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Public Sector Impasse Resolution Procedures - The Kenneth M. Piper Lectures

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Although private sector employees have enjoyed organizational and collective bargaining rights since the enactment of the National Labor Relations Act in 1935,1 most of their public sector counterparts were not provided with such prerogatives until the 1960s and 1970s. Governmental personnel in the State of Illinois were not accorded such statutory protections until 1983, when the Illinois Public Labor Relations Act [IPLRA] was enacted.2

The vast majority of states have granted public sector workers the right to collectivize and to negotiate with their respective governmental employers regarding their wages, hours, and working conditions, and many groups of public employees have formally selected collective bargaining agents to represent them.3 As a result of these labor-management relationships, thousands of bargaining agreements are negotiated each year in the United States. Most of these contracts are achieved by the parties amicably and without the need for outside intervention. In some cases, however, such voluntary results are not readily obtained. When bargaining impasses occur, it is frequently beneficial to utilize mediation, fact-finding, and/or arbitration techniques. In a few jurisdictions, such as Illinois, dissatisfied public employees might legally engage in work stoppages to enhance their negotiating positions.4

4. Although most states have not provided governmental personnel with the right to resort
This presentation will discuss the manner in which third-party intervention may be used to prevent or to alleviate collective bargaining impasses. Mediation and fact-finding techniques will be initially explored. The legality and enforceability of binding interest arbitration schemes will next be explained. The propriety and regulation of public sector work stoppages will finally be discussed. Appropriate references will be made throughout to the procedures established under the new IPLRA.

II. Mediation and Fact-Finding

Since the parties to a labor-management arrangement are most familiar with their own needs and interests, it is preferable for them to determine their joint priorities through professional negotiations based upon mutual respect. However, even where a mature relationship exists, the parties may not always be able to achieve a voluntary agreement by themselves. They may simply be unable to understand each other's priorities and constraints. Furthermore, parties with recently established bargaining relationships may be expected to encounter more frequent difficulties. They often use inexperienced negotiators who do not fully comprehend the intricacies and nuances indigenous to the collective bargaining process. Where negotiators are not able to reach a mutual accord through traditional bilateral negotiations, it is generally beneficial to permit the intervention of a trained mediator.

A competent mediator can educate unsophisticated negotiators concerning the operation of the bargaining process and reopen severed channels of communication. While recalcitrant parties at or on the verge of an impasse are usually still talking to one another, neither side may be truly listening to what the other side is endeavoring to say. An adroit mediator can re-establish meaningful communications and induce the parties to focus their attention upon their areas of common interest. Emotional issues can be diffused, and direct conflicts can be minimized. This permits the mediator to act as a face-saving catalyst which can often enable parties to achieve a mutually acceptable accord.

The benefits to be derived from mediation have been expressly to work stoppages, such jurisdictions have found that strike proscriptions do not always preclude collective employee behavior. See id. at 493-96.

5. It is often difficult for governmental managers who have previously been empowered to decide basic employment issues for their workers unilaterally to accept a new bargaining relationship which obliges them to regard subordinate personnel as equals at the negotiating table.

recognized in the IPLRA. Section 12(a) authorizes the Illinois Labor Relations Board and the Chicago Labor Relations Board\(^7\) to jointly create a public Employees Mediation Roster containing the names of qualified mediators who are empowered to intervene in bargaining disputes whenever requested by either party.\(^8\) It should further be noted that Section 5(f) provides the Illinois and Chicago Boards with the authority to "develop and effectuate appropriate impasse resolution procedures for purposes of resolving labor disputes."\(^9\) If these Boards were to decide that mediation might have a beneficial impact upon all collective bargaining disputes, they could presumably promulgate regulations requiring the intervention of a mediator in all seemingly stalled negotiations.

Where parties have been unable to achieve a mutual accommodation through the bargaining process and the efforts of a mediator have been unsuccessful, most state public sector labor relations statutes, including the IPLRA,\(^10\) either permit or require some form of fact-finding. The fact-finder may be selected by the disputants themselves or be appointed by the state board from a list of respected neutrals. Relatively formal evidentiary hearings are conducted, and the public employer and representative labor organization are permitted to present oral and documentary evidence in support of their respective positions.\(^11\) The fact-finder endeavors to clarify the relevant issues. Under appropriate circumstances, he or she may even utilize mediation techniques in an effort to produce voluntary agreement with respect to some or all of the unresolved topics.\(^12\) However, since the parties will usually have been exposed to the mediation function prior to the institution of the fact-finding proceedings, the fact-finder should be careful to only contemplate additional mediation where it appears that the parties would be receptive to such an alternative approach. This might

7. Established officially as the Illinois Local Labor Relations Board pursuant to § 5(b) of the IPLRA. ILL. REV. STAT. ch. 48, § 1605(b) (Supp. 1983).
8. Where security personnel are involved, § 14(a) mandates the intervention of a mediator where negotiations have not been completed prior to thirty days of the expiration date of the current contract.
10. Under § 13 of the IPLRA, fact-finding procedures may be utilized where both parties consent. The fact-finder is to be selected by the disputants from the Illinois Public Employees Mediation Roster. The same procedure is followed under § 12 of the IELRA. See ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983).
occur once the pertinent issues have been delineated and the disputants have gained new insights regarding each other’s interpretation of the underlying facts. At this point, an adroit mediator may effectively re-establish inter-party communication and precipitate a new round of meaningful collective bargaining.13

Following the completion of the fact-finding hearing, the arbiter must prepare a set of detailed conclusions. The fact-finder’s clarification of the unresolved issues and determination of the underlying factual matters may induce the parties to return to the bargaining table. At this point, additional mediation by the fact-finder or another individual may be productive.

The fact-finding process may merely culminate with a delineation of issues and a report on the pertinent factual circumstances. However, such procedures usually permit the neutral person to prepare recommendations concerning the manner in which he or she believes the unresolved items should be resolved. Although the recommendations of a fact-finder are generally advisory and not binding, they may provide the parties with perceptions and options they may not have previously considered.14 If the fact-finder’s supporting rationales are persuasively articulated, his or her report may have an ameliorative impact upon the disputants.15 This is especially true where the conclusions and proposals of the fact-finder are to be made public since societal pressure may be exerted through this process upon the more recalcitrant party.

Even though fact-finder recommendations are not binding, such neutrals should usually utilize the same guidelines which would be applied by an interest arbitrator who is empowered to issue a binding award. Since most neutral arbiters would be expected to apply the appropriate criteria in a similar manner to the relevant facts, such an approach by the fact-finder may obviate the need for resort to a subsequent interest arbitration proceeding—with the disputants recognizing that they would be unlikely to obtain a significantly different result in the arbitral forum. Additionally, it should be noted that if subsequent interest arbitration is needed, the arbitrator may wish to consider the previous fact-finder’s recommendations. If the same stan-

13. Since fact-finders do not possess the authority to issue binding awards with respect to any unresolved issues, the parties should not be as fearful of the prejudice which might result from fact-finder mediation efforts as opposed to a binding interest arbitration proceeding.

