Labor Relations Act covers state and local government employees except for educational employees who are covered by the Illinois Educational Labor Relations Act. *Id.* paras. 1701–20.

[204] *See id.* para. 1607.

[205] *Id.* para. 1615.

disciplinary grievances, despite a municipal civil service system that provided a discipline appeal procedure.[206]

The Washington bargaining law provides a variation on the above theme, absolving the employer of any bargaining obligation in matters delegated to a civil service commission similar in scope and authority to that created by statute for state employees.[207] The Public Employee Relations Commission generally has concluded that local civil service commissions are not sufficiently similar to the state commission to excuse bargaining by local government employers.[208] The Washington statute also specifies that its provisions

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[206] *See* City of Decatur v. AFSCME, Local 268, 122 Ill. 2d 353, 365–67, 522 N.E.2d 1219, 1224–25 (1988). The decision in *Decatur* was based on section 1607, which defines the subjects of bargaining. *See id.* at 358–59, 522 N.E.2d at 1221. *See supra* note 204 and accompanying text.

[207] *See* WASH. REV. CODE ANN. § 41.56.100 (Supp. 1990). The status of bargaining for state employees in Washington is a matter "of some complication" under the Washington statute. Ortblad v. State, 85 Wash. 2d 109, 114, 530 P.2d 635, 639, 88 L.R.R.M. 3402, 3404 (1975) (en banc). Citing various provisions of the bargaining statute, the Washington Supreme Court held in *Ortblad* that state employees have a right to collective bargaining. *Id.* at 114–15, 530 P.2d at 639, 88 L.R.R.M. at 3404–05. Later that same year, the court held that juvenile court employees were state employees who were not covered by the collective bargaining statute with respect to hiring, firing, and working conditions for which the juvenile court judges had responsibility, and therefore, the collective bargaining agreement with the county governing those matters was void. Zylstra v. Piva, 85 Wash. 2d 743, 748, 750, 539 P.2d 823, 826, 827, 90 L.R.R.M. 2832, 2834–35 (1975) (en banc).

The state civil service statute authorizes the State Personnel Board to adopt rules regarding the basis and procedures for reducing, dismissing, suspending, or demoting an employee, WASH. REV. CODE ANN. § 41.06.150(1) (Supp. 1990), and "[a]greements between agencies and certified exclusive bargaining representatives providing for grievance procedures and collective negotiations on all personnel matters over which the appointing authority of the appropriate bargaining unit may lawfully exercise discretion." *Id.* § 41.06.150(13). This statutory provision, contained in the civil service statute, is also referenced in the collective bargaining statute. *See id.* § 41.56.130. The unfair labor practice portions of the bargaining statute are incorporated by the civil service statute. *See id.* § 41.06.340. The rules of the State Personnel Board require that each contract contain a grievance procedure with arbitration by the State Personnel Board. *See* Kerr v. Department of Game, 14 Wash. App. 427, 430, 542 P.2d 467, 469 (1975). Although the law regarding state employees is complex, as noted in *Ortblad*, a right to collective bargaining clearly exists. With respect to the relationship between collective bargaining and civil service, the civil service statute would appear to authorize bargaining only where the employer has discretion over a particular personnel matter. *See* WASH. REV. CODE ANN. § 41.06.150(13) (Supp. 1990). Where the civil service law or any other statute restricts the employer's discretion, bargaining would be precluded. *See id.*; *see also Ortblad*, where the court held that the state budget director was the employer who must bargain with the union representing state employees on the subject of wages because he had discretion. 85 Wash. 2d at 115–16, 530 P.2d at 639–40, 88 L.R.R.M. at 3405. In *Ortblad II*, however, the court held that the director was not authorized to enter into a binding agreement. Ortblad v. Washington, 88 Wash. 2d 380, 383, 561 P.2d 201, 203, 95 L.R.R.M. 2114, 2115 (1977) (en banc).

[208] *See* IAFF, Local 1890 and City of Wenatchee, Decision 2216 (PECB, 1985); City of

are additional to other remedies and supersede conflicting statutes.[209] This section has been interpreted to require an employer to arbitrate a discharge grievance where the contract gave the employee a choice between the contractual procedure and the civil service appeals procedure.[210]

Another group of states in this category address the issue through statutory and collective bargaining agreement priority provisions, with varying results.[211] The Illinois Educational Labor Relations Act[212] and the Pennsylvania Public Employee Relations Act[213] contain language stating that the parties shall not effect or implement contract provisions in violation of or inconsistent with other statutes.[214] These provisions attempt to address both negotiability and enforceability by barring the parties from both effecting and implementing conflicting contractual provisions.[215] Courts in both states have addressed the applicability of the statutes to discharge cases. In *Board of Governors v. Illinois Educational Labor Relations Board*,[216] the Illinois Appellate Court held that civil service law did not establish the exclusive remedy for discharge and that the employer violated the law by refusing to process a discharge grievance to arbitration.[217] The Pennsylvania Supreme Court took a different approach in *Pittsburgh Joint Collective Bargaining Committee v. City of*

Walla Walla, Decision 1999 and 1999–A (PECB, 1984); City of Bellevue, Decision 839 (PECB, 1980).

[209] *See* WASH. REV. CODE ANN. § 41.56.905 (Supp. 1990).

[210] *See* Rose v. Erikson, 106 Wash. 2d 420, 421, 721 P.2d 969, 970 (1986) (en banc).

[211] These states include Kansas, California (state and local government employees), Florida, Illinois (educational employees), Pennsylvania, and Texas (police and firefighters). *See infra* notes 212–39 and accompanying text. States that have statutes containing both negotiability provisions and priority provisions were discussed previously. *See supra* notes 188–210 and accompanying text.

[212] ILL. ANN. STAT. ch. 48, paras. 1701–20 (Smith-Hurd 1986 & Supp. 1990). The statute covers educational employees only. *See supra* note 203.

[213] PA. STAT. ANN. tit. 43, §§ 1101.101–2301 (Purdon Supp. 1990).

[214] ILL. ANN. STAT. ch. 48, para. 1710(b) (Smith-Hurd 1986); PA. STAT. ANN. tit. 43, § 1101.703 (Purdon Supp. 1990). The Pennsylvania statute prohibits conflict with municipal home rule charters as well.

[215] The Illinois Educational Labor Relations Board has narrowly interpreted the prohibition on effecting provisions in conflict with other statutes, requiring negotiations on matters within the exclusive authority of the statutory merit board but prohibiting their implementation without merit board approval. *See* AFSCME and Board of Trustees, University of Illinois, Case No. 86–CA–0087–C (1989).

[216] 170 Ill. App. 3d 463, 524 N.E.2d 758 (1988).

[217] *See id.* at 478, 483, 524 N.E.2d at 764, 770. The court's decision relied, in part, on statutory language that allows the parties to supplement but not diminish employee rights under other statutes. *See id.* at 478–80, 524 N.E.2d at 766–67; ILL. ANN. STAT. ch. 48, para. 1710(b) (Smith-Hurd 1986).

Pittsburgh.[218] Without deciding whether a conflict between the contract and civil service law existed, the court held that an employer could not agree to arbitrate discharges and then refuse to arbitrate based on allegedly conflicting civil service law.[219]

The Texas police and firefighter bargaining law preempts all contrary laws, and collective bargaining agreements are expressly permitted to preempt civil service law.[220] Where the agreement contains no provision preempting civil service law, civil service governs.[221] Relying on this language, the Texas Appellate Court has voided disciplinary proceedings of the civil service commission where contractual requirements, which were given priority by the collective bargaining agreement, were not followed.[222] In contrast, the Kansas statute bars the contract from covering subjects

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[218] 481 Pa. 66, 391 A.2d 1318, 99 L.R.R.M. 3278 (1978).

[219] *See id.* at 70–71, 391 A.2d at 1320, 99 L.R.R.M. at 3279–80. The Pennsylvania courts have narrowly construed other statutes to avoid conflicts that would preclude arbitration of discharges. *See, e.g.*, Pennsylvania Labor Relations Bd. v. Franklin Township Municipal Sanitary Auth., 39 Pa. Commw. 10, 15, 395 A.2d 606, 608, 100 L.R.R.M. 2186, 2187 (1978) (no statutory directive "expressly commanding that the authorities and authorities alone exercise the power to appoint and dismiss employees at will unfettered by a review of arbitration under a PERA contract"); Board of Educ. v. Philadelphia Fed'n of Teachers Local No. 3, 464 Pa. 92, 96, 97, 101, 346 A.2d 35, 37, 40, 90 L.R.R.M. 2879, 2880, 2882 (1975) (statutory authority to remove teachers for specified causes and to establish rules and regulations does not preclude contractual arbitration of the discharges of nontenured teachers); AFSCME Local 159 v. City of Philadelphia, Docket No. PERA–C–88–222–E (Pennsylvania Labor Relations Bd. 1989) (civil service regulations cannot supersede the employer's statutory obligation to comply with an arbitration award).

[220] *See* TEX. REV. CIV. STAT. ANN. art. 5154c–1, § 20 (Vernon 1987). Similarly, the law governing employees of the Maryland National Park and Planning Commission covers a limited group of employees and expressly permits contractual preemption of conflicting rules, regulations, and policies of the employer. *See* MD. ANN. CODE art. 28, § 5–114.1(f)(4) (1986). No decisional law addressing any effect on civil service rules and regulations has been found. In addition, the Baltimore City Code has established provisions governing city employees. Baltimore City Code, Art. I, § 110–126(a) (1974), 4 Lab. Rel. Rep. (BNA) No. 745, at 30:215–224 (Oct. 23, 1989). Section 114 of the Code reserves to the employer the right to take disciplinary action against its employees in accordance with the civil service provisions of the charter and other applicable laws. *Id.* at 30:218. The statutory provisions of this section are deemed to be a part of every collective bargaining agreement, but the employee's right to file a grievance over the interpretation and application of the contract or the agency's rules and regulations is preserved. Section 122 of the Code states that arbitration of grievances is permitted unless binding arbitration is contrary to the City Charter, in which case arbitration is advisory only. *Id.* at 30:223. The City Charter allows binding arbitration of contract disputes. *Id.* at 30:215. Negotiated grievance procedures are in addition to those established by the board of estimates, and the employee must elect which procedure to pursue. *Id.* at 30:223. The employee's election is binding.

[221] *See* TEX. REV. CIV. STAT. ANN. art. 5154c–1, § 20(b) (Vernon 1987).

[222] *See* City of San Antonio Firemen's and Policemen's Civil Serv. Comm'n v. Villanueva, 630 S.W.2d 661, 665 (Tex. Ct. App. 1981); City of San Antonio Firemen's and Policemen's Civil Serv. Comm'n v. Lott, 630 S.W.2d 667, 669 (Tex. Ct. App. 1981).

preempted by federal or state law, home rule ordinances, or the authority of any civil service commission to conduct and grade exams and rate candidates.[223] Similarly, in the Meyers-Milias-Brown Act,[224] California gives priority to laws and rules regarding merit and civil service systems.[225] The California courts have construed civil service laws to be compatible with the bargaining law in most cases, however, and have required negotiations over topics covered by civil service, including discharge.[226]

The law governing state employees in California (hereinafter "SEERA") also preserves the merit principle and prohibits any limitation on entitlements of civil service employees.[227] This law then lists those statutory provisions that may be preempted by a collective bargaining agreement, those that may be preempted unless the

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[223] *See* KAN. STAT. ANN. § 75–4330(a) (1989). See generally Goetz, *The Kansas Public Employer Employee Relations Law*, 28 KAN. L. REV. 243 (1980) for a thorough discussion of the Kansas statute. Goetz cites Local 1357, AFSCME v. Emporia State University, P.E.R.B. Case No. CAE6–1979 (Feb. 18, 1980), in which the Public Employee Relations Board ("PERB") adopted a hearing officer's decision holding that employers are required to negotiate about subjects that are covered by existing administrative rules and regulations. *See* 28 KAN. L. REV. at 284–87. Any agreement on such issues must be approved by the relevant governing body. A grievance procedure providing for arbitration of dismissals is a mandatory subject of bargaining, and any agreement to such a procedure "could be approved by the appointing authority and the Director of Personnel Services as a supplement to the civil service procedures established in Section 75–2949." *Id.* at 286. In *Kansas Board of Regents v. Pittsburgh State University Chapter*, the Kansas Supreme Court upheld PERB's conclusion that the statute required bargaining about both the period of time a university faculty member must serve before consideration for tenure and the procedures for retrenchment or reductions in staff. 233 Kan. 801, 824–25, 667 P.2d 306, 322–23, 116 L.R.R.M. 2696, 2709–10 (1983).

