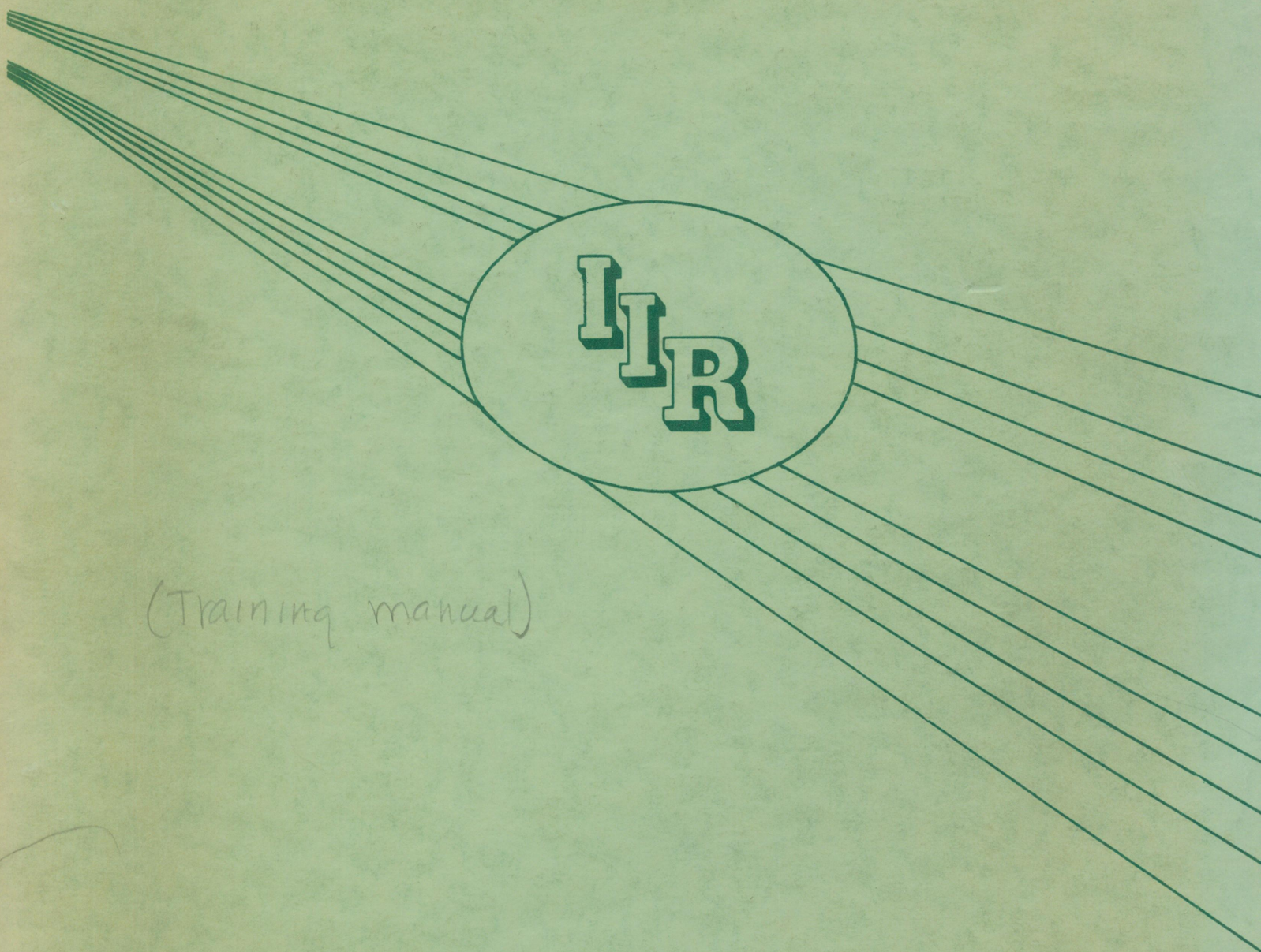
IMPASSE RESOLUTION IN PUBLIC SECTOR INTEREST DISPUTES



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FOREWORD

The Institute of Industrial Relations is happy to present this, the sixth in a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided to the State by the federal government, the State asked the Institutes at UCLA and Berkeley to assist in the training of state and local public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training materials.

One of the most fundamental problems for labor relations practitioners is the challenge to resolve peacefully the terms of a future contract. Yet even in the private sector, many employers and unions are reluctant to forego their lawful right in a collective bargaining relationship to use economic force as a means of producing agreement. Such reluctance is often based on the assumption that the right to use economic force if negotiations fail is a *most* powerful inducement to reach agreement and gives meaning and substance to the process of "free" collective bargaining in the United States.

With the growth of unionism in the public sector and the evolution of a sophisticated relationship between the bargaining parties more closely resembling the private sector model, the use of economic force or the public employee strike has become a somewhat frequent event. In contrast to the private sector, such strikes are in most cases unlawful and are a subject of concern to practitioners, government officials charged with the formulation of public policy, and the public, especially in the public safety fields.

Contemporary commentators are, therefore, raising new questions about the potential of impasse settlement procedures previously applied in the private sector and applicability of these procedures to the needs of practitioners engaged in public sector bargaining. Indeed, while public sector practitioners have been guided by private sector precedents in other areas of labor relations, it now appears that public sector practitioners may be setting precedents in impasse resolution.

Today a variety of techniques confront the public sector practitioners who seek knowledge of procedural alternatives for resolving impasse in an interest dispute. These include mediation, fact-finding, arbitration (binding, non-binding or advisory), the combination of mediation and arbitration popularly known as "med-arb," and the relatively new concept of final offer arbitration. It is important that representatives of labor and management clearly understand not only the meaning of such terms, but the special circumstances in which these processes may most fruitfully be applied.

It is our hope that the materials on impasse resolution included in this manual will be valuable to both public sector practitioners and their constituencies as a guide to procedural preparation and as a basis for continuing discussion of the concepts and their relationship to the collective bargaining process.

November, 1976

Frederic Meyers
Director

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TAB A

INTRODUCTION

During the last three years some 822,000 work days have been lost due to public employee strikes in California.[1/] A startling statistic, it signifies that the question of public employee strikes is no longer limited to the theoretical discussion of their legal or philosophical propriety. Public sector strikes are issues of significant social and economic concern.

In light of these statistics, it is clear that a discussion of alternatives to strikes in the public sector is timely. What alternatives are consistent with the norms of a free society and a representative form of government remains, however, a matter of continuing controversy.

This discussion of interest impasse resolution techniques is, of course, of particular importance to the public sector labor relations practitioner. To the extent that the parties succeeded in finding alternatives to the strike, the practitioner must have a knowledge of the methods, techniques, and legal requirements of such processes.

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[1] California Department of Industrial Relations figures show 160,000 and 322,000 work days idle for fiscal years 1973-74 and 1974-75, respectively. Unofficial statistics from the same source and from the City and County of San Francisco show 340,000 work days idle for fiscal 1975-76. Total for the 3-year period: 822,000!

Moreover, to the extent that labor and management practitioners are also participants in shaping public policy to accommodate alternative impasse resolution techniques, it is vital that they have knowledge of those forms which are most effective and most compatible with their respective interests.

The materials which follow in this manual fall into the two broad categories which correspond to these needs. In Tabs B through D the reader will find a definition of the various impasse resolution techniques, the standards used by neutrals in their determinations, and a detailed outline of how the practitioner should prepare his/her case for presentation in either fact-finding or abritration procedures. In Tab E the experiences with the various forms of arbitration are explored in both the public and private sector, some innovations of new techniques are analyzed, and points of view are expressed.

In reviewing the arbitration experience of other public entities, the article in Tab E by Robert G. Howlett is the most comprehensive. Mr. Howlett, the former director of the Michigan Public Employee Relations Board, produces strong evidence that interest arbitration is not only compatible with the interests of the parties, but that it has proven to be an effective alternative to the strike. On this last point the author's view has been substantiated by a more recent

work, which notes that there has not been a single incident of a strike by either a police or firefighters organization since the Michigan statute was amended to provide for final-offer arbitration.[2/]

The California Experience

California cannot be said to be a leader in this area of developing alternative impasse procedures in public sector interest disputes. While more than half the states in the nation have adopted interest arbitration statutes for safety personnel or other public employees, only the relatively small number of public employees in transit districts governed by the Public Utility Code are provided this option in California.[3/] As limited as this experience is, however, it does provide some insights into this process.

As a part of this study, the twelve transit districts that are covered by the PUC's provisions[4/] were polled to determine what their experiences were with regard to arbitration. Since even voluntary arbitration of interest matters is frequently seen as the

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[2]Both Howlett's article and the position paper of the League of California Cities and CSAC are based upon the experience under Michigan's original arbitration statute, which was adopted in 1969. The amendment which requires the arbitrator to select one of the final offers of the parties as his or her award was put into effect on January 1, 1973. See Final-Offer Arbitration by James L. Stern, et al, Lexington Books, D.C. Heath and Co., Lexington, Mass., 1975

[3]See J.R. Grodin, Political Aspects of Public Sector Interest Arbitration, and chart of "Impasse Procedure In State Legislation." Tab E.

[4]The California Public Utility Code provides arbitration as a voluntary alternative to the parties in impasse. It also permits, through court interpretation, the right to strike.

end of collective bargaining, it was noteworthy to find that only four districts had ever used this provision. Moreover, those that had could hardly be said to be "addicted" to the process, since one district had used it four times, another twice, and two, only once.

In asking those who had used arbitration why they had not done so more frequently, two management officials stated that they objected to delegating management authority to an arbitrator. Another district stated, however, that it would use arbitration again, the reasons being that arbitration "...avoids strikes, protects the riding public, keeps politicans out of disputes and keeps settlements within reason."

In view of the lack of resort to arbitration in the transit districts, it must be concluded that all of the parties do not seem to share the enthusiastic view of this district that so warmly supports it. Nevertheless, the existence of this voluntary procedure has at least lead to eight agreements through a neutral's intervention when the parties themselves had not been successful.

The Need for Innovation

In the absence of additional legislation, those employees and agencies covered by the Meyers-Milias-Brown Act and the Education Employment Relations Act will be limited to the non-binding dispute resolution techniques provided under these acts. As the case study of the

San Bernardino experiment included in this manual demonstrates, innovative approaches to such methods are possible and can be successful. The extent to which they are, however, depends in large part on the willingness of the parties to make that effort.

In terms of developing legislative proposals for interest impasse resolution techniques, the most exhaustive effort in that regard was made by the Assembly Advisory Council on Public Employee Relations, in 1973, included in Tab E. The impasse procedures proposed by that Council also served as a basis for such procedures, which were included in at least one major collective bargaining bill in the last session of the California Legislature. The Council's report is included for discussion purposes since it provides one approach to legislative alternatives which could again be proposed. In any case, it is apparent that if the incidence of public employee strikes is to be reduced, further innovation in the development of interest impasse resolution techniques is needed.

TAB B

MEDIATION

Mediation Defined

Mediation is gaining increasing acceptance as an important tool in impasse resolution and conciliation in public-sector interest disputes. Mediation may be defined as the intervention of a third party (mediator) in an impasse situation in order to aid the parties to the collective bargaining agreement in their negotiations. The mediator may be a government official or a person chosen by the parties themselves. The mediator meets with the parties jointly and/or separately in attempts to narrow their differences on issues in negotiation--his continued participation being contingent upon the approval of both parties. The mediator will remove himself from the proceedings when agreement is reached or upon the request of either party to the dispute. The mediator will also remove himself when the proceedings move to the next step, i.e., factfinding or arbitration, or if he feels his effectiveness has been exhausted. He has no authority to compel agreement between the parties; he must depend on his own perception and ability of persuasion to help the parties reach agreement.

A mediator is particularly valuable in an impasse situation because he serves as another channel of communication between the parties. A good mediator never commits himself or takes sides on the merits of a case. He is strictly a confidant and go-between, seeking to bring both parties to the point where they would be if they had resolved

the situation without him. (See Appendix for a cogent definition of mediation by John R. Commons, considered by many the "father" of industrial relations in the U.S.)

The State Conciliation Service

In California, mediation, conciliation, and related services are provided by the State Conciliation Services (SCS). The SCS was created in 1947 as an administrative unit of the Department of Industrial Relations. Its duties are governed by Section 65 of the State Labor Code. Additional responsibilities are set forth in amendments to the Public Utilities Code, in the Meyers-Milias-Brown Act, and in the Educational Employment Relations (Rodda) Act. The conciliation services of the SCS are provided free of charge, and are invaluable in impasse situations. The SCS staff of professional conciliators are thoroughly skilled and knowledgeable in the field of industrial relations. The staff have proven willing and anxious to aid in dispute settlement. Requests for assistance in the course of a dispute may be made by the parties either individually or by joint action.*

How and When - The Mechanics of Mediation

Mediation is not a magic formula. It does not seek to innovate or modify the basic process of collective bargaining. Rather, mediation

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*Information may be obtained from any SCS office or conciliator. The Service maintains offices in San Francisco, Oakland, San Jose, Fresno, Los Angeles, and San Diego. (See Appendix to Tab B for further details on the SCS).

is a continuation of the collective bargaining process using a third party as an expediter who may open new lines of communication and aid the parties in gaining insights. Inasmuch as an impartial third party is frequently in a better position to question, reason, and offer suggestions for settling a dispute than are the collective bargaining parties themselves, mediation may be the catalyst leading to agreement.

The element of confidence, of prime importance in any mediation, has two meanings in this context: On the one hand, the parties must be assured that they can confide their position to the mediator without fear of it being revealed, and the mediator must be able to expect the parties to be truthful in their discussions with him. On the other hand, confidence also means that the mediator must present himself as both trustworthy and competent. He must show more than his credentials. The mediator must exhibit genuine knowledge and perception of all the issues involved.

It should be remembered that it is the role of the mediator to settle disputes. He does not pass judgment on the question of what is equitable or necessarily in the interest of the parties. His job is simply that of assisting the parties in reaching an agreement which they can accept. Keeping this in mind, the mediator will ideally act as a confidential advisor to both sides, and he must be given all necessary information. The parties should not hesitate to provide the mediator with thorough background information and briefing on the

negotiations and their status. The parties, therefore, should not assume without good reason that the mediator has prior knowledge of the existing situation. Since the relationship between the mediator and the parties is reciprocal, the parties should be willing to put themselves in the mediator's hands and work with him in all frankness. Only under such circumstances can a mediator render effective service to both parties. To be fully effective, several items should be stressed in consultations between the mediator and the parties at impasse. From your point of view, these include:

1) the present status of impasse and what has transpired;

2) the issues involved and their relative importance to your constituency (union or management);

3) the areas in which your party is receptive to bargaining, as well as where and why it is not;

4) the issues your party considers important in terms of timing;

5) your perception of important political and personality factors relative to both parties;

6) any ancillary information deemed pertinent to the negotiations.

Depending on how well-established the relationship is with the mediator, there may be one exception to the rule of total frankness. You are not obliged necessarily to give your maximum/minimum offer to the mediator in the initial briefing. Such information may serve no specific purpose while it may put an excessive amount of pressure on the mediator. This does not mean that the mediator should be given a misleading figure. It merely means you may, in good faith, avoid disclosing the maximum/minimum settlement you are willing to accept at the outset.

Avoiding Capricious Actions or Requests

If a mediator is to maintain his effectiveness and credibility, it is vital that he has the complete and sincere backing of the parties in order to assume a strong position on an issue. In conferring with the opposition he will be reflecting your stance. Therefore, if you take a strong position on an issue you must mean it. There is nothing so destructive to a mediator's credibility as being undercut by the party whose position he has been presenting. It should also be remembered that the mediation process must not be abused by capricious actions or requests. You cannot, and should not, expect the mediator to do anything for labor that he wouldn't do for management, and vice versa.

Since mediation is an extension of the collective bargaining process itself, many of the activities in that context will continue as usual, bearing in mind the presence of the mediator. For example, confidential meetings may continue to take place, but the parties must be ready to apprise the mediator of the meetings, their purpose, and their outcome. In his capacity as intermediary, the mediator can effectively work with only tangible issues and realistic arguments. For example, if the mediator is to present arguments to the opposition on why their demands or proposals are unacceptable, he must be armed with justifiable data. Moreover, if one bargaining team feels that certain issues are "not negotiable," that decision should be made clear to the mediator and to the opposition in the strongest possible terms.

It is important, not only in bargaining with the opposition but in caucusing with the mediator, that the bargaining team present a unified position and avoid the appearance of internal dissent. Disunity is more easily perceived than one might think. If dissent is evident to the opposition, the other party's bargaining position is weakened, and if that is evident to the mediator he may question the validity of the position he is assuming on behalf of the respective party.

When to Mediate

After having dealt with some of the basics of how to mediate, the next step is to ask "when?" The question of when to mediate may be divided into two questions: 1) When should a party accept mediation proposed by others? and 2) When should a party invoke the mediation process?

In answer to the first question--it is a generally accepted policy never to refuse mediation, the primary reason being that the refusal to mediate provides the opposition with a strong propaganda tool. Refusal to mediate may leave a party open to criticism that its bargaining team is being obstructive and not making every attempt to resolve the impasse in good faith. In fact, there is no reason to refuse mediation; no mediator or mediation board has the authority to force a party to do anything. The terms of a mediated settlement may serve as a psychological crutch to make a settlement more palatable for the party making the most concessions.

In answer to the second question--there may be instances when a bargaining team is particularly well-advised to invoke mediation, for example, when there is obvious disunity among the opposition. Conversely, requesting mediation may also be helpful in dealing with a stubborn or militant opposition, or when the opposition in a party's own constituency requires a demonstration that every effort is being made to reach agreement. At times, it may be wise to let the mediator be the moving party. This approach may lead to a settlement without either party showing weakness by initiating a compromise proposal.

When Not to Mediate

There may be situations when mediation would allow the opposition to delay or avoid what may be an imminent settlement. This may be an easy way out for a bargaining team with a weak position. Conversely, it may be more practicable for the team with a strong position to press for settlement and disallow mediation. Whatever the situation, if a party is disinclined to mediate, that position should be made clear to the mediator who will pursue the case in the best interest of both parties. It must be stressed, however, that in the public sector an outright refusal to deal with a mediator carries the risk of alienating public support.

In sum, the mediation process, when properly and skillfully used, can provide a valuable opportunity to reopen communications between conflicting parties. It forces a settlement on no one, but, rather, expedites the parties' attempts to settle the impasse themselves.

Mediation may contribute directly or psychologically to the bargaining process. But whatever the nature of the contribution, mediation is a significant tool in reaching a negotiated settlement acceptable to the parties.

Mediation's Role Under the Rodda Act

The Educational Employment Relations (Rodda) Act became fully effective on July 1, 1976. The law establishes the parameters for collective bargaining for California public school employees, both classified and certificated, and replaces the Winton Act in regulating collective bargaining relationships in the public school system (kindergarten through the 14th grade). In the context of this training manual on impasse resolution, it is instructive to take a brief look at the new impasse procedures provided under the Act and some of their implications.

Article 9 of the EERA deals with interest impasse procedures. Section 3548 spells out how an impasse may be declared and how a mediator is brought into the proceedings. This section also provides for the nature and time of the mediator's intervention:

> Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually

> acceptable. If the board determines that an impasse exists, it shall, in no event later than five working days after the receipt of a request, appoint a mediator in accordance with such rules as it shall prescribe. The mediator shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties. Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. If the parties agree upon their own mediation procedure, the cost of the services of any appointed mediator, unless appointed by the board, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

In addition to the traditional role played by mediation, the EERA adds potential duties to the mediator's functions. Under section 3548.1 the act provides:

> If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator

> declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a fact-finding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The board shall, within five days after such selection, select a chairman of the factfinding panel. The chairman designated by the board shall not, without consent of both parties, be the same person who served as mediator pursuant to Section 3548.

Since detailed discussion of factfinding is included in other sections of this module, the portions of the Act limited specifically to fact-finding will not be dealt with here. However, attention should be drawn to two potential problems raised by Section 3548.4 that involve the mediation and factfinding process.

> Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from <u>continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3</u>. (our emphasis)

One problem posed by Section 3548.1 is that while the mediator certifies impasse, he is not required to note the issues at impasse. As a result, the scope of possible subsequent factfinding is undefined. As will be

suggested in Tab C of this manual dealing with factfinding, the parties should be aware of this potential problem and request the mediator to assist them in drawing up a submission agreement of the issues that will go to factfinding.

The Conflict of the Mediator-Factfinder Role

An even more important problem is raised by the EERA provision which allows the conciliator to act as both mediator and factfinder. If this were to be done, it would, in the eyes of many authorities, raise an irresolvable conflict of roles, if not of interest.

One of the reasons for opposition to a conciliator playing dual roles stems from the effect this would have on the candidness of the parties. The parties would certainly be hesitant to confide their bottom line to a mediator when they may have to defend a different figure to that same person acting as factfinder. Such loss of frankness, of course, can only work against a mediator's credibility and effectiveness. One also must bear in mind that since the factfinding process is non-binding, the services of a mediator may be required in the critical post-fact-finding period. Indeed, Section 3548.4 of the EERA specifically provides for that possibility.

Another factor may contribute to undermine the credibility of a mediator with labor or with management: if he is brought into an impasse situation as a mediator after having served as a factfinder in another case, he may be labeled--justly or not--as either pro-

management or pro-labor. While an arbitrator may be able to stand up against such doubts, a counciliator would be perhaps less successful.

Arguments in favor of the dual role are based on private sector experience with the mediation-arbitration procedure. Med-arb, however, has been more accurately described as "mediation with a stick." The neutral in such a situation tends to "hint" at what may be appropriate rather than serve as a genuine neutral conciliator. Whereas the counciliator's "success" is dependent upon persuasion, the mediating arbitrator has the power to impose a settlement.

In response to the procedure suggested by the EERA that would have SCS conciliators "wear two hats," an Inter-Agency Agreement was recently signed between the EERB and the State Department of Industrial Relations. The agreement provides that state conciliators shall continue to function as neutral mediators and that they will not be required to also serve as factfinders. Factfinders under the EERA will be drawn from other sources so as to avoid any conflict of interest. This approach will then allow the SCS mediators to deal with the parties at impasse in an open and candid manner.

Although factfinding is provided by the EERA, the mediator will play an important role in the impasse resolution procedure under the Act. Indeed, if the precedence of the private sector and experience of other states are any indication, there will be greater, not less, demand of the SCS in this post-enactment period.

APPENDIX TO TAB B

1. Additional Information on the State Conciliation Service
2. How Mediation and Factfinding Break Deadlocks
3. Definition of Mediation or Conciliation

ADDITIONAL INFORMATION ON THE STATE CONCILIATION SERVICE

The primary function of the State Conciliation Service (SCS) in California is to provide mediation and conciliation in labor disputes, both in the public and the private sector. Mediation deals with all forms of labor disputes involving intrastate and interstate commerce and the public sector. SCS jurisdiction is concurrent with that of the Federal Mediation and Conciliation Service (FMCS) in matters affecting interstate commerce. The SCS has exclusive jurisdiction in intrastate, public sector, and agriculture disputes.

The SCS mediates disputes and conducts elections with regard to recognition of employee organizations,* grievances, jurisdictional disputes, labor agreements, and other issues involving labor-management relations. It also provides lists of qualified arbitrators and factfinders for the use of parties needing such assistance.

In efforts to prevent labor disputes the SCS offers advisory conciliation and mediation as well as information and counseling. All actions and records of the SCS are confidential except when stipulated otherwise by statute.

The conciliation staff has an enormous workload; in fiscal year 1975-76 it handled more than 600 private-sector and more than 800 public-sector cases. In calendar year 1975 approximately 122 school district cases were handled. Public sector demand for SCS services is expected to grow.

It was hoped that the recent passage of the Educational Employment Relations Act, which provides for factfinding in disputes involving school districts, would decrease the caseload of the SCS. However, this will probably not be the case since agencies other than school districts account for most of the SCS caseload.

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*Except for agencies governed by the EERA or where otherwise provided by local legislation with regard to Meyers, Milias, Brown Act Agencies.

HOW MEDIATION AND FACTFINDING BREAK DEADLOCKS

by
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[¶3108] Some labor relations disputes, those about how to live with the terms of a collective bargaining agreement, are known as grievances and are commonly handled by contract-set machinery designed to dispose of employee-dissatisfaction. Others, known as impasse disputes, occur when the parties deadlock on one or more issues during the course of negotiations for a collective bargaining agreement. In the event of deadlock, two nonbinding techniques commonly used to help settle them are mediation and factfinding. These techniques are the subject of my discussion.

ANSWERS TO SOME QUESTIONS ABOUT MEDIATION

Why mediate?

Mediation can assist both labor and management as the first step—if not last—in an important process of dispute resolution techniques. If, in the process of negotiating for a new contract, there are one or more issues on which the parties have reached impasse and are unable to agree, the mediator may be called upon to use his skill to bring the parties closer and to achieve a speedy and expeditious settlement.

➠ **SIDE BENEFIT** ➔ Besides achieving settlement, mediation has an inherent side benefit. It employs the skill of a third party neutral who is not personally or emotionally involved with the situation. As a skilled professional, the mediator is able to examine the positions of both parties, insert his own ideas, and urge the parties to compromise.

When to mediate?

Since mediation survives and flourishes on the ability of the mediator to work with both sides to a dispute and to "sell" an agreement, some have suggested that it should not be used unless *both sides* want it. This thinking may not be appropriate for the public sector. Mediation procedures should be available whenever either party requests them since the public interest is best served by a speedy and effective settlement of the controversy.

➠ **HOW DO YOU FIND A MEDIATOR?** ➔ Mediation services are generally obtained from one of three sources: from a state agency furnishing mediation services; from the Federal Mediation and Conciliation Service; or from a method specified in a collective bargaining agreement for choosing a mediator.

How does mediation work?

Briefing. After a mediator is appointed, he will then arrange a mutually satisfactory meeting time for both parties, during which they will confer with him regarding the issues in dispute, the causes for the dispute, and other background information.

Separate meetings. After the introductory meeting, a mediator commonly meets with the parties separately, in "executive session." This allows each side to consult with him in the strictest confidence. The trust and confidence of both sides regarding the authority and capability of a mediator is essential.

both sides, when meeting in private with the mediator, must exhibit this trust and be truthful as to exactly how far they are willing to go on each of the issues in order to reach a settlement. The mediator, by knowing the ultimate positions of each party, may then use this knowledge to make reasonable and acceptable recommendations to settle the dispute.

➠ **MEDIATOR WILL HONOR CONFIDENCE** → As a professional, the mediator knows that he cannot be effective if he divulges the final position of either side since such an act would destroy the parties' confidence in him, and, obviously, would not result in a suggested solution which would be acceptable to both sides.

Joint meetings. Mediation may consist of one meeting or of several meetings between the parties and the mediator. As the parties move closer and closer to an ultimate settlement, the mediator will carry the suggestions and offers of each side back and forth between both sides and, in case of lack of progress or intransigence, he will use his skills, observations, and suggestions to get the negotiations and the counteroffers moving once again.

Settlement or recommendations. At the end of the proceeding, the parties generally settle and the settlement is reduced to writing.

If a settlement is not reached, the mediator will tell the parties how he thinks they could reasonably settle the controversy to the best interest of both sides.

➠ **PUBLIC INTEREST** → In public sector cases, the mediator may also indicate how his recommendations would benefit the public interest. He knows that the parties should be aware of the impact of their proposals in generating either adverse or positive public opinion.

How is mediation helpful?

Mediation has many benefits:

✓ The presence of a neutral encourages both parties to make offers, counteroffers and to compromise what were once "last ditch" stands without losing face. The mediator can be blamed for compromises or settlements that were originally beyond the acceptable range of one or both parties.

✓ If settlement is not reached, the mediator's efforts will narrow the issues to be presented in a possible later factfinding or arbitration proceeding. The mediator identifies and discounts those issues which are put into controversy purely as "trade-offs" without significant value to either side.

✓ In the event of failure to settle the dispute, the mediator will insure that those issues which go forward to factfinding or arbitration are identified, and understood and that the issues and facts are accurately presented. This means quicker identification and understanding by the factfinders or by the arbitrators.

EFFECTIVE PARTICIPATION IN A FACTFINDING PROCEEDING

The factfinding process requires the parties to the proceeding to gather objective information and to present arguments concerning that information to the factfinder who will then issue a report and, generally, recommendations for the settlement of the dispute. There are, then, three separate phases in the process: the preparation; the hearing; and, the writing and rendering of the factfinding report.

Preparation.

The parties should realize that they can influence the second two phases of the proceeding—the hearing and report—by careful preparation. The presentation should be well documented. It should include facts showing how your wages, hours, fringes or other conditions of employment, in dispute, compare favorably with other agencies—or with private concerns—employing people doing a similar job. If possible, a showing that the cost of living in your area has risen slower or faster than in other areas would carry weight with the factfinder.

Will the union's demand for a change in working hours mean that essential services will be curtailed? If so, document this or other claims affecting the public interest. Factfinders consider the impact of a settlement on the public when they make their recommendations.

Good preparation helps the parties understand the issues *and* helps point up the techniques for presenting them in such a way that the factfinder will understand your presentation, too. In essence, good preparation helps *you* as well as the factfinder.

The hearing.

Who serves as factfinder? There are three kinds of factfinders: a single, neutral factfinder; a neutral panel of factfinders; and, a tripartite factfinding panel with a neutral chairman plus one management and one labor representative.

A factfinder should not have served as a mediator in the same case nor should he be from the same community involved in the dispute. He should not, in any way have—or be subject to—a charge of conflict of interest in connection with the controversy.

Factfinder's role. The role of the factfiner will vary because of individual differences. He will be influenced by:

- ✓ What he sees his own role to be.
- ✓ His views of the fact situation.
- ✓ His analysis of the collective bargaining history of the parties.
- ✓ The attitudes and personalities of the advocates.
- ✓ His own personality.
- ✓ His labor relations experience.
- ✓ The particular issues presented.

These individual differences in factfinders have been known to cause fear in the inexperienced or nonprofessional negotiator.

The proceeding. The factfinder acts in a spectrum with strict judicial rules at one end and informal mediation at the other. The factfinder's latitude in determining the formality of the hearing controls the attitudes of the parties. *A less formal atmosphere is sometimes more conducive to settlement, but the factfinder must never lose control of the hearing.* He must know when to project the "fatherly image" of a trusted consultant or when to allow himself to be the scapegoat for a settlement which either or both sides must disclaim politically.

The factfinder will generally try to achieve a settlement between the parties by enticing them to caucus and to reconsider their positions during the course of the hearing. Frequently this will result in the nonessential issues being settled or withdrawn before the end of the hearing.

At the outset the parties at the factfinding hearing should agree that the proceeding will not be public unless all parties and the factfinder agree to have it public. While the factfinder should not insist on strict adherence to the legal rules of evidence, he will base his findings on the reliable and credible evidence produced at the hearing, subject, of course, to cross-examination by the other party and questions from the factfinder. Generally, the party raising a given issue will present his testimony first on that issue, as the moving party has the initiative.

It is important for the factfinding hearing to proceed on an orderly and prearranged schedule without planned or unplanned upsets for either side.

➠ **DON'T MAKE PROCEEDING GAME OF WITS →** The purpose of factfinding is to determine the facts as the result of hearing testimony from both sides to the proceeding; it is not intended to be a game of wits where one party tries to surprise the other and where the dramatics of the presentation become more important than the facts.

By taking testimony from both sides, the factfinder helps to educate not only himself, but also the opposite side to the dispute. The more awareness of the issues the parties have, the more likely they are to settle issues or, in the alternative, trade-off issues and thereby reduce the final number of items requiring recommendations on the part of the factfinder.

Although a factfinder may request statistical data and reports on his own initiative, this procedure should not be followed unless both parties are given a chance to review and comment on such

information. *Each bit of evidence submitted should be subject to the review, scrutiny, and comment of the other side* so that it can be discounted, if appropriate, and so that the factfinder can reach a sound conclusion as to the importance and accuracy of the information presented.

Good faith a must. Factfinding should not be used as an idle threat and it should not be invoked arbitrarily, capriciously, or without good reason. If the hearing proceeds on a spurious factual situation or if either party does not participate in the process in good faith, the resulting report of the factfinder could be devastating. Extreme or unsubstantial positions on the part of either side will lose their force in this forum.

The report.

More often than not, the factfinding report is most effective when it is made as soon after the hearing as possible. This enables the factfinder to recall the circumstances of the hearing concisely and the parties to maintain any momentum towards settlement which may have started at, or as the result of, the hearing.

The report must meet with a reasonable amount of acceptability to both sides or it will not settle the dispute. Since, unlike arbitration, factfinding is a recommendatory process only, its acceptability to the parties and its effect on public opinion are its two main purposes.

PRESSURE TACTIC → When and if the factfinding report is made public, this may serve to crystallize public opinion. A reaction by the electorate cannot help but have an impact on the negotiators.

In the event the factfinders cannot agree, in total, as to the contents of the factfinding report, a minority report may be filed. *However, minority reports are generally to be discouraged because the factfinders have only the authority to recommend a reasonable settlement.* The existence of a minority report serves to indicate that three outside parties, none of whom are personally or emotionally involved with the fact situation, could not agree on a reasonable recommendation. This may tend to increase the intransigence of one or both sides to the dispute as to a particular issue. *Factfinders, therefore, should charge themselves with the objective of settlement, not polarization!*

How factfinding produces settlements. As mentioned earlier, factfinding can result in an acceptable formula for settling a dispute. It also serves as a catalyst for forming public opinion with resulting pressure to settle. Moreover, the process can serve to provide the parties with an effective scapegoat. Because it takes the recommendations of an unbiased neutral, not associated with the community involved, and presents them in a logical form, either side can back off from its original position and say that it was forced into accepting the recommendations of the factfinder. In other words, the factfinder can be the "bad guy" responsible for a settlement that is not entirely satisfactory to one side of the dispute, but which can be accepted in lieu of adverse public opinion or further time and expense involved in seeking settlement.

DEFINITION OF MEDIATION OR CONCILIATION FROM:

"Principles of Labor Legislation"
by

John R. Commons and John B. Andrews
Published 1916

By mediation or conciliation is usually meant the bringing together of employers and employees for a peaceable settlement of their differences by discussion and negotiation. The mediator may be either a private or an official individual or board, and may make inquiries without compulsory powers, trying to induce the two parties by mutual concessions to effect a settlement.

The successful mediator never takes sides and never commits himself as to the merits of a dispute. He acts purely as a go-between, seeking to ascertain, in confidence, the most that one party will give and the least that the other will take without entering on either a lockout or a strike. If he succeeds in this, he is really discovering the bargaining power of both sides and bringing them to the point where they would be if they made an agreement without him.

Where the difficulty is due to the parties' not having thoroughly discussed the situation together, the mediator is often able to bring them into joint conference, and, in practice, most of the settlements have been arranged through compromise. In other cases the parties are unwilling to admit to each other the utmost concession they will make, fearing to weaken their position. In such cases a mediator whom both sides can trust can render invaluable service as an intermediary. Occasionally parties refuse to treat each other, but will consent to make each separate settlement with the mediator.

Finally, mediators, through their familiarity with methods for dealing with analogous difficulties in differentttrades, are sometimes able to suggest a solution. In all cases the mediator is merely a confidential adviser. Even when he is a state authority he does not exercise any of the compulsory powers of the state, and if he even endeavors, by public investigations and recommendations, to bring public opinion to bear upon the disputants, he disqualifies himself for further mediation.

TAB C

UNDERSTANDING FACT FINDING AND ARBITRATION IN THE PUBLIC SECTOR

The following material was developed by Arbitrator Arnold Zack for a report submitted to the Division of Public Employee Labor Relations of the U.S. Department of Labor.[1]

As collective bargaining in the public sector becomes more widespread, there is a corresponding likelihood of impasses arising between employers and organizations of employees over terms and conditions of employment. Representatives of the employer and of the employee organization, as well as those called upon to serve as fact finders or arbitrators who are new to the field will be required to work with unfamiliar language, concepts and procedures.

Much has been written of the history of collective bargaining and of the problems of negotiations. The newcomer to the field would help himself considerably by reading some of the published volumes which are available on the subject. They provide a valuable background to the more specialized problems of public sector impasse resolution and to this text, which is intended to provide guidance to the participants as well as the inexperienced in fact finding and interest arbitration.

It should be emphasized that our primary concern in this text is with disputes over new contract terms. Disputes which arise between the parties after contract terms are agreed upon, involving interpretation and/or application of such contracts, are processed through a different channel called grievance arbitration. That form of arbitration is the subject of a companion volume entitled, "Understanding Grievance Arbitration in the Public Sector."

A. DEFINITIONS

At the outset it is desirable to distinguish several terms used frequently in the collective bargaining process and which appear throughout this volume. Let us consider them in the order in which they are likely to arise.

Negotiation refers to the practice of adversary parties meeting together for the purpose of reaching agreement on the items which are in dispute between them. This format of face-to-face discussion is usually carried on between the parties without any third party presence. It is usually the first step in collective bargaining, but will probably recur at such other times in the impasse procedure as the parties feel will be helpful to settle all or a portion of their differences.

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[1] Understanding Fact Finding and Arbitration in the Public Sector U.S. Government Printing Office, Washington D.C. 20402, Price $1.00. Stock Number 029-00-00227.

Mediation arises when a third party, called the mediator, comes in to help the adversaries with their negotiations. He may either be designated by the government or selected by the parties themselves. In seeking to narrow the differences between the parties the mediator may meet with them jointly and/or separately. He continues to function only as long as the parties both agree to his presence. He will remove himself from a case when (1) agreement is reached, (2) one of the parties requests his departure, (3) the agreed upon time comes for appeal to the next step in the procedure, or (4) he feels his acceptability or effectiveness is exhausted. He operates without any authority to compel an agreement, depending instead upon his ability to persuade the parties to come together and upon their own overriding need to do so. For a more detailed analysis of the mediation process, one is referred to Mediation and the Dynamics of Collective Bargaining by William Simkin.

Fact finding has come into use as an impasse resolution procedure in the public sector from the high "public interest" segments of the private sector (transportation, public utilities, etc.) where it originated. In this procedure a neutral or neutrals, known as a fact finder (or a fact finding panel) conducts a hearing at which the opposing parties define the issues in dispute and propose their prospective resolutions therefor with supporting evidence and argument. Following the hearing, the fact finder(s) issues recommendations for a solution, usually in writing. Hopefully these recommendations will be accepted by the parties and will bring the dispute to an end. They are not binding and the parties are free to accept or reject them or to use them as a basis for further negotiation. It should be obvious from this description of the process that the term fact finding is a misnomer. Although the finding of facts is an essential element of the task, its greatest impact comes from the recommendations made by the fact finder. The contradictory term advisory arbitration is sometimes used to describe what is in reality fact finding, arbitration be definition being final and binding, not advisory. *

Arbitration as a process is similar in form to fact finding but differs with respect to the binding nature of the decision. Unlike fact finding which results in recommendations, the end product of arbitration is a final and binding decision which sets the terms of the settlement and with which the parties are legally required to comply. This is interest arbitration as distinguished from grievance or rights arbitration implies, it is concerned with the interests of the respective parties in achieving mutually acceptable terms and conditions of employment. Together with fact finding, it is the subject of this volume.

*Note: Although commonly used in this sense, factfinding does not always end in recommendation. Under the Taft-Hartley Act emergency impasse procedures, recommendations are statutorily precluded. Also, in California the now defunct Winton Act provided for factfinding without recommendations. When recommendations are made, we agree with Zack that the process is identical to "advisory arbitration." It is important, however, to keep in mind the critical differences between simple factfinding and factfinding with recommendations.

Arbitration may be compulsory or voluntary. It is compulsory when mandated by law, regulation and/or Executive Order and is binding upon the parties even if one of them is unwilling to comply. On the other hand it is voluntary when the parties undertake of their own volition to use the procedure. Voluntarism could be the result of a statute which permits, rather than requires, the parties to submit disputed issues to binding arbitration on their own initiative. It could also arise from the parties' own initiative with respect to future contract impasses pursuant to a permanent negotiation procedure.

A recent innovation in arbitration is final offer selection whereby the arbitrator is restricted in his decision to selecting the last offer of one of the parties. The procedure may be varied by permitting a single revision of the parties' last offer, by permitting the arbitrator to make his selection on an issue-by-issue basis rather than package basis, or by providing fact finding as a preliminary step before the arbitration. In theory the risk of the other party's offer being selected will encourage fruitful negotiation and mediation with each final offer designed to appeal to the arbitrator as more reasonable than the other.

In some situations, fact finding and arbitration may be combined into one proceeding. This may be done through the device referred to as med-arb, where the parties authorize the neutral to mediate and, if not totally successful, to arbitrate the remaining unresolved issues.

To another combination of roles the neutral may be given different authority over separate aspects of the parties' impasse. For example, under the Rhode Island statute dealing with teacher disputes, the arbitrator's award is final and binding on non-economic matters, but is merely advisory on economic matters. Despite the fact that the Rhode Island statute refers to arbitration (in this case by a tripartite panel), the function provided for the resolution of the economic matters is really fact finding with recommendations.

The reader should be aware that the terms "fact finding" and "arbitration" are frequently misused and abused in the public sector. The author regards such aberrations as "advisory arbitration" to be a contradiction of terms. For the purpose of this text, arbitration which is not final and binding will be considered as fact finding regardless of the label a particular statute may apply to the procedure.

B. RELATIONSHIP TO THE PRIVATE SECTOR EXPERIENCE

Public sector collective bargaining in the United States has sought to emulate the private sector model of collective bargaining with minimal reference to the strike as the ultimate dispute settlement process, as used in the private sector.

Since 1935, collective bargaining has been recognized in the United States as the most appropriate method for establishing wages, hours and working conditions between employers and unions representing employees in the private sector. But until a few years ago, this legislatively mandated national labor policy was not considered to be pertinent to the internal employment relations practices of government units. That situation is changing as the federal government and an increasing

number of state and local governments begin to accept this labor policy as an appropriate means to satisfy the desires of their employees.

Many of the procedures and practices used in private sector labor relations may be readily adaptable to the public sector. Many others, as in the case of conflict resolution, require special treatment when considered for the public sector.

In the private sector, the threat of an economic confrontation - a strike or lockout - pervades the negotiations. In most cases the parties are successful in reaching agreement before the contract deadline is reached, either directly by themselves or with a mediator's assistance. In relatively few cases the parties are unsuccessful and a strike or lockout ensues. The relative power of the two parties then comes into play, often to the detriment of one or both of them, and occasionally to the detriment of the public.

Despite the traditional prevalence of the free labor market concept in private sector conflict resolution, significant experiences with fact finding and arbitration in certain types of private sector impasses over the years may be viewed as foreshadowing what has recently evolved in the public sector.

The Railway Labor Act of 1926, as amended, permits the appointment of a Presidential Emergency Board, when a serious interruption in service is threatened to study the issues and make recommendations to the parties for their settlement. Failure to reach a negotiated agreement in such disputes has on occasion led to Congress legislating a settlement by compulsory interest arbitration. Under the Taft-Hartley Act as well, the President is empowered to create a Board of Inquiry to examine disputes which may imperil the national health or safety.

Arbitration has also been used as a routine procedure for impasse resolution. During World War II the War Labor Board utilized arbitration to resolve contract disputes,and the procedure has been used as a voluntaty dispute settlement process for a number of years in local mass transit as well as in the printing industry.

When statutory machinery was first being evolved for public sector employment, it was widely accepted (or anticipated) that fact finding and/or interest arbitration would be effective substitutes for the private sector right to strike or lockout as an impasse resolution procedure.

History and tradition in the public sector have virtually dictated the development of rational dispute resolution procedures. One factor of this has been the concept of sovereignty of the public authority. Another has been the established sanctity of preserving without interruption the public health, safety and welfare. It is reasoned

that the sovereignty of the state and the needs of the public cannot be threatened by the interruption of essential services. It is also a fact that the absence of the private sector profit motive lessens the value of reliance on economic confrontation. Finally, there is a limit to the extent to which the increased costs of settlement can be passed on to the consumer/taxpayer, even though it can be argued that the public employer holds a monopoly over the provision of most services and is in a better position to pass on such costs than are most employers in the competitive market of the private sector. Such passing on of costs is rapidly losing any validity it might have as demands for increased services are matched by increasing public resistance to rising taxes.

Accordingly, the federal and state governments have begun to adopt substitute settlement procedures for the strike and threat of the strike to achieve the goal of agreement on new contract terms without comparable dislocation of community services. In some cases where state legislative machinery cannot handle impasse resolution, the parties themselves have developed such procedures. The devices utilized to achieve this goal are quite vared and are, in fact, undergoing continual change as experience in impasse resolution expands. But, for the most part, the include mediation, fact finding and arbitration in a growing number of situations.

C. PUBLIC SECTOR SUBSTITUTE FOR THE STRIKE

In an effort to assure that public sector employees are provided with reasonable and acceptable wages, hours and working conditions, without need to resort to the strike, public sector collective bargaining legislation usually provides that the outstanding differences between the parties over terms and conditions of employment should be subjected to review and determination by an experienced, objective and neutral party(or parties). But, the expectation that such determination would be accepted by employees as a viable substutute for the strike has not always been borne out by experience. Employees and their organizations have resorted to outright strikes, wildcats, slowdowns, working by the rule, "blue flu" or "red menace", and a variety of other pressures, in an effort to exert a force comparable to the economic confrontation proven to be effective in the private sector.

However, fact finding and arbitration have generally proved to be adequate devices for the resolution of impasses. More often than not, these procedures have convinced over-reaching employees that their demands are excessive and/or convinced the parsimonious or recalcitrant employer that its proposals are inadequate as a proper reward to its employees for the work they are expected to perform.

The continued experimentation by legislatures and by the parties themselves with methods directed toward the improvement of the fact finding and arbitration procedures will hopefully further enhance conformity to the recommendations and findings by the parties and lead to a greater incidence of successful dispute resolution through such peaceful devices.

The initial experimentation with legislated impasse resolution procedures in the public sector can be traced to the 1959 Wisconsin public sector law. Three years later, Executive Order 10988 was issued by President Kennedy. Although it prohibited the use of arbitration, it did grant to federal employees the National Labor Relations Act right to join or not to join unions without fear of reprisal and did provide recognition of employee organizations for the purpose of collective bargaining on limited subjects.

In 1969, President Nixon expanded the coverage of the earlier Executive Order by EO11491. Among other things it removed control over labor relations administration from the individual agencies and transferred it to the Federal Labor Relations Council; it provided for binding arbitration of grievances; and it established impasse resolution procedures which emphasized fact finding with recommendations by the Federal Services Impasse Panel, an agency within the Council. Executive Order 11491 makes no specific reference to the Panel's authority to use "binding arbitration" in the resolution of negotiation impasses. Rather, it uses the expression "appropriate action" which many believe may encompass binding arbitration.

In the past five years, formal impasse procedures have multiplied throughout the country, some covering limited groups of employees and others covering some or all state and local government employees. There are a number of states which currently have legislation calling for binding arbitration of impasses involving at least some groups of employees, such as police or fire fighters. Some local governments have independently developed their own machinery for employee dispute settlement. The prospect is that such procedures will soon be available to the parties in virtually all areas of federal, state and local government services.

The steps of direct negotiation and mediation, if necessary, which usually precede fact finding and/or arbitration, are the forums where conscientious parties attempt to resolve their differences directly. These procedures are utilized in the public sector in much the same manner as in the private sector.

In this volume we are concerned only with the two final steps for resolving public sector disputes over new contract terms: fact finding and arbitration. We hope to show how the procedures work and to assist the interested parties and the neutrals themselves in making the system work to maximum advantage.

D. SIMILARITIES AND DIFFERENCES BETWEEN FACT FINDING AND ARBITRATION

To better understand why these two subjects are being treated in a single volume, it may help to point out that fact finding and arbitration have far more similarities than differences.

Both procedures are quasi-judicial in nature. Both depend upon both parties directing proposals over which they differ to a neutral with the expectation of obtaining favorable findings and an end to their conflict. The parties have the same or similar obligations of case preparation and proof; are bound by the same or similar concepts of conduct and evidence; and the hearings generally follow the same format in both forums.

The role of the neutral is virtually the same. He may confine his role to that of a receiver of evidence, or he may undertake to mediate if circumstances and the parties permit. In both proceedings the parties may submit briefs in support of their positions and will usually receive a document from the neutral setting forth his rationale for the findings he has reached.

The primary difference between the two procedures is in the extent to which each is fitted to serve as a terminal point in the dispute final and binding by definition and as such is a clear and effective termination to the impasse, assuming no illegal refusal to comply. Fact finding, on the other hand may be an effective terminal point only if the parties both agree to conform to the fact finder's report and recommendations, or if they are mutually able to evolve a settlement at variance with, but based upon those recommendations. This difference between the two forums may therefore also give rise to another difference, i.e., the greater pressure placed on the fact finder as distinguished from the arbitrator, to predict acceptability of an advisory recommendation.

E. ADVANTAGES OF FACT FINDING AND ARBITRATION

There are several reasons for the increased use of fact finding and interest arbitration as the last step in the impasse procedure in the public sector.

FIRST, whether fact finding or arbitration is employed, it provides a measure of finality to a negotiating process which generally runs even longer than its private sector counterpart. In private sector negotiations the contract expiration date, which often falls at a crucial time of the business year, sets a realistic negotiations deadline because of the traditional "no contract - no work" expectation. But in the public sector the contract expiration date is usually unrelated to any crisis deadline and is made even less meaningful by the omnipresence of the legal prohibitation against the strike. Thus there is a tendency for negotiations in the public sector to drag on and on, without an identifiable finality. The availability of a fact finding or arbitration step thus sets a deadline to what might otherwise be interminable negotiations. Both processes introduce a meaningful terminal point to the negotiation process. This increases the likelihood that the negotiatiors and their teams will be freed of their responsibilities in this area and able to return to their normal duties, while at the same time providing the parties with a completed agreement.

SECOND, fact finding and arbitration tend to dispose of those issues on which the parties are genuinely unable to reach direct agreement. Whether the issue be economic or non-economic, there comes a point in direct negotiations where either or both of the parties cannot move further. Items which at the outset of negotiations are top priority tend to be emphasized out of proportion and there is likli-hood that some items are subject to contention even though the parties may recognize the hostility of the other side to their achievement. Under such circumstances a fresh view of the disputed items by an experienced outsider making an objective determination as to the relative worth of such items is often welcomed by the adversaries. Presumably the neutral designated by the appointing agency or chosen by the parties themselves will have had sufficient exposure to comparable situations in other communities to promulgate findings which may overcome the parties' resistance to settlement. Even if the determination is one which one of the parties still finds to be objectionable, it is possible for the two negotiators to work out a tolerable arrangement following the issuance of the report. This is expected in fact finding where the report is merely advisory and constitutes the basis for further direct negotiations between the parties. But it can also be expected to occur even following arbitration since the parties may still meet after the issuance of the award to work out varying contract language.

In either case the specific determinations in the fact finder's report or arbitrator's award provide the advocates with guidelines for a mutually acceptable arrangement for the life of their new agreement.

THIRD, fact finding and arbitration can frequently get the "monkey off the back" of one or both parties. Government agencies as well as employee organizations are political entities with diverse centers of power having overriding interest in certain proposals during negotiations. Sometimes these proposals are enthusiastically embrased as essential by the team as a whole, and pushed with genuine fervor until attained. At other times such proposals reflect a narrow perspective of a particular internal pressure group and it may not always be feasible or politically realistic for a spokesman on the team to initiate the removal from the table of such favored proposals. Other superfluous items often remain on the table because, although intended as a tradeoff or give-away in direct negotiations, they were never picked up or taken advantage of by the other party.

The fact finder or arbitrator can save the parties considerable embarassment by taking them off the hook through denial of such low priority demands. Often in the process he can dispose of a sizeable number of issues which have cluttered negotiations and detracted from serious discussion of the core issues.

FOURTH, the prospect of having reached the end of the procedural line at fact finding or arbitration may produce a unique opportunity for the neutral to seek an informal and mutually acceptable resolution to the

parties' overall duspute through mediation. This is a very real potential even though the mediation step in its proper sequence had been utilized without success. Frequently in the formal mediation step, with the prospect of appeal to fact finding or arbitration confronting them, the parties may be loathe to mediate seriously since any compromise would tend to erode their position and narrow the neutral's range of choice in the subsequent fact finding or arbitration step.

As a result the parties may logically fear that the neutral will miss the significance and validity of their arguments and err in favor of the other side. The prospect of this occurring, particularly when in the throes of binding arbitration, may be enough to induce such an effort at mediation. Although the availability of such belated mediation may deter its use at the appropriate step in the process, arbitrators generally recognize that a settlement reached voluntarily is preferable to one which is imposed and may thus offer to mediate if earlier efforts to do so proved ineffective. Using that device, even at that late date, raises the likelihood of salvaging at least some of the parties' original goals on a particular issue. It may indeed even lead to an acceptable total package. Such effort to achieve voluntary settlement is perhaps even more vital in fact finding where the final report is only advisory and where the ultimate goal of acceptability makes it mandatory to at least "psyche out" the parties' range of expectations. A further reason for taking advantage of the mediatory opportunity at this stage is the absence of any further machinery and thus the absence of reason to hold back on compromise for a better deal later.

Such explorations of the mediation route should be undertaken only if the neutral feels competent at mediation, only if he is convinced that both parties are interested in exploring that approach, and only if both parties consent to his so doing.

If there is a tripartite panel, such mediation becomes almost automatic among the panel members. It is essential for the neutral member of the panel to secure accord of at least one of the parties to secure a majority decision. This pressure often opens a dispute to exploration of settlement when it might otherwise not appear feasible.