14. This will likely occur where the antecedent collective bargaining was conducted by inexperienced negotiators.

15. The fact-finders’ recommendations may be accepted by the parties without further negotiations or dispute resolution proceedings.
dards which constrain the arbitrator were applied by the prior fact-finder, this task would be greatly facilitated.

Some people might wonder why fact-finding with merely advisory recommendations should ever be used where binding interest arbitration will subsequently be available. They may view such procedures as duplicative, with the fact-finding being of little benefit to skilled negotiators who should certainly be able to comprehend the relevant issues and the underlying factual circumstances. While this point may have validity in some cases, it must be remembered that a fact-finder's report may well induce the parties to engage in further negotiations, while a binding interest arbitration determination would usually not have such an impact. If one accepts the premise that a voluntarily achieved agreement by the parties themselves is preferable to an externally imposed resolution, it should be apparent why the intervening fact-finding step is not wholly redundant. Furthermore, a recent empirical study by Professors Stephen Goldberg and Jeanne Brett, using mediation as a last step for contractual grievance disputes that were otherwise destined for arbitral adjudication supports the thesis that even professional parties may benefit from the last minute intervention of a competent mediator. They found that 86% of the grievances which would otherwise have been taken to arbitration—since the parties themselves had been unable to settle them during the prior stages of the grievance procedure—were resolved through resort to the pre-arbitration mediation.

III. INTEREST ARBITRATION

Where collective bargaining procedures have not produced a new contract and mediation and fact-finding techniques have been exhausted without success, the disputants may be able to resort to binding interest arbitration. Twenty-eight states, including Illinois, the Dis-

16. See Simkin, supra note 11.
18. It is particularly appropriate to note that the mediators in the Goldberg and Brett experiment frequently conducted mini-trials which closely resembled the types of hearings conducted by fact-finders with respect to interest disputes. See id. at 24.
trict of Columbia, and the federal government presently have legislation authorizing the use of voluntary (i.e., by consent of parties) or compulsory interest arbitration to resolve some or all public sector bargaining impasses.

Interest arbitration provisions which had been enacted in South Dakota, S.D. COMP. LAWS ANN. §§ 9-14A (Supp. 1983), and Utah, Utah CODE ANN. §§ 34-20a-7 (Supp. 1983), were previously declared unconstitutional. See City of Sioux Falls v. Sioux Falls Firefighters Local 814, 89 S.D. 455, 234 N.W.2d 35 (1975); Salt Lake City v. Int'l Ass'n of Firefighters, 563 P.2d 786 (Utah 1977). Regarding the constitutionality of public sector interest arbitration legislation, see discussion in Part III(B), infra.


22. See, e.g., § 7 of the IPLRA, ILL. REV. STAT. ch. 48, § 1607 (Supp. 1983), which authorizes parties to enter into agreements providing for the use of binding interest arbitration to resolve bargaining impasses. Educational institutions in Illinois may similarly agree to such arbitration procedures. See § 12 of IELRA, ILL. REV. STAT. ch. 48, § 1712 (Supp. 1983).

23. See, e.g., § 14(g) of the IPLRA, ILL. ANN. STAT. Ch. 48, § 1614(g) (Smith-Hurd Supp. 1984-1985), which mandates the use of interest arbitration procedures to resolve negotiation impasses involving security employees and state peace officers and state fire-fighters who are denied the right to engage in work stoppages under § 17(a).

24. "Interest" or "contract" arbitration must be distinguished from the more familiar "grievance" or "rights" arbitration. In the former situation, the designated neutral is used to determine the future contract terms which will bind parties who have been unable to achieve a new agreement through the bargaining process. In the latter situation, the arbiter is merely empowered to decide controversies concerning the interpretation and application of the terms of an already existing collective contract. "Interest" arbitrators generally possess liberal authority, while "grievance" arbitrators are normally precluded from adding to, subtracting from, or modifying the provisions of any contract they are interpreting. See F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 47-50 (1973).
The procedures utilized in interest arbitration cases differ from state to state. Variations may even be encountered within the same state where the applicable legislation follows the IPLRA approach and permits negotiating parties to establish their own mutually acceptable rules. In some cases, a single neutral arbitrator or a state administrative agency may be employed to resolve the bargaining impasse, while in other instances a tripartite arbitral panel consisting of a management representative, a labor representative, and an impartial chair will be utilized. The arbiters may be empowered to formulate any final resolutions of the unresolved issues they believe is appropriate, or they may simply be authorized to select the more reasonable final offer made by one of the disputants, either on an “issue-by-issue” or “total package” approach. Several statutes provide arbitrators with some additional latitude by allowing them to make their selections not only from the final proposals of the parties themselves but from the prior fact-finding recommendations as well.

A. Propriety as Impasse Resolution Device

The proliferation of interest arbitration schemes as an accepted means to finally resolve public sector bargaining impasses has caused some people to question the propriety of such dispute resolution techniques. It has been suggested that the availability of such procedures

25. See supra note 22.


28. See, e.g., MICH. COMP. LAWS ANN. §§ 423.231-423.240 (1978). Under s 14(g) of the IPLRA, ILL. REV. STAT. ch. 48, § 1614(g) (Supp. 1984), the issue-by-issue approach is mandated for security personnel in Illinois with respect to economic subjects. Regarding the appropriate definition of the term “issue,” see West Des Moines Ed. Ass’n v. PERB, 266 N.W.2d 118 (Iowa 1978). Concerning the demarcation between “economic” and “non-monetary” subjects, see Franklin County Prison Bd. v. PLRB, 491 Pa. 50, 417 A.2d 1138 (1980).


30. See, e.g., IOWA CODE ANN. § 20.22 (1978). If a public employer in Illinois rejects any portion of an interest arbitration award pertaining to security personnel, it must provide specific reasons for the rejection and resubmit the issues to the arbitration panel. See § 14(m) of IPLRA, ILL. REV. STAT. ch. 48, § 1614(m) (Supp. 1983). Participating labor organizations are not provided with this option. They are bound by such interest awards if they are accepted by the public employers involved.
may undermine the collective bargaining process by encouraging parties to rely upon the arbitral alternative as a substitute for meaningful negotiations. Some observers have even questioned the fundamental belief of most interest arbitration proponents concerning the efficacy of this device as a strike deterrent. Critics have further maintained that interest arbitration provisions inappropriately delegate to politically unaccountable private arbiters the ultimate authority to determine important employment matters which could profoundly affect the services being provided for the public and the manner in which finite governmental revenues are to be expended.

Although it is not the intention of this presentation to examine these criticisms of public sector interest arbitration in detail, some observations should be briefly noted. The empirical data from those jurisdictions which utilize this technique to resolve bargaining impasses demonstrate that the availability of this device has actually diminished strike activity. Furthermore, there has been no indication that this option has had any pernicious impact upon the bargaining process. Nonetheless, it must be acknowledged that interest arbitration proceedings have undoubtedly influenced governmental institutions by imposing upon public entities employment terms which were not consensually accepted by the elected representatives.