[224] CAL. GOV'T. CODE §§ 3500–10 (West 1980 & Supp. 1990). The Meyers-Milias-Brown Act covers public employees other than state and school employees. *Id.* § 3501.

[225] *See id.* § 3500 (West 1980).

[226] *See, e.g.*, Taylor v. Crane, 24 Cal. 3d 442, 450–53, 595 P.2d 129, 134–36, 155 Cal. Rptr. 695, 700–02, 101 L.R.R.M. 3060, 3063–65 (1979) (where city charter does not expressly ban arbitration of discharge, arbitrator's decision is binding on the city); Los Angeles County Civil Serv. Comm'n v. Superior Court, 23 Cal. 3d 55, 65–66, 588 P.2d 249, 254–55, 151 Cal. Rptr. 547, 552–53, 100 L.R.R.M. 2854, 2859 (1978) (civil service commission of county must meet and confer with union prior to changing layoff rules); Cerini v. City of Cloverdale, 191 Cal. App. 3d 1471, 1480–81, 237 Cal. Rptr. 116, 122 (1987) (city council must negotiate before changing procedure for appeal of discharge); Los Angeles Police Protective League v. City of Los Angeles, 163 Cal. App. 3d 1141, 1146, 209 Cal. Rptr. 890, 893 (1985) (agreement that purports to exclude discharge grievances from grievance procedure because they are appealable using the procedure created by city ordinance is of no effect because it is against public policy favoring arbitration and employee can file grievance after exhausting procedure created by ordinance).

[227] *See* CAL. GOV'T CODE § 3512 (West 1980). See generally Comment, *California's SEERA v. The Civil Service System: Making State Employee Collective Bargaining Work*, 18 U.C. DAVIS L. REV. 829 (1985), for a thorough discussion of the relationship between the State Employer-Employee Relations Act and civil service.

State Personnel Board finds the collective bargaining agreement to be inconsistent with the merit principle, and those that cannot be preempted absent approval of the collective bargaining agreement by the legislature.[228] The Supreme Court of California rejected a challenge to SEERA based on the state constitutional provisions that created a merit-based civil service system and a State Personnel Board for enforcement of the system.[229] The court found no facial conflict between collective bargaining and the merit principle, but recognized that the product of bargaining, in theory, could interfere with the merit principle.[230] The court stated, however, that the legislature effectively minimized the possibility of conflict.[231] In harmonizing the constitutional provision giving the State Personnel Board jurisdiction to review disciplinary actions with the provisions of SEERA, the court stated that the constitution does not preclude creation of another agency to consider the legality of employee discipline.[232]

Florida provides the final example of a state that addresses the issue through priority of law provisions. The Florida law does not address negotiability expressly but, by implication, permits the parties to negotiate provisions in conflict with other laws. If the contract as negotiated conflicts with a law, ordinance, rule, or regulation over which the negotiating employer has no amendatory authority, the employer must propose an amendment to the appropriate body, and the conflicting provision will have no effect until the amendment occurs.[233] The act also specifies that where civil service conflicts with the bargaining statute, the bargaining statute governs, but if there is no conflict, the bargaining law does not affect the civil service system.[234] Finally, an employee can choose between the civil service appeal procedure and the contract's binding arbitration pro-

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[228] *See* CAL. GOV'T CODE § 3517.6 (West 1980 & Supp. 1990). The latter provision, which permits legislative amendment to render an otherwise unlawful contract enforceable, effectuates the legislature's intent to eliminate conflicts over whether subjects are negotiable and requires bargaining subject to the decision of the legislature. *See* Comment, *supra* note 227, at 844–48.

[229] *See* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 174, 624 P.2d 1215, 1217, 172 Cal. Rptr. 487, 489–90, 109 L.R.R.M. 2674, 2675 (1981).

[230] *See id.* at 185, 624 P.2d at 1224, 172 Cal. Rptr. at 496, 109 L.R.R.M. at 2681.

[231] *See id.* at 185–86, 624 P.2d at 1224–25, 172 Cal. Rptr. at 496–97, 109 L.R.R.M. at 268.

[232] *See id.* at 196–200, 624 P.2d at 1231–34, 172 Cal. Rptr. at 503–06, 109 L.R.R.M. at 2687–89.

[233] *See* FLA. STAT. ANN. § 447.309(3) (West 1981).

[234] *See id.* § 447.601.

cedure for grievances, but the employee cannot pursue the same grievance under both procedures.[235]

The Florida Supreme Court construed these sections regarding conflicts of law in *Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority*.[236] The court held that a public employer must implement a negotiated agreement even though it conflicts with civil service rules and regulations that the civil service commission refuses to amend to conform to the contract.[237] Any other decision would interfere excessively with the employees' state constitutional right to bargain.[238] In addition, the Florida Supreme Court has held that a city is required to bargain on demotion and discharge standards and appeals despite civil service provisions on the subject because the bargaining statute prevails over a conflicting ordinance, even where the ordinance creating the civil service commission is authorized by the state constitution.[239]

2. Strengths and Weaknesses of State Law Approaches Regulating the Relationship of Collective Bargaining to Other Laws

a. *Statutory Provisions Regarding Enforceability and Negotiability*

The various state approaches discussed above each have strengths and weaknesses. A statute that addresses negotiability or enforceability alone, like the Nebraska and Vermont state employee statutes, leaves open the possibility of great confusion about civil service and bargaining.[240] Where a subject is negotiable, a negotiated contract provision should be enforceable. Any other conclusion requires the parties to engage in useless negotiations. In addition, as noted by the Pennsylvania Supreme Court:

> To permit [a party] to enter into agreements and include terms such as grievance arbitration which raise the expec-

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[235] *See id.* § 447.401 (1990 Supp.). The statute requires that each negotiated contract contain a procedure for binding arbitration of grievances.

[236] 522 So. 2d 358 (Fla. 1988).

[237] *Id.* at 363. For further discussion of the *Hillsborough County* case, see *infra* notes 249–50 and accompanying text.

[238] *Id.* at 362. The court relied on the state constitutional right of employees to bargain collectively and held that the civil service goals of uniform personnel administration and equal pay for equal work were not sufficiently compelling to warrant the significant interference with this fundamental constitutional right. *Id.*

[239] *See* City of Casselberry v. Orange County Police Benevolent Ass'n, 482 So. 2d 336, 337–39 (Fla. 1986).

[240] *See supra* notes 178–84 and accompanying text.

> tations of those concerned, and then to subsequently refuse to abide by those provisions on the basis of its lack of capacity would invite discord and distrust and create an atmosphere wherein a harmonious relationship would be virtually impossible to maintain.[241]

In order to achieve the statutory purpose of encouraging harmonious collective bargaining relationships, the legislature should include language in the statute that clearly defines the relationship of civil service and collective bargaining in both the scope of negotiable subjects and the enforcement of contractual provisions. In the absence of such language, a court or administrative agency may conclude that the scope of the bargaining obligation differs from the scope of enforceable contract language.

The alternative to this approach is that used by SEERA.[242] SEERA requires negotiation on all subjects encompassed by the statutory definition, but disallows enforcement of contract provisions contrary to certain laws unless the legislature approves the contract and amends the contrary code provisions.[243] Thus, the scope of negotiability is potentially much broader than the scope of enforceability. This approach has the apparent advantage of removing conflicts over subjects of negotiation from the bargaining table and requiring negotiations regardless of alleged conflicts with other laws.[244] In theory, delays in bargaining will be avoided and the salutary effects of negotiations will be achieved. The parties can negotiate about matters of importance to them and attempt to persuade the legislature to approve the agreement and amend the conflicting laws.

Advantages of this approach are outweighed by its disadvantages, however. The parties may expend much time and energy negotiating provisions that will never be implemented. Expectations may be raised and dashed. Rather than routine approval of collective bargaining agreements, if required, the legislature will be besieged with petitions to amend existing laws. Although there may be fewer delays in negotiations,[245] there may be substantial delays

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[241] Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh, 481 Pa. 66, 72, 391 A.2d 1318, 1322, 99 L.R.R.M. 3278, 3281 (1978).

[242] *See* CAL. GOV'T. CODE § 3517.6 (West Supp. 1990). The State Employer-Employee Relations Act is now known as the Ralph C. Dills Act. *Id.* § 3524.

[243] *See id.* §§ 3516, 3517.6; Comment, *supra* note 227, at 844–46.

[244] Comment, *supra* note 227, at 844–45 n.65.

[245] The California experience has demonstrated that laws of this type do not necessarily discourage refusals to bargain on the basis of conflict with other laws, at least in the years immediately after enactment of the statute. *See id.* at 846–47.

in approval of the contract where it requires amendment of existing statutes. This procedure may also foster charges of bad faith where one party believes that the other party is not effectively lobbying for the amendment. Contrary to the purpose of the collective bargaining law, the procedure may damage, rather than improve, the relationship of the parties. Furthermore, the parties are free to seek amendment of existing statutes that potentially conflict with collective bargaining agreements without the necessity of first expending resources negotiating an unenforceable agreement.[246]

In addition, although this structure *may* work reasonably well for state employees negotiating with state employers in the context of state statutes, its use in laws covering employees of political subdivisions becomes much more complex. Negotiations between local government employers and employees take place in the context of not only state statutes, but also municipal charters, local ordinances, and home rule provisions, not to mention rules and regulations promulgated pursuant to all of the above.

Different legislative or administrative bodies control amendment of the various laws and regulations governing local employees. To require an employer and a union to negotiate about all subjects and seek approval from all bodies with conflicting laws and regulations imposes a herculean task, the effect of which is likely to be the same as prohibiting negotiations on the subjects altogether. Not only is the task enormous, but the likelihood of success on all fronts is minimal, thus discouraging the parties from undertaking negotiations. This outcome is particularly likely where subjects conflict with state statutes. Because most statutes apply to many, if not all, government bodies, the legislature is unlikely to amend a statute at the request, however urgently pressed, of one local government unit and one union. If achieved, success will likely result from a lengthy lobbying process by a number of groups. If that is the case, the amendment is equally effective when it comes before, rather than after, the negotiations. Moreover, it is more efficient for the legislature to address the issue as a part of its determination of negotiability under the bargaining statute than as a response to petitions to amend other statutes to conform to negotiated agreements.

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[246] Arguably, the parties will be more motivated to press for statutory amendments with a collective bargaining agreement at stake. If this is so, however, it suggests that the issue is not sufficiently important to the parties to require a change in the law.

The Florida experience highlights the difficulties of such laws. Its bargaining law states that if a collective bargaining agreement conflicts with existing laws, ordinances, rules, or regulations over which the negotiating employer[247] has no amendatory power, the employer shall propose an amendment, and the contract will not be effective until the conflicting law is amended.[248] Hillsborough County negotiated an agreement containing provisions regarding various terms and conditions of employment that conflicted with terms set by the civil service commission.[249] The civil service commission refused to amend its rules, and the employer refused to implement the agreement. The Florida Supreme Court ultimately resolved the issue, concluding that allowing the civil service commission to veto the agreement was too great an interference with the right to bargain collectively.[250] Accordingly, the court required the employer to implement the agreement without civil service approval. For all of these reasons, contract clauses on subjects that are negotiable under the statute should be enforceable without the necessity of amending existing laws or regulations.

Similarly, where the contract clauses on civil service subjects are enforceable under the statute, negotiation about such subjects should be required.[251] By providing for the enforceability of such

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[247] The statute requires the chief executive officer of the public employer to negotiate with the union. *See* FLA. STAT. ANN. § 447.309(1) (West 1981). The chief executive officer for the state is the governor, and for other public employers, it is the person responsible to the legislative body for the administration of the employer. *See id.* § 447.203(9).

[248] *See id.* § 447.309(3).

[249] Hillsborough County Govtl. Employees Ass'n v. Hillsborough County Aviation Auth., 522 So. 2d 358, 359 (Fla. 1988).

[250] *Id.* at 363.