FINALLY, there is the advantage of attracting public attention to the parties' dispute and to the neutral's proposal for resolving it. Most statutes calling for fact finding or arbitration make some provision for the final document to be made public. Sometimes such publication is mandatory at the time of distribution to the parties or within a few days thereafter. Sometimes such publication is discretionary with the neutral or the designating agency. Preferably, in the case of fact finding there will be some time available for the parties to consider the report and recommendations prior to its publication so that they will be able to use its findings as a basis for reaching an agreement, perhaps more to their liking than the fact finder's report. In such cases the report should not be released to the public.

Public release of such reports is usually based upon the theory that the citizens and/or taxpayers should be kept informed of the progress of the dispute, the neutral's analysis of the parties' positions on

various issues, and his determination as to how the dispute should be resolved. It may also be intended as a method of bringing public attention and pressure on the recalcitrant party or parties, to thus move them to accept the recommendations of the fact finder or to resolve the impasse through some other mutually acceptable determination.

The same arguments could be advanced for delayed issuance of arbitration awards so as to enable the parties to negotiate more palatable trade-offs than might be found in the award.

Although it is true that the local media often do cover the issuance of a fact finding report or arbitration award, the routinization of the impasse procedure has diminished the newsworthy aspects of the neutral's report. As a result, only those reports which follow a widely publicized dispute are likely to be reported. Even then the coverage rarely includes publication of the report or award or even the reasoning behind the determination, since most are too lengthy or complex to command press space.

F. DISADVANTAGES OF FACT FINDING AND ARBITRATION

Despite the benefits of fact finding and arbitration as means of resolving disputes, they do have their limitations.

FIRST, although fact finding and arbitration have been widely acclaimed as providing the final solutions to collective bargaining disputes, neither really guarantees the re-establishment of labor management relations harmony. Since the fact finder's report is advisory it may be totally rejected by either or both parties. If this occurs the parties may well be back where they started or perhaps even worse off. If the fact finder's report is only partially rejected, an additional effort at settlement is dictated by the need for the parties to meet and negotiate some adjustment or compromise which will bring them to settlement. In this subsequent negotiation there is always a chance of stalemate recurring. In a few states the designating agencies may make arrangements for offering additional mediation services. However, the use of such steps beyond fact finding is discouraged because it tends to invite by-passing of mediation at its proper place in the system.

There is some question as to whether even arbitration achieves the finality for which it is acclaimed. It is always possible for one of the parties to continue to press the other to adjust the arbitrator's award more to its liking. Even if there is no such re-structuring by the parties themselves, the award is implemented as written, and there is still the prospect that it will not be accepted. Even though the award is presumably final and binding, there is a body of experience which suggests that dissatisfaction by either party may preclude a complete compliance with its terms.

The Montreal Police strike of a few years ago occurred in defiance of a final and binding arbitration award. Although we have not yet had out-and-out strikes in the U.S. under such circumstances, there have been occasional protests through slowdown, sick call and the like, demonstrating rank-and-file objections to an award. As arbitration of impasse disputes expands, so too will the likelihood of objections to imposed awards.

SECOND, the issuance of a fact finding report recommending specific dispositions of disputed issues undoubtedly deadlocks the parties by creating a vested interest for the successful proponents of those issues. This problem is of course much less likely to exist in arbitration although it might occur if one of the parties sought the agreement of the other to modify the award.

In both arbitration and fact finding, the neutral's determination may thus become a strait jacket. This may be a more serious problem where findings are off-base, unrealistic, or impractical of attainment. It virtually precludes any flexibility for subsequent negotiations toward a more workable agreement. Thus when the document makes a finding which favors one part of the constituency, the interests represented thereby become virtually immutable and it is difficult at best, to then negotiate these "victories" away.

FINALLY, neither fact finding nor arbitration can guarantee a final document which can be hailed as the true substitute for the strike, i.e., that result which would have been reached if the parties had been in a position to negotiate their agreement to finality without the intervention of the fact finding or arbitration. Fact finders, with their inability to bind the parties to their recommendations, must place extensive (if not excessive) emphasis on acceptability as distinguished from equity. Arbitrators, on the other hand, working in a more legalistic and antiseptic atmosphere, are usually deprived of any insight into the true priorities of the parties. It is difficult for them to ascertain acceptability and hence, equity tends to be emphasized. This would be true even if the parties themselves might have preferred to have settled on a more acceptable, though less equitable package. Finality may be stimulated or achieved, but the "best" package for both parties may not be the end result.

APPENDIX TO TAB C

1. Impasse Procedures in California Public Sector Employment Legislation

2. The Educational Employment Relations Act (The Rodda Act)

IMPASSE PROCEDURES IN CALIFORNIA PUBLIC SECTOR EMPLOYMENT LEGISLATION

LOCAL GOVERNMENT EMPLOYEES

Meyers-Milias-Brown Act (1968), as amended in 1968, 1969, 1970, 1971, and 1972. Effective January 1, 1969. California *Government Code Sections 3500-3510.* The MMB Act is the amended (1968) version of the former George Brown Act (1961).

3505. The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. (Amended 1968.)

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent. (Amended 1971.)

3505.1. If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination. (Added 1968.)

3505.2. If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations. (Added 1968.)

3507. A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500). (Amended 1968.)

Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502 (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin boards and other means of communication by employee organizations (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter. (Amended 1971.)

*Los Angeles County and a number of other local public agencies have utilized this section to adopt factfinding as an impasse resolution procedure. See also "The San Bernadino Experiment" in Tab E of this manual.

Article 9. Impasse Procedures

3548. Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. If the board determines that an impasse exists, it shall, in no event later than five working days after the receipt of a request, appoint a mediator in accordance with such rules as it shall prescribe. The mediator shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties. Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. If the parties agree upon their own mediation procedure, the cost of the services of any appointed mediator, unless appointed by the board, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

3548.1. If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The board shall, within five days after such selection, select a chairman of the factfinding panel. The chairman designated by the board shall not, without the consent of both parties, be the same person who served as mediator pursuant to Section 3548.

3548.2. The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take such other steps as it may deem appropriate. For the purpose of such hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. The several departments, commissions, divisions, authorities, boards, bureaus, agencies, and officers of the state, or any political subdivision or agency thereof, including any board of education, shall furnish the panel, upon its request, with all records, papers and information in their possession relating to any matter under investigation by or in issue before the panel.

In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the public school employee-employer.

(4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.

(5) The consumer price index for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Such other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making such findings and recommendations.

3548.3. If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt. The costs for the services of the panel chairman, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board. Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

3548.4. Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3.

TAB D

ARBITRATION OF INTEREST DISPUTES: ARE THERE EXISTING STANDARDS?

Many practitioners view arbitration of interest disputes with misgivings because they believe definite criteria or standards to govern the arbitrator do not exist. Since the establishment of the National War Labor Board and in the period immediately following World War II, however, a number of standards have evolved through common practice in the private sector which guide arbitrators in their decision-making. Such standards may be specified by the parties in their request for arbitration, or arbitrators may make awards based on the commonly accepted standards which he/she applies to the facts and circumstances of a given case.

Interest Dispute Resolution Techniques in California's Public Sector

In California, binding interest arbitration has been used in transit districts covered by the Public Utility Codes and in three cities that have adopted charter provisions for arbitration of interest disputes involving public safety personnel.[1/] Forms of advisory arbitration and fact-finding are permissible under the Meyers-Milias-Brown Act and have been established in a number of public jurisdictions (City and County of Los Angeles, San Bernardino County). Where such provisions have not been

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[1] Vallejo, Oakland, and Hayward have adopted such charter amendments. General law cities governed by the Meyers-Milias-Brown Act are barred from adopting binding arbitration procedures under the recent ruling of the California Supreme Court in Bagley v. City of Manhattan Beach (see Appendix to this Tab).

adopted, the MMBA specifies only that if an impasse is reached, a public agency and the recognized employee organization may agree on the appointment of a mediator with the cost to be divided between the parties (Section 3505.2). Mediation under Meyers-Milias-Brown is defined as an effort by an impartial third party to assist in reconciling a dispute regarding wages, hours, and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or organizations through interpretation, suggestion and advice (Sec. 3501 [e]).

Rodda Act Standards

There is also growing interest in standards governing interest disputes under the Educational Employment Relations (Rodda) Act, which permits mediation and fact-finding procedures to resolve such matters.[2/] While disputes over scope of bargaining are to be resolved through appeal procedures of the Educational Employment Relations Board, Section 3548 of the EERA lists formal

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[2]Under the EERA (Rodda Act), there is a question of whether the parties, under the statutory authority to enter into a contract, may agree by contract to arbitrate interest matters. Leading management and labor attorneys are divided in their opinions on the question.

criteria to guide fact-finding panels in their recommendations on bargainable issues when the bargainable nature of the issue is not in dispute.[3/] These criteria are:

(1) State and federal laws that are applicable to the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the public school employee-employer.

(4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.

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[3]Scope of Bargaining is defined in Section 3543.2: The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

(5) The consumer price index for goods and services, commonly known as the cost-of-living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Such other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making such findings and recommendations.

In addition to listed standards in the Rodda Act on the resolution of public-sector interest disputes, there is considerable precedent from the private-sector and public-sector employment laws in other states.[4/] Such precedents serve as a guide to criteria for arbitrator/fact-finder's decision-making in California.

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[4]Iowa's Public Employment Relations Law, for example, calls for reference to past contracts, comparable work, interest and welfare of the public, power of the public employer to levy taxes, and other relevant factors.

Customary Criteria

In the following discussion, customary criteria are described that are used in practice by negotiators, arbitrators, and others in deciding interest matters and, more specifically, wage issues which constitute a high percentage of interest disputes. No attempt is made here to analyze or criticize existing criteria in terms of "logic or realism,"[5/] but wherever possible examples are given which apply these standards to the public sector.

Nine commonly accepted standards are discussed below:

(1) prevailing practice

(2) ability to pay

(3) cost of living

(4) living wage

(5) wage patterns

(6) take-home pay

(7) productivity

(8) past practice and bargaining history

(9) public interest

Any one of these standards is rarely used alone in the resolution of interest matters; final determinations are usually based upon some combination of these criteria.[6/]

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[5]Paul Bullock, Standards of Wage Determination, Institute of Industrial Relations, University of California, Los Angeles, 1960, p.2.

[6]The following discussion is based in part on Frank Elkouri and Edna Asper Elkouri, How Arbitration Works, Bureau of National Affairs, Washington, D.C., 1960, Chapter VII pp. 745-796.

(1) Prevailing Practice

Prevailing practice rests on the commonly accepted idea that there should be no basic inequalities in remuneration among comparable individuals or groups in the performance of their tasks. By definition, prevailing practice or prevailing wage is based on the concept of comparisons. As Professor Irving Bernstein notes in his authoritative work on wage arbitration.[7/]

> Comparisons. . .are preeminent in wage determination because all parties at interest derive benefit from them. To the worker they permit a decision on the adequacy of his income. He feels no discrimination if he stays abreast of other workers in his industry, his locality, his neighborhood. They are vital to the union because they provide guidance to its officials upon what must be insisted upon and a yardstick for measuring their bargaining skill. In the presence of internal factionalism or rival unionism, the power of comparisons is enhanced. The employer is drawn to them because they assure him that competitors will not gain a wage-cost advantage and that he will be able to recruit in the local labor market. Small firms (and unions) profit administratively by accepting a ready-made solution; they avoid the expenditure of time and money needed for working one out themselves. Arbitrators benefit no less from comparisons. They have the appeal of precedent and. . .awards based thereon are apt to satisfy the normal expectations of the parties and to appear just to the public.

Application of the prevailing practice standard presents several difficulties: (1) What is the basis of comparison--intrajurisdictional (among comparable groups of workers in a particular

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[7]Irving Bernstein, Arbitration of Wages, Publications of the Institute of Industrial Relations (Berkeley: University of California Press, 1954) p. 54.

jurisdiction); interjurisdictional (between groups of workers (e.g. clerical) in similar agencies,) or between groups of workers performing similar tasks for public or private employers in the same geographical area.

Moreover, if a prevailing practice standard is used, a judgment about its application in a particular agency must be made. For example, if wage comparisons are made on the basis of job titles, are the minimum qualifications for the positions and their duties similar?

If the parties are not in agreement as to the basis of comparison or if it is not specified in enabling legislation, the parties should then be aware that they are leaving the basis of comparison entirely to the judgment of the arbitrator.

In the public sector, several possible bases of comparison may be combined. For example, some public sector arbitration statutes specify that comparisons should be made among similar occupational groups in comparable cities within a specified geographic area.[8/] When each of many possible comparisons is valid, arbitrators may give considerable weight to comparisons the parties themselves have utilized in past collective bargaining negotiations.

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[8]The San Bernardino County ordinance governing its advisory arbitration procedures states that wages shall be based on a survey of the local labor market within San Bernardino and Riverside counties for certain specific positions. For other specified positions, the survey is based on salaries paid by five named counties and the State of California.

In sum, a checklist of the numerous interest issues which have been resolved on the basis of prevailing practice suggests that this standard has been broadly applied by arbitrators in the public and private sectors.

In addition to wage rates, some of the many issues that have been resolved with the aid of the prevailing practice standard are: holidays, vacations, sick leave, hospitalization benefits, pensions and retirement, meal periods, rest periods, union security provisions, length of workday or workweek, shift differentials, work schedules and shifts, overtime provisions, premium pay for Sundays and holidays, and length of contract term.

Factors Modifying Prevailing Practice in Wage Determination

Factors justifying wage differentials and other minor standards may be the very reasons why wage terms of a particular employer differ from prevailing practice. For example, an arbitrator may be asked to institute a new differential or recognize an old one. Outlined below are additional factors which may justify a departure from prevailing practice:

- Skill and Training - a job may require less experience and training compared with the average job in an agency.
- Responsibility - greater responsibility or accountability may be placed on a particular group of employees.

. Fluctuating Employment - wage rates for seasonal employees are frequently set above those employees with more predictable job tenure.

. Hazards and Undesirable Conditions - this factor may be considered in determining salaries of police, firemen, or other public safety personnel.

. Geographic Differentials - cost-of-living allowances may be granted for urban workers, although there is some question among economists as to whether traditional assumptions about a lower cost of living in rural areas are valid.

. Fringe Benefits - terms of employment may include pecuniary benefits other than salary, i.e., pensions, holidays, vacations with pay, sick leave, shift premiums, social or health insurance, bonuses.

. Wage Leadership - an employer's position as wage leader may be the basis for a wage award higher than prevailing rates.

. Historical Differentials - initial differentials established by collective bargaining are often left undisturbed in the interest of stability.

How should arbitrators deal with demands for contract terms in the absence of sufficient precedent, i.e., when no prevailing practice is available? In response to this point Elkouri and Elkouri suggest:

> It might be urged that demands for improved contract terms should not be rejected on the sole ground that they are unprecedented, since the adoption of a

> contrary principle would seriously impair the usefulness of arbitration as a method of settling labor disputes. It is clear, however, that arbitrators will require a party seeking a novel change to justify it by strong evidence establishing its reasonableness and soundness.

(2) Ability to Pay

In the private sector, inability to pay has been given significant weight in relatively few instances. Usually the standard if relied upon to justify a postponement of wage adjustments dictated by the labor market, but not to deny adjustments permanently. Private-sector operating decisions, moreover, are economic in nature, that is, rooted in the profit motive. The same decisions in a public enterprise are political, that is, economic factors are dominated by political considerations.[9/]

Special considerations are involved in applying the ability-to-pay standard in public sector interest disputes. Often the public sector employer has no sources of revenue other than taxing power, which is constrained by the need for public support as well as conflicting claims on the tax dollar. And the power to tax may even be limited by state, federal, city or county charter restrictions. For example, California state law limits the amount by which school districts may increase their reserves without an offsetting loss of state aid.

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9 Howard S. Block, "Criteria in Public Sector Interest Disputes," in Arbitrators and the Public Interest, Proceedings of the Twenty-fourth Annual Meeting, National Academy of Arbitrators (Washington, D.C.: Bureau of National Affairs, 1971) p. 170.

On the other hand, inability to pay may be the result of an unwillingness to raise local taxes or reassess property to make funds available. Thus claiming inability to pay may simply enable public management to maintain a bargaining position by refusing to revise allocations or redistribute funds.

There is growing evidence that neutrals and authorities in the field have become aware of problems involving the ability-to-pay standard. Charles M. Rehmus discusses some of them:

> In part, our failure at times to deal squarely with ability to pay arguments results from the almost frivolous way the argument was raised by many employers in the early days of public employee bargaining. All too often the employer simply put forward an already completed, fixed budget as an impossible barrier to raising salaries above the amount already allocated for this purpose by the fiscal authorities. Neutrals uniformly rejected this ploy. Obviously both collective bargaining and neutral fact-finding would be a mere ritual, quickly rejected by the employees, if we were to permit management's self-imposed budget to be a privileged sanctuary, reviewable only as to its internal consistency. We refused to accept such arguments because to do otherwise would be to abandon all pretense of carrying out our function. This early experience I fear led too many of us to conclude that inability to pay arguments are invariably a facade to cover unwillingness to pay.
>
> Today, however, ability, or more properly inability, to pay is often a real problem where public service bargaining has been firmly established. The contemporary economic dilemma of many public employers is no pretense. Collective bargaining and other factors have had the effect of stripping them not only of their reserves but also of most of their discretionary funds. Faced with escalating costs, a continually

> inflating economy, and often a legislative or constitutionally fixed tax base, the revenue-raising problems of our school systems and municipalities are often very real. In short, many of these employers, when faced with a recommendation to raise the salaries and fringe benefits of one group of public employees have no real alternative but to reduce public services or perhaps even lay off other employees. My own experience as a neutral in interest disputes has not suggested any single basic criterion I can offer with assurance to cope with problems of inability to pay. I am increasingly inclined to believe, however, that when we reject inability to pay as a valid defense we as factfinders must assume some responsibility for suggesting where the funds to implement our recommendations should be obtained.10/

Although claims of inability to pay in a public jurisdiction must be considered, they may not be controlling. In cases in which the public agency has reached its taxing limit, however, a claim of inability to pay may be substantiated.

In short, in cases in which the public agency has reached its taxing limit, a claim of inability to pay may be substantiated, and the parties should be prepared to expect suggestions from the neutral on shifting priorities, etc., if they themselves do not offer alternatives.

Other factors may be considered in deciding public sector interest disputes; for example, will additional funds become available during the contract period (e.g., CETA (Comprehensive Employment Training Act) funds, undistributed surplusses from the legislature, etc.), and, have the parties determined what distribution should be made of these funds or should they be covered by a re-opener clause. A clause referring to unanticipated funds may be helpful to both management and labor.

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10 Charles M. Rehmus, Fact-finding and the Public Interest, a paper prepared for the Inaugural Convention of the Society for Professionals in Dispute Resolution (SPIDR) at Reston, Virginia, October 17-19,1973. Reproduced as an occasional paper, Institute of Public Employment, New York State School of Industrial and Labor Relations, Cornell University, Ithaca, N.Y., pp. 12-13.

(3) Cost of Living

A cost-of-living standard is frequently used in collective bargaining and in arbitration during periods of inflationary pressures leading to upward changes in living costs. The standard has been criticized on two grounds: (1) increased wages may aggravate the problem of a spiraling demand which exceeds supply; (2) labor argues that rigid application of a cost-of-living standard would result in a stationary real wage rather than an increased standard of living.

The latest Bureau of Labor Statistics, (U.S. Department of Labor) Consumer Price Index figure determined for a family of four at the time of arbitration is generally used in setting a cost-of-living adjustment to be paid employees until the next wage review.

The cost-of-living factor, a criterion specifically mandated by the Rodda Act of 1975, has received increasing attention in the California public sector since 1974, when the rate of inflation reached 14 percent. The income of state and local government agencies in California has not kept pace with this figure, and, as a result, there has been widespread resistance to cost-of-living demands by public employees.

Although in general, recent public-sector wage improvements have not been based on a cost-of-living standard, some commentators feel this criterion deserves additional attention.

One criticism of this standard voiced by labor has been that it is unfair if applied to families with incomes below that used by the BLS Consumer Price Index model. It is felt that lower income families spend a disproportionate amount of their net income for the basic necessities of food, transportation, and lodging.

Arbitrators and fact-finders have recognized the validity in collective bargaining agreements of escalator clauses to achieve changes in wage rates in response to changes in cost of living. One approach is to provide for a wage, re-opener clause in the collective agreement, permitting negotiations of new wage terms (1) when the cost of living changes by a specified percentage; (2) when a substantial change in cost of living occurs; or (3) simply at specified intervals. In contract re-opening disputes, a cost of living standard is often deemed relevant.

(4) Living Wage

There is an important difference between the concept of living wage and the cost of living standard. A cost-of-living standard, based on the Consumer Price Index or similar figure, is used to keep an employee's standard of living at status quo. A living-wage criterion is invoked to raise employee wages to a level that will allow a decent standard of living.

The concept is broad and not directly tied to changes in a cost-of-living index. Indeed, a final award based on living wage may include a wage increase greater than indicated by changes in a cost-of-living index.

A variant of living wage is the budget approach. Neutrals may be asked to consider the "City Worker's Family Budget," issued by the Bureau of Labor Statistics (Department of Labor) as a wage standard.

There are at least two major criticisms of the living wage approach which limit its usefulness as a major standard. First, the standard is indefinite since a decent living standard depends largely on time and circumstances. Second, budgetary experts do not agree on the compostiion of an "adequate" budget. In a case in which teachers asserted their salaries should be "commensurate with the standard of living in their community," an arbitration tribunal ruled that this "should be a goal rather than a controlling criterion."[11/]

(5) Wage Patterns

Wage patterns or a uniform wage policy, a criterion closely related to the prevailing practice standard, has been widely used and can be distinctly identified. A "pattern," in wage arbitration, is often stated in terms of cents per hour or as

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[11]Arlington Education Association, 54 LA 492,494 (Zack, Fitzgerald & Cohen, 1970).

a percentage wage increase. For example, agencies X,Y, and Z grant wage increases of ten percent per hour; therefore, related agency P should grant a ten percent increase. Emphasis in this example is on the percentage increase rather than the total wage paid by comparable employers.

In the private sector, a few key wage bargains or, indeed, only one (i.e., steel) may set a pattern for a large segment of American industry. The pattern may call for wage decreases or, in a depressed economy, maintenance of the status quo. The reference pattern may be national for the particular or a related industry, for general industry in an area, or for the particular industry in an area.

In early (1947) decisions, arbitrator Clark Kerr stated that neutrals in resolving interest disputes should give great weight to patterns of wage increases since these had been established and applied in free collective bargaining. A basic problem for management in the public sector, however, is to avoid a settlement with specialized groups (teachers, police, firefighters) which would promote unrealistic demands from other employees who are asked to accept a uniform wage policy at a lower figure.

The parties should be aware that additional difficulties with a uniform wage increase arise when they are not prepared to demonstrate that pay levels among groups of employees

are properly related. In the absence of an historical wage pattern, this argument is difficult to construct.

(6) Take-Home Pay

In the period immediately following World War II, when hours of work were reduced, labor demanded wage increases to maintain take-home pay. Guided by national wage-price standards in executive orders and regulations under the Wage Stabilization Act, arbitrators recognized that wage increases based on this criterion could reduce the shock of the war-peace conversion of industry in a favorable business climate, which enabled private sector employers to increase wages without seeking corresponding price increases.

While take-home pay is considered in numerous cases, it is usually not a major criterion. Potential or probably loss of take-home pay may be considered in public-sector cases, but the lack of ability to pay standard may supercede take-home pay as sufficient reason for permitting discontinuance of overtime work without a corresponding wage increase to maintain take-home pay.

(7) Productivity

Productivity standards are receiving increased attention in public agencies as public budgets are affected by inflation, shrinking federal subsidies, and public resistance to higher taxes.

In the area of wage determination, many practitioners take the position that wage increases should reflect increases in output at the same quality level with the same number of personnel, the same equipment, or the same allocated monies. Clearly, if an increase in output per man hour is due to greater effort and greater skill, a wage gain should accrue to employees.

On the other hand, there are reasons why a productivity standard may not be considered decisive: a productivity increase may be the result of technological improvement or better management; a wage increase in productivity cases might introduce inequalities in a community wage structure; a claim of low productivity may not justify denial of a pattern increase since it can be argued that an employee's efficiency and output are controlled by the employer.

Further, changes in the rate of productivity may vary from one agency to another, and any statistical measurement of productivity is highly tentative. Even if rates and measurement could be standardized, the neutral in an interest dispute faces the problem of establishing a cause and effect relationship between a productivity increase and skill and effort of employees, better management, or improved technology. Application of productivity standards in service

industries is particularly difficult and may not be appropriate (e.g. seeing fewer patients may mean better care although it may measure as lower productivity.).

(8) Past Practice and Bargaining History

Past practice of the parties to collective bargaining has often been considered a standard for "interest" arbitration. The standard is especially significant in the public sector when parties are engaged in initial negotiations. As arbitrator Clark Kerr has observed:

> The arbitrator considers past practice a primary factor. It is standard form to incorporate past conditions into collective bargaining contracts, whether these contracts are developed by negotiation or arbitration. The fact of unionization creates no basis for the withdrawal of conditions previously in effect. If they were justified before, they remain justified after the event of union affiliation. It is almost axiomatic that the existing conditions be perpetuated. Some contracts even blanket them in through a general 'catch-all' clause.[12]

Arbitrators may take several positions regarding past practice in an initial agreement. They may require a persuasive reason for eliminating a clause included in past agreements, or order formalization of past practices by requiring that they be incorporated in a written agreement. In considering

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[12] Luckenbach Steamship Co., 6 LA 98, 101 (1946).

terms of a renewal agreement, an arbitrator may view what the parties have previously agreed upon in past collective bargaining as affected by intervening economic events.

(9) Public Interest

Both management and labor invoke this standard to support a specific bargaining position. It is nearly impossible to apply the standard in the abstract, and there is some question as to how far arbitrators should go in considering public interest aspects of "interest disputes."

(The public interest standard is not specified in California's Educational Employee Relations Act, but is listed in the Iowa Public Employment Relations Act and in Michigan's Public Act 312 (1969) providing for compulsory arbitration of police and fire disputes. In the Michigan Act, the interests and welfare of the public and financial ability of the unit of government to meet those costs are grouped together under Section C, indicating a close relationship between public interest and a public agency's ability to pay.)

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The preceding discussion reviews major theoretical standards utilized by arbitrators and fact-finders. The following section in this Tab deals with the importance of organizing a presentation which addresses these standards in the arbitration or fact-finding hearings.

The readers attention is also directed to the City of Hayward Charter amendment providing for binding interest arbitration, which is included in the appendix to this section along with the first award issued pursuant to its provisions. It is of particular interest to note that while the charter is extremely limited in regard to standards guiding the arbitrator in the decision-making process, many of the standards mentioned in this section are argued by the parties and specifically cited by the arbitrator.

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PREPARING FOR INTEREST IMPASSE PROCEDURES*

The relative success or failure of the parties in interest arbitration or fact-finding depends in large part upon the effectiveness with which they present their respective positions. While there is nothing in such proceedings to preclude their being handled by lay practitioners or representatives, the parties must be prepared to present a convincing case based upon factual and relevant material.

As in grievance arbitration, the preparation for interest arbitration or factfinding should begin with a review of the issues in dispute. If a specification of the points at impasse has not been certified by a mediator, a written agreement enumerating these points should be prepared by the parties for submission to the arbitrator or factfinding panel. The "submission agreement" is designed to avoid confusion and delays at the outset of the hearing. By definition, it also serves to remove any doubt as to the issues of the case which is to be constructed.

The next important step is to determine those factors which the arbitrator or factfinding panel may be mandated to consider in reaching their decisions under the enabling legislation governing

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*Much of the material in this section was drawn from Preparation and Presentation of Interest Arbitration Cases, by Thomas Gilroy and Russell Dafflitte, Published by the Center for Labor and Management, University of Iowa, 1975.

the impasse procedure. For example, under Section 3548.2 of the Education Employment Relations Act, factfinding panels in school district disputes ". . . shall consider, weigh and be guided by all of the following criteria." (emphasis added).

(1) State and federal laws that are applicable to the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the public school employee-employer.

(4) Comparison of the wages, hours and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.

(5) The consumer price index for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Such other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making such findings and recommendations.

Parties governed by EERA or similar legislative provisions should give special attention to insure that their arguments relate to these specified criteria.[1] If they fail to do so, the "other facts" which

[1]Such provisions are found in a number of city and county impasse procedures as well as in charter provisions relating to wages and benefits.

may be introduced under this EERA example may be of little help.

In addition to legislatively mandated criteria, the provisions of past collective bargaining contracts and the bargaining history leading to these agreements are factors frequently considered by many neutrals. For example, large salary increases that have recently been granted or, conversely, past willingness of the union to forego justified increases in view of the employer's economic position are issues that the parties should be prepared to deal with. It is not enough, however, to present isolated facts. All facts in the case should be part of a developed theory.

In stressing the importance of developing a theory behind the facts, one authority on arbitration has stated:

> By [developing a theory] I mean that a case should have an extra ingredient over and above just the submission of evidence. The advocate should organize the presentation in such a way that the meat and bones take on a definite configuration.[2]

In short, the evidence and arguments presented--the theory--should inescapably lead the arbitrator or factfinding panel to accepting the validity of the rationale behind the position taken on the issues at hand. Above all, this "theory" must be convincing so as to justify the desired award.

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[2]Robert Liebes "Preparing the Case for Arbitration" Collective Bargaining and Labor Arbitration Bobbs-Merill 1970

Your Opponent's Position

The accurate anticipation of the opponent's position and arguments are vital to effective case presentation. Therefore, it is essential that you view the issues at impasse as though you were the spokesman for your adversary. It is fundamental not only to assume the perspective of the opposing party, but to <u>understand</u> as well the underlying philosophy. This approach, together with the known facts, will enable you to construct the opponent's "theory" that will aid you in the accurate anticipation of the case and its arguments to follow.

Summarized, the following steps are recommended in preparing for an effective presentation of a case to be argued in fact-finding or arbitration:

1. Review the items at impasse and how they relate to past agreements and past practices of the agency or the union.
2. Study the original positions taken by both sides on each item at impasse. Review the history of negotiations, with special attention to arguments which may have been successful in obtaining a concession on any impasse item.
3. Carefully examine any contract provisions that may have been agreed upon during the current negotiations. Determine if any relationship, either direct or indirect, exists

between the agreed upon provisions and the issues to be placed before the impasse procedure. Itemize the points of any such relationship.

4. Assemble all documents that will be needed at the hearing. If feasible, reproduce copies for the arbitrator or panel and for the other party. If some of the needed documents are in the possession of the other party, request that they be brought to the hearing or be provided in advance to it.

5. Interview any witness that you consider calling. When it is determined that they will be used, make certain they understand the whole case and particularly the importance of their testimony within it.

6. If witnesses are to be called, make a written summary of what each witness will seek to establish. This will be useful at the hearing as a checklist to make certain nothing has been overlooked.

7. Study the case from the other side's point of view. Be prepared to answer the opposing evidence and arguments.

8. Discuss your outline of the presentation with others in your organization. A fresh viewpoint will often disclose weak spots and previously overlooked details.

9. Read as many articles and published awards as you can, in both your jurisdiction and surrounding jurisdictions, on the general subject of impasse. While awards by other arbitrators in other cases have no precedent value, they may be introduced as exhibits and may help clarify the issues before the arbitrator or panel.

In addition, the decisions of the courts and of various labor boards on the issues at impasse may be of particular value, especially if questions of scope of bargaining arise. Under the EERA as well as a number of city and county ordinances, scope questions would be settled by rulings of the appropriate employee relations board.

Do Not's

1. There is no substitute for having your facts in logical order; do not neglect to do so.
2. Witnesses who have not been examined before a hearing should not be called, if at all possible.
3. When past practice or past collective bargaining agreements are involved try to avoid presenting only one example when you are relatively certain the opponent has many examples showing a different emphasis on the past practice or past labor agreement in question.

Do's

1. Talk to all persons who can shed light on the case. Prepare the other side's case in addition to your own!
2. Interview all your witnesses, relate their testimony to the case, give them some practice in answering questions in cross-examination.
3. Examine and organize all records and documents.
4. Consider the use of statistical exhibits.
5. Consider making comparisons with surrounding jurisdictions in matters of wages, hours, and conditions of employment of those doing work comparable to that of employees in the arbitration proceeding. (See "Standards of Impasse Resolution" in the appendix to this tab.)
6. Present fiscal data in the most comprehensible manner. Consider using visual aids.
7. Consider preparing your argument in writing, pre- or post-hearing, in order to gain discipline and expertise in these matters. Do this particularly if no transcript will be provided.

A Point-by-Point Checklist

The following is a detailed, point-by-point checklist to assist in preparing for an interest impasse hearing. Many of the points are, of course, painfully obvious; they are listed here only to make sure that the parties will not experience the "pain" of forgetting them.

I. Factors Affecting the Arbitrator or Arbitration Panel

A. The Arbitrator or Arbitration Panel:

1. Must be able to "know" the agency's job or services it performs.
2. Must be able to "feel" the emotions.
3. Must be reminded of the relevant statutory rights of the parties.
4. Must "know" the past practices and past collective bargaining agreements.
5. Must "know" the intent of the past provisions in former agreements which are directly or indirectly related to the item(s) at impasse.
6. Must "know" the intent of the parties in their bargaining which led up to the impasse procedures. (This intent should concern both the bargaining on the specific issues at impasse and the provisions which are directly or indirectly related to the impasse items.)
7. Must know the "expectations" of the parties.

B. Write a Working Brief:

1. The issue(s) at impasse.
2. The detailed definition of each issue at impasse.
3. The facts and bargaining positions which you are likely to concede at the hearing.

4. The facts and bargaining positions which the other side is likely to concede at the hearing.
5. Bargaining history (i.e., proposals of each party, intent of each proposal by the parties, references to past practices, references to practices in surrounding areas in negotiations, etc.). Bargaining history:
   a. Past contracts,
   b. Prior to mediation,
   c. During mediation,
   d. Post-mediation, prior to fact-finding if fact-finding was utilized.
   e. Fact-finding recommendations of issues at impasse.*
   f. Post-fact-finding bargaining up to arbitration.*
6. Data pertaining to statutory criteria (i.e., guidelines of EERA).
7. Likely response of the other side:
   a. Analyze opposition's arguments and facts.
   b. Establish effective answers to opposition's arguments:
      (1) Not in the interest and welfare of public.
      (2) Adverse effect on the normal standard of service.
      (3) Inability to finance and levy taxes to cover increased cost if opposition's issues are adopted.

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*Points "e" and "f" apply only where arbitration would follow fact-finding.

(4) Inaccuracy or improper use of data in arguments and opposition's position on each impasse issue.

(5) Not comparable to surrounding jurisdictions.

(6) Opponent's positions are not adequately based on current cost-of-living data.

8. Preparation of witnesses:

a. It is proper and necessary to interview witnesses in advance. (Note: witness is to admit fact of advance conference if asked.)

b. It is proper to inform witnesses in advance what questions will be asked.

c. Tell witnesses that their answers should be brief and non-technical, that they should <u>not</u> argue the case, and that when objections are made the witness should allow his/her answer to be interrupted.

e. Anticipate possible cross-examination by:

(1) Anticipating opposition's original positions;

(2) Anticipating opposition's reaction to your first questioning of the witness;

(3) Preparing redirect questions that will clarify your witnesses' positions after the opposition's cross- and recross-examination questions.

9. Prepare visual material:

   a. Make charts, graphs, models, etc., large enough for everyone to see easily.

   b. Make photocopies of handouts.

III. Dry Run

A. Assign opposition's role to the person who will present your case at the arbitration hearing.

B. Assign your party's role to an individual knowledgeable in employee relations.

C. Assign role of arbitrator or panel of arbitrators to persons not familiar with the "inside" facts.

D. Select a jury to evaluate the dry run.

E. Use this evaluation to correct presentation.

IV. Preparation for Intragroup Communications at Hearing

A. Have a single speaker or divide presentation of your case among single speakers.

B. Sit together at the hearing for easy communication.

C. Pass notes to speaker, but don't overdo it.

D. Recess may be asked for consultation, but not too frequently.

E. Assign one associate to take full notes.

F. If the hearing continues past one day, at the end of each day evaluate the day's proceedings. Plan for the following day's hearing strategy.

F. If the hearing continues past one day, at the end of each day evaluate the day's proceedings. Plan for the following day's hearing strategy.

V. Decorum

A. Show conviction, yet be cordial.

B. Questions to witness should be explicit. Questions should not be leading. This is to avoid unwanted or damaging testimony. Also note: typically an arbitration hearing is not subject to the rules of evidence used by courts. Therefore the arbitrator or arbitration panel will take a liberal attitude on hearsay and introduction of other evidence. The test commonly used by the arbitration proceeding is to receive evidence "for what it is worth."

C. Don't interrupt proceedings by remarks, etc.

D. Cross-examination may be pointed. It should normally be confined to statements already made. Avoid repetition of a witness's testimony.

VI. Prepare Summation

A. Be ready to include all points brought out in your behalf. Relate these points to the statutory criteria for arbitration decisions, if such criteria are provided. Obviously concentrate on the clarity of your summation as well as the substance of the points.

B. Prepare responses to all points which may be brought out by the opposition.

C. Repeat the facts of the case.

D. Repeat explicitly the language of the contract provisions you are requesting.

VII. Post-Hearing Brief

A. May be desirable as part of arbitrator's or arbitration panel's education. Also may be desired to clarify aspects of the case.

B. A common arrangement is for both parties to mail briefs simultaneously, on a specified date, to both the arbitrator or arbitration panel and the opposing party. Typically the specified date of mailing is set by either the parties or the arbitrator or panel.

C. Considerations in preparing the post-hearing brief:

1. Make it as concise as possible.
2. Refer to facts disclosed at the hearing. (Note that new evidence cannot be introduced in a post-hearing brief.)
3. Be certain to include and emphasize the contract provisions you desire.

D. Note: In some instances rebuttals to post-hearing briefs are desired. If so, rebuttals will be simultaneously mailed within a specified number of days after briefs are mailed. (Note: rebuttals are not generally desired due to the time delay involved in rendering an award.)

APPENDIX ADDENDUM TO TAB D

of

IMPASSE RESOLUTION IN PUBLIC SECTOR INTEREST DISPUTES

AGENCY BUDGET PRIORITIES AND THE FACTFINDING PROCESS

In Appendix E, Professor Grodin expresses the concern shared by many practitioners, that the application of conventional binding arbitration to public sector interest disputes may be in conflict with the basic concepts of representative government in a democratic society. Professor Grodin does not consider this to be an insoluble problem, however, and suggests certain approaches which may resolve this potential conflict.

It should be noted that his concerns apply to the process of binding arbitration and not to advisory arbitration or the factfinding process contained in the Rodda Act, where the elected legislative body has final authority over the adoption of the factfinder's report.

Although a factfinding process, such as in Rodda, may be advisory, the question of how a factfinder is to treat the proposed budgetary priorities still remains unresolved. Some practitioners propose that these priorities must remain untouched in the factfinding process except where they would appear to be unreasonable or discretionary. Others hold that in a wage impasse, the factfinder should totally disregard other factors and simply recommend a "proper wage" in the proceeding's findings.

The highly regarded and distinguished arbitrator, Howard S. Block, has dealt with this question of public sector budget priorities in the factfinding process in a number of decisions which he has rendered in the state of Nevada. In the following decision involving the International Association of Firefighters Local 1285, AFL-CIO, and the City of Las Vegas, Mr. Block provides valuable insight as to how one might expect an experienced arbitrator to approach this dilemma.

FACT-FINDING REPORT

In the Matter of Fact-finding Between INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1285 LAS VEGAS, NEVADA, AND CITY OF LAS VEGAS.	)	ISSUES: Impasse in Negotiations on Fifteen Issues

Impartial Factfinder

Howard S. Block, Esq.
1226 North Broadway
Santa Ana, California 92701

Hearings Held

June 10, 11, 12, 13, and July 8, 1972
Las Vegas, Nevada

Appearances:

For the Fire Fighters: I. R. Ashelman, II, Esq.
415 Bridger Avenue
Las Vegas, Nevada

For the City: R. Ian Ross, Esq.
Deputy City Attorney
City Hall
821 Las Vegas Boulevard North
Las Vegas, Nevada

BACKGROUND

This fact-finding proceeding arises out of an impasse in negotiations between the International Association of Fire Fighters (sometimes hereinafter referred to as Fire Fighters or Union) and the City of Las Vegas (sometimes hereinafter referred to as City), and was conducted pursuant to the pertinent provisions of NRS Chapter 288. However, compliance with the May 5 deadline for completing these proceedings proved impractical and, as noted below, this statutory time limit was waived by the parties. Before proceeding to a consideration of the specific issues in dispute, a brief statement of background facts will aid in placing the controversy in perspective.

The City has a total employment of 1,450 full-time employees who furnish complete municipal services to its residents except for power, telephone and water services. The employees are divided into three collective bargaining units consisting of the Fire Fighters, with approximately 250 represented employees; the Police Protective Association, with approximately 450 employees; and the City Employees Association, commonly referred to as the non-uniformed employees, with approximately 700 employees.

To fully comprehend the conflicting positions of the parties on several key monetary issues, and also on the reclassification study completed in February 1972 and implemented at the beginning of this fiscal year (i.e., July 1, 1972), it is necessary to begin in 1968 when the Fire Fighters were granted a $144 monthly wage increase as the result of an initiative ordinance approved by the voters on November 5, 1968 retroactive to July 1, 1968. The identical increase was then granted to the Police Department by action of the City Board of Commissioners, but was made effective in July, 1969. This $144 sum amounted to an increase of between 20% and 27% for Fire Fighters and Policemen while non-uniformed employees received only a 12% increase. According to the City, this created a distortion in internal salary relationships which affected the morale of non-uniformed

employees and increased their turnover rate. The City undertook to correct this problem by a reclassification study which endeavored to restore a balanced internal relationship by increasing certain individual wage ranges based upon the results of the study. While the actual percentage increase necessarily varied from department to department, the reclassification study resulted in an overall 2.6% rise in the City's salary structure, but only 1.6% in the Fire Department. The Fire Fighters, quite understandably, viewed the results of this reclassification study with skepticism because they were not invited to participate to the same extent as were other employees.

In 1970, all employees were granted a $70 across-the-board increase, which averaged 10% City-wide (TR 239:22-240:1). The percentage was slightly lower for uniformed employees because their average base is higher. In 1971, no general increase was granted because of an anticiapted budget deficit which required some stringent economy measures.

For the current (1972-73) fiscal year, the City offered an across-the-board wage increase of 5% to all employees which, when added to the reclassification study increase, amounts to a total wage advance averaging 6.6% for Fire Fighters. This does not include in-step and longevity increases already built into the salary schedule, and a number of minor fringe benefit items, which together add 4.39% to the average income of City employees. According to the Fire Fighters, this 4.39% figure is significantly less in the Fire Department.

The City's 1972-73 wage proposal was accepted by the City Employees Association. It was rejected by the Police Protective Association and the resulting impasse was submitted to Factfinder Joseph F. Gentile who submitted a comprehensive report on May 5, 1972 (City Exhibit 1) which concluded that the City did not have the financial ability to grant additional monetary benefits. Chronologically, that brings us down to the instant case to which we now turn.

The parties to this proceeding are at impasse over the following fifteen issues:

1. Civil Service Rules
2. Sick Leave Policy
3. Holidays
4. Call-back pay
5. Union Leave
6. Maintenance of Benefits
7. Duration of Agreement
8. Wages
9. Salary Grade Adjustments
10. Vacation Benefits
11. Weekly Working Hours
12. Injury Leave
13. Sick Leave Compensation
14. Longevity Pay
15. Savings Clause

NRS 288.200-7 empowers the Governor to make the findings and recommendations of the factfinder final and binding at the request of either party. The Fire Fighters invoked this statutory provision and, after a hearing, Governor O'Callaghan ordered that the Factfinder's findings and recommendations be final and binding as to the following six issues (Joint Exhibit 6):

1. Union Leave
2. Benefits
3. Duration of Agreement
4. Wages
5. Salary Grade Adjustments
6. Savings Clause

Following the Governor's hearing, the parties jointly selected Howard S. Block to serve as Factfinder from a list of factfinders submitted by the American Arbitration Association. By letter dated April 21, 1972 (Joint Exhibit 7), the parties mutually waived the time limits prescribed by Section 288.200-4 and agreed that the Factfinding hearing could take place and the Factfinding Report be issued after May 5, 1972. It was further agreed that the decision of the Factfinder would be made retroactive to July 1, 1972, with the understanding that, on non-binding issues, implementation of the Factfinder's recommendations were subject to the prior approval of the Board of City Commissioners. Hearings were held before the Factfinder on June 10, 11, 12, 13, and July 8, 1972, at which time

all parties concerned were given a full opportunity to present evidence and argument bearing on the issues.

PRELIMINARY DETERMINATION PURSUANT TO NRS 288.200-8(a)

For a Factfinder, the crux of the Nevada Statute is found in NRS 288.200-8(a) which delineates the criteria he must apply in arriving at his decision. Because of its importance in this proceeding, that statutory language is set forth below:

> "8. Any factfinder, whether acting in a recommendatory or binding capacity, shall base his recommendations or award on the following criteria:
>
> "(a) A preliminary determination shall be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer, and with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision.
>
> "(b) Once the factfinder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, he shall use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute.
>
> "The factfinder's report shall contain the facts upon which he based his recommendations or award." [Emphasis added.]

It is clear from the foregoing provision that the Legislature has established a two-step procedure, with the first step being a preliminary determination of financial ability. What is not at all clear is the test to be applied in making this "preliminary determination", and the parties are in sharp disagreement on this point. Thus, the "preliminary determination" question poses two issues for the Factfinder: (1) the meaning that can reasonably be ascribed to this statutory requirement and (2) how that meaning should be applied to the instant case.

The City's position on the first issue was summarized by Counsel as follows (TR 32:24-33:4):

> ". . . if the Board of City Commissioners with reference to the budget have made the allocations reasonably, that the Factfinder cannot tamper with them. In essence, turning the coin around, it is the City's position that the Factfinder has to be able to say that as a matter of law the Commission's allocations were unreasonable."

In other words, the City maintains that its budgetary allocations are conclusive upon all parties unless it can be determined that some of its allocations are unreasonable. The Factfinder cannot accept this interpretation for the following two principal reasons: (1) it is readily apparent to the most casual observer that, over at least the past several years, financial constraints upon local government in Nevada, and elsewhere across the United States, make it impossible to satisfy all of the requirements that would fall within the broad classification of a "reasonable allocation". Therefore, if a Union's right to negotiate matters within the scope of representation were limited to funds "unreasonably allocated", it would make the negotiating process a meaningless ritual; and (2) if the Legislature intended the budgetary allocations of local government to be conclusive, it could have easily said so. There is simply no justification for "reading-in" such an interpretation which, in practical effect, would restore employer-employee relations to where they were before the Dodge Act was passed.

In the Factfinder's opinion, if the criteria imposed by NRS 288.200-8(a) are to be reconciled, in any meaningful way, with the duty to negotiate over wages, hours and conditions of employment as prescribed by NRS 288.150, then, once the City has determined the sums that are necessary ". . . to provide facilities and services guaranteeing the health, welfare and safety of the people residing within [the City limits] . . . " [NRS 288.200-8(a)], it must then establish priorities in its allocation of remaining funds as between all claimants - e.g. capital expenditures, employee requests, taxpayer proposals, and all of the other competing claims upon the limited funds available. The ranking of these priorities may be reviewed by

a Factfinder as to its reasonableness. Indeed, this is ordinarily the principal function of the interest dispute factfinder in the public sector where, as here, there are insufficient funds to meet all legitimate demands. Were the Factfinder barred from reviewing the order of priorities, as the City has argued, then this entire factfinding procedure would serve little, if any, purpose. The Factfinder rules, therefore, that a review of City established priorities is proper under the statutory language.

We turn now to the principal and remaining question bearing on the "preliminary determination" issue -- whether the City's priorities should be revised in order to meet the Union's demands. Or, stating the question in statutory terms, whether the City has the financial ability to pay such demands. The parties focused their attention on this key issue because the answer to it determines, in large measure, the extent to which the Union's demands can be satisfied, if at all.

Both the Fire Fighters and the City offered an analysis of budget expenditures and revenues through expert testimony. In addition, each submitted comprehensive exhibits into evidence which compared the City's salaries and benefits with Fire Fighters in other public jurisdictions of Nevada, California and elsewhere in the United States. All of these data were then summarized and ably argued by Counsel for each side in his closing argument. The exigencies of time make it impractical for the Factfinder to review all of the arguments advanced or even most of them. However, on the basis of a careful scrutiny of the entire record of this proceeding, the Factfinder concludes that he would not be justified in altering the priorities established by the Board of City Commissioners. He has reached this conclusion for the following principal reasons:

1. The Fire Fighers salary schedule compares favorably with those of other Nevada jurisdictions. On the basis of the record before him, the Factfinder cannot agree with the Union's argument that the proper comparison is with the salary schedule

of the City of Los Angeles. In support of this contention, the Union relied upon the following two principal arguments: (a) this was the recommendation of Factfinder Johns in his 1971 Report and (b) the Los Angeles rates were the guideline for voter approval, in 1968, of the $144 increase for Fire Fighters.

As to the first point, it must be noted that Professor Johns' recommendation was not adopted by the Board of City Commissioners; furthermore, this Factfinder would hesitate to adopt the conclusions of a prior Factfinder without examining the evidence upon which his conclusions were based - evidence which is not before him. With regard to the second argument advanced by the Union, it does appear from Fire Fighters Exhibit 41 that the 1968 $144 increase was based upon a comparison with Los Angeles rates, although that explanation did not appear on the ballot (City Exhibit 51). Whatever may have been the motivation in basing the 1968 increase on Los Angeles rates, the record since then negates any intent to use Los Angeles as a guideline. For this Factfinder to conclude that the Los Angeles and Las Vegas Fire Fighter salary schedules should be linked together permanently, it would take far more persuasive evidence than is present in this record.

2. The 6.6% increase offered by the City (5% general increase and 1.6% reclassification) approximates the change in the cost of living since the last general increase and, in addition, is comparable to the increases granted other public employees in Clark County.

3. The Fire Fighters cannot be viewed in isolation from other City employees. While the relationship of their salaries and benefits to other employees in the City cannot be decisive, it is, nevertheless, a factor entitled to considerable weight. The evidence reveals that Policemen (450 unit employees) and Fire Fighters (250 unit employees), and to a lesser extent

members of the City Employees Association (700 unit employees) have been granted similar increases in prior years. For this Factfinder to depart from the established past practice in granting such general increases, it would require clear and convincing proof - a level of proof that cannot be discerned in the record of this proceeding.

4. An analysis of the fund allocations in the 1972-73 budget, taken together with the respectable relationship between income and expenditures in prior years, is convincing to the Factfinder that current budget projections are realistic. Any significant revision or reduction in the expenditures as allocated by the City in the current budget could seriously impair its ability to furnish essential facilities and services.

The finding on this crucial point of ability to pay disposes of all monetary issues save one -- Salary Grade Adjustments. For the reasons set forth below in the discussion of this item, the Factfinder has remanded it back to the parties for negotiation. The sum required to meet the Union's demand on this issue is not significant, and is well within the City's ability to pay. Following consideration of Salary Grade Adjustments, the Factfinder will then take up the non-monetary issues, namely, Benefits, Duration, Savings Clause, Civil Service Rules, and Sick Leave.

SALARY GRADE ADJUSTMENTS

Union Position:

The Fire Fighters request that inequity wage adjustments be granted the following two classifications: Alarm Operators, $71.00 per month, and Hydrant Repairman, $110.00 per month. According to the Fire Fighters, the historical relationship between these two classifications and Firemen was disrupted in 1968 when the Union won an initiative petition awarding them an $144 across-the-board wage increase. A lesser increase was granted to Alarm Operators and Hydrant Repairmen. As a result, they dropped four labor grades below the Firemen classification whereas they had traditionally been two salary grades lower. The Union points out that these two classifica- are an integral part of the Fire Department, and it requests that this past relationship between them and Firemen be restored.

In further support of their position, the Fire Fighters point out that: (1) they were not invited to participate in the City's reclassification study where this inequity might have been adjusted; (2) a comparison of the Firemen and Alarm Operator classifications in a number of representative California jurisdictions reveals that the Alarm Operators are paid at levels more nearly comparable with Firemen's pay, and in some jurisdictions the Alarm Operator is paid at an even higher rate; and (3) the proposed increase for these two classifications is warranted on the basis of a comparison with other City classifications which have comparable duties (Fire Fighters Exhibits 36 and 37). Finally, the Union emphatically rejects the City's position that this issue is non-negotiable and that the dispute as to its negotiability can only be resolved by the Employee-Management Relations Board (hereinafter referred to as EMRB).

City Position:

The City takes the position that this issue involves a matter of classification which is exempted from the scope of negotiations by NRS 288.150-2(b). Management retains the exclusive right to make decisions on such matters and a wide variety of other matters enumerated in the statute. According to the City, when disputes arise as to the negotiability of a particular matter, the EMRB has exclusive jurisdiction over such controversy. Thus, the Factfinder is barred from ruling on this issue until the ERMB decides whether or not it is negotiable.