It would be impossible for meaningful collective bargaining rights to be extended to government employees without having some impact upon the political process. An effect upon the political system, however, should not ipso facto preclude the enactment of such labor legislation. Even where no formal negotiation rights are granted to public personnel, such employees can significantly influence the political process through resort to lobbying tactics which are protected under the First Amendment right to petition the government for the redress of grievances. The use of orderly bargaining procedures may even be a more appropriate manner for employees to affect government action.

31. See, e.g., McAvoy, supra note 26, at 1209-1210 and the authorities cited therein.  
32. See, e.g., id. at 1210-1211 and authorities cited therein.  
33. See generally Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156 (1974); Grodin, Political Aspects of Public Sector Interest Arbitration, 64 Cal. L. Rev. 678 (1976). See also McAvoy, supra note 26, at 1208-1209; Morris, supra note 26, at 472.  
35. See Howlett, supra note 34, at 57-61.  
than the less visible types of behavior often utilized by discrete lobbyists.

Despite the distortion of the political process which might occasionally result from the extension of negotiation rights to governmental workers, the extension should be viewed as an appropriate means of enhancing the personal dignity of such employees by providing them with a formal process for participating in the determination of their basic employment conditions. If negotiation rights are to be meaningful, some mechanism must be available to permit the resolution of disputes which parties are unable to settle voluntarily at the bargaining table. Since the vast majority of states have decided that the traditional strike weapon should not be used to break public sector impasses, it should be recognized that interest arbitration may constitute a utilitarian impasse resolution device which is appropriate where suitable substantive and procedural safeguards are provided. It should finally be noted that the alternative to an arbitral dispute resolution procedure would not infrequently consist of strike action regardless of its legality, and it must be emphasized that the distortion of the political process which may be achieved through such disruptive behavior could easily transcend that which would likely be indigenous to a carefully devised interest arbitration program.37

B. Constitutional Considerations

Where legislative assemblies have decided to enact interest arbitration provisions, such statutes have frequently been challenged under diverse constitutional theories. The contention engendering the most intricate judicial scrutiny has concerned the assertion that such enactments constitute impermissible delegations of legislative authority to politically unaccountable private individuals. However, various other constitutional claims have also been raised. Although those other constitutional issues have usually been expeditiously disposed of by judicial tribunals, they should be briefly discussed.

1. Non-Delegation Challenges

Five distinct non-delegation theories have been cited by parties questioning the constitutional validity of interest arbitration statutes. Governmental employers have claimed that such enactments contravene due process and equal protection principles, the one man one vote

doctrine, home rule authorizations, and governmental taxing power.\(^{38}\)

In *Harney v. Russo*,\(^{39}\) the Pennsylvania Supreme Court confronted the argument that a state interest arbitration statute unconstitutionally permitted arbitrators to ignore due process standards. The court recognized that such a contention assumed that procedural safeguards would generally not be satisfied. It appropriately indicated that the possibility of such an impropriety in a specific case could not taint the entire statutory scheme, but only the results of the improperly conducted proceeding.\(^{40}\) Since the availability of judicial review would presumably preclude the enforcement of awards emanating from arbitral hearings conducted in an arbitrary or unfair manner, the court found no reason to sustain a challenge to the underlying enactment.\(^{41}\)

Statutes establishing arbitral dispute resolution procedures for only specific groups of public employees—such as Section 14 of the IPLRA which mandates such an approach for security personnel\(^{42}\)—have been challenged under equal protection concepts. Courts, however, have readily concluded that such legislative distinctions are permissible since they are supported by rational considerations.\(^{43}\) So long as the elected representatives do not make wholly illogical demarcations, the fact that a provision applies to certain government workers but not to others should be irrelevant.

Litigants have alleged that interest arbitration enactments are unconstitutional since they authorize the performance of quasi-legislative functions by private arbiters who have not been selected in conformity with the one man, one vote doctrine. Nonetheless, this claim has been summarily rejected by the courts. As the Pennsylvania Supreme Court

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One writer has suggested that an interest arbitration provision may contravene the separation of powers concept by enmeshing the judicial branch in legislative decision-making through the power of courts to review and enforce the resulting arbitral awards. See Note, *Binding Interest Arbitration in the Public Sector: Is It Constitutional?*, 18 *Wm. & Mary L. Rev.* 787, 816-17 (1977). Such an argument ignores the fact that the judicial review of such quasi-legislative awards is really no different from that traditionally exercised over administrative agencies when they perform similar quasi-legislative functions.

40. 435 Pa. at 192-93, 255 A.2d at 565.
noted in *Harney*, "[T]he mere fact that the arbitration panel . . . could affect the spending of public funds is clearly not sufficient to make that body 'legislative' and thus subject to the one man, one vote principle." Courts have thus refused to accept the notion that statutorily empowered arbitrators are "unelected representatives" who lack the authority to influence the appropriation of public monies.

Judicial tribunals have similarly dismissed assertions that interest arbitration schemes enacted by state legislatures conflict with home rule provisions in state constitutions delegating authority over local matters to municipal entities. Such constitutional provisions usually provide specific exceptions for legislative enactments of general, as opposed to limited, applicability. Thus courts have uniformly sustained statutes which have provided for state-wide coverage, despite the resulting impact of such laws upon local governments.

The final non-delegation challenge to interest arbitration statutes has concerned the effect such enactments have upon the taxing power of municipalities. It has been argued that such laws impermissibly provide arbitrators with the capacity to regulate taxes, a matter within the exclusive domain of elected representatives. This claim has been summarily rejected, since no taxing authority is actually transferred by such legislation to arbitrators. While an arbitral award may provide the impetus for a reconsideration of the existing tax structure, any resulting change will appropriately be effectuated by elected representatives and not by the arbitrator. It has similarly been acknowledged that the enactment of an interest arbitration provision does not usurp the taxing authority vested in local governments. As the Supreme Court of Washington has noted, "although [such a law] may result in the need for local taxation, it does not itself impose any [tax]."

2. Delegation Challenges

The most consequential challenge to public sector interest arbitra-

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tion statutes has involved the contention that such laws impermissibly delegate legislative authority to politically unaccountable arbitrators. Although most judicial decisions have found this argument unpersuasive, it has frequently precipitated strongly divergent opinions.48

In recent years, only three state supreme courts have invalidated public sector interest arbitration enactments based upon the theory that such laws impermissibly delegate governmental authority to private arbitrators.49 In *Salt Lake City v. Int'l. Ass'n. of Firefighters*,50 the Utah Supreme Court succinctly summarized the *ratio decedendi* underlying these decisions:

[T]he [Firefighters Negotiation] act authorizes the appointment of arbitrators, who are private citizens with no responsibility to the public, to make binding determinations affecting the quantity, quality, and cost of an essential public service. The legislature may not surrender its legislative authority to a body wherein the public interest is subjected to the interest of a group which may be antagonistic to the public interest.