[251] The one exception to the rule that enforceability should be coextensive with the scope of mandatory negotiations is the creation of a category of permissive bargaining subjects. Under the National Labor Relations Act ("NLRA"), which covers private sector employees, bargaining subjects have been divided into three categories—mandatory, permissive, and illegal. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958). Parties are allowed, but not required, to negotiate about permissive subjects. Once a contract clause on a permissive subject is included in the agreement, however, it is enforceable in a breach of contract action under § 301 of the NLRA, 29 U.S.C. § 185 (1988). *See* C. MORRIS, THE DEVELOPING LABOR LAW 848 (2d ed. 1983). As virtually all matters covered by civil service law involve terms and conditions of employment, they will be encompassed in any definition of bargaining subjects that is not unduly restrictive. *See* Edwards, *supra* note 1 at 910–11. A subject that falls within the definition is a mandatory bargaining subject unless civil service law removes it from the area of required negotiation. If the legislature determines that bargaining is a threat to civil service principles with respect to any employment condition covered by the relevant definition of bargaining, negotiation should be prohibited. If not, bargaining should be required. See C. MORRIS, *supra*, at 848–63 for examples of permissive subjects of bargaining. The civil service/collective bargaining conflict should not implicate

contract provisions, the legislature, like the employer that negotiates such provisions, creates expectations on the part of the employees that the union will be able to negotiate a contract covering the matter.[252] If the issue is significant to the employees, and the union is unable to satisfy those expectations because the employer lawfully refuses to negotiate, the result will be a group of dissatisfied employees.[253] This dissatisfaction may manifest itself in lack of productivity and/or disruption of work, again defeating the purposes of the collective bargaining statute. Accordingly, uniformity of negotiable and enforceable contract provisions should be a legislative goal in enactment of the bargaining statute, and both should be expressly delineated in the law to avoid disputes and contrary court decisions.

b. *The Use of General Language Regarding Conflicts with Other Laws*

The use of general, rather than specific, language regarding both subjects of bargaining and enforceability of contracts as they relate to other laws has certain advantages. With respect to the scope of required negotiations, the statutes with general provisions take two basic forms. One group requires bargaining over terms and conditions of employment, except where the conditions are mandated by other laws.[254] The second group mandates bargaining over terms and conditions of employment, except where certain matters are reserved to the civil service commission.[255]

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permissive subjects of bargaining even in those states where such a category exists. *Compare* City of Beloit v. Wisconsin Employment Relations Comm'n, 73 Wis. 2d 43, 50–51, 242 N.W.2d 231, 234, 92 L.R.R.M. 3318, 3320 (1976) (a category of permissive bargaining subjects exists) *with* Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 166, 393 A.2d 278, 279, 98 L.R.R.M. 3285, 3292 (1978) (no category of permissive bargaining subjects exists).

[252] *See supra* note 241 and accompanying text.

[253] The employees also may experience dissatisfaction if they are unable to achieve their desired changes because of lack of power in the negotiating process. Lack of power, however, is at least potentially remediable whereas a legal bar to negotiation removes any possibility of accomplishing the desired change.

[254] This group includes those statutes that ban negotiations over conditions that would violate other laws. The states in this category are Vermont (state employees), Nebraska (state employees), Illinois (public employees and education employees), Kansas, Maine (state employees), and Pennsylvania. The Maine and Vermont statutes also contain language providing that the statute shall not be construed to contravene the spirit of the merit system. *See supra* notes 178–82 and accompanying text. The Alaska statute contains similar language with no other reference to conflicts with other laws. *See supra* note 176 and accompanying text.

[255] States in this group include Connecticut (state and municipal employees), Ohio, Iowa, Washington, Maine (public employees), and New Hampshire. Typically, the matters reserved to the civil service commission are those deemed essential to the merit principle, such as

The first approach ensures that all other conflicting statutes have the effect desired by the legislature, thus relieving the legislature of the problem of investigating and analyzing possible conflicts. The legislature can eliminate later-discovered, unintended conflicts by amending the conflicting statute. Although it diminishes the workload of the legislature, this method creates problems of interpretation for the courts and administrative agency. The interpretation problem is particularly acute when negotiations about provisions that supplement, implement, or relate to a subject covered by another statute are permitted, whereas negotiations over matters specifically provided for in other laws are prohibited.[256] The decisional body must determine whether the disputed proposal, in fact, conflicts with existing law, or whether it simply relates without conflict.[257]

An example in the disciplinary area illustrates the problem. If a union seeks to negotiate a grievance and arbitration procedure for disciplinary actions, the employer may refuse on the ground that the civil service law provides an appeal procedure. A challenge to the refusal to negotiate must be resolved by deciding whether the civil service law prohibits negotiation. Does the grievance and arbitration procedure conflict with the civil service law, or does it merely supplement the civil service law by providing an additional procedure? If the state intended the civil service procedure to be exclusive, there is a conflict. If not, the grievance procedure is supplementary. The language of the civil service statute may not be clear on the issue of exclusivity because, with few exceptions, states designed civil service procedures at a time when no potentially conflicting procedures existed. If the language is unclear, the deciding body must look to legislative intent and the policies underlying the statutes.

If the union seeks to replace the civil service procedure with the grievance procedure, it raises an additional set of issues regarding negotiability. Even if the legislature did not intend the proce-

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conducting and grading exams, rating candidates, and making initial appointments from lists of eligibles. *See, e.g.*, CONN. GEN. STAT. ANN. § 5–272(d) (West 1988); ME. REV. STAT. ANN. tit. 26, § 969 (1988). The Maine statute for public employees also contains specific provisions regarding discipline. ME. REV. STAT. ANN. § 969. *Cf.* IOWA CODE ANN. § 20.9 (West 1989), which declares that the bargaining act does not diminish the authority and power of the civil service commission not only with respect to the above-mentioned subjects, but also with respect to classification, reclassification, and appeal rights.

[256] *See, e.g.*, ILL. ANN. STAT. ch. 48, paras. 1607, 1710(b) (Smith-Hurd 1986).

[257] *See, e.g.*, Board of Governors of State Colleges and Univs. v. Illinois Educ. Labor Relations Bd., 170 Ill. App. 3d 463, 469–72, 524 N.E.2d 758, 761–62 (1988).

dure to be exclusive, replacement of the procedure may pose a conflict by depriving employees of a procedure made available to them by statute. The legislature must determine whether the exclusive bargaining representative selected pursuant to the labor relations law can waive statutory rights of employees, and, if so, whether such a waiver is consistent with the employees' constitutional due process rights.[258] As is evident, a statutory provision that prohibits negotiations about matters in conflict with other laws creates significant and often difficult issues of statutory interpretation.

Although this approach lacks legislative clarity, it is arguably preferable to describe the mandatory and prohibited subjects of bargaining as generally as possible, avoiding a "rigid legislative limitation on the scope of bargaining."[259] Delegating difficult decisions about the scope of bargaining to an administrative agency with labor relations expertise permits changes in judgments about appropriate subjects for bargaining without the necessity of statutory amendment.[260] Notions about appropriate subjects for bargaining have evolved in both the private and public sectors as society and labor relations have changed.[261] Where possible, the statute should be written to permit such evolution. Because the potential conflict with civil service law is so pervasive and easily anticipated,[262] however, and because resolution of the conflict necessitates decisions about the priority of legislative enactments based on the importance of public policy, it is a matter that can and should be addressed by the legislature.

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[258] *See infra* notes 358–71 and accompanying text.

[259] Edwards, *supra* note 1, at 916. See Schmedemann, *The Scope of Bargaining in Minnesota's Public Sector Labor Relations: A Proposal for Change*, 10 WM. MITCHELL L. REV. 213, 232 (1984), for a discussion of the difficulties in interpreting a general provision regarding conflicts with other laws. As noted by the author, while a contract provision calling for a school year of 175 days would clearly conflict with a statute requiring a 180-day school year, it is unclear whether the same provision would conflict with a statute giving school boards the responsibility of setting school calendars.

[260] Edwards, *supra* note 1, at 916. Judge Edwards suggests, however, that statutory limitations on subjects of negotiation are counterproductive because they limit the therapeutic benefits of bargaining and interfere with harmonious labor relations.

[261] *See* Edwards, *supra* note 1, at 916–19; B. MELTZER & S. HENDERSON, LABOR LAW 851 (3d ed. 1985).

[262] *See* Edwards, *supra* note 1, at 910. Other statutes that pose potential conflict with bargaining obligations include statutes setting terms and conditions of employment, such as laws that establish retirement plans for large categories of government employees. *See, e.g.*, Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574, 576–78, 401 A.2d 681, 682–83, 102 L.R.R.M. 2205, 2206–07 (1979). Other such statutes include those giving public officials, such as sheriffs or police chiefs, discretion to hire and fire employees. *See, e.g.*, Fraternal Order of Police Ionia County Lodge No. 157 v. Bensinger, 122 Mich. App. 437, 442, 333 N.W.2d 73, 75 (1983).

The Connecticut statute, which contains a broad description of the scope of bargaining with specific reservation of certain functions for the civil service commission,[263] achieves the goal of a flexible definition of the scope of bargaining. At the same time, it expresses the legislative judgment that certain functions of the civil service commission are too important for the merit principle to be modified by negotiation. Although there may be some dispute as to which civil service commission functions, if any,[264] should be preserved, the statutory language provides the most specific direction of legislative intent without unreasonably restricting the flexibility of negotiations.[265] Because the act reserves for the civil service commission the authority to perform certain acts and precludes negotiations on those subjects,[266] it conveys clearly the intent of the legislature to preclude bargaining on certain matters covered by civil service law but to permit bargaining on all aspects of civil service law not expressly excluded.[267] This formulation provides certainty and predictability for the parties to negotiations and for the agency and courts interpreting the law, avoiding the problem of creating

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[263] *See* CONN. GEN. STAT. ANN. § 5–272(c), (d) (West 1988). The statutes of Maine (public employees) and Ohio also use this approach. *See supra* notes 147, 194–97 and accompanying text.

[264] See *infra* notes 274–350 and accompanying text for a discussion of whether disciplinary issues should be negotiable.

[265] But see *State Employees Association v. New Hampshire Public Employee Labor Relations Board*, in which the New Hampshire Supreme Court interpreted similar statutory language to preclude negotiations about discipline and discharge. 118 N.H. 885, 887, 890, 397 A.2d 1035, 1036–37, 100 L.R.R.M. 2484, 2486 (1978). In *State Employees Association*, the court relied, in part, on a statutory bargaining exclusion for matters of managerial policy within the exclusive prerogative of the public employer. *Id.* at 890, 397 A.2d at 1038, 100 L.R.R.M. at 2486. To avoid this problem, the legislative intent to permit bargaining on other issues relating to civil service should be very clear in the legislative history or in the statute itself. The Maine public employees statute reserves certain functions to the civil service commission, and explicitly states that if the contract contains arbitration provisions regarding demotion, layoff, reinstatement, suspension, removal, discharge, or discipline, such provisions are controlling in the event of a conflict with civil service. ME. REV. STAT. ANN. tit. 26, § 969 (1988). This provision does not expressly authorize bargaining over standards, procedures, and appeals of such actions, however, and therefore, may give rise to dispute over whether such matters are negotiable. Better language would directly address that issue, stating that all other matters covered by civil service law (excepting those expressly reserved to the commission) are negotiable, and any contract provision with respect to such matters is enforceable, notwithstanding any conflicting statutory provisions or civil service rules.

[266] *See* CONN. GEN. STAT. ANN. § 5–272(d) (West 1986).

[267] The statute only precludes negotiation on the hiring and promotion functions of civil service. H. WELLINGTON & R. WINTER, *supra* note 1, at 145. Wellington and Winter recommend that only the employment of new applicants should be excluded from collective bargaining and reserved to the civil service system. *Id.*

uncertainty about the negotiability of other subjects.[268] In addition, it allows for flexibility in determining requisite bargaining subjects where no potential conflict with civil service is involved.

If the legislature has defined the scope of bargaining with relationship to civil service as discussed above, the law can provide for enforcement of the collective bargaining agreement despite conflicting civil service provisions, except where negotiations are prohibited. This method of addressing enforceability[269] clearly delineates the interrelationship between the scope of bargaining and the enforcement of the agreement, providing the necessary uniformity.[270] In addition, it offers specific language on enforcement to minimize disruptive disputes over compliance with a negotiated contract.[271] Predictability in contract administration is particularly important in encouraging a harmonious relationship between the employer and its employees.[272] The ability to enforce the contract is essential to meaningful collective bargaining.[273] An agreement that is easily and peacefully negotiated, but not followed, is not only useless; it is destructive to working relationships and labor peace. If expectations about rights and duties created by a contract are continually frustrated by lack of enforceability of the agreement, problems and tensions in the work place that collective bargaining was designed to resolve will be exacerbated. Accordingly, statutory language that minimizes disputes about contract enforcement is essential to accomplish the central purposes of collective bargaining legislation.

V. RESOLUTION OF THE CONFLICT

As is evident from the review of state laws, some states require negotiation about disciplinary standards and procedures; others

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[268] Of course, the legislature can only minimize the uncertainty. It cannot prevent litigation by recalcitrant parties based on strained or insupportable interpretations of the law.

[269] The Illinois Public Labor Relations Act ("IPLRA") offers an example of this type of priority provision. *See* ILL. ANN. STAT. ch. 48, para. 1615 (Smith-Hurd 1986). The IPLRA contains language regarding the obligation to bargain that has the potential to create confusion, however. *See id.* para. 1607 and *supra* notes 203–06 and accompanying text.