While steadfastly maintaining its position that this is non-negotiable and outside the Factfinder's jurisdiction, the City also asserts that, on the merits, its position is supported by the results of the reclassification study which establishes that these two jobs are presently in the proper salary grade. An analysis of the workload of the Alarm Operators reveals that, as the result of a new switchboard installed in 1969 and the addition of one new Alarm Operator (City Exhibit 48), the workload of Alarm Operators has decreased. With reference to Hydrant Repairman, their workload has not increased over the years (City Exhibit 49). Furthermore, a comparison with other jobs in the City (City Exhibits 61 and 62) reveals not only that a change in classification is unwarranted, but that the proposed change would create disruptive inequities in the present classification system. In this connection, the City emphasizes that it cannot ignore the impact of reclassifying one or two jobs in the Fire Department upon comparable jobs in other City Departments.

Discussion

The basic assumption underlying the entire negotiating process in both the public and private sectors is the belief that problems that relate to the employment relationship, particularly wages, hours and conditions of employment, can be resolved more satisfactorily by joint determination between management and labor. On the other hand, it must also be recognized that there are a number of areas where Management must have the unfettered right to exercise the administrative initiative necessary to carry out its duties and responsibilities, in short, to run the City. These areas of exclusive management jurisdiction are commonly referred to as Management's rights[1/] and are enumerated in NRS 288.150-2. However, the Factfinder cannot agree that the proposed salary grade adjustments for Alarm Operators and Hydrant Repairman fall within the exclusive province of Management. While Counsel for the City advanced a number of resourceful arguments in support of his position on this point, it is the Factfinder's opinion that this is clearly a matter of wages which should have been negotiated. Nor can the Factfinder accept the City's argument that such disputes over negotiability are within the exclusive jurisdiction of the EMRB since NRS 288.110-2 provides that the EMRB "may hear and determine" such controversies but the Act does not confer exclusive jurisdiction upon it.

Since this issue was never negotiated between the parties, and the Fire Fighters were not invited to participate on the Committee that worked with Management on the reclassification study, the Factfinder has returned this issue to the parties for negotiation, and retains jurisdiction in the event they are unable to resolve it.

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1. For the insights of one experienced negotiator in dealing with disputes over the scope of negotiations, see The Bargaining Process in the Public Sector, D. H. Wollett, Oreg. L.Rev., vol. 51 (1971).

BENEFITS

Union Position:

In order to preserve some of the minor benefits that have been established by practice over the years, but are not of sufficient importance to memorialize in the Agreement between the parties, the Union suggests the following language:

> "No employee benefit, whether it is wages, hours, or conditions of employment, may be reduced below its present existing level." (Firefighters Exhibit 14).

City Position:

The City has stated its willingness to negotiate such a provision provided the Union submits a list that enumerates the claimed benefits. Management is reluctant to "blanket-in" benefits which the Union is unwilling to specify.

Discussion

The status of benefits that arise from custom and practice, rather than from the written Agreement between the parties, has frequently been the subject of arbitration proceedings. When the claimed practice has been established by convincing proof, the vast majority of arbitrators have held that such benefits are an implicit part of the entire agreement. The reasoning set forth in a number of these opinions is noteworthy,[2] and is equally applicable to the public sector:

> "Arbitrator Dudley E. Whiting: 'Collective labor agreements are not negotiated in a vacuum but in a setting of past practices and prior agreements. Such an agreement has the effect of eliminating prior practices which are in conflict with the terms of the agreement but, unless the agreement specifically provides otherwise, practices consistent with the agreement remain in effect.'"[3]

> "Arbitrator Arthur T. Jacobs: 'A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time. Stable and peaceful relations between the parties depend upon the development of a mutually satisfactory superstructure of understanding which gives operating

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2. For an excellent discussion of this entire subject, which includes the cases cited herein, see Elkouri & Elkouri, How Arbitration Works, BNA Incorporated, 1960, Chapter 12.

3. American Seating Co., 16 LA 115, 117 (1951).

significance and practicality to the purely legal wording of the written contract. Peaceful relations depend, further, upon both parties faithfully living up to their mutual commitments as embodied not only in the actual contract itself but also in the modes of action which have become an integral part of it.'" 4/

"Arbitrator Whitley P. McCoy: 'Custom can, under some circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the contract was entered into upon the assumption that that customary action would continue to be taken, such customary action may be an implied term.'" 5/

"Arbitrator Maurice H. Merrill: 'In the light of the (arbitration) decisions, * * * it seems to me that the current of opinion has set strongly in favor of the position that existing practices, in respect to major conditions of employment, are to be regarded as included within a collective bargaining contract, negotiated after the practice has become established and not repudiated or limited by it. This also seems to me the reasonable view, since the negotiators work within the frame of existent practice and must be taken to be conscious of it.'" 6/

The principle described by these arbitrators has been labeled the "Doctrine of implied obligations" by two noted arbitrators who recently authored an excellent work on arbitration. 7/ As the authors point out, the doctrine of implied obligations has also been applied to government agencies in collective bargaining disputes with Unions and their employees, citing an arbitration decision in New York City where the ruling was based squarely upon this principle (see page 40).

A brief word of explanation concerning the application of this principle may, to some extent, allay the concern expressed by Management. The phrase "past practice" is a term of art in the lexicon of labor relations. It is not every benefit, procedure, or way of doing things that is or should be enshrined as a past practice. A review of the decided cases on this point reveals that arbitrators have required persuasive proof before ruling that a practice is binding.

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4. Coca-Cola Bottling Co., 9 LA 197, 198 (1947).

5. Esso Standard Oil Co., 16 LA 73, 74 (1951).

6. Phillips Petroleum Co., 24 LA 191, 194-195 (1955).

7. Prasow and Peters, Arbitration and Collecting Bargaining: Conflict Resolution in Labor Relations, Mc-Graw-Hill, Inc., 1970, pp. 40-42.

No effort will be made herein to summarize the voluminous literature on this subject, or to enumerate all of the factors that are weighed, except to note that every contention of a binding practice must stand or fall upon its own particular facts.

Since the presence or absence of a practice depends upon the circumstances of each case, and becomes a part of the Agreement by implication, it is neither feasible nor necessary to include contract language on this point. Finally, since the status of such benefits will be determined on a case by case basis, it is unnecessary for the Factfinder to rule on the City's contention that the subject matter of this issue is an exclusive management right and therefore non-negotiable (City Exhibit 30).

DURATION

Union Position:

The Union contends that since it is denied the right to strike, an existing Collective Bargaining Agreement should remain in effect until the successor agreement has been duly executed. In order to accomplish this objective, the Union has submitted the following two alternative proposals (Firefighters Exhibit 16):

> 1. "This Agreement shall be effective as of the First day of July 1972 and shall continue in full force until a new Agreement has been negotiated and properly signed."
>
> 2. "This Agreement shall be effective as of 0001 hours July 1, 1972 and shall continue in full force until 2400 hours June 30, 1973. If a full agreement, on all future contracts, is not reached by March 1, then all impasse items shall automatically be submitted to binding arbitration. The rules of the A. A. A. shall govern these proceedings."

City Position:

The City proposes a duration clause with an ending date that is definite and certain, but it rejects the Union's proposal that the Agreement continue beyond the established expiration date. The City maintains that negotiations are more likely to be productive when the contract contains a fixed expiration date. As Counsel put it at the hearing (TR 396:4-6):

> "We feel that if a contract has a definite ending date it will cause reasonable and complete negotiations during the proper time limits."

Furthermore, adds the City, the present Agreement between the parties has expired without adverse effect to the Union.

As to the Union's alternative proposal for the automatic submission of all impasse issues to binding arbitration, the City points out that this would contravene the Dodge Act.

Discussion

A principal difference, perhaps the principal difference, between collective bargaining in the public and private sector is found in the rights granted to employees when a negotiating impasse occurs. In the private sector, when the Employer and Union are unable to resolve the terms of the new or renewed Agreement at the bargaining table, the employees may strike. In Nevada, and most other states, strikes by public employees have been declared illegal because of the importance of continuity in rendering public services. Therefore, in the public sector, the emphasis is upon orderly procedures for resolving negotiating impasses -- procedures such as mediation, fact-finding and arbitration, all of which are provided for in NRS Chapter 288 (sometimes herein referred to as the Dodge Act). The purpose of these procedures is to preserve the status quo while the differences between the parties are being processed through the statutory machinery. Part of that status quo is an existing Agreement between the parties. In the Factfinder's opinion, it would be inconsistent with the intent

of the Dodge Act to permit the Contract to lapse while the mandated impasse procedures were being carried out. He therefore rules that the Agreement between the parties should include a provision which would continue the terms of an Agreement until all statutory impasse procedures have been concluded.

SAVINGS CLAUSE

Union Position:

In the event that a provision of the Agreement is declared illegal or void, the Union proposes that the parties enter negotiations concerning the "substance thereof" forthwith. This would permit the parties to restore the intent of the Agreement, if it could be done lawfully. The Union proposes the following language to implement this proposal (Fire Fighters Exhibit 17):

> "It is not the intent of either party hereto to violate any laws, rulings, or regulations of any Governmental authority or agency having jurisdiction of the subject matter of this agreement; and the parties agree that in the event that any provisions of this agreement are finally held or determined to be illegal or void as being in contravention of any such laws, rulings, or regulations, nevertheless, the remainder of the Agreement shall remain in full force and effect unless the parts so found to be void and fully inseparable from the remaining portion of this Agreement. The parties agree that if and when any provisions of this Agreement are held or determined to be illegal or void, they will then promptly enter into lawful negotiations concerning the substance thereof."

City Position:

The City agrees with the Union that if a part of the Agreement is declared unlawful, the remaining provisions should not be affected. Accordingly, it has proposed a Savings Clause which preserves all lawful provisions, but does not provide for renegotiations of any portions that might be declared illegal or void. According to the City, the erosion of Management's rights has not evolved to the point where it should be required to return to the bargaining table in the event that a clause or a portion of the Agreement has been determined

to be illegal. Furthermore, points out the City, most public agencies in Southern Nevada with collective bargaining agreements have adopted a Savings Clause similar to the City's proposal. Finally, it is important to note that if this problem of illegality arises, there is nothing in the City's proposal that precludes the parties from returning to the bargaining table if they mutually choose to do so.

Discussion

If a provision of the Agreement is declared illegal, and it is clear that the subject matter is barred as a matter of law, such determination would be conclusive on both parties. But what if such decision affects other provisions of the Agreement that can be remedied? And what of a contract provision, declared illegal, that can be modified to satisfy the legal requirements? How should such questions be handled? It appears that there are only two alternatives: (1) to make no provision, thereby permitting Management to fill the void through its own action or inaction; or (2) to provide for discussions between the parties in an effort to resolve the matter. In the Factfinder's opinion, the latter alternative is more consistent with the intent and purpose of the Dodge Act, particularly Section 288.150, which imposes a broad duty upon local government employers to negotiate in good faith. It is difficult to understand why a subject, which was initially appropriate for negotiations, should be exempted from later negotiations because it has been declared invalid by an unforeseeable development which neither party anticipated. For these reasons, the Factfinder rules that the Agreement between the parties should include the clause proposed by the Union, which makes appropriate provision for negotiations to remedy such legal defects in the Agreement.

CIVIL SERVICE RULES

Union Position:

The Civil Service Rules cover many present benefits (a majority of both monetary and non-monetary benefits according to Fire Fighters Exhibit 11) and many additional areas that have traditionally been the subject of bargaining between employers and unions. On the other hand, the purpose of the Agreement negotiated between the City and the Fire Fighters is to establish with certainty, for the duration of the Agreement, the wages, hours, and conditions of employment to which the Fire Fighters are entitled. This objective could never be achieved if the Civil Service Commission were free to change these matters that are within the scope of collective bargaining. As Union Counsel put it at the hearing (TR 372:4-14):

> ". . . we are not asking to negotiate the Civil Service rules. We're saying that at the time when we negotiate we want to nail down the wages, hours, working conditions and the framework around them, and if you leave the Civil Service rules open to change you simply haven't done that, and negotiation could become rather ineffective, and also it's a considerable burden. We have to serve notice before December 1st, and the process we used to say ran through May and it looks like it now might run through June, 30 we're trying to avoid that."

In order to accomplish its objective, the Fire Fighters propose the following provision (Fire Fighters Exhibit 11):

> "The City of Las Vegas Civil Service Rules and all provisions contained therein as of July 1, 1972 where not inconsistent herewith, are adopted by reference."

City Position:

The arguments advanced by the City in opposition to the Fire Fighter's proposal on this issue may be summarized as follows: (1) it would be improper to "blanket-in" all Civil Service Rules in the Agreement between the parties because many of the subjects covered are not within the scope of bargaining and are expressly excluded from negotiations by the Dodge Act, specifically Section 288.150-2; (2) the Factfinder lacks jurisdiction to resolve the preliminary

determination necessary on this issue, namely, whether or not it is a negotiable matter, because the jurisdiction over such questions rests with the Employee-Management Relations Board [Section 288.110(2) and City Exhibit 29]; and (3) any subjects contained in the Civil Service Rules which the Fire Fighters wish to place into the Agreement should be negotiated between the parties on an item-by-item basis, rather than by a sweeping and indiscriminate inclusion of all Civil Service Rules.

Discussion

In the current transistion of the public sector to full fledged collective bargaining, the overlapping jurisdiction between the role of the Civil Service Commission and the traditional scope of bargaining has created problems for public agencies not readily resolved.[8/] Before considering the positions of the parties on this issue, it might be helpful to briefly examine the nature of the problem.

Under the authority granted by the City Charter, the Civil Service Commission has promulgated comprehensive rules which cover many areas that are within the scope of collective bargaining. On the other hand, the Nevada State Legislature has, with the passage of the 1969 Dodge Act, imposed a "duty" upon local government employers to negotiate in good faith with employee organization representatives on wages, hours, and conditions of employment (Section 288.150-1). Thus, at present, there are two forums where decisions concerning wages, hours, and working conditions could properly be made - the Civil Service Commission and the negotiating table. In the Factfinder's opinion, these two forums have concurrent jurisdiction over matters properly before either of them. The question of which one will prevail depends upon the action taken by the parties.

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8. For an illuminating discussion of this problem, and how it was resolved by the Michigan Supreme Court, see Government Employee Relations Report, BNA Incorporated, Issue No. 393, B-1, March 22, 1971.

The Fire Fighter's concern over possible inconsistencies between the Civil Service Commission Rules and the rights arising from the collective bargaining agreement between the parties, is understandable and legitimate. However, the Factfinder cannot agree that the solution is to simply make all of the Civil Service Rules an appendage to the Agreement. This would be inconsistent with the role of the Civil Service Commission as established by the City Charter. In the Factfinder's opinion, the integrity of the Agreement can be preserved without impairing the status of Civil Service Commission Rules by: (1) adopting as part of the Agreement, the specific Civil Service Commission Rules which apply to the Fire Fighters; and (2) provide that the terms of the Agreement shall take precedence over conflicting Civil Service Commission Rules. The Factfinder has included such a provision in his recommendations.

Since the Factfinder has not recommended that all Civil Service Commission Rules be adopted by reference, as proposed by the Fire Fighters, it is unnecessary for him to consider the City's argument that some of the Rules are non-negotiable.

SICK LEAVE

Union position:

The Fire Fighters propose no change in the present Civil Service Rule applicable to Sick Leave. Their proposal on this point requests that the following 1970-71 contract language be carried forward to the present Agreement:

"SICK LEAVE"

"Refer to Civil Service Rule No. 670.3 attached hereto and made a part hereof marked Appendix B".

The Union charges that the City's refusal to incorporate this provision cannot be reconciled with its position on Civil Service Rules where the City argued that all Civil Service Rules should not be incorporated -- only those that apply to the Fire Fighters. This Section most certainly does apply.

City Position:

The City points out that there is a Fire Fighters' grievance pending before the Civil Service Commission which urges an interpretation of the Sick Leave Rule that, if sustained, could double or triple the established cost of this benefit as it applies to employees in the Fire Department (TR·376:1-3). Until this dispute over the meaning of the Rule is clarified by the Civil Service Commission, the City is unwilling to incorporate the Sick Leave Rule into the Agreement. Furthermore, contends the City, since this is a monetary item the Union could not prevail in any event unless the Factfinder ruled in its favor on the "threshhold" question.

Discussion

The vast majority of employee benefits are incorporated in the established Civil Service Rules (Joint Exhibit 4). To the extent that there may be some dispute over the meaning of a particular Rule, as with the Fire Fighters' pending grievance, the Civil Service Commission is authorized to clarify any ambiguity that might exist in the language. Therefore, the meaning of a disputed Rule is determined by what the Civil Service Commission says it means. The Rule does not become something different merely because the Civil Service Commission's ruling on a grievance may be at variance with the City's interpretation of the Rule.

In the instant case, the Union seeks a continuation of the present sick leave rule. Assuming, for the sake of argument, that the Civil Service Commission ruled in the Union's favor on the pending grievance, the Factfinder cannot agree with the City's contention that this would amount to an additional monetary benefit, because the Commission would merely be defining established employee rights under the existing Rule. Furthermore, the amount of money at stake in the pending grievance is not significant, particularly when compared with the importance of preserving the integrity of established benefits as set forth in the Civil Service Rules. For these reasons, the Factfinder has recommended that the Civil Service Sick Leave Rule be incorporated into the 1972-73 Agreement.

AWARD AND RECOMMENDATIONS

Based upon a careful review of all of the evidence and argument, the Factfinder orders (as to binding issues) and recommends (as to non-binding issues) as follows:

1. BINDING MONETARY ISSUES

(a) Salary Grade Adjustments - The parties are ordered to negotiate the issue of Salary Grade Adjustments for the classifications of Alarm Operator and Hydrant Repairman. The Factfinder reserves jurisdiction to determine this issue if the parties are unable to resolve it within thirty days from the date of this Report.

(b) As to all other monetary issues, the Factfinder rules that the City does not have the financial ability to pay the additional wages and benefits proposed by the Fire Fighters.

2. BINDING NON-MONETARY ISSUES

(a) Benefits - It is ordered that the benefits established by past practice that are consistent with the principles set forth on pages 12-14 of this Report, be continued, but that they not be incorporated into the Agreement.

(b) Duration - It is ordered that the following provision be included in the Agreement between the parties:

> "This Agreement shall continue until a new Agreement has been negotiated and signed or until all statutory impasse procedures have been concluded, whichever of said events occurs first."

(c) Savings Clause - It is ordered that the Saving Clause proposed by the Fire Fighters and reproduced on page 16 of this Report be included in the Agreement between the parties.

3. NON-BINDING NON-MONETARY ISSUES

(a) Civil Service Rules - It is recommended that only those Civil Service Rules applicable to the Fire Fighters be included in the Agreement. It is further recommended that the following provision be added to the Agreement:

> "The terms of this Agreement shall take precedence over any conflicting Civil Service Commission Rules."

(b) Sick Leave -- It is recommended that the Sick Leave provision proposed by the Fire Fighters and reproduced on page 20 of this Report be included in the Agreement between the parties.

Howard S. Block

HOWARD S. BLOCK
Impartial Factfinder

July 27, 1972

Santa Ana, California

APPENDIX TO TAB D

1. Bagley v. City of Manhattan Beach
2. Hayward Arbitration Award
3. Amendment to City of Hayward Charter
4. Factfinding Award, International Association of Firefighters, Local 1285 v. City of Las Vegas

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BARRY BAGLEY et al.,

Plaintiffs and Appellants,

v.

CITY OF MANHATTAN BEACH et al.,

Defendants and Respondents.

L.A. 30523

(Sup. Ct. No. C 76275)

After the City Council of the City of Manhattan Beach refused to place an initiative measure on the ballot, petitioners sought a writ of mandate to compel the council to do so. The trial court denied relief, and petitioners appeal.

The proposed initiative measure provides that unresolved disputes between the city and the recognized firemen's employee organization shall be submitted to arbitration and that the arbitrator's award shall be final and binding. The arbitration requirement applies not only to unresolved disputes pertaining to the interpretation or application of contracts but also to all disputes as to wages, hours, and terms of employment.

(SEE DISSENTING OPINION)

Denying the writ, the superior court concluded the proposed measure is invalid because (1) the Legislature placed the power to determine salaries in a general law city in the city council, precluding delegation to an arbitrator and (2) there are no safeguards in the proposed initiative to prevent abuse of the arbitrator's power. We affirm the judgment on the first ground, finding it unnecessary to reach the second.

Government Code section 36506, dealing with general law cities, provides: "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees."

The language in the statute is clear. It requires compensation be fixed by the city council by ordinance or resolution; the language does not permit fixing of compensation by administrative order or by arbitrator's award.

When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization. (City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 923-924; California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal.3d 139, 144.)

Although standards might be established governing the fixing of compensation and the city council might delegate functions relating to the application of those standards, the ultimate act of applying the standards and of fixing compensation is legislative in character, invoking the discretion of the council. (City and County of San Francisco v. Cooper, supra, 13 Cal.3d 898, 919-921; Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 634, 637; City and County of S.F. v. Boyd (1943) 22 Cal.2d 685, 689-690; Alameda County Employees' Assn. v. County of Alameda (1973) 30 Cal.App.3d 518, 532; Collins v. City & County of S. F. (1952) 112 Cal.App.2d 719, 730-731; Spencer v. City of Alhambra (1941) 44 Cal.App.2d 75, 77.) As such, and because the language of the statute is not merely clear, but redundant (cf. Geiger v. Board of Supervisors (1957) 48 Cal.2d 832, 838), the city council may not delegate its power and duty to fix compensation.

Examination of the history of other legislation relating to general law city employees confirms that we should apply the plain language of Government Code section 36506 literally. The Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510), which applies to local government employees and deals with public employee organizations

and labor relations, seeks to provide "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code, § 3500.) Although there is provision for a written memorandum of understanding by employee organizations and representatives of a negotiating public agency, the act expressly provides that the memorandum "shall not be binding" but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others. (Gov. Code, § 3505.1; see City and County of San Francisco v. Cooper, supra, 13 Cal.3d 898, 926-928 [under the Winton Act involving school labor relations, written memorandum of understanding is not binding, the school board retaining ultimate authority].)

Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration. (Gov. Code, §§ 3505, 3505.2; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 614,

fn. 4; Alameda County Employees' Assn. v. Alameda County, supra, 30 Cal.App.3d 518, 533-534.) Similarly, Labor Code sections 1960-1963 permit firefighters to form unions and to present grievances but do not authorize arbitration.

Probably no issue in recent years has been presented to the Legislature more frequently than proposed arbitration of public employee salaries, including firemen's. (Assem. Bill Nos. 1781, 1724, 119, 86 (1975-1976 Reg. Sess.); Sen. Bill Nos. 1310, 1294, 275, 4 (1975-1976 Reg. Sess.); Assem. Bill Nos. 3666, 1243, 33 (1973-1974 Reg. Sess.); Sen. Bill No. 32 (1973-1974 Reg. Sess.); Sen. Bill Nos. 1440, 1424 (1972 Reg. Sess.); Sen. Bill No. 333 (1971 Reg. Sess.); Assem. Bill No. 98 (1970 Reg. Sess.); Sen. Bill Nos. 1294, 1293 (1970 Reg. Sess.); Assem. Bill No. 1400 (1969 Reg. Sess.); Assem. Bill No. 1935 (1967 Reg. Sess.); Assem. Bill Nos. 3084, 2500 (1963 Reg. Sess.).) But no such bill has become law.

Petitioner's reliance on Kugler v. Yokum (1968) 69 Cal.2d 371, is misplaced. The case involved the sufficiency of standards necessary to a valid delegation of legislative power in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body. Here legislative intent limiting delegability is clear.

The language of Government Code section 36506, the provisions of the Meyers-Milias-Brown Act, and the Legislature's repeated refusal to enact any law permitting general law cities to fix salaries by arbitration compel the conclusion that the Legislature intends the city council of a general law city to fix compensation, precluding the fixing of compensation by arbitrator.

It has long been settled that a city ordinance proposed by initiative "must constitute such legislation as the legislative body of such . . . city has the power to enact under the law granting, defining and limiting the powers of such body. [Citations.]" (Hurst v. City of Burlingame (1929) 207 Cal. 134, 140.) The city possessing no power under existing state statute to provide for arbitration of wage rates, such power cannot be created by local initiative.[1/]

The judgment is affirmed.

CLARK, J.

WE CONCUR:
WRIGHT, C.J.
McCOMB, J.
SULLIVAN, J.
RICHARDSON, J.

1/ Although Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608, approved arbitration procedures adopted by initiative, Vallejo is a chartered city--not a general law city subject to Government Code section 36506.

C O P Y

BAGLEY v. CITY OF MANHATTAN BEACH

L.A. 30523

DISSENTING OPINION BY MOSK, J.

I dissent. Under the principles enunciated by this court in Kugler v. Yocum (1968) 69 Cal.2d 371, the proposed initiative should not be banned, as an improper delegation of power, from consideration by the electorate.

In divining a legislative intent to preclude the local use of arbitration for resolution of labor disputes, the majority appear to employ two theories. First, they seem to conclude that whenever a discretionary power is granted to one body, any infringement on that authority, of whatever extent or effect, is per se an improper delegation of power. (Ante, p. ___.*) Second, in the majority view, the Legislature has expressly voiced hostility to any arbitration ordinance. The former conclusion is incorrect under relevant case law, the latter as a matter of statutory interpretation.

As for the first rationale, the majority position is contradicted by Kugler v. Yocum, supra, in which we upheld a proposed ordinance decreeing that the salaries of Alhambra

*Majority opinion, page 2.

firefighters shall be no less than the average wage of firefighters employed by the City of Los Angeles and those working for Los Angeles County. The majority vainly attempt to distinguish Kugler because it involved a chartered city and thus was decided "in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body.". (Ante, p. ___.*)

On the contrary, at the time of the proposed ordinance in Kugler, the Alhambra city charter provided, in a manner similar to Government Code section 36506, on which the majority rely, that "The [city] council . . . shall have power to organize the fire division and . . . establish the number of its members and the amount of their salaries . . . ." (Kugler, supra, 69 Cal.2d at p. 374, fn. 1.) As a charter provision has all the force of state law within a chartered city (Bruce v. Civil Service Board (1935) 6 Cal.App.2d 633, 636), pursuant to the majority's reasoning we could have held simply that the terms of the Alhambra charter precluded the proposed ordinance. Instead, we proceeded to scrutinize the ordinance in order to ascertain whether it contained safeguards sufficient to insure that the fundamental policy decisions regarding wages would be made by the city council, not by extraneous forces. (Kugler, supra, 69 Cal.2d 371, 376.) We declared, "Doctrinaire legal concepts should not be invoked to impede the reasonable

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*Majority opinion, page 5.

exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative character of the process of reaching legislative decision." (Id. at p. 384.)

Yet the majority imperiously label a legislative enactment an unlawful delegation without ascertaining the extent of the delegation or the availability of standards and safeguards to prevent its abuse. This result cannot be justified on the simplistic ground that the Legislature granted the city council power to fix wages. In Kugler and in every California case confronting the issue of unlawful delegation, a power has been granted by statute or the Constitution to one body and then delegated some aspect to another entity. Yet unless the delegation removes all authority from the group originally directed to exercise that power (see City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 923-924), courts have analyzed the delegation to determine whether fundamental policy-making power has been maintained by the legislative body originally designated to exercise it. (See, e.g., Clean Air Constituency v. California State Air

Resources Bd. (1974) 11 Cal.3d 801, 816; Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control (1966) 65 Cal.2d 349, 369; Gaylord v. City of Pasadena (1917) 175 Cal. 433, 437.)

In the present case, Government Code section 36506 states only that, "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees." The proposed initiative would not divest the council of that designated power; indeed, the arbitrator's award could be implemented only by a council ordinance. Of course, the initiative would, in many instances, inhibit the council from unilaterally pronouncing decisions regarding wages, as would, for example, any collective bargaining with the firefighters. Because of this potential infringement, we should analyze the initiative in the manner undertaken by Kugler. But it is heroic and unprecedented to conclude that grants of power to one body absolutely preclude any appropriate referral of aspects of that power to another entity. (See Eastlake v. Forest City Enterprises, Inc. (1976) ___ U.S. ___.)

As for the other point relied upon by the majority--the Legislature expressly intended to prohibit local arbitration ordinances--little persuasive support is offered. Government Code section 36506, as we have seen, does not, by its terms, prohibit arbitration or other reasonable means to

resolve labor disputes. The majority can find no legislative history to suggest that the section was intended to be anything other than it facially appears to be: a general grant of power to a local government.

The majority also rely on the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.). It is true that the act does not compel local governments to submit to arbitration, but the majority misreads the statute to conclude that the act prohibits municipalities from arbitrating. The act establishes certain minimum procedures that must be undertaken by public employers and employees. They must meet and confer with each other and bargain in good faith. (Gov. Code, § 3505.) If they reach an agreement, they must prepare a memorandum of agreement (§ 3505.1). The Legislature's directive that the agreement shall not be binding reflects a reluctance to impose arbitration on unwilling municipalities, not a repudiation of local arbitration ordinances voluntarily adopted.

This is made clear in other provisions of the act. Section 3500 provides: "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon

those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." The act thus allows local governments to maintain their own procedures, consistent with the purposes of the act. (Ball v. City Council (1967) 252 Cal.App.2d 136, 143; Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 725.) As the act is designed to provide reasonable dispute-solving mechanisms, section 3500 seems to permit such procedures as arbitration.

Also significant are sections 3505 and 3507. The former provides that the bargaining process "should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance . . . ." Section 3507 allows a public agency to adopt "additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." Taken together, these provisions indicate that the Meyers-Milias-Brown Act expresses no marked hostility, but benign neutrality toward local use of arbitration procedures.

Also lending dubious credence to the majority conclusion is the reference to defeat of various public

employment bills in the Legislature. (Ante, p. ___.*) As we observed recently in Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392, 418, "At best, 'Legislative silence is a Delphic divination.'" In these circumstances, even the Oracle of Delphi would have difficulty in finding legislative hostility to local use of arbitration. Of the 22 bills cited by the majority, 14 would have required as a matter of state law public employers and employees to submit to arbitration of wage disputes. Obviously, the defeat of a bill to establish state-imposed arbitration requirements does not signify legislative opposition to voluntary local decisions to adopt arbitration. Six of the bills would have imposed mandatory mediation and fact-finding, while at the same time providing for arbitration of disputes revolving around interpretations of existing agreements, an area entirely different from arbitration of wage disputes. One of the remaining two measures cryptically stated, without further explanation, "Upon failure to reach agreement, the difference may be referred to voluntary arbitration." (Assem. Bill No. 3084 (1963 Reg. Sess.).) Only 1 of the 22 bills was at all relevant to our problem. That measure purported to amend the Meyers-Milias-Brown Act to provide that any arbitration procedures adopted by local agencies would be governed

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*Majority opinion, page 5.

by the Code of Civil Procedure sections regarding arbitration. (Assem. Bill No. 3666 (1973-1974 Reg. Sess.).) The bill, thus, did not propose allowing local governments to use arbitration, but assumed that the power already existed.

In short, from the standpoint of case law and legislative history, the majority have erred in concluding that the Legislature expressly intended to prevent adoption of arbitration to resolve labor disputes.

But the initiative must still be examined to determine whether it constitutes an improper delegation of power. As stated, the keys to this determination are whether the legislative body retains the fundamental policy-making decision and whether there are sufficient safeguards in the initiative to prevent abuse of authority. (Kugler v. Yocum (1968) supra, 69 Cal.2d 371, 381-382.)

Our analysis in Kugler aids us in ascertaining when a delegation of power amounts to an abdication of the legislative policy-making role in labor matters. In approving in that case the proposed ordinance pegging wages of Alhambra firefighters to their counterparts in Los Angeles, we stated, "Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the 'fundamental issue'; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative

delegation . . . the implementation of the policy by reference to Los Angeles is not the delegation of it." (Id. at p. 377.)

Similarly, the initiative in question here does not strip policy-making powers from the legislative body of Manhattan Beach. The proposed ordinance makes a fundamental policy determination, i.e., that impasses in labor disputes involving firefighters shall be resolved not by the present adversary method, with its potential for disruption of essential services, but by a mutual reasoned appeal to an impartial arbitrator. Also, it sets forth detailed procedures concerning the selection of the arbitrator and guidelines governing his decisions. Referring disputes to an arbitrator so selected and directed, like the pegging of wages to those prevalent in Los Angeles in Kugler, is not delegating but implementing policy-making.

Further, the proposed ordinance contains safeguards sufficient to prevent abuse of the grant of authority; indeed it appears to be less susceptible to abuse than the proposal approved by this court in Kugler.

First, the present initiative, unlike the ordinance in Kugler, contemplates reference to an agency beyond the control of the city council only when all else fails. In most circumstances, the firefighters and the city council will continue to reach agreements based on normal collective

bargaining. Only when an impasse is reached will there be resort to arbitration. While it may be suggested that the availability of a compulsory arbitration alternative will discourage serious compromising by disputants, it is equally likely that the potential of an adverse binding arbitration award will encourage each side to be conciliatory. In Michigan, where compulsory arbitration is available to resolve police and firefighter labor disputes, during a 15-month period 224 disputes were settled by the parties and only 105 went to arbitration; of the latter, 17 were settled before final determination by the arbitrator. (McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector (1972) 72 Colum.L.Rev. 1192, 1210 (hereinafter cited as McAvoy).)

Another safeguard inherent in the present initiative is the potentiality of court review of an arbitrator's decision. Under Code of Civil Procedure section 1286.2, a court must vacate an arbitration award if, inter alia, the arbitrator exceeds his powers or his award is tainted with corruption, fraud, misconduct, or procedural irregularities. While courts will not usually examine the merits of an arbitration decision (Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332 (1974) 40 Cal.App.3d 431, 437), the prospect of judicial review on the grounds listed in section

1286.2 should deter any untoward tendency of an arbitrator to rule capriciously. Indeed, the Oregon Supreme Court has held that the existence of an appeals procedure in itself may constitute an adequate safeguard against administrative abuse. (Warren v. Marion County (Ore. 1960) 353 P.2d 257, 261-262, cited with approval in Kugler at pp. 381-382 of 69 Cal.2d.)

Most significantly, the present initiative purports to afford protection to the municipal fisc. In this regard, the city and amici claim, in a strictly policy argument, that the imposition of arbitration will inevitably lead to exorbitant labor settlements and skyrocketing taxes. Implicit in their contention is a marked antipathy to arbitrators as being biased and irresponsible, particularly in matters affecting city treasuries. No authority in support of such apprehension is offered. On the contrary, this court has recognized arbitration to be a time-honored, respected method of settling labor disputes. In Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 622, a case involving a charter amendment providing for arbitration of disputes between firefighters and a city, we declared that "state policy in California 'favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.'"

Again, a comparison with Kugler is appropriate. There we approved the proposed ordinance even though it linked firefighter salaries in Alhambra, population 64,500, with those paid in Los Angeles, where 2,743,500 people lived at the time. (69 Cal.2d at p. 385, Burke, J., dissenting.) While Los Angeles may have had greater tax resources to pay salary increases than Alhambra and a tradition of providing some of the highest salaries in the state, we reasoned that the proposed parity plan contained safeguards because "Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra." (69 Cal.2d 371, 382.)

The arbitration provisions in the present case contain a number of financial safeguards. In contrast to the Kugler initiative, the ordinance here in question sets no floor for salaries. Although the arbitrator will not be directly responsible to the electorate, the city will share an equal role with the employees in selecting him. While the salary level in Kugler was to be determined solely by one index--the wages paid by Los Angeles--the Manhattan Beach arbitrator must weigh a number of factors. The initiative requires the arbitrator not only to consider the cost of living and existing salaries and benefits in other communities, but also "the interest and welfare of the public; [and] the

availability and sources of funds to defray the cost of any changes in wages, hours and conditions of employment." As one commentator has suggested, in reference to a provision in a Nebraska statute similar to the quoted clauses, "Such a formulation avoids the possibility of an award that would necessitate increased taxes, employee lay-offs or reduced municipal services." (McAvoy, at p. 1200.)

For the foregoing reasons I conclude that the proposed initiative is not an unconstitutional delegation of power. The people of the city should not be denied the right to determine by democratic vote how their city government is to resolve labor disputes.

I would reverse the judgment.

MOSK, J.

I CONCUR:

TOBRINER, J.

IN ARBITRATION PROCEEDINGS PURSUANT TO SECTION 809

OF THE CHARTER OF THE CITY OF HAYWARD

In the Matter of a Controversy	)
	)
between	)
	)
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1909,	)
	)
Complainant,	)
	)
and	)
	)
CITY OF HAYWARD,	)
	)
Respondent.	)
	)

APPEARANCES:

ON BEHALF OF THE COMPLAINANT:

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OPINION

The parties to this arbitration, International Association of Fire Fighters, Local 1909 (hereinafter the "Union") and The City of Hayward (hereinafter the "City") met and conferred, and agreed on certain matters pertaining to working conditions for members of the Union. A Memorandum of Understanding of February 26, 1976 was entered into by the parties which contains the matters upon which agreement had been reached. The Memorandum (Section 17.01) provides inter alia: "Arbitration of Unresolved Issues. The amount of a general wage increase, if any; the amount of annual sick leave allowance and the maximum amount of unused sick leave an employee may be allowed to accumulate; and the duration of this Memorandum of Understanding shall be determined by impartial arbitration pursuant to applicable provisions of the Charter of the City of Hayward.

The applicable provision of the Charter is Section 809:

"(a) It is hereby declared to be the policy of the City to endeavor to establish and maintain, without labor strife and dissension, wages, hours, and other terms and conditions of employment for the uniformed members of the Fire Department which are fair and competitive with comparable private and public employment. To such purpose, the City hereby recognizes the efficacy of and adopts the

principles of binding arbitration as an equitable and necessary alternative means to arrive at a fair resolution of terms of wages, hours, and other terms and conditions of employment for such employees when the parties have been unable to resolve these questions through negotiations.

(b) The City, through its duly authorized representatives, shall bargain in good faith with the recognized employee organization for the unit composed of all the uniformed employees of the Fire Department as to all matters relating to the wages, hours and terms and conditions of employment of such employees. Unless and until agreement is reached through the bargaining process, or a determination is made through the arbitration procedure hereinafter provided, no existing benefit or employment condition applicable to the said uniformed forces shall be changed or eliminated.

(c) Pursuant to the public policy hereinabove declared, the City or the recognized employee organization for the uniformed members of the Fire Department may, as the result of an impasse in bargaining, refer any unresolved issues to binding arbitration under the provisions of this Section.

(d) When an impasse has been reached, any unresolved dispute or controversy pertaining to wages, hours, or other terms and conditions of employment, or any unresolved dispute or controversy pertaining to the interpretation or application of any negotiated

agreement covering uniformed members of the Fire Department shall be submitted to an impartial arbitrator.

(e) An impasse may be declared by either theCity or the recognized employee organization in the event good faith bargaining or other mutually agreed upon settlement methods concerning the dispute or controversy fail to result in an agreement between the parties. Representatives designated by the City and representatives of the recognized employee organization shall select the arbitrator. In the event that said parties cannot agree upon the selection of an arbitrator within five days from the date of any impasse, then the California State Conciliation Service shall be requested to nominate five (5) persons, all of whom shall be qualified and experienced as labor arbitrators. If the representatives of the recognized employee organization and the City cannot agree on one of the five to act as arbitrator, they shall strike names from the list of said nominees alternately until the name of one nominee remains who shall thereupon become the arbitrator. Every effort shall be made to secure an award from the impartial arbitrator within thirty (30) calendar days after submission of all issues to him.

(f) The arbitration proceedings herein provided shall be governed by Sections 1280, et seq., of the California Code of Civil Procedure. The arbitrator's award shall be submitted in writing and shall be final and binding on all parties. The City and the affected

employee organization shall take whatever action is necessary to carry out and effectuate the award. The expenses of arbitration including the fee for the arbitrator's services, shall be borne equally by the parties. All other expenses whichthe parties may incur individually are to be borne by the party incurring such expenses.

(g) In any arbitration under subsection (c) of this section, the arbitrator is directed to take into consideration the City's purpose and policy to create and maintain wages, hours, and other terms and conditions of employ ment which are fair and competitive with comparable private and public employment and which are responsive to changing conditions and changing costs and standards of living. The arbitrator shall also consider the interest and welfare of the public and the availability and sources of funds to defray the cost of any changes in wages, hours and conditions of employment. The arbitrator shall also consider such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of employment conditions through voluntary collective bargaining, mediation, fact finding, and arbitration between the parties, in the public service or in private employment.

(h) Nothing herein shall be construed to prevent the parties from submitting controversies or disputes to mediation, fact finding or other reasonable method to finally resolve the dispute should the City and the recognized employee organization in the controversy or dispute so agree."

The above Charter Amendment was sponsored by the Union and adopted by the electorate on November 4, 1975. This arbitration was invoked by the Union pursuant to the above Section of the Charter. Hearings were held before me on March 16, 1976, March 18, 1976, April 15, 1976, April 28, 1976, and April 30, 1976 at Hayward, California. Each of the parties introduced relevant oral and documentary evidence, and thereafter post hearing briefs were submitted. The final brief was received by me on July 3, 1976 at which time the matter was submitted for decision.

The parties stipulated the issued to be decided are:

"1. What, if any, percentage wage increases shall be applied uniformly to all classifications in the representation unit during the term of the Memorandum of Understanding?

"2. What shall be the term of the Memorandum of Understanding?

"3. What shall be the amount of annual sick leave allowance to be credited to each employee annually, and what shall be the maximum amount of unused sick leave an employee shall be allowed to accumulate?"

The City contends that "a salary award of 5% (in addition to the 1.14% fringe benefit package already granted by the City in the negotiations preceding this arbitration) for a one-year term with no change in sick leave accrual and accumulation will preserve the City's financial integrity, preserve the proper

balance among the various groups of City employees, and at the same time maintain the Hayward fire fighters' total compensation at a most favorable level in comparison with other comparable jurisdictions".

The Union asks that I make the following award with respect to salaries:

"For the calendar year commencing January 1, 1976, and for each calendar year thereafter during the term of this award, the monthly salaries of the members of the Fire Department shall be an amount computed as follows: The City Manager shall determine the monthly salaries paid to the classification equivalent to that of fire fighter in the Hayward Fire Department in the Fire Departments of the cities of Alameda, Berkeley, Fremont, Oakland, Palo Alto, Redwood City, Richmond, San Jose, San Leandro, San Mateo, and Santa Clara, as of January 1 and July 1. Such monthly salaries shall be totaled, and that amount divided by eleven to obtain the average salary paid to those cities. The average salary paid in those cities as of January 1 shall be the monthly salary as of January 1 paid to the members of the Hayward Fire Department holding the classification of fire fighter, and the average salary as of July 1 shall be the monthly salary as of July 1. The monthly salary of the members of the Hayward Fire Department holding the classifications of apparatus operator, fire inspector, and captain shall be adjusted upward or downward in the same percentage as the monthly salary

of the members of the department holding the classification of fire fighter is adjusted upward or downward through effectuation of the average salary so computed.

"In the event that the monthly salary of the classification equivalent to fire fighter in the Hayward Fire Department has not been fixed in one or more of the cities enumerated above as of January 1 or July 1, then until such time as such monthly salary becomes fixed for such date the monthly salary last fixed by such city shall be used for the purpose of computing the average salary. The monthly salaries of the members of the Hayward Fire Department shall be adjusted retroactively at such time when such monthly salary in such city or cities does become fixed so that the actual average salary for such date may be computed.

The monthly salary which this award would provide for the classification of fire fighter in the Hayward Fire Department as of January 1, 1976, is $1,366, as computed below:

CITY	SALARY AS OF JANUARY 1, 1976
Alameda	$1401 (City Exhibit 9)
Berkeley	1348 (Union Exhibit 8)
Fremont	1330 (City Exhibit 9)
Oakland	1464 (Union Exhibit 8)
Palo Alto	1416 (Union Exhibit 8)

CITY	SALARY AS OF JANUARY 1, 1976
Redwood City	$1303 (City Exhibit 9)
Richmond	1426 (Union Exhibit 8)
San Jose	1355 (Union Exhibit 8)
San Leandro	1370 (City Exhibit 9)
San Mateo	1262 (City Exhibit 51)
Santa Clara	1356 (City Exhibit 9)

TOTAL equals - - - - - $15,031

AVERAGE equals $15,031/11 equals $1366."

The Union's proposed monthly salary of $1366 would result in an increase of 12.15% over the salary received by fire fighters in 1975.

The Union also requests that interest be awarded at the legal rate of 7% on all cash payments due the members of the Hayward Fire Department as a result of any salary increase which I may order, and which might be retroactive. It seeks the same award of interest on any amount which I might order in respect of fringe, or supplemental, benefits.

With regard to sick leave the Union requests that I order the amount of such leave be increased from the present 135 hours per year to 192 hours per year, an increase of 42.2%. It further requests the amount of sick leave which may be accumulated from year to year be changed from 2016 hours to an unlimited amount. The City contends the present policy for sick leave for fire fighters, enumerated

in City of Hayward Administrative Rule 2.4 (revised January 1, 1971), should remain in effect.

The Union requests that the term of my award with respect to salaries be for a period of three (3) years commencing January 1, 1976; but that the sick leave award be for a term of one year commencing January 1, 1976, and renewed from year to year thereafter unless either party gives written notice to the other of a desire to revise or terminate its provisions before November 1, 1976, or November 1st of any year thereafter. The Union also proposes that those matters heretofore agreed upon in the Memorandum of Understanding, dated February 26, 1976, likewise be in effect for one year commencing January 1, 1976. It contends the above proposal will be fair to the City for it will know what it will be expected to pay in the way of salaries for a definite term. The Union argues that an award of salaries for only one year may well result in its being forced into arbitration again within a relatively short time, with the resultant necessity of again proving its case at a considerable cost to the members in professional fees and other expenses.

The City urges me to award a memorandum of understanding covering salaries, sick leave, and all those matters enumerated in the Memorandum of Understanding of February 26, 1976, for a period of one year commencing January 1, 1976. It argues the Union's proposal would lead to a chaotic situation for with only salary figures fixed

there would be no way in which it could predict what its other costs would be over the extended period. The City points to existing statutes and proposed legislation and proposed state constitutional amendments which proscribe certain actions by the City thus making it difficult or impossible for it to raise the funds which might be needed to pay for increased supplemental benefits. The City argues that in the private sector industry is relatively free to shut down or curtail operations in order to reduce expenses; but that this avenue is not open to a municipality which must continue to provide essential services such as fire fighting and fire protection. The City also points to the fact that in the private sector when additional funds are needed to meet greater expenses prices of goods and commodities may be raised; but this is not true in the case of certain governmental entities. The City also argues that it is virtually unheard of in the private sector to have multi-year agreements with wages locked in for the term of the agreement, and supplemental benefits and other working conditions open for negotiations during said term.

In the conduct of the hearing and in reaching my decision I was and am bound by Section 809 (g) of the Hayward City Charter which is set out above. The Union has brought this matter to arbitration because it believes the salaries and other benefits sought herein by its members have fallen far below the benefits received by employees in jurisdictions with which the City of Hayward has

traditionally been compared. Its members do not believe they and other public safety employees should engage in strikes; but they argue this belief and actions taken in accord with it has placed them in a most disadvantageous position in attempting to negotiate with the City. The City believes the offers it has made to the Union, if accepted by the latter, would provide for equitable salaries and supplemental benefits. It also contends the matter before me is one of the gravest matters confronting it for its fiscal stability may be jeopardized if my award is in such an amount as to make it difficult or impossible to provide essential services. The City recognizes this Arbitration is concerned with only one aspect of municipal services, and the costs pertaining thereto; but it contends that my Award will undoubtedly affect its ability to carry out its responsibilities in other areas. It contends excessive arbitration awards in other public jurisdictions have exacerbated those cities' already severe financial problems.

The Union's request with respect to salaries is set out in full above; this formal and specific request is contained in the Union's post hearing brief. This in effect asks for an automatic salary setting formula which existed in the City prior to April, 1971, and which was known as the "Doran Plan". At the hearing the Union indicated that if I did not believe the evidence warranted a return to the "Doran Plan" for setting salaries, I should resort to "something like a cost of living escalator". (The "Doran Plan", named

after the late city manager of Hayward, maintained the Union members' salaries at a level at or above the average of certain specified jurisdictions.) The Union contends, and the evidence showed, the salaries paid its members had fallen below the average paid to fire fighters in the Doran Plan cities.

The Union contended the salary increases it seeks are justified for the following reasons, and it introduced evidence in support of each one:

(a) The salaries paid by the City have failed to keep pace with increases in the cost of living for the San Francisco-Oakland Area, as is shown by the statistics published by the Bureau of Labor Statistics, United States Department of Labor.

(b) The workload of the members has increased over the years; the prerequisites for being employed by the City have been raised; the members are constantly engaged in up to date training programs to increase their skills; the awards received by the Department testify to the excellence of the Department and its personnel.

(c) Fire fighting is a hazardous occupation, and salaries and benefits paid to fire fighters should reflect this fact.

(d) The amount paid by the City to members of its police department should not be determinative of what a proper wage is for fire fighters, for the latter have no voice in setting salaries for the police, and for other compelling reasons.

(e) The new list of "comparison cities" submitted by the City, and the wages and benefits paid by them, are not persuasive; most of these cities have never been used before by either the City or the Union to determine what an equiable salary level should be in the Hayward Fire Department. No good reason has been advanced by the City for the Arbitrator's resorting to the "new cities", rather than examining the conditions in the "Doran Plan" municipalities.

(f) The Union did not voluntarily abandon the Doran Plan approach in an effort to obtain higher supplemental benefits in the past; rather it was presented with a "take it or leave it" offer by the City.

(g) The supplemental benefits received by departments in other jurisdictions are comparable to those received by members of the Union; but salary levels in those other ones are much higher.

(h) Salaries and benefits received by employees in the private sector are higher than those received by members of the Union, while entry requirements in the former are lower.

(i) The City can afford to pay the costs of the salaries the Union seeks.

The City contends:

(a) The Union's request for a return to the Doran Plan for setting salaries should be denied, for it was the Union, in the negotiations in 1971, that decided to depart from the Plan so

that it could obtain higher fringe benefits; that now that those benefits have materially increased the Union should not be able again to return to the Plan in order to obtain higher salaries.

Again in 1974 the Union and the Hayward Police Association, although negotiating separately, placed emphasis on certain fringe benefits in lieu of a higher level of salary which might otherwise have been obtained.

The jurisdictions covered by the Doran Plan are not in the main comparable to the City; rather the seventeen jurisdictions listed by the City are comparable to the City in terms of workload, skill and knowledge levels, and job hazards.

The arguments advanced by the Union for a return to the Doran Plan, (viz., increased skill and knowledge of fire fighters; fire fighting is an exceptionally hazardous occupation; increase in workload) are not relevant because a formula for automatic salary setting does not take these factors into consideration.

(b) In order to arrive at a proper Award for salaries I should look not to salaries alone in other jurisdictions and in the private sector, but to the total compensation of the Union's members, and compare it with that received by employees in the other occupations mentioned above. A failure to do so would result in the Union's members having "the best of all possible worlds", for once they had obtained supplemental benefits higher than others in comparable work they could then ask for higher salaries. The net result

would be greater fringe benefits and comparable salaries.

(c) If the Union's request for a 12.5% salary increase is granted this will produce a 16.88% increase in total compensation. The evidence, offered by the City Manager, shows that an increase in total compensation costs in excess of 7.5% to 8.5% of payroll would exceed the City's "capacity to handle", and would of necessity force the City to re-allocate its monies and reduce the level of services provided in the City.

(d) A return to the Doran Plan, or to any method by which salaries are set automatically, should not be ordered because it would lead to a situation where costs are unpredictable. The City must know in advance what its costs are to be so they may be included in the budget. Precise cost figures must be available because of "SB 90", enacted in 1972, which precludes the City from increasing its tax rate.

The use of the Consumer Price Index to set salaries, an alternative suggested by the Union, is not proper or appropriate for the reasons set out above; and because the CPI does not serve as a true index of the "cost of living". The U.S. Government itself has recognized the latter fact, and for that reason this type of formula is extremely uncommon in collective bargaining agreements.

(e) The workload of the Union members has not increased in recent years; in fact work schedules over the past 15 years have been reduced from 67 hours to 56 hours, and the number of fire

fighters has increased from 85 to 121. The basic duties of fire fighters have not changed appreciably, and the improvement in training programs show a willingness on the part of the City to introduce and pay for time, personnel and equipment to keep abreast with fire service apparatus and equipment. Participation by personnel in the improved training programs has not caused the members to spend more working time; the records show there is more than ample time for training when not responding to alarms.

(f) The Union's attempt to show that fire fighting is a most hazardous occupation failed; on the contrary the City's evidence showed that fire fighting in California is considerably less hazardous than police work, and less hazardous than a significant number of private sector occupations. Fire fighting in the City of Hayward is not a particularly hazardous occupation as is shown by the history of the Department.

(g) The increase in tax revenues over the recent past few years does not mean the City has the ability to pay the excessive salaries requested by the Union. In fact, in the words of the City Manager "we have been in a position where we have been, in the last three years, simply fortunate to maintain existing levels of services and manpower in the face of that kind of inflation. . .".

(h) The relationship between police and fire duties mandate a higher degree of compensation for police officers as opposed to fire fighters; this is shown by the experience of public jurisdictions

throughout the United States. This policy has been adopted by the City and should continue. The highly desirous work schedule enjoyed by fire fighters is one of the significant factors which led to this policy in the City; other incidents of the fire fighters' work, vis-a-vis the police officers, justify the differential. If a 5% salary increase is granted to the Union the traditional balance will be maintained in the City.

(i) At the present level of salaries and supplemental benefits the City has had no difficulty in recruiting and retaining fire fighters; the opposite is true, for the City has been inundated with applications for the position of fire fighter.