The power conferred on the panel of arbitrators is not consonant with the concept of representative democracy. The political power, which the people possess under [the state constitution], and which they confer on their elected representatives is to be exercised by persons responsible and accountable to the people—not independent of them. The act is designed to insulate the decision-making process and the results from accountability within the political process; therefore, it is not an appropriate means of resolving legislative-political issues.51


49. See City of Sioux Falls v. Sioux Falls Fire Fighters, Local 814, 89 S.D. 455, 234 N.W.2d 35 (1975); Greeley Police Union v. City Council of Greeley, 191 Colo. 419, 553 P.2d 790 (1976); Salt Lake City v. Int'l. Ass'n of Firefighters, 563 P.2d 786 (Utah 1977). See also City of Covington v. Covington Lodge No. 1, 622 S.W.2d 221 (Ky. 1981), wherein the court held that a bargaining agreement provision providing for binding arbitration of impasse disputes pertaining to negotiations over subsequent contracts constituted an unconstitutional delegation of power by the municipal employer involved.

Although in State v. Johnson, 46 Wash.2d 114, 278 P.2d 662 (1955), the Washington Supreme Court had invalidated a city charter initiative provision adopting interest arbitration as an impasse resolution device based upon the unconstitutional delegation of legislative authority theory, it subsequently rejected this position in *City of Spokane v. Police Guild*, 87 Wash.2d 457, 553 P.2d 1316 (1976), wherein it sustained the legality of a state interest arbitration statute covering uniformed personnel.

50. 563 P.2d 786 (Wash. 1977).

51. 563 P.2d at 789, 790. See Greeley Police Union v. City Council, 191 Colo. 419, 423, 553
The basic constitutional issue raised by public sector interest arbitration provisions concerns the fact that some legislative authority is being entrusted to non-governmental decision-makers. A state might avoid this legal morass by simply establishing a politically accountable administrative agency to resolve bargaining impasses, as Nebraska did through its creation of the Court of Industrial Relation.\(^5\) It might also be feasible to circumvent the constitutional dilemma by contending that governmentally authorized private arbitrators act as "public officials" when they perform their arbitral functions, thus rendering them "politically responsible." Although this semantical prestidigitation was accepted by the Rhode Island Supreme Court as the basis for sustaining the constitutionality of the Rhode Island Fire Fighters Arbitration Act,\(^5\) other courts have appropriately declined to engage in such legal conjuration. Nonetheless, most have found no impermissible legislative delegation.

The prevailing contemporary judicial philosophy recognizes that while "purely legislative power cannot be delegated, . . . where a law embodies a reasonably clear policy or standard to guide and control administrative officers, so that the law takes effect by its own terms when the facts are ascertained by the officers and not according to their whim, then the delegation of power will be constitutional."\(^5\) Public sector interest arbitration statutes usually satisfy this benchmark, since they empower arbitrators merely to determine the relevant factual circumstances pertaining to a bargaining impasse and to interpret such facts in accordance with prescribed guidelines. Such enactments do not delegate "any power to make the law. The only authority conferred is power to execute the law already determined and circumscribed."\(^5\)


Although the statutes involved in theSioux Falls and Salt Lake Citycases provided no specific standards to guide arbitrators when they were formulating their determinations, neither decision indicated that this legislative omission meaningfully affected the resolution of the constitutionality question.

52. See Neb. Rev. Stat. §§ 48-801 to 48-838 (Supp. 1983). The right of that administrative tribunal to engage in interest arbitration is set forth in § 48-818. This legislative approach might be used in states which have found the use of private interest arbitrators to be unconstitutional.


55. State v. City of Laramie, 437 P.2d 295, 301 (Wyo. Sup. Ct. 1968). In addition to the cases cited in note 54, supra, see City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294
Although interest arbitrators are not directly accountable to the public, appropriate statutory and judicial constraints adequately insure their competency and responsibility. Interest arbitration enactments usually list specific factors which should be considered by arbiters when they are formulating their decisions. Some provide very detailed criteria, as does the IPLRA with respect to impasse procedures involving security personnel:

(h) Where there is no agreement between the parties, . . . and wage rates or other conditions of employment . . . are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

1. The lawful authority of the employer.
2. Stipulations of the parties.
3. The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
4. 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:
   A. In public employment in comparable communities.
   B. 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. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
8. 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.

A few statutes do not enumerate specific standards which must be

56. See City of Richfield v. Fire Fighters Local 1215, 276 N.W.2d 42, 47 (Minn. 1979).
57. See generally McAvoy, supra note 26, at 1199-1201; Morris, supra note 26, at 469-471.
58. ILL. REV. STAT. ch. 48, § 1614(h) (Supp. 1983). Other arbitration provisions list more general factors. See, e.g., MINN. STAT. ANN. § 179.72(7) (West Supp. 1984). With respect to economic issues, § 14(g) of the IPLRA requires the arbitrator to resolve each subject on an issue-by-issue basis from the final offers submitted by the parties. The arbiter would presumably apply the relevant criteria to determine which party's offer is more reasonable.
weighed by arbitral decision-makers. For example, neither Section 7 of the IPLRA\(^59\) nor Section 12 of the IELRA,\(^60\) which authorize public employers and representative labor organizations to negotiate their own interest arbitration procedures, expressly defines the criteria which should guide the designated adjudicators. Nonetheless, as the Pennsylvania Supreme Court appropriately recognized in *Harney v. Russo*,\(^61\) a statute should not be found unconstitutional merely because of the absence of specifically prescribed guidelines. Sufficient guidance may be readily derived from the fundamental policies underlying the adoption of the particular enactment in question and from the decisions of interest arbitrators acting under similar laws. If the Illinois Supreme Court were to be concerned with the legislative omissions in the IPLRA and the IELRA, it could either decide that the legislature must necessarily have intended the standards set forth in Section 14(h) of the IPLRA\(^62\) to guide interest arbitrators resolving impasses involving security personnel to regulate arbiters acting pursuant to voluntarily negotiated procedures or simply obligate such adjudicators to apply generally accepted criteria. Since experienced arbitrators would normally apply similar guidelines even if no legislative or judicial standards were presented,\(^63\) neither of these alternatives would unduly restrict arbitral discretion. Such an approach would also provide for a more orderly judicial review of arbitral determinations.

Courts sustaining the constitutionality of interest arbitration schemes have frequently emphasized the importance of judicial review as a means of ensuring substantive and procedural fairness:

> [T]he courts have the power and the duty to make certain that the [arbitrator] has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature.

Due process of law requires . . . that the contract imposed by the arbitrator under the power conferred by statute have a basis not only in his good faith, but in law and the record before him . . .\(^64\)

Nonetheless, the extent of available judicial review should be carefully

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62. See supra note 58 and accompanying text.
circumscribed. If judicial intervention were too readily permitted, the legislative objective of providing an expeditious and final resolution of bargaining impasses would be seriously compromised. On the other hand, if arbitral awards were accorded excessive deference, public interest could occasionally be substantially prejudiced by intemperate arbitral action.

C. Judicial Intervention/Review

Judicial involvement can occur either before or after an arbitration proceeding has been conducted. A pre-arbitration suit may contend that arbitration should be precluded either because the issues in dispute are not subject to arbitral resolution or the procedural prerequisites to arbitration have not been satisfied. Following the issuance of an award, judicial relief may be sought on the ground that the arbitral decision is substantively or procedurally defective.