[270] *See supra* notes 171–73 and accompanying text.

[271] *See supra* notes 171–72 and accompanying text.

[272] *See* T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 385–86 (1980).

[273] "[A] statute which encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede effective bargaining . . . . Successful bargaining rests upon the sanctity and legal viability of the given word." Glendale City Employees Ass'n v. City of Glendale, 15 Cal. 3d 328, 336, 540 P.2d 609, 614–15, 124 Cal. Rptr. 513, 518–19, 90 L.R.R.M. 2603, 2607 (1975).

have determined that the civil service law preempts such negotiation. In other states, the issue is present but unresolved. The remaining question is which resolution of the conflict best preserves the important goals of civil service and collective bargaining.

As previously noted, the essential principle of the civil service system is employment on the basis of merit rather than political patronage. Although political patronage remains a fact of life in some jurisdictions,[274] the focus of public employees has shifted from protection from political pressures to obtaining a role in determining their terms and conditions of employment through collective bargaining.[275] There is little dispute about the value of the merit principle in theory,[276] but there is substantial question about whether the civil service system, as it has evolved, is essential to preservation of the merit principle.[277] In most states, the civil service system is no longer limited to its initial purpose of employment on the basis of merit,[278] but instead has become a personnel system.[279] Noted commentators have suggested that the comprehensive civil service system "complicates the achievement of a rational regime of collective bargaining."[280]

To insure preservation of the merit principle, one must determine which functions of the civil service system are essential to that principle.[281] The hiring function of civil service is most essential to the merit principle because it ensures that new employees are hired on the basis of merit.[282] Most civil service systems use an examination process to rate candidates for appointment to classified posi-

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[274] *See* Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181, 201 & n.130 and works cited therein (1982); Branti v. Finkel, 445 U.S. 507, 508 (1980); Rutan v. Republican Party of Illinois, 110 S. Ct. 2729, 2732 (1990).

[275] *See* LMSA, *supra* note 7, at 19–27.

[276] R. KEARNEY, *supra* note 7, at 167.

[277] *Id.* at 167–70; *see* LMSA, *supra* note 7, at 15.

[278] R. VAUGHN, *supra* note 7, at 9–27, 9–30; Aaron, *supra* note 9, at 162; Comment, *supra* note 38, at 828.

[279] *Id.*; Stanley, *supra* note 48, at 109.

[280] H. WELLINGTON & R. WINTER, *supra* note 1, at 143; *see* Edwards, *supra* note 1, at 911.

[281] Some years ago, Helburn and Bennett suggested this as the way to preserve both the merit system and collective bargaining. Helburn & Bennett, *supra* note 37, at 626–27; *see also* R. VAUGHN, *supra* note 7, at 9–29.

[282] *But see* Savas & Ginsburg, *supra* note 25, at 70–71; R. KEARNEY, *supra* note 7, at 169–70. Notably, early civil service laws regulated only hiring, not discharge. The discipline provisions evolved to protect the employee from discipline on the basis of political patronage, but were not initially viewed as necessary for civil service reform. R. VAUGHN, *supra* note 7, at 5–36 to 5–38. By depriving officials of the ability to appoint on the basis of politics, reformers believed that any incentive to discharge for political reasons would be removed. *Id.* at 5–36.

tions.[283] The civil service or merit commission designs and conducts the examination, often in consultation with the officials of the department for which employees are to be hired.[284] The commission then grades the exams and rates candidates on the basis of scores, placing the candidates on an eligibility list.[285] The commission, or the supervising government officials in the department for which the hiring is made, then appoints candidates from the list.[286] The commission may use the rule of one, under which the highest scoring candidate is selected, or the rule of three, which allows the appointing official to choose any of the top three candidates.[287] Unless one subscribes to the view that the merit system should be abolished or changed significantly,[288] the initial appointment process, including the conduct and grading of exams and the rating of candidates on the basis of test scores, should be excluded from bargaining.[289] The Connecticut and Ohio legislatures have taken this approach.[290]

Commentators also have argued that retention of employees on the basis of merit is essential to the system.[291] This might suggest that unions should be precluded from negotiating about disciplinary standards, procedures for discipline, and procedures to challenge discipline, for fear that unions would negotiate limitations on management's right to discipline or terminate unsatisfactory employees. To the extent that the merit system is concerned with elimination of politics as a criterion for employment, there is little danger that allowing unions to negotiate about disciplinary matters will lead to a return to patronage.[292] Unions representing public employees

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[283] Lewin, *supra* note 16, at 429.

[284] *See* Savas & Ginsburg, *supra* note 25, at 74.

[285] *See* Lewin, *supra* note 16, at 429; Savas & Ginsburg, *supra* note 25, at 74.

[286] *See id.*

[287] Lewin, *supra* note 16, at 429; R. KEARNEY, *supra* note 7, at 185; R. VAUGHN, *supra* note 7, at 3–11.

[288] See Savas & Ginsburg, *supra* note 25, at 83–85 for a discussion of the need for civil service reform.

[289] *See* H. WELLINGTON & R. WINTER, *supra* note 1, at 145. It is not uncommon for collective bargaining statutes to reserve to management the exclusive authority to select personnel, removing hiring from the scope of collective bargaining. *See e.g.*, N.H. REV. STAT. ANN. § 273–A:1 XI (1987).

[290] *See supra* notes 185–86, 190–97 and accompanying text. The Connecticut statute exempts the establishment of exams from bargaining; the Ohio statute does not. *Compare* CONN. GEN. STAT. ANN. § 5–272(d) (West 1988) *with* OHIO REV. CODE ANN. § 4117.08(B) (Baldwin 1983).

[291] *See* R. VAUGHN, *supra* note 7, at 9–29 to 9–30.

[292] *See id.* at 9–28; Comment, *supra* note 38, at 838–39.

have supported merit systems for years.[293] Furthermore, although unions in the public sector are involved in political lobbying for union and employee interests, acceding to a patronage system of employment ultimately would be contrary to the interests of the union.[294] The loyalty of the employees to the union in a political patronage system eventually would be replaced by loyalty to politicians, once the employees recognized where the real power lay. When this shift of loyalty occurred, the union would no longer be a necessary middle person for the employees, and decertification would be likely.[295] Because it is unlikely that unions will seek a return to the patronage system, allowing unions to negotiate regarding discipline poses little or no threat to the merit system goal of eliminating political considerations from employment.

As political patronage has become less significant, however, the merit system has come to be viewed as a means not only of eliminating patronage employment, but also of promoting economy and efficiency in government by ensuring employment based on merit.[296] To achieve this objective, disciplinary standards and procedures, and appeals procedures must allow discipline and termination of incompetent employees while ensuring that competent employees cannot be disciplined or terminated arbitrarily by managers motivated by considerations other than merit. Furthermore, employees must believe that disciplinary decisions are fairly made, based on uniform standards, and that a fair procedure exists for challenging decisions perceived to be based on considerations other than merit. To the extent that employees believe otherwise, achievement of effective and efficient government will be hampered by employee morale problems.[297]

The question that must be considered in deciding whether collective bargaining impinges upon the merit principle is whether permitting negotiations over disciplinary issues will result in retention of poor employees or allow termination of competent employees. Although predicting what unions will seek to negotiate is always hazardous, both experience and consideration of union and employee interests suggest that union proposals for disciplinary standards and procedures will not be inimical to the merit principle.

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[293] R. VAUGHN, *supra* note 7, at 9–28; Wurf, *supra* note 18, at 432.

[294] R. VAUGHN, *supra* note 7, at 9–28 to 9–29.

[295] *Id.* at 9–28.

[296] AARON, *supra* note 9, at 162.

[297] *See* Killingsworth, *Grievance Adjudication in Public Employment*, 13 ARB. J. 3, 15 (1958).

First, unions have not opposed the merit principle in the past.[298] On the contrary, they have supported it.[299] Union opposition to civil service commissions stems from a belief that these commissions are management functionaries, not impartial adjudicatory bodies.[300]

Second, unions typically negotiate "just cause" requirements for discipline.[301] A just cause or cause requirement differs little, if at all, from the provisions contained in most civil service laws with respect to discipline.[302] Although unions can be expected to fight to prove that the employer did not have just cause for discharging an employee when the employee grieves a termination, unions will rarely, if at all, attempt to negotiate language that would prohibit discharge of incompetent employees or employees who engage in serious misconduct. It might be argued, however, that private sector employers have more incentive to resist limitations on the right to discharge employees because of the profit motive.[303] If this is so, then the statistical data regarding the frequency with which unions negotiate just cause provisions might not hold true for the public sector.

It will rarely be in the union's interest, however, even where feasible, to negotiate provisions that protect incompetent or abusive employees.[304] Employees whom the union represents, and must

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[298] *See* Stanley, *supra* note 48, at 113; R. VAUGHN, *supra* note 7, at 9–28.

[299] *Id.*

[300] R. VAUGHN, *supra* note 7, at 9–28 to 9–29; Wurf, *supra* note 18, at 432; Lewin, *supra* note 16, at 432.

[301] In a survey of patterns in collective bargaining agreements conducted by the Bureau of National Affairs and based on 400 contracts, 86% of the contracts required that discharge be for "cause" or "just cause." 2 Collective Bargaining Negot. & Cont. (BNA) § 40.1 (Basic Patterns: Discharge, Discipline and Resignation) (Mar. 9, 1989). Ninety-four percent of the contracts surveyed contained grounds for discharge. The grounds were of two types—discharge for cause or just cause and discharge for specific offenses. *Id.* Based on this information, it is unlikely that unions will seek or be able to obtain limitations on discharge that are inconsistent with termination or retention based on merit or cause.

[302] *See, e.g.*, NEB. REV. STAT. § 19–1833 (1987); OR. REV. STAT. § 241.430 (1987).

[303] See Comment, *supra* note 38, at 838–39, where this argument is suggested. When management attorneys, Lee Shaw and R. Theodore Clark, discuss the problems resulting from collective bargaining by unmotivated and inexperienced public management, they do not mention the issue of unwillingness or inability to resist limitations on the right to discipline for cause. *See* Shaw & Clark, *supra* note 60, at 875–76.

[304] As persuasively pointed out by Lewin and Horton, "self-interest or perceptions of self-interest dictate the policies of interest groups in collective bargaining." *Supra* note 11, at 205. Thus, in some circumstances, management may take positions in bargaining that support merit principles. In other situations, the same management officials may take positions inconsistent with merit principles. The same is true of unions. Notably, in a study of public sector labor relations, the authors found that "unions have not negotiated rules or practices that, on average, adversely affect productivity." D. LEWIN, P. FEUILLE, T. KOCHAN, J. DELANEY, PUBLIC SECTOR LABOR RELATIONS 517 (1988).

satisfy in order to retain its position as a collective bargaining representative,[305] seek fair treatment, but have little or no interest in protecting incompetent employees. On the contrary, competent employees are likely to resent the union's efforts to protect employees who are perceived to be incompetent. This effect is inimical to the union's interest in satisfying its constituency. Further, incompetent employees are unlikely to recognize or admit their incompetence, which may be a necessary prerequisite to pressing the union to negotiate for protections. At a minimum, it is doubtful that restrictions on discipline beyond just cause limitations will be a high priority for the union in negotiations. It is even less likely that employees would be willing to strike, where lawful, for such provisions. Thus, strong management resistance is unnecessary to prevent inroads on the merit principle.

Furthermore, many statutes contain management rights provisions that expressly provide that management has the right to discipline employees for just cause.[306] In such states, any contractual limitations on management's right to discipline for just cause would be unenforceable. Thus, there is little risk that allowing negotiation over disciplinary standards will impair the merit principle.

Negotiation of procedural protections for employees in the event of discipline, such as notice and opportunity to be heard, arguably would place certain hurdles in the way of management seeking to discipline employees and might discourage discipline of culpable employees. Such argument, however, is unpersuasive insofar as it suggests limiting negotiation. First, in the event of termination, the United States Constitution requires a pre-termination hearing for public employees with civil service status.[307] Thus, certain protections are inherent regardless of any contractual requirements. Second, many civil service systems already contain procedural safeguards such as notice, an opportunity to be heard, and the right to representation at any hearing.[308] Third, just cause lim-

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[305] *See* D. BOK & J. DUNLOP, *supra* note 15, at 77. The authors note that union leaders are "under heavy constraint to pay close attention" to the desires of the members in contract negotiations. *Id.*

[306] *See, e.g.*, FLA. STAT. ANN. § 447.209 (West 1981); HAW. REV. STAT. § 89–9(d) (1988); IOWA CODE ANN. § 20.7 (West 1989).