I believe a return to the Doran Plan is not warranted in view of all the evidence; nor do I deem it proper to utilize any other type of approach which calls for automatic salary raises. Had the protagonists of this view wished to attain this result the then proposed ordinance could have been drafted to accomplish this end. But the language of the ordinance under which I am to make findings and an Award uses other guide lines, and I shall follow them. The City is within its rights in deciding against being locked into financial obligations as a result of actions taken by other jurisdictions. This is not to say however that resort should not be had by an arbitrator to the salaries and benefits paid elsewhere; the ordinance reflects this approach.

On the basis of all the evidence I cannot find the Union, or its

predecessors, voluntarily abandoned the Doran Plan so that they might gain increased supplemental benefits, and once having achieved them seek the "advantage" of higher salaries. This may have been its motive; but the evidence does not show it to have been.

Though the supplemental benefits available to the Union members are greater than some comparable departments the disparity is not so great as to make a 5% increase in their salary a proper one.

On the basis of all the evidence, oral and documentary, I conclude the fire fighters should receive a salary increase of 9% effective January 1, 1976 and continuing up and until December 31, 1976 and that effective January 1, 1977 and until December 31, 1977 a further increase of 7% should be in effect. This award is retroactive to January 1, 1976, and the City is directed to pay to the members 7% interest on the amount of the pay increase so ordered from January 1, 1976 to the date when the City commences paying the new salaries.

The Union, as mentioned above, has requested that my Award increase the sick leave for fire fighters from the present 135 hours to 192 hours per year; and that the amount of sick leave which can be accrued from year to year be changed from the present 2016 hours to an unlimited amount.

The Union points out that of the eleven "Doran Plan" cities ten have sick leave programs which can be compared with the City's; that the average leave for these cities is 177.2 hours. It showed that of the above ten, six place no limit on the amount of such leave which may be accrued by their fire fighters, one grants 2160

hours, and three other cities an amount lesser than that afforded by the City. On the basis of the above the Union contends its members do not receive fair treatment, nor is the City competitive with those benefits provided in other comparable public employment.

The Union points to the history of one of its members, Gerald Rafford, who would have benefitted had the Union's present contention been the rule; and who would have sustained serious economic injury had not other fire fighters assisted him. It also introduced evidence pertaining to the problems faced by another of its members, one Guy Sachs.

The Union argues the hazardous nature of the fire fighter's work, and the fatigue brought on by inability at times to obtain proper rest, make him or her more susceptible to illness, with the consequest need for special consideration in the matter of sick leave. It argues the special presumptions in the law, which are favorable to fire fighters, come into effect only when the injury or illness is so severe as to be disabling; and thus are irrelevant to the issue posed by its request.

The City contends the present sick leave benefits held by the members of the Union are fair and reasonable as shown by the history of the employees. It points out that though thirty-one City employees, excluding fire fighters, exhausted their sick leave during the period January 1, 1970 through December 31, 1975, no member of the Union exhausted his sick leave allowance during the same period of time. With regard to Mr. Sachs, mentioned above, the City records

showed he did not exhuast his sick leave benefits, presumably because other fire fighters, on an informal basis, traded some shifts with him. Mr. Sachs began work with the City on June 15, 1970, and at the time of his disability he had been employed by the City for only seven months, and therefore had not as of that time accrued a full year's sick leave coverage. With regard to Mr. Rafford, the testimony showed he was off duty due to illness from January 27, 1974 through January 2, 1975. Subsequent illnesses in 1975 and 1976 were also suffered by Mr. Rafford; but at no time did he exhaust his sick leave balances. Apparently Mr. Rafford did not suffer any loss of income because he was able to utilize a combination of sick leave, and vacation time, and to trade shifts with other members of the Union.

The City points to the fact that the Workers' Compensation plan covers on the job accidents and/or illnesses; and an employee is entitled to full salary for one year per incident. It also emphasizes the added benefits Union members enjoy under the law of the State of California, viz., that those employees who are afflicted with heart disease, pneumonia or hernias, no matter where or when incurred, are presumed to have suffered a job-related injury or illness. Such injuries or illnesses sustained by other City employees who are not public safety employees are not accorded the same benefits. The City also argues that the fact members of the Union are scheduled to report for duty 121 times in a calendar year,

whereas police officers are scheduled for 209 reporting times, and miscellaneous employees 226 times, indicates Union members probably have less need to utilize sick leave than other City employees.

The City contends sick leave programs were not inaugurated nor maintained to serve as a substitute for a guaranteed annual wage; but rather to mitigate the impact of loss of income due to illness or injury. It also argues that the City's program is consistent with that of other comparable public jurisdictions, and far exceeds that afforded to employees in the private sector.

The City contends the second aspect of the Union's request in re sick leave, viz., unlimited accrual of sick leave, would increase the City's cost under the prevailing policy which provides for the reimbursement of employees for a portion of their unused sick leave upon termination of employment under conditions of satisfactory service. It contends if I award additional sick leave accumulation this will of necessity increase the City's liability for pay off of unused but accumulated sick leave upon termination; and in the event my Award is favorable to the Union in this regard it should be coupled with a reduction in, or elimination of, the City's formula for paying off unused sick leave.

The history of sick leave in the Hayward Fire Department indicates the amount of such leave available has been sufficient to provide the employees with the protection required. Though there may arise isolated incidents in the future where an employee, a fire fighter, may require more than I award, the present formula, on the basis

of all the evidence, is fair and adequate. The amount of the leave, though not identical with that provided in other jurisdictions, is comparable. It certainly exceeds the number of days to which employees in the private sector are entitled. I therefore decide the formula for computing sick leave shall remain unchanged.

I deny the Union's request that the amount of sick leave which may be accrued by a fire fighter be increased to an unlimited amount. Here again the present entitlement is comparable to that enjoyed by fire fighters in other jurisdictions. The recent past history shows the present formula in the main has been sufficient.

With respect to the award I make for salaries, sick leave benefits, and all those matters covered in the Memorandum of Understanding of February 26, 1976 I conclude the term should be from January 1, 1976 to and including December 31, 1977, or a period of two years. Compelling and meritorious arguments have been advanced by both sides for their respective positions as to how long the term should be; they have been detailed above. It seems to me a two year period is a reasonable and proper one. Were I to grant the City's request for a one year term it would mean that within a little over five (5) months from the date of this Opinion and Award the parties would have had to agree to a new contract, or face the prospect of another arbitration if either side invoked this process. This does not seem satisfactory for either party--the City could not properly plan for the future; the Union and the City would again be forced to ascertain and marshal facts needed for negotiations

and possible arbitration. This would result in the expenditure of countless hours, and considerable expense to both parties. Obviously this result is not desirable. I recognize the two year term will present uncertainties and difficulties for both sides. The future salaries and benefits obtained by others in comparable work, and the possible and unknown increase in the cost of living may cause the Union members to believe they are not being treated equitably. The City too may have problems in anticipating its costs and in ascertaining how these costs may be met out of revenue. But on balance I believe the two year term I award is fair to both sides, and that the City will have ample time in which to plan how it shall meet its obligations to the members of the Union.

AWARD

1. The fire fighters are awarded a salary increase of 9% effective January 1, 1976, said new salary to remain in effect up to and including December 31, 1976.

2. Effective January 1, 1977 the fire fighters shall receive a further increase of 7%, said new salary to remain in effect up to and including December 31, 1977.

3. The City shall pay to the fire fighters 7% interest on the amount of the pay increase beginning January 1, 1976 to the date when the City commences paying the new salaries.

4. The formula for computing sick leave for fire fighters shall remain unchanged.

5. The amount of sick leave which may be accrued by a fire fighter shall remain at 135 hours.

6. The term for the matters covered in the Memorandum of Feburary 26, 1976 and for the matters specifically referred to and decided above shall be from January 1, 1976 to and including December 31, 1977.

July 13, 1976

Francis Richard Walsh,
Arbitrator
28 Spring Road
Kentfield, California 94904

PETITION FOR SUBMISSION TO ELECTORS OF PROPOSED AMENDMENT TO THE CHARTER OF THE CITY OF HAYWARD

TO THE CITY COUNCIL OF THE CITY OF HAYWARD:

We, the undersigned, registered and qualified electors of the State of California, residents of the City of Hayward, County of Alameda, pursuant to Section 3 of Article XI of the Constitution of this State and Chapter 3 of Division 2 of Title 4, commencing at Section 34450 of the Government Code, present to the City Council of the City of Hayward this petition and request that the following proposed amendment to the Charter of the City of Hayward be submitted to the registered and qualified electors of the City of Hayward for their adoption or rejection at an election on a date to be determined by the Hayward City Council.

The proposed Charter Amendment reads as follows:

Section 809. ARBITRATION FOR FIRE DEPARTMENT EMPLOYEES.

(a) It is hereby declared to be the policy of the City to endeavor to establish and maintain, without labor strife and dissension, wages, hours, and other terms and conditions of employment for the uniformed members of the Fire Department which are fair and competitive with comparable private and public employment. To such purpose, the City hereby recognizes the efficacy of and adopts the principles of binding arbitration

as an equitable and necessary alternative means to arrive at a fair resolution of terms of wages, hours, and other terms and conditions of employment for such employees when the parties have been unable to resolve these questions through negotiations.

(b) The City, through its duly authorized representatives, shall bargain in good faith with the recognized employee organization for the unit composed of all the uniformed employees of the Fire Department as to all matters relating to the wages, hours and terms and conditions of employment of such employees. Unless and until agreement is reached through the bargaining process, or a determination is made through the arbitration procedure hereinafter provided, no existing benefit or employment condition applicable to the said uniformed forces shall be changed or eliminated.

(c) Pursuant to the public policy hereinabove declared, the City or the recognized employee organization for the uniformed members of the Fire Department may, as the result of an impasse in bargaining, refer any unresolved issues to binding arbitration under the provisions of this Section.

(d) When an impasse has been reached, any unresolved dispute or controversy pertaining to wages, hours, or other terms and conditions of employment, or any unresolved dispute or controversy pertaining to the interpretation or application of any negotiated

agreement covering uniformed members of the Fire Department shall be submitted to an impartial arbitrator.

(e) An impasse may be declared by either the City or the recognized employee organization in the event of good faith bargaining or other mutually agreed upon settlement methods concerning the dispute or controversy fail to result in an agreement between the parties. Representatives designated by the City and representatives of the recognized employee organization shall select the arbitrator. In the event that said parties cannot agree upon the selection of an arbitrator within five days from the date of any impasse, then the California State Conciliation Service shall be requested to nominate five (5) persons, all of whom shall be qualified and experienced as labor arbitrators. If the representatives of the recognized employee organization and the City cannot agree on one of the five to act as arbitrator, they shall strike names from the list of said nominees alternately until the name of one nominee remains who shall thereupon become the arbitrator. Every effort shall be made to secure an award from the impartial arbitrator within thirty (30)calendar days after submission of all issues to him.

(f) The arbitration proceedings herein provided shall be governed by Section 1280, et seq., of the California Code of Civil Procedure. The arbitrator's award shall be submitted in writing and shall be final and binding on all parties. The City

and the affected employee organization shall take whatever action is necessary to carry out and effectuate the award. The expenses of arbitration, including the fee for the arbitrator's services, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

(g) In any arbitration under subsection (c) of this section, the arbitrator is directed to take into consideration the City's purpose and policy to create and maintain wages, hours, and other terms and conditions of employment which are fair and competitive with comparable private and public employment and which are responsive to changing conditions and changing costs and standards of living. The arbitrator shall also consider the interest and welfare of the public and the availability and sources of funds to defray the cost of any changes in wages, hours, and conditions of employment. The arbitrator shall also consider such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of employment conditions through voluntary collective bargaining, mediation, fact finding, and arbitration between the parties, in the public service or in private employment.

(h) Nothing herein shall be construed to prevent the parties from submitting controversies or disputes to mediation, fact finding or other reasonable method to finally resolve the dispute should the City and the recognized employee organization in the controversy or dispute so agree.

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TAB E

NEW MODES AND PROCEDURES IN INTEREST IMPASSE RESOLUTION

The use of factfinding and, more particularly, interest arbitration as alternatives to the strike in the public sector are issues which have evoked a high degree of controversy. While there are a number of experiments which have been engaged in by public agencies across the nation, observers are divided as to whether or not the stated purpose of these experiments has been attained. Even more important, serious questions as to the basic propriety of public sector interest arbitration have been raised by various representatives of both management and labor: Should workers under any condition ever surrender the right to strike? Is the concept of binding interest arbitration in the public sector compatible with the institutions of democracy and representative government?

This section contains a number of articles by nationally known authorities in labor relations who comment on these questions and experiences. In addition, the reader will find a position paper of the California League of Cities and the County Supervisors Association of California, the impasse procedures proposed in 1973 by the California Assembly Advisory Council on Public Employee Relations, and other materials as well as studies prepared especially for this manual.

The purpose of including these materials is twofold. First, it is hoped that they will be of direct assistance to practitioners in devising new techniques in interest impasse resolution within the existing framework of California's public sector labor legislation. Second--but no less important--it is hoped that the material will be of value to practitioners and their constituencies as they participate in the continuing discussions and legislative efforts regarding these subjects at both the state and local levels.

APPENDIX TO TAB E

1. Compulsory Binding Arbitration

2. Contract Negotiation Arbitration in the Public Sector

3. Final-Offer Arbitration: "Sudden Death" in Eugene

4. Bargaining Ordinance of Eugene, Ore., Resolving Impasses by Impartial Panel's Choice of Either Party's Final Offer

5. Combining Mediation and Arbitration

6. Mediation-Arbitration From the Employer's Standpoint.

7. Mediation-Arbitration: A Trade Union View

8. Political Aspects of Public Sector Interest Arbitration

9. Final Report of the Assembly Advisory Council on Public Employee Relations

10. San Bernardino Experiment in Interest Impasse Resolution-A Case Study

11. San Bernardino Ordinance

12. Chart of Impasse Procedure in State Legislation

13. Experimental Negotiating Agreement Adopted in Steel Industry to Avoid Work Stoppages

COMPULSORY BINDING ARBITRATION*

Police and fire strikes in San Francisco and Berkeley have focused new attention on "compulsory binding arbitration" as the terminal step in collective bargaining for essential services in the public sector. The League of California Cities and the County Supervisors Association of California again voice their strong opposition to such a system.

Compulsory binding arbitration removes the power to set salaries and working conditions for their employees from the hands of the elected representatives. Furthermore, it removes from those elected representatives the responsibility and ability to establish priorities and to set tax rates for their jurisdictions. The reason, of course, is that the arbitrator makes decisions regarding the employee costs to the agency, costs which frequently run 70% of the agency's budget and higher. Under compulsory binding arbitration, it is the arbitrator who has the final word and the arbitrator is not even required to live in the jurisdiction, let alone be responsive to the taxpayers and voters of that city or county.

The proponents of arbitration to settle new contract terms and conditions claim that it would be a "last resort" replacing the strike. In fact, where compulsory binding arbitration has

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*This article was originally published as a position paper by the League of California Cities and the County Supervisors Association of California. It is reprinted here with the permission of the two organizations in the interest of promoting discussion on this important topic.

been passed into law, experience shows that the unions frequently disregard the negotiating process -- which is supposed to precede any impasse resolution mechanisms -- and request the immediate imposition of arbitration. Where they have gone through negotiations and mediation processes prior to arbitration, in many cases the union's actions have been only perfunctory and not at all "in good faith."

Under compulsory binding arbitration, wages and fringe benefits will not be the only items to be decided by the arbitrator. Work rules, the number of firemen on a ladder truck, and other management-type decisions have been subjects of arbitration awards.

Although covered by a California law that does not allow the right to strike in the case of policemen, policeman strike. Although covered by a state law which definitely outlaws the right to strike for firemen, firemen strike. When served with court orders from judges demanding their return to work, police officers and firefighters continue to strike. It becomes obvious, therefore, when faced with awards under compulsory binding arbitration with which they are unhappy, police officers and firefighters will again illegally strike.

The Costs of Arbitration

As a means of settling collective bargaining disputes, arbitration has been shown to be more expensive in Michigan, Pennsylvania, and other states in which it exists than the costs incurred by a city or county through the negotiations process. The awards generally are higher than the city or county would have normally negotiated and the cost of the arbtration itself has run extremely high.

Earlier this year, the city of Oakland had a compulsory binding arbitration decided against it which cost between two and

one-half and three million dollars to implement. That arbitration dealt only with the Oakland firefighters. The ripple effects of that decision are still being felt, not only in the increased dollar costs of that award, but in the corresponding salary demands and agreements reached with other segments of the city's employee population. In that case, the arbitrator not only increased wages of firemen 3% beyond that negotiated with the police in Oakland, but he alone decided that the City Council was wrong in eliminating 36 firefighter positions. He not only restored those 36, but through his decision he caused the creation of an additional 66 positions.

Arbitration Does Not End Strikes

In most rhetoric, the proponents of binding arbitration claim that it is a substitute for the strike by public safety employees. In actuality it is not. The state of Michigan, after adopting compulsory binding arbitration for their police and fire employees in 1969, experienced over twice as many police and fire strikes the following year.[1] Binding arbitration in that state and elsewhere has not eliminated strikes. For twenty years, the policemen and firemen in the provinces of Canada have been under compulsory binding arbitration in lieu of the right to strike. In 1969, both the policemen and firemen in the city of Montreal went on strike in response to an unfavorable arbitration award. Again, in 1974, the Montreal firemen struck because they didn't believe that the arbitrator's award was high enough.

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1) Note: For further discussion of this point, see "Contract Negotiation in the Public Sector" by Michigan PERB Director Robert Howlett, also included in the appendix of this manual. Also see the more recent data on the Michigan, Wisconsin and Pennsylvania experiences with arbitration included in Final-Offer Arbitration by James Stern et al, Lexington Books, D.C. Health Co., Lexington, Massachusetts.

In essence, as long as the awards are to the liking of the union, they will accept the awards and will not go on strike. But to the extent they are unhappy with the awards, the unions will not hesitate to strike any more than they hesitate to strike when such a strike is an illegal act, as it is now in California.

Are Public Employees Underpaid?

Amid the cries for another solution, should be the question, "Do public employees really need more power?" The fact is that local firefighters and police officers in the state of California are among the highest paid, if not the highest paid in the nation. The average wage for persons in law enforcement and fire protection in nearly any city is well above the average of the other employees of that city. Added to these high salaries are tremendous pension and other benefits which cost enormous sums to the taxpayers in municipalities and counties employing those public safety members.

A recent survey showed that deputy sheriffs in ten major counties in California have had salary increases between the years 1964 and 1974 ranging from 77.95% to 121.23%, for an average of 88.13%. The cost of living during that time, measured by the consumer price index, rose only 53.6%, for a difference of 24.35 — 67.63% to the advantage of those public safety employees. These statistics are not unusual and could be easily duplicated through a comparison of any police officer or firefighter's wage against cost of living data in most municipalities and counties in this state.

The fact that the compensation for these positions is high is demonstrated by the numbers of applicants for jobs in the police and fire ranks, when they become open. No longer is there any need to scour the country to find someone willing to take a police officer's job. There are hundreds of people who will apply in most areas when those jobs become available. It is not unusual to have thousands of people applying for two or three vacancies for the position of firefighter.

Who Will Benefit From Compulsory Arbitration?

One has only to look at the sources which are crying for compulsory binding arbitration to find who compulsory binding arbitration is going to benefit most. It is the police and fire unions and their members who demand such a process. Unfortunately that process will not guarantee strike-free, uninterrupted public safety services for the cities and counties of California.

It might be well to note that if the police and fire unions thought there was a chance of getting less from arbitration than from straight negotiations, they would not be pushing for it.

In Michigan, during the last year, 31 cases were reported in which the arbitrator had to make a choice from the "last best offer" of the City or the Union. Out of those 31 cases, the arbitrator chose the union's position 21 times, and found for the employer on only 10 occasions. But, it was up to the elected officials to determine from whence the money must come

in order to comply with the arbitrators' awards. In many cases it has been through cutbacks in other services or through elimination of positions within the safety services themselves.

The principle of representative government is that the people elect their representatives to determine the kinds of services and the level of services to be provided within their community. With the mandating of major costs through arbitration, those representatives no longer have a choice of service priorities and level of services to be rendered. Frequently, the public agency is at the maximum of its tax limitations. Taxpayers deserve to have their priorities equitably determined by those people they elect for that purpose. Taxpayers deserve to know that their tax rates are not being increased on the basis of a decision by an unelected third party whose responsibility to that community is, at best, a tenuous one.

Contract Negotiation Arbitration in the Public Sector

Robert G. Howlett

I. Introduction: The Growth of Collective Bargaining

Arbitration of the terms of collective bargaining agreements is vigorously opposed by employers and unions. Why is there this opposition to a judicial procedure for resolution of bargaining disputes when, in our democracy, most issues of disagreement are resolved through court or administrative processes? The history of collective bargaining may provide the answer.

Collective bargaining had its genesis in the legal, economic and sociological fact that for centuries employers ordered and employees obeyed. At common law, where the ownership of private property was perhaps the most revered of society's values, human labor was not "property" and employees were prohibited under threat of criminal penalties from taking any concerted action to change their working conditions.[1] Employers, for all their Sunday acknowledgement of the Puritan ethic and the sanctity of labor, did not understand that good morals and good economics required the establishment of superior working conditions for employees.

Judges, both federal and state, enjoined unions and employees when they sought to improve their rank in the hierarchy of American industrial life. When some courts ultimately recognized the legality of employees' concerted activities,[2] employers were not moved.

Employees learned that the only way to secure higher pay and better working conditions from employers was through economic power, and sometimes more than economic power. It took some "bloody doing" before employers—and courts and legislatures—recognized any right of employees to participate in regulating working conditions. It took the Molly Maguires, the Pullman strike, the Battle of Homestead, Pennsylvania, the National Railroad Strikes of 1877, the Danbury-Hatters case, the Knights of Labor, the IWW, the San Francisco Preparedness Day bombing, the Memorial Day Massacre, sit-down strikes and the Battle of the Overpass.

Without the use of collective power by people who worked in factories and mines and on the railroads, there would have been no judicial or legislative recognition of collective bargaining; no Clayton or Norris-LaGuardia Act; no Workmen's Compensation; no statutes on minimum wages, safety and health and child labor; and especially no National Labor Relations Act.[3] Collective bargaining was born of warfare and remains, in theory, a struggle for power between two equal giants who stalemate each other into equity.[4] It

[1]Commonwealth v. Pullis (Philadelphia Cordwainers' Case 1806); 3 J. Commons & E. Gilmore, A Documentary History of American Industrial Society 59-248 (1910); C. Gregory & H. Katz, Labor Law: Cases, Materials & Comments 1 (1948).

[2]Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842).

[3]Our unions did not accept the European concept that employees' economic benefits could be gained through the political process. For the influence of European labor ideas on American labor, *see* S. Perlman, A Theory of the Labor Movement (1928).

[4]I do not overlook the cooperative theory of collective bargaining—that through cooperation there will be economic growth and more economic and social gains for all. Even those who espouse this concept recognize that under the collective bargaining process, there is always the threat of strike or lockout. I also do not overlook the fact that the contestants are not always equal.

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is trial by battle, with the threats of strike and lockout as persuasive weapons.[5]

Collective bargaining *has been* a significant factor, perhaps the most significant factor, in the rise in the American standard of living. Indeed, without collective bargaining, and the need of the boss to stay ahead of the union, much of our technology and automation would have been undeveloped and unused.[6]

II. Time for a Change?

As collective bargaining has been a highly successful means of extracting "more" from recalcitrant employers, is it surprising that employees do not want a substitute? And is it surprising that employers, who historically exercised complete economic power, are not disposed toward decisions by "outsiders"?

Now, labor has captured an influential role in both the economy and the political arena and employers do recognize, albeit some reluctantly, that the determination of working conditions is not their sole prerogative. Collective bargaining has become part of the establishment—and, to some, a religion.

It is time to question whether continued determination of working conditions through trial by battle is in the public interest for the last quarter of the twentieth century. The increasing complexity of our society has caused not only work stoppages, but collective bargaining per se, to have a profound effect on the nation's economy and on the lives of people. We already use a judicial procedure in labor relations to determine representation issues and the validity of unfair labor practice charges.[7] It is now time to examine judicial processes for resolving collective bargaining disputes as we resolve every other domestic, economic and human relationship in our nation, and to urge the logic of extending those processes to the determination of working conditions.

There is now almost universal agreement that grievances should be settled through arbitration rather than by strikes and lockout.[8] Will the public, inconvenienced and endangered by strikes, insist that contract terms also be decided by the legislature or judiciary?

There is indication that the answer may be "yes" and a growing recognition that voluntary arbitration of contract terms is an intelligent way to resolve an impasse. This is often referred to as interest (or interests) arbitration. It is a method to determine the substantive context of collective bargaining agreements as distinguished from grievance arbitration which is, "[a] voluntary means of settling grievances which arise from the interpretation or application of an existing contract."[9] Three years ago, AFL-CIO President George Meany said:

> [What] would be wrong with the union signing an agreement for, let's say two years and then saying that at the end of two years all the basic conditions of this agreement will prevail except wages and that wages shall be the subject of collective bargaining? And, if, after a certain length of time, there is no agreement between the parties, the American Arbitration Association will make a final and binding decision. . . . You see this is not compulsory arbitration because if the two parties come to the table and agree in advance that they are going to do something, that is not compulsory. . . . [W]e are getting more and more to the point where we have a well-established industry and a well-established union, [and] . . . a strike doesn't make sense.[10]

I am sure that five years before, George Meany would

[5]We are not far removed from "trial by battle." As late as 1774, the English Government sought to "improve the administration of justice" in Massachusetts by abolishing trial by battle on appeals for murder (a private person brought a murder charge against another). This attempt aroused opposition "from those who . . . regard[ed] trial by battle as a great pillar of the constitution." The attempt to abolish trial by battle was withdrawn. Trial by battle on an appeal of murder was not abolished in England until 1819. T. Plucknett, A Concise History of the Common Law 117, 118 (5th ed. 1956).

[6]D. Bok & J. Dunlop, Labor and the American Community 226 (1970).

[7]I recognize that most contracts are negotiated by promisors and promisees, and that they "go to court" only when there is a breakdown in the contractual relationship. But "contracts" are forced on parties when the public interest requires it; *e.g.*, Workmen's Compensation, Unemployment Compensation, minimum wages and premium pay after 40 hours in a work week, and—soon, apparently—some decreed vesting in private pension plans.

[8]The Bureau of National Affairs reports that 95% of contracts in manufacturing, and 97% of contracts in non-manufacturing, provide for arbitration of grievances. Collective Bargaining—Negotiations of Contracts, ¶ 51.6 Professor I. Sharfman summarizes: "In disputes arising out of differing interpretations or applications of existing agreements, the case for resort to voluntary arbitration appears to be clear and conclusive." *Free Enterprise, Collective Bargaining, and the Arbitration Expedient*, Proceedings of Fourth Annual Meeting, Industrial Relations Research Association 140, 147 (1951).

[9]Roberts' Dictionary of Industrial Relations (rev. ed. 1971).

[10]BNA Labor Relations Year Book—1970, at 271, 276. Jerry Wurf, one of the militant leaders of public unionism, while vigorously opposed to legislated arbitration, has recognized voluntary arbitration as an intelligent method of resolving public sector bargaining impasses. *See* Wurf, *The Use of Fact-finding in Public Employee Dispute Settlement* in BNA Arbitration and Social Change: Proceedings of the Twenty-second Annual Meeting, National Academy of Arbitrators 95, 104 (1969). The "pros" and "cons" of interest arbitration in the private sector, with supporting opinions, are listed in H. Roberts, Compulsory Arbitration: Panacea or Millstone (1967).

have viewed voluntary arbitration as a derogation of the right of free men.

This historical discussion, while related to the private sector, is applicable as well to the public sector, which followed private sector experience in the main, although public employees were spared violent episodes. Their battles were fought primarily in the legislatures–first in Wisconsin, then in Connecticut, Massachusetts and Michigan.[11] There the state statutes borrowed from the National Labor Relations Act and benefitted from experiences under it. Thus, public employees were afforded the right to engage in collective activities. Employers and labor organizations were required to bargain in good faith. Procedures for determining representation were established, a number of statutes adopting NLRA language. Unfair or improper labor practices were specified and administration was assigned to existing state agencies or to new agencies created for the purpose.

As Arvid Anderson has summarized: "During the past decade there has been an extension of the private sector bargaining process to the public sector with some modifications to meet the needs of the public service."[12] And Lee Shaw views "collective bargaining in the public sector [as] in many respects at the same state of development as collective bargaining was in the private sector in the late 1930's."[13]

That the similarity will continue is evidenced by recent studies and reports which recommend that the public sector adopt procedures similar to the private sector, although the Report of the Advisory Commission on Intergovernmental Relations issued in 1969 recommends, "meet and confer in good faith" as more appropriate than collective bargaining "in the light of present working conditions in state and local employment."[14] The Twentieth Century Fund Task Force on Labor Disputes in Public Employment more realistically recommends that "it is the responsibility of both the union and the employer to meet and negotiate in 'good faith', as the labor statute in the private sector requires."[15]

III. Growth of Voluntary Arbitration in the Public Sector

Others, however, stress the differences between the public and private sectors.[16] For example, until Hawaii and Pennsylvania adopted statutes authorizing a limited right to strike, public employees were prohibited from striking by statute or court decisions.[17] This prohibition of strikes was due to the opinion, and in some areas the fact, that public sector disputes have a greater impact on the public safety and health than private sector disputes.[18]

Because of the strike prohibition, a number of the state statutes provide affirmatively for impasse resolving procedures. The first line of impasse resolution is mediation, which is assigned to an existing agency or to persons selected on an ad hoc basis.[19]

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[11]Executive Order No. 10,988, 3 C.F.R. 208 (1962), issued by President Kennedy in January, 1962, was a significant factor in promoting organizational activities by public employees throughout the country, and lobbying to secure enactment of state legislation. Executive Order 10,988 made bargaining by public employers and public employees "respectable."

[12]Anderson, *The Structure of Public Sector Bargaining*, in Public Workers & Public Unions 37, 52 (S. Zagoria ed. 1972). For a recent compilation of the laws of the several states and of the federal government, *see* U.S. Dep't of Labor, Dispute Settlement in the Public Sectors The-State-of-the-Art (1972).

[13]Shaw, *The Development of State and Federal Labor Laws*, in Public Workers & Public Unions 20, 35 (S. Zagoria ed. 1972).

[14]Recommendation No. 5, at 99, in Report, *published in* BNA Gov't Emp. Rel. Rep. R.F. § 51-101 at 101,108.

[15]Twentieth-Century Fund, Inc., Pickets at City Hall: Report and Recommendation of the Twentieth Century Fund Task Force on Labor Disputes in the Public Sector 13 (1970). *See also* Report of the Task Force on State and Local Gov't Labor Relations (1967) (prepared for the 1967 National Governors' Conference); Report and Recommendations: Governors' Commission to Revise the Public Employer Law of Pennsylvania (1968); Governor's New York Committee on Public Employee Relations: Final Report (1966); Report and Recommendations of the Illinois Governor's Advisory Commission on Labor Management Policy for Public Employees (1967); Commission on Labor Laws, State of Illinois, Collective Bargaining in the Public Sector, pt. 2 (1971).

[16]On the similarities and differences, *see* Howlett, *The Right to Strike in the Public Sector*, 53 Chi. B. Rec. 108 (1971). *See also* Herman, *Strikes By Public Employees: The Search for "Right Principles,"* 53 Chi. B. Rec. 57 (1971).

Even those who do stress differences also recognize that there are similarities. Thus, Professor George H. Hildebrand says:

"A key question is to what extent are the practices of the private sector transferable to the public sector. The short answer is that because the public sector is *sui generis*, there are barriers to full-scale importation of private bargaining institutions; although all elements essential to collective bargaining can be used." *The Public Sector*, in Frontiers of Collective Bargaining 25 (Dunlop and Chamberlain, eds, 1967).

[17]A Montana statute authorizes strikes by nurses under limited circumstances, Mont. Rev. Codes Ann. § 41-2209 (Supp. 1971); and the Vermont statute, by indirection, appears to recognize that there is a right to strike, Vt. Stat. Ann. § 21-1704 (Supp. 1972).

[18]The differences are often overstated by theoretical observers. Many private enterprises have a greater impact on the public than many public enterprises. Collective bargaining agreements between General Motors and the U.A.W. are far more significant than many Congressional enactments.

[19]Many states specify fact-finding as the terminal point in the resolution of impasses. Simkin, *Fact-finding: Its Values and Limitations*, in BNA Proceedings of the Twenty-third Annual Meeting, National Academy of Arbitrators 165 (1970).

While tentative approaches toward interest arbitration have also been made in the private sector,[20] the concept that voluntary arbitration is a viable means to resolve contract terms is developing more rapidly in the public sector.[21] Several states have enacted statutes affirmatively authorizing, but not requiring, municipalities and other public employers to submit contract disputes to binding arbitration.[22] I have found no case authorizing the submission of a collective bargaining dispute to binding arbitration, absent a state statute. But the question arises whether a municipal legislature has the power to submit such disputes to binding arbitration. It might proceed on the theory that "fair latitude should be allowed by the court[s] to the legislative body to generate new and imaginative mechanisms addressed to municipal problems [for] novelty is no argument against constitutionality."[23]

IV. The Pros and Cons of Legislated Arbitration

Much has been said in recent years on the pros and cons of legislated arbitration. A prime controversy arises over binding arbitration imposed by legislative enactment, generally called "compulsory arbitration." The word "compulsory" is unfortunate; when that word appears to describe legislated arbitration, the reasoning process of many city officials and union representatives disappears.

We pay taxes decreed by legislatures, but do not refer to "compulsory" taxes. Employers do not describe workmen's compensation as "compulsory" workmen's compensation, but it is. The recent Occupational Safety and Health Act is about as "compulsory" as one can get, but it is not so designated. "Compulsory arbitration" is simply a process of dispute settlement directed by a legislature.

The two basic arguments in favor of legislated arbitration are listed by the late Professor Harold S. Roberts: (1) it protects the paramount needs of the public and (2) it substitutes judicial procedures for jungle warfare.[24] Arguments against legislated arbitration are: (1) it is an unconstitutional delegation of legislated power; (2) it damages collective bargaining; (3) it is not effective (or will not work) because there is no practical way to enforce compliance; and (4) it may result in administered wages.[25]

A. *The Constitutional Issue*

The constitutional objection has been answered in five states: Michigan,[26] Nebraska, Pennsylvania, Rhode

[20]For many years, the transit industry and the unions representing its employees settled contract disputes through arbitration. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Ind. & Lab. Rel. Rev. 95 (1971); Roberts, *Compulsory Arbitration of Labor Disputes in Public Utilities*, 1 Lab. L. J. 694 (1950); Young, *Arbitration of Terms for New Labor Contracts*, 17 W. Res. L. Rev. 1302 (1966). *See* A. Kuhn, Arbitration in Transit (1952) After World War II, several states legislated arbitration for public utility disputes, but the Supreme Court put an end to that experiment, before it had a chance to prove whether it was of value, in Street Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 257 Wis. 53, 42 N.W.2d 477 (1950), *vacated*, 340 U.S. 383 (1951).

[21]In Canada, where unions representing federal employees may opt for arbitration or the privilege to strike, in case of an impasse, experience with respect to arbitration appears to be satisfactory. Finkelman, *The Scope of Bargaining in Canadian Public Service Labour Relations Legislation*, Proceedings of the International Symposium on Public Employment Labor Relations 68 (1971); Address by J. Finkelman, Second Bi-National Conference on Collective Bargaining in Federal Public Service, Oct. 5, 1971; Hines, *Mandatory Contract Arbitration: Is it a Viable Process?*, 25 Ind. & Lab. Rel. Rev. 533 (1972) (arbitration in Ontario hospitals); Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly*, 67 Mich. L. Rev. 971 (1969); *Emerging Sectors of Collective Bargaining*, Eighteenth Annual Conference of the Industrial Relations Centre of Niagara University, April 2-3, 1968; Herman, *Collective Bargaining by Civil Service in Canada*, Proceedings of the 1966 Annual Spring Meeting, Indus. Rel. Research Assoc. 10 (1966).

[22]Hawaii Rev. Stat. § 89-11 (1971); Kansas Stat. Ann. § 75-4332 (Supp. 1972); Neb. Rev. Stat. § 48-820 (1968); N.J. Stat. Ann. § 34:13A-7 (1965); N.Y. Civ. Serv. Law § 209 (McKinney 1972). *See* Standohar, *Voluntary Binding Arbitration in Public Employment*, 25 Arb. J. (n.s.) 30 (1970).

[23]8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 261 N.E.2d 647, 313 N.Y.S.2d 733 (1970). On the question whether a city in a state having constitutional home rule might also have this power, *see* E. McQuillin, The Law of Municipal Corporations §§ 4.105, 12.140, 34.35 (3d ed. rev. 1963).

[24]Professor Roberts specifies thirteen specific arguments for legislated arbitration. Roberts, *supra* note 10, at 25-26. He divides the arguments *against* legislated arbitration into three general categories: (1) opposition based on philosophic or conceptual grounds; (2) opposition based on the inadequacy of arbitrators; and (3) opposition based on practical grounds. *Id.* at 26-28. The experience in Michigan leads me to conclude that the argument on the inadequacy of arbitration has no basis in fact. Arbitration of employers and unions was required by government order during World War II under the procedures of the National War Labor Board. I have not commented on the successes and failures of World War II arbitration, as the rules in effect when a nation is involved in a war for survival are not necessarily transferable to a peacetime economy. I have also not commented on the successes and failures in foreign countries. To make intelligent comment, it would be necessary to discuss at length the differences between labor relations in the United States of America and other countries which employ legislated arbitration in labor relations.

[25]This charge has been made. To the extent that arbitrators give weight to other awards, the charge is probably true. But every collective bargaining situation is influenced by other collective bargaining settlements in comparable areas of interest. *See* Loewenberg, *The Effect of Compulsory Arbitration on Collective Negotiations*, 1 J. Collective Negotiations 177, 181 (1972).

[26]In Michigan, a decision by the court of appeals upholding the constitutionality of the Police-Fire Fighters Arbitration Act,

Island and Wyoming. The statutes requiring arbitration of the terms and conditions of collective bargaining agreements cover firefighters in the case of Wyoming, and both police and firefighters in the other four states.

The Wyoming Supreme Court was the first to consider the constitutional issue.[27] There the court cited a state policy in favor of collective bargaining and a constitutional provision prohibiting the legislature from delegating "to any special commissioner" power "to levy taxes, or to perform any municipal function. . . ." In balancing the two policies, the court recognized that "there could be no collective bargaining if the bargaining necessarily had to end with terms and conditions dictated by the city." It continued:

> Even though one of the parties in the arbitration . . . is [the] city, the act of arbitration is no different from the act of arbitration in business and industrial affairs. It is nothing more than [a] performance of arbitration, and it cannot be said to be the performance of a municipal function. . . . [A] city [is] a creature of the legislature, having only such powers as [are] granted to it by the state. [Thus] the state can direct cities to submit labor disputes with firemen to arbitration. . . .[28]

The Pennsylvania Supreme Court found that the Pennsylvania statute does not violate either the Pennsylvania Constitution or the equal protection and due process clauses of the fourteenth amendment to the United States Constitution.[29] Although there are no stated standards to guide arbitrators in their decisions in the Pennsylvania statute, the court found there were sufficient standards. It pointed to the "obvious legislative policy to protect the public from strikes by policemen and firemen," and held that "[t]o require a more explicit statement of legislative policy in a statute calling for labor arbitration would be sheer folly [as] [t]he great advantage of arbitration is . . . the ability of the arbitrators to deal with each case on its own merits in order to arrive at a compromise which is fair to both parties."[30]

The public employer urged that because it could be held in contempt for not implementing an arbitration award even though tax limitations denied it sufficient funds, the statute denies due process. The court replied that there was nothing in the record to disclose that the public employer would be unable to raise the tax millage to pay the arbitrator's award, but that if tax millage

> cannot permissively be raised so as to provide sufficient funds to pay the required benefits to the employees, it will still be open to the court to rule that the [statute] impliedly authorizes a court-approved millage ceiling increase to pay the arbitration award when necessary, or to hold that the municipal budget must be adjusted in other places in order to provide resources for policemen's or firemen's salaries.[31]

Apparently, the judge would direct the municipal legislature to raise taxes—or decree an increase.

The Supreme Court of Rhode Island held that the Rhode Island Firefighters Arbitration Act is constitutional,[32] stating that an arbitrator to whom power is delegated becomes a public (not a private) person, vested with a portion of state sovereignty and free to exercise his powers without the supervision and control of others.

The Rhode Island statute, like the Michigan Police-Firefighters Arbitration Act, includes standards to guide the arbitrators. With respect to the standards, the court said:[33]

> We would also direct attention to the obvious fact that these standards serve a dual purpose. They not only operate to direct or limit the action of the recipients of such delegated power, but they are standards pursuant to which on judicial review a court may determine whether the action taken by the recipients of such powers was capricious, arbitrary, or in excess of the delegated authority.

The court found it unnecessary to consider whether the provision that the chief justice of the [Rhode

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Mich. Stat. Ann. § 17.455(31) (1972); Mich. Comp. Laws Ann. § 423.231 (1972), is on appeal to the Michigan Supreme Court. Fire Fighters Local 412 v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972). *See generally* McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 Colum. L. Rev. 1192, 1205 (1972).

[27]State *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968). The court answered six questions relating to possible conflict of legislative arbitration with the Wyoming Constitution and state statutes.

[28]*Id.* at 300, 304.

[29]Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969).

[30]*Id.* at 189, 255 A.2d at 563. Man practitioners in public sector labor relations would object to the "compromise" concept in arbitration.

[31]*Id.* at 193, 255 A.2d at 565. In Transit Union v. Port Authority, 58 L.R.R.M. 2257 (1965), a court of common pleas held that Section 13 of the Pennsylvania Port Authority Act, which requires submission of a labor dispute between a union and the Authority to binding arbitration where collective bargaining has failed, is not unconstitutional as an unlawful delegation to a private board of arbitrators. The Port Authority is a quasi-public entity financed by fares and charges, not by public funds.

[32]Warwick v. Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969). *See* R.I. Gen. Laws Ann. §§ 28-9.1-1 *et seq.* (1968).

[33]Warwick v. Regular Firemen's Ass'n, 106 R.I. 109,—, 256 A.2d 206, 211 (1969).

Island] Supreme Court appoint the third arbitrator when the parties fail to do so is a violation of the doctrine of separation of power.

The Nebraska Supreme Court, by a four to three decision, upheld the constitutionality of the Nebraska Public Employment Relations Act.[34] Noting that the Nebraska Constitution provides for an industrial commission (known as the Court of Industrial Relations), the court held that this constitutional provision authorizes an agency with combined legislative, administrative and judicial powers. The majority opinion notes the statutory provision that a school district may not be compelled to enter into a collective bargaining agreement following bargaining, but concludes that a binding decision by the Court of Industrial Relations does not force the school district to enter into a contract but simply settles the dispute.

B. The Alleged Damage to Collective Bargaining

It is urged that legislated arbitration damages collective bargaining.[35] If true, the postulate leads nowhere. If the public interest is better served by interest arbitration than by collective bargaining, damage to collective bargaining is immaterial.[36]

In fact the experience in legislated arbitration in the public sector is so recent that the validity of this postulate is to be questioned seriously anyway. As of this date the evidence which is available does not support that allegation at all. To cite one case in point, it has been charged (primarily by city officials) that the Michigan Police-Firefighters Arbitration Act (PFAA)[37] has damaged collective bargaining.[38]

In Michigan, there are approximately 100 firefighters and 200 police departments, not all of which bargain with a labor organization. Under the Michigan Police-Firefighter Arbitration Act either the public employer or labor organization may, after thirty days of mediation, petition for arbitration. Two panel members, appointed by the parties appoint the chairman, but if they disagree, the panel chairman is selected by the chairman of the Michigan Employment Relations Commission.

The statistics compiled under the Police-Firefighters Arbitration Act between October 1, 1969 and September 30, 1972 show the following:

Cases submitted to arbitration	161[39]
Arbitrators appointed by MERC Chairman	91
Arbitrators selected by parties	35
Awards	78
Settled prior to award	43
Pending	35
Unanimous decisions	27
Known contracts negotiated without submission to arbitration	288

While we have no statistics on the number of police and firefighters bargaining units in the state, the substantial number of cases settled without resort to arbitration discloses that collective bargaining has been effective in a large number of bargaining situations. The Michigan mediators have experienced resistance in some cases where parties have held back on the resolution of bargaining issues, clearly preferring to submit them to arbitration. But, as the foregoing statistics disclose, there are more cases where the parties do bargain successfully.

There is indication that some representatives of public employers and labor organizations are getting the message that an arbitrator's decision may not re-

[34]School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972). Two of the dissenting judges held that the Nebraska Constitution does not vest the court of industrial relations with authority over public employees. The other dissenting judge agreed that the constitutional grant was valid, but that the statute did not apply to the public sector. The three dissenters did not argue that interest arbitration is unconstitutional per se. *See* Neb. Rev. Stat. §§ 48-801 *et seq.* (1972).

[35]Professor Roberts has gathered together a number of statements so averring with respect to the private sector. H. Roberts, *supra* note 10, at 108-1401. *See also* D. Bok & J. Dunlop, *supra* note 6, at 237; Howlett, *Arbitration in the Public Sector*, in Proceedings of the Southwestern Legal Foundation, Fifteenth Annual Institute on Labor Law 231, 233-234 (Matthew Bender & Co., 1969); Northup, *Compulsory Arbitration and Government Intervention*, in Labor Disputes 183 (Labor Policy Ass'n, Inc. 1966); J. Wurf, 248 BNA Gov't Emp. Rel. Rep. D-4 (June 10, 1968).

[36]For favorable comments on legislated arbitration, *see* Harlan, *An Answer to National Emergency Transportation Strikes*, 58 A.B.A.J. 26 (1972); Gilroy & Sinicropi, *Impasse Resolution in Public Employment: A Current Assessment*, 25 Ind. & Lab. Rel. L. Rev. 496, 502 (1972); Seinsheimer, *What's Wrong with Compulsory Arbitration*, 24 Arb. J. 219 (1971).

[37]Mich. Stat. Ann. § 17.455(31) (1972); Mich. Comp. Laws Ann. § 423.231 (1972).

[38]The Michigan Municipal League opposed the extension of the statute which originally expired June 30, 1972 for the reason, among others, that it damaged collective bargaining. After the two houses of the Michigan Legislature enacted the Public Employment Relations Act, Mich. Stat. Ann. § 17.455(1) (1968); Mich. Comp. Laws Ann. § 423.201 (1967), in 1965, mayors and city commissioners throughout Michigan sought to persuade Governor George Romney to veto the bill on the ground, among others, that collective bargaining had no place in the public sector.

[39]One additional application was made for arbitration, but as it involved a unit at Michigan State University, it was not covered by PFAA.

sult in as good a deal as collective bargaining, and on non-economic issues, he may come up with a solution that is administratively unpalatable.[40]

At first some unions looked forward most to arbitration, apparently because they believed they could secure more from an arbitrator than they could through collective bargaining. During recent months, there appear to be more public employers holding back in bargaining, although in some cases the motive is unclear. In one recent case, a union demanded an increase of 20%. The city countered with a wage decrease of 20%. The union reduced its demand to 18%. The city offered an 18% decrease. I discussed the matter with the city personnel officer, suggesting that a knowledgeable bargainer for an employer would tell union representatives that 20% was an impossible goal; that there was an increase in the offing, but that the city could not put a proposal on the table until the union started to discuss a wage increase which was "in the ball park." Two mediators were unable to resolve this nonsensical impasse. Then the city, perhaps in a fit of pique, refused to appoint its delegate to the arbitration panel. As I prepare this Article, I have just appointed an arbitrator and called the city's attention to the fact that the Michigan Court of Appeals has upheld the awards of two member arbitration panels.[41]

The Rhode Island[42] and Wyoming[43] statutes provide for arbitration if no agreement is reached within a specified time. Under the Michigan[44] and Pennsylvania[45] statutes, arbitration is initiated at the request of one of the parties. The Michigan-Pennsylvania requirement is more likely to promote bargaining than the Rhode Island-Wyoming approach.

This year the Michigan Legislature, recognizing the tendency of some parties to hold back on bargaining, amended the statute[46] to authorize the chairman of the arbitration panel to return the parties to the bargaining table for a period of not more than three weeks.

Perhaps the most objective evidence on legislative arbitration in this country comes from Minnesota, which has had legislated arbitration in both public and private non-profit hospitals since 1947. The statute,[47] quietly and without fanfare, has been effective.

Union organization in Minnesota was both early and vigorous. In the early 1940s, there was organization of hospital employees in the larger Minnesota cities. The hospitals resisted the organization drives, with the result that there were numerous strikes. In 1947, the legislature enacted the Charitable Hospitals Act, covering "all charitable hospitals," both non-profit private and public. Strikes and lockouts were prohibited and mandatory arbitration was substituted. Arbitration is conducted by a three-member board of arbitration chosen by the parties, with the Governor submitting a panel of five names in the event the hospital and union are unable to agree upon the board chairman. The statute provides that if the parties are unable to agree with respect to "which party shall take the first turn for the purpose of striking a name, it shall be decided by the flip of a coin."

Since 1947, there have been no hospital strikes in Minnesota's 223 hospitals, 85 of which are public. Over 50% of the employees in Minnesota hospitals are organized in unions and associations. The Minnesota Bureau of Mediation Services, which administers the law, has processed 954 hospital cases. There have been 361 settlements in direct negotiations without mediation, for a total of 1,315 contracts since the enactment of the law. (Note the large percentage of cases mediated.) Of this number, 251, or about 26%, have been arbitrated. Minnesota Director Vern E. Buck has said:[48] "This in itself should be sufficient proof that binding arbitration does not abolish across-the-table bargaining, but as a matter of fact would indicate that it strengthens it."

Director Buck continued:

> In addition to this, it should be recognized that Minnesota has some of the finest medical facilities in the nation and I sincerely believe that part of this has been brought about because of the no-strike provision of our law which has placed the non-professional workers among the three top brackets in the United States insofar as salaries and working conditions are concerned. . . .

[40]It is non-economic issues where collective bargaining experience by the arbitrator is desirable. As I write this paper I have one case that may go to factfinding (non-uniformed employees) where the only issue is binding grievance arbitration. How does a fact-finder or arbitrator make an objective decision on that issue, or on union security and checkoff?

[41]*See* note 26 *supra*. There have been four or five instances recently where cities have "dragged their feet" on the appointment of their panel members.

[42]R. I. Gen. Laws Ann. § 28-9.1-7 (1968).

[43]Wyo. Stat. Ann. § 27-269 (1967).

[44]Mich. Stat. Ann. § 17.455(33) (Supp. 1972); Mich. Comp. Laws Ann. § 423.233 (1972).

[45]Pa. Stat. Ann. tit. 43 § 217.7(a) (Supp. 1972).

[46]Mich. Stat. Ann. § 17.455 (37a) (Supp. 1973); Mich. Comp. Laws Ann. § 423.237 (a) (Supp. 1973).

[47]Minn. Stat. Ann. § 179.35-179.39 (1972).

[48]Letter from Vern E. Buck to the author, January 8, 1970. The statistics have been updated to the middle of 1972.

You might ask why I say this law has been beneficial in bringing about these fine medical facilities.

1. The workers are of a higher caliber because of the conditions which lead to better care of the patients.
2. The fact that the hospitals have been able to concentrate on the care of the patients and construction of new facilities without any interruptions or losses because of work stoppages.
3. Although our hospital workers rank in higher brackets in a national survey, our costs to a hospital patient rank in about the middle on a national average. This again is brought about by higher quality workers and no losses through work stoppages.

He concluded that "our experience is proof that the theorists are incorrect. . . . I also sincerely believe the same approach can be used with the same answers found if this is applied to public employment."

One law professor has written, " 'Compulsory arbitration' would soon result in the disappearance of bargaining between employers and organized labor, for the party favored by the foreordained standards in a specific dispute would subject the other party to the compulsory procedure, instead of attempting painstakingly to work out a voluntary settlement."[49] Another opines, "Under the Pennsylvania Statute you really won't have any meaningful bargaining so long as there exists such a great area of difference in what a policeman thinks he should get and what most municipalities are willing to pay."[50]

Experience, admittedly brief, is not in accord with the doomsday prophecies of those who discuss legislated arbitration before it has had an opportunity to prove its merits or demerits. Such information as I have been able to gather during the past two or three years supports instead the summary of Donald B. Straus: "Some of these compulsory arbitration statutes, especially for police and fire, seem to be working well."[51]

C. The Charge That Arbitration Will Not Work

What of the charge that arbitration will not work, as it does not settle disputes or prevent strikes?[52] Arbitration settles disputes to the extent that there is an award resolving an issue, or issues. But no one in his right mind will contend that any legislation will stop all strikes. If employees feel sufficiently frustrated with a situation, they will strike, just as students will demonstrate and revolutionaries throw bombs. But this is no argument against a rational judicial process for the resolution of issues.

Although there is no current experience to make a definite statement possible, it seems likely that public opinion will not be inclined to support employees who "thumb their noses" at arbitrators' awards. There is also reason to believe that courts will be more inclined to issue injunctions against employees who go on strike against an arbitration award than against employees who strike in breach of a state statute.

