Some Problems with the Administration of Compulsory Final Offer Arbitration Procedures

George R. Fleischli
SOME PROBLEMS WITH THE ADMINISTRATION OF COMPULSORY FINAL OFFER ARBITRATION PROCEDURES

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Much has transpired in the fourteen years that have elapsed since Professor Carl Stevens¹ first proposed final offer arbitration as a form of compulsory interest arbitration that would operate as a strike substitute which was compatible with collective bargaining. A number of jurisdictions have enacted laws incorporating some variant of his proposal as a compulsory procedure to resolve impasses in public sector labor disputes.² As a result, a substantial body of literature has developed discussing these laws, attempting to analyze their impact on the collective bargaining process.³ Consequently, numerous other jurisdictions, also concerned with alternative ways to deal with impasses and strikes in the public sector, are turning to this body of existing laws and literature for guidance.

The structure of these laws and the overall results reached under them are the most important considerations to be used when deciding whether to adopt such a procedure. Key provisions of these laws, and

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The term "final offer" as used herein refers to any form of compulsory interest arbitration where the arbitrator must select the final proposal of the employer or union, or in some jurisdictions the fact-finder, on the unresolved issues either as a total package or on an issue-by-issue basis. While Stevens originally referred to such arbitration as "either/or" or "one or the other" arbitration, others have used more colorful phrases such as "sudden death" arbitration. See Feuille & Long, Final Offer Arbitration: Sudden Death in Eugene, 27 IND. & LAB. REL. REV. 186 (1974) [hereinafter referred to as Final Offer Arbitration].

The term most frequently used to describe this form of arbitration is "final offer" or, occasionally, "last best offer".

2. See text accompanying notes 21-72 infra. Final offer arbitration was first proposed legislatively by President Nixon as one of several mechanisms in an "arsenal of weapons" to deal with emergency disputes in the transportation industry. See S. 3526, 91st Cong., 2d Sess. (1970). Final offer arbitration has also been adopted as an impasse resolving mechanism for individual contract disputes in major league baseball. See Dworkin, The Impact of Final Offer Arbitration on Bargaining: The Case of Major League Baseball, in PROCEEDINGS OF THE 29TH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 161 (1977).


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the regulations adopted for their implementation, may have a particular effect on the relative success of the legislation. It is the purpose of this article to identify some of the problems which have been encountered in the administration of existing final offer laws in order to provide some guidance for those jurisdictions which have recently enacted such laws or are considering such legislation for the first time.

A review of the literature\(^4\) suggests that there is a great deal of information available concerning the operation of these laws and their relative success in achieving the goal of inducing voluntary settlements without stifling the bargaining process or creating undue reliance on the procedure itself. However, very little attention has been directed to the somewhat technical but potentially critical problems that can arise in administering the process of final offer exchange which is the key feature of the laws. For this reason, it has been necessary to draw heavily on essentially three sources of information concerning these problems: the implications of the laws themselves;\(^5\) problems encountered in other jurisdictions;\(^6\) and the experience in the State of Wisconsin.\(^7\)

This article first will outline the key features of the compulsory final offer arbitration laws which have been enacted to date. These laws will then be compared to the two models proposed by Professor Stevens. Having established an analytical framework, this article then will identify some of the problems which have been encountered under these laws, as well as in their administration.

**Jurisdictions with Final Offer Laws**

By the fall of 1979, at least nine states, Connecticut,\(^8\) Hawaii,\(^9\) Iowa,\(^10\) Massachusetts,\(^11\) Michigan,\(^12\) Montana,\(^13\) Nevada,\(^14\) New Jersey,\(^15\) and Wisconsin\(^16\) had adopted some form of compulsory final offer arbitration to resolve public employee disputes. In addition, Eu-

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4. See text accompanying notes 96-100 infra.
5. See text accompanying notes 73-126 infra.
6. See text accompanying notes 21-72 infra.
7. See text accompanying notes 119-154 infra.
16. WIS. STAT. ANN. §§ 111.70(4)(cm)6, 111.77(4)(b) (West Supp. 1979).
gene, Oregon has adopted a municipal ordinance providing for final offer arbitration;\textsuperscript{17} significant largely because it was the first such law in the country.\textsuperscript{18} As a consequence, a number of studies have been conducted\textsuperscript{19} and articles written\textsuperscript{20} concerning the operation of these laws.

\textit{Eugene, Oregon}

On September 13, 1971, Eugene, Oregon became the first public sector jurisdiction\textsuperscript{21} to adopt a compulsory final offer arbitration procedure. The ordinance in question\textsuperscript{22} provides that if bilateral negotiations fail to produce an agreement within twenty-five days following the commencement of negotiations, each party is required to submit a final offer and may, at the same time, submit one alternative final offer.\textsuperscript{23} The final offers are to be in the form of a complete draft of the proposed agreement unless the parties agree to submit package proposals dealing only with the issues in dispute. A tripartite arbitration panel,\textsuperscript{24} which is prohibited from attempting to mediate or otherwise settle disputes, must thereafter select the final offer which is the most reasonable based on the selection criteria set out in the ordinance.\textsuperscript{25} The panel may not consider other offers of settlement.\textsuperscript{26} However, if the parties agree to submit package proposals which are limited to the issues in dispute, the panel is required to give consideration to the items previously agreed to by the parties in determining which offer is most reasonable.\textsuperscript{27}

\textsuperscript{17} EUGENE, ORE. CODE § 2.876 (1971).
\textsuperscript{18} The Eugene Code was adopted on Sept. 13, 1971.
\textsuperscript{19} See e.g., Olson, \textit{Final Offer Arbitration in Wisconsin After Five Years}, in PROCEEDINGS OF THE 31ST ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 111 (1978) [hereinafter referred to as Olson].
\textsuperscript{21} Public sector jurisdiction here refers to:
A state and any of its agencies and institutions, including cities, counties and other political subdivisions.
EUGENE, ORE. CODE § 2.876 (1971).
\textsuperscript{22} Id. §§ 2.875, 2.876.
\textsuperscript{23} Id. § 2.875(6).
\textsuperscript{24} One member is appointed by the city and another by the bargaining agent. The two members then must agree upon a third member. Id. § 2.876(7)(a).
\textsuperscript{25} Id. § 2.876(7)(g).
\textsuperscript{26} Id. § 2.876(7)(b).
\textsuperscript{27} Id.
On April 21, 1972, Wisconsin adopted a compulsory interest arbitration statute which provides for final and binding arbitration in law enforcement and fire fighter negotiations. The arbitrator is required to select the single final offer of the employer or union on all issues in dispute. Under this statute, the Wisconsin Employment Relations Commission conducts an investigation in which a member of the staff attempts to mediate the dispute and, if an impasse is reached, identifies the issues in dispute and the parties' final offers.