[307] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–42 (1985). In *Loudermill*, the civil service status of the employee provided a property interest in employment sufficient to trigger the protections of procedural due process. *Id.* at 538–41.

[308] *See* D. STANLEY, *supra* note 1, at 55–56; *see, e.g.*, CAL. GOV'T CODE § 19574.5 (West 1980 & Supp. 1990); MASS. GEN. L. ch. 31, § 41 (1989); N.Y. CIV. SERV. LAW § 75(2) (McKinney 1983); WASH. REV. CODE ANN. §§ 41.06.170, 41.06.176 (Supp. 1990).

itations on discipline have been construed to require some procedural protections even in the absence of explicit procedural requirements.[309] Given the current widespread requirements for pretermination procedures, it scarcely can be contended that such procedures are inconsistent with the merit principle. Furthermore, to suggest that unions should be prevented from negotiating due process protections for employees because it will make it more difficult to terminate poor employees is inconsistent with American societal principles of justice. To the extent that such protections foster the view that it is difficult for government to discharge incompetents, the civil service and constitutional protections serve the same function yet they are an essential part of the merit system. Therefore, allowing unions to bargain about procedural requirements for discipline is not inconsistent with the merit principle of employment.[310]

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[309] *See* F. ELKOURI & E.A. ELKOURI, *supra* note 67, at 673–74; *see, e.g.*, Rodriguez v. Dept. of Sanitation, 437 So. 2d 378, 379 (La. Ct. App. 1983); Holden, *Grievance Arbitration*, in PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 374, 382 (1979).

[310] Progressive discipline requirements or provisions that protect employees from discipline on the basis of stale misconduct are also negotiated and placed in collective bargaining agreements. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 67, at 671–73, 680. These provisions might be considered hybrids because they have both procedural and substantive elements. Neither, however, is inconsistent with employment based on merit. A progressive discipline system merely provides for a progressive system of warnings and more serious discipline for repeated violations of standards of conduct or rules. *Id.* at 671. Progressive discipline systems typically reserve to management the right to skip steps of the procedure for serious misconduct. *Id.* Such systems are common in both public and private employment, including civil service. *See, e.g.*, WASH. REV. CODE ANN. § 41.06.176 (Supp. 1990) (employee whose work is unsatisfactory is entitled to written notice of deficiency and opportunity to improve unless deficiency is extreme); Thompson v. American Motor Inns, 623 F. Supp. 409, 410–11, 418, 121 L.R.R.M. 2066, 2067–68, 2073 (W.D. Va. 1985) (employer breached implied employment contract when it fired employee without following the warning procedure specified in employee handbook); Brigham v. Department of Health and Welfare, 106 Idaho 347, 350–51, 679 P.2d 147, 150–51 (1984) (termination invalidated because of failure to evaluate based on express standards and to provide an opportunity to improve). Just cause requirements for discipline have been interpreted to require progressive discipline for lesser offenses, even where not expressly mandated. *See, e.g., In re* Kennedy, 442 So. 2d 566, 569 (La. Ct. App. 1983) (no just cause for dismissal where no evidence of previous misconduct); Ryder v. Department of Health and Human Resources, 400 So. 2d 1123, 1126 (La. Ct. App. 1981) (cause for discharge under civil service law may be a totality of lesser offenses, repeated improper conduct after lesser disciplinary action, or a single aggravated incident); Blake v. Civil Serv. Comm'n, 310 S.E.2d 472, 473–74 (W. Va. 1983) (dismissal may be too severe a penalty for a civil service employee depending on the gravity of the offense and the prior employment record). Some civil service systems also limit the right to discipline employees based on prior incidents of misconduct. *See, e.g.*, N.Y. CIV. SERV. LAW § 75(4) (McKinney Supp. 1990) (employer cannot impose discipline based on incidents occurring more than 18 months prior to discipline unless the conduct is criminal); Hamlett v. Division of Mental Health, 325 So. 2d 696, 701 (La. Ct. App. 1976) (civil service employee cannot be discharged based on conduct for which he was suspended previously). Thus, progressive discipline and

In addition to disciplinary standards and procedures, unions permitted to bargain over disciplinary matters can be expected to negotiate a grievance and arbitration procedure for appealing disciplinary decisions. Like the substantive and procedural provisions relating to discipline, inclusion of disciplinary matters in the category of issues subject to the grievance and arbitration procedure will not have a negative impact on the merit principle. Most civil service systems based on the merit principle contain an appeals procedure that is applicable to many, if not all, disciplinary decisions.[311] Accordingly, it cannot be contended that, in principle, appeals procedures for discipline conflict with the merit system. A conflict with the merit principle arises only if union-negotiated procedures differ from civil service appeals procedures in some significant way that inhibits discipline based on merit.

There are three potentially significant ways in which a union-negotiated procedure may differ from a civil service procedure. First, the union procedure may permit appeals of lesser disciplinary penalties that may not be appealable under the civil service system.[312] Second, the union procedure is likely to provide for arbitration by a mutually selected arbitrator or arbitration board as the final step of the appeal, rather than a hearing before the civil service commission.[313] Third, the arbitration decision may be subject to narrower grounds for appeal than the decision of the commission.[314]

The first difference of allowing appeals of lesser penalties is not inconsistent with the merit system. Although such appeals might limit the flexibility of management, to the extent that they simply ensure that discipline is based on just cause rather than arbitrary considerations, permitting such appeals is completely consistent

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time limits on discipline, although limiting management's flexibility, do not interfere with employment decisions based on merit. Where public management believes that such limits are inconsistent with its needs, it can refuse to include such provisions in the collective bargaining agreement. Requiring negotiation about discipline does not require agreement to any particular disciplinary system. Progressive discipline and limits on the time period for which an employer can impose discipline for particular misconduct are consistent with notions of due process for public employees as evidenced by the fact that various civil service systems incorporate them.

[311] *See* D. STANLEY, *supra* note 1, at 55–56; *see, e.g.*, CAL. GOV'T CODE, §§ 19578–19583 (West 1980 & Supp. 1990); OR. REV. STAT. §§ 241.430–.460 (1987); WASH. REV. CODE ANN. §§ 41.06.170–.220 (Supp. 1990).

[312] *See* D. STANLEY, *supra* note 1, at 56; *see, e.g.*, N.J. STAT. ANN. § 11:15–1 (West 1976).

[313] *See* Hayford & Pegnetter, *supra* note 73, at 24, 25–26.

[314] *See id.* at 24–26.

with employment based on merit. This is evidenced by the fact that some existing merit systems permit such appeals.[315] The only rationale for limiting such appeals is one of economy, but the parties should not be precluded from negotiating a grievance procedure covering discipline if they so desire.

The second difference of using arbitrators to hear appeals, rather than civil service commissions, interferes with the merit principle only if mutually selected arbitrators are more likely to force retention of poor employees or to permit discharge of competent employees than are civil service commissions. There is nothing to suggest such a result.[316] A cadre of well-qualified labor arbitrators have been hearing and deciding both private and public sector arbitration cases for years.[317] Although most arbitrators have significantly more experience in the private than the public sector, no significant difference exists between the private and public sectors in deciding issues of just cause and compliance with procedural disciplinary requirements that would render this experience inapplicable to the public sector.[318] Because arbitration provisions commonly provide for mutual selection of the arbitrator,[319] employers and unions have a means to eliminate unacceptable arbitrators, including arbitrators who do not base decisions on the provisions of the collective bargaining agreement. Moreover, negotiated arbitration provisions typically confine the arbitrator to interpretation and application of the agreement.[320] A successful appeal is likely if the arbitrator exceeds his or her authority under the contract.[321]

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[315] *See supra* note 50.

[316] Wellington and Winter suggest that arbitrators should be more restricted in the public sector than in the private sector because they may expand the scope of bargaining, giving unions in arbitration what they have been unable to obtain in negotiations. *See* H. WELLINGTON & R. WINTER, *supra* note 1, at 161–62. To the extent that this is a legitimate concern, which is subject to debate, there is little risk in the arbitration of discipline cases where the issue is whether just cause exists for discipline.

[317] Both the American Arbitration Association and the Federal Mediation and Conciliation Service supply arbitrators for labor disputes as do many state labor relations agencies. Holden, *supra* note 293, at 376. See PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1990); WIS. STAT. ANN. § 111.86 (West 1988). Issues arbitrated in the private sector do not differ substantially from those arbitrated in the public sector. Arbitrators typically apply the same standards to disputes in both arenas. *See* F. ELKOURI & E.A. ELKOURI, *supra* note 67, at 10 & n.39 and works cited therein.

[318] *See supra* note 317 and accompanying text.

[319] *See* Hayford & Pegnetter, *supra* note 73, at 24; D. STANLEY, *supra* note 1, at 53.

[320] Hayford & Pegnetter, *supra* note 73, at 24.

[321] *Id.* at 24–25.

Indeed, there is reason to believe that arbitrators may be better able to decide appeals of disciplinary decisions than civil service commissions, based on their experience in the private sector in which a common law of arbitration has developed.[322] In contrast to arbitrators, who have a well-developed body of authority with respect to discipline, civil service commissions often are dealing with relatively unfamiliar issues.[323] In addition, many are primarily policymaking bodies with little time for lengthy hearing procedures and careful consideration of disciplinary issues.[324] These differences suggest that the merit principle is well served, and perhaps better served, by appeals procedures that end in neutral arbitration.

There may well be other benefits of negotiated grievance procedures. Impartial review of grievances is important for employee morale.[325] As noted earlier, employees do not view civil service commissions as impartial bodies, but rather as management agents.[326] Thus, the acceptability of decisions on appeals is apt to be greater where the employee, through the union, has a role in selection of the arbitrator.[327] Where employees believe that their position has been given a fair hearing, the decision is much more likely to resolve the dispute, minimizing further appeals and continuing employee dissatisfaction.[328]

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[322] *See* Killingsworth, *supra* note 297, at 11–12.

[323] *Id.* at 11, 13. Long-standing civil service commissions covering many employees may have rendered a sufficient number of decisions to have a body of authority. Even so, however, the number of decisions will be far more limited than available arbitral authority. *See, e.g.*, F. ELKOURI & E.A. ELKOURI, *supra* note 67; Lab. Arb. (BNA) Vols. 1–92. In contrast to arbitration decisions, civil service commission decisions are not widely available to other commissions.

[324] Killingsworth, *supra* note 297, at 11.

[325] *Id.* at 15.

[326] LMSA, *supra* note 7, at 21–22; *see supra* note 73 and accompanying text. If employees are not dissatisfied with civil service review of disciplinary decisions, then the union and the employer can agree in negotiations to retain exclusive civil service jurisdiction over discipline appeals. Even if the union has created employee dissatisfaction as an organizing issue, negotiation should not be precluded. If the issue is not sufficiently important to employees, it will not be pursued to impasse. If it is important, the origin of employee interest is irrelevant to the question of whether bargaining should be permitted. Allowing negotiation will further the purposes of the bargaining statute and should be prohibited only if it interferes with merit principles that are deemed weightier than the goals of the bargaining statute.

[327] Hayford & Pegnetter, *supra* note 73, at 27; *see* Killingsworth, *supra* note 297, at 11. The employees' perception of the lack of neutrality of the civil service commission may or may not be accurate. The degree of independence of civil service commissions varies widely. Killingsworth, *supra* note 297, at 6. It is at least arguable that the appointed commission members may have a conscious or unconscious loyalty to the public employer that appointed them, which might affect their decisions. Regardless of the reality, however, the perception of lack of neutrality is important because of the potential adverse effect on employee morale.

[328] Hayford & Pegnetter, *supra* note 73, at 27; *see* D. BOK & J. DUNLOP, *supra* note 15,

In addition, the arbitration system is more likely to provide employees with adequate representation in the appeals procedure.[329] Few employees can afford competent legal representation for grievances.[330] Where a negotiated grievance and arbitration procedure exists, the union normally represents the employee in the procedure. Representation of the employee by union officials or attorneys experienced in handling grievances will enhance the likelihood that the decision is based on the merits of the issue, rather than on the inabililty of the employee to present his or her position clearly. Furthermore, the employee is more likely to be satisfied with the outcome if the employee believes that his or her side of the story was properly presented and fairly considered.[331]

The use of an impartial arbitrator may provide an additional benefit by encouraging the parties to be more reasonable in the earlier stages of the grievance procedure.[332] As a result, some disputes that would otherwise be litigated may be settled without a hearing. Thus, the negotiated procedure may reduce the number of disputes that progress to the hearing stage, providing both cost savings and quicker resolution of disruptive and unproductive disputes in the work place.