As arbitrators' awards are not self-enforcing, it will be necessary to secure enforcement through the injunctive procedure. This has been the procedure for enforcement of arbitrators' awards under both federal and state statutes.[53] State courts have concurrent jurisdiction with federal courts in such enforcement actions.[54]

Such awards are also enforceable under state statutes.[55] Indeed, under the Wisconsin private sector law, it is an unfair labor practice to violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).[56]

It may not be the employees who refuse to comply or who protest the award; it may be the employer. What if the legislative body refuses to appropriate funds necessary to pay the wages and salaries specified in the award? In Pennsylvania, a public employer is required by statute[57] to comply with the provisions of the board of arbitration's award. A public employer may not hide behind self-imposed legal restrictions; an arbitration award covering proper terms and conditions of employment is a mandate to the legislative

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[49]A. Frey, *Is Compulsory Arbitration of Wages Inevitable?* in Speeches, Ass'n of Labor Mediation Agencies (1972).

[50]Lynch, *Problems in the Laws: Suggestions for Improvement*, in Arbitration of Police and Firefighter Disputes: Proceedings of a Conference on Arbitration of New Contract Terms for the Protective Services 12 (American Arbitration Ass'n 1971). *See also* D. Bok & J. Dunlop, *supra note* 6, at 240.

[51]Labor Arbitration May Work—When Born of Consensus: Proceedings of the International Symposium on Public Employment Labor Relations 110, 115 (1971).

[52]Anderson, *Compulsory Arbitration under State Statutes*, in Proceedings of New York University Twenty-second Annual Conference on Labor 259, 275 (T. Christensen ed. 1970).

[53]Arbitrators' awards are enforceable under Section 301 of the Labor Management Relations Act, as amended 29 U.S.C. § 185 (1970), Boys Market, Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). For an example of such a state statute, *see* Wis. Stat. Ann. § 111.10 (1957).

[54]Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[55]*See, e.g.*, Wis. Stat. Ann. § 111.10 (1957).

[56]Wis. Stat. Ann. § 111.06(1)(c)2-(f) (1957).

[57]Pa. Stat. Ann. tit. 43 § 217.7 (Supp. 1972).

branch of the public employer to take affirmative action, within its lawful scope of authority, as required by the arbitration award.[58] A Connecticut statute[59] requires a municipal employer to appropriate whatever funds are required to comply with a collective bargaining agreement. Arguably, an award in a voluntary arbitration following the statutory procedure[60] would be included in this mandate for fiscal action.

In *Wayne Circuit Judges* v. *Wayne County*,[61] the circuit judges of Wayne County, Michigan, directed the Board of Commissioners to appropriate sufficient funds to provide the court with the clerical help the judges believed necessary. In upholding the action of the circuit judges, the Michigan Supreme Court said, quoting *Commonwealth* v. *Tate*,[62]

> [The] Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer justice, if it is to be in reality a co-equal, independent Branch of our Government . . .[63]

On rehearing, Mr. Justice Brennan, in a separate opinion, said:

> The constitution established that the judicial power of the state is vested exclusively in one court of justice. The legislature may not abolish that court. Neither is it permissible for the legislature to render the court inoperative by refusing financial support.[64]

If a court has power to direct a legislative body to supply funds for personnel which the court required in the exercise of its judicial function, there would seem to be no reason why a court may not direct a city commission or a school board to supply the funds required by an arbitrator's award.[65]

The charge that the Michigan Police-Firefighters Arbitration Act (hereafter PFAA) did not prevent strikes was made by the Michigan Municipal League in its campaign opposing extension of the Michigan statute. Ten police strikes after October, 1969 were cited as proof that the statute had not been effective. Of the ten strikes cited, three were part of a single incident in one city where there were also non-collective bargaining issues. The city discharged the police for their work stoppage. Some policemen returned, but as new employees.

At least one of the strikes involved a grievance with which PFAA is not involved. All (except the three-strike situation discussed above) were of short duration; and in each instance, the police officers, and in some cases the city, did not understand the procedures under the new statute.[66] No objective observer will conclude that these incidents establish that the Michigan PFAA has not been effective.

It may be significant that there have been no firefighter strikes since the enactment of PFAA, whereas, between 1965, when the Public Employment Relations Act (PERA)[67] became effective and October, 1969, there were three firefighter strikes, one of which lasted a week.

It was also charged by the Michigan Municipal League that the awards have been excessively high. In most instances during the "first round," they were substantial. However, a comparison made in our office between arbitration decisions establishing wage increases and wage increases determined by bargaining shows no significant difference in wage increases occurring before and after the passage of the Act. Admittedly, awards issued may have had an impact on later bargaining. But even if they were high, some urge that substantial awards were warranted, so that police and firefighters who had not been as militant as other public employees—teachers being the prime example—could "catch up." The "second round" awards are coming in lower than those during 1970-71 and recent public support for the Michigan statute, was shown by the extension from October 30, 1972 to June 30, 1975, passed by large majorities in both houses of the legislature.

The published material with respect to Pennsylvania, where there has been great use of the statute, leads an observer to conclude that the law has worked well in that state. Professor Loewenberg, of Temple University, has collected statistics, dividing the Pennsylvania cities into major and nonmajor municipalities. He found that the availability of the arbitration pro-

[58] *See* City of Washington v. Police Dep't, 436 Pa. 168, 259 A.2d 437 (1969).

[59] Conn. Gen. Stat. Ann. § 7-473 (1972).

[60] *Id.* § 7-472 (1972).

[61] 383 Mich. 10, 172 N.W.2d 436 (1969), *aff'd on rehearing*, 386 Mich. 1, 190 N.W.2d 228 (1971).

[62] 442 Pa. 45, 52, 274 A.2d 193, 197 (1971).

[63] 386 Mich. at 9, 190 N.W.2d at 230.

[64] *Id.* at 14, 190 N.W.2d at 231.

[65] Anderson, *supra* note 47, at 274.

[66] When I asked the mayor of Highland Park about one alleged strike—of which we had not heard—he said, "We did not have a strike." He then went on to explain that a few police were "sick" for about five hours because of lack of communication between the city and the police. The matter was quickly resolved; there has been no trouble since.

[67] Public Employment Relations Act, Mich. Comp. Laws § 423.201 (1967), Mich. Stat. Ann. § 17.455(1) (1968).

cess has not destroyed collective bargaining activity, since two-thirds of the municipalities which negotiated were able to negotiate their own settlements.[68]

V. State Statutes

While legislated arbitration has been vigorously attacked, thirteen states are experimenting with the process in the public sector:[69] Alaska,[70] Maine,[71] Michigan,[72] Minnesota,[73] (if accepted by the public employer), Nebraska,[74] Nevada,[75] (at the direction of the Governor), Oklahoma,[76] (if accepted by the public employer), Pennsylvania,[77] Rhode Island,[78] South Dakota,[79] Vermont,[80] Wisconsin,[81] and Wyoming.[82]

There are differences in the thirteen state arbitration statutes; some are significant, others not. Each statute is directed toward a particular condition in a state; hence, differences are normal, and as all result from the legislative process, differences are inevitable.

In all states except Wisconsin, there are three-member arbitration panels, all tripartite except in Minnesota where three public members are appointed, subject to the right of the parties to agree on a single arbitrator. The chairman is selected by the arbitrators appointed by the parties, or, on their failure to select, by or through an independent agent. Maine, Nevada and Pennsylvania provide for appointment of the chairman from lists supplied by the American Arbitration Association, while Oklahoma decrees selection from a Federal Mediation and Conciliation Service list. Rhode Island and Wyoming use judges as the appointing authority, and Michigan, Minnesota, Nebraska, South Dakota, Vermont and Wisconsin vest the appointing power in an executive department official or officials.

In Maine, Minnesota, Nevada, Oklahoma, Rhode Island, South Dakota, Vermont, Wisconsin and Wyoming, the parties pay the costs. In Nebraska, the state pays the cost, while in Pennsylvania, it is the responsibility of the public employer involved. In Michigan, the public employer, the labor organization and the state share the cost equally.[83]

In Michigan, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin and Wyoming, only uniformed employees are covered, while in Maine, Minnesota, Nebraska and Nevada, non-uniformed are subject to the statutes. In Maine, the arbitrators' decisions are advisory only on salaries, pensions and insurance, but binding on other issues.

It is noteworthy that all thirteen states, except Wisconsin, have elected tripartite arbitration. While tripartite arbitration serves no useful purpose in most (but not all) grievance cases, it does have a value when arbitrators are charged with writing a contract. While arbitrators have the responsibility to decide cases on the evidence (unlike fact-finding statutes which provide for an investigatory procedure where the fact-finder may base decisions on material not in the record), they are interested in an acceptable solution. If the arbitrators appointed by the parties will "level" with the chairman, it may be possible to tailor an award which, because its acceptability, will serve the employer-employees relationship well, will aid employees' morale and result in better service to the public.

Another objection raised against tripartitism is the occasional necessity of compromise majority votes.[84] To the extent that acceptability is desirable, a need to compromise is not likely to be detrimental to the process.

After the Michigan PFAA was enacted, my fellow Commissioners and I recommended that the two "side

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[68]Loewenberg, *Compulsory Arbitration for Police and Firefighters in Pennsylvania in 1968*, 23 Ind. & Lab. Rel. Rev. 367 (1970). *See also* Loewenberg, *Compulsory Arbitration and the Arbitrator*, 25 Arb. J. 248 (1970). The material I have seen and the discussions I have had with Mollie Bowers, a Cornell Ph.D. student writing her thesis on the Michigan and Pennsylvania Police Firefighters Acts, is in accord. She will report that the arbitration process is working well in Michigan, but that lack of mediation prior to the hearing and no sharing of expenses (the municipality pays the full cost of the arbitration) may have debilitated bargaining in Pennsylvania.

[69]The City of New York has also provided for binding arbitration in some cases, BNA Gov't Emp. Rel. Rep. RF 51:4161 (1972). *See generally* McAvoy, *supra* note 26, at 1194.

[70]Alaska Stat. § 23.40200 (1972).

[71]Me. Rev. Stat. Ann. tit. 26, § 965 (Supp. 1972).

[72]Mich. Stat. Ann. § 17.455(31) (Supp. 1972); Mich. Comp. Laws Ann. § 423.231 (1972).

[73]Minn. Stat. Ann. § 179.72 (1972).

[74]Neb. Rev. Stat. § 48-801 (1972).

[75]Nev. Rev. Stat. § 288.200 (1971).

[76]Okla. Stat. tit. 11, § 548.1 (1971).

[77]Pa. Stat. Ann. tit. 43, § 1101.101 (1972).

[78]R.I. Gen. Laws Ann. § 28-9.1-2 (1968); R.I. Gen. Laws Ann. § 28-9.2-2 (1968).

[79]S.D. Comp. Laws Ann. § 9-14A-1 (1972).

[80]Vt. Stat. Ann. tit. 21, § 1701 (1972).

[81]Wis. Stat. Ann. § 111.70(4)(jm) (1972).

[82]Wyo. Stat. Ann. § 27-265 (1967).

[83]This was a compromise between the House of Representatives which voted that the state pay the entire cost, and the Senate, which proposed that the parties pay it.

[84]Anderson, *A Survey of Statutes with Compulsory Arbitration Provisions for Fire and Police*, in Arbitration of Police and Fire Fighter Disputes: Proceedings of a Conference on Arbitration of New Contract Terms for the Protective Services 1, 10 (American Arbitration Ass'n ed. 1971).

men" be made advisory. After three years of experience, we are no longer pressing this proposal. The chairmen of the arbitration panels appear to have had no difficulty over the fact that they must persuade at least one member to vote with them.

A. Statutory Standards

Perhaps the most significant difference among state statutes is statutory standards. The Maine, Minnesota, Pennsylvania, South Dakota, Vermont and Wyoming statutes do not specify standards. In spite of this, the Supreme Courts of Pennsylvania and Wyoming had no difficulty in upholding the constitutionality of the statute, the Pennsylvania Supreme Court reading standards into the Act.[85]

Professor Hines of McMaster University has noted "the absence of substantive criteria to guide the arbitrators" as a difficulty in the implementation of interest arbitration.[86] He points out that the English common law system progressed slowly, developing principles of law by judicial decision and legislation, whereas arbitrators are now asked to establish instant criteria and standards.

The criticism has merit. This is one obstacle to my thesis that we should—and it will be a delaying factor in my thesis that we will—adopt a judicial procedure for the determination of collective bargaining issues on which employers and unions fail to agree. However, our need is *now*; not for the next century. Unfortunately, we have greater success in solving scientific and technological problems than human problems. But this is no reason for not making a serious effort to accommodate collective bargaining to the world of today.

Attempts are being made to develop substantive criteria. The legislatures of six of the thirteen states have tried their hands at establishing statutory standards.[87] In Michigan, the statutory standards, similar to those in Rhode Island, are as follows:[88]

(a) The lawful authority of the employer.
(b) Stipulations of the parties.
(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
(i) in public employment in comparable communities.
(ii) In private employment in comparable communities.
(e) The average consumer prices for goods and services, commonly known as the cost of living.
(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

While some Michigan city officials have criticized arbitration panels for not giving sufficient weight to "the financial ability of the unit of government to meet those costs,"[89] the opinions disclose that this factor has been considered by the panels.

The desirability, if not the necessity of standards, is summarized by David B. Ross:[90]

> Arbitrators of wage disputes, especially in public employment, lack intelligible standards by which the "relevance of proofs can be judged and the cogency of arguments measured." When there are no standards, the arbitrator abandons his adjudicative role and becomes another mediator. He tries to find a recommendation which may please both sides and uses his opinion to coerce an unyielding party or to aid the disadvantaged side in the donnybrook which follows his "decision."

[85] *See* text accompanying notes 28 and 30 *supra*.

[86] Hines, *Mandatory Contract Arbitration—Is it a Viable Process?*, 25 Ind. & Lab. Rel. Rev. 533 (1972). Professor Hines discusses the development of criteria used in several Canadian Hospital arbitrations.

[87] Michigan, Nebraska, Nevada, Oklahoma, Rhode Island and Wisconsin.

[88] Police-Firefighters Arbitration Act, Mich. Stat. Ann. 17.455 (39) (Supp. 1972); Mich. Comp. Laws Ann. § 423.239 (Supp. 1972).

[89] Mich. Comp. Laws Ann. § 423.239c (Supp. 1972).

[90] Ross, *The Arbitration of Public Employee Wage Disputes*, 23 Ind. & Lab. Rel. Rev. 3 (1969).

One value of standards is the influence they have on preparation. All arbitrators have experienced both grievance and interest cases where a representative expounds the virtues of his client's position but is devoid of evidence to back up the vigorously presented claim. With standards before him, an advocate preparing a case has a guide in his marshalling of evidence to be offered at the forthcoming hearing. It will be difficult for him not to cover the items in the standards.

B. Appeal from an Award

In Michigan, failure to consider the financial criteria may result in the award being set aside by a circuit court. Nevada, Pennsylvania, Rhode Island and Wyoming do not provide for an appeal. The arbitration award may not be appealed in Minnesota and in Oklahoma it may be rejected by the employer. Maine, Vermont and Wisconsin specify the traditional rule of fraud and collusion. In Maine, an award may be reversed for "erroneous ruling or finding of law," and in Vermont, for an error of law not concerning the admissibility of evidence. In Nebraska and South Dakota, appeals of arbitration awards may be taken to the circuit court and supreme court, respectively, like other civil actions.

The most comprehensive appeal provision is in the Michigan statute, which provides:[91]

> Orders of the arbitration panel shall be reviewable by the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside, but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence [on the whole record; or the order] was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceeding for review shall not automatically stay the order of the arbitration panel.

I submit that the Michigan provision is juridically correct. Anglo-American jurisprudence allows, in almost all circumstances, one appeal, as a matter of right. Is there any reason that the award of an arbitrator should have greater status than the decision of a trial court of general jurisdiction?

C. Arbitrators as Mediators

One question frequently discussed is whether an arbitrator should mediate. In voluntary arbitration, this question should be determined by the desires of the parties and the competence of the arbitrator as a mediator. In mandated interest arbitration in the public sector, the arbitrators have a public responsibility. The public interest may call for an attempt to mediate, although this too depends on an arbitrator's qualifications and the presence or absence of a state mediation service. In Michigan, with twenty staff mediators to serve the public, there is less need for an arbitrator to attempt mediation.

When Michigan's Public Employment Relations Act was first enacted, we instructed our fact-finders to mediate. This, we found, was a mistake: (1) it damaged the confidentiality of the mediation process, for employer and union representatives will disclose to a mediator facts and positions which they do not wish to present to a quasi-judicial functionary; (2) some competent arbitrators had no experience in collective bargaining; and (3) our staff mediators—understandably—believed it was criticism of their performance.

The damage to the confidentiality of the mediation process applies primarily to legislated arbitration, although some states, including New York, employ the same person as an ad hoc mediator and fact-finder. Robert D. Helsby, Chairman of the New York Public Employment Relations Board, is authority for a statement to me that the combined mediator-fact-finder procedure is effective in New York. There would also appear to be no reason why the combined mediator-fact-finder or mediator-arbitrator combination should not be effective if the parties themselves agree to this procedure.[92]

"In chambers" settlements should never be ruled out, for an agreement is generally preferable to an order. This is a type of mediation and, as such, it is desirable. But an arbitrator should not follow the practice of one judge I knew—a judge who avoided decision-making if at all possible. He invariably called the lawyers into his chambers, pointed to the state reports and pontificated, "Half the lawyers named in all those reports lost their cases."

The extent of mediation—and whether it should be tried at all—depends on the relationship of the arbitrator to the parties, his own personality and experience, and, as noted above, the existence of a state service. There are cases which lend themselves to an attempt by the arbitrator to secure a settlement agreement. The State of Maine has recognized the mediator-arbitrator dichotomy by decreeing that a person who

[91]Police-Firefighters Arbitration Act, Mich. Stat. Ann. § 17.455 (42) (Supp. 1972); Mich. Comp. Laws Ann. § 423.242 (Supp. 1972).

[92]Kagel & Kagel, *Using Two New Arbitration Techniques*, 95 Month. Lab. Rev. 11 (1972).

has served as mediator may not, without the consent of both parties, serve as either fact-finder or arbitrator.

I cannot stress too strongly the need for effective mediation as part of legislated arbitration. The two go hand in hand. Arbitration is most effective in those cases where only the more significant issues remain to be arbitrated. A competent mediator will assist in narrowing the issues and persuading the parties that arbitration is not well adapted to some issues. Union security and check-off are two such issues. An arbitrator either believes in union security and/or check-off, or he does not. We had one recent case where an arbitrator refused to order binding grievance arbitration, contending—and perhaps correctly—that this is not the type of issue which an arbitrator should order.

One advantage of legislated arbitration, as in grievance arbitration, is the post-award expendability of the arbitrator. An award, in an emotionally charged situation, may prevent criticism from constituents or remove the threat to the re-election of a mayor or union president.

D. Last Offer Arbitration

Two states, Michigan and Wisconsin,[93] are experimenting with last offer arbitration. Under "last offer" arbitration (sometimes called "one-or-the-other" or "either/or" arbitration), employer and union each submit their final proposals to an arbitrator or arbitration panel which is required to select one of the proposals. The arbitrator or panel may not make an award of an intermediate position.

The concept behind this type of arbitration is stated by Professors Wellington and Winter:

> Employer and union, realizing that the arbitrator's power is limited to accepting the entire proposed contract of one or the other party, will each bargain in good faith and in great earnestness to reach an agreement. If this process fails to produce agreement, it will, nevertheless, narrow very substantially the area of disagreement as each party strains for a favorable decision from the arbitrators by attempting to make its position appear the more reasonable of the two.[94]

An amendment to the Michigan Police-Firefighters Arbitration Act, effective January 1, 1973, applies this procedure to economic issues.[95] The statute requires that the parties submit economic issues severally to the panel, with the panel having authority to determine whether an issue is economic. The panel is directed by statute to make written findings of fact and promulgate a written opinion and order upon the issues presented, adopting as to each economic issue the last offer of settlement which, in the opinion of the panel, more nearly complies with the statutory standards. With respect to non-economic issues, the panel may issue an award as panels have been doing in the past.

In Wisconsin, there are two statutes, one applicable to police in the city of Milwaukee[96] and the other to both firemen and policemen in cities having populations between 5,000 and 500,000.[97] In the Milwaukee Act, an arbitrator has unrestricted power to make awards with respect to compensation and other listed items which cover most subjects of collective bargaining. In the act applicable to cities with a population between 5,000 and 500,000, either the city or the labor organization may petition the Wisconsin Employment Relations Commission to initiate binding arbitration. The Commission investigates to determine whether an impasse has been reached and, if its decision is affirmative, may order arbitration. If the parties fail to select an arbitrator (or three arbitrators if the parties so elect), the Commission submits a list to the parties, which alternately strike the names until one name is left. The remaining person is appointed by the Commission as arbitrator.

The Act provides for two alternative forms of arbitration: (1) the arbitrator determines all issues in disputes involving wages, hours and conditions of employment; (2) the parties submit their final offer in effect at the time the petition for final and binding arbitration was filed, subject to a right to amend a final offer within five days of the date of the hearing. In type 2, the arbitrator must select the final offer of one of the parties. The last offer type of arbitration is to be used unless the parties agree prior to the hearing that the first type shall be employed. The statute specifies standards to which the arbitrator is to "give weight."

The city of Eugene, Oregon has also adopted a

[93]In Minnesota, public employers and labor organizations are required to submit their final positions on each issue to the Public Employment Relations Board, but the arbitration panel is not required to select either of the last positions. However, with respect to "essential employees" the parties may agree that the panel shall select one of the parties' last offer, in which event the public employer loses its privilege to reject an award.

[94]H. Wellington & R. Winter, The Unions and the Cities 180 (1971). *See also* Grodin, *Either-or Arbitration for Public Employee Disputes*, 11 Indus. Rel. 260 (May, 1972).

[95]Police Firefighters Arbitration Act, Mich. Stat. Ann. § 17.455 (38) (Supp. 1972), Mich. Comp. Laws Ann. § 423.238 (Supp. 1972).

[96]Both Acts expire on September 1, 1973. Wis. Stat. Ann. § 111.70(4)(jm) (Supp. 1972).

[97]Wis. Stat. Ann. § 111.77 (1972).

"last offer" arbitration ordinance.[98] In the only decision issued under the Eugene ordinance, the chairman's opinion noted that under, "conventional arbitration procedures" the majority of the arbitration board would have adopted the labor organization's proposal after eliminating certain clauses dealing with Civil Service Commission rules on manning requirements, but that the proposal, "with its many meritorious and acceptable provisions foundered on the single issue of contract manning requirements which a majority of the board found so unacceptable and objectionable as a matter of principle that a contract including such a provision could not be accepted."[99]

An attempt to enact a "last offer" statute was made in Indiana. Cities and unions were to submit their last offer to a panel, which was to select the most reasonable final offer as the binding contract between the parties. While the legislative attempt failed, the city of Indianapolis and a local of the American Federation of State, City, County & Municipal Employees submitted their last offers to an arbitration board of two neutrals,[100] pursuant to the senate bill. The board found the union's proposal for a wage increase reasonable and within the city's financial capability. But it found other items in the union's offer unacceptable, and hence chose the city's last offer. The experience in Eugene and Indianapolis emphasizes that the Michigan procedures of submitting economic items separately has advantages over submission of a "package."

VI. The Future

Five years from now, we will have more evidence to guide us in the workability of judicial procedures in the determination of working conditions. We will have more experience because there will be more experimentation with legislated arbitration. When collective bargaining impasses endanger the health and safety, or even the convenience, of the public, as they do at times, the public will demand some judicial procedure for resolving disruptive disputes.

I venture a prophecy that the development of judicial decision-making will not be limited to the public sector but will also find a place in the private sector. Congress has found it necessary to require arbitration of one dispute in the railroad industry, and to legislate settlements in others.[101] Arbitration would appear to be preferable to legislation, as it is a judicial proceeding and avoids the political pressures which are inherent in the legislative process. This is not to say that employees may not secure more through lobbying and supporting friendly candidates for the local legislature than through arbitration. This is not the issue. The question is: Which method of dispute resolution following a collective bargaining impasse is more in the public interest? I "come down" on the side of a quasi-judicial procedure, rather than submission to a political body which is moved (and quite properly) by influences other than statutory criteria, or in the absence of criteria, the type of comparable data which arbitrators generally consider in interest arbitration cases.

Another argument against legislative decision-making is that the legislature is the representative of the employer.[102] The consequent need for a judicial tribunal for employer-employee disputes was suggested in an American Bar Association Journal editorial in April, 1921, a period in our history when collective bargaining in the public sector was not even a gleam in a unionist's eye.

in an American Bar Association Journal editorial in *Duplex Printing Press Co.* v. *Deering*[103] that society should "substitute processes of justice for the more primitive method of trial by combat," and concluded:

> There is therefore no hope of any cessation of the present state of class war until a special form of tribunal, purely judicial in its character, is devised and given jurisdiction to decide controversies of this class, and proves itself capable of performing its great task. If employers and employees cannot see the advantage to themselves of cooperating in the creation of such a tribunal, those who are not parties to the quarrel, but who are in a real sense its victims, may well ponder these impressive words of Mr. Justice Brandeis: "The condition developed in industry

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[98]423 BNA Gov't Emp. Rel. Rep. G-1 (Oct. 18, 1971).

[99]451 BNA Gov't Emp. Rel. Rep. E-1 (May 8, 1972).

[100]City of Indianapolis & AESCME, Local 725, 58 Lab. Arb. 1302 (1958).

[101]Act of August 28, 1963, Pub. L. No. 88-108, 77 Stat. 132 (created Arbitration Board 282 to provide for final disposition of the firemen issue); Act of July 17, 1967, Pub. L. No. 90-54, 81 Stat. 122 (established a "mediation procedure," terminating in what amounted to compulsory arbitration by a new five-member "Special Board"); Act of April 9, 1970, Pub. L. No. 91-226, 84 Stat. 118 (executed a memorandum of understanding, which had been previously negotiated by the parties but not ratified by the rank and file members, to have the same effect as though it had been arrived at by agreement of the parties); Act of May 18, 1971, Pub. L. No. 92-17, 85 Stat. 39 (ordered strikers back to work and instituted a wage schedule). *See generally* Kilgour, *Alternatives To The Railway Labor Act: An Appraisal*, 25 Ind. & Lab. Rel. Rev. 71, 77 (1971).

[102]For a comment on the role of the local legislature in final decision-making, *see* Howlett, *Some Observations on Neutrals: The Role of the Neutral in Public Employee Disputes 60*, 64 169 (1942).

[103]254 U.S. 443 (1921).

> may be such that those engaged in it cannot continue their struggle without danger to the community."[104]

That editorial is more current in 1973 than in 1921.

[104]The 1921 editorial is quoted in 57 A.B.A.J. 343 (1971). For two interesting articles on the desirability of a labor court for controversies subject to federal jurisdictions, see Morris, *The Case for Unitary Enforcement of Federal Labor Law*, 26 Sw. L.J. 471 (1972) and Levine, *Compulsory Dispute Settlement via Litigation: The Rhodes Labor Court Proposal*, 27 Arb. J. 169 (1942).

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FINAL-OFFER ARBITRATION: "SUDDEN DEATH" IN EUGENE

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THE TREMENDOUS expansion of collective bargaining that occurred in the public sector during the 1960s and early 1970s has fostered a continuous, often heated, and probably unresolvable debate over the type of collective bargaining system that would be most appropriate for the public sector. As might have been expected, the most controversial issue has been the role of work stoppages.

Since the majority of public employees do not have the *de jure* right to strike, much attention has been focused on the question of a balancing of interests: how can bargaining impasses be resolved in a manner that protects the interests of both parties at the table, if public employees are denied the right to effectively manipulate management's costs of disagreement, and at the same time protect the public's interest in continuously receiving essential government services? In the private sector, interests are balanced by the relative abilities of the two sides to take a work stoppage, since the marketplace affords the consumer some freedom-of-choice protection from the results of bargaining. To a limited extent, this approach is undergoing experimentation in selected public jurisdictions as some employee groups are granted the right to strike.[1] In most public sector jurisdictions, however, the strike is banned and some kind of formal impasse-resolution machinery is provided, under which a third party assists the employer and

Final-offer arbitration—requiring an arbitrator to select one of the last offers made by the parties to a negotiation—was first proposed less than ten years ago, but it has already become the source of considerable controversy, a major element in President Nixon's 1970 proposal for handling national emergency strikes in transportation, and the prescribed method of resolving certain public sector disputes in three states and two cities. This study reports on the experience with final-offer arbitration in Eugene, Oregon, one of the first jurisdictions to adopt this procedure. Based on an analysis of the first six sets of negotiations under Eugene's final-offer system, the authors conclude that this procedure has been relatively successful in preserving the parties' incentive to negotiate their own agreements.

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[1] Alaska, Hawaii, Pennsylvania, and Oregon legislation grant most state and local government employees (except police and fire fighters or "essential" employees) the right to strike, except in all four states this right can be abridged if such a strike endangers public health, safety, or welfare. Vermont legislation prohibits local government employee strikes but says they are enjoinable only if they endanger the public interest or welfare. Montana legislation allows nurses to strike only if no other health care strike is in progress within 150 miles and after 30 days' notice is given of intent to strike.

union in reaching agreement without a work stoppage.

Various types of third-party intervention (all of which are some form of mediation, fact finding, or arbitration) have been used in public sector impasses in recent years, and each has been acknowledged to be useful in one context or another.[2] The newest method, and one that has attracted much attention, is known variously as "final-offer," "either-or," "last-best-offer," or "one-or-the-other" arbitration. Although this kind of interest arbitration has been part of the industrial relations literature since 1966,[3] actual bargaining impasses have been resolved under this procedure only since 1972. Final-offer arbitration has recently become part of Wisconsin, Michigan, and Minnesota legislation and is being employed in those states, although in Wisconsin and Michigan this legislation applies only to impasses involving public safety employees. Final-offer arbitration also has been used on an ad hoc basis in a few other jurisdictions.[4] To date, however, the most substantial experience with this procedure, at least in a single city, has occurred in Eugene, Oregon, where six contracts have been negotiated under a final-offer ordinance passed in 1971. In addition, the Eugene final-offer framework is significantly different from final-offer systems in effect elsewhere. The purpose of this article is to examine and assess the experience in Eugene with this unique method of impasse resolution.

Before proceeding further, we believe it is appropriate to alert the reader to our preferences (or prejudices) on this subject. We start with the basic premise that negotiated agreements are highly preferable to settlements imposed by a third party. Consequently, neither author is enamored with compulsory interest arbitration in any form. We strongly believe that no completely satisfactory solution to the impasse problem in the public sector has been found (and probably will not be) and further that the best solution is either no solution (i.e., allow work stoppages) or a variety of solutions aimed at inducing the parties to effect their own direct compromises and settlements. We believe that final-offer arbitration goes farther toward this latter objective than conventional arbitration, and we offer the Eugene experience as tentative and partial evidence. In any case, the following material should be read in the context of these preferences.

Conventional Versus Final-Offer Arbitration

Before examining the particulars of the Eugene experience, it would be useful to compare conventional and final-

[2]For a comprehensive review of the evidence regarding public-sector impasse intervention, see Thomas P. Gilroy and Anthony V. Sinicropi, "Impasse Resolution in Public Employment: A Current Assessment," *Industrial and Labor Relations Review*, Vol. 25, No. 4 (July 1972), pp. 496–511.

[3]Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" *Industrial Relations*, Vol. 5, No. 2 (February 1966), pp. 38–52; more recently Harry H. Rains, "Dispute Settlement in the Public Sector," *Buffalo Law Review*, Vol. 19, No. 2 (1969–70), pp. 279–287, reprinted in J. Joseph Loewenberg and Michael H. Moskow, eds., *Collective Bargaining in Government* (Englewood Cliffs, N.J.: Prentice-Hall, 1972); and Edward R. Lev, "Strikes by Government Employees: Problems and Solutions," *American Bar Association Journal*, Vol. 57, No. 8 (August 1971), pp. 771–777; and Joseph R. Grodin, "Either-or Arbitration for Public Employee Disputes," *Industrial Relations*, Vol. 11, No. 2 (May 1972), pp. 260–266.

[4]An experiment with final offers in Indianapolis is reported by Fred Witney, "Final-Offer Arbitration: The Indianapolis Experience," *Monthly Labor Review*, Vol. 96, No. 5 (May 1973), pp. 20–25.

offer arbitration, with particular attention focused on the effect these two procedures have on the negotiation process.[5]

Conventional arbitration—the submission of a bargaining impasse to an arbitrator who then fashions the binding award he deems proper for the issues in dispute—has been used in this country in both the private and public sectors. Its limited use in the private sector has tended to be in impasses that threatened work stoppages perceived as national emergencies, such as railroad disputes.[6] Interest arbitration has been used more extensively in the public sector, especially in impasses involving public safety employees.[7] The apparent rationale of these laws is that police and fire services are too essential to the public health and safety to be interrupted, and arbitration provides a peaceful means of resolving bargaining disputes involving those services while protecting the interests of both parties to the negotiation.

Compulsory arbitration has been touted as the "wave of the future" in public sector impasse resolution,[8] and certainly it has been used increasingly since 1968. Interest arbitration in its conventional form, however, has received its share of criticism. Perhaps the bulk of these critical comments focuses on conventional arbitration's deterrent or "chilling" effect on the bargaining process. In the typical private sector negotiation, the parties are presumed to engage in sincere attempts to reach agreement because of the significant costs they will incur if they remain in disagreement. These costs of disagreement are usually associated with a work stoppage: no revenue for the firm, no paychecks for the employees, and a reduced treasury for the union. Perhaps equally important is the fact that each party is able to make only relatively uncertain estimates of what its costs of disagreement will be if a work stoppage occurs, in either absolute terms or relative to the other party's costs. The fact that these costs, if incurred, are substantial,

[5]In the interests of readability and brevity, we will not always use the adjectives "compulsory," "binding," and "interest" in the remainder of the paper. It should be understood, however, that our discussion is limited to interest arbitration that is both compulsory and binding, unless otherwise noted.

[6]The recent United Steelworkers–steel industry agreement to arbitrate 1974 negotiation differences is a significant departure from the traditional reluctance of parties in the private sector to utilize interest arbitration. It remains to be seen, however, whether the steel decision is a harbinger of the "wave of the future" or is only a single industry's response to its own particular bargaining and product market conditions. See *The Wall Street Journal*, 24 April 1973, p. 18.

[7]Alaska, Pennsylvania, Rhode Island, Michigan, Wisconsin, and Oregon have legislation mandating arbitration of police and fire bargaining disputes. The current Michigan and Wisconsin laws provide for a form of final-offer arbitration; the previous Michigan law provided for conventional arbitration. Wyoming has an arbitration law applicable to fire fighters. Minnesota permits the Public Employment Relations Board to invoke final-offer arbitration, and the arbitration decision is binding on "essential" employees. Several states, including Hawaii, Kansas, Maine, New Jersey, New Mexico, and South Dakota, have legislation that permits compulsory arbitration for various groups of employees. At the municipal level, New York City and Vallejo, California have a conventional arbitration framework to resolve impasses with all city employee groups; Oakland, California voters recently amended the city charter to provide for arbitration of police and fire fighter disputes; and Boulder, Colorado recently adopted a final-offer arbitration ordinance.

Probably the most complete analysis of public sector interest arbitration has been made by J. Joseph Loewenberg, "Compulsory Binding Arbitration in the Public Sector" (Paper delivered at the International Symposium on Public Employment Labor Relations, New York City, May 4, 1971). An abridged version of this paper can be found in International Symposium of Public Employment Labor Relations, New York, *Proceedings* (New York: New York State Public Employment Relations Board, 1971).

[8]See Gilroy and Sinicropi, "Impasse Resolution in Public Employment," p. 503.

and also of a relatively uncertain magnitude before the fact, tends to push the parties toward a voluntary settlement. The same reasoning applies to public sector disputes in which the employees have a right to strike, although a complicating factor is the political rather than economic nature of the costs of disagreement (especially on the management side).

These strike-associated costs of disagreement are dramatically reduced when bargaining takes place in a context culminating in conventional arbitration. Not only will there usually be no strike-induced costs of disagreement, but also the uncertainties associated with disagreement are significantly reduced. Conventional arbitration awards tend to be based on the compromise principle: the arbitrator's award gives more than the employer has offered and less than the union has asked for. Consequently, it can be argued that it will "be to the advantage of each party to enter the arbitration proceeding without having given away too much in advance."[9] To the extent that this reasoning is valid, conventional arbitration has a "chilling" effect on good-faith bargaining as each side holds back in anticipation of handing the dispute to an arbitrator. Although the available evidence shows that conventional arbitration "does not immediately and inevitably destroy collective bargaining,"[10] there is evidence that conventional arbitration has often reduced the incentive to bargain.[11]

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[9]Grodin, "Either-or Arbitration for Public Employee Disputes," p. 262.

[10]Loewenberg, "Compulsory Binding Arbitration in the Public Sector," p. 39.

[11]Loewenberg concludes that the arbitration experiences he examined do not prove the skeptics' predictions about its inevitable use, yet he provides evidence that it is used rather frequently. (*Ibid.*, pp. 37–40.) Juris and Feuille in 1971 examined police labor relations in six cities using conventional arbitration and found that police bargaining regularly ended in the arbitrator's lap in five of these cities. Hervey Juris and Peter Feuille, *Police Unionism: Power and Impact in Public Sector Bargaining* (Lexington, Mass.: D. C. Heath, 1973), chap. 5. Hines examined the use of interest arbitration in Ontario hospital disputes from 1966 through 1970 and found the incidence of arbitration increasing over time. Robert J. Hines, "Mandatory Contract Arbitration—Is It A Viable Process?" *Industrial and Labor Relations Review*, Vol. 25, No. 4 (July 1972), pp. 533–544. Probably the most complete study of public safety interest arbitration has been done by Bowers, who examined police and fire fighter negotiation outcomes under the Michigan and Pennsylvania arbitration statutes from the statutes' implementation (in 1969 and 1968, respectively) through 1971, and found that approximately 19 percent of Michigan public safety negotiations and 45 to 50 percent of Pennsylvania public safety negotiations culminated in an arbitration award. One of her conclusions is that the design of an arbitration procedure may result in a deleterious effect on the incentive to bargain. Mollie Bowers, "A Study of Legislated Arbitration and Collective Bargaining in the Public Safety Services in Michigan and Pennsylvania" (Ph.D. dissertation, Cornell University, 1973), a version of which is soon to be published by Prentice-Hall.

The "chilling" effect of conventional arbitration on negotiations in the private sector has often been noted. See Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" pp. 44–45; and Carl M. Stevens, *Strategy and Collective Bargaining Negotiation* (New York: McGraw-Hill, 1963), p. 53. Kaufman presents an interesting examination of impasse resolution (including *de jure* and *de facto* arbitration) and the erosion of genuine collective bargaining in the railroad industry. Jacob J. Kaufman, "Procedures Versus Collective Bargaining in Railroad Labor Disputes," *Industrial and Labor Relations Review*, Vol. 25, No. 1 (October 1971), pp. 53–70. Probably the most complete examination of conventional interest arbitration in the private sector has been performed by Northrup. After reviewing the experience with wartime adjustment procedures, state compulsory arbitration laws, national emergency disputes under the Railway Labor and Taft-Hartley Acts, and selected foreign procedures, he concludes that his analysis "confirms beyond a suggestion of doubt that compulsory arbitration . . . [d]iscourages collective bargaining." Herbert R. Northrup, *Compulsory Arbitration and Government Intervention in Labor Disputes* (Washington: Labor Policy Association, 1966), p. 207.

Other criticisms of conventional arbitration can be made: it may involve an unconstitutional delegation of legislative or executive decision-making power; elected officials should not permit an arbitrator to determine issues they were elected to decide; arbitration may inhibit the bargaining compromises and innovations necessary to cope with changing conditions; and it tends to prevent the parties from coming to grips with efficiency versus equity questions.

It is in response to these criticisms, especially the deterrent effect of conventional arbitration on bargaining, that final-offer arbitration has been proposed. As Grodin explains, under the final-offer procedure, "an arbitrator would not be free to compromise between the positions of the parties but would be required to accept one position or the other *in toto* . . . . The theory is that the process, instead of chilling bargaining, will induce the parties to develop their most 'reasonable' position prior to the arbitrator's decision."[12] The possibility that either party "may lose the entire ball game" in arbitration is intended to act as a psychological, economic, and political incentive for the parties to reach their own agreement: "This [one-or-the-other] criterion generates just the kind of uncertainty about the location of the arbitration award that is well calculated to recommend maximin notions of prudence to the parties and, hence, compel them to seek security in agreement."[13] In other words, the final-offer procedure functions as a "strikelike" mechanism by posing potentially severe costs of disagreement in a manner that conventional arbitration does not.

It is primarily this incentive-to-bargain criterion, and only secondarily the other criteria just described, that will be used to assess the final-offer arbitration experience in Eugene.

The Eugene Setting

Eugene's approximately 800 public service employees provide the city's 90,000 citizens with the usual range of municipal services. The city has three bargaining units, each represented by a different union. The Eugene Police Patrolmen's Association (an independent organization) represents a total of 145 nonsupervisory police officers and civilian records clerks employed in the police department. The Eugene Fire Fighters Association, International Association of Fire Fighters Local 851, AFL-CIO, represents the 140 nonsupervisory fire fighters. The American Federation of State, County, and Municipal Employees Local 1724A represents a unit of 300 civilian employees from the remaining city departments.[14] None of the city's professional employees have selected union representation, and the city bargaining ordinance denies representation rights to confidential and supervisory employees.[15] The city has a council-manager form of government, with an eight-member council elected on a stag-

[12]Grodin, "Either-or Arbitration for Public Employee Disputes," p. 263.

[13]Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" p. 46.

[14]The AFSCME unit consists of blue-collar and white-collar, public works, parks maintenance, clerical, and technical employees.

[15]Under previous Oregon labor legislation, local jurisdictions had great latitude in structuring the bargaining relationship and also could elect not to be covered by the law and thus have no legal obligation to bargain. A new law, passed in July 1973, mandates bargaining rights for all state and local government employees, but it also includes a grandfather clause that protects existing bargaining arrangements.

gered, nonpartisan, uncompensated, district basis for four-year terms. The city's administrative branch handles the labor relations function. The personnel director is the chief negotiator and contract administrator, and he reports to the city manager. The city council plays a minimal role in labor relations. Council members, by ordinance, have delegated the responsibility for labor relations to the city manager and the personnel director. The council limits itself to reviewing privately the city's bargaining position and to deciding on tentative contracts submitted by the manager.

The legal framework governing these bargaining relationships was developed with inputs from both sides. As the city council was studying the wisdom of establishing a collective bargaining system in 1969–70, the IAFF and AFSCME locals circulated among the voters an initiative petition to amend the city charter to require collective bargaining and "compulsory binding arbitration" to resolve impasses. In May 1970, the voters narrowly adopted the initiative, and bargaining began shortly thereafter with the fire fighters, the only group that was well organized at that time. The negotiations halted, however, because of disputes over the interpretation of the charter amendment. The two sides went to court to resolve the matter, and in March 1971 the court upheld the amendment's validity and suggested that it be implemented by ordinances in a manner to ensure its constitutionality.[16] Consequently, during the spring and summer of 1971, city and fire fighter representatives drafted an ordinance that clarified and defined the more general language in the charter amendment. The city council passed the ordinance (which was supported by city administrators and two of the three unions) in September 1971, and it is this ordinance which established Eugene's unique final-offer procedures.[17]

The ordinance establishes a bargaining-arbitration timetable so that union-management contracts will be geared to a fiscal year basis and will be finalized before the annual budget-adoption deadlines in May and June.[18] Consequently, the ordinance provides that between October 1 and 15 of any year in which a party wants to negotiate a contract for the next fiscal year, that party must send a "letter of intent" to bargain to the other party. After such notification, the period between October 15 and December 15 is to be used for "preliminary discussions" during which time the participants shall "meet and confer in good faith" on contract terms. If, by December 15, the two sides have not reached a "tentative agreement," the city manager shall request mediation assistance from the state (this requirement may be mutually waived). If either party then wishes to proceed to "bi-lateral negotiations," it must send a letter of intent to the other party between January 2 and 5, and such negotiations shall commence within ten calendar days (by January 15).[19]

[16]City of Eugene v. Eugene Fire Fighters Association No. 851 and AFSCME Local 1724A, Case No. 100756 Lane County Circuit Court, Eugene, Oregon.

[17]See Bureau of National Affairs, *Government Employee Relations Report*, No. 423 (Washington: October 18, 1971), for a description of and the text of the ordinance.

[18]In recent years, the city budget usually has been submitted to the voters for their approval because the property tax rate necessary to fund the budget has exceeded a legislated limitation.

[19]The distinction between "preliminary discussions" and "bi-lateral negotiations" is primarily a semantic one designed to cope with the language of the fire fighters' charter amend-

The official negotiation period is short. If the two sides have not reached agreement within twenty-five days from the beginning of official negotations, "each party shall submit a final offer and may at the same time submit one alternative offer to the other party." These four offers may constitute a complete proposed contract or may be limited to the specific items still in dispute. In either case, these offers are filed with the city recorder and preserved for the arbitration board. If only the disputed items are submitted, all items previously agreed on also shall be filed with the recorder. This filing of final offers does not end negotiations, for after the filing the parties are mandated to continue their negotiations. If, after five more days, agreement has not been reached on a complete package (i.e., by February 15), the arbitration procedure shall be invoked. Negotiation is again encouraged at this point, by a provision that the "parties may continue to discuss these offers until agreement is reached or a decision is rendered" by the arbitration panel.

The arbitration board is tripartite, consisting of a representative from each side and a chairman. When arbitration is invoked, the ordinance provides ten days for the selection of the panel, ten more days for the panel to convene, and ten more days for the panel to make its selection of one final offer from among four (i.e., by approximately March 15 the process should be completed). The arbitrators shall hold at least one hearing to discuss the offers submitted and then shall select "the most reasonable" of the offers submitted. The board cannot make any changes in the offer selected, and the selection must be based solely "on the content of that offer." The board is to determine which offer is the most reasonable according to four criteria: the bargaining history of the parties, relevant market comparisons in the private sector, relevant market comparisons in the public sector, and the city's ability to pay.[20] The ordinance also provides that the city shall pay all of the arbitration panel's expenses.

It should be noted that the Eugene procedure was based on the Nixon administration's proposed legislation for dealing with national emergency disputes in the transportation industry. This was due to the fact that the Nixon proposal was one of the few (and perhaps the only) specific final-offer procedural proposal then in circulation, and it conveniently suited the city administration's desire to avoid implementing a conventional arbitration system. Although there are significant differences between that proposed legislation and the Eugene system, the latter is closer to that proposed by President Nixon than are the other final-offer systems now in effect.[21]

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ment, which limits "bi-lateral negotiations" to a thirty-day period in January and February. In order to cope with this overly rigid requirement, those who drafted the ordinance added a "preliminary discussion" period prior to the official negotiation period in order to have more time to reach an agreement. In effect, the Eugene ordinance calls for a negotiation process that begins in October and ends in February (except in cases in which the parties mutually agree to deadline extensions), with most of the hard bargaining occurring during the official "bi-lateral negotiations" period.

[20]See the source cited in footnote 17 for the complete criteria language.

[21]For the text of that proposed legislation, see Bureau of National Affairs, *Daily Labor Report*, No. 40 (February 27, 1970) pp. F1–F6. Perhaps the most important difference between that proposal and the Eugene procedure is that the former provided final-offer arbitration as one of three alternatives in an "arsenal of weapons," whereas in Eugene, the final-offer procedure is the only impasse resolution mechanism available. In addition, the administration proposal requires sharing of the arbitration costs; in Eugene, the city picks up the entire

The Eugene Experience

The city and the unions have negotiated a total of seven contracts since collective bargaining was introduced into city government—three with the fire fighters, and two each with the police and AFSCME. Six of these contracts were negotiated under the auspices of the final-offer ordinance. (The initial fire fighters' contract was agreed to in February-March 1971 under the threat of a court-imposed conventional arbitration procedure.)

The first final-offer experience involved the negotiation in 1971–72 of the second fire fighters' contract. During these negotiations, the city and the union tentatively agreed on several items, but because of significant disagreements on selected items, they declared the entire package in dispute. The major disputed issues included the incorporation into the contract of manning standards and civil service procedures (both of which the union wanted included), longevity pay, which the union also demanded, and the size of the economic adjustment. Each side submitted two offers (a final offer plus an alternative offer) to the arbitrators. The economic packages offered by the city totaled 6.0 percent and 6.5 percent in its two offers, with the first offer consisting mostly of an across-the-board wage increase and the second emphasizing an increase in health and retirement benefits. The union asked for economic adjustments of 8.6 percent and 7.4 percent,[22] with longevity pay included in both its proposals. In addition, both union proposals contained the disputed manning and civil service provisions.

A majority of the arbitration panel (the chairman and the city representative) selected the city's first offer primarily because of the chairman's objections to the manning requirement (that a three-man crew of designated rank be used on certain fire vehicles) in both union offers: "If it had not been for the inclusion of the mandatory manning requirement clause in both Association offers, the Chairman would have voted to select [the alternate] Association offer . . . as the most reasonable."[23] The chairman also objected to the union's inclusion of civil service provisions.[24] The city's first offer was selected, even though the size of the increase was smaller than in its alternate offer, because its across-the-board wage increase was preferred by the union over the

tab. Finally, there are differences in the selection criteria, particularly a "catch-all" criterion in the Nixon proposal that would give more discretion to the arbitrators than do the more specific criteria in the Eugene procedure.

[22]These cost estimates are those used by the city and as such include an increase, mandated by the state Public Employees Retirement System, of 1.15 percent in both 1971 and 1972. The city's position is that although such legislated increases may not have been bargained at the table, they are a very real portion of the city's labor costs and consequently must be included in any calculations of annual economic adjustments. Naturally, the unions have not enthusiastically agreed with this position, and in a later case (AFSCME in 1972–73), this issue was an important bone of contention, with the arbitration chairman agreeing with the city's position.

[23]Paul D. Hanlon, "Explanation of the Selection of Final Offer," *In the Matter of Arbitration between International Association of Fire Fighters, Eugene Fire Fighters Association No. 851, AFL-CIO and City of Eugene, Oregon* (American Arbitration Association Case No. 75-39-0004-72, March 8, 1972), p. 10.

[24]*Ibid.*, pp. 7–8. The city administration and the fire fighters disagreed about the continued existence of the civil service system. The city's position has been that the bargaining-arbitration charter amendment eliminated civil service; that is, the employees have either bargaining or civil service rights, but not both. The city's position has been upheld in court. Frank D. Jackson v. City of Eugene, Case No. 72-1590, Lane County Circuit Court, Eugene, Oregon.

fringe benefit increases in the alternate offer.

The second final-offer experience involved the negotiation of an initial contract with the police union during the period 1971–72. As in the case of the fire fighters, all items were declared in dispute, and each side submitted two final offers for consideration. The major disputed items included the scope of management rights and the size of the economic adjustment. The city offered package increases of 6.2 percent and 6.7 percent, and the union asked for 15.9 percent and 13.0 percent.[25] As a result of feedback from its arbitration representative about the third party's reaction to the size of its proposals, the union approached the city about a negotiated agreement. Consequently, during the second day of arbitration hearings, the two sides mutually requested a recess, reached agreement on all items, and the arbitration process was terminated. The final settlement was based largely on the city's alternate offer and the financial adjustment was slightly increased (to 6.8 percent). The noneconomic clauses in the final agreement followed the language in the city's alternate offer.

The third final offer experience involved the negotiation of an initial contract with the AFSCME local. Both sides wanted to avoid arbitration of this first contract, and as a result they agreed on all items with the single exception of union security. The union wanted an agency shop (labeled a "fair share" arrangement), and the city offered a maintenance of membership provision. The city believed it could not voluntarily agree to the agency shop proposal, because a sizeable number of employees in the AFSCME unit were opposed to being represented by the union and were not members. The city representative did not oppose the agency shop in principle, however, and the union representatives recognized that the city's maintenance of membership offer would strengthen the union's position over the existing open shop situation. Both sides were therefore willing to let a third party decide the issue. Instead of utilizing the city's arbitration procedure on this one issue, the parties agreed to use the fact finding services provided free by the state and to be bound by the fact finder's decision. Although the parties officially labeled this procedure "binding fact finding," it was actually final-offer arbitration since they agreed to be bound by the decision, and, as a practical matter, the third party had almost no choice other than to select either the union or city position. In this case, the union's position was selected.

The 1972–73 round of bargaining also yielded a variety of results. In early 1973, the city and the police union reached a two-year agreement without resorting to the arbitration procedure. In addition to an overall 12.0 percent economic adjustment, the agreement includes a new promotion hierarchy, from patrol officer to police agent, with advancement based on a combination of advanced education, training, and above-average performance. Shortly thereafter, the city and the fire fighters' local reached agreement on almost all items in a two-year contract with the exception of the form of part of the pay package, which was another manifestation of the continuing dispute over the establishment of longevity pay. The two sides took this single issue to arbitra-

[25] These are the city's calculations and as such include the 1.15 percent legislated increase in retirement contributions.

tion, with the union proposing a longevity pay plan estimated to cost 3.1 percent annually and the city offering a tax-sheltered annuity benefit of 3.0 percent in its first offer and an across-the-board increase of 2.8 percent in its alternate offer.[26] The majority of the arbitration panel (i.e., the chairman and city representative) selected the city's across-the-board increase as the most reasonable offer and rejected the other proposals primarily because of the scarcity of similar pay plans in the relevant labor market.