In addition, Wisconsin has adopted a second compulsory interest arbitration statute, effective January 1, 1978, which covers all municipal employees, including county and school district employees. This statute requires the arbitrator to select the single final offer of one of the parties on all issues in dispute. Although there are numerous differences between this law and the earlier legislation covering law enforcement personnel and fire fighters, the final offer provisions of the two laws are essentially the same. In particular, although the arbitrator, who is identified as a mediator-arbitrator in the later statute, is required to endeavor to mediate the dispute, either party may amend its final offer made during the WERC investigation without the express agreement of the other party.

The second law provides that if both parties withdraw their final offers, the union may lawfully strike after giving ten days notice. This law also provides that the parties may agree to alternative forms of arbitration or impasse resolution, but few have elected to do so.

29. Under this law, the parties may agree to an alternative form of arbitration where the arbitrator has the power to decide all issues in dispute in a conventional manner. Id. In practice such agreements are rare.
30. Hereinafter referred to as WERC.
32. Id. § 111.70(4)(c)(6). This law is commonly referred to as "Senate Bill 15" or the "mediation-arbitration" law.
33. Id.
34. Id. § 111.77.
35. Id. § 111.70(4)(c)(6).a.
36. Id. § 111.70(4)(c)(6).b.
37. Id. § 111.70(4)(c)(6).c.
38. Id § 111.70(4)(c)(5).
39. WERC records indicate that sixteen such agreements have been filed during the first two years of the law. From 1973 through 1977, about sixty-five percent of the 852 negotiations were settled without any third-party assistance. The approximately 300 remaining cases were mediated by the WERC and more than fifty percent of them were settled at this stage. Olson, supra note 19, at 114.
Michigan

Michigan adopted a conventional compulsory interest arbitration law for police and fire fighters in 1969.\textsuperscript{40} In 1972, that statute was amended to require that the arbitration panel select between the last offer of the parties on each economic issue in dispute.\textsuperscript{41} The arbitration panel is required to identify which issues are economic at or before the conclusion of the hearing and the parties must then simultaneously submit their final offers.\textsuperscript{42} Non-economic issues continue to be subject to conventional arbitration.

Massachusetts

In 1973, Massachusetts became the third state to adopt a final offer statute.\textsuperscript{43} Like Michigan, the Massachusetts arbitration statute is limited to police and fire fighters, and applies only if an impasse continues after mediation and fact-finding.\textsuperscript{44} Until recently, either party had the right to invoke arbitration by a tripartite panel. Each party was required to submit a “written statement” of its “last and best offer” for each of the issues still in dispute at the conclusion of the arbitration hearing.\textsuperscript{45} The panel then was required to select one of the written statements within ten days. Unless the parties had agreed to eliminate fact-finding, the panel could also select the fact-finder’s recommendations on any of the issues.\textsuperscript{46}

Massachusetts has recently amended this law\textsuperscript{47} to provide that the availability of arbitration and the form of the arbitration must be decided by a joint labor-management committee. Compulsory arbitration is still available to resolve police and fire disputes in Massachusetts. The decision, however, as to whether the arbitration panel will be limited to some form of final offer selection is now decided on an \textit{ad hoc} basis.\textsuperscript{48}

\textsuperscript{40} Mich. Comp. Laws Ann. § 423.231 (1967).
\textsuperscript{41} Id. § 423.238. It is interesting to note that, according to one estimate, the settlement rate during arbitration, which was thirty-nine percent prior to this change, increased to sixty-four percent thereafter.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. ch. 154.
\textsuperscript{48} Id.
Connecticut

Connecticut’s final offer procedure, enacted during the 1975 legislative session,49 cannot be invoked until after fact-finding. It is automatically invoked ninety days after the expiration of a collective bargaining agreement covering municipal employees if the Connecticut Board of Mediation and Arbitration has not been previously requested to provide its mediation services.50 The panel is tripartite and the parties are permitted to file their offers in a “blind exchange” five days after the hearing and filing of briefs, including reply briefs. The panel must then select the “last best offer” on an issue-by-issue basis within twenty days after the offers have been filed.

Connecticut recently enacted a new law providing for a similar form of final offer arbitration for impasses in negotiations between teacher organizations and school boards.51 Under the new impasse procedure, which took effect on October 1, 1979, the dispute is submitted to a single arbitrator or tripartite panel according to the agreement of the parties. If the parties fail to agree to an arbitrator or arbitrators, three arbitrators are appointed from a tripartite panel maintained by the Connecticut Department of Education. A hearing is to be set within ten days. The hearing may be continued, but must be concluded twenty days after its commencement. The parties are required to submit to the arbitrator or arbitrators their respective positions on each individual issue in dispute in the form of a “last best offer.”52 The arbitrator or arbitrators must then select the last best offer of one of the parties on each issue in dispute. They have fifteen days after the hearing to render their decisions in writing detailing the nature of their decision and the disposition of the issues.

It is unclear as to exactly when last best offers of the parties are to be exchanged under this law. Therefore, it would appear that the arbitrators are free to determine when to call for final offers, either at the outset or during the course of the hearing. This suggests that the last best offers will be exchanged at or near the end of the hearing as is the case under the prior law in Connecticut.

49. CONN. GEN. STAT. ANN. § 7-473c (West 1979). However, this law has been found unconstitutional by a Connecticut trial court. Town of Berlin v. Santaguida, No. 20-13-07 (Hartford County Super. Ct., June 26, 1978).
50. Id.
51. Id. § 7-473c(c)(1).
52. Connecticut, as well as Iowa and Michigan, allows arbitrators to consider each outstanding issue separately and select from one or the other side’s final position on an issue-by-issue basis.
Iowa

Iowa, the fifth state to adopt a final offer procedure, did so as part of its comprehensive public sector bargaining law. The procedure is applicable to all state and local employees covered by the law. The arbitration procedure may not be invoked unless the parties have failed to settle the matter based on a fact-finder's report. Each party must submit its final offer on each "subject category" still in dispute. The tripartite panel is then limited to selecting the final offer of one of the parties or the fact-finder's recommendation on each impasse item.

Nevada

Nevada adopted a final offer arbitration procedure for fire fighters in 1977. Until 1981, fire fighters, unlike all other Nevada municipal employees are no longer governed by the unique impasse procedures of Nevada's Local Government Employee-Management Relations Act. Under that law, if the parties fail to agree to a different impasse procedure, they must participate in mediation and if mediation fails, fact-finding. They may agree in advance to accept some or all of the fact-finder's recommendations as binding. If they fail to do so, the governor has the power, within certain limitations, to direct that the fact-finder's recommendations be binding.