In addition, the number of hearings may be reduced because the union serves a screening role in the grievance procedure, filtering out frivolous grievances by declining to appeal them or by convincing the employee of the futility of an appeal.[333] Finally, the use of negotiated grievance and arbitration procedures and resulting union pressure on management with respect to discipline may force management to review and improve its personnel practices, imposing greater controls to ensure consistent discipline decisions based on employee merit.[334] The employment of a negotiated griev-

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at 221 ("[I]t is clear beyond dispute that an effective, well-administered grievance procedure can play an indispensable role in improving labor relations and providing a measure of industrial due process to the workers involved.").

[329] Hayford & Pegnetter, *supra* note 73, at 27.

[330] *Id.*

[331] *Id.* If the union is permitted to represent employees in the civil service appeals procedure, and does so, this advantage of arbitration over civil service appeals will be eliminated.

[332] Killingsworth, *supra* note 297, at 15.

[333] See Vaca v. Sipes, 386 U.S. 171, 191 (1967), in which the Supreme Court recognized the importance of this screening function performed by the union.

[334] *See* Lewin, *supra* note 16, at 432–33 (citing Begin, *The Private Grievance Model in the Public Sector*, 10 INDUS. REL. 34 (1971)); D. STANLEY, *supra* note 1, at 56–57. Most managers interviewed by Stanley believed that this union pressure was good for both management and employees. *Id.* at 56–58.

ance procedure with impartial arbitration, therefore, may enhance, rather than interfere with, the merit principle of employment.

The difference in appellate standards for arbitration and civil service appeals has no uniform identifiable impact on the merit principle. In states where the *Steelworkers Trilogy*[335] principles of arbitration review are followed, judicial review of arbitration awards generally will be more limited than review of civil service decisions.[336] If a particular administrative or arbitral decision is contrary to the merit principle, limited judicial review *may* adversely affect the merit principle in *that* case. There is no guarantee, however, that availability of more extensive judicial review would result in reversal of the decision. Furthermore, there is a possibility that expansive judicial review may result in reversal of decisions made in accordance with the merit principle. In the absence of an unfounded assumption that arbitration decisions will be contrary to the merit principle and court decisions in accordance with the merit principle, one cannot conclude that any difference in judicial review will interfere with the goal of merit-based employment.

As detailed above, authorizing negotiation of disciplinary matters will not adversely affect the merit principle of employment.[337]

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[335] In the *Steelworkers Trilogy*, the United States Supreme Court set forth principles regarding the enforcement of agreements to arbitrate and the court's role in reviewing arbitration awards in the private sector. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (courts should not review the merits of an arbitration award under a collective bargaining agreement); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960) (in a suit to compel arbitration, the role of the court is limited to determining whether the parties agreed to arbitrate the dispute and doubts should be resolved in favor of arbitration); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567–68 (1960) (in determining whether to order arbitration, the courts "have no business weighing the merits of the grievance," which is the function of the arbitrator). Pursuant to the *Trilogy*, courts have accorded decisions of arbitrators in the private sector substantial deference. *See* Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 TEX. L. REV. 329, 341–43 (1980). Most states that have addressed the issue have adopted, although not always followed, similarly limited standards of review. *Id.* at 345–48; H. EDWARDS, R.T. CLARK, JR. & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 745 (3d ed. 1985).

[336] *See* Hayford & Pegnetter, *supra* note 73, at 24–26. The most common standard for judicial review of civil service commission decisions is "substantial evidence." Hayford & Pegnetter, *State Employee Grievances and Due Process: An Analysis of Contract Arbitration and Civil Service Review Systems*, 29 S.C.L. REV. 305, 323 (1978).

[337] It is, of course, conceivable that under certain circumstances, however rare, a union might seek to negotiate a contractual provision inimical to the merit principle. Given the unlikelihood of the possibility, restricting negotiations over discipline is not justified. Management's inclination to resist such demands is a natural obstacle to agreement to such provisions and must be relied upon to prevent agreement. The provisions in some statutes authorizing discipline for cause also provide a check on such actions. A statutory provision prohibiting agreement to clauses inconsistent with the merit principle would provide a further

Indeed, as noted,[338] such negotiations may promote employment based on merit by encouraging management to ensure that personnel decisions are based on merit in order to avoid losing grievances.[339] In addition, there are other positive values that may result from permitting negotiation of disciplinary matters. Where the parties are able to negotiate about disciplinary standards and procedures, the resulting agreement will be more responsive to the needs of the parties to the collective bargaining relationship. The employer and the union can structure the standards and procedures in the way that is most useful, appropriate, and efficient. In one employment setting, a grievance procedure with fewer steps and quicker resolution may be most workable. In another, the parties may need more time to investigate and respond to grievances, and may be more concerned about issues of due process than speedy resolution. Moreover, where the civil service procedure is workable and acceptable, the parties are free to adopt that procedure in lieu of, or as an alternative to, any negotiated grievance procedure.

Not only will a negotiated agreement on these issues be more appropriate to the particular needs of the employer and the employees, but the decisions that result from a procedure that the parties have designed, in most cases, will be more acceptable to the parties.[340] Having created the procedure, the parties have a stake in its success. Thus, in all probability, the procedure will resolve disputes more successfully, minimizing the continuing disruption of the work place that may be caused by the perception that discipline is either unfairly administered or improperly overturned.[341] Fur-

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limitation. *See, e.g.*, HAW. REV. STAT. § 89–9(d) (1988). Such a provision offers the parties an arguable basis on which to refuse to negotiate many potential bargaining subjects, however, thereby injecting substantial uncertainty into the negotiating process.

[338] *See supra* note 334 and accompanying text.

[339] Union grievance procedures will have a greater effect in this regard than civil service appeals procedures for several reasons. Because such procedures are perceived as fair, they will be used more often by employees. *See* Hayford & Pegnetter, *supra* note 73, at 27. The grievance procedures also will be used more often and more effectively because the employees will have union representation, rather than having to pay an attorney or handle the procedure themselves. *See id.*; D. STANLEY, *supra* note 1, at 56. Supervisors may fear, with or without basis, that a neutral arbitrator will overturn their decisions more readily than the civil service commission, based upon their perception of the commission's lack of neutrality, which is similar to the perception of employees. Finally, supervisors may view defeat in a union grievance procedure more adversely than loss of a case before the civil service commission.

[340] *See supra* notes 327–31 and accompanying text.

[341] Management representatives will be dissatisfied if they believe that their decisions to discipline are reversed arbitrarily; employees will be dissatisfied if they believe that discipline is administered unfairly without a fair opportunity for review of the decision. Either of these perceptions will cause problems in the employment setting. Although a negotiated procedure

thermore, the process of negotiations is therapeutic and will promote harmonious labor relations by allowing the parties to discuss problems and vent frustrations.[342] Giving employees a voice in determining their working conditions in order to avoid labor unrest and resulting disruption is a significant goal of collective bargaining laws that will be furthered by authorizing negotiation regarding employee discipline.

There has been substantial discussion in the literature regarding whether differences between the private sector and the public sector require different conclusions about the appropriate scope of bargaining in the public sector.[343] Scholars disagree about the extent to which the scope of bargaining in the public sector should be limited because government is the employer, and indeed, whether any differentiation from the private sector is required. The primary concern voiced by those who would limit negotiations is that unions may become too powerful an interest group in a collective bargain-

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will not completely eliminate such views, it should minimize them because of the participation of management and the employees, through the union, in designing the procedure.

[342] Edwards, *supra* note 1, at 916. If, as posited, the arbitration process has significant advantages over the civil service appeals procedure in the accomplishment of the objectives of civil service law, then perhaps the arbitration procedure should be imposed by statute for all employees covered by civil service protections. *See* Hayford & Pegnetter, *supra* note 73, at 28. Imposition of such a requirement arguably would be more efficient than simply permitting negotiation of a grievance and arbitration procedure because it would avoid the costs associated with bargaining. The disadvantage of a statutory procedure is that it does not provide the benefits of the bargaining process, including, *inter alia*, permitting the parties to negotiate a procedure designed to meet their needs, *see supra* notes 339–40 and accompanying text, and giving the parties a stake in the success of the procedure by virtue of their role in negotiating it. *See supra* notes 327–31, 340–41 and accompanying text. In addition, a statutory procedure does not afford the benefits of the therapeutic function of negotiations, *see* Edwards, *supra* note 1, at 916, and the union's function in screening out frivolous grievances. *See supra* note 333 and accompanying text. In order to retain these benefits, even where a statutory arbitration procedure exists, the parties should be permitted to negotiate alternative procedures, as long as the statutory minima are met. Having determined that bargaining is beneficial to the employer, the employees, and the public interest by enacting a collective bargaining statute, the state should not restrict negotiations in the important area of discipline even when a statutory arbitration procedure is available. It is notable that some collective bargaining statutes require that the agreement of the parties contains a grievance and arbitration procedure. *See, e.g.*, ILL. ANN. STAT. ch. 48, para. 1710(c) (Smith-Hurd 1986); MINN. STAT. ANN. § 179A.20 (West Supp. 1990). Although such statutes require a binding grievance and arbitration procedure, the parties are free to negotiate the type of procedure within these limits. Similar provisions related to statutory arbitration procedures would retain the advantages of allowing bargaining without requiring the sacrifice of the benefits of binding arbitration.

[343] *See, e.g.*, H. WELLINGTON & R. WINTER, *supra* note 1, at 21–30; Edwards, *supra* note 1, at 885–87. *See generally* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?*, 51 OR. L. REV. 177 (1971).

ing system, drowning out the voices of the citizens on issues of public interest.[344]

Analyzing this concern, Professor Clyde Summers suggests a solution that determines negotiability of issues on the basis of whether the public employees need a more effective method of being heard on a particular concern because of massed political opposition.[345] Summers concludes that, in general, discipline is an appropriate subject for negotiation. He notes that management's resistance to union demands to bargain about discipline is commonly based on the argument that limits on disciplinary discretion reduce efficiency.[346] Because the public is equally concerned about efficiency,[347] its interest will be represented by management at the bargaining table.[348] Thus, there is no need for an additional mechanism for public input. Accordingly, even if one accepts the argument that different limitations on the scope of negotiable issues are necessary in the public sector,[349] that conclusion does not require limiting or barring negotiation of disciplinary issues.[350]

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[344] *See, e.g.*, H. WELLINGTON & R. WINTER, *supra* note 1, at 29–32.

[345] Summers, *supra* note 343, at 1193.

[346] *Id.* at 1196.

[347] The existence of civil service systems with disciplinary protections confirms that the interest of the public is in employment based on merit, which translates, in large part, to efficiency.

[348] Summers, *supra* note 343, at 1196.

[349] See Wollett, *supra* note 343, for a persuasive argument that such limitations are not required.

[350] Summers does note one aspect of discipline that he suggests should not be the subject of negotiations. Summers, *supra* note 343, at 1196. Summers contends that demands by police officers for disciplinary procedures that do not permit the use of public review boards are likely to be agreed to by management, but perhaps opposed by public interest groups who fear police abuse. *Id.* at 1196–97. If Summers is correct, the legislature could preclude any agreement that would restrict management's ability to establish a public review board, thus leaving the issue to the political process. If there is sufficient political pressure for such a board, management would have the option to institute it. Alternatively, if public pressure for such a board is strong, management may be forced to take a posture in favor of such a board in collective bargaining. The latter alternative is, of course, somewhat inconsistent with the view that public pressure will not be strong enough to counter union pressure and the public desire to avoid a strike. In any event, this narrow concern is not sufficient to preclude bargaining on any disciplinary issues. *See Pontiac Police Officers Association v. City of Pontiac*, in which the Michigan Supreme Court held that, although it might be desirable to provide for a civilian role in the police disciplinary process, it was up to the legislature to make such a determination. 397 Mich. 674, 683–84, 246 N.W.2d 831, 835–36, 94 L.R.R.M. 2175, 2177–78 (1976). The court found that disciplinary and grievance procedures were encompassed by the statutory definition of bargaining subjects and, therefore, bargaining over such matters was required. *Id.* at 680–81, 246 N.W.2d at 834, 94 L.R.R.M. at 2176–77; see also ILL. REV. STAT. ANN. ch. 24, paras. 10.1–18.1 (Smith-Hurd Supp. 1990), which provides for a separate procedure for appeal of discipline of police officers in cities over 500,000 than for other civil

VI. Recommendations For Implementation

A. *States Enacting or Substantially Amending Collective Bargaining Laws*

Having concluded that negotiation over disciplinary issues furthers the goals of collective bargaining statutes and is compatible with the merit system, the determination as to the best method for implementing such bargaining remains. As suggested in section IV A *supra*, any state considering enactment of a bargaining statute should consider and specifically address the potential conflict with civil service.[351] In the absence of statutory provisions, courts will have little or no guidance when faced with conflicts. Furthermore, both negotiability of issues and enforcement of contract provisions covered by civil service law should be expressly addressed.[352] Contractual provisions addressing disciplinary issues should be both negotiable and enforceable.