In their second contract negotiations, the city and AFSCME reached agreement on the noneconomic clauses in the contract (which amounted to little more than a continutation of the first contract's language), but they could not agree on the size of the economic adjustment. Each side submitted two one-year final offers to the arbitrators, with much disagreement over the calculation of the value of each side's offers. The arbitrator's figures put the city's offers at 5.9 and 6.2 percent and the union's offers at 10.4 and 10.0 percent.[27] The arbitration board received the parties' testimony, convened in executive session to make a selection, and tentatively decided in favor of the city's alternate offer—that is, the chairman indicated he favored that offer. The two adversary representatives on the board then communicated this tentative decision to their principals, and the two sides resumed direct negotiations. Before a formal arbitration award was served on the parties, they reached direct agreement on a three-year contract containing a 13 percent economic adjustment over the first two years and a wage reopener for the third year.

The results of the Eugene experience are summarized in Table 1.

Effects on the Negotiation Process

As noted previously, the most salient criterion by which to evaluate the Eugene experience is whether or not this particular form of arbitration induces the parties to reach their own agreements. Since the evidence offers support to both opponents and proponents of final-offer arbitration, any conclusions reached must be tentative and will depend in part on one's preferences and vantage point.

The initial contract negotiations with the police were unsuccessful in producing an agreement prior to arbitration, but the actual arbitration proceedings show how this procedure can induce the parties to reach an agreement. After the arbitration hearings commenced, the association's representative on the board informed his principals that their proposals would not meet the arbitrators' criteria for selecting the most reasonable offer.[28] As a result, association and city representatives conferred, mutually requested a recess, and then negotiated an agreement.

As a consequence of this first-round

[26] These figures do not include the 1.15 percent legislated increase in retirement contributions. In addition to longevity pay, the union's offer proposed to eliminate all the pay steps in several ranks except for the highest step.

[27] The city calculated the cost of its offers to be 6.1 and 6.4 percent, and the cost of the union's offers to be 10.8 and 10.4 percent. The union's calculations of the city's offers were 4.6 and 4.7 percent, and of its own offers, 9.0 and 8.6 percent. The union's figures did not include the legislated increase in retirement contributions, a position the arbitrator rejected. H. Kenneth Zenger, *In the Matter of the Arbitration Between the City of Eugene Local 1724-A, American Federation of State, County, and Municipal Employees, AFL-CIO, Affiliated with Council 75* (March 21, 1973), pp. 4–7.

[28] The union representative was a Portland attorney. This statement is based on conversations with him and with union leaders.

Table 1. Eugene Negotiation-Arbitration Experience in the Public Sector, 1970–73.

Employee Group	*Arbitration Invoked?*	*Items Submitted to Arbitrators*	*Outcome*
1970–71 negotiations (under conventional arbitration):			
Fire Fighters	No	—	Negotiated agreement
1971–72 negotiations (under final-offer arbitration):			
Fire Fighters	Yes	Entire contractual package	City first offer selected
Police Patrolmen	Yes	Entire contractual package	Direct agreement reached during arbitration proceedings
AFSCME	Yes (binding fact finding)	Union security; all other items agreed to in negotiations	Union position (agency shop) selected
1972–73 negotiations (under final-offer arbitration):			
Fire Fighters	Yes	Longevity pay dispute; all other items agreed to in negotiations	City alternate offer selected
Police Patrolmen	No	—	Negotiated agreement
AFSCME	Yes	One-year economic package; noneconomic issues agreed to in negotiations	City alternate offer selected but was moot because of three-year agreement negotiated during arbitration proceedings

arbitration experience, police association leaders indicated their desire to avoid arbitration during 1972–73 negotiations. Consequently, the two sides negotiated a two-year contract that included the innovative promotion hierarchy referred to earlier. Both sides have indicated their satisfaction with this contract, and it seems fair to give substantial credit to the previous year's arbitration experience as providing the incentive necessary for this negotiated agreement.

The experience with the fire fighters does not lead to any clear-cut conclusion. After negotiating a first contract under a conventional arbitration procedure in February-March 1971, the city and the union did not formally agree on anything in their next negotiation, and each took two complete contract packages to arbitration. Although the two sides were not very far apart on the size of their economic proposals (6.0 and 6.5 percent versus 8.6 and 7.4 percent), they differed widely on noneconomic issues, and the chairman selected one of the city's offers because he ob-

jected to the manning requirements in both union offers. This outcome apparently had a salutary effect on the incentive to bargain, for the next year the two sides agreed on a two-year package with the exception of longevity pay, which was submitted for arbitration.

Negotiations with the AFSCME local reflect a mixture of bargaining incentives, the importance of informal communications, and internal union political considerations. The first set of negotiations resulted in a direct agreement, and union leaders' comments indicate that the incentive to bargain was increased because of the police and fire unions' experiences a few months previously.[29] The second round of AFSCME negotiations went to arbitration on the economic adjustment package, in part because of internal union political considerations. Selected portions of the bargaining unit were unhappy with union representation, in part because of the imposition of the agency shop a few months previously.[30] Union representatives felt constrained to ask for a relatively large package in order to defend their own organizational position. It was only after the union leaders learned from their association representative that the arbitration chairman had tentatively decided in favor of the city that they negotiated an agreement. The result was a three-year contract that provides increased security for both sides. This outcome is similar to that of the initial police experience, in that both agreements were negotiated after the unions involved were informed by their arbitration representatives that their offers would fail (as in the case of the police negotiations) or had failed (as in the case of the AFSCME) the "most reasonable" tests.

One can conclude, after examining these experiences, that the incentive to bargain is increased primarily because of the "sudden death" nature of the procedure: either party may "lose the entire ball game" if the arbitrators deem its offers less reasonable than one of those made by the other party. The 1971–72 arbitration experiences with police and fire fighters and the 1972–73 experience with AFSCME demonstrated this possibility. The police and AFSCME experiences revealed the futility of asking for economic gains that considerably exceed prevailing market standards, and the fire fighters' experience revealed that it is possible to lose an entire package because of the inclusion of one objectionable provision. These experiences have made all the parties in Eugene aware that a successful final-offer arbitration strategy is the antithesis of a successful conventional arbitration strategy: instead of maintaining wide areas of disagreement in hope of a more favorable compromise award, each side must develop more reasonable proposals than the other side, which, on economic issues in Eugene, translates into narrowing the areas of disagreement around a central figure supplied by market comparisons.

It can be seen why this record offers comfort to both supporters and critics of final-offer arbitration: proponents may stress that only one of six cases resulted in an arbitration decision covering the entire contractual package; opponents may argue that arbitration was invoked in five out of six cases. Considering the parties' almost total lack of

[29]The serious bargaining with AFSCME over this first contract was conducted in the summer of 1972. The initial police and fire fighters' experiences with final-offer procedures occurred in February and May 1972.

[30]Arbitration was invoked in February 1973; the agency shop award was issued in November 1972.

bargaining and arbitration experience, however, and the fact that the city pays all arbitration costs, we believe that final-offer arbitration has been at least moderately successful in Eugene in preserving the parties' incentive to bargain.

Procedural Characteristics

Selected aspects of the Eugene final-offer procedure deserve examination for their contribution to the workability of the process. To the extent these procedural characteristics have unifying themes, these themes are flexibility and uncertainty.

Probably the most unusual aspect of the Eugene final-offer framework, as compared to final-offer procedures adopted elsewhere, is the fact that each side may submit two final offers. This dual opportunity greatly increases each side's flexibility in its presentation to the arbitrators, and this flexibility is especially evident with multi-item packages.[31] This was demonstrated in the first fire fighters' arbitration case, in which the economic portion of the city's first final offer consisted largely of an across-the-board pay increase, and the city's alternate offer consisted primarily of fringe benefit increases. The second AFSCME arbitration provides a similar example. This dual opportunity also allows both sides more flexibility in acceding to constituent pressures. For example, union leaders may load one offer with many "goodies" in order to satisfy membership pressures, but they may also make another offer that is structured in a more realistic manner.

An equally important result of the dual offers is that they increase uncertainty on both sides of the table. If a party only had to present one offer, it seems reasonable to expect that this offer would approximate its final negotiating position and the other party would be aware of that. This relative certainty is substantially reduced when each side may present two offers, for even if one offer does approximate the final negotiation position, the other may not. Not only does this uncertainty put pressure on both parties to be more "reasonable" in their offers, it increases the probability that each party might have one offer so close to an offer of the other party that the two sides can reach their own agreement.

The second procedural aspect worth emphasizing is the maintenance of the flow of communications—between the parties directly and between the parties and the arbitration chairman—once the arbitration procedure is invoked. As noted, the ordinance mandates negotiations for five more days after the parties have exchanged final offers, and it also invites negotiations after the arbitration procedure has begun. The tripartite form of the arbitration board has also assisted significantly in maintaining the flow of communications, and in both the first police and second AFSCME cases, union representatives on the board were instrumental in conveying information to their principals, about the chairman's tentative decision, which resulted in negotiated agreements.[32] Used in this manner, the Eugene procedure becomes a form of "med-arb" in which the arbitrator uses his decision-making power to pressure the parties into reaching their own agreement.

[31]Grodin argues in favor of multiple offers in multi-issue cases as one way of providing flexibility. Grodin, "Either-or Arbitration for Public Employment Disputes," pp. 264–265.

[32]Stevens speculates on the usefulness of this kind of communication in his discussion of "Type II" one-or-the-other arbitration. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" p. 47.

Critics may legitimately question whether in most situations there would be an incentive for a party to negotiate further if it knew it was going to be awarded the decision. For instance, in a city where union-management relations are hostile, internal political constraints normally would not permit union leaders to negotiate away anything achieved as a result of an arbitration award. The fact remains, however, that in Eugene most of the arbitration chairmen have perceived the city's offers as most reasonable, and yet city representatives have been willing to resume negotiations.[33]

The third aspect of the Eugene procedure worth emphasizing is the extent to which the arbitration criteria reduce the arbitrators' discretion and consequently the parties' uncertainty about which final offer will be selected. The ordinance was purposefully fashioned to include only four specific criteria—bargaining history, private market comparisons, public market comparisons, and the city's ability to pay. The interests of both sides can thus be considered, but the arbitrators do not have a "catch-all" criterion on which to base their selection.[34] Such specificity significantly reduces the possibility that the arbitrators may make a decision on the basis of factors unknown to or not considered by the parties. Consequently, there is little incentive to use a strategy of "let's take it all to the arbitrator and he might find a way to justify giving us the award." Also, if the parties know in advance the criteria the arbitrators will use, they can use these same criteria to reach a negotiated settlement.

The final procedural aspect to be considered involves Eugene's negotiation-arbitration timetable described earlier in this article. In the 1971–72 negotiations and arbitrations with police and AFSCME, this timetable was waived because the ordinance permits such waivers in initial contract negotiations. Similarly, in 1972–73 negotiations, the union and the city in the police and AFSCME negotiations mutually waived the procedural deadlines, but in the case of the fire fighters, there was no mutual waiver and negotiations and arbitration proceeded as required by the ordinance. Although there needs to be a hard-and-fast deadline in any negotiation setting, there also needs to be some flexibility to allow the parties additional negotiating time, if such time can be used to achieve a settlement. This flexibility is not built into the Eugene procedure, and if the two sides cannot agree to mutually waive the time constraints, the timetable's rigidity may operate to inhibit a negotiated settlement.

Environmental Characteristics

Any examination of the Eugene system would be incomplete without mention of two salient characteristics of the negotiation-arbitration environment:

[33]City representatives place a high value on negotiated settlements because they believe that such agreements are more likely than imposed settlements to reflect both parties' objectives and that needed innovations can be implemented successfully only if voluntarily agreed to, and also because they desire to avoid the negative impact on union-management relations that may result when one party loses in arbitration.

[34]Consider, for instance, the final criterion in the Michigan public safety arbitration law: "Such other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-findings, arbitration or otherwise between the parties, in the public service or in private employment." Subsection (h) of Section 423.239 of Michigan Public Act 312 (1969), as amended by Public Act 127 (1972), in Bureau of National Affairs, *Government Employee Relations Report Reference File*, 51: 3115.

the union-management attitudinal relationships and the relationship between city labor relations and city politics. In terms of Walton and McKersie's typology, interactions between the city and its three unions probably are best described as accommodation: the parties accept each other's legitimacy, are willing to trust each other up to a point, and are reasonably friendly in their day-to-day dealings with each other.[35] Although each party protects its rights and interests, both have displayed a fair amount of goodwill in their dealings with each other.

A second important factor is the relative absence of "distributive" or competitive elements in the city's political situation, at least with respect to labor relations. Elected city officials serve on an uncompensated part-time basis and are relatively removed from the union-management interaction system. Also, these officials have not attempted to use municipal labor relations as a vehicle for the advancement of their political careers. On the financial side, the city's financial position is strong enough that the city has not relied on an "inability to pay" theme in negotiations or arbitration, so there has been almost no distributive competition among the parties over the allocation of scarce resources. Finally, the city is overwhelmingly white,[36] so the racial tensions that have affected labor relations in other cities have been absent.

The fact that the negotiation-arbitration system does not have to cope with distributive political pressures and overtly hostile union-management interaction patterns has contributed to the parties' willingness to seek direct agreements instead of insisting on pursuing the complete arbitration route over all issues in each negotiation. In addition, the existence of the bargaining-arbitration ordinance has tended to de-politicize the city labor relations system. The ordinance gives elected officials a legitimate reason for refusing access to union leaders, and the final-offer process prevents matters within the scope of bargaining from being resolved in political arenas, such as the floor of the city council.[37]

Concluding Observations

In this concluding section, the Eugene experience will be used as a base from which to respond to the following criticisms of final-offer arbitration: the need for bargaining sophistication, the lack of face-saving quality in final offers, and the almost complete elimination of the arbitrator's discretion.

The Eugene experience offers some support to both proponents and opponents of Grodin's view that the final-offer procedure "appears best suited for parties fairly sophisticated in the bar-

[35]Richard Walton and Robert McKersie, *A Behavioral Theory of Labor Negotiations* (New York: McGraw-Hill, 1965), pp. 185–189.

[36]Approximately 2 percent of the city's population are members of racial minority groups.

[37]It is difficult to present "before and after" evidence regarding the de-politicization of bargaining, since very little bargaining occurred prior to the implementation of the final-offer system. Prior to the introduction of bargaining, however, the city employee organizations regularly lobbied with city council members concerning pay and other personnel matters. With the introduction of formal collective bargaining in September 1971, the council designated the city manager or his appointed representative to handle all matters within the scope of bargaining. Since then, the council has rebuffed attempts by city union representatives to discuss bargainable matters and has referred them to the city manager and the personnel director. The ordinance also preempts any role the council might play in dispute resolution by mandating that all impasses be referred to the arbitrators. This same effect, of course, might have been achieved by a conventional arbitration system.

gaining process, fairly well able to judge the reasonableness of their own positions in relation to the standards likely to be applied by the arbitrator." [38] Proponents of this view can point to the first police, second fire fighters, and second AFSCME cases for support. Certainly the 13–16 percent economic adjustments proposed by the police union would not have met the arbitrators' "most reasonable" criteria, especially with city offers in the 6–7 percent range, and the AFSCME case presents a similar although less clear-cut example. The fire fighter's manning proposals were found so objectionable that both their offers were rejected. One might argue that the union representatives in these cases lacked the bargaining sophistication necessary to participate successfully in final-offer arbitration and thus were penalized unfairly.

This argument, however, has a hollow ring when one considers the fact that city representatives also had almost no experience in bargaining or arbitration. Also, it must be remembered that in other cases the same parties either did not go to arbitration or went to arbitration with only one issue after agreeing to all the others. One must also realize that in the second fire fighters case, the parties were not very far apart on economic issues. Consequently, the Eugene experience does not necessarily support the contention that sophisticated and experienced practitioners are needed to make the final-offer mechanism function properly. Furthermore, we believe the Eugene experience suggests that actual immersion in the final-offer process facilitates sophistication in the most rapid manner possible.

Another criticism that has been leveled at final-offer arbitration is that the procedure "lacks the face-saving quality available in conventional arbitration where one of the parties, or both, feels it must assert certain positions which it knows to be 'out of the ball park', for political or ideological reasons." [39] In conventional arbitration the arbitrator can excise these unreasonable proposals, but in final-offer arbitration he cannot.

This criticism seems faulty for at least three reasons. First, if direct settlement is going to be reached in any negotiating setting, these "out of the ball park" proposals must be dropped. This criticism seems to imply that conventional arbitration should be the end point of all negotiations so that adversary representatives will be free to advance unreasonable proposals. It is difficult to see why final-offer arbitration should be singled out for criticism on this dimension, especially when one considers that the "loss of face" question is integrally involved in all strike-resolved impasses. Second, the dual-offer framework allows an escape valve for these situations. The "out of the ball park" demands can be loaded in one offer, and the second offer can be made more realistic. Third, in the second AFSCME and first police final-offer experiences, a union clung to extreme offers until it received negative feedback from its panel representative, after which the parties negotiated their own agreement. Thus, this process permits the union leaders to tell the membership that the negotiated agreement was the best they could do, given the unfavorable decision.

Perhaps the most widespread and disturbing criticism is that the final-offer procedure too severely circumscribes the arbitrator's discretion. For instance, Grodin's primary objection to having an

[38] Grodin, "Either-or Arbitration for Public Employee Disputes," p. 264.

[39] *Ibid.*, p. 264.

arbitrator select an entire package of issues is that he would not have the flexibility necessary to effectuate the priorities he considers appropriate.[40] Another example is the complaint by one of the neutrals in a recent final-offer case in Indianapolis, who has said that the arbitration panel in that case did not have the necessary flexibility to "fashion a labor agreement which, in its judgment, would have been workable and equitable and which would have met the needs of the parties."[41] Finally, the arbitrator in one of the Eugene cases also criticized the fact that he was not in a position to use his discretion to fashion what he considered to be the most desirable award.[42]

This kind of criticism is disturbing because it suggests a misconception of the function of the final-offer procedure.[43] In conventional interest arbitration, the arbitrator issues an award in which he effectuates his judgment of the compromises that the parties could not or would not effectuate at the table. The overriding purpose of the final-offer procedure, however, is to induce the parties to make their own compromises by posing potentially severe costs if they do not agree. In other words, a successful final-offer procedure is one that is not used; one that induces direct agreement during the proceedings; or, using a less rigorous definition of success, one that substantially narrows the area of disagreement. And when the procedure is used, the function of the arbitrator is to operationalize its potential costs by deciding against the party that advocated the less reasonable offer (s). In other words, the final-offer mechanism is intended to promote the give-and-take of good-faith bargaining by acting as a "strikelike" substitute rather than to serve as a mechanism by which arbitrators may exercise their discretion. Consequently, arbitrators' complaints of a lack of discretion suggests that the final-offer procedure is functioning as it was designed to function.[44]

This criticism stems in part from the difficulties a final-offer arbitrator would presumably have in trying to resolve a multi-issue impasse. In response, some authors have proposed that in multi-issue disputes the arbitrator might choose among the final offers on an issue-by-issue basis,[45] and the Michigan public safety arbitration statute does provide for that type of selection on economic

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[40] *Ibid.*, p. 265.

[41] Witney, "Final Offer Arbitration: The Indianapolis Experience," p. 25. The criticisms of final-offer arbitration offered as a result of this experience seem exceptionally misplaced. For final offers to be effective as a "strikelike" impasse resolution mechanism, negotiations *must* take place in a context in which the parties know *in advance* that if they do not agree, an arbitrator will select one party's final offer. In Indianapolis, the parties decided to use a final-offer procedure *after* they had negotiated to impasse. The parties' lack of understanding of what final-offer arbitration is designed to do is exemplified further by their selection of *two* arbitrators to hear the case.

[42] Hanlon, "Explanation of the Selection of Final Offer," p. 10.

[43] We are assuming that these criticisms are genuine and are not offered simply as face-saving solace to the losing party. If this assumption is incorrect, our responses to the criticisms are misplaced.

[44] These complaints may stem in part from arbitrators' objections to the win-lose nature of the final-offer process. It is understandable that a third party would prefer to fashion an award that gives something to both sides rather than issue an award that is identified solely with one side or the other. See Byron E. Calame, "'Best Offer' Arbitration's Critics," *Wall Street Journal*, June 14, 1972, editorial page.

[45] See Lev, "Strikes by Government Employees: Problems and Solutions," pp. 771–777; and Gilroy and Sinicropi, "Impasse Resolution in Public Employment: A Current Assessment," p. 511.

issues.[46] The Eugene experience with entire package selection suggests that issue-by-issue selection would permit the arbitrator to substitute his judgment for the compromises the parties could not or would not make at the table and to balance a multi-issue award with something for each side, thus reducing the incentive to avoid final-offer arbitration. As such, issue-by-issue selection seems conceptually more similar to the compromise-by-third-party-fiat nature of conventional arbitration than to the compromise-across-the-table nature of the Eugene final-offer procedure.

The experience in one city obviously does not establish a *prima facie* case either for or against the workability of the final-offer concept, and much more empirical evidence is needed before any accurate conclusions can be formulated. There is no perfect final-offer procedure. Instead, final-offer procedures can be built in a variety of forms (entire package versus issue-by-issue selection, one versus two offers, tripartite board versus single arbitrator, specific versus general selection criteria, shared costs versus employer paid, etc.), and the outcomes under any procedure must be evaluated against the provisions contained in that particular procedure. In addition, any evaluation of the final-offer process must consider the issues involved in the various disputes. The Eugene experience suggests that the final-offer procedure is effective in narrowing the area of disagreement around many monetary and nonmonetary issues but may be less effective in bringing the parties together on certain issues requiring "yes or no" positions (e.g., the first fire fighter arbitration concerning the union's insistence on the inclusion of manning standards in the contract and the city's insistence on their exclusion, or the first AFSCME arbitration concerning the union's demand for the agency shop and the city's offer of maintenance of membership). In all, the Eugene experience suggests, but certainly does not prove, that final-offer arbitration, as compared to conventional arbitration, can increase the probability of negotiated settlements by requiring the parties to bargain in the context of an effective "strikelike" impasse resolution procedure. Accordingly, it is the recommendation of the authors that the final-offer procedure be used more widely in place of conventional arbitration.

[46] Michigan Public Act 312 (1969), as amended by Public Act 127 (1972), Section 423.238; and Bureau of National Affairs, *Government Employee Relations Report Reference File*, 51: 3115.

BARGAINING ORDINANCE OF EUGENE, ORE., RESOLVING IMPASSES BY IMPARTIAL PANEL'S CHOICE OF EITHER PARTY'S FINAL OFFER

AN ORDINANCE PERTAINING TO COLLECTIVE BARGAINING PROCEDURES AND PROCESSES FOR RECOGNITION, NEGOTIATIONS AND SETTLEMENT OF DISPUTES; IMPLEMENTING THE CHARTER AMENDMENT ADOPTED MAY 26, 1970; AMENDING SECTION 2.875 OF THE EUGENE CODE, 1971; ADDING A NEW SECTION 2.876 TO THE EUGENE CODE, 1971; AND DECLARING AN EMERGENCY.

WHEREAS, the citizens of Eugene, to achieve harmonious labor management relations and sound labor practices, have established by amendment to the City Charter certain procedures and processes relating to collective bargaining and compulsory binding arbitration; and,

WHEREAS, it is necessary and proper for the Common Council of the City of Eugene to adopt an ordinance which would set forth procedures to further implement and complete the collective bargaining processes,

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

Section 1. Section 2.875 of The Eugene Code, 1971 is hereby amended to read as follows:

2.875 The city of Eugene does hereby declare itself a "Public Employer" and does hereby request the Public Employee Relations Board to make its services and facilities available for the purpose of establishing public employee representation pursuant to the City Charter and to Oregon Revised Statutes 243.711 through 243.795 as implemented by Chapter 671 Oregon Laws.

Section 2. There shall be added to The Eugene Code, 1971 a new section numbered 2.876, and reading as follows:

2.876 (1) Definitions. For the purposes of implementing the collective bargaining procedures and processes under the City Charter and applicable statutory provisions of the State of Oregon, the following terms shall have the meanings indicated:

City. The executive, legislative and administrative officers of the city of Eugene or their agents acting on behalf of the city directly or indirectly, including duly authorized supervisory employees.

City Employee. Any person regularly and permanently employed by the city of Eugene on a full-time basis, not including supervisory employees.

Supervisory employee. Any individual, having authority, in the interest of the city to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Professional employee.

(a) A city employee engaged in work (1) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (2) involving the consistent exercise of discretion and judgment in its performance; (3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (4) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or,

(b) An employee who (1) has completed the courses of specialized instruction and study described in subparagraph (a) (4) above; and (2) is performing related work under the supervision of a professional person to qualify himself as a professional employee as defined in paragraph (a) above.

City Agent. The city manager, or such alternate permanent supervisory employees designated by him, not to exceed three, who shall act on behalf of the city in the collective bargaining process.

Employee Representatives. Those members of a certified bargaining unit, not to exceed three, elected by the employees in that unit as agents to represent them in the collective bargaining process.

In determining whether any person is acting as an "agent" of another person so as to make such other persons responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Labor Organization. Any organization of any kind, or any employee association, in which city employees participate and which exists for the purpose, in whole or in part, of dealing with the city concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Bargaining Agent. A labor organization certified by the Public Employee Relations Board as the representative of a bargaining unit for purposes of negotiating with the city under the collective bargaining process and procedures.

Bargaining Unit. A unit certified by the Public Employees Relations Board as appropriate but which shall not include supervisory employees as defined in this ordinance, or employees who occupy a position of a confidential nature relating to employee relations. Professional employees will not normally be considered for inclusion in a bargaining unit consisting of other employees unless they so choose by majority vote.

Unfair Labor Practices.

(a) It shall be unfair labor practice for the city individually or in concert with others:

(1) to interfere with, restrain or coerce city employees in the exercise of their rights guaranteed in this ordinance;

(2) to dominate, interfere, or assist in the formation, existence, or administration of any labor organization;

(3) by discrimination in hiring, tenure, or any term or condition of employment, to encourage or discourage membership in any labor organization;

(4) to refuse to meet at reasonable times for preliminary discussions and/or good faith bilateral negotiations as provided for in this ordinance;

(5) to discharge or otherwise discriminate against any employee because he has filed charges or given testimony under this ordinance;

(6) to willingly violate the provisions of any written contract with respect to terms and conditions of employment affecting city employees.

(b) It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce:

(A) employees in the exercise of their rights guaranteed in this ordinance, provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or,

(B) the City in the selection of its agents for the purpose of entering into the collective bargaining process;

(2) to cause or attempt to cause the city to discriminate against an employee in violation of this section;

(3) to refuse to meet at reasonable times for preliminary discussions and good faith bi-lateral negotiations as provided for in this ordinance;

(4) to willingly violate the provisions of any written contract with respect to terms and conditions of employment affecting city employees;

(5) to cause, instigate, encourage, or participate in any work stoppage, slowdown or other disruption of city services;

(6) to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender initiation fees and periodic dues uniformly required as a condition of acquiring or maintaining membership. The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this ordinance, if such expression contains no threat of reprisal or force or promise of benefit.

Employee rights. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing.

Issues that Remain in Dispute. Only those issues to which neither party can reach agreement at the conclusion of bi-lateral negotiations. One or both parties may declare all issues in a proposed contract as "issues that remain in disputes," or the parties may mutually agree to submit one or a package of "issues that remain in dispute" to the Board of Arbitrators.

Collective Bargaining Procedure. Including but not limited to preliminary discussions between the city agent and employee representatives, requiring said parties to meet and confer with each other and, in the event of impasses, to seek mediation of differences prior to filing a letter of intent and commencing with bi-lateral negotiations. Fact-finding procedures are to be considered a part of those procedures and may be requested by mutual consent of the city and the employee representatives. Compulsory binding arbitration is the final step of the collective bargaining procedure. The collective bargaining procedure is initiated by the first written notice as provided in (3) (a) and (b) herein.

Preliminary Discussions. An initial discussion period held at least sixty days prior to bi-lateral negotiations during which participants to a proposed labor agreement shall meet and confer in good faith on all contract items proposed to be in effect during the following contract period.

Bi-Lateral Negotiations. For the purposes of this ordinance, bi-lateral negotiations is the performance of the mutual obligation of the city agent and employee representatives to meet at reasonable times and negotiate in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. Bi-lateral negotiations shall always be preceded by preliminary discussions between the parties and proper notification by a letter of intent as provided by City Charter and this ordinance unless waiver of such procedure is mutually agreed upon by both parties. Bi-lateral negotiations shall commence within ten calendar days from and including the first meeting following the submission of the "letter of intent" and shall be concluded within thirty days from and including the first meeting. Nothing in this paragraph shall prohibit both parties from mutually agreeing to request the Public Employee Relations Board to make its mediation and/or fact-finding services available to resolve any impasses arising during the bi-lateral negotiations.

Labor Dispute. Excludes "issues that remain in dispute" as defined above, but includes any other controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing or seeking to arrange terms of conditions of employment, regardless of whether the disputants stand in the proximate relations of employer and employee.

Letter of Intent. A letter to be submitted by one or both of the parties to the other party between January second and January fifth inclusive of each year if either party desires a contract to be in force during the next fiscal year unless such contract has already been agreed upon. Such letter shall precede bi-lateral negotiations.

(2) The city shall enter into the collective bargaining procedure resulting in signed contractual agreements with certified bargaining units which request such agreements. Said bargaining shall include terms and conditions of employment, wages, hours, working conditions, retirement, pensions, and other benefits. It shall also include the right to an adjustment or settlement of grievances or disputes in accordance with the terms of the signed contract.

(3) The city agent as herein defined shall be the negotiator for the city. The city agent and the employee representatives shall:

(a) hold preliminary discussions, as defined in this ordinance, upon written notification by a bargaining agent that said agent wishes to establish an initial labor contract with the city;

(b) not later than October first of any year if either party proposes a collective bargaining agreement to be in effect for the following fiscal year, such party shall inform the other party in writing and include such information as is necessary for informative and constructive preliminary discussions required herein;

(c) not later than October fifteenth commence to meet and confer in good faith.

(4) Mediation Required. If by December fifteenth of any year the city agent and the bargaining agent have not reached tentative agreement through their preliminary discussions on a collective bargaining contract, then the city manager shall request the Oregon State Conciliation Service and/or its successors for assistance in mediating unresolved matters.

(5) Bi-lateral Negotiations. If either party wishes to proceed to bi-lateral negotiations, they shall file a letter-of-intent prior to January fifth but no earlier than January second inclusive. Bi-lateral negotiations shall commence within ten calendar days and be concluded within thirty days from and including the first meeting. Nothing in this section shall prohibit both parties by mutual agreement from seeking further mediation and/or fact-finding.

(6) Final Offers. If, within twenty-five days following the first bi-lateral negotiations a contract has not been agreed upon, each party shall submit a final offer and may at the same time submit one alternative offer to the other party. These offers shall be officially received by the city recorder and preserved for the Board of Arbitrators. Such offers shall constitute a complete draft of a proposed collective bargaining agreement or both parties may mutually agree to submit for arbitration a package proposal on specific impasse items. If only package proposals of specific impasse items are submitted, all items previously agreed upon shall be filed with the recorder. Subsequent to this filing the parties shall continue to negotiate until agreement is reached or bi-lateral negotiations are completed.

(7) Arbitration. If an agreement has not been reached within thirty days following the first bilateral negotiations the "final offers" shall be submitted to a Board of Arbitrators. The parties may continue to discuss these offers until an agreement is reached or a decision is rendered by a Board of Arbitrators.

(a) The Board of Arbitrators shall consist of three members; one appointed by the city, one by the bargaining agent. These appointments shall be made within four days after the conclusion of the bi-lateral negotiations. The two members appointed shall mutually agree upon a third member within four days. The third member appointed shall be the chairman of the arbitration board. No member of the Board of Arbitrators shall be employed by the city of Eugene. Disinterested parties to the dispute shall be selected and whenever possible shall have experience in labor-management relations. The chairman shall be a professional arbitrator. Nothing in this section prohibits citizens of Eugene from appointment to the board.

(b) If after four days the third member has not been mutually agreed upon, a list of three members of the American Arbitration Board, who reside in the State of Oregon, shall be requested by the appointees from the American Arbitration Association or its successor. The designate of the city shall have two days to remove one name and the bargaining agent designate shall have one additional day to remove one of the two remaining names. The remaining member shall become the chairman of the arbitration board. The chairman shall call a meeting within ten days thereafter, at a location within the city of Eugene, designated by the chairman.

(c) If a vacancy should occur on the board due to death or resignation, the selection for replacement of such member shall be in the same manner as the resigned or deceased member was chosen. Such a vacancy shall not impair the right of the remaining members from exercising all of the powers of the board except that no final selection under subsection (f) of this section shall be made by the board until the vacancy has been filled.

(d) The board shall at no time engage in an effort to mediate or otherwise settle the dispute in any manner other than that prescribed in this section.

(e) From the time of appointment until such time as the board makes its selection, there shall be no communication by the members of the board with other parties other than those who are direct parties to the dispute concerning recommendations for settlement of the dispute. This shall not preclude the board from, on its own initiative, obtaining whatever information from whatever sources it deems appropriate to assist in its selection.

(f) The board shall have ten days to make its selection. The board shall also have the power to subpoena any person or persons necessary to arrive at a decision and shall conduct formal or informal hearings to discuss offers submitted by both parties.

(g) The board shall select the most reasonable, in its judgment, of the final offers submitted by the parties. The board may take into account only the following factors:

(1) past collective bargaining contracts between the parties including the bargaining that led up to such contracts;

(2) comparison of wages, hours and conditions of employment of the employees involved, with wages, hours and conditions of employment of other employees doing comparable work, giving consideration to factors peculiar to the market area and the classifications involved;

(3) comparison of wages, hours and conditions of employment as reflected in municipalities in general, and in the same or similiar municipalities reasonably proximate to the city;

(4) the interests and welfare of the public, the ability of the city to finance economic adjustments and the effect of such adjustments on the normal standard of city services.

(h) The board shall not compromise or alter the final offer that it selects. Selection of an offer shall be based on the content of that offer and no consideration shall be given to, nor shall any evidence be received concerning the collective bargaining in this dispute including offers of settlement not contained in the offers submitted to the board unless there is mutual agreement to submit package proposals on specific impasse items. In such an instance, the board must consider all previously agreed upon items received by the city recorder.

(i) The offer selected by the board, integrated with previously agreed upon items received by the city recorder, shall be deemed to represent the contract between the parties.

(j) The determination of the board shall be by majority and shall be conclusive. The board shall give written and/or oral explanation of its selection to the parties in dispute.

(k) Any expenses incurred or submitted by the Board of Arbitration shall be the liability of the city.

(8) All conclusions whether arising out of preliminary discussions, bi-lateral negotiations or compulsory binding arbitration shall be reduced to writing if requested by either party and signed by both parties. The document shall be binding for the duration of the contract.

(9) Nothing herein contained shall limit or prohibit a collective bargaining agreement which may cover a period in excess of one year or which may provide for renegotiating only of parts thereof relating to direct or indirect monetary benefits to city employees.

(10) Time limits relating to collective bargaining procedures preceding bi-lateral negotiations may be waived or deferred by mutual agreement of the parties.

(11) Contract Termination. Contracts agreed to under the provisions of this ordinance will be in effect in accordance with the terms of such agreement except that agreements between the city and bargaining agent(s) who are de-certified by the Public Employee Relations Board under its procedures shall terminate as of the date of said de-certification.

(12) Ordinance Enforcement. The enforcement and compliance with the provisions of this ordinance shall be by a suit in equity brought in the Circuit Court of the State of Oregon for Lane County by the city, or by a duly elected bargaining representative, against any person or party who it is claimed has violated this ordinance.

(13) Severability. It is hereby declared to be the legislative intent of the common council that the provisions of this ordinance are severable and if any provisions, sentence, clause, section or part is held illegal, invalid, or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons and circumstances.

Section 3. The council of the city of Eugene does hereby determine that matters concerning the collective bargaining process are matters which affect the public health, safety and welfare of the city, that an emergency exists, and therefore this ordinance shall take effect immediately upon its passage by the council and approval by the mayor.

Passed by the Common Council this 13th day of September, 1971

/s/ City Recorder

Approved by the Mayor this 14th day of September, 1971.

/s/ Mayor

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Combining mediation and arbitration

SAM KAGEL

THE WHOLE POINT of what we call mediation-arbitration, or med-arb, is to give the parties an opportunity to carry out the negotiation process. Where med-arb differs from orthodox mediation is that the orthodox mediator, as such, does not have any muscle. And orthodox arbitration, in terms of substantive matters or interest arbitration, is not used very frequently; parties are afraid to put their fate in the hands of the third parties.

When parties agree to med-arb, they have to agree in advance that all decisions, whether reached by mediation or arbitration, become part of the mediator-arbitrator's award and are final and binding. None of the decisions go back to the parties for acceptance or rejection. Once having agreed to that, you can see immediately that when you take off the arbitrator hat and put on the mediator hat you have muscle that you don't have when you exercise orthodox mediation—and that's the whole name of the game.

In carrying out the functions of med-arb, you have in effect negotiating meetings. We don't have records, we don't take a transcript, and we take up each issue whatever it might be. The parties for the first time really have to bare their souls, because if they are dishonest in the sense of holding back on a particular issue, they know the med-arbitrator is going to make the decision. It really does keep them honest, and that's the whole point in med-arb. Most interest problems are settled by direct negotiations; and since both parties approach the problem with complete honesty, they come within an area of settlement.

In the med-arb process, whatever is settled by mediation becomes a part of the arbitrator's decision and is written up as his decision. It doesn't have to go back to a vote of either the board of directors or the membership, and it becomes enforceable in court.

If certain issues are left on which the med-arbitrators will have to make the decision, by the time that point is reached there is usually a very small difference left between the parties. The med-arbiter has only to decide within that area. And that is really the whole point of it. The incentive is for the parties to settle their own agreement through direct negotiations, and the med-arbiter is really a threat to keep the parties honest and move them to a settlement.

In 1970 we had 4,000 nurses organized in the Bay Area, in 36 hospitals. There had been a San Francisco nurses' strike in 1968 that was settled by direct mediation. In 1970 when the contracts were to be opened, all three hospital employer associations asked me if I would mediate. I said only if I have some muscle, if both parties would agree to med-arb, and that means the parties would have to give up the right to strike and lockout. The nurses voted and did give up the right to strike, and the employers agreed to med-arb. The nurses had something like 90 proposals on the table when we went into a process of med-arb. A good many of those proposals were withdrawn once we went into that process, because by the time we got to that particular situation the nurses saw that they didn't have any case. That would not normally happen in an orthodox arbitration; they'd put the whole ball of wax into the formal arbitration.

We had to settle only two matters by way of formal decision, even though we had some very difficult questions. For example, we have in this State a law permitting abortions, and a lot of the nurses simply did not want to participate in that procedure. To make a long story short, the parties worked out this problem by way of the med-arb process. They drew up what they called a statement of conscience, which is actually a part of the collective bargaining agreement, in which a nurse in a non-Catholic hospital who does not want to participate in this procedure notifies the employer in writing to that effect. The employer undertakes the obligation to see that that person is not assigned to a case unless there is an emergency.

Another recent example occurred here in San Francisco in the printing company that published both local newspapers. They had just introduced some very new automated machinery called scanners. Without going into detail, these machines were going to require numerous changes in the collective bargaining agreement. The parties asked me to med-arb this particular problem. What was the problem? The problem was, first, what are you going to do with the guys who are going to lose their jobs? What are we going to do with reference to seniority? They had departmental seniority, but this equipment doesn't recognize that, so we had to set up what we call a vertical board. There were many complicated

internal matters which required the agreement to be changed. In about 6 or 7 days, we worked out every one of those problems unanimously, which were then issued as an award and decision. I'm convinced that in an orthodox arbitration, a decision would not in many respects have helped solve the problem. Although years ago I represented all the newspaper unions and thought I knew something about the newspaper industry, I'm convinced that if I had had just a formal presentation of the problem, whatever award I came out with would have had some holes in it. The board in this case retained jurisdiction over this award, with not only the right to interpret or apply it but to change it if necessary.

The med-arb process was also used in April of this year by me in the case of the State-wide teachers' strike in Hawaii. And I acted as mediator-arbitrator for the Pacific Coast and Hawaiian longshore industry, which concluded a new 2-year agreement without a strike.

There is no magic to med-arb; it is really not new, except its name. The most important thing is that it places an incentive on the parties to settle their own differences. □

Sam Kagel is an arbitrator and a partner in the San Francisco law firm of Kagel and Kagel.

MEDIATION-ARBITRATION FROM THE EMPLOYER'S STANDPOINT

LAURENCE P. CORBETT

A SPECIAL SECTION of the September *Monthly Labor Review* presented various points of view on the technique called med-arb (mediation-arbitration), but my remarks arrived too late for publication. I offer these comments from the point of view of management, which I represent.

Mediation-arbitration (med-arb) is in my experience accepted with greater reluctance by employers than by unions. The mediator-arbitrator has the ultimate say, the authority given to him by the parties to make a final and binding decision. In all but the most desperate circumstances, the employer can expect the process will increase his costs and add to the complexity of administering the contract. Employers prefer by far to make their own determinations if they can, because they fear the tendency of the third party to compromise, to split the difference, and to go beyond what the employers believe is good business judgment.

While there are many employers who state categorically that they will not submit an interest case to arbitration under any circumstances, mediation-arbitration in a situation which could otherwise lead to destruction may find more acceptance. This is because the parties can experience a sense of direct participation in the result. It is different from arbitration, with its sworn testimony, transcript of hearing, formal exhibits, advocacy by counsel, and exchange of briefs. In med-arb the mediator-arbitrator engages in informal mediation between the two parties, reserving for last resort the authority to make a final and binding decision as a third party. In the course of mediation, the mediator-arbitrator meets privately on occasions with each party and learns at first hand facts that for sound reasons might not be presented and recorded in formal arbitration. Such information permits the mediator-arbitrator to say that if the parties cannot find a solution themselves or if they will not accept an informal off-the-record suggestion, he may be forced to make a formal award which will be pleasing to neither side.

To some employers who can survive a strike, the peaceful alternative of med-arb is not worth the gamble that some significant management prerogative or principle will be lost in the process. For example, in the 1970–71 med-arb involving the California Nurses Association and the Hospital Associations, the nurses were interested in negotiating more than the traditional subjects of wages, hours, and working conditions. As a professional association, CNA sought to bargain on patient-care matters, such as staffing patterns, the ratio of Registered Nurses to patients, and the ratio of Registered Nurses to other paramedical personnel. Hospital employers stubbornly resisted what they considered a flagrant invasion of management prerogative and expressed extreme concern that such an issue should be in the hands of a third party.

If med-arb is wide open with no limitations on the subject matter, of course it can be time-consuming and costly, for the mediator-arbitrator feels bound to treat each issue, several of which would normally be ignored or dropped in direct negotiations. In the med-arb involving the nurses, there were 68 unresolved issues, which took 45 days to settle. Admittedly, this involved the resolution of differences between two independent hospital associations and the Kaiser Foundation hospitals, and for that reason negotiations would have been prolonged no matter what form they took. Under other circumstances, the parties can themselves agree to limit by stipulation those matters that are subject to med-arb.

Without prior agreement of the parties, there is no criteria for arriving at a determination other than the contentions of the participants. Yet as a continuation of collective bargaining, this alternative procedure ideally should bring the parties to the decision they reasonably would have reached on their own, utilizing data, comparisons, and precedents which have served them in the past. As the process receives greater use and gains further sophistication, stipulation of the criteria for decision can be reached in many instances.

Med-arb is not a panacea. It doesn't fit each impasse situation. To establish mandatory med-arb for the resolution of all impasses in collective bargaining would, in my opinion, be a grave mistake. With a fixed format for resolving negotiating differences, there is the temptation to devise ways of beating the game. In preparing to beat the game under mandatory med-arb, the parties adopt strategic positions which prolong and complicate the procedure.

Each form or combination of forms has a place in the right situation, but no one of them has general application. Med-arb is a constructive alternative to a strike under certain circumstances, but its use should be limited to the impasses for which it is suited. □

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Mediation-arbitration: a trade union view

HARRY POLLAND

AMONG ALL of the innovative labor-management techniques that have been considered in recent years, mediation-arbitration may well be the most creative and most flexible, but it is not without its drawbacks.

However promising it may be, there are some necessary preconditions that must be met in order to realize its full potential: (1) It is a delicate mechanism which should be undertaken primarily in situations where the issues truly are difficult or complex; (2) it should be used where an impasse in negotiations could result in a strike that would have a serious impact upon the community or on the economy.

In short, med-arb is an innovative technique which should be utilized sparingly if it is to be effective. It should not be used as a substitute for orthodox collective bargaining in routine cases, strike threats notwithstanding.

Med-arb has definite advantages over mediation or standard arbitration in interest cases.

In conventional mediation, the role of the mediator is limited. He has no power to prevent a strike; he appears at a time of crisis; he has little time to accomplish more than to fashion short-term, pragmatic results (if successful). His objective is to get the dispute settled quickly and peacefully, with little regard for the substance of the settlement.

In conventional interest arbitration, the role of the arbitrator is also limited. He is remote from the parties and the issue and is bound by formal procedures. In the conventional process a record is kept, witnesses testify, and exhibits are introduced. The arbitrator is called upon to render an opinion and to expand upon it in a way that may limit the parties in their ability at a future negotiation to bring up similar issues without having to follow the precedents established by the formal decision. In mediation-arbitration, no precedents are set by transcripts, technical procedures, or arbitrators' opinions. Through this flexibility, the process takes on more of the characteristics of bona fide negotiations than it does of conventional mediation or conventional arbitration. It incorporates the elements of both processes and integrates both by the very act of bringing them together. It is an issue-oriented procedure and, thus, it upgrades the quality of the negotiations themselves. During the course of mediation-arbitration between the California Nurses' Association and the San Francisco Bay Area Hospitals, the mediator-arbitrator, by his very presence, forced the negotiators to respond to the issues with facts, statistics, and intelligent arguments. They could not resort to repetitious platitudes, bluff, or exaggeration in justifying positions. The presence of the mediator-arbitrator kept the negotiators honest and created a new atmosphere. He kept the negotiators alert and forced them to recognize that unless they dealt with the issues, made necessary concessions, and suggested new options, the arbitrator might render an arbitrary decision. As a result, mediation-arbitration stimulates more creative thinking and more alternatives to fixed positions by both parties than is found in conventional bargaining.

Mediation-arbitration minimizes crisis bargaining, and this, too, is an aspect of the quality of the bargaining. Usually in conventional bargaining, negotiators are up against strike deadlines and hastily settle many complex issues. As a result of the pressures from crisis bargaining, they often do a poor job. Mediation-arbitration gives the parties a better opportunity to consider the issues reasonably and to create some constructive solutions that will be valid for the long term. Indeed, the mediator-arbitrator may maintain jurisdiction over an issue while the parties work out the more technical details after the proceedings have ended.

Mediation-arbitration also works admirably in industries where the scars created by strikes may do substantial harm to morale, efficiency, and the quality of work. The hospital industry is a case in point. Here, delicate relationships exist between management and employees, and teamwork in providing patient care is basic. Thus, mediation-arbitration can help avoid the tremendous cleavage that develops as a result of the divisive aspects of a strike.

In order for mediation-arbitration to be successful, the mediator-arbitrator must be an individual who possesses unusual qualities. He ideally combines the conciliatory talents of the mediator with the objectivity and the authority of the arbitrator. It is required that he be knowledgeable about the industry involved, and, above all, he must be as well prepared as the negotiators themselves. He must have the skill of a magician who intermittently wears the mediator's hat and the arbitrator's hat; he must be able to move from role to role swiftly and with subtlety.

However many advantages there are to med-arb, one cannot avoid the conclusion that there are a number of disadvantages as seen from the point of view of the employee organization. The ability of the organization to communicate with its membership and to have members participate in the decisionmaking process through ratification is completely lost. Management does not face this problem; because of the limited number of persons who have any role in decisionmaking, management negotiators can make on-the-spot decisions. For the employee representatives, the matter is much more difficult. In the case of the nurses, the negotiating team could not communicate with the 4,000 nurses and obtain their responses; it had to decide what was best for the nurses and, at the every end, tell them the results. This places a very heavy responsibility upon the employee negotiating committee. From the point of view of the members, it may seem that med–arb takes away their rights and gives too much authority to both the mediator-arbitrator and the negotiating committee.

Mediation-arbitration offers an important impasse option which deserves widespread use. It is obviously not a panacea, but it provides a rational, unhurried, and peaceful approach to resolving the difficulties and complexities in collective bargaining. □

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Political Aspects of Public Sector Interest Arbitration*

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In this Article, Professor Grodin examines the impact of binding interest arbitration on the political process by showing the situations in which arbitrators are, in effect, making social policy decisions that are otherwise usually reserved for elected or appointed officials. He then discusses changes which, without sacrificing the arbitrator's neutrality, may make the arbitration process more politically responsive.

The growing number of strikes by public employees in recent years has stimulated an interest in the use of binding interest arbitration[1] as a means of resolving public sector labor disputes. Over half the states have adopted legislation expressly authorizing the voluntary use of binding interest arbitration;[2] and a substantial number of states and

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1. The term "interest arbitration" refers to the arbitration of disputes arising from negotiations for new contract terms. In contrast, "grievance" disputes arise from the interpretation or application of an existing agreement. "Binding" interest arbitration is arbitration that results in a legally binding contract award. The term is used in this Article to include any procedure resulting in a binding award by a neutral decisionmaker or by a panel that includes such a neutral. Binding arbitration also includes any procedure, regardless of the specific statutory terms used, by which the recommendation of a factfinding panel, otherwise advisory, becomes binding under certain circumstances. *E.g.*, NEV. REV. STAT. § 28.200 (1973).

2. ALASKA STAT. § 23.40.200 (1974); CONN. PUB. ACT NO. 75-570 §§ 6-7 (July 7, 1975) (West's Connecticut Legislative Service 1071); DEL. CODE ANN. tit. 19, § 1310 (1975); HAWAII REV. STAT. § 89-11 (Supp. 1974); IND. STAT. ANN. § 22-6-4-11 (Burns Supp. 1975); IOWA CODE ANN. § 20.22 (Supp. 1975); KAN. STAT. ANN. § 75-4332

municipalities have mandated its use or granted either party the right to require its use in certain situations.[3]

Most of the legislation mandating interest arbitration has been premised on the need for protecting the public against particularly harmful strikes. This premise is reflected in the typical limitation of such arbitration to specific classes of employees,[4] to employees performing "essential services,"[5] or to situations where strikes are found to cause particular public harm.[6] But arbitration may serve other functions as well. It can permit a more reasoned and studied exploration of issues than is typically possible in "crisis bargaining," where complex issues tend to get lost.[7] It also protects employees against the costs of a strike, and provides bargaining leverage to unions incapable of striking effec-

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(Supp. Pamphlet 1974); LA. REV. STAT. ANN. § 23:890(E) (West Supp. 1975); ME. REV. STAT. ANN. tit. 26, § 965 (1974); ME. REV. STAT. ANN. tit. 26, § 979-D (1974); MASS. GEN. LAWS ANN. ch. 150E, § 9 (Supp. 1975); MICH. COMP. LAWS ANN. § 423.231 (Supp. 1975); MINN. STAT. ANN. § 179.69 (Supp. 1975); REV. CODES OF MONTANA § 59-1614(9) (Supp. 1974); NEB. REV. STAT. § 48-801 (1974); NEV. REV. STAT. § 288.200 (1973); N.H. REV. STAT. ANN. § 98-C:4 (Supp. 1973); N.J. STAT. ANN. § 34: 13A-3(d) (Supp. 1975); N.Y. CIVIL SERVICE LAW § 209(4)(c) (McKinney Supp. 1974); OKLA. STAT. ANN. tit. 11, § 548.10 (Supp. 1974); ORE. REV. STAT. § 243.742 (1974); PA. STAT. ANN. tit. 43, § 217.4 (Purdon Supp. 1975); PA. STAT. ANN. tit. 43, § 1101.805 (Purdon Supp. 1975); PA. STAT. ANN. tit. 53, § 39951(d) (Purdon Supp. 1975); PA. STAT. ANN. tit. 55, § 563.2 (Purdon 1965); R.I. GEN. LAWS ANN. §§ 28-9.1 to 9.4 (1968); R.I. GEN. LAWS ANN. § 36-11-9 (Supp. 1974); S.D. COMP. LAWS ANN. ch. 9-14A (Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 9-15 (Supp. 1974); UTAH CODE ANN. § 34-20a-8 (Supp. 1975); VT. STAT. ANN. tit. 21, § 1733 (Supp. 1974); REV. CODE WASH. ANN. § 41.56.450 (Supp. 1974); WIS. STAT. § 111.77 (1974); WYO. STAT. ANN. § 27-269 (1967).

3. The terms "mandated arbitration" and "compulsory arbitration" are used interchangeably to identify any procedure requiring arbitration whether or not all parties agree to arbitrate. Some statutes require that at least one of the parties want the arbitration. *E.g.*, MICH. COMP. LAWS ANN. § 423.231 (Supp. 1975); N.Y. CIVIL SERVICE LAW § 209(4)(c) (McKinney Supp. 1974). Others compel arbitration even if neither party wants to arbitrate. *E.g.*, NEV. REV. STAT. § 288.200 (1973); R.I. GEN. LAWS ANN. §§ 29-9.1 to 9.2 (1968). Unless indicated, the term "mandated arbitration" is used in this Article to refer to both situations.