Under the new Nevada procedures, if the parties fail to agree to make the fact-finder's recommendations binding, they must, within ten days after the fact-finding report, submit all remaining issues to arbitration. A single arbitrator, selected from a panel of seven supplied by the American Arbitration Association, thereafter holds a hearing where the parties and other interested persons may present information concerning the dispute. Before submission of final offers, the arbitrator may recommend that the parties enter into negotiations and, if negotiations actually begin, the hearing may be adjourned for three weeks. If the parties do not enter into negotiations or fail to reach agreement,
each party must submit a written statement containing its final offer on all of the unresolved issues. The arbitrator must then select one of the written statements on the basis of the same statutory criteria provided for fact-finding.

New Jersey

In 1978, New Jersey adopted a final offer procedure for resolving impasses.\(^6\) Like Michigan, the procedure is only available to resolve police and fire fighter disputes. However, other employee groups may voluntarily agree to utilize the procedure if the legislative body for the governmental unit involved approves.\(^6\) Although the statute lists several alternative types of procedures, the parties may voluntarily agree to include several final offer variants. It mandates a particular form of final offer arbitration for those parties who do not agree to utilize one of the alternative procedures.

Like Nevada\(^6\) and Iowa,\(^6\) arbitration is not available in New Jersey unless the parties have been unable to resolve the dispute after a fact-finder has made recommendations. Each party is required to submit its final offer prior to the arbitration proceedings. Economic proposals, namely, those proposals which inure to the benefit of employees financially, are treated as one item and non-economic issues are treated as separate items. The arbitrator is then required, after a hearing, to select one of the parties' offers as the most reasonable offer on an item-by-item basis.

Hawaii

Hawaii's new law\(^6\) covers fire fighters only. Other employees continue to be covered by pre-existing impasse procedures which provide for mediation and fact-finding under a statutory timetable, followed by the right to strike sixty days after the fact-finder's report has been made public.\(^6\) Under Hawaii's final offer procedure, impasses in fire fighter negotiations are submitted to mediation three days after an impasse is reached and arbitration fifteen days later. The law provides that if the parties fail to mutually agree on an arbitration procedure within eighteen days after impasse, a tripartite panel is to be appointed in accord-

\(^{61}\) Id.
\(^{63}\) Iowa Code Ann. § 20.22(1) (1950).
\(^{65}\) Id. §§ 89-11(a) to 89-11(d) (Supp. 1979).
ance with final offer provisions of the statute. If the arbitrators appointed by the parties fail to agree to a third arbitrator within twenty-four days, the third member is selected by the Hawaiian Public Employment Relations Board from a list submitted by the American Arbitration Association. Final offers are to be submitted to the panel upon its selection and the panel must hold a hearing within twenty days.

The statute specifically provides that the parties may continue to negotiate and participate in mediation up to the conclusion of the hearing. Thirty days after the hearing, the arbitrator must select one of the two final offers in its entirety. It is unclear whether the law contemplates changes in the final offers during the proceedings before the arbitrator. The final offers must include all existing provisions of the agreement which the parties wish to continue; all new provisions agreed to; and all other proposals not agreed to.

Montana

Montana’s recently enacted statute also applies only to fire fighters. Previously, all public employees in Montana, including fire fighters, were required to participate in mediation after a reasonable period of negotiations or upon expiration of the collective bargaining agreement. Either party may request fact-finding after the expiration of the agreement or thirty days after the certification of the union. Under the terms of the Montana Public Employees Collective Bargaining Act, as interpreted by the Montana Supreme Court, public employees in Montana have the right to strike.

Under the new statute, fire fighters are prohibited from striking and either party may, after exhausting the mediation and fact-finding procedures, petition for final and binding arbitration. Arbitration is by a single arbitrator selected from a list provided by the Montana Board of Personnel Appeals. The arbitrator has the right to refer the issues back to the parties for further negotiations. At the conclusion of the hearing, the arbitrator requires the parties to submit their final positions on the matters in dispute and must, within thirty days of the com-

66. Id. § 89-11(d).
67. Id.
69. Id. § 39-31-308.
70. Id. §§ 39-31-301 to 39-31-311 (Supp. 1979).
mencement of the proceeding determine which party's final position should be adopted.

**Comparison to Stevens' Models**

It is instructive to compare these various laws with the two model final offer procedures first suggested by Professor Stevens. One model calls for direct negotiations followed by arbitration, based on the final positions of the parties presented to an "arbitration authority" which would act "with no further hearing." This model contemplates no mediation or opportunity to compromise short of total settlement during the arbitration phase.

The second model proposed by Professor Stevens provides for arbitration by a tripartite panel which would act only after a hearing during which the neutral appointee would mediate, utilizing the implicit threat of acceptance of the other party's offer as more reasonable unless concessions were made. Fundamental to this latter procedure is the right of the parties to change their offers up to the point in time where an award is issued.

While none of the laws discussed above conform completely to either model, the Eugene, Oregon ordinance and the two Wisconsin statutes more closely resemble the first of the two models. The statutes in Connecticut, Michigan, Massachusetts, Montana, New Jersey, and Nevada have many features which cause them to more closely resemble the second. The situation in Hawaii is less clear because of the uncertainty as to whether either party has the right to amend its final offer during the arbitration proceeding. The situation in Iowa is somewhat difficult to categorize for reasons discussed more fully below.

Under Eugene, Oregon's ordinance and the two Wisconsin stat-

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73. See note 1 and accompanying text supra.
74. See Stevens 1, supra note 1, at 45-46.
75. Id. at 46.
76. Id. at 46-47.
77. EUGENE, ORE. CODE § 2.876 (1971).
78. WIS. STAT. ANN. §§ 111.70(4)(cm)6, 111.77 (West 1971).
79. CONN. GEN. STAT. § 7-473c (1975).
80. MICH. COMP. LAWS ANN. § 423.231 (1967).
81. MASS. GEN. LAWS ANN. ch. 150E, § 9 (Supp. 1979).
85. HAW. REV. STAT. § 89-11(d) (Supp. 1979).
86. See text accompanying note 95 infra.
utes, the parties may not, under ordinary circumstances, escape the risk attendant upon making a final offer and submitting the dispute to the arbitration process. In effect, the “strike substitute” which the final offer procedure was intended to provide has a “strike deadline” under these laws which occurs when the parties exchange their final offers and terminate bilateral negotiations. Unless the parties are able to reach total agreement or at least obtain the consent of the other party to change their final offer, they run the very real risk of suffering a total loss. Consequently, as anticipated by Stevens, “genuine negotiations” occur prior to that point in time, greatly moderating the parties’ positions and resulting in a maximization of bilateral settlements.

The provision for alternative final offers in the Eugene, Oregon procedure is intended to and probably does have a moderating influence on this risk. However, the moderating influence, like the opportunity for mediation by the arbitrator under Wisconsin’s most recently enacted statute, does not eliminate the risk attendant upon failing to reach agreement bilaterally before the “finalization” of offers. Similarly, the fact that the arbitrators are required to conduct a hearing under each of these laws if requested to do so, does not necessarily result in a reduction of this risk. Such a requirement does force the parties to re-evaluate their positions and provides them with one last opportunity to eliminate the risk by reaching a bilateral agreement.