1. Pre-Arbitration Intervention

Where state legislatures have indicated their desire to have public sector impasses resolved through arbitral procedures, pre-arbitration judicial intervention should be severely limited. If a governmental employer can unequivocally demonstrate that an allegedly applicable interest arbitration provision does not cover the employees involved in an existing bargaining dispute, it would be appropriate for a court to entertain a request for an order precluding arbitration. Such a wholly legal interpretation would involve issues within the traditional expertise of judges, and there would be little likelihood that the development of an arbitral record would meaningfully assist the court with its decision.

A more complex situation concerns the propriety of pre-arbitration judicial intervention where a party contends that mandatory procedural prerequisites have not been satisfied. Although a court might

65. Although such questions are usually raised in suits by governmental employers to prevent arbitration, they could also be raised by such employers as defenses to actions commenced by representative labor organizations to compel arbitration where such public agencies are refusing to participate in arbitral proceedings.

66. Such relief could either be directly sought by a party dissatisfied with a particular award or be prosecuted by a prevailing labor union against a public employer which has refused to comply with the terms of an arbitral decision. For a more exhaustive discussion of the judicial intervention/review area, see Craver, supra note 48, at 568-77; Grodin, Judicial Response to Public-Sector Arbitration, in PUBLIC SECTOR BARGAINING 241-50 (B. Aaron, J. Grodin & J. Stern eds. 1979).

intervene and prevent arbitration where a statutorily prescribed time limit has elapsed, judges must be careful to recognize that temporal limitations should not always be accorded unquestioned deference. If a labor organization can demonstrate that compliance with a prescribed time frame has been precluded by management's own dilatory tactics, the apparent statutory deficiency should be equitably excused. Courts must realize that time is of the essence with respect to the resolution of bargaining impasses and the prevention of work stoppages which could be precipitated by employee frustration. Thus, such pre-arbitration litigation should always be handled on an expedited basis. Furthermore, judges should unambiguously indicate that arbitration will only be precluded where an employer can convincingly establish that the legislature did not intend to permit arbitral proceedings under the particular circumstances involved. This would indicate to recalcitrant governmental entities the futility of using disingenuous pre-arbitration litigation as a device to thwart the arbitral process.

The most difficult question likely to confront a court prior to the commencement of arbitration would concern a claim that a particular bargaining topic is not subject to interest arbitration resolution. Most interest arbitration schemes assume that the scope of arbitral coverage is congruent with the scope of bargaining, thus restricting arbitral authority to mandatory subjects for negotiation. Such a contention could create a substantial dilemma for the court since the distinction between mandatory wages, hours, and working conditions and merely permissive management prerogatives is frequently nebulous. The development of a detailed arbitral record would generally facilitate the final resolution of this type of question. Thus, judges should normally defer such claims until the completion of the arbitration process.

68. See, e.g., City of Des Moines v. PERB, 275 N.W.2d 753 (Iowa 1979).
69. See, e.g., Firefighters Local 463 v. City of Johnstown, 468 Pa. 96, 360 A.2d 197 (1976). See also John Wiley & Sons v. Livingston, 376 U.S. 543, 557-59 (1964), where the Supreme Court recognized with respect to private sector grievance arbitration disputes that procedural questions should generally be decided by arbitrators, not judges, due to the special equitable considerations that frequently permeate such issues.
70. See Grodin, supra note 33, at 699.

Where parties have themselves voluntarily agreed to more expansive arbitration covering all items in dispute, permissive, as well as mandatory, topics may be subject to arbitral jurisdiction. See Patterson Police Local 1 v. City of Patterson, 87 N.J. 78, 432 A.2d 847 (1981); Sch. Com. of Boston v. Boston Tchrs. U., 372 Mass. 605, 363 N.E.2d 485 (1977). Such a situation may arise under either § 7 of the IPLRA or § 12 of the IELRA (see supra note 22), but not if those provisions are interpreted as permitting voluntarily established procedures with respect to only mandatory topics due to their limiting language.
procedure would avoid the prejudice which might result to employees from a delay of the arbitral proceedings during the judicial determination of the negotiability issue. Yet, it would not detrimentally affect public employers since “after an arbitration decision has been rendered, judicial review is available to determine whether the arbitrators have exceeded their powers.”

2. Post-Arbitration Review

For many years, the national labor policy has acknowledged the exalted status of private sector grievance arbitration procedures by permitting very circumscribed judicial review of awards emanating from such contractually established dispute resolution schemes. So long as a grievance determination “draws its essence from the collective bargaining agreement,” it is entitled to judicial respect.

The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation is different from his.

A similar degree of deference to grievance arbitration determinations has appropriately been demonstrated by most state courts with respect to contractual disputes involving public sector personnel. One might understandably argue that the need for arbitral finality unfettered by time-consuming judicial involvement should militate in favor of such a restrictive review standard for public sector interest arbitration. However, critical differences between grievance arbitration and interest arbitration suggest the need for a somewhat stricter standard of judicial review with respect to interest arbitration awards.

Grievance arbitration procedures generally result from the voluntary agreement of the particular parties involved, while public sector interest arbitration schemes are usually imposed statutorily, not infre-

72. Firefighters Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 615 n.6, 116 Cal. Rptr. 507, 512 n.6, 526 P.2d 971, 976 n.6 (1974). The portions of the challenged arbitral award pertaining to concededly mandatory topics could then be immediately effectuated, with only those portions covering allegedly non-obligatory items being held in abeyance during the judicial review process. See also Sheriffs’ Ass’n v. Milwaukee County, 64 Wis. 2d 651, 221 N.W.2d 673 (1974).


74. Id. at 599. “A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award.” Id. at 598. See generally Comment, Judicial Enforcement of Labor Arbitrators’ Awards, 114 U. Pa. L. Rev. 1050 (1966).

quently upon unenthusiastic governmental employers. Another critical distinction concerns the fact that a grievance arbitrator is merely empowered to interpret and apply the express terms of an existing contract, while an interest arbitrator is authorized to formulate the actual employment terms which will govern the relationship of parties who have been unable to achieve a voluntary agreement themselves. Although the grievance arbitrator's discretion is delineated by the terms of the pertinent bargaining agreement, the interest arbitrator possesses substantial latitude to recommend whatever final resolution seems appropriate. As a result of the discretionary freedom enjoyed by interest arbiters, aberrational decisions may occasionally be issued which reflect neither the desires of the parties nor the realities of the relevant employment market. To preclude the effectuation of such deviant awards, some meaningful judicial review must be available.

Some public sector interest arbitration enactments specifically define the scope of judicial review to be applied to arbitral decisions, while most statutes are either silent with respect to this subject or provide no really definitive standards. Where express review criteria are legislatively prescribed, courts are fairly well apprised of the reviewing function they are expected to perform. In jurisdictions where no statutory guidelines are delineated—and even to a substantial degree in states where express standards are enumerated—judges must themselves develop appropriate review criteria.