With respect to negotiability, the Connecticut statutory provisions exemplify the most effective statutory approach, providing sufficient specificity without unreasonably restricting the flexibility of the parties in negotiations or creating unnecessarily confusing issues of interpretation.[353] The Connecticut statute addresses the entire scope of potential conflict with civil service law, which is preferable to provisions limited to discipline and discharge. Similarly, with respect to enforceability, a statutory provision that addresses the range of potential conflicting laws is most advantageous.[354] In this regard, the Illinois approach is commendable because it provides that the collective bargaining statute and collec-

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service employees. The appeals procedure for police officers utilizes a police board appointed by the mayor with majority representation from city residents, rather than the civil service commission. *See id.* paras. 10.1–18.1 and 3–7–3.1. Where the civil service law contains such a structure, a legislature desiring to preserve civilian review could give those provisions of the civil service statute priority over the collective bargaining agreement and preclude negotiation over the issue.

[351] *See supra* notes 127–31 and accompanying text.

[352] *See supra* notes 171–73 and accompanying text.

[353] *See supra* notes 185–86, 190–93 and accompanying text. The Ohio statute has similar provisions. *See supra* notes 194–97 and accompanying text. A sample of recommended statutory provisions is included in Appendix I.

[354] See Schmedemann, *supra* note 259, at 253–56 for a discussion of one approach to deal with potentially conflicting statutes.

tive bargaining agreements negotiated thereunder supersede conflicting laws.[355] In the event that there are certain conflicting laws that the legislature wishes to exempt from this provision for both negotiation and enforcement purposes, an explicit exemption could be included in the collective bargaining statute.[356]

Alternatively, the collective bargaining statute could contain a provision preempting all statutes except those that contain language expressly exempting them from preemption by collective bargaining. States enacting collective bargaining laws also should review civil service statutes for provisions that might raise issues of conflict. To the extent that civil service laws suggest that disciplinary and/or appeals procedures included therein are exclusive, the civil service law should be amended to authorize collective bargaining over such issues.[357]

An additional consideration must be taken into account by states enacting collective bargaining laws against a background of existing civil service laws. Where the parties are permitted to negotiate alternatives to the civil service appeals procedure, the legislature must decide whether both procedures remain available, whether the contractual procedure supersedes the grievance procedure, or whether the employee must choose one procedure or the other.[358] There is little to recommend allowing employees access to both procedures except to provide the losing party a second bite

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[355] *See supra* note 205 and accompanying text. An alternative approach would be to provide that disputes over discipline should be resolved in accordance with the collective bargaining agreement. *See, e.g.*, OR. REV. STAT. § 240.321(2), (3), (4) (1987) (allowing terms and conditions of employment to be determined by the contract notwithstanding the civil service provisions regarding discipline). A provision directed solely at discipline, however, does not address the potential conflicts with other laws or even the other potential conflicts with civil service laws.

[356] *See, e.g.*, OHIO REV. CODE ANN. § 4117.10 (Baldwin Supp. 1989). A sample of the recommended statutory provisions is included in Appendix I.

[357] Because a civil service provision gave exclusive jurisdiction over civil service employee discharges to the civil service commission, the Iowa Supreme Court held that a civil service employee discharge was not subject to arbitration. Devine v. City of Des Moines, 366 N.W.2d 580, 582–83, 122 L.R.R.M. 3109, 3111 (Iowa 1985).

[358] Under the New York statute, the union can negotiate a grievance and arbitration procedure that eliminates the employee's right to use the civil service procedure. *See* Antinore v. State of New York, 49 A.D.2d 6, 8, 10–11, 371 N.Y.S.2d 213, 215, 216–17, 90 L.R.R.M. 2127, 2128–29 (1975), *aff'd*, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 358 N.E.2d 268, 94 L.R.R.M. 2224 (1976). In Minnesota, the employee may opt for the contractual procedure or the statutory procedure, but cannot pursue both. *See* MINN. STAT. ANN. § 179A.20 (West Supp. 1990).

at the apple. If the employee must initiate and pursue both procedures, then only the employee will have two opportunities to prevail because an employee who wins in one forum will have no incentive to continue proceedings in the other forum.

Moreover, if proceedings in two forums are permitted, significant issues of collateral estoppel and res judicata are raised.[359] There also is a distinct possibility of conflicting judgments, yielding further litigation. Such problems can be avoided by limiting the issue to one forum. Although such a limitation may not be warranted where the issues to be litigated in the two forums differ and the expertise of the particular forum is important for deciding the issues,[360] here the issues will be virtually identical, i.e., whether the employee was disciplined for just cause. There is nothing unique about the issues that would require the special expertise of the appeals board or the arbitrator to make a fair and reasoned decision. Litigating the same issue in two similar forums is highly inefficient and expends resources unnecessarily.

There are several alternatives available to address this problem. The statute could provide that, where a negotiated grievance procedure exists, disputes are to be resolved using the negotiated procedure rather than the statutory appeals procedure.[361] This approach preserves the statutory appeals procedure if no alternative is negotiated. On the other hand, it allows, but does not require, the union to waive the employee's access to the statutory proce-

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[359] *See* Board of Governors v. Illinois Educ. Labor Relations Bd., 170 Ill. App. 3d 463, 481–84, 524 N.E.2d 758, 768–70 (1988).

[360] See Alexander v. Gardner-Denver Co., 415 U.S. 36, 55–60 (1974), in which the Supreme Court held that voluntary submission of a discrimination claim to binding arbitration does not preclude a subsequent action in federal court based on Title VII of the Civil Rights Act because of the intent to provide overlapping remedies in cases of discrimination and the significant differences between the arbitral and statutory processes. *See also* McDonald v. City of West Branch, 466 U.S. 284, 290–91 (1984) (arbitration does not preclude subsequent suit under section 1983 because arbitrators may lack the expertise and contractual authority to resolve section 1983 claims, arbitral factfinding is not equivalent to judicial factfinding, and union control over the arbitration process may adversely affect the employee's claim); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 734 (1981) (arbitration does not preclude action under the Fair Labor Standards Act); Town of Dedham v. Labor Relations Comm'n, 365 Mass. 392, 400–06, 312 N.E.2d 548, 555–59, 85 L.R.R.M. 2918, 2922–25 (1974) (existence of civil service statutory remedy does not deprive Labor Relations Commission of jurisdiction over unfair labor practice claim of discriminatory discipline because of differences in issues, rights, and remedies).

[361] *See, e.g.*, OHIO REV. CODE ANN. § 4117.10(A) (Baldwin Supp. 1989).

dure.[362] Although some states have upheld such a waiver,[363] a legislature may be reluctant to take such a step. Certainly, the statute must ensure that the negotiated procedure provides all the constitutionally required due process protections.[364] Furthermore, in the event that a state constitution guarantees the right to civil service appeals,[365] this option may not be available to the legislature. In such a state, depending on the constitutional language, the legislature might be forced to allow a dual forum or prohibit negotiations on the issue.[366]

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[362] A rational union will waive the appeals procedure only if a majority of the employees so desire because the union must satisfy its constituency. There may be a minority of employees, however, who prefer the civil service procedure and are therefore dissatisfied. Of course, this type of collective decisionmaking is the very essence of collective bargaining.

[363] *See, e.g.*, Antinore v. State of New York, 49 A.D.2d 6, 10–11, 371 N.Y.S.2d 213, 216–18, 90 L.R.R.M. 2127, 2128–29 (1975), *aff'd*, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 358 N.E.2d 268, 94 L.R.R.M. 2224 (1976).

[364] Where the grievance and arbitration procedure contains procedural safeguards, the procedure satisfies the constitutional due process requirements and can be substituted for a statutory procedure. *See* Gorham v. City of Kansas City, 225 Kan. 369, 378, 590 P.2d 1051, 1058, 101 L.R.R.M. 2290, 2294 (1979); *Antinore*, 49 A.D.2d at 9, 10, 371 N.Y.S.2d at 216, 90 L.R.R.M. at 2128; *see also* Jackson v. Temple Univ., 721 F.2d 931, 933, 114 L.R.R.M. 3579, 3580 (3d Cir. 1983) (no due process violation where union declined to arbitrate employee's grievance); Stephens v. Postmaster Gen., 623 F.2d 594, 595, 596, 104 L.R.R.M. 2808, 2809, 2810 (9th Cir. 1980) (no due process violation where union cancelled arbitration because employee contractually waived right to arbitration by filing civil service appeal, even though the civil service appeal was dismissed as untimely). For a thorough discussion of due process issues relating to public employee grievances, see generally Note, *Public Sector Grievance Procedures, Due Process and the Duty of Fair Representation*, 89 HARV. L. REV. 752 (1976).

[365] *See* CAL. CONST. art. VII, § 3(a) (Supp. 1990) (the personnel board shall review disciplinary actions of state employees); COLO. CONST. art. XII, § 13(8) (1980) (any disciplinary action against personnel system employees shall be subject to appeal to the state personnel board); LA. CONST. art. 10, § 8(A) (West Supp. 1989) (a classified employee subjected to disciplinary action shall have the right of appeal to the appropriate commission). This provision applies to state employees and employees in cities over 400,000. LA. CONST. art. 10, §§ 1, 12 (West 1977 & Supp. 1989).

[366] Although the California Constitution provides that the State Personnel Board has the authority to review all disciplinary actions, CAL. CONST. art. VII, § 3(a), this provision has not been construed to prohibit negotiations over disciplinary matters. *See* Comment, *supra* note 227, at 848–52. Instead, proposals regarding discipline have been found negotiable unless they completely remove the Personnel Board's authority to review disciplinary decisions. *See id.* and cases cited therein. For example, a proposal that required just cause for discipline and permitted alleged violations of this requirement to be challenged through the grievance procedure was held to be negotiable because it allowed the Personnel Board to review all ultimate decisions on such grievances, including arbitration awards. *Id.* at 852 (citing Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 446, 457 n.6 *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984)); see also *supra* note 92 for the effect of the Michigan constitutional provisions regarding civil service on collective bargaining for state employees.

A second alternative is to provide by statute that the employee has the choice of the statutory procedure or the negotiated procedure, but cannot use both.[367] This approach eliminates concerns about union waivers of employee rights, as well as the need to ensure that the grievance procedure provides sufficient due process protection.[368] Providing the employee with an option will encourage acceptance of the decision because the statute has permitted the employee to choose the forum that he or she believes will hear the case most fairly. At the same time, this option avoids the problems of a dual forum.

The drawback of this procedure is that it allows issues of discipline to be decided by two different forums if employees so choose. Although each employee is restricted to one forum, some disciplinary issues may be decided under civil service procedures and standards, and others under contractual procedures and standards. Availability of dual procedures interferes with the development of a uniform body of authority with respect to disciplinary matters, which would provide predictability and stability for the employer, the employees, and the union.[369] Furthermore, to the extent that the grievance procedure is an extension of the bargaining process designed to further the goals of the bargaining statute, permitting employees to use civil service procedures in the absence of agreement by the employer and the union that these procedures are the appropriate exclusive forum for disciplinary appeals, frustrates the statutory objectives.[370]

A third alternative is to prohibit litigation of the same issue in both forums by statute, but to allow the parties in negotiations to decide whether to limit employees to the grievance procedure or to give employees a choice of forums. This option retains the most flexibility for the parties in negotiations. Such flexibility enables

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[367] *See, e.g.*, MINN. STAT. ANN. § 179A.20 (West Supp. 1990). The Civil Service Reform Act, which covers federal employees, provides such an option. *See* Craver, *The Regulation of Federal Sector Labor Relations: Overlapping Administrative Responsibilities*, 39 LAB. L.J. 387, 399 (1988).

[368] Because the employee has the option to choose a civil service procedure that complies with due process protections, the choice of the grievance procedure should be considered a knowing waiver of the constitutional right without the necessity of inquiring whether the grievance procedure meets due process requirements. Individuals can waive constitutional protections as long as the waiver is voluntary, knowing, and intelligent. *See* D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 185–86 (1971); Miranda v. Arizona, 384 U.S. 436, 444 (1966). For further discussion of the due process issues, see Note, *supra* note 364, at 769–92.

[369] *See* Note, *supra* note 364, at 764.

[370] *See id.*

tradeoffs, which are essential to effective collective bargaining.[371] Further, it permits the parties to determine which system best suits their particular relationship.