On the other hand, the statutes in Connecticut, Massachusetts, Montana, New Jersey, and Nevada, in addition to containing many features designed to reduce the potential harshness of the outcome of final offer selection and the attendant risk of participation in the procedure, also contain two features which cause them to more closely resemble Stevens’ second model. The utilization of fact-finding as a preliminary step, particularly where the arbitrator may select the fact-finder’s recommendations on a total package or issue-by-issue basis, may be viewed as a disguised form of conventional arbitration. Under most circumstances, the party that “prevails” on an issue or issues in

87. EUGENE, ORE. CODE §§ 2.876(6),(7) (1971); WIS. STAT. ANN. §§ 111.70(4)(cm)6, 111.77(4)(b) (West Supp. 1979).
88. See Stevens I, supra note 1, at 46.
89. See Donn, Games Final Offer Arbitrators Might Play, 6 IND. REL. 306 (1977). See also Final Offer Arbitration supra note 1.
90. EUGENE, ORE. CODE § 2.876 (1971); WIS. STAT. ANN. §§ 111.70(4)(cm)6, 111.77 (West Supp. 1979).
91. Id.
fact-finding will ordinarily conform its final offer to the fact-finder’s recommendations. This process has obvious similarity to the second procedure envisioned by Stevens where the neutral third party secures the “voluntary” agreement of the parties to conform their final offers to his or her view of the most reasonable outcome. More importantly, the parties have the right to change their “final offers” after the jurisdiction of the arbitration panel has been invoked. Because the statute in Iowa provides for fact-finding but also finalizes the offers at the outset of the arbitration proceeding, it is difficult to categorize the Iowa statute. However, on balance, the Iowa statute more closely resembles the second model.

Some of the recent literature on final offer arbitration has been devoted to criticizing the concept or analyzing the impact of existing laws on bargaining and bargaining outcomes. Some commentators discuss the effectiveness of achieving certain important goals such as avoidance of the “chilling effect” and avoidance of the “narcotic effect”.

This body of literature provides invaluable background information to those making the basic public policy choices as to which impasse procedure should be adopted to resolve public employe disputes.

93. See Stevens I, supra note 1, at 47.
94. See, e.g., CONN. GEN. STAT. § 7-473c(1)(1975).
95. IOWA CODE ANN. § 20.22 (1950).
96. Articles which are generally critical of final offer arbitration include: Feigenbaum supra note 3; Wheeler supra note 3; Zack, Final Offer Arbitration—Panacea or Pandora’s Box?, 19 N.Y.L.F. 567 (1974).
98. This is the tendency to withhold concessions in bilateral negotiations or mediation in order to preserve one’s position for arbitration.
99. This is the tendency to overuse third party procedures rather than reaching negotiated settlements.
and, if compulsory arbitration is to be utilized, whether to adopt some form of final offer selection. However, little space has been devoted to the problems that have been encountered to date in administering such laws. 100 Basically, these problems relate to the timing of the final offers which includes the question of who controls the timing and the content of the final offers.

PROBLEMS RELATED TO TIMING

It is undoubtedly true that, in the ultimate sense, no final offer is ever "final" until it has been selected by the arbitrator. 101 This is so because the parties are always free to reach bilateral agreement on the remaining issues in dispute or at least to agree to allow the other party to make modifications after the offers have been "finalized" under the statutory procedure. Putting these possibilities aside, however, there must be some point under any statutory procedure where the parties are required to "finalize" their offers.

Finalizing the Offers

It would appear that two basic patterns are followed in finalizing offers under the existing final offer laws. On the one hand, in Eugene, Oregon and Wisconsin, the offers are deemed "final" at the point in time that the parties terminate bilateral negotiations. 102 In Iowa, they become final after fact-finding but at the outset of arbitration. 103 On the other hand, under the provisions of the Connecticut, 104 Massachusetts, 105 Montana, 106 and Nevada statutes, 107 the final offers are not deemed final until the end of the arbitration proceeding. In New Jersey, the same result was achieved by adopting an administrative rule which has been sustained in two lower court challenges. 108

100. A significant exception is Rehmus, Is a Final Offer Ever Final?, 97 MONTHLY LAB. REV. 43, 44 (1974). See also Rehmus, Is a Final Offer Ever Final?, in PROCEEDING OF THE 27TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 77 (1974) [hereinafter referred to as Rehmus].
101. See Rehmus note 100 supra.
103. In Iowa, the parties must submit final offers within four days of either party's request for arbitration following completion of fact-finding. The parties may continue to negotiate, however, until a decision is rendered. IOWA CODE ANN. §§ 20.20, 20.22(2) (1950).
104. CONN. GEN. STAT. ANN. § 7-473c(c)(1) (Supp. 1979).
105. MASS. GEN. LAWS ANN. ch. 150E, § 9 (Supp. 1979).
The importance of establishing a clear statute or rule regarding the timing of the finalization of offers cannot be overemphasized. If the call for final offers is to function effectively as a substitute to the call for a strike, the parties must be made to take the matter seriously. They must be made to understand that once they have finalized their offers, they have invoked a form of economic warfare in which there may be a loser. The cost of non-agreement thereafter is measured by the “spread” between their offers. If the consequences of having made a final offer become murky, or worse yet, are viewed as unsubstantial, the pressure that is intended to be present is greatly dissipated.

Wisconsin's first final offer law failed to deal adequately with this particular reality. As originally worded, the statute permitted either party to modify its final offer “within five days of the hearing.”109 If it is assumed that this provision was intended to permit either party to change its final offer five days prior to the hearing before the arbitrator, the practical effect was to allow the parties to make changes in their offers at a time when neither the WERC mediator nor the arbitrator were present to help to settle the dispute.110 Worse yet, the provision encouraged the parties to utilize this opportunity to make surprise moves, through blind exchanges of amendments, in the hope of out-flanking the other party.

There is a tendency on the part of both parties to a dispute under a final offer system of negotiating with a view to winning the possibly inevitable arbitration proceeding. While the beneficial result of that tendency is normally compromise and moderation of position, the value of that tendency can be lost if the parties are permitted to pursue practices which focus too much on winning the arbitration proceeding and not sufficiently on achieving a voluntary settlement.

Consistent with the heavy emphasis placed on settlement through bilateral negotiations and mediation in Wisconsin, the statute was amended to provide that the final offers of the parties become final when the WERC mediator/investigator transmits his or her advice to the WERC concerning the impasse.111 Neither party may now amend its final offer thereafter without the written agreement of the other

Newark Firemen's Union of New Jersey v. City of Newark, No. C-347-78 (Essex County Super. Ct., Nov. 9, 1978).


110. It is a tribute to the ingenuity of the parties and an indication of the importance of this defect, that some parties jointly “interpreted” the statute to allow them to change their final offers within five days after the hearing.