If courts are so hesitant to disturb arbitral determinations that they effectively provide total deference to the recommendations of arbiters, there exists the possibility of catastrophic consequences resulting from an intemperate award. Conversely, if judicial intervention is readily available, one of the basic benefits to be derived from interest

76. See Overton, Criteria in Grievance and Interest Arbitration in the Public Sector, 28 ARB. J. 159, 161-63 (1973).
77. Collective contracts typically provide that the grievance arbitrator is not authorized to add to, subtract from, or modify the terms of the agreement.
79. See, e.g., § 14(j) of the IELRA, ILL. REV. STAT. ch. 48, § 1614(j) (Supp. 1983), which provides for the rejection of an arbitral award pertaining to security personnel only where "the arbitration panel was without or exceeded its statutory authority; the order is arbitrary, or capricious; or the order was procured by fraud, collusion or other similar and unlawful means." Although § 7 of the IELRA, ILL. REV. STAT. ch. 48, § 1607 (Supp. 1983), specifies that the Illinois "Uniform Arbitration Act," ILL. REV. STAT. ch. 10, §§ 101-123 (1983), shall regulate voluntarily negotiated interest arbitration schemes, § 12 of the IELRA, ILL. REV. STAT. ch. 48, § 1712 (Supp. 1984), contains no such directive.
80. See McAvoy, supra note 26, at 1204; Morris, supra note 26, at 492-93.
81. Even where fairly specific standards are statutorily prescribed, sufficient latitude usually exists to accord reviewing courts meaningful discretion.
arbitration schemes, the expeditious resolution of bargaining impasses, would be substantially endangered. The challenge is to develop review standards that will discourage frivolous appeals while still allowing judicial intervention in those occasional situations where corrective action is warranted.

Since interest arbitrators are generally empowered to perform functions analogous to those performed by administrative agencies, it is appropriate for courts to utilize review procedures similar to those used to review administrative adjudications. It is recognized that the burden of persuasion must rest upon those parties challenging arbitral decisions. If a party can demonstrate that an award has been procured by fraud or corruption, it should not be entitled to judicial acceptance. However, the mere allegation of arbitral misconduct should not automatically prevent enforcement of a challenged decision. The claimed transgression must first be established, and it must additionally be shown that the questioned behavior may actually have influenced the outcome.

Where all or part of an arbitral order is procedurally or substantively defective, judicial intervention should be available. For exam-


85. See Crosby-Ironton Fed'n of Teachers, Local 1325 v. Independent School Dist., No. 182, 285 N.W.2d 667 (Minn. 1979). Cf. Bethlehem Steel Corp. v. Fennie, 86 Misc.2d 968, 383 N.Y.S.2d 948 (1976), aff'd, 55 A.D.2d 1007, 391 N.Y.S.2d 227 (N.Y. App. Div. 1977), wherein the court vacated a 2-1 arbitral decision. The majority panel consisted of the union and the police department representatives. It was established that the employer's representative, who was then the city safety commissioner, had shifted his loyalty prior to the award from the police department to the union, following an intervening mayoral election, since he knew that he would no longer be retained as safety commissioner but would instead be returning to his former position as police captain.

86. See City of Manitowoc v. Police Department, 70 Wis. 2d 1006, 1019-1020, 236 N.W.2d 231, 239 (1975); Firefighters Local 1296 v. City of Kennewick, 86 Wash.2d 156, 162, 542 P.2d 1252, 1256 (1975). These decisions recognized that mere contact between the arbitrator and one party under circumstances creating the impression of possible impropriety did not require vacation of the award where no inappropriate influence was substantiated.

87. If only part of an arbitral decision is unenforceable, the remaining portion of the award should be left intact by the reviewing court so long as it appears that the invalid portion did not impermissibly taint the other sections. See Marlborough Firefighters v. City, 375 Mass. 593, 596-601, 378 N.E.2d 437, 439-41 (1978). Where the evidence indicates that the improper part of the decision may have affected the other recommendations, the court should, if possible, remand the case to the arbitrator for reconsideration.
ple, if an arbitration statute were to specifically mandate the issuance of decisions within a certain number of days following the commencement or termination of the evidentiary hearings, an opinion rendered after the expiration of the requisite time limit should usually be denied enforcement.\(^8\) Where an enactment expressly precludes the issuance of arbitral directives operating beyond a particular time period, an order obligating the public employer for a longer duration should be curtailed.\(^8\) A similar result should occur where an arbitrator who only possesses the authority to issue prospectively effective orders announces an award requiring retroactive application.\(^9\)

Even in the absence of an explicit legislative provision limiting arbitral authority, courts should certainly not sustain decisions which direct the performance of improper acts.\(^9\) This doctrine should not, however, permit recalcitrant governmental entities to circumvent their labor obligations through the enactment of self-imposed legal restrictions.

An arbitration award which deals only with proper terms and conditions of employment serves as a mandate to the legislative branch of the public employer, and if the terms of the award require affirmative action on the part of the Legislature, then they must take such action, if it is within their power to do so.\(^9\)

The most delicate issue which regularly confronts courts concerns the degree of judicial deference to be accorded discretionary evaluations made by interest arbitrators. Factual determinations that are rationally supported by the evidentiary record should usually be confirmed, even where the court is not entirely satisfied with the conclusions reached.

\[\text{The only question \ldots is whether the [arbitration] board has abused its discretion. In making this determination, we do not weigh evidence or act as fact-finders. All we shall do is to examine the}\]

\(^8\) See Maquoketa Valley Community School Dist. v. Education Ass'n., 279 N.W.2d 510 (Iowa 1979). If such a time limit were found to be merely suggestive instead of mandatory, a belated award should probably be enforced, except, perhaps, where undue prejudice to one of the parties has been caused by the delay.


record made before the board to determine whether it contains any competent evidence that would support the board's action. Nonetheless, circumspection must be maintained in specific cases to ensure that questionable factual determinations are not perfunctorily accepted by overly deferential judges. Because of the significant impact upon the general public which could result from an irrational arbitral decision, a court should cautiously examine the entire record before confirming a challenged factual conclusion. Even though a court should never simply substitute its assessment of the factual record for that of the arbitrator, since the legislature has designated that individual as the person who is to make the requisite factual evaluations, a reviewing tribunal should not hesitate to vacate arbitral findings which are unquestionably contrary to the evidentiary record.

Once the reviewing court has decided to accept the factual conclusions of the arbitrator, it must determine whether the arbiter has applied the appropriate criteria to those findings. Where specific statutory guidelines are prescribed, the reviewing tribunal should certainly consider their applicability. If such standards appear to be all-inclusive, a court might conclude that the legislature must necessarily have intended to exclude the application of other criteria. However, such a conclusion should only occur in the face of an unequivocal legislative mandate. It should not be presumed from a set of typical guidelines which might be more reasonably regarded as illustrative, rather than exclusive. If it is not readily apparent that the legislative body intended that the statutory criteria be exclusive, courts should be willing to develop such additional guidelines as are consistent with those specified in the law. In jurisdictions where no definitive standards are enumerated, courts must adopt their own. They should look to the criteria contained in similar enactments in other states and to the factors generally applied by interest arbitrators in their decisions.

Arbitral determinations that have a reasonable foundation in the statutorily prescribed or judicially developed interpretive guidelines should usually be accorded judicial acceptance.