The disadvantage to this third approach is that it allows the union to restrict employee access to the appeals procedure. The state constitution and existing civil service laws must be examined carefully to ensure that there is no conflict. In the event of conflict with the civil service law, a statutory amendment would easily resolve the issue, but, in the absence of a constitutional amendment, a constitutional conflict may doom this approach.

B. *States with Existing Collective Bargaining Laws*

States with existing bargaining laws fall into two categories—those with language or definitive case law[372] holding that negotiation over disciplinary issues is prohibited, and those in which there is no clear language or available definitive case law. In these former states, the statute must be amended to permit bargaining.

The Iowa Supreme Court, for example, held in *Devine v. City of Des Moines* that discharged employees were limited to civil service grievance procedures.[373] The court reasoned that the language of the civil service statute gave exclusive jurisdiction over discharge procedures to the civil service commission.[374] The court also relied on language in the collective bargaining statute that provided that the Iowa Code prevailed over conflicting provisions of collective bargaining agreements.[375] Yet the collective bargaining statute also provided that the contractual grievance procedure, not the civil service appeals procedure, should be followed where available.[376] Given this provision of the Iowa Code, the court logically could have concluded that, by enacting the collective bargaining statute subsequent to the civil service statute, the legislature modified the civil service statute to the extent of conflict. Therefore, the contractual grievance and arbitration procedure was available to employees challenging their discharges. Nevertheless, in view of the *Devine* decision, in order to accomplish the above recommendations, the

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[371] *See* Schmedemann, *supra* note 259, at 220.

[372] For purposes of this discussion, only state supreme court decisions are considered definitive case law.

[373] 366 N.W.2d 580, 122 L.R.R.M. 3109 (Iowa 1985); *see supra* note 202 and accompanying text.

[374] *See Devine*, 366 N.W.2d at 582, 122 L.R.R.M. at 3110.

[375] *Id.* at 583, 122 L.R.R.M. at 3111.

[376] *See* IOWA CODE ANN. § 20.18 (West 1989).

legislature must amend the civil service law to make it clear that classified employees may enforce negotiated grievance and arbitration procedures in discharge cases. Because the Iowa statute explicitly enumerates many negotiable matters, including grievance procedures, but does not specifically mention discipline, inclusion of discipline in the listed items for negotiations would further clarify the issue.

Other states also would require amendments to their statutes to permit negotiation. In New Mexico, for example, the State Personnel Board would have to amend its rules to authorize negotiation over discipline and to allow contractual arbitration of dismissals, demotions, and suspensions.[377] In New Jersey, the legislature would have to amend the statute to omit the restriction that provides that disciplinary review procedures cannot replace or be inconsistent with statutory appeals procedures and cannot provide for binding arbitration of disciplinary disputes where civil service procedures exist.[378] Because courts have interpreted these provisions to preclude negotiations over any discipline-related proposal, with appropriately clear evidence of legislative intent, this change should permit negotiation and enforcement of contract provisions relating to discipline.

The New Hampshire Supreme Court has upheld the Public Employee Labor Relations Board's decision that proposals relating to employee discipline are not negotiable.[379] As in the case of Iowa, this result does not appear to be dictated by the statute that precludes bargaining over managerial policy matters and policies and practices of any merit system relating to recruitment, examination, appointment, and advancement.[380] Again, however, a clarifying amendment that specifically authorizes negotiation over disciplinary policies, procedures, and related contract provisions, including the grievance and arbitration procedure, would be necessary to establish a bargaining requirement in light of the decision.

In jurisdictions where the bargaining obligation and enforceability of contract provisions relating to discipline are unsettled issues, statutory amendment along the suggested lines[381] would clarify

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[377] *See supra* notes 141–44 and accompanying text.

[378] *See supra* notes 145–46 and accompanying text.

[379] State Employees Ass'n v. New Hampshire Pub. Employee Relations Bd., 118 N.H. 885, 889–90, 397 A.2d 1035, 1037–38, 100 L.R.R.M. 2485, 2480 (1978). *See supra* note 187 and accompanying text.

[380] *See* N.H. REV. STAT. ANN. § 273–A:1, A:3 (1987).

[381] *See supra* notes 351–71 and accompanying text.

the legislative intent. In most cases, however, statutory amendment is unnecessary. In states like Hawaii, where the statute prohibits agreement to proposals inconsistent with the merit principle,[382] administrative agencies and courts faced with issues regarding negotiability and enforceability of contract clauses on disciplinary matters can and should conclude that such proposals are negotiable because, as demonstrated, negotiation about these issues does not conflict with the merit principle.[383]

When faced with language in the collective bargaining statute that limits negotiability or enforceability to matters not in conflict with other statutes,[384] states should carefully examine these other statutes to determine whether the conflict is real. Courts and administrative agencies should not preclude bargaining over disciplinary issues unless there is clear prohibition on such negotiation or direct conflict with existing statutory law. For example, if the civil service statute provides an appeals procedure but nowhere suggests that it is the exclusive means for challenging disciplinary decisions, there should be no bar to negotiating a grievance and arbitration procedure that covers disciplinary decisions.[385]

Similarly, where the collective bargaining statute is silent with respect to conflict, administrative agencies and courts should follow the analysis of the Michigan and Oregon courts.[386] First, the tribunal should attempt to determine whether the statutes can be accommodated. Where there is no direct prohibition on negotiation of disciplinary issues in the civil service statute, the tribunal should permit negotiation and enforcement of negotiated provisions. Because there is no conflict with the merit principle, permitting bargaining over disciplinary issues will effectuate the legislative intent of both statutes by requiring negotiation to settle labor disputes and, at the same time, preserving merit-based employment. Where a clear conflict exists, and the collective bargaining statute is a later

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[382] *See supra* notes 188–89 and accompanying text. The Vermont and Maine state employees statutes and the Alaska statute should be construed similarly. *See supra* notes 176, 178–82, 254 and accompanying text.

[383] See *supra* notes 291–350 and accompanying text for a discussion of the compatibility between negotiating disciplinary issues and the merit principle. In the improbable event that these decisionmakers should be faced with a proposal unquestionably inconsistent with the merit principle, such as a proposal that decisions relating to termination be based on political loyalty, the opposite conclusion could be reached.

[384] *See, e.g.*, PA. STAT. ANN. tit. 43, § 1101.703 (Purdon Supp. 1990).

[385] *See, e.g.*, Board of Governors v. Illinois Educ. Labor Relations Bd., 170 Ill. App. 3d 463, 470–72, 475, 524 N.E.2d 758, 761–62, 64 (1988).

[386] *See supra* notes 92–93, 98–101 and accompanying text.

enactment providing comprehensive coverage of the public employment relations of the employees in the statute, the tribunal should conclude that the legislature intended the collective bargaining statute to govern.[387] As long as the description of bargainable subjects is susceptible to an interpretation that would include employee discipline, bargaining over all aspects of discipline should be required and the resulting agreement should be enforceable.[388]

Using these principles of statutory construction, courts and administrative agencies in most states where the issue is unsettled should conclude that negotiation over disciplinary matters is required in order to effectuate the purposes of both collective bargaining and civil service statutes. The policies discussed herein that underlie the collective bargaining laws support such a conclusion. Moreover, the merit principles that are the primary focus of civil service laws will not be affected adversely, and indeed, may even be furthered.

VII. Conclusion

States can resolve the perceived conflict between civil service law and bargaining over employee discipline without interfering with the goals of either statute. Although statutory provisions may appear to conflict, permitting negotiation over disciplinary procedures and standards does not hinder and may, in fact, promote merit employment. Accordingly, states should allow unions and employers to negotiate over these issues and to determine the appropriate disciplinary procedures and standards for the relevant employment setting. This can be accomplished either by statutory authorization for negotiation and enforcement of disciplinary matters in existing or newly enacted collective bargaining or civil service laws, or by interpretive case law. Where necessary, statutes should be amended to permit the negotiating parties to decide the applicable disciplinary standards and procedures. Such action will preserve merit employment and enhance labor peace, thus furthering two important public policies in the employment arena.

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[387] *See, e.g.*, Wayne County Civil Serv. Comm'n v. Board of Supervisors, 384 Mich. 363, 371–77, 184 N.W.2d 201, 204–06, 77 L.R.R.M. 2034, 2036–38 (1971).

[388] If the statute specifies negotiable subjects and expressly limits negotiation to those subjects, the absence of discipline and/or grievance and arbitration procedures would preclude an interpretation that bargaining over those subjects was required.

APPENDIX I

Sample recommended statutory language regarding:

Negotiability

Collective bargaining is the performance of the mutual obligation of the employer or its designated representatives and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, except as provided in subsection (a) of this section, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation shall not compel either party to agree to a proposal or require the making of a concession.[1]

(a) The conduct and grading of civil service examinations, the rating of candidates, and the establishment of lists from such examinations and the original appointments from the eligibles list shall not be subject to collective bargaining.[2]

Enforceability

The provisions of this Act and any collective bargaining agreement negotiated thereunder shall prevail over any other law, executive order, administrative regulation, charter, ordinance, or other rule or regulation, except as otherwise expressly specified by the legislature.[3]

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[1] This language is taken substantially from the Connecticut statute, *Conn. Gen. Stat. Ann.* § 5–272(c) (West 1988), which is patterned after the National Labor Relations Act, 29 U.S.C. § 158(d) (1988), indicating a broad scope of bargaining

[2] This proposal is an amalgam of the Connecticut and Ohio statutes. *See Conn. Gen. Stat. Ann.* § 5–272(d) (West 1988) and *Ohio Rev. Code Ann.* § 4117.08(B) (Baldwin 1983). The legislature must decide which aspects of the appointment process should be exempted from negotiation.

[3] This provision is an amalgam of *Ill. Ann. Stat.* ch. 48, para. 1615 (Smith-Hurd 1986) and *Ohio Rev. Code Ann.* § 4117.10(A) (Baldwin 1989). The modifications are designed to clarify the legislature's intent that the collective bargaining statute shall prevail unless otherwise expressly provided in the collective bargaining statute or another legislative enactment. Such a provision would require the review of other laws to avoid unintended preemption of the bargaining statute but allows the legislature to preempt bargaining by subsequent enactments without amending the bargaining law.

The legislature must decide which, if any, laws should prevail over negotiated provisions. Ohio, for example, has provided that laws regarding retirement, affirmative action, and workers' compensation, among others, supersede collectively bargained agreements. *See id.*

APPENDIX II

State	No Statute	Statute[1] w/ No Provision Or Decision	Silent[2] Statute	Statute w/Disc Prov.[3]	Statute w/Gen'l Prov.[4]
Alabama		x			
Alaska					x
Arizona	x				
Arkansas	x				
Calif (mun)[5]					x
Calif (state)					x
Colorado	x				
Conn (mun)					x
Conn (state)					x
Delaware				x	
D. C.				x	
Florida					x
Georgia		x			
Hawaii					x
Idaho		x			
Ill (public)					x
Ill (educ.)					x
Indiana		x			
Iowa					x
Kansas					x
Kentucky		x			
Louisiana		x			
Maine (pub)				x	
Maine (state)					x
Md (park emp)					x
Massachusetts				x	
Michigan			x		
Minnesota				x	
Mississippi	x				
Missouri		x			
Montana			x		
Neb (local)			x		
Neb (state)					x
Nev (local)				x	
New Hamp					x
New Jersey				x	
NM (state)				x	
New York			x		
N. C.	x				
N. D.		x			
Ohio					x
Okla (police and ffs)			x		
Ore (local)			x		
Ore (state)				x	
Pennsylvania					x
Rhode Island			x		
S. C.	x				
S. D.		x			
Tennessee		x			
Texas (police and ffs)					x
Utah	x				
Vt (state)					x

APPENDIX II

State	No Statute	Statute[1] w/ No Provision Or Decision	Silent[2] Statute	Statute w/Disc Prov.[3]	Statute w/Gen'l Prov.[4]
Vt (local)				x	
Virginia	x				
Washington					x
West Va.	x				
Wisc (state)				x	
Wisc (mun)			x		
Wyoming		x			

[1] Many of the statutes listed in this category are limited in scope and/or coverage of employees. They differ from the category of silent statutes because of the absence of decisional law.

[2] Silent statutes have no statutory provision, but are distinguished from the previous category because there is some decisional law on the issue.

[3] These statutory provisions relate directly to the issue of discipline and include provisions on negotiability, enforceability, or both.

[4] These statutory provisions include general provisions regarding conflict with other statutes and provisions specific to conflicts between civil service law and the bargaining statute. This category includes states with provisions regarding negotiability only, enforceability only, and states with provisions relating to both.

[5] States that have more than one statute with relevant provisions are listed by statute with the employees covered by the particular statute in parentheses.