Further, when Wisconsin enacted its comprehensive mediation-arbitration statute, it provided that once the parties have exchanged their final offers and the WERC has ordered mediation-arbitration, neither party may modify its final offer during the mediation conducted by the mediator-arbitrator without the consent of the other party.\footnote{113}

Notwithstanding this experience in Wisconsin and a similar experience in Iowa,\footnote{114} New Jersey's recently enacted statute, which calls for final offers at the outset of the arbitration procedure, has failed to deal specifically with the problem of finalization, instead requiring the adoption of administrative rules permitting modifications during the hearing.\footnote{115} This rule was subsequently tested in the courts.\footnote{116} Similarly, Hawaii's statute\footnote{117} appears to be ambiguous in this regard in that it provides for an initial exchange of final offers upon selection of the panel but is silent as to modifications.

**Order of Presentation of Final Offers**

Numerous other problems arise with regard to the timing of the final offer procedure, ultimately raising the issue of who controls the timing of the procedure. The answer to this question inevitably must be the neutral third party administering the procedure at the time the offers are finalized. Any other approach can result in practices which tend to defeat the underlying purpose of the procedure—voluntary settlement.

The problem that arises most frequently can best be described as the question of "who goes first." Where the parties are unsophisticated or the issues are straightforward, this is not usually a serious problem. Both parties know or accurately anticipate the other party's position and feel no disadvantage in any particular order of presentation. In fact, many "final offers" are identical to the offers on the table or exchanged informally through the mediator at the time of impasse.

However, where the parties are sophisticated or the issues are susceptible to change because of the prospect of final offer selection, the person administering the law at the point of finalization must take care to insure that any procedure followed maximizes settlement opportuni-
ties rather than allows the parties to engage in practices which make arbitration more likely to occur. In particular, if the parties are allowed to determine for themselves when their offers are final without the approval of the mediator or arbitrator administering the law, they will be tempted to make surprise concessions and modifications of position. The net result may well be the need to proceed to final offer selection on all of the issues, although there would have been a basis for settlement of some or perhaps all of the remaining issues still in dispute had the surprised party been apprised of the concessions or modifications of position that would be contained in the other party’s final offer.118

Implicit in this problem is the assumption that once a party is asked to present its final offer and it presents an offer under that label, it may not thereafter change its offer even if it is surprised by the other party's offer. This assumption, which flows naturally from a simple reading of any of the statutes, is quickly dispelled as totally unworkable by exposure to the process of exchanging final offers. The procedure followed by the mediator or arbitrator administering the law must be designed so that neither party is disadvantaged by the order of presentation. In many cases, this necessarily means more than one exchange.

One way to proceed is to allow for an initial, simultaneous exchange, followed by an opportunity to make modifications to meet any changes in the other party's position which were not anticipated. Once this ground rule is established, it is a simple matter for one of the parties to withhold a concession or other change of position until after the initial exchange. Regardless of the reason why a party might choose to change its position during this second exchange, either party may legitimately desire to modify further its position at that point.

Another approach is to allow each party to change its position in response to the changes in the other's position until such time as the other party makes no further changes in response. This is probably the best procedure. But it is flawed by the possibility that one of the parties may so seriously overestimate the other party's potential for movement that the first party will remain in an unrealistic posture even though the other party has failed to change its position after having been given the opportunity. While some might argue that such a result is consistent with one of the basic tenets of final offer arbitration—that it be risky and distasteful—such an argument focuses too much on the means and not sufficiently on the end to be achieved.

118. It should be noted that an argument can be made for the value of allowing the parties to so utilize the procedure, in the interest of discouraging resort to arbitration in future negotiations.
Another procedure, available only where the individual calling for the exchange of final offers is not also the arbitrator, is to advise the parties that they may identify possible concessions through "mediator proposals" which are not required to be included in their final offers and, if not included, will not be disclosed to the arbitrator. This practice is very helpful in achieving mediated settlements and is compatible with the two procedures discussed above. It does not necessarily prevent the parties from attempting to withhold possible concessions until the offers are finalized, if they believe arbitration is inevitable and that such a practice will help them win. For example, if both sides believe that arbitration over an issue such as inclusion of a fair share agreement is inevitable, they may see some tactical advantage to withholding a possible concession such as the making or withdrawing of a proposal on dental insurance until such time as the other party has finalized its position.

Under the Wisconsin procedure, prior to May 1978, each of the WERC mediators was permitted to deal with this problem on an individual basis. The exchange procedure varied greatly depending on the individual mediator's practices and the parties' preferences. In addition, some mediators who attempted to pursue a strong policy of full disclosure were confronted with situations where both parties refused to cooperate. In a few instances, the parties attempted to insist on the right to make blind exchanges through the mail after mediation had failed to resolve the dispute. For this reason, the WERC adopted a rule dealing with the problem. According to the rule: "[t]he Commission or its agent shall not close the investigation until the Commission or its agent is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer . . . ."120

The WERC was recently called upon to determine whether a "ground rule" established by one of its mediators, which provided that each party could modify its final offer only in response to a change in the other party's offer, constituted a valid application of this rule.121 The WERC held that if the ground rule is clearly established, effectively communicated, and if the investigator closes the investigation based on the ground rule, it constitutes a valid and enforceable application of the policy reflected in this rule.122 However, the investigator in

122. Id.
the case held the investigation open for several weeks after the initial exchange of final offers, during which time he successfully mediated a settlement which was later rejected by the union's membership. The investigator still had not officially closed the investigation at the time that the employer indicated its desire to further modify its offer. The thrust of this decision was to preserve the mediator's discretion to use the particular ground rule in question in his efforts to insure compliance with the policy reflected in this rule by giving controlling importance to the notice closing the investigation. The WERC reasoned that, had the employer been made aware that the investigator was about to close the investigation, the employer might well have further modified its final offer position to reflect some of the concessions it was willing to make in the mediation that preceded the tentative settlement.

The adoption of this rule was not without controversy within the WERC and among the parties it serves. There are some mediators who subscribe to the notion that it is therapeutic to allow the parties to pursue practices which increase the risk of loss since, in the long run, this policy will discourage use of the procedure.

The statutes of Connecticut, Massachusetts, Michigan, Nevada, and Montana all specifically provide that the exchange of final offers shall occur at the conclusion of the arbitration procedure. A practice of allowing blind exchanges at that juncture would not only seem to pose serious due process problems if one party were allowed to make a significant change in position without affording the other party an opportunity to present evidence and arguments, but it would seriously jeopardize the settlement potential that such a change normally presents. For these reasons, any procedure utilized by the arbitrator ought to insure that the other party has an opportunity to further modify its position as well or at least respond to the merits of the other party's position. New Jersey's rule, clarifying the ambiguity in its law, deals with both the due process problem and the settlement potential. It provides that: "[t]he arbitrator may, in his or her discretion accept a revision of position by either party on any issue until a hearing is deemed closed, provided that the other party is given the opportunity


124. This problem would appear to be particularly acute under the Connecticut law covering municipal employees where the parties are allowed to submit their final offers in a blind exchange five days after the exchange of reply briefs.