[T]he presence of evidence pertaining to any or all of the specific criteria which are to be "considered" is a factor to be taken into account when determining whether the award itself is founded on a rational basis . . . An award may be found on review to be rational if any basis for such a conclusion is apparent to the court . . . And it

need only appear from the decision of the arbitrators that the criteria specified in the statute were "considered" in good faith and that the resulting award has a "plausible basis". 98

Where a court is asked to ascertain whether an interest arbitration award has correctly explicated the applicable interpretive guidelines and properly applied them to the underlying factual findings, it should scrutinize the arbitral opinion to insure the presence of a rational foundation. Although one court has indicated that it will not always require interest arbitrators to provide written decisions to explain the manner in which the resulting award has been achieved,97 other tribunals have appropriately refused to countenance such a practice.98 If pertinent guidelines have been impermissibly ignored or have been interpreted in an unquestionably incorrect manner, the award should be vacated.99 Furthermore, while a court should not reject arbitral recommendations merely because it would not have rendered the same conclusions had it been the original arbiter, it should not sustain an award that has applied the relevant criteria to the pertinent facts in a wholly irrational manner.

Where a reviewing tribunal vacates a discretionary finding or recommendation contained in an arbitral decision, it should, if possible, remand the case to the arbitrator for a reconsideration of the relevant portion of the award. Such a re-evaluation should not initially be undertaken by the court, since it is not the entity that the legislature designated to make such determinations. The other untainted parts of the award should, of course, be immediately enforced.

Judges reviewing interest arbitration decisions must endeavor to maintain a precarious balance. They must recognize that they should not impermissibly usurp the authority of the arbitrator by injudiciously interfering with that individual's conclusions and recommendations. They must conversely realize that they should not abdicate their judicial obligation by providing arbitral determinations with undue defer-

97. See City of Manitowoc v. Police Department, 70 Wis. 2d 1006, 1017, 236 N.W.2d 231, 237-38 (1975).
98. See, e.g., City of Cranston v. Hall, 116 R.I. 183, 187, 354 A.2d 415, 418 (1975). While such an abbreviated approach might be appropriate with respect to grievance awards, due to the substantial judicial deference given to such determinations, [see United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)], it should not be accepted regarding quasi-legislative interest arbitration determinations which are not entitled to such a strong presumption of arbitral propriety.
ence. As long as this equilibrium is maintained, the arbitration process and the public interest should both be appropriately protected.

IV. PROPRIETY AND REGULATION OF WORK STOPPAGES

The conventional work stoppage has been the most potent economic weapon used by private sector labor organizations to enhance their collective bargaining interests. Since the enactment of the National Labor Relations Act in 1935, private sector employees have enjoyed the statutorily protected right to engage in peaceful strikes. Most governmental personnel, however, have not been accorded such a privilege.

It is generally recognized that public employees do not possess any constitutional right to participate in a concerted work stoppage. Nor is such a privilege embodied in traditional common law principles. As a result, strike action by government workers has usually been expressly or implicitly prohibited. Nonetheless, such proscriptions have certainly not prevented all public sector work stoppages.

Where government personnel become substantially dissatisfied with their existing employment conditions or the manner in which they are being treated by their employer, they may contemplate the joint withholding of their services regardless of the presence or absence of any statute providing them with the right to strike. One of the fundamental causes of worker unrest concerns the paternalistic attitude which has conventionally been exuded by many governmental administrators. Since such managers have, until quite recently, possessed the authority to unilaterally dictate the terms of employment to their respective subordinates, without being under any legal obligation to accept any meaningful input from such individuals, they often find it difficult to accept the codetermination principle inherent in collective bargaining legislation. Employees who are denied the opportunity to participate in the determination of their employment destiny may occa-

sionally become frustrated by their lack of influence. If that frustration becomes sufficiently intense, it may precipitate concerted behavior.

Conventional managers frequently make the mistake of assuming that their subordinates are entirely loyal to their governmental employer. They ignore the fact that such people share a significant community of interest with their fellow rank-and-file workers and with their representative labor organization, if any. Where naive supervisors deprive those fellow employees of basic employment dignity or choose to ignore the right of a designated bargaining agent to participate in the formulation of basic employment policies, they must realize that workers may become sufficiently outraged to consider a joint response.

Some myopic managerial personnel may create circumstances favorable to strike activity in either of two direct ways. When a collective contract is being negotiated, they may over-estimate the effectiveness of statutory strike proscriptions and engage in provocative bargaining tactics, assuming that their underlings will simply have to accept such behavior. During the life of a bargaining agreement, they may similarly disregard their obligations to deal with employee grievances in a serious and expeditious manner. If sufficient worker frustration arises from the mishandling of an accumulated number of different grievances, the circumstances may precipitate a work stoppage. This is why public employers and judges who observe a strike over a seemingly insignificant matter should endeavor to obtain an understanding of the entire situation. Since people will rarely leave work over a minor disagreement, they must acknowledge the fact that the issue which may have precipitated the walkout merely represents the tip of the iceberg.

A. Propriety of Public Sector Strikes

Although observers have generally recognized that strike proscriptions do not ipso facto prevent work stoppages, they have disagreed about the propriety of authorizing such conduct by public employees. Some have asserted that the injury to the public caused by inter-

ruptions of services which may only be provided by government agencies and the disruption of the political process created by the excessive influence exerted by labor organizations through such tactics should militate against the extension of a strike privilege. Such strike opponents understandably fear that precious community resources will be expended, not in accordance with the true needs and desires of the general public, but in accordance with the parochial demands of particular labor unions which are politically unaccountable. While this contention is clearly not specious, it must be recognized that this situation is not that different from the distortion of the political process generally caused by various special interest groups which might unduly influence the decisions of elected officials. Although striking employees who perform important services might occasionally exert excessive pressure during a work stoppage, such influence may be diminished significantly by the willingness of public consumers to accept the short-term inconvenience indigenous to such walkouts.

Other experts have maintained that the acceptance of a strike right for government personnel will not automatically result in dire consequences. They emphasize that even services provided by political entities normally do not exist in a vacuum. They are affected by conventional market restraints which preclude unreasonable distortion through the bargaining process. If public employees are able to obtain exalted compensation and unproductive work rules, their employing agency may be forced to consider the contracting of their functions to private companies. Refuse collection, snow removal, health care, transportation services, and even firefighting responsibilities have been performed for municipalities by private contractors. It should also be noted that in those jurisdictions where such services are already accomplished through private enterprise, the employees involved generally possess the right to engage in work stoppages. It must finally be emphasized that if public employees are to be provided with any meaningful collective bargaining rights, they will either have to be given the privilege to utilize walkouts to enhance their position vis-a-vis recalcitrant governmental employers or be provided with some other dispute resolution mechanism, such as interest arbitration procedures. In the


absence of such impasse resolution techniques, collective bargaining is effectively reduced to collective begging.

Most observers do recognize that certain critical public services must never be curtailed by strike action. For example, police and fire protection, and emergency medical services in communities which have no private sector facilities, must be available on a continuous basis if unconscionable catastrophes are to be avoided. As a result, even proponents of the strike privilege have generally acknowledged that truly “essential” public servants should not be permitted to withhold their services. Many less essential employees, however, might be allowed to engage in work stoppages to enhance their bargaining interests.