4. The limitation typically applies to police officers and fire fighters. *E.g.*, MICH. COMP. LAWS ANN. § 423.231 (Supp. 1972); S.D. COMP. LAWS ANN. ch. 9-14A (Supp. 1975); WIS. STAT. ANN. § 111.77 (Supp. 1975). Some states also specify prison guards (ALASKA STAT. § 23.40.200(3)(b) (1974); PA. STAT. ANN. tit. 43 § 1101.805 (Purdon Supp. 1975)); hospital employees (ALASKA STAT. § 23.40.200(3)(b) (1974)); public transportation workers (LA. STAT. ANN. § 23:890(E) (West Supp. 1975); PA. STAT. ANN. tit. 53, § 39951 (Purdon Supp. 1975)); and port authority employees (PA. STAT. ANN. tit. 55, § 563.2 (Purdon 1964)).

5. MINN. STAT. ANN. § 179.72 (Supp. 1975) establishes arbitration procedures for all public employees and mandates binding arbitration for "essential employees," if their union requests it.

6. ALASKA STAT. § 23.40.200(3)(c) (1974) (permits public utility, snow removal, sanitation, school and certain other educational employees to strike, subject to mandatory injunction if their strike imperils public health, safety or welfare).

7. Polland, *Meditation-Arbitration: A Trade Union View*, 96 MONTHLY LABOR REV. 63, 64 (1973).

tively.[8] Finally, where arbitration is mandated for a wide range of public employees, it can serve to protect the public against disruption of services that are important although perhaps not essential for the public health or welfare. Several states and a number of municipalities have adopted mandatory arbitration systems covering broad categories of public employees,[9] and further movement in this direction is predictable.

The trend toward legislatively mandated interest arbitration raises three cautionary concerns. Two of these—that arbitration may not in fact deter strikes and that it may, on the other hand, chill collective bargaining—have been the subject of numerous commentaries and will not be reconsidered here.[10] This Article assumes that it is possible to design a system of arbitration, if it does not already exist, that meets both these objections. Thus, the Article focuses on the third concern, which is that a system of legislatively mandated interest arbitration may intrude upon the central democratic premise that governmental policy is to be determined by persons responsible, directly or indirectly, to the electorate.[11]

There has been considerable discussion of the political implication

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8. *See* Grodin, *Arbitration of Public Sector Labor Disputes: The Nevada Experiment*, 28 IND. & LAB. REL. REV. 89, 102 (1974). If the wages and working conditions of some government employees are fixed by arbitration, other public employees may view their right to strike as less advantageous than the right to arbitrate. Donald S. Wasserman of American Federation of State, County, and Municipal Employees (AFSCME) recently articulated this concern:

> AFSCME members in a few local governments have paid a heavy price for the wage gains made by others through compulsory arbitration awards. After large settlements awarded to police or fire, our members have been told in effect there is no more money. And, our members could not fall back on compulsory arbitration. Obviously, this situation cannot long be tolerated.

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL WINTER MEETING 315, 316 (1974).

9. Several states provide mandatory binding arbitration for all public employees irrespective of the nature of service they perform. *E.g.*, Iowa Public Employment Relations Act, IOWA CODE ANN. § 20.22 (Supp. 1975); ME. REV. STAT. ANN. tit. 26, § 965 (4) (1974) (advisory only with respect to salaries, pensions and insurance; binding on all other issues); ORE. REV. STAT. § 243.742 (1974); R.I. GEN. LAWS ANN. §§ 28-9.1 to 9.4 (1968), § 36-11-9 (Supp. 1974) (five separate statutes applicable to state employees, municipal employees, teachers, firefighters and police officers; advisory on wages, binding on other issues). NEB. REV. STAT. ch. 48, art. 8 (1968) provides for a Court of Industrial Relations to arbitrate disputes involving proprietary employees; and NEV. REV. STAT. § 288.200 (1973) allows the governor to order that the results of fact-finding, otherwise advisory only, will have binding effect.

10. *E.g.*, Anderson, *Compulsory Arbitration in Public Sector Dispute Settlement: An Affirmative View*, in DISPUTE SETTLEMENT IN THE PUBLIC SECTOR (T. Gilroy ed. 1972); Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47 (1973).

11. For a discussion of this point in relationship to the New York binding arbitration statute, see Barr, *The Public Arbitration Panel as an Administrative Agency: Can Compulsory Interest Arbitration Be an Acceptable Dispute Resolution Method in the Public Sector?* 39 ALBANY L. REV. 377 (1975).

of public sector collective bargaining per se or, at least, of collective bargaining coupled with the opportunity to strike. Professors Wellington and Winter suggest that public sector collective bargaining may distort the "normal" political process by providing the union with a dispute-settlement forum from which other competing political interests are to some extent excluded, and that the right to strike may distort the process even more by generating pressures the governing body will find difficult to resist.[12] Other commentators have taken issue with Wellington, pointing to variables that may reduce the political impact of collective bargaining and strikes in particular situations.[13]

Whatever impact collective bargaining and strikes may have upon the political process, however, there is a qualitative difference between that impact and the effect of interest arbitration. Under a regime of collective bargaining, whether or not accompanied by strikes,[14] the public employer retains ultimate power to approve or disapprove the agreement, and the decision is therefore a product in part of political influence. In the case of binding interest arbitration, however, this ultimate power to decide is given to a person who, typically, is neither elected nor directly responsible to any elected official. Under all existing statutory schemes, the arbitrator is chosen by the parties or through some statutory process of selection.[15] He or she is independent of direct

12. Wellington and Winter argue that since the services provided by government are often important to public health and safety, and since the demand for these governmental services is relatively inelastic, disruption is likely to produce intense political pressure for a settlement at any cost. H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES (1971).

13. Professors Burton and Krider have argued that market restraints operate to a greater extent and public pressure for settlement to a lesser extent than postulated by Wellington and Winter. Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970).

More recently, Professor Summers has suggested that the alignment of interest groups will vary depending upon the specific bargaining issues. Thus, on salary issues, for example, Summers has argued that public employees are likely to be at a political disadvantage in the absence of collective bargaining since wage increases confront a more or less united phalanx of taxpayers opposed to increases in governmental expenditures. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1160 (1974) [hereinafter cited as Summers].

14. It has become academic, in the public sector, to speak of the "right to strike," since strikes may and frequently do occur without effective legal sanction. It is the premise of this Article that strikes by public employees should be legally permissible except as limited by a statute providing for binding arbitration.

15. In most states arbitration is conducted by a tripartite panel consisting of one person appointed by each of the parties and a jointly selected neutral chairman. If the partisan members are unable to agree upon the selection of a neutral, two alternative procedures are implemented. In the majority of states the parties retain maximum control insofar as they are allowed to select the neutral by alternate striking of names from a list supplied by an agency. *E.g.*, IOWA CODE ANN. § 20.22(5) (Supp. 1975) (State Public Employee Relations Board); ME. REV. STAT. ANN. tit. 26, § 965(4) (1974); PA. STAT. ANN. tit. 43, § 217.4(b) (Purdon Supp. 1975) (American Arbitration Associa-

political control.[16] Yet the arbitrator's decision is a substitute for the decision of the legislative body ultimately approving or disapproving the agreement. Arbitration can thus be said to establish an essentially closed legislative process from which the play of political forces is excluded, except to the extent that these forces determine the position of the public employer in the arbitration proceeding or the selection of the neutral arbitrator.

This skew between the arbitral process and traditional notions of legislative accountability becomes a more compelling cause of concern when the nature of the issues the arbitrator typically confronts is taken into account. In many situations a public sector arbitrator faces issues that extend beyond those over which labor and management customarily bargain in private sector disputes. They can involve significant elements of social planning.[17]

The relationship between public sector interest arbitration and the political process may, in some states, pose substantial issues of constitutional law. So far, all but one of the courts that have considered the

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tion); UTAH CODE ANN. § 34-20a-8 (Supp. 1975) (the Federal Mediation and Conciliation Service). In other states, in the event of disagreement the neutral is appointed by a judge or, more commonly, by a state official. *E.g.*, MICH. COMP. LAWS ANN. § 423.231 (Supp. 1975) (chairman of the state mediation board); R.I. GEN. LAWS ANN. § 20-9.1-8 (Supp. 1975) (judge). In all states, the neutral is appointed to serve on an ad hoc basis and is not a permanent officer or employee of the state. Most often, he or she regularly serves as a neutral arbitrator in private sector labor disputes.

These statutes reflect a clear underlying theme that views arbitration as an extension of the collective bargaining process rather than as a part of the political process. That function will be best fulfilled, it is believed, if the arbitrator is selected by the parties and is independent and free of political control.

16. Most states that provide for a state official to appoint the arbitrator do so not to impose political responsibility, although the process may in fact have that effect, but simply because it is a convenient way to supply the parties with an acceptable neutral when they cannot agree on one. The arbitrator's responsibility is, however, to the parties and not to the appointing authority. His other function is to get the parties to agree or, failing that, to impose a fair and equitable settlement. It is not to implement some state policy as to what the terms and conditions of local government employment ought to be.

This means that the interest arbitrator is unlike the administrative officials to whom the legislature customarily delegates policymaking authority. The arbitrator is usually appointed by an elected or appointed official only when the parties are unable to agree, he or she serves on an ad hoc rather than a continuing basis, and his or her performance is not subject to continuing legislative or administrative oversight. This independence from political control is almost judicial, although the actual function of arbitration is more legislative in character. Although judges can and do decide important questions of public policy, they do so in the context of determining individual rights based on some asserted violation of legal principles, and the norms used are subject to ultimate legislative and constitutional control. Thus, while a grievance arbitrator functions like a judge and determines the rights of parties by interpreting an existing agreement, the interest arbitrator's concern with the terms of new agreements is more like legislative policymaking.

17. See text accompanying notes 23 through 43 *infra*.

question have upheld the validity of interest arbitration against the contention that it involves an improper delegation of legislative authority.[18] In two recent cases, however, the courts reaching that result were equally divided courts.[19] In one of these cases, *Fire Fighters Union v. City of Dearborn*,[20] the Supreme Court of Michigan affirmed the state's compulsory arbitration legislation in a combination of opinions providing an extremely narrow basis for its continued operation.[21]

The primary focus of this Article is the policy rather than the constitutional issues involved in interest arbitration. Nondelegation doctrine is an unusually murky area of constitutional law. At its core is the notion that the power of legislatures to insulate policymaking from ultimate political control must have some limits. Courts have never developed meaningful criteria for the imposition of those limits, however, and their inability to do so reflects both the complexity of modern government and the reluctance, at least in recent decades, of the judiciary to intrude too deeply into legislative discretion in the structuring of the decisionmaking process.[22] It can be assumed, for the purposes of this analysis, that most state courts will continue to allow legislatures to delegate authority to arbitrators, and that the key question is not what a legislature can get away with but what it ought to do.

In answering that question, this Article first examines the impact of interest arbitration on the political process in terms of the numerous policy decisions an arbitrator may make or influence. The Article then explores whether and to what extent a system of interest arbitration may be structured so as to minimize that impact.

I

IMPLICATIONS OF ARBITRATION FOR SOCIAL PLANNING

A. Salary Issues

In the private sector, interest arbitration is rare.[23] Where it is

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18. *E.g.*, Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 622 n.13, 526 P.2d 971, 981 n.13, 116 Cal. Rptr. 507, 517 n. 13 (1974) (dicta); City of Biddeford v. Teachers Ass'n, 304 A.2d 387 (Me. Sup. Jud. Ct. 1973); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); Warwick v. Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); State *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. Sup. Ct. 1968). *Contra*, City of Sioux Falls v. Firefighters Local 814, No. 11406, 11411, 11424 (S.D., October 9, 1975).

19. City of Biddeford v. Teachers Ass'n, 304 A.2d 387 (Me. Sup. Jud. Ct. 1973); Fire Fighters Union v. City of Dearborn, ___ Mich. ___, 231 N.W.2d 226 (1975).

20. ___ Mich. ___, 231 N.W.2d 226 (1975).

21. For a discussion of this case, see the text accompanying notes 51-57.

22. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:00 (Supp. 1970).

23. Feller, *The Impetus to Contract Arbitration in the Private Area*, in PROCEED-

used, it functions within fairly narrow parameters. The desire of employees for improved wages and working conditions is balanced against the interest of the employer in operating his business in the most efficient and economical way possible. Neither the employer's claimed inability to pay nor the impact of particular decisions upon the public is likely to be taken into account.[24]

It is possible to structure a system of public sector arbitration with similarly limited parameters. Thus, with respect to salary issues, the arbitrator would be limited to determining the proper wage for a group of employees without regard to the fiscal impact of the decision. It should be recognized, however, that such a system would presuppose a policy determination that employees should be paid whatever they are "worth," in the same way that public agencies purchase goods at whatever price the market dictates. In some cases the proper wage could be defined in terms of a precise formula based on objectively ascertainable facts, such as cost of living increases or the collectively bargained wage rates of private employees in the same or similar crafts. If the wage could be determined by a forumla, the arbitrator's function would become essentially one of judicial factfinding and interpretation.[25] More realistically, since the process would be expected to be more mediative and legislative than judicial,[26] the arbitrator might be given authority to consider a variety of factors. Either way, the fiscal impact of the award would not be considered. If the public could not "afford" the price of labor as determined by the arbitrator, it would then be required to choose among the options of: (1) doing without the labor, or part of it; (2) making cuts elsewhere in the budget, and living with whatever layoffs of other employees or limitations on other services might result; (3) raising taxes; or (4) borrowing money. Under the "proper wage" model the arbitrator, by definition, would be insulated from considering any of these options.

As a matter of policy, there is much to commend the "proper wage" model. It asserts, in effect, that employees should not be required to subsidize government operations out of deserved wage increas-

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INGS OF NEW YORK UNIVERSITY TWENTY-FOURTH ANNUAL CONFERENCE ON LABOR 79 (1972).

24. Zack, *Ability to Pay in Public Sector Bargaining*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-THIRD ANNUAL CONFERENCE ON LABOR (1970).

25. Some cities presently have charter provisions requiring that wage rates be determined in relationship to specifically enumerated criteria; these provisions are enforceable through the judicial process. For a list of such cities in California, see Schneider, *Introduction to Prevailing Rates in California: A Symposium*, CALIF. PUB. EMPLOYEE RELATIONS, June 1971, at 5.

26. Rehmus, *Legislated Interest Arbitration*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL WINTER MEETING 307, 311 (1974).

es.[27] It suffers, however, from two defects, one technical, the other political. The technical defect stems from the degree of subjectivity, and in some cases artificiality, involved in determination of the proper wage. For example, a policy that public employees should be paid no less than private employees performing the same work may have clear application where the work involved is that of a craft for which a single rate has been established in private employment through collective bargaining; its application is less clear where the classification involved is one for which the wage scales in private employment vary considerably; and its application becomes artificial where the work involved is unique to public employment, or where the number of employees who perform that work in public employment is so great in relation to the private sector that the wage rate established by the public body in effect determines the rate to be paid by private employers. A policy that public employees should be paid by reference to comparable rates in other public employment is likely also to be artificial in a context in which the wages paid by other public employers are themselves determined by arbitration on the basis of the same criteria: the process becomes circular, with each arbitrator looking to the results of arbitration in other areas.

Admittedly, these technical limitations on the proper wage model are not necessarily determinative. There are classifications for which the wage rates in private employment provide substantial guidance; wage rates for other comparable public employment may in fact be negotiated rather than arbitrated (though even then, there is an arguable circular effect); and in addition to comparability criteria, changes in the cost of living index may provide a substantial basis for determining the range of an appropriate wage increase. But added to these technical limitations is a fact of political reality: the current state of the economy is catching public employees in a fiscal squeeze created by rising costs which justify substantially increased wages but simultaneously reduce the government's capacity to meet such obligations. Citizens of a township verging on bankruptcy are simply not about to give an arbitra-

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27. For a forceful statement of this position, see DISPUTES PANEL, DETROIT POLICE OFFICERS ASS'N AND CITY OF DETROIT, FINDINGS AND RECOMMENDATIONS ON UNRESOLVED "ECONOMIC" AND OTHER ISSUES (February 27, 1968), excerpted in R. SMITH, H. EDWARDS, & R. CLARK, LABOR RELATIONS IN THE PUBLIC SECTOR: CASES AND MATERIALS 844, 852 (1974):

> In all probability . . . the City will not be able to solve these problems without finding new sources of revenue or sharply curtailing many kinds of City services and programs. But we do not think the City of Detroit, any more than other public employers, can expect its employees to subsidize the public service for an extended period by working at salaries substantially below the levels which, in terms of applicable criteria, are proper. If the citizenry are unwilling to pay a fair price for employment services they will, in our judgment, have to be willing to live with reduced services.

tor carte blanche to award wage increases that could push them over the brink.[28]

There is an alternative model that would also insulate the arbitrator from the political consequences of his or her decision, but in a quite different way: it would limit the arbitrator's discretion over money issues to whatever funds were "available" on the basis of the budget prepared by the governing authority. If the arbitrator were required to accept that authority's determinations regarding the available revenues and their allocation among competing claims for priority, he or she would simply be called upon to determine how any or all of the residual amount should be allocated among salary and other cost benefits.

This "residual" model, while possibly appealing to public management, would clearly be unacceptable to labor because it allows the governing body to predetermine the limits of salary increases by unilateral fiat. There is little point in having arbitration if the arbitrator acts solely, or primarily, as a rubber stamp for predetermined management decisions.

Many of the statutes mandating arbitration seek a compromise between these two models by requiring the arbitrator to take into account the public employer's ability to pay.[29] Except for Nevada, which conditions a monetary award on the arbitrator's determination of fiscal ability,[30] the statutes adopting the "ability to pay" model are vague

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28. The arguments in favor of considering ability to pay as a factor in public sector interest arbitration have been ably stated in Block, *Criteria in Public Sector Interest Disputes*, in ARBITRATION AND THE PUBLIC INTEREST: PROCEEDINGS OF THE TWENTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 161, 169-75 (G. Somers ed. 1971).

29. The statutes of Michigan, Wisconsin and Oregon require the arbitrator to consider the interests and welfare of the public and the financial ability of the unit of government to meet these costs. MICH. COMP. LAWS ANN. § 423.239 sec. 9(c) (Supp. 1975); WIS. STAT. ANN. § 111.70 (1974) (applies only to Milwaukee police); ORE. REV. STAT. § 243.746 (1974). The New York statute provides that the arbitration board should take into account so far as it deems them applicable various criteria, including "the interests and welfare of the public and the financial ability of the public employer to pay." N.Y. CIVIL SERVICE LAW § 209(4)(c)(v) (McKinney Supp. 1974). In Oklahoma, the criterion is phrased in terms of "interest and welfare of the public and revenues available to the city or town"; in Iowa, "the interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the standard of services." OKLA. STAT. ANN. tit. 11, § 548.10(4) (Supp. 1974); IOWA CODE ANN. § 20.22(9)(c) (Supp. 1975). In Minnesota, the arbitrator is required to give "due consideration to the statutory rights and obligations of public employers to efficiently manage and conduct its operations within the legal limitations surrounding the financing of such operations." MINN. STAT. ANN. § 179.72 subdiv. 7 (Supp. 1975). In other states, for example Maine, South Dakota, and Washington, the applicable statutes contain no criteria relevant to ability to pay. ME. REV. STAT. ANN. tit. 26, § 965(4) (1974); S.D. COMP. LAWS ANN. tit. 9-14A-3 (Supp. 1975); REV. CODE WASH. ANN. § 41.56.460 (Supp. 1974).

30. *See* Grodin, *supra* note 8. NEV. REV. STAT. § 288.200 (1973).

as to both how the factor should be taken into account and what weight it should be given in relation to other factors. Arbitrators themselves tend to remain noncommittal.[31]

However the ability-to-pay factor is applied, it is apparent that rather than resolving the question of political responsibility it shifts the issue to new ground. Except to the extent that the arbitrator can detect errors in the calculation of income or expenditures, any consideration of ability to pay necessarily involves the arbitrator in policy decisions. If there are insufficient funds to meet what the arbitrator considers to be an approriate award, he or she explicitly or implicitly determines what particular items are to be cut out of the budget or (if applicable law permits) whether taxes should be increased. The former may involve questions such as the extent to which other employees of the same employer are entitled to a salary increase or perhaps even to continued employment and whether a particular program should be cut or eliminated.[32] The latter may raise esoteric issues, such as consideration of comparative tax effort and consideration of the impact of a tax increase upon the future of the tax base.[33]

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31. Arbitrator Charles C. Killingsworth suggests that the employer's ability to pay may properly be taken into consideration only within the limits of a "zone of reasonableness." This zone is determined by examining wage rates in other cities for similarly situated public employees. R. SMITH, H. EDWARDS & R. CLARK, LABOR RELATIONS IN THE PUBLIC SECTOR: CASES AND MATERIALS 858 (1974).

Professor Smith submits that arbitrators who consider the employer's ability to pay are not greatly swayed by a scarcity of funds but typically make an award which is claimed to be somewhat less than that which would otherwise have been made. Smith, *Comment*, in ARBITRATION AND THE PUBLIC INTEREST, PROCEEDINGS OF THE TWENTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 180, 184-87 (G. Somers ed. 1971).

32. *See, e.g.*, the opinion of Howard Block in the 1971 dispute between the Clark County School District and the Clark County Classroom Teachers Association, reprinted in part in J. GRODIN & D. WOLLETT, LABOR RELATIONS AND SOCIAL PROBLEMS, UNIT FOUR, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 373 (2d ed. 1974). Arbitrator Block, operating under Nevada's requirement for finding of ability to pay, undertook to divide the school budget into "Priority No. 1 items" (those deemed essential for the current year) and "Priority No. 2 items" (those desirable but not indispensable, or essential but deferrable). He considered the former beyond reach under the applicable statute, but subjected the latter to proof by the employee organization that they should give way to wage increases on the basis of normal interest criteria. Applying these standards, he decided that budget items for a new subschool and additional deans belonged in the second category (on grounds that the new subschool was a belated addition to the budget and that the addition of deans could be deferred); and among the Priority 2 items he thought the justification for a cost-of-living increase was sufficiently substantial that it should take precedence over both the funding of an integration program from the general budget (there being sufficient funds for that purpose in contingency reserve) and the "hot lunch" program, (since part of it could be funded from bond issues). Interviews with Arbitrator Block and the participants indicates that these decisions were arrived at through consultation with the parties and represented, in part, a negotiated result. Grodin, *supra* note 8, at 101.

33. *See* Ross, *The Arbitration of Public Employee Wage Disputes*, 23 IND. & LAB. REL. REV. 3 (1969).

No doubt there are arbitrators capable of passing reasoned and sound judgment on such matters. The point, however, is that the exercise of judgment in this area involves broad issues of social planning that are most appropriate for resolution through the legislative process. Arbitrators are naturally aware of these observations and shy away from making such judgments precisely because of their greater magnitude. To the extent that they do so, however, they are being unfaithful to the policy embodied in the legislative mandate.

B. Other Issues Involving Cost to the Employer

The proper, residual and ability to pay models are also applicable to the settlement of other public employer-employee issues involving monetary costs and therefore a fiscal impact. Three additional considerations, however, must be taken into account. First, it is more difficult to establish what demands are reasonable outside the area of wages. If the employees are asking for a dental plan, and every other comparable public employee in the state has one, it would probably be reasonable to grant the benefit. But, as is more likely to be the case, if other employees have dental plans of varying quality and some have no dental plan at all, it becomes difficult to characterize any result as "unreasonable," except, perhaps, in relation to the total package of wages and benefits. Comparison on the basis of the total package, however, is extremely difficult. Items entailing determinable costs to the employer but not determinable monetary benefit to the employee, such as those arising out of teacher demands for smaller class size or additional time for class preparation, practically defy "package" analysis on a comparative basis.

Second, non-wage cost items may involve an indeterminable fiscal impact in the future. A pension plan with deferred or partially deferred funding, for example, constitutes an encumbrance upon future budgets, and to that extent funds future governing boards. Some items, such as personnel increases that can only be met by additional facilities, may require capital investment.[34] If an arbitrator has authority to decide such issues, the range of policy questions he or she may be called upon to consider is considerably expanded.[35]

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34. The issue is not at all academic. In Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the union's initial proposals with respect to manning would have required the construction of a new fire house and the purchase of new equipment.

35. In Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the court remarked that the union's demands, if they involved capital expenditures, "could very well intrude upon management's role of formulating policy." 12 Cal. 3d at 619, 526 P.2d at 978, 116 Cal. Rptr. at 514. But since the union had changed its position, the court found it unnecessary to decide that issue.

Finally, non-wage cost issues may directly involve important social policy considerations. Class size is an example in the area of education. Although the number of students assigned each teacher may be a bargainable issue because of its impact upon working conditions,[36] it triggers an underlying question of educational policy as well. This is so, not necessarily because the teachers are motivated by such considerations, although that also may be true,[37] but because class size reductions are an element of school cost and therefore require an arbitrator to weigh competing educational claims for the available funds. The question confronting the arbitrator is not only the same as that involved in deciding wage disputes, but it is also a clear expression of governmental policy with social planning implications that cannot easily be finessed. Similar questions may be posed by the demand of social workers for smaller caseloads or of firefighters for a particular ratio of employees to equipment.[38]

C. Non-Salary Issues Involving No Significant Cost

The monetary cost of an interest arbitration settlement is not the only factor posing political questions. Indeed, issues involving no significant costs may carry substantial political overtones. While most personnel matters—such as seniority, protection against unjust disciplinary action, and scheduling of vacations—involve limited issues of the kind that labor arbitrators are experienced in resolving, in the public sector these can take on a political dimension. The Supreme Court of Michigan held, for example, that a police residency requirement relates to working conditions and is therefore a mandatory subject of bargaining under Michigan law.[39] The court found that the parties had

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Id. The issue arose in the context of a local charter provision requiring arbitration of disputes not resolved in negotiations.

36. Class size has been held to be a bargainable issue on that ground. *E.g.*, Education Association v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972); School District v. Local Government Employee Management Relations Board, 530 P.2d 114 (Nev. 1974).

37. The difference in focus between class size as a matter of educational policy and class size as a matter of teaching load may depend largely upon whether the teacher group is adequately advised regarding applicable law. D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS 6:61 (1974).

38. In Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the court reasoned that if the union's manpower proposal were directed to standards of fire prevention, the city's objection based on management prerogative would be well taken, but that if it involved matters of workload and safety, the issue would relate to working conditions and would therefore be both bargainable and arbitrable. *See also* County Employees Ass'n v. County of Los Angeles, 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 (2d Dist. 1973) (caseloads for social workers held to be bargainable on the basis of similar reasoning).

39. Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974).

bargained to impasse over the residency issue, and concluded that the city was free to take unilateral action in the form of an ordinance imposing the residency requirement. At the time these events occurred, Michigan had not yet passed its compulsory arbitration statute.[40] A subsequent arbitration proceeding found the residency requirement to be valid.[41]

A similar situation occurred in Berkeley, California, after voters approved an initiative establishing a citizens' Police Review Commission.[42] As soon as the Commission began to consider procedures that would require an officer accused of misconduct to attend public hearings inquiring into the matter, the local police association sought and obtained an injunction preventing the Commission from adopting such procedures prior to "meeting and conferring" with the association as required by California law.[43] Eventually, the Commission met and conferred with the police association, agreed to some modifications in the procedures, and adopted the procedures despite continued police association opposition. No applicable law required arbitration of the dispute.

In both the Michigan and California cases, the judicial determination that the issues in dispute were proper subjects of mandatory bargaining seems correct as a matter of statutory interpretation; it is difficult to quarrel with the proposition that rules determining where employees may live while working or how their conduct may be called into account involve "working conditions" in a fairly direct and substantial way. Yet the political implications of a system that subjects such disputes to binding decision by an arbitrator are also direct and substantial. It means that an arbitrator is to be given the political task of assessing the impact of proposed rules on the interests of the broader community as well as those of employees. In the two police cases, an arbitrator would be expected to take into account all the policy arguments asserted in favor of or against police residence requirements or the use of public hearings to control police behavior.

II

CHECKS ON THE POLITICAL IMPACT OF INTEREST ARBITRATION

The strong terms in which the political implications of arbitration were discussed above require some qualification. Most arbitrators are sensible people, constrained by feelings of responsibility to the commu-

40. MICH. COMP. LAWS ANN. § 423.231 (Supp. 1972).

41. City of Detroit v. Police Ass'n, 627 GERR B-13 (1975) (Platt, Arbitrator).

42. Berkeley, Cal., Ordinance 4644-NS (April, 1974).

43. Police Ass'n v. Police Review Comm'n, Civil No. 459-645-9 (Alameda County Sup. Ct., Feb. 7, 1975).

nity and by a desire for continued acceptability. They are not likely to render a decision they know or believe will bring financial ruin to a community or create disruptive political reaction. On the contrary, they are likely to view the arbitral process as an extension of the negotiating process and to seek consensus where it is possible.[44] Moreover, this search for consensus is aided by the unions' interest in avoiding havoc, maintaining stability, and continuing the employment of their members. There is evidence that a substantial number, perhaps a majority, of interest arbitration awards rendered by tripartite panels are unanimous; and even where they are not, the evidence indicates that dissent may be more pro forma than real.[45] The disruptive impact of disputed awards can be minimized through the arbitrator's ability to locate areas of flexibility through his or her consultations with the parties.[46] Finally, there is evidence that, over a period of years, arbitrators' decisions on salary matters may not vary substantially from accords reached through collective bargaining.[47]

On an ad hoc basis, therefore, a reasonable legislator might well conclude that the risks of arbitration are less than the risks of the political and economic dislocation a strike or other conflict might cause. More, however, than the results in particular cases must be considered. The benevolence of a dictatorship and the likelihood that it will reach decisions similar to those that would be reached under a democratic system does not justify its existence. What must be considered also are the longrange consequences of institutionalizing a system which makes the decision of an arbitrator available as a matter of course.[48]

This is not to conclude that the observations made in Part I of this Article necessarily argue against the use of arbitration on an institutionalized basis. They do suggest, however, that the arbitration process

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44. Rehmus, *supra* note 26, at 310-11.

45. *Id.* at 308.

46. *See* Grodin, *supra* note 8, at 98, 99-101.

47. Data on the results of compulsory arbitration for Michigan police and firefighters between 1969 and 1972 indicates only slight differences in the size of salary increases when compared with the increase obtained under other forms of dispute settlement. Bezdek & Ripley, *Compulsory Arbitration Versus Negotiations for Public Safety Employees: The Michigan Experience*, 3 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 167 (1974).

48. Professor Summers suggests that if the arbitration system is applied generally its effects will be to rearrange but not escape the political process. In brief, "the crucial political decision . . . [becomes] the selection of the arbitrator, based on his past performance." Summers, *supra* note 13, at 1200. Such an arbitrator, however, "is likely to be less responsible to his constituency because his defined role is to be objective and his award is disguised as nonpolitical." *Id.* This view seems correct with one addition. Under a system in which both parties participate equally in the selection of the arbitrator, he or she will still have a "constituency," albeit one that is clearly different from the constituencies of elected officials.

needs to be structured so as to maximize political responsibility.[49] The rest of this Article offers a number of suggestions, not necessarily as a recipe, but at least as a listing of possible ingredients.

A. The Arbitral Tribunal

The nature of public sector interest arbitration supports the widespread use of a tripartite panel consisting of a neutral and two partisans, rather than a single neutral decisionmaker. The tripartite panel is likely to force the neutral arbitrator to consult with his partisan colleagues, to allow for compromise, and to diminish the risk that the broader consequences of the award[50] will be ignored. Whether a single or tripartite panel is used, the procedures for selecting neutral arbitrators and evaluating their qualifications are important policy issues.

The Michigan Supreme Court's decision in *Fire Fighters Union v. City of Dearborn*[51] provides a useful point of departure for analysis of these issues. The Michigan statute provides for arbitration of police and fire department labor disputes by a tripartite panel consisting of one delegate selected by each party and an "arbitrator/chairman" selected by the two delegates. In the event the two partisans are unable to select the third member of the panel, the arbitrator/chairman is to be appointed by the chairman of the Michigan Employment Relations Commission (MERC).[52] In *Dearborn*, the city declined to name a delegate to either of two arbitration panels established to resolve certain police and fire department disputes. As a result, the MERC chairman selected a neutral arbitrator for each panel and the proceedings were held on an ex parte basis. Upon the city's refusal to comply with the decisions, the unions initiated these actions.

The four participating justices divided evenly as to the constitutional validity of the delegation of power to the arbitrator, thus affirming the lower court's ruling that the delegation was valid.[53] Of the two justices who voted for affirmance, one did so on the narrow ground that the arbitrator/chairman had been designated by an official appointed by the governor rather than by the parties themselves. In his opinion, this fact

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49. One method of "containing" the political impact of arbitration is, obviously, to limit its use. Such limits, however, may become increasingly difficult and, for reasons mentioned earlier, are arguably undesirable from the perspective of public employer-employee relations. See the text accompanying notes 7-9 *supra*. Moreover, political implications exist even when arbitration is used on a limited basis.

50. *See* note 15 *supra*, and Barr, *supra* note 11.

51. ___ Mich. ___, 231 N.W.2d 226 (1975).

52. MICH. COMP. LAWS ANN. § 423.235 (Supp. 1975).

53. Fire Fighters Union v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972).

supplied the necessary ingredient of public responsibility.[54] The result, as the two justices voting for reversal noted in their opinion, is that the Michigan law may be constitutional only to the extent it does not function as planned.[55]

The two justices voting for reversal found the law defective.

> It is the unique method of appointment, requiring independent decision makers without accountability to a governmental appointing authority, and the unique dispersal of decision-making power among numerous *ad hoc* decision makers, only temporarily in office, precluding assessment of responsibility for the consequences of their decisions on the level of public services, the allocation of public resources, and the cost of government, which renders invalid this particular delegation of legislative power.[56]

That defect was not cured, in their opinion, by the circumstance that the neutrals in the *Dearborn* disputes happened to have been appointed by the MERC chairman, since the chairman is not generally regarded as accountable for the decisions of the ad hoc arbitrator.[57] The statute would only be cured, according to the dissenters' strong suggestion, if it were amended to provide for arbitration by a person or tribunal with continuing political responsibility.

An attempt to make arbitrators more politically responsible by electing them, or by having them appointed by elected officials to serve on a continuing basis, poses a difficult dilemma. The problem of political responsibility arises initially from the fact that arbitrators may be called upon to determine policy issues otherwise subject to the local legislative process. But if the arbitrator is made politically responsible to the local electorate, which is in effect a party to the dispute, then arbitration loses its neutral character; and to the extent that the arbitrator's constituency is the same as that of the legislative body that would otherwise exercise authority over the policy questions posed, the process becomes redundant.

If, on the other hand, the arbitrator is made politically responsible to a larger electorate—for example, the electorate of the state as a

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54. Fire Fighters Union v. City of Dearborn, ___ Mich. ___, 231 N.W.2d 226, 264 (1975).

55. *Id.* at 237.

56. *Id.* at 241.

57. The dissenters made the following observations:

> The chairman of the MERC and his superior, the Governor, properly do not regard themselves to be and are not generally regarded by the citizenry as responsible or accountable for the decisions of the ad hoc, outside arbitrator/chairman. The statutory duty of the chairman of the MERC is to appoint an 'impartial' person as arbitrator/chairman. He is not expected to appoint an arbitrator/chairman who will render a decision which will have the support of the electorate or of their elected representatives.

Id. at 238.

whole—problems of lack of neutrality and redundancy give way to problems concerning local autonomy and the role of collective bargaining. What was once a local issue, determinable ultimately through the local political process, becomes a state issue, determinable by state officials. An argument can be made in favor of centralizing decisionmaking with respect to issues of public employee wages and working conditions, and with respect to the larger questions of budgetary policy which those issues entail. Indeed, in many states local government decisions, particularly those involving fiscal policy, are already largely controlled by state law,[58] and more control may be inevitable if not desirable. Centralization of decisionmaking seems hardly an appropriate response to the concerns of the local electorate over the loss of their right to control local policy issues, however. Moreover, such a process is inevitably antithetical to collective bargaining, for it assumes the existence of a state policy for determination of wages and conditions of employment.

Here is the heart of the dilemma. Those who favor the use of arbitration to resolve interest disputes in the public sector see it primarily as an extension of the negotiating process[59] and evaluate it on the basis primarily of its effectiveness in adapting to that process. Thus, emphasis is placed, under existing systems, upon allowing the parties to choose their own arbitrators rather than upon having them elected or appointed by some state official or agency; and it is on that basis that arbitration is defended against the criticism that it may chill negotiations. There is an obvious tension between that perspective and one which views arbitration as part of an administrative mechanism for implementing governmental policy regarding wages and conditions of employment. One perspective sees the arbitrator as an essentially private person who happens to be involved in resolving a dispute concerning a public entity; the other sees the arbitrator as an agent of government involved primarily in implementing public policy.

There may be room for accommodation between these competing views. One need not accept the model of arbitrator as administrator to recognize that there is a difference between the role an arbitrator plays in public sector interest disputes and the traditional role of the arbitrator in private sector labor relations. Even on the basis of the prevailing practice—which permits the parties to select their own arbitrator, by agreement or by striking names from a list if they fail to agree[60]—the partly public nature of the process can be reflected in the makeup of lists

58. *E.g.*, CAL. GOV'T CODE §§ 53732, 53734 (West 1966); MICH. COMP. LAWS ANN. § 141.1-.919 (Supp. 1975).

59. *See* note 15 *supra*.

60. *E.g.*, N.Y. CIVIL SERVICE LAWS § 209(4)(c)(ii) (McKinney Supp. 1974).

from which the arbitrators are selected. Although experience in private sector labor relations should be recognized as extremely valuable, for example, it should not ipso facto qualify someone for public sector interest arbitration. The public sector arbitrator should have an understanding of public finance and a sensitivity to the policy issues that may be involved. Ultimately, of course, the arbitrator's qualifications are a matter for the parties to judge. Nevertheless, governmental agencies, educational institutions, and organizations of arbitrators could establish training programs to provide aspiring public sector arbitrators with relevant information and exposure. Governmental or private organizations that submit lists of arbitrators' names for selection by the parties could develop separate public sector arbitration lists. The certification of arbitrators as being qualified for public sector interest disputes, while not of itself imposing political responsibility, may serve to make the arbitrator more responsible in fact.

Because salary and other cost determinations involve political decisions, the statute governing public sector interest arbitration should attempt to control arbitral discretion by incorporating explicit decisional criteria. Specifically, the statute should require arbitrators to consider the employer's ability to pay in fixing awards. Although precision is difficult, and a degree of ambiguity may arguably even be desirable, the statute should require that both the arbitrator and the parties be informed as to both how much weight ability to pay is to be given and whether the arbitrator is authorized to consider factors such as possible tax increases, financial aid from other sources (such as the state or federal government), and readjustments to the budget in making the determination.

Finally, there is no reason the wage disputes of various groups of employees of the same employer cannot be arbitrated concurrently. To the extent ability to pay is a factor for one group of employees it will be a factor for all. Each group wants a piece of the same limited pie. By consolidating arbitral proceedings involving more than one group of employees, the potential for conflicting awards may be reduced.[61]

B. Scope of the Arbitration

Most binding arbitration legislation assumes that the scope of arbitration includes or is actually congruent with the scope of bargaining and, therefore, that any mandatory bargaining issue should be subject to arbitral determination.[62] There are grounds, however, for questioning

61. *See* Bible, *The Governor's Power in Public Sector Labor Disputes*, INTER ALIA (a publication of the Nevada State Bar) July 1973, at 38.

62. Most statutes contain no description of the scope of arbitration, simply employing such phrases as "the issues in dispute" or "the dispute." *E.g.*, MASS. GEN. LAWS

such an assumption. Some states exclude wages from binding determination,[63] although this seems counterproductive given the function of arbitration. The wage issue lies at the core of the bargaining process. Matters such as the residency of police officers may well be considered appropriate for bargaining but inappropriate for resolution through arbitration. Experience from the private sector suggests that attempts to limit the scope of matters discussed at the bargaining table are likely to be artificial and ineffective.[64] But it does not follow that if agreement is not reached on such an issue during negotiations it should therefore be subject to binding determination by an arbitrator.

On the other hand, there are two strong arguments against making the scope of arbitration more narrow than that of bargaining. First, if arbitration is to be a substitute for the right to strike, a union should be allowed binding arbitration for any issue over which it might strike in the absence of arbitration. This argument loses some of its force if all public employees are prevented from striking, although strike deterrence may still be a factor. If strikes are allowed, except those that imperil public health or safety or those that are limited to particular groups of public employees, the argument for similar scope remains. Perhaps the assumption that the right to strike, where granted by law, entails the right to strike over any issue subject to bargaining needs to be reconsidered.[65]

The second argument against making either the scope of arbitration or the right to strike more narrow than the scope of bargaining rests

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ANN. ch. 150E, § 9 (Supp. 1975) ("issues in dispute"); N.Y. CIVIL SERVICE LAW § 209 (4)(c)(v) (McKinney Supp. 1971-72) ("matters in dispute"); OKLA. STAT. ANN. tit. 11, § 548.7 (Supp. 1974) ("unresolved issues"). Some, such as the Iowa Public Employment Relations Act, IOWA CODE ANN. § 20.22 (Supp. 1975), and the Minnesota Public Employee Labor Relations Act of 1971, MINN. STAT. ANN. § 179.69 (Supp. 1975), make specific reference to the scope of bargaining. Wisconsin is unique in listing the matters subject to determination by the arbitrator. WIS. STAT. ANN. § 111.70 (1974). Also see Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974) (rejecting, on the basis of clear charter language, the city's argument that the scope of arbitration should be narrower than the scope of bargaining).

63. *E.g.*, Maine, ME. REV. STAT. ANN. § 979-D (1974) (salaries, pensions and insurance); Rhode Island, R.I. GEN. LAWS ANN. § 36-11-9 (Supp. 1974) (matters involving expenditure of money).

64. Wollett, *The Bargaining Process in the Public Sector: What is Bargainable*, 51 OREGON L.R. 177 (1971).

65. One of the considerations to be used in drawing the line between mandatory and nonmandatory subjects is the appropriateness of submitting the subject to the arbiter of economic force. In the public sector where the strike is prohibited entirely this consideration is absent. To the extent that strikes are legalized in the public sector, then the subjects for which the union can strike should be limited to those for which the use of the strike as a political pressure device is appropriate. The union might, therefore, not be allowed to strike for some objectives for which it would be allowed to bargain without recourse to the strike.

Summers, *supra* note 13, at 1193-94 n.69.

on the fact that it is exceedingly difficult to establish workable criteria for determining those matters which, while affecting working conditions, nevertheless involve political elements and therefore make strike or arbitration inappropriate. The difficulty is not prohibitive, however. The Wisconsin statute, for example, expressly lists those matters that are to be subject to arbitral determination.[66] Alternatively, the legislative history of a general language statute might give examples of the kinds of issues considered inappropriate.

Although it is desirable that the scope of arbitration include all issues of mandatory bargaining, it seems clear that the parties should not be forced to arbitrate non-mandatory bargaining issues. Whether they should be *permitted* to do so is another matter. In part, the answer depends upon the public employer's authority to enter into a binding agreement on subjects that are not mandatory. If the public employer lacks such authority (on the theory that it is contrary to the public interest to subject non-mandatory issues to bargaining's bilateral determination),[67] then it lacks the authority to agree to an arbitration which would produce the same result. On the other hand, even if the public employer has the authority to conclude an agreement on a non-mandatory issue, it need not follow that an arbitrator's authority should also extend that far.[68] If anything, the closed nature of the arbitral process suggests that it might be wiser if such issues were not open to arbitration.

C. *Review of the Arbitral Award*

In general, the judicial role in arbitration is extremely limited, and properly so. Where arbitration is based on voluntary agreement, the arbitrator is applying norms established, or at least incorporated, by the parties themselves. Subject to overriding considerations of public policy, the parties ought to be free to establish or incorporate whatever norms they like and to agree that the arbitrator's application of the norms is not subject to review. Thus, in the absence of fraud or misconduct, the courts will not disturb an arbitrator's determination of those factual or "legal" issues that the parties have authorized for arbitral decision.[69] This is the general rule despite the broad leeway

66. WIS. STAT. ANN. § 111.77(6) (1974).

67. *Cf.* Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972). *See* Summers, *supra* note 13, at 1194.

68. With the exception of Wisconsin's statute, no statute expressly adopts this view. WIS. STAT. ANN. § 111.77(6)(h) (1974). Minnesota provides that the arbitrator will have no jurisdiction to entertain any matter or issue not within the scope of bargaining *unless* it is contained in the employer's final offer. MINN. STAT. ANN. § 179.69(3) (Supp. 1975).

69. *See* United Steelworkers of America v. Enterprise Wheel & Car Corp., 365 U.S. 593 (1960).

given arbitrators to interpret the language of the agreement governing what they are authorized to decide. As a result, the issue of arbitrability, though ultimately a basis for judicial review, is often inextricable from the underlying substantive issues.

These principles of judicial restraint are equally applicable, on policy grounds, to grievance arbitration in the public sector. It is questionable, however, whether these same conclusions are relevant in the case of interest arbitration, particularly interest arbitration that is legislatively mandated.[70] If the applicable statute contains decisional criteria and limitations on the scope of matters subject to arbitral determination, it is presumably because the legislature considers that these constraints serve some overriding public interest. From this it follows that even where the public employer consents to arbitrate, it does not have the power to authorize the arbitrator to disregard the legislature's constraints. Some form of meaningful review needs to be provided to ensure these bounds are not overstepped. Where there is no bargain, and the arbitration is conducted because the law requires it, the argument for review becomes even more substantial. In both cases, the arbitrator is performing a public, rather than a private, function, and the traditional standards of review should be adjusted accordingly.

With regard to questions of fact, and more broadly with regard to the application of decisional criteria to determined facts, the nature of the process dictates that the arbitrator have broad discretion. The "substantial evidence" rule, which some arbitration statutes have borrowed from administrative law,[71] may be a workable standard if it is applied with recognition of the quasi-legislative, quasi-negotiating func-

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70. A majority of statutes are silent on the question of appeal from an award. *See* McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1204 (1972). The Maine statute provides that the award is binding on questions of fact in the absence of fraud, but subject to affirmation, reversal, or modification "based upon an erroneous ruling or finding of law." ME. REV. STAT. ANN. tit. 26, § 972 (1974). In Michigan, an award is binding "if supported by competent, material, and substantial evidence on the whole record." MICH. COMP. LAWS ANN. § 423.242 (Supp. 1975). Oregon uses the same terminology, but adds the qualification that the award be "based upon the factors" set forth in the statute as criteria for decision. ORE. REV. STAT. § 243.752 (1974). South Dakota provides for appeal de novo. S.D. COMP. LAWS ANN. § 9-14A-19 (Supp. 1975). Washington provides for review solely upon the question whether the decision was "arbitrary or capricious." REV. CODE WASH. ANN. § 41.56.450 (Supp. 1974). The Pennsylvania Supreme Court has held that review of the arbitrator's jurisdiction may be had through extraordinary writ, even though the legislature precluded appeal. *In re* City of Washington, 436 Pa. 168, 259 A.2d 437 (1969). *Cf.* Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970) (holding that due process requires limited judicial review of awards rendered pursuant to a statute providing for compulsory arbitration of disputes between nonprofit hospitals and their employees).

71. Michigan and Oregon statutes so provide. See note 46 *supra*.

tion performed by the arbitrator. An "arbitrary or unreasonable" test might be equally adequate for resolving these issues.[72] But questions that involve a determination of the meaning of the decisional criteria contained in the governing statute or of the arbitrator's scope of authority are questions of law and cannot be resolved in terms of the arbitrator's view of the legislative intent. In such cases, the private sector rule that the arbitrator's decision is binding on issues of law as well as on issues of fact is inapplicable. The reason for this is that the legal norms involved are operable, not because they have been incorporated as standards into the agreement of the parties, but because the legislature has considered them to be appropriate limitations upon the process in which the parties are engaged.[73]

The principle argument against an expanded scope of review is that it might invite litigation over each award and thus prolong what should be a speedy method for settlement of disputes.[74] Although this is a formidable argument, on balance it is not persuasive for two reasons. First, the review in question is to occur after the arbitration has been completed. Courts should not entertain attempts by either party to block arbitration on the ground that the issue in the dispute is not arbitrable except in the most extreme circumstances. The need for pre-arbitral judicial restraint is even greater in the case of interest arbitration than in the case of grievance arbitration, since there is more likely to be modification in the positions of the parties in the course of the proceeding before the interest arbitrator, which in turn, will change the issues to be decided.[75]

Second, post-arbitral review may be structured in non-traditional ways so as to minimize disruption of the parties' relationship. This review could be conducted by the state public employee relations board rather than by the courts to allow for expertise, uniformity of judgment,

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72. REV. CODE WASH. ANN. § 41.56.450 (Supp. 1974) ("arbitrary or capricious").

73. The cases are in accord. *E.g.*, Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 615, 526 P.2d 971, 975-76, 116 Cal. Rptr. 507, 511-12 (1974) ("[T]he city council *after* the rendition of the award may reject any award that invades its authority over matters involving 'merits, necessity or organization' since the charter itself limits the scope of the arbitration decision to that which is 'consistent with applicable law.' "); Cheltenham Township v. Police Department, 11 Pa. Commonwealth 348, 312 A.2d 835 (1973) (declaring invalid an arbitration award which required the township to pick up and deliver policemen at their homes when going on and off duty); North Kingston v. Teachers Ass'n, 110 R.I. 698, 297 A.2d 342 (1972) (undertaking independent statutory interpretation to uphold award against attack that arbitrators exceeded their authority).

74. *Cf.* Concurring opinion of Judge Fuld in Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 493, 511-20, 260 N.E.2d 508, 518-24, 311 N.Y.S.2d 863, 877-84 (1970).

75. *See* Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974).

and savings of time. Unfounded attempts at review could be deterred by requiring the unsuccessful appellant to pay not only the costs of the proceeding, but the attorney's fees of the successful respondent as well.

D. Options Available to the Governing Body

If mandatory arbitration is premised on the need for protecting the public against harmful strikes, the option to arbitrate or incur a strike might be left to the public employer for its case-by-case evaluation of the comparative risks. This reform would not have much impact in those cases where statutory schemes confine mandatory arbitration to police officers and firefighters. At least it is less likely that a governing body would consider a police or fire department strike to be preferable to arbitration.[76] But where the touchstone for arbitration is phrased more broadly in terms of the "essentiality" of the particular service, or the danger to public health or safety, it may make sense to let the governing body determine how the public interest would best be served.

One counterargument is that it would be unfair to grant such an option to the governing body while withholding it from the union. This would be persuasive if public employee arbitration were mandated for reasons other than the protection of the public. But if, as is true in most states, mandatory arbitration is limited to particular employees because of the public impact of particular kinds of strikes, it is no more unfair to tell those employees that the public employer does not want to arbitrate and that they may go ahead and strike than it is to tell the same thing to any group of less crucial public employees, such as librarians or custodians, or for that matter to employees of private employers. On the contrary, the employees in question are presumably in a position to strike more effectively than are those whose strikes are not considered especially critical.

Another, and somewhat conflicting argument against giving the public employer the option to reject arbitration is that it may be influenced either by the political pressures of a union that wants to strike, or it may allow a strike because of the fiscal savings that may temporarily be involved. In both cases the need to take adequate account of the impact of the strike upon the public will be overlooked. Although these dangers exist, a legislative mandate that denies an option to the governing body discounts the disadvantages of arbitration by creating, in effect, an irrebuttable presumption that arbitration is always preferable

76. Such a situation arose recently in Berkeley, California, however. The city council chose to endure a 25-day strike by firefighters rather than submit to arbitration as the firefighters suggested. The strike culminated in an agreement on terms closer to the city's bargaining position than that of the firefighters. *See Berkeley Firefighters' 25-Day Strike*, CALIF. PUB. EMPLOYEE RELATIONS, December 1975, at 43.

to strikes by certain employees. Only if the strikes allowable are defined in a very limited way is the presumption justified. The broader the definition, however, the more questionable is the presumption until it can be defended only on the premise that the political process cannot be counted upon to hold the governing body to reasonable limits in making its choice. That premise invites studied inquiry; hopefully, we may one day have more than isolated experiences on which to base our judgment as to its validity. Meanwhile, it is no less reasonable to presume that if the strike is indeed one that imperils public health or safety, public pressures are likely to make it dangerous for the governing body explicitly to opt for a strike without adequate explanation. If and as the scope of mandated arbitration is broadened beyond narrowly defined categories of employees, the argument for leaving the strike-arbitration decision to the local political process becomes stronger.

CONCLUSION

We are currently at an important crossroad in public policy. The old system, in which public employees were told they could not strike and at the same time were told that they must live with whatever determinations were made by the governing body of their public employer, has proved to be both impractical and, in the judgment of many, unfair. While numerous variations are possible, the basic policy choice is either to allow the right to strike or to determine the wages and conditions of employment through the use of some "neutral" method of arbitration. Evaluation of that choice depends on a number of factors outside the scope of this Article, including principally the still undetermined impact of arbitration upon the collective bargaining process and the ability of arbitration to deter strikes over extended periods of time.

But even if it is assumed that arbitration generally deters strikes and that its impact on collective bargaining is benign or can be made benign, considerations of political responsibility remain. These considerations do not necessarily argue against a system of arbitration, but they do suggest that it be structured and limited in such a way as to preserve both the appearance and the reality of the democratic process in relation to important aspects of social planning. The problem of evaluation is complicated by the fact that the limitations on the arbitral process indicated by considerations of political responsibility may tend to make that process less attractive to unions, and consequently less effective in deterring strikes. The balance is a difficult one, but it needs to be made.