125. N.J. ADM. CODE ch. 19, § 16-5.7(f) (1978).
to respond . . . ”

PROBLEMS RELATED TO CONTENT

The problems related to the content of final offers fall into three general areas: problems regarding completeness; problems regarding legality; and problems regarding ambiguity.

Completeness

The Eugene, Oregon ordinance is the only statute that requires the parties to each submit a complete draft of the proposed collective bargaining agreement unless the parties specifically agree to submit package proposals dealing only with the issues in dispute. In the latter situation, the arbitration panel, which is not permitted to mediate, is required to give consideration to the tentative agreements reached by the parties in their negotiations. All of the statutes, except the Hawaii statute, would appear to limit the final offers to the issues in dispute. Under the procedure in Hawaii, the final offers are in three parts consisting of existing provisions, new provisions agreed to, and all other proposed provisions.

Under those statutes which evidence an intent that the final offer be in the form of proposals on the issues in dispute, several potential problems can arise. One of the parties may have entered into tentative agreements on proposals with contingencies attached which may, in effect, make such proposals issues in dispute. If this is the case, the party which attached the contingency ought to be permitted to force the other party to include the proposal in its final offer. In one Wisconsin case, a union had entered into a large number of tentative agreements to change existing contract language on the somewhat unique but express statement that such tentative agreements were contingent on agreement being reached on all the remaining proposals, mostly economic, in

126. Id.
128. Id. § 2.876(7)(d).
129. Id. § 2.876(7)(g)(1).
130. This is somewhat unclear under the wording of the Wisconsin statute dealing with law enforcement personnel and fire fighters. In the case Sheboygan County, No. 14,859 (WERC Dec. Aug. 24, 1976), the WERC held that final offers were to be based on the issues in dispute rather than submitted in the form of a complete collective bargaining agreement. This problem prompted a more explicit treatment under the new mediation-arbitration procedure. WIS. STAT. ANN. § 111.70(4)(cm)6.a (West Supp. 1979) requires the parties to execute a stipulation of agreed upon matters to be included in the new agreement.
131. HAW. REV. STAT. § 89-11(d) (Supp. 1979).
which the union was most interested. It was understood that the union had reserved the right to withdraw its tentative agreements if the matter was submitted to arbitration. The WERC held that the union did not commit a prohibited practice when it submitted a final offer which was limited to economic improvements it was seeking, based on the provisions of the expired agreement, with none of the changes tentatively agreed to during negotiations. In effect, the employer in that case was required to include, as part of its final offer, all of its proposals that the union had tentatively agreed to during negotiations.

Another related question that can arise is the status of matters which are not in dispute. Tentative agreements reached on specific issues in the bargaining process are invariably subject to some explicit or implicit contingencies. Ratification by the union membership is one such contingency which is all but universal. A second contingency, normally operative in the public sector, is ratification by the legislative body for the public employer. Normally, this would not take place until a tentative agreement is reached on all issues in dispute. However, when the parties submit final offers on the remaining disputed items, the status of these tentative agreements remains in doubt. Presumably, no ratification is necessary. The final offer which is ultimately selected by the arbitrator is legally imposed on the parties. All that is required is legislative action to implement the offer selected.

One possible way to avoid the ratification question is to agree to make the tentative agreements a technical part of the final offers by including a statement to the effect that each party's offer includes all matters tentatively agreed to during negotiations. In a Wisconsin case, a municipal employer attempted to insist that each party be required to submit a proposed collective bargaining agreement as its final offer. The offers in question would have included all undisputed language agreed to during the negotiations for a first contract, although there were only a few remaining issues in dispute. It was the employer's theory that under the statute the arbitrator's award was a substitute for a collective bargaining agreement.

Under the procedure set out in the Eugene, Oregon ordinance, this approach would have been appropriate. However, in view of the fact that the first Wisconsin statute, like all the other statutes except

133. Id. at 5, 11.
135. Id. at 3.
Hawaii's, requires only that the parties submit final offers on the issues in dispute, the WERC determined that it was inappropriate to require the parties to draft final offers in the form of a total agreement.\(^{138}\)

This has led to a subsequent problem in Wisconsin where the same municipal employer ultimately refused to execute a collective bargaining agreement prepared by the union which included all of the items from the arbitrator's award which incorporated the union's final offer on the issues in dispute.\(^{139}\) The employer implemented the terms of the award but maintained that it had no obligation to execute an agreement, particularly in light of the fact that it had never acted on the tentative agreements. The WERC held that the employer was obligated under its duty to bargain in good faith to execute the agreement and that it could not use its own failure to adopt the tentative agreements as justification for refusing to execute the proffered agreement.\(^{140}\) The best way to deal with this particular problem is through legislative action, as was done in Hawaii and under Wisconsin's most recent law.\(^{141}\) Of course, the same result can be accomplished by rule.

**Legality**

Compulsory arbitration allows either party to force a proposal to resolution and possible inclusion in a collective bargaining agreement. Therefore, it is inevitable that disputes may arise over the duty to arbitrate a particular proposal. While this is true of conventional arbitration as well as final offer arbitration, it poses a particularly difficult problem in final offer arbitration because the arbitrator may not have the authority to modify either party's final offer at the time that the issue is raised. The problem is particularly acute in jurisdictions like Eugene, Oregon, Wisconsin, and Iowa where the offers are finalized before submission to arbitration. In these situations, it is advisable to establish a procedure for making timely objections to the legality of particular proposals.

The most common problem affects proposals which are alleged to be non-mandatory subjects of bargaining. In jurisdictions where the final offers are finalized before submission to arbitration, the procedure should require the parties to raise any objection concerning the alleged non-mandatory nature of proposals at some point prior to the finaliza-

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tion of offers. This approach is followed in Wisconsin where the parties are permitted to bargain concerning non-mandatory subjects up to the close of the investigation before they are held to have waived their right to object. In jurisdictions where the parties exchange their final offers before the arbitrator, it is less clear whether the procedure should require the raising of such objections prior to the declaration of the impasse. If not, a procedure should be established permitting the arbitrator to remand the dispute back to the administrative agency charged with the responsibility for making such determinations.

One troublesome area that appears to have no solution is the handling of proposals that are ultimately found to be prohibited subjects of bargaining. This same problem would apply to final offers which, because of some procedural irregularity, are deemed to be illegal. The failure to raise a timely objection that a proposal relates to a permissive subject of bargaining is treated as a waiver in most jurisdictions. But it must be assumed that neither party may normally be deemed to have waived an objection that a proposal is illegal. The question then arises as to the proper procedure to follow when one party waits until the offers are finalized or until after final offer selection before raising an objection as to the legality of the other party's offer.

The first such case to arise in Wisconsin involved the latter type of situation and ultimately went to the Wisconsin Supreme Court. In that case, the court found that there had been no bargaining on any proposal for a two year agreement prior to the original submission of final offers. The court concluded that the county's final offer, therefore, was unlawful under the then existing procedure which called for the submission of final offers at the time of the alleged impasse subject only to modification five days prior to the hearing. The union, in that case, was permitted to challenge the legality of the offer after the award was issued. This same problem resulted in one arbitrator refusing to select the final offer of the union where the union had included a new item,

Permissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject.

143. But see Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 393 A.2d 278 (1978), where the court held that the parties may not lawfully bargain about matters which do not fall within the mandatory duty to bargain.

144. Milwaukee County Deputy Sheriff's Ass'n v. Milwaukee County, 64 Wis. 2d 651, 221 N.W.2d 673 (1974).

145. Id. at 654, 221 N.W.2d at 676.
never previously negotiated, prior to the exchange of final offers.\textsuperscript{146}

This problem is fraught with potential for abuse. A party, either intent on frustrating the procedure, or more likely, focusing its attention primarily on winning rather than the manner by which that result is achieved, could wait with the intent of springing its objection at the most advantageous moment. While it is possible to establish a procedure for remanding the dispute to the administrative agency charged with making such determinations, as suggested above under the discussion concerning permissive subjects of bargaining, that approach results in delay and frustration of the procedure. The approach taken by two other arbitrators in Wisconsin was to refuse to consider the objection as to the possible illegality of a particular proposal in deciding which final offer was the most reasonable.\textsuperscript{147} Both arbitrators stated that they preferred to rely on the WERC or the courts to subsequently review the proposal and remedy any problems as to legality.\textsuperscript{148}

Where the final offer selection is on an issue-by-issue basis, the arbitrator has greater latitude to refuse to select an offer which is of questionable legality. However, the problem with this approach is that if a timely objection had been raised to the alleged illegality of the proposal, the proponent of the proposal might have been in a position to overcome the objection. For this reason, some parties have included savings clause proposals in their final offers which require further bargaining and possible arbitration in the event that any portion of its proposal is finally declared illegal by an administrative agency or court having competent jurisdiction. The inclusion of such proposals will no doubt discourage the practice of waiting to challenge the legality of a proposal in many circumstances. Another approach for dealing with this problem is to adopt a rule which provides that the arbitrator may permit changes in offers which have been finalized for the sole purpose of overcoming objections as to the legality of proposals.

Another problem concerning the legality of final offers warrants some special comment: the problem of final offers expressed in the alternative. A final offer expressed in the alternative is probably not a proper final offer in the absence of a specific authorization such as that which is provided in the Eugene, Oregon ordinance. This is the conclu-


\textsuperscript{148} Id.
sion reached recently by the WERC in *Milwaukee Area Technical College.* Notwithstanding this result, the WERC went on to hold that the parties may agree to submit final offers to the arbitrator expressed in the alternative in whole or in part. Presumably, they may also do so if the other party does not object since public policy would not be offended by such a practice.

One problem that arises when one of the final offers is expressed in the alternative relates to how the arbitrator proceeds to evaluate the final offers in question. If it occurs in an issue-by-issue jurisdiction, the arbitrator is in effect called upon to evaluate the relative merits of three proposals on that particular issue—not including the fact-finder’s recommendation, if any. If it occurs in a total package jurisdiction, the arbitrator is also called upon to evaluate the relative merits of three total package offers, two of which may be identical in some respects. It was largely for this reason that the WERC concluded that such an offer was not a “single final offer” within the meaning of the statute and, therefore, could not be submitted to arbitration over the objection or absent the agreement of the other party.

Other problems can arise in the implementation of such offers. In the *Milwaukee Area Technical College* case, the offer purported to give both the union and the arbitrator a choice between three proposed salary schedules. Presumably, the arbitrator would have had the choice of making the selection or giving the union the opportunity to do so. If the arbitrator chose either course, it could raise an issue as to whether the arbitrator had adopted the final offer of one of the parties on all disputed issues without further modification as required. In addition, it might be noted that one of the first court cases challenging an arbitration award in Wisconsin involved a dispute where the union’s final offer, which was selected by the arbitrator, was ambiguously worded, referring as it did to both a percentage and a dollar figure in its wage demand. While technically not an offer in the alternative, the case is illustrative of what can happen if alternative proposals are not carefully drawn.

150. Id.
151. Local 74, IAFF & City of Superior, No. 11,585-C (WERC Dec. July 27, 1973). This dispute resulted in subsequent litigation in which the award ultimately was confirmed and enforced. See Local 74, IAFF v. City of Superior, No. 73-289 (Douglas County Cir. Ct. Feb. 12, 1974).
Ambiguity

Either party's proposal, unilaterally drafted and submitted to arbitration, is a potential source of ambiguity. A provision contained in a collective bargaining agreement which is jointly agreed to reflects the parties' mutual intent, however well or poorly drafted the provision may be. The disputes that do arise concerning the meaning of such provisions are normally raised in the grievance procedure and eventually become grist for the mill of grievance arbitrators. The grievance arbitrator can refer to the bargaining history, as well as the practices of the parties, for guidance as to their intended meaning. On the other hand, disputes over the meaning of provisions submitted to interest arbitration can, and do, arise during the course of the interest arbitration proceeding itself; particularly where it is to the advantage of one party to raise them.

The problem of ambiguity can generally be resolved in conventional interest arbitration. There, the interest arbitrator can attempt to reword the provision to reflect his or her intent in making the award. However, in final offer arbitration, either party is ultimately in a position to impose its version of a proposal on the other, thus creating a much greater potential for dispute.

If the dispute arises during the course of the arbitration proceeding, the proposal can be reworded in those jurisdictions permitting the amendment of final offers during the course of the arbitration proceeding. The problem is not so easily solved in those jurisdictions where the offers are finalized prior to the arbitration proceeding. The proponent can state what it intended the provision to mean, but it cannot compel the other party to allow it to amend the proposal, if necessary, to reflect that intent. It is for this reason that there is a tactical advantage to be gained by waiting until the other party has "finalized" its offer before objecting that a proposal is worded in such a way as to be subject to an interpretation that is unreasonable, illegal, or in conflict with other provisions of the agreement.152

It is the responsibility of the arbitrator to select the offer which is most reasonable under the statutory criteria. Therefore, it would seem reasonable that the best solution to this problem is to provide that the

152. If the provision is merely subject to an interpretation which is unfavorable to the party making the proposal, it is more advantageous to the other party to wait until the proposal has been ruled upon and, if it is included in the agreement, raise the objection as a basis for refusing to implement the provision in the way intended by the proponent. If the matter is submitted to grievance arbitration, the other party can seek to envoke the rule of construction that a provision should be most strictly construed against the draftsman.
interest arbitrator has the authority to resolve such disputes in the course of making the final offer selection. For the same reason, the proper interpretation placed on a provision to be included in an agreement through final offer selection probably should be deemed that adopted by the interest arbitrator. Certainly, in looking at the “bargaining history” of such a provision, a grievance arbitrator would have to give great weight to such interpretation.