Recommended Impasse Procedures:

Final Report of the

ASSEMBLY ADVISORY COUNCIL ON

PUBLIC EMPLOYEE RELATIONS*

March 15, 1973

Article 11. Strikes and Lockouts

3511. (a) Subject only to the restrictions and limitations contained in this chapter, public employers shall have the right to lock out and public employees shall have the right to strike.

(b) An employer or employee organization that is injured, or threatened with injury, by a strike or lockout (1) over a matter or matters subject to final and binding arbitration of rights disputes under a collective agreement to which they are

*Appointed by the then Speaker of the Assembly, Robert Moretti, the nationally recognized authorities in Labor relations comprising the Advisory Council were: Benjamin Aaron; Chairman, Howard S. Block, Morris L. Myers, Don Vial and Donald H. Wollett. The material reproduced in this section is extracted from the 267 page report published by the California State Assembly.

parties, or (2) in violation of a no-strike or no-lockout provision in a collective agreement to which they are parties, shall have the right to bring an action in a court of competent jurisdiction to recover damages and to receive such other relief as the court may deem appropriate.

Article 12. Interests Disputes

3512. (a) The provisions of this Article shall be inapplicable to any employer and recognized or certified employee organization which agree to a procedure for settlement of their differences that will result in decisions that are final and binding.

(b) Either the employer or the employee representative may declare that an impasse has been reached in negotiations over the provisions of a collective agreement. The party making such declaration may (1) ask the Board for a list of mediators from which the parties may make a selection, in which event the Board shall supply such list forthwith; or (2) ask the Board to designate a mediator, in which event the Board shall comply immediately upon the consent of the other party; or (3) ask the California State Conciliation Service to designate a mediator, in which event the Conciliation Service shall comply immediately upon the consent of the other party.

(c) When a mediator is selected by the parties from a Board list or designated by the Board, the fees and costs of such service shall be borne equally by the parties unless they have agreed to some other arrangement. When a mediator is designated by the Conciliation Service, the services of the mediator shall be pro-

vided without charge.

(d) The Board shall have the right, on its own motion, and pursuant to such rules and regulations as it shall prescribe, to appoint a mediator if it is satisfied that an impasse exists and that the exigencies of the situation created by the failure of the parties to request the designation of a mediator or to agree on a mediator justify such intervention. The fees and costs of such service shall be borne equally by the parties unless they have agreed otherwise.

(e) The mediator, when selected or appointed, shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement.

(f) If the mediator is unable to effect settlement of the controversy within 15 days after his appointment, either party may, by written notification to the other, request that their differences be submitted to a fact-finding panel. Within five days after receipt of the aforesaid written request, each party shall designate a person to serve as its member of the fact-finding panel. The members so designated shall select the third member who shall serve as chairman of the panel; or if within five days after such designation they fail to do so, the Board shall appoint such chairman within five days after receiving a request from one of the parties. The Board shall appoint the chairman of the fact-finding panel in accordance with such rules and procedures as it shall prescribe.

The chairman appointed by the Board shall not, without the consent of both parties, be the same person who served as mediator.

The panel shall, within 10 days after its establishment, meet with the parties or their representatives, either jointly or separately, and shall make inquiries and investigations, hold hearings, and take such other steps as it may deem appropriate. The panel shall initially determine what issues are in dispute and therefore properly before the fact-finders. The parties shall be required to address their initial evidence and argument to this question, unless they have reached an agreement defining the issues.

In arriving at their findings and recommendations, the fact-finders shall consider, weigh, and be guided by the following criteria:

(1) The lawful authority of the employer.

(2) Stipulation of the parties.

(3) The interests and welfare of the public and the financial ability of the employer to meet those costs.

(4) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally:

(i) In public employment in comparable communities.

(ii) In private employment in comparable communities.

(5) The average consumer prices for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment, including any other matters agreed to by the parties as a subject of bargaining, through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in public or private employment.

For the purpose of such hearings, investigations, and inquiries, the Chairman of the fact-finding panel shall have the power to hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter subject to its jurisdiction. In the event of contumacy or refusal to obey a subpoena on the part of any person or persons, the Board has authority to bring an action to enforce the subpoena in a court of competent jurisdiction.

If the dispute is not settled within 30 days after its appointment, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only, unless the parties have agreed in writing prior thereto that such recom-

mendations shall be binding. All members of the panel shall have the right to vote on the recommendations unless the parties agree to the contrary.

Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties and to the Board privately. If the parties do not accept the recommendations as the basis for settlement, they shall resume negotiations for a period of 10 calendar days or longer if they mutually agree. During this time the Board shall exercise a continuing jurisdiction in an effort to facilitate settlement of the dispute. The Board, the panel, the employer or the employee representative may make such findings and recommendations public if the dispute is not settled after the 10-day period, or such extended period as the parties have agreed to, has been exhausted.

The costs for the services of the chairman, including per diem fees, if any, and actual and necessary travel and subsistence expenses, and any other mutually incurred costs, shall be borne equally by the employer and the employee representative, unless they have agreed otherwise.

(g) If the dispute remains unresolved, the employee organization, as a condition precedent to striking, shall call a meeting of its membership, at which the members attending shall be asked to vote by secret ballot on the following question: "Do you wish to accept the fact-finders' recommendations?" As a condition precedent to locking out the employees, the legislative body of the employer shall vote on the same question.

(h) If both parties answer the question in the affirmative, the dispute shall be settled on the basis of those recommendations. If one of the parties answers the question in the negative, the employees shall be permitted to strike and the employer to lock out; provided, however, that notice of such decision shall be communicated to the other party in writing and announced to the public immediately, and that such strike or lockout shall not commence until five calendar days thereafter.

(i) Any party in interest, including an employee organization, a public employer, a citizen who would be affected by the interruption of services, or a taxpayer may, either during the five-day period specified in subdivision (h) of this section or, after such strike or lockout has commenced, initiate proceedings in a court of competent jurisdiction, for injunctive relief to prevent or stop the strike or lockout.

(j) The superior court in which such proceedings are brought shall not issue any form of injunctive process, including a temporary restraining order, except on the basis of findings of fact supported by evidence elicited at a hearing, that the strike or lockout imminently threatens public health or safety. If the court finds that the evidence establishes such a threat, and finds further that there is no other feasible method for the protection of public health or safety, the court shall issue injunctive relief and shall direct the parties to accept the recommendations of the fact-finders in settlement of their dispute. If the court does not make these findings, injunctive relief shall

be denied and the lockout or strike shall be permitted to commence or continue; provided, however, that the court may retain jurisdiction of the case until the dispute is resolved.

(k) The merits of the fact-finders' recommendations shall not be before the court and shall play no part in its determination. The fact-finders' recommendations, if made binding by court decree, may be subject to review in a separate proceeding in the superior court in any county where the agreement is to be performed. Review shall be limited as specified in Title 9 (commencing with Section 1286.2) of Part 3 of the Code of Civil Procedure dealing with vacation of arbitration awards.

(l) The issuance or denial of relief in a proceeding under subdivisions (i) and (j) shall be subject to an expedited review before the appropriate court of appeal. Upon the filing of the record, the appeal shall be heard and the order below affirmed, modified, or set aside with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

(m) If relief is granted by the trial court, the question of whether its operation should be stayed pending the outcome of the appeal shall be determined by a motion before the trial court, subject to the same expedited appeal as the injunction order.

TAB E -- Appendix

SAN BERNARDINO EXPERIMENT IN INTEREST IMPASSE RESOLUTION

A CASE STUDY

An interesting aspect of public sector labor relations in California is the fact that many innovations have originated in non-urban areas. Thus, for example, the first county-wide public employee strike occurred in Humboldt County.[1] The first formal procedure for recognizing public employee organizations was adopted by Ventura County.[2] Grievance arbitration for public employees was first obtained in Anaheim, Orange County.[3] Flex time provisions were first negotiated in suburban Marin County.[4] Interest arbitration was first adopted by charter amendment for public safety employees in the small city of Vallejo.[5]

Social scientists may some day establish that it is perhaps the very absence of strong labor-management traditions in non-urban areas that permits, or even encourages, experimentation. Whatever the underlying reasons, another imaginative and highly successful experiment in public sector labor relations has been carried out in non-urban San Bernardino County: *advisory, final-offer by issue, mediation-arbitration of interest disputes.*

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[1] 1967, Local 1684 AFSCME (although there were public employee strikes in California prior to that year).

[2] 1967 Ventura County Employees Association

[3] 1966, Local 399 SEIU

[4] 1969, Local 535 SEIU

[5] 1970, Local 876 Fire Fighters

The San Bernardino experiment was selected for inclusion in this manual in part because of its uniqueness. San Bernardino County is possibly the only jurisdiction in the state--and perhaps in the nation--to have combined the elements of mediation-arbitration with final-offer arbitration. It provides a stimulating example of how voluntary dispute resolution techniques may be improvised by the parties. By studying its operation, we may learn how this process can serve the parties of other jurisdictions as well. Moreover, since the sole difference is in the nature of the award, this advisory process may also provide important insight as to how such a system would work if the results were to be binding.

Background of the Experiment

San Bernardino adopted this unusual impasse procedure as a direct result of pressures brought on the County by its two non-uniformed employee organizations, the independent San Bernardino Public Employees Association and Local 122 of the American Federation of State, County, and Municipal Employees, AFL-CIO. The two organizations iniated separate drives in 1969 to have the meet and confer provisions of the Meyers-Milias-Brown Act implemented by the County, which finally were successful in 1972. Although the ultimate form for implementing the MMBA was unforeseen, it may well have had its roots in the past.

Prior to 1972, the County had refused to meet and confer with the employee groups on salary issues. This was handled, instead, by a committee of management representatives, the employee organizations, and some fifteen community organizations. This group would hold semi-public

sessions and ultimately submit salary proposals to the Board of Supervisors for adoption. As can be imagined, the submitted recommendations frequently failed to reflect the proposals of either County management or the employee organizations.

After some stormy sessions with employee representatives, including one incident of informational picketing by AFSCME, the Board of Supervisors agreed early in 1972 to restructure its employee relations in order to comply more fully with the provisions of the MMBA.

Institutionalizing "MED-ARB"

In implementing its decision the County adopted a series of ordinances governing employee relations and established two new committees or panels. One of these, the three-member Employee Relations Panel, was to have as its purpose the administration of the ordinance, (i.e. overseeing, recognition procedures, hearing unfairs, etc.) The other, the Employee Relations Committee (ERC), was to carry out the meet and confer process.

The Employee Relations Committee is composed of five members: two from management, one each from the two recognized employee organizations,[6] and a fifth "public member," selected by the other four. As can be seen from the following exerpt from the enabling ordinance, the Committee represents an institutionalized form of advisory mediation-arbitration:

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[6] Another unique feature of San Bernardino's labor relations is that the structure of this committee effected a bargaining council between two competing employee organizations. That is, although the Employee Relations Ordinance allows either of the two to file for an election to determine one as the exclusive bargaining agent, neither organization has done so. The anomalous result is that the two organizations are recognized as "Joint and exclusive bargaining agents" for the units which they mutually represent while warring with each other. Originality must be said to abound in San Barnardino County!

13.0215 Employee Relations Committee.

(a) EMPLOYEE RELATIONS COMMITTEE: The Employee Relations Committee will be used in negotiations between County management and recognized majority employee organizations. The Employee Relations Committee is charged and authorized within a single framework to (1) meet and confer with the public member serving as facilitator of agreement on those matters in dispute, (2) to mediate the points of impasse by means of the public member who acts in the role of a third impartial party and (3) to see to the final arbitration of any dispute by means of the public member casting a vote. Nothing herein shall preclude any member of the Employee Relations Committee from making a presentation to the Board of Supervisors at public hearing.

While these changes were not adopted without some controversey, it was understood that in addition to replacing the former salary committee the Employee Relations Committee also took jurisdiction over many areas[7] previously governed by the County Civil Service Commission.

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[7]This would include items such as vacations, holidays, and other working conditions, matters that were normally administered by the California Civil Service Commission prior to passage of Meyers-Milias-Brown. However, the ordinance also gave the employees the right to opt for the Employee Relations Committee as an alternate tribunal to the Civil Service Commission for the hearing of grievances. When functioning in that capacity, the decisions of the employee Relations Committee--like those of the Civil Service Commission--are final and binding.

Final Offer Selection

The notion of final-offer selection is not directly spelled out in the ordinance which established the ERC, but is included instead in the County's salary ordinance. In refering to the ERC, this latter ordinance[8] provides that:

> The committee members shall seek agreement upon each item of the review, and if there is disagreement on any item, a vote shall be taken and recorded. A vote of the majority of the members shall determine any recommendation. (our emphasis)

Although this final-offer procedure technically applies only to salary matters, it has been adopted by the ERC in resolving differences over all other matters within the scope of bargaining as well.

The Mechanics of Final-Offer MED-ARB

Final-offer, by issue, mediation-arbitration differs from other tripartite dispute resolution methods in a number of respects:

1. Unlike tripartite fact-finding or arbitration, the neutral on the panel is included at the outset of negotiations, or at least at the stage when it is clear that a mediator will be required.
2. Unlike simple mediation, the neutral carries the "stick" of the potential arbitrator as he attempts to lead the parties to agreement. In San Bernardino this has been effected by the neutral

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[8] See Appendix.

stating that while he might dislike both proposals before him, he would prefer one over the other. On other occasions he might announce to the parties that he would entertain a motion that strikes a compromise between their offers. In both cases this is reported to have had the effect of almost immediate revision of the proposals, as each side tried to tailor the item to meet the views of the neutral while maintaining as much of their original proposal as possible.

3. Unlike simple mediation-arbitration, the final offer aspect of this process imposes limits on the arbitration award beyond those standards which may be included in the submission agreement or enabling legislation (e.g., comparison jurisdictions, cost of living, etc.). Under simple med-arb the neutral may hand down a decision which, while complying with these standards, may still be mutually repulsive to the parties. This dilemma is avoided in the San Bernardino approach because the arbitrator's award must be drawn from one of the two proposals on the table.
4. Unlike final-offer by package, where the arbitrator must select the total package of one party or the other, the issue-by-issue approach of this procedure more closely resembles the give-and-take of normal collective bargaining in the construction of a package.[9] In this sense it lacks the artificiality--if not inequity --of the "all or nothing" aspect of final-offer by package arbitration.

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[9]Final-offer by issue has frequently been criticized for allowing an arbitrator to award an item which was intended as a concession without giving the party the item the concession was intended to gain. If not eliminated, this problem is at least reduced in this tripartite model. Should the neutral indicate a move in this direction, the party which would be adversely affected is present and can hope to shape the decision of the arbitrator by raising this argument.

How Has the San Bernardino Experiment Worked

As an initial phase of this study, a questionnaire was developed designed to gain answers to questions which are most frequently raised about arbitration in general and about the component techniques used in the San Bernardino model in particular. After completion of the questionnaire by the principal representatives of the parties,[10] they were questioned further in in-depth interviews. Except as otherwise indicated, the following is based on the commonly shared views of the parties.

Effect Upon Negotiations: One of the fears often expressed with regard to arbitration is that it would have a "chilling effect" upon the willingness of the parties to negotiate. The reasoning behind this view is that if arbitrators--as is also frequently charged "split" the decision, then the parties are best advised to maintain their maximum position in the hope of gaining at least half.

One of the claims made by proponents of med-arb and final-offer arbitration is that both processes tend to increase, rather than decrease, the willingness of the parties to negotiate. In response to the question dealing with this motion, the parties unanimously felt that this process increased the willingness of the parties to bargain.

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[10]The Institute is indebted to the following individuals who supplied much of the information and background material of this study: Martin Nelson, Asst. Administrative Officer and Personnel Director of San Bernardino County; Richard Stearns, General Manager, San Bernardino Public Employees Association; and John Mutschler, Recording Secretary, Local 122, AFSCME, AFL-CIO.

An analysis of the answers given to this question points out that this willingness is increased by the final-offer aspect of this process. That is, as opposed to encouraging a compromise proposal from the neutral, all parties agreed with one of the responses given that an "unyielding position by one party would most likely create the probability of a negative vote (i.e., vote for the opposite's proposal) from the chairman (i.e., neutral)."

In a related question the parties were asked how this process affected the length of negotiations. Two of the parties responded that the process "consume[d] less time" than normal bargaining. One of the parties responded that it "consume[d] more time," but added, significantly, that it was "... time well spent."

Effect Upon Size or Cost of Settlements: All parties agreed that the awards granted under this procedure have roughly equaled what the parties would have gained through normal bargaining. This was essentially substantiated in a later check of seven representative positions with respect to their relative standing vis-à-vis the counties being used as standards of comparison in San Bernardino County's salary ordinance. In comparing present salaries with those that were essentially set by different methods and with a different set of counties of comparison in 1971, five classes today would have been at parity with the 1971 salaries of the classes used in present comparison counties. Two classes however have improved their relative standing over the 1971 salary relationship by 2-1/2 percent.

Effect upon Innovation: While under the procedure itself there have not been great innovations, there are important changes. One example is the addition of a dental plan covering employees, where the neutral selected the less expensive management proposal over the plan suggested by the employee organizations. Another is an ongoing experiment with a four ten-hour day workweek in various selected departments. One impartial innovation is a cyclical classification study of the county's 8.000 positions, which is now carried out under the present three-year agreement.

"Narcotic Effect": Former Secretary of Labor Willard Wirtz once prophesied that compulsory arbitration impasse procedures would have a "narcotic effect." That is, having once engaged in

interest arbitration, the parties would become "addicted" to it and cease bargaining collectively altogether. This notion is different from the "willingness to bargain" discussed above. Under that question, we included bargaining behavior prior to and during the mediation phase of the San Bernardino model. Translated to fit the mediation-arbitration procedure, the question posed by Wirtz can be interpreted as referring only to bargaining behavior before the impasse procedure (i.e., mediation phase) is invoked.

If one accepts the latter interpretation of the "narcotic effect," the parties in San Bernardino can be judged to be "addicts" of their system. In response to this question, the parties said the impasse procedure was invoked in 75 to 80 percent of the issues over which they bargain.[11]

This dependency factor is, however, less real than it is apparent. Under further questioning the parties related that although the neutral is brought into deliberations in 75 to 80 percent of the issues, his vote is used to break impasses in only 20 to 25 percent of the cases in which he participates. This then reduces the number of arbitrated cases to about 10 to 15 percent of the overall total of bargainable items.

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[11] It should be noted that the San Bernardino memoranda are open-ended in the sense that bargainable issues may be raised and are raised during the term of the agreements.

When asked about the discrepancy between the number of times the procedure is invoked and the actual number of cases that are arbitrated, the parties responded that this was due to the expediency of having the arbitrator involved from the beginning of negotiations. While they admitted to having overestimated the number of cases in which they thought arbitration or mediation might be necessary, they stated that it was preferable to "make a mistake in this fashion then it would be to call in the neutral at a later point and have to retrace the negotiations" that brought them to an unexpected impasse.

Strikes and Award Compliance: San Bernardino County has never experienced a strike of public employees, and it is speculative as to whether there might have been one without this impasse procedure. However, there have been no further instances of the informational picketing and demonstrations that took place prior to the adoption of this procedure. The parties have in all instances, except one, complied with the terms of the awards. The one exception involved a 1972-73 memorandum and the first award under this impasse procedure, the Board of Supervisors acceeded to the demands of the employee organizations and granted an additional 2-1/2 percent salary increase to lower paid clerical positions above that concurred in by the arbitrator.

Effects On Employee Organization Membership: When asked if the absence of "crisis bargaining" had any adverse effect on membership levels, both organizations replied that it had not. Since management

representatives had indicated a significant loss in membership for one of the organizations, the representative of that organization was questioned about it and responded that the loss was due to "internal political problems" and "not due to the impasse procedure."

Level of Acceptance: The parties unanimously stated that they were satisfied with the impasse procedure and would recommend it to other agencies and/or employee organizations. While none of the parties contemplated proposing any changes in the process, one of the employee organizations indicated a willingness to have the awards made binding whereas the other parties did not.

When asked to what they attributed the success of this procedure, the parties unanimously agreed that it was primarily due to "the skill and integrity" of the neutral. They viewed the procedure to be more demanding on the neutral in this regard than other impasse procedures, and unanimously agreed that they would not recommend it to other agencies/employee organizations if the neutral to be used possessed lesser degrees of these characteristics.[12]

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[12]The neutral in this case is Dr. William Moore, President of Crafton Hills Community College. Ironically, Dr. Moore was not a professional arbitrator when he was first appointed as the ERC neutral. He had served, however, as a teachers' representative in salary negotiations at San Bernardino Valley Community College prior to his present potition. These balancing factors made him acceptable to both labor and management. It should also be noted that during the course of this study, Dr. Moore became a professional arbitrator, in the sense that his name was added to the list of arbitrators of the American Arbitration Association.

CONCLUSIONS

There is no question that advisory final-offer, by issue, mediation-arbitration has worked as an interest impasse resolution procedure in San Bernardino County. One of the reasons stated for this success is the high quality of the neutral who has served in the procedure. Certainly, this is a major factor. Just as certainly, however, the experiment could not have succeeded without the demonstrated effort made by all the parties involved to make it work.

This latter statement is not meant to imply that either management or the labor organizations are "overly compliant." The fact that on the day the questionnaires were completed the union publicly announced a strike deadline in another jurisdiction and that the employee association obtained a Temporary Restraining Order against the County on a civil service matter clearly indicates the existence of two spirited and committed labor organizations. On the other hand, the fact that the County is still below its taxing limit and has laid off employees to remain within its budget would indicate that management is just as serious about its job.

The questions then arise: Is this impasse procedure "exportable" to other jurisdictions? Would it work where binding interest arbitrations is permissible by statute or charter?

On the latter point, there was nothing in the San Bernardino experience to indicate that the nature of the award in itself would in any way adversely affect the operation of the procedure. If anything,

the prospect of a binding award might even increase the willingness of the parties to compromise and possibly avoid an award through a bargained settlement. To the extent that such mutual accord is preferable to an imposed settlement, rendering the decision binding could conceivably improve the procedure.

A question more basic than the nature of the award faces those who would use this procedure in other jurisdictions, namely, the problem of cost.

As emphasized by the parties, an impasse procedure of the type described in this paper requires the services of a third-party neutral of professional caliber. To retain such an individual on the scale indicated in this case would make the cost prohibitive to most labor organizations and to many governmental agencies as well. The fact that this was not the case in San Bernardino was simply because the neutral in question had in effect donated much of his time.[13] In a word, the parties seem to have been fortunate.

What are the alternatives of making this procedure work in other jurisdictions? One alternative is a state subsidy for all or part of such a program. This approach is already being practiced in the arbitration of interest disputes involving safety employees in Michigan, where the state contributes one-third of the total cost.

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[13]Although a fee was charged by the arbitrator for all meetings, it is a matter of public record that only a modest fee was charged.

In California mediation services are provided without cost to the parties and, more recently, the Educational Employment Relations Act has set the precedent of providing neutrals as fact-finders in interest disputes involving school districts--again without cost to the parties.[14]

Another alternative is simply that the parties practice more restraint in using neutrals that they have in San Bernardino. While there is no doubt that the mediation-arbitration procedure is costly even if used only once a year to negotiate a contract, less frequent resort to neutrals than is the case in San Bernardino would seem to be quite possible.

If either of these methods of cost reduction are feasible, then advisory (or binding) final-offer, by issue, mediation-arbitration of interest disputes should prove a valuable tool to the parties in impasse.

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[14] As per the reasons set forth in the section of this manual on mediation, neutrals selected for med-arb should not serve as SCS mediators and vice versa.

ORDINANCE NO. 1933

AN ORDINANCE OF THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AMENDING CHAPTER 3, DIVISION 3, TITLE 1, OF THE SAN BERNARDINO COUNTY CODE RELATING TO SALARY REVIEW PROCEDURES.

The Board of Supervisors of the County of San Bernardino, State of California, does ordain as follows:

SECTION 1. Chapter 3, Division 3, Title 1 of the San Bernardino County Code is hereby amended to read as follows:

Chapter 3
SALARY REVIEW PROCEDURE

Sections:

13.031 Service.

The preparation, adoption and administration of the compensation plan of the County of San Bernardino is governed by the underlying principle that employment by this County carries with it the responsibility to perform services of value; that each officer and employee shall be entitled to compensation for such service proportionate to the value and quality of the work done.

13.032 Factors.

In making the annual salary review required by the referendum civil service ordinance (County Code Section 13.019(f)), the Board of Supervisors shall review positions with respect to prevailing wages, recruitment, turnover, internal relationships of County positions and general economic factors.

13.033 Data.

Data for the annual salary review shall be obtained by the Administrative Office Personnel Division on the basis of benchmark positions, as follows:

(a) For the benchmark classifications shown below, local government and industry data shall apply; provided however, that such data shall be obtained from the annual San Bernardino - Riverside bi-county survey.

Professional and Professional Preparatory
- Accountant
- Librarian
- Junior Civil Engineer
- Laboratory Technologist
- Staff Nurse

Technical and Inspection
- Programmer
- Computer Operator II
- X-ray Technician
- Licensed Vocational Nurse
- Building Inspector II

Clerical
- Key Punch Operator I
- Clerk I
- Clerk II
- Stenographer I
- Telephone Operator

Craft, Labor and Trades
- Offset Equipment Operator
- Warehouseman
- Custodian
- Food Service Worker
- Laundry Worker
- Equipment Mechanic
- Welder
- Automotive Mechanic
- Electrician
- Painter
- Carpenter
- Laborer
- Nursing Attendant
- Grounds Caretaker

Safety
- Deputy Sheriff

(b) For the benchmark classifications listed below, data from the State of California and the Counties of San Diego, Orange, Riverside, Ventura and Kern shall be applicable.

Professional and Professional Preparatory
- Accountant
- Senior Accountant
- Senior Auditor Appraiser
- Public Health Analyst
- Right-of-way Agent
- Appraiser
- Librarian
- Dietitian
- Junior Civil Engineer
- Associate Park Planner
- Deputy District Attorney I
- Traffic Hearing Officer
- Laboratory Technologist
- Pharmacist
- Microbiologist
- Public Health Medical Officer
- Public Health Veterinarian
- Supervising Public Health Nurse
- Public Health Nurse
- Staff Nurse
- Supervising Therapist
- Public Health Physical Therapist
- Director of Health Education
- Staff Health Educator
- Senior Air Pollution Control Engineer - Reg.
- Associate Planner
- Planner I
- Supervising Public Health Sanitarian
- Public Health Sanitarian
- Clinical Psychologist
- Senior Psychiatric Social Worker
- Group Supervisor
- Probation Officer
- Social Service Supervisor I
- Social Service Practitioner I
- Social Service Worker II

Technical and Inspection
- Programmer
- Records Reproduction Supervisor
- Microfilm Technician
- Buyer
- Deputy Public Guardian
- Branch Library Assistant
- Communications Technician
- Cadastral Draftsman
- Principal Engineering Technician
- Laboratory Assistant
- Engineering Technician
- Survey Party Chief
- Senior Deputy Coroner Investigator
- Public Defender Investigator
- Welfare Investigator
- Deputy Coroner Investigator
- Radio Dispatcher
- X-ray Technician
- Histology Technician
- Agricultural Inspector I
- Rabies Control Officer
- Air Pollution Control Inst. Tech.
- Air Pollution Control Investigator
- Building Inspector II
- Communicable Disease Investigator
- Weights & Measures Inspector
- Eligibility Worker II
- Crippled Children's Services Supv.
- Welfare Services Aid
- Veterans' Services Representative

Craft, Labor and Trades
- Scale Operator
- Heavy Equipment Operator
- Light Equipment Operator
- Equipment Shop Foreman
- Building Plant Operator
- Park Ranger I
- Head Cook
- Cook

Safety
- Deputy Sheriff
- Sheriff's Criminalist II

Management and Confidential
- Asst. Auditor Controller
- Chief Internal Auditor
- County Administrative Officer
- Administrative Analyst II
- Asst. County Clerk
- Asst. Recorder
- Clerk of the Board of Supv.

Medical Records Admin.
Director of Trade & Ind. Dev.
Purchasing Agent
Personnel Division Chief
Personnel Analyst
Systems Analyst
Chief Appraiser
County Librarian
Custodial Services Supervisor
Food Service Manager
Senior Civil Engineer Reg.
Director of Regional Parks
County Counsel
Asst. County Counsel
Asst. District Attorney
Public Defender
Superior Court Coordinator
Supt. of Buildings and Grounds
Park Supt. I
Regional Road Supt.
District Road Supervisor
Director of Public Health Lab.
Chief X-ray Technician
Director of Public Health
Director of Public Health Nursing
Director of Nursing Service
Chief Respiratory Therapist
Agricultural Commissioner
Air Pollution Control Officer
Director of Building & Safety
Director of Planning
Undersheriff
Sheriff's Lieutenant
Director of Environmental Health Services
Sealer of Weights & Measures
County Probation Officer
Probation Div. Director III
Director of Welfare
Director of Veterans' Services

(c) In the event data obtained under (a) and (b) above, are insufficient for a particular benchmark or group of classifications, information from other sources may be considered if relevant to the factors set forth in Section 13.032.

13.034 Employee Relations Committee.

(a) There shall be an employee relations committee which shall review salary and wage data and other pertinent information and make recommendations to the Board of Supervisors, giving due consideration to the factors set forth in Section 13.032. The committee shall be composed of five members selected as follows: Each of the two recognized employee organizations shall appoint a member, and the Board of Supervisors shall appoint two members. The four members so appointed shall nominate an impartial person as the fifth member to be designated as the "public member." The public member shall be appointed by the Board to serve for a period of one year, commencing January 1.

(b) A quorum for the transaction of business shall consist of no less than four (4) members. Provided, however, that if the public member cannot attend any meeting, the other members may meet to determine those matters upon which they are in agreement. In the event a member representing the County or an employee organization is absent, a duly authorized alternate may act. The committee members shall seek agreement upon each item of the review, and if there is disagreement on any item, a vote shall be taken and recorded. A vote of the majority of the members shall determine any recommendation.

(c) The Employee Relations Committee shall consider salaries, wages, and fringe benefits. The County and the recognized employee organizations may submit written proposals or requests to the committee for review and recommendation to the Board of Supervisors. Such requests shall be submitted at least five (5) months prior to the commencement of the fiscal year.

13.035 Salary Package / Multiyear Agreement.

Notwithstanding Section 13.019(f) or any other provisions of this Code or the County Personnel Rules, salary increases may be determined on an across - the - board basis, resulting in a flat percent (%) or range increase for some or all County employees, and such increases may be provided for through a single or multiyear agreement between the County and any recognized majority employee organization covering one or more occupational units. Any flat percent (%) or range increase, whether or not the subject of a multiyear agreement, shall be computed after having generally considered the factors set forth in Section 13.019(f) of this Code. In the case of any multiyear agreement, provision may be made to reopen such agreement upon the occurrence of certain contingencies, provided however, that the designation of a predetermined rise in the Consumer Price Index as one of those contingencies shall in no way alter the required review of the factors specified in Section 13.019(f), nor alter the weight afforded such factors.

SECTION 2. This ordinance is hereby declared to be an urgency measure necessary for the immediate protection and preservation of the public peace, health, safety and welfare in that the updating and amendment of the salary review procedures of the County of San Bernardino is necessary to allow for the immediate adoption of the Wage Package for County employees covering the period July 1974 through June 1977, and further the adoption of this Wage Package is necessary for the retention of trained personnel. Therefore, this ordinance shall take effect July 6, 1974.

NANCY E. SMITH, Chairman
Board of Supervisors

ATTEST:
LEONA RAPOPORT, Clerk of the
Board of Supervisors

STATE OF CALIFORNIA)
COUNTY OF) ss.
SAN BERNARDINO)

I, LEONA RAPOPORT, Clerk of the Board of Supervisors of the County of San Bernardino, State of California, hereby certify that at a regular meeting of the Board of Supervisors of said County and State, held on the 15th day of July, 1974 at which meeting were present Supervisors Nancy E. Smith, Chairman; James Mayfield, Dennis Hansberger, Robert Townsend and the Clerk, the foregoing ordinance was passed and adopted by the following vote, to wit:

AYES: Supervisors Mayfield, Hansberger, Townsend, Smith
NOES: None
ABSENT: Supervisor Mikesell

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Board of Supervisors this 15th day of July, 1974.

LEONA RAPOPORT, Clerk of the Board of Supervisors
of the County of San Bernardino, State of California.

IMPASSE PROCEDURE IN STATE LEGISLATION

State	Employees Covered	Mediation	Factfinding	Conventional Arbitration	Final-Offer Arbitration by issue	Final-Offer Arbitration total pkg.
Alabama	No provision					
Alaska	State, local,[2] Police, Fire	x		x		
Alaska	Teachers	x	x			
Arizona	No provision					
Arkansas	No provision					
California	Local, Police, Fire	x	x3			
	Teachers	x	x			
Colorado	No provision					
Connecticut	Local, Police, Fire	x	x	x		
	Teachers	x	x			
Delaware	State,Local,Police,Fire	x	x	x		
	Teachers	x	x			
D.C.	Local,Police,Fire	x	x	x		
Florida	State,Local,Police,Fire,Tchs.	x	x			
Georgia	State	x	x			
Hawaii	State,Local,Police,Fire,Tchs.	x	x	x		
Idaho	Fire		x			
	Teachers	x	x			
Illinois	Fire			x4		
Indiana	Teachers	x	x			
Iowa	State,Local,Police,Fire,Tchs.	x			x5	
Kansas	State,Local,Police,Fire	x	x			
Kentucky	Fire	x	x			
Louisiana	No provision					
Maine	State,Local,Police,Fire,Tchs.	x	x	x		
Maryland	Teacher, School Employees					
Mass.	State,Local,Teachers	x	x			
	Police, Fire					x

IMPASSE PROCEDURE IN STATE LEGISLATION

State	Employee Covered	Mediation	Factfinding	Conventional Arbitration	Final-Offer Arbitration by issue	Final-Offer Arbitration total pkg.
Michigan	State,Local,Teachers,	x	x			
	Police, Fire				x	
Minnesota	State,Local,Police,Fire,Tchs.			x		
Mississippi	No provision					
Missouri	No provision					
Montana	State,Local,Police,Fire	x	x	x		
	Teachers		x			
Nebraska	State,Local,Police,Fire	x	x			
	Teachers		x			
Nevada	Local,Police,Fire,Teachers		x			
New Hampshr.	State,Non-academic employees	x	x			
	of Uni. of N.H.					
	Police		x			
New Jersey	State,Local,Police,Fire	x	x	x		
New Mexico	State	x	x	x		
New York	State,Local,Police,Fire,Tchs.	x	x	x		
No.Carolina	No provision					
No.Dakota	State,Local,Police,Fire	x				
	Teachers	x	x			
Ohio	No provision					
Oklahoma	Local,Police,Fire,Teachers		x			
Oregon	State,local,Police,Fire,Tchs.	x	x	x		
Pennsylvania	State,Local,Teachers		x	x		
	Police,Fire			x		
Rhode Island	State		x	x		
	Local	x		x		
	Police,Fire			x		
	Teachers	x		x		

State	Employees Covered	Mediation	Factfinding	Conventional Arbitration	Final-Offer Arbitration by issue	Final-Offer Arbitration total pkg.
So.Carolina	No provision					
So.Dakota	State,Local,Police,Fire,Tchs.	x	x			
Tennessee	No provision					
Texas	Police,Fire	x		x		
Utah	No provision					
Vermont	State	x	x			
	Local,Police,Fire	x	x	x		
Virginia	No provision					
Washington	State	x		x		
	Local,Police,Fire	x	x	x		
	Teachers		x6			
	Community College Employees	x	x7			
W.Virginia	State,Local,Police,Fire,Tchs.	x	x			
Wisconsin	State	x	x			
	Local,Police,Fire,Teachers	x	x			x
Wyoming	Firefighters			x		

1. The impasse procedures indicated are those provided by state law. They do not include those provisions which may be adopted by local option (e.g. City Charter Amendments in California, Oregon, etc.) The data was compiled from "Summary of State Labor Laws" Government Employees Relations Report, The Bureau of National Affairs, Washington, D.C. 1975; "Guide to Statutory Provisions in Public Sector Collective Bargaining: Impassee Resolution Procedures," Helene S. Tanimoto, Industrial Relations Center, College of Business Administration, University of Hawaii; and chart of State Labor Relations Policy" Public Personnel Administrator, Prentice Hall, 10-14-75, p. 5137-5216.

2. Local refers to local government agencies.

3. Some agencies, based on an elastic clause in the legislation, have used fact-finding though it isn't specifically mentioned in the bill.

4. Advisory arbitration.

5. The arbitrator may choose the package offered by either party or the package suggested by the fact-finder.

6. An advisory committee, appointed by the state superintendent of public instruction makes recommendations.

7. An advisory committee, appointed by the director of the state system of community colleges, makes recommendations.

EXPERIMENTAL NEGOTIATING AGREEMENT ADOPTED IN STEEL INDUSTRY TO AVOID WORK STOPPAGES (OFFICIAL TEXT)

This Experimental Negotiating Agreement, dated March 29, 1973, is between United Steelworkers of America (hereinafter referred to as the "Union") and the Coordinating Committee Steel Companies (hereinafter referred to as the "Companies") and is applicable to Union-represented employees in the plants listed in Appendix A (hereinafter referred to as "employees").

It is highly desirable to provide stability of steel operations, production and employment for the benefit of the employees, customers, suppliers and stockholders of the Companies, and the public. To attain this objective requires that the Union and the Companies settle issues which arise in collective bargaining in such a way as to avoid industry-wide strikes or lockouts or government intervention. The parties are confident that they possess the requisite ability and skills to resolve whatever differences may exist between them in future negotiations through the process of free collective bargaining.

The parties believe that this Agreement will enhance the success of the 1974 negotiations, will avert a strike-hedge steel inventory buildup and will reduce foreign steel imports into the United States.

In view of the foregoing, it is agreed by the Union and the Companies that they will make every effort to resolve through negotiations any differences which may arise in bargaining. After thorough bargaining in good faith the parties may submit any unresolved issue (which is not excluded from arbitration by this Agreement or any subsequent agreement between the parties) to final and binding arbitration by an Impartial Arbitration Panel in accordance with the provisions hereinafter set forth. The submission of any issue to final and binding arbitration shall not preclude the parties from continuing to bargain on such issue prior to the issuance of a decision by the Impartial Arbitration Panel.

A. Strikes and Lockouts:

Except as otherwise provided in Paragraph 5 of Section D of this Agreement, the Union on behalf of the employees agrees not to engage in strikes, work stoppages or concerted refusals to work in support of its bargaining demands, and the Companies agree not to resort to lockouts of employees to support their bargaining positions.

B. Wage Increases:

1. Effective August 1, 1974, the rates in effect July 31, 1974 shall be increased as follows:

   a. Each standard hourly job class rate for nonincentive jobs shall be increased by 3% of such rate.

   b. Each hourly job class rate for incentive jobs shall be increased by the same cents per hour as the corresponding standard hourly job class rate for nonincentive jobs with no increase in the hourly additive.*

   c. Each standard salary rate shall be increased by 3%.

2. Effective August 1, 1975, the rates established by B-1 above shall be increased as follows:

   a. Each standard hourly job class rate for nonincentive jobs shall be increased by 3% of such rate.

   b. Each hourly job class rate for incentive jobs shall be increased by the same cents per hour as the corresponding standard hourly job class rate for nonincentive jobs with no increase in the hourly additive.*

   c. Each standard salary rate shall be increased by 3%.

3. Effective August 1, 1976, the rates established by B-2 above shall be increased as follows:

   a. Each standard hourly job class rate for nonincentive jobs shall be increased by 3% of such rate.

   b. Each hourly job class rate for incentive jobs shall be increased by the same cents per hour as the corresponding standard hourly job class rate for nonincentive jobs with no increase in the hourly additive.*

   c. Each standard salary rate shall be increased by 3%.

4. For hourly paid employees covered by basic labor agreements containing base rates differing from the scales of rates in Appendix A and Appendix A-1 of the basic labor agreement between United States Steel Corporation and the Union covering production and maintenance employees in the steel plants, and for salaried employees covered by basic labor agreements containing base rates differing from the scale of rates in Appendix A of the basic labor agreement between United States Steel Corporation and the Union covering salaried employees in such plants, the base rates shall be increased each August 1 by the same percentage as set forth above.

* The adjustment each August 1 for an employee on a job covered by an existing incentive plan not based on the Incentive Calculation Rate Scale shall be made in the same manner as the adjustments that were made effective August 1, 1971.

C. Bonus:

In consideration of the contribution made by employees to stability of steel operations, each employee as of August 1, 1974, shall receive $150.00 in the pay period next closed and calculated after September 30, 1974. Any dispute as to whether an employee is eligible for a bonus payment will be a proper subject for the grievance and arbitration procedure under the applicable basic labor agreement.

D. The Negotiations and Arbitration:

1. It is the intention of the parties hereto that all issues, except as otherwise provided herein, which arise in collective bargaining between the parties shall be either resolved by them or decided by the Impartial Arbitration Panel. In order to achieve this objective:

a. The negotiating teams representing the Union and the Companies will begin negotiations not later than February 1, 1974 for new agreements applicable to employees. If, after the date of this Agreement, a Union-represented bargaining unit becomes covered by a basic labor agreement covering plants listed in Appendix A, because of a provision

of such basic labor agreement making it applicable to such unit, such unit shall be added to Appendix A.

b. Not later than April 15, 1974, the parties shall:

(1) reach a full settlement agreement on all issues; or

(2) agree that certain specified issues are settled (through collective bargaining or special procedures) and certain other issues will be submitted to the Impartial Arbitration Panel (established in accordance with the provisions of Section E of this Agreement) for final and binding decision; or

(3) withdraw all offers and counter-offers and, except as otherwise provided herein, submit to the Impartial Arbitration Panel for final and binding decision such issues as the parties respectively may urge upon the Panel.

2. If arbitration is required, the parties shall not later than April 20, 1974 submit to the Impartial Arbitration Panel an agreed upon list of issues to be submitted to the Panel or, if no agreement has been reached on such a list, their respective lists or formulations of such issues. Within twenty days thereafter each party shall submit to the Panel and to each other a detailed written statement supporting its position on the issues before the Panel for determination. Within ten days subsequent to the filing of written statements of position with the Panel, the parties may file with the Panel and exchange written replies to each other's statements, which shall be restricted to responses to the other party's written statement. Subsequent to the receipt of the written statements of position and replies, the Panel shall conduct hearings and shall render its decisions in accordance with Paragraphs 4, 5 and 6 of Section E of this Agreement.

3. Prior to the commencement of hearings by the Panel, representatives of the parties shall meet with the Chairman of the Panel and establish procedures to be followed at the hearings with respect to the following matters: (i) order of presentation, (ii) allocation of time for presentation, (iii) designation of persons to present and comment on parties' positions, and (iv) such other procedural matters as the Chairman and the aforementioned representatives may agree upon.

4. The Panel's decision shall be rendered not later than midnight, July 10, 1974. Subsequent to the issuance of the Panel's decision, the parties shall have until midnight, July 20, 1974, to reach agreement as to any contract language and any other steps required to implement the Panel's decision. Absent final agreement by the parties by July 20, 1974, as to such language or other implementing steps, either party may immediately refer any such unresolved questions to the Panel which shall make a final and binding determination on such questions on or before midnight, July 31, 1974.

5. Local collective bargaining issues:

a. Definition

A local collective bargaining issue is an issue entered at plant level, proposing establishment of or change in a condition of employment at that particular plant which:

(1) would not, if adopted, be inconsistent with any provision of a company agreement (as defined below) or involve any addition to or modification of any such provision or agreement;

(2) would not be an arbitrable grievance as defined in the applicable basic labor agreement; and

(3) does not relate to a grievance settlement or an arbitration award; provided, however, this subparagraph (3) does not apply to non-arbitrable grievances.

Subparagraph (2) above shall not exclude an issue which involves a local agreement or practice relying for enforceability on Section 2-B of the basic labor agreements between United States Steel Corporation and the Union and its counterpart provisions in the agreements of the other Companies.

The term "company agreement" means any basic labor agreement and all related appendices, understandings, or agreements, including those covering pensions, insurance, SUB or SVP, which contain the kinds of provisions, although not in identical language, included in such agreements between the International Union and the United States Steel Corporation. Any provision of a company agreement that is solely applicable to a particular plant and is not the kind of provision contained in such agreements between the International Union and the United States Steel Corporation shall not be considered part of a company agreement for the purpose of this definition.

b. Procedure for disposition

The parties shall make every effort to settle local collective bargaining issues and in order to achieve this objective shall proceed as follows:

(1) Discussions with respect to these issues shall commence at plant level at such time as the parties locally shall deem necessary but in no event later than April 1, 1974. This date shall likewise be the cutoff date and no additional issues, except for those issues which thereafter arise as a result of changed conditions, may subsequently be initiated by either party under the procedures of this Agreement at the plant level.

(2) Any local issue not disposed of by May 1, 1974 shall be referred to and dealt with by the respective Chairmen of the Union-Company negotiating committee.

(3) Should any such issue or issues initiated by the Union remain unresolved as of June 10, 1974, the Union Co-Chairman shall decide whether the issue or issues shall be withdrawn or put to a secret ballot vote available to all employees at that plant as defined in Appendix A, who worked or were on vacation in the last pay period closed on or before June 10, 1974. Such election, to be valid, must take place no later than June 30, 1974. Every such eligible employee shall be entitled to a ballot furnished by the International Union and appropriate ballot boxes, properly supervised, will be made available for the casting of such ballots. Such ballots shall be collected and counted by tellers selected in conformance with International Union procedures. If a majority of those voting vote in favor of a strike, and if the matter is not otherwise

resolved, the matter shall no later than July 8, 1974 be referred by the Union Co-Chairman to the President of the International Union along with a request for permission to strike the plant in which the issue or issues originated. His decision on the request for permission to strike shall be forwarded in writing to the Union Co-Chairman with a copy to the Company Co-Chairman not later than July 15, 1974. Should permission to strike be granted by the President of the International Union, he shall at the same time specify the date on which the strike, if it is to occur, must commence, which shall not be earlier than the first scheduled turn of August 1, 1974, and such strike shall be confined to the plant where the issue or issues originated and as defined in Appendix A. The right to strike pursuant to permission granted by the President of the International Union shall automatically be canceled and the issue between the parties deemed resolved if the strike does not commence on the first scheduled turn of the date specified by the President of the International Union except as the parties at the International-Company level shall agree to another date.

Should any local collective bargaining issue or issues initiated by a Company remain unresolved as of June 10, 1974, the Company shall decide whether the issue or issues shall be withdrawn or become the basis for a lockout at the plant involved. The requirements as to timetable and date of commencement of any lockout by any Company shall be the same as those set out above for strikes over local collective bargaining issues, as more specifically set forth in the balance of this paragraph. The Company's decision shall be forwarded in writing to the Union Co-Chairman not later than July 15, 1974. Should the Company decide to lockout at a plant in support of a local collective bargaining issue or issues, the notice shall specify the date on which the lockout, if it is to occur, must commence, which shall not be earlier than the first scheduled turn of August 1, 1974, and such lockout shall be confined to the plant where the issue or issues originated and as defined in Appendix A. The right to lockout shall automatically be canceled and the issue between the parties deemed resolved if the lockout does not commence on the first scheduled turn of the date specified in the notice except as the parties at the International-Company level shall agree to another date.

Any such strike or lockout shall cease upon the resolution of the local collective bargaining issue or issues because of which such strike or lockout commenced.

6. Issues excluded from arbitration

The Impartial Arbitration Panel shall not have jurisdiction of, and the parties shall not present to the Panel, any issue affecting or relating to:

a. The Section 2-B Local Working Conditions provisions of the basic labor agreements between the United States Steel Corporation and the Union and counterpart provisions in the agreements of the other Companies.

b. The Union Membership and Checkoff provisions of any such agreements.

c. The Cost-of-Living Adjustment provisions of any such agreements, but the Panel shall consider the cost of such item in rendering its decisions on

wages and other issues presented to it.

d. The uniformity (or current relationship of parity, in the event that uniformity does not prevail) of wages and benefits between and among the various units, plants or operations covered by this Agreement. Nor shall the Panel make any determination which would result in a different application, than has historically prevailed, of the wage or benefit features of its award as among such units, plants or operations.

e. The wage increases and bonus granted under Sections B and C of this Agreement, but the Panel shall consider the cost of such items in rendering its decisions on wages and other issues presented to it.

f. The no-strike and no-lockout provisions of any such agreements.

g. The management rights provisions of any such agreements.

E. The Impartial Arbitration Panel:

1. Appointment.

The Impartial Arbitration Panel shall consist of five members, one appointed by the Union, one appointed by the Companies and three impartial members appointed by agreement of the parties. Two of the three impartial members shall be persons who are thoroughly familiar with collective bargaining agreements in the steel industry. The Union and the Companies will inform each other as to the identity of their respective members on or before February 1, 1974 and also on or before such date agree upon the three impartial members of the Panel and designate a Chairman.

2. Successorship.

In the event of refusal to serve, death, incapacity or resignation of any member of the Panel, a successor having essentially the same qualifications as his predecessor on the Panel shall be immediately appointed to fill such vacancy in the manner provided for the appointment of members in E-1 above.

3. Method of voting.

All matters presented to the Panel for its determination shall be decided by a majority vote of the impartial members of the Panel. The members representing the Union and the Companies shall not have a vote. The Panel, prior to a vote on any issue in dispute before it, shall, upon the joint request of the Union's and Companies' members of the Panel, refer the issue back to the parties for further negotiations, provided that such a request is made not later than June 30, 1974.

4. Time and place of hearing.

The Panel shall hold hearings at such times and places as agreed to by the parties for the purpose of developing those facts and additional arguments which the parties may desire to present or which the Panel may require. Each of the parties may invite to such hearings such members, employees, representatives

and staff as each may desire, who shall be provided with proper identification. The hearings shall begin not later than June 1, 1974.

5. Conduct of the hearing.

a. The record of the hearings shall include all documents, written statements and exhibits which may be submitted, together with a stenographic record. The Panel shall, in the absence of agreement of the parties, have authority to make whatever reasonable rules are necessary for the conduct of an orderly hearing. In the formulation of such rules the Panel shall be guided by the need to gather full information on all issues in an expeditious, orderly and informal manner. The impartial members of the Panel shall have the authority to limit the number of witnesses which the parties may call in support of their respective positions on any issue before the Panel, when, in their judgment, it is necessary to the expeditious inquiry into the dispute.

b. The Panel or any of its members may, at the hearing, call as witnesses such members, employees and representatives of the parties as may be necessary, and may participate in the examination of witnesses for the purpose of expediting the hearings or eliciting material facts. They may also request the parties to produce any evidence which they deem relevant to the issue before them.

c. The hearings may be conducted informally. The receipt of evidence at the hearing need not be governed by statutory or common law rules of evidence.

d. In order to encourage frank discussions between the parties during negotiations, those conversations which occurred and proposals made during such negotiations shall not be referred to in connection with the presentation of any issue to the Panel, except as the parties agree otherwise.

6. Decisions of the Panel.

a. All decisions of the Panel shall be in writing and shall set forth the facts and reasons for the Panel's conclusions with sufficient specificity to enable the parties to understand and implement the Panel's decisions.

b. Decisions of the Panel shall be effective as of August 1, 1974, and specific provisions of the award shall become applicable as of dates provided in the award.

c. Decisions of the Panel shall be final and binding on the parties.

7. Duration of the Panel.

The members of the Panel shall continue to serve until August 1, 1974 to assist the parties in the interpretation and implementation of the Panel's decisions.

8. Compensation and Costs of the Panel.

The Union's member of the Panel shall be paid by the Union and the Companies' member of the Panel shall be paid by the Companies. The compensation

and expenses of the impartial members of the Panel, as well as the costs incurred by the Panel in conducting the hearings, shall be borne equally by the Union and the Companies.

F. Term of the New Agreements:

The term of the new agreements shall be three years.

G. Continuation of Existing Agreement Terms:

Except as contained in or required by the award of the Panel or as agreed to by the parties, the provisions of the existing agreements (except for the Annual Cost-of-Living Adjustment Guarantees Section [Marginal Paragraphs 9.88, 9.89 and the last portion of 9.87, commencing with the word "subject," of the Agreement between the International Union and the United States Steel Corporation] which will no longer be applicable) will be carried forward in the new agreements. Should it become desirable to revise the cost-of-living formula (Marginal Paragraph 9.84 of the Agreement above and counterpart paragraphs of the agreements of the other Companies), the parties will negotiate in an attempt to reach agreement on such revision and, failing such agreement, either party may submit the issue of such revision to arbitration.

H. Term of Experimental Negotiating Agreement:

This Agreement shall become effective upon execution by the officers of the International Union and an authorized official of each of the Companies and shall terminate August 1, 1974, except to the extent that its continuation beyond that date is deemed necessary by the parties to achieve the objectives of this Agreement.

UNITED STEELWORKERS OF AMERICA

By

ALLEGHENY LUDLUM INDUSTRIES, INC.

By

ARMCO STEEL CORPORATION

By

BETHLEHEM STEEL CORPORATION

By

INLAND STEEL COMPANY

By

JONES & LAUGHLIN STEEL CORPORATION

By

UNITED STEELWORKERS
OF AMERICA (Continued)

By Charles D. Youngblood

James P. Griffin

Lloyd Stevens

NATIONAL STEEL CORPORATION

By

REPUBLIC STEEL CORPORATION

By

UNITED STATES STEEL CORPORATION

By

WHEELING-PITTSBURGH STEEL CORPORATION

By

YOUNGSTOWN SHEET & TUBE COMPANY

By

- - End of Official Text - -

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