When the dispute over the interpretation does not arise until after one party's final offer has actually been selected, it may result in a grievance under the new agreement. At worst, it can result in delayed implementation or challenges to the validity of the award itself.

For these reasons, care should be taken in scrutinizing the proposals of the parties before the offers are finalized to insure that they accurately reflect the proponent's intent. In one Wisconsin case, the non-prevailing party attacked the award in part on the basis that one of the union's proposals was not worded in a way so as to accomplish its intended purpose. The city sought to include a residency requirement in the agreement and the union resisted such proposal even though there was a de facto practice of requiring residency. In effect, the union's offer was a “no residency requirement” rather than a proposed contract provision which would accomplish that result. The court reached the pragmatic result that it would exercise its power to modify the award so as to require the inclusion of such a provision in the agreement to effectuate the actual intent of the union and the arbitrator.

**Policy Implications and Some Possible Solutions**

The problems encountered in the administration of a final offer arbitration law would not appear to have sufficient importance to control the outcome of the basic policy choice between final offer arbitration and conventional arbitration. While final offer arbitration laws have a number of unique problems associated with their administration, none of those problems would appear to be insurmountable or serve as a basis for avoiding its use.

First of all, in adopting a final offer procedure, careful consideration should be given to the importance of the choice as to the timing of the finalization process. The choice between finalizing offers prior to the arbitration step or during the arbitration step will result in either

153. City of Mantiowoc v. Mantiowoc Police Patrolmen's Local 731, 70 Wis. 2d 1006, 236 N.W.2d 231 (1975).
154. Id. at 1013, 236 N.W.2d at 236-37.
strengthening or weakening any third party procedure which immediately precedes arbitration such as mediation or fact-finding. Moreover, if the choice is to require the finalization of offers during the arbitration step, that choice will not only weaken any third party procedure which precedes arbitration, but it may also increase the number of cases taken to and settled at the arbitration step of the mandated procedure. As the Michigan experience has demonstrated, this approach really amounts to the introduction of “mediation-arbitration” and the indirect imposition of a solution to the impasse which meets the approval of a third party based on the statutory criteria.

A second consideration, closely related to and inseparable from the first, is the choice as to who should control the procedure of finalization. Proper administration of a final offer law which will help achieve the overall settlement objective suggests that the neutral third party administering the law at the point of the finalization of offers, must be in control of the procedure.

The determination whether the mediator or the arbitrator should finalize the offers is inseparable from determining the timing of the finalization process. The ultimate choice between these alternatives is dictated by practical considerations such as the history of public sector bargaining in the particular jurisdiction and the relative availability of skilled and experienced mediators, arbitrators and mediator-arbitrators.

With regard to the procedures to be followed in finalizing offers, the third party neutral who is administering the law at the point of the finalization of offers should probably be given considerable discretion. However, it will no doubt prove necessary to provide some policy guidance to this individual in the form of recommended procedures or rules regarding the proper handling of the finalization process.

One approach, which is arguably consistent with one of the basic tenents of final offer arbitration—that it is risky and distasteful to discourage use—would suggest the adoption of rules and procedures which would allow the parties an equal opportunity to attempt to formulate a winning proposal without regard to full disclosure. The alternative approach, favored herein, is to devise procedures and rules which insure full disclosure and tend to minimize if not eliminate the area of dispute. If the basic outlines of the final offer law are sufficiently fraught with risk, it is inappropriate to allow the parties to pur-

155. See Rehmus note 100 supra.
sue practices which tend to reward cleverness and deception and result in even harsher outcomes.

A legislative choice must be made as to whether the parties should be required to make proposals in the form of complete agreements or in the form of offers which are limited to the issues in dispute. If the latter course is taken, as it has been in most instances, it may become necessary to deal with a number of problems legislatively, by the adoption of rules, or by decisions in contested cases. Probably the best solution is legislation or the adoption of rules designed to insure that any award on the issues in dispute is ultimately incorporated into a comprehensive collective bargaining agreement. Such an agreement should include the provisions of any expired agreement which are to be carried forward in the new agreement; all matters unconditionally agreed upon for inclusion in the new agreement; and the matters awarded by the arbitrator.

Regardless of which legislative model is followed, a procedure should be devised to allow the parties to raise timely objections concerning the legality of the other party's final offer or any portion thereof before the offers become final. To the extent that it is legally possible to do so, the parties should be precluded from engaging in the practice of withholding such challenges until after the offers have become finalized or an award has been issued.

Finally, with regard to the problem of ambiguity, the neutral third party who is administering the law at the point of finalization should take care to insure that the parties' respective offers accurately reflect their intended meaning and do not conflict with the other provisions of the agreement or other provisions of law. If the offers have been finalized before the ambiguity or potential conflict has been identified, the best practical solution would be to provide that the arbitrator may resolve any ambiguities and, if possible, interpret the provision in a way that avoids any potential conflict. A savings clause either proposed by the parties as part of their final offers or mandated by statute will also help to eliminate this problem.

**Conclusion**

There have been a number of compulsory final offer arbitration laws enacted since Professor Stevens first suggested final offer arbitration as a strike substitute that would help overcome some of the basic objections to conventional arbitration. Much of the literature has been devoted to an analysis of those laws and their relative success or failure.
in achieving the results intended. The purpose here has been to identify the basic outlines of those laws and to propose solutions to some of the problems associated with administering such laws.

An analysis of the laws enacted to date indicates that there are two basic patterns roughly conforming to the two models suggested by Stevens, but containing numerous provisions largely designed to temper the potential harshness of the outcome of final offer selection. An analysis of the operation of the final offer arbitration process demonstrates that there are a number of problems associated with their proper administration. Prominent among these are problems regarding the timing of the exchange of final offers, which require the adoption of policies, practices or rules designed to maximize the settlement objective by preventing the parties from engaging in unwholesome practices which might defeat that objective. Other problems regarding the content of the final offers must be effectively dealt with in order to achieve the same objective and to avoid disputes and legal challenges. In particular, statutory provisions or rules should be adopted to insure proper implementation of the award in the form of a written collective bargaining agreement and to insure that disputes over the legality of a particular proposal are raised and resolved in a timely manner so as not to unduly interfere with the arbitration process or create problems regarding the implementation of awards. Disputes over the wording of proposals should be minimized before the offers are finalized and, if necessary, resolved as part of the interest arbitration process itself in order to prevent post-award disputes and challenges.