If the general public and political officials are willing to accept the fact that governmental service interruptions will occasionally cause some inconvenience, such employee behavior might be effectively counterbalanced and even discouraged. When transit or refuse personnel leave their positions, the consuming public will have to make other arrangements. If they are able to do so efficiently, the pressure being exerted by the striking employees will be significantly diminished. Elected officials must be similarly willing to accept the discomfort caused by constituents who are displeased by the temporary unavailability of expected services. By having the courage to avoid an immediate and costly capitulation to the occasionally excessive demands of a striking union, such officials can both protect the overall public interest and demonstrate to public servants that they cannot simply extort unreasonable benefits through concerted conduct. Once an appropriate balance of power has been obtained, parties should be able to achieve reasonable accommodations in most instances without the need for service interruptions. States such as Illinois have provided an additional prophylactic mechanism, by authorizing public employers and labor organizations who are unable to resolve their bargaining disagreements amicably to utilize interest arbitration procedures as a substitute for work stoppages.

108. Some of the less critical functions performed by such “essential” personnel might easily be curtailed in the short run without any deleterious consequences. However, strike proscription statutes normally do not make such distinctions.

109. As a substitute for the right to strike, such personnel are often provided with the interest arbitration alternative to insure equitable treatment during the bargaining process. See, e.g., § 14(g) of the IPLRA, ILL. REV. STAT. ch.48, § 1614(g) (Supp. 1983), which provides such a right for security workers.

110. See supra note 22.
B. Enforcing Strike Proscriptions

States which prohibit work stoppages by public employees must initially determine which forms of concerted behavior are to be covered by their strike ban. It is obvious that a group refusal to work would be proscribed even if it were accomplished under the guise of a "sick-out." Partial strikes consisting of slow-down or a refusal by employees to perform all of their regular duties should also be precluded. For example, if workers declined to carry out ancillary job functions which they have consistently performed over a sustained period of time, it would normally be viewed as "strike" activity. Although a concerted refusal to perform certain basic job functions would normally be proscribed, it is not always clear whether such tactics as a group refusal by teachers to attend a Parent Teacher Association conference should be included. A rule of reason must be articulated to provide appropriate guidance in this area.

Some government workers endeavor to enhance their bargaining interests by assiduously complying with regulations which are not usually strictly followed. Police officers might, for example, issue citations for every conceivable infraction. So long as they are distributing valid summonses, and their behavior does not interfere with their performance of other duties, it is likely that such action will not be found to contravene a strike ban.

A problem may arise where an individual or several people who are not ostensibly on strike decline to cross a picket line established by other employees under circumstances where they fear either immediate physical violence or future retaliation if they endeavor to enter their place of employment. If they possess a reasonable apprehension of serious consequences, their decision not to cross the picket line should not be found to violate a strike prohibition. However, the evidence should demonstrate that their failure to report for work was the result

111. See, e.g., In re Forestville Transportation Ass'n, 4 N.Y.P.E.R.B. ¶8020 (1971).
112. See, e.g., Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula Unified School Dist., Cal. P.E.R.B. No. LA-CE-361, ¶142,733 (1982) (refusal of teachers to give discretionary examinations which have traditionally been given); City of Dover v. Int'l. Ass'n. of Firefighters, Local 1312, 214 N.H. 481, 322 A.2d 918 (1974) (refusal of firefighters to respond to alarms during off-duty hours as normally done). Lenox Education Ass'n v. Mass. L.R.C., 471 N.E.2d 81 (Mass. Sup. Jud. Ct. 1984) (concerted refusal of teachers to perform services traditionally [performed] after school hours even though not specified in most recent collective contract—but not refusal by specific employee to do tasks individual to that particular worker and which had not been customarily performed by other employees).
113. See, e.g., Purcell v. Greenwald, 1981-83 PBC ¶37,361 (Sup. Ct., Nassau Co. 1980).
of intimidating conduct sufficient to instill a reasonable fear of meaningful physical danger which a person of ordinary firmness would not be expected to resist. Such a standard would prevent the disingenuous use of this device as a means of circumventing a strike proscription.

States which have prohibited strikes must decide what punishments should be imposed upon transgressors. A penalty scheme must be devised which will adequately punish violators while simultaneously deterring other government workers who might contemplate proscribed behavior. The punishment to be imposed upon individuals contravening the strike proscription must not be so Draconian that it effectively forces people who become involved in an unlawful work stoppage to relinquish their jobs permanently. For example, if truly excessive fines were to be imposed upon such violators, they might be compelled to resign their positions in an effort to prevent their financial ruin.

Jurisdictions should similarly eschew provisions which deprive struck governmental employers of all flexibility. It would be disastrous to adopt a rule which required either the automatic and permanent termination of all striking employees or the negation of any bargaining agreement which has been procured through strike action. Once such a diabolical measure fails to prevent a particular walkout, the dire consequences associated with such a myopic approach become clear. At this point, the unreasonable rule must either be ignored, or the public must suffers a terrible inconvenience as the governmental employer seeks to re-establish operations with entirely new personnel.

Injunctive proceedings often provide the most effective means of initially combating strike action. Although courts will usually not utilize their equity power to enjoin a work stoppage which is merely being contemplated by public employees, they will generally be willing to entertain a request for injunctive relief once a walkout has commenced. In states which have anti-injunction statutes pertaining to peaceful labor disputes, courts have appropriately recognized that such enactments were not intended to preclude injunctive orders applicable to illegal strikes associated with public sector controversies.

Courts are not always willing to permit struck governmental em-

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117. See, e.g., City of Pana v. Crowe, 57 Ill. 2d 547, 316 N.E.2d 513 (1974); Minneapolis Fed'n of Teachers v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966).
ployers to obtain immediate injunctive relief in judicial forums. For example, the California Supreme Court has ruled that since an unlawful work stoppage may constitute an unfair labor practice, a struck entity must initially petition the public employment relations board for redress. If the state board determines that injunctive relief would be appropriate in a particular case, it has the authority to petition a court for such an order. Although this approach guarantees a more uniform state policy with respect to the availability of strike injunctions, most other courts have not imposed such a prerequisite to judicial intervention. They have recognized that time is of the essence when government services are being interrupted, and they have evidenced a willingness to entertain injunction requests filed directly by struck employers.

When some courts are asked to enjoin public sector work stoppages, they initially determine whether traditional equity doctrines warrant the granting of such relief. They require the petitioning party to establish that irreparable harm may result if such relief is denied. However, most state courts do not require a showing of irreparable harm where a governmental employer is being struck. Those courts which apply equitable principles to such injunctive proceedings should be willing to reject a requested order in those circumstances where it is demonstrated that the public employer actually provoked the work stoppage through intolerable conduct. In *Holland School District v. Holland Education Association*, the Michigan Supreme Court indicated that a manifest refusal by the governmental employer to bargain in good faith with a representative labor organization could provide a

118. *See* San Diego Teachers Ass’n v. Superior Court of San Diego County, 24 Cal. 3d 1, 154 Cal. Rptr. 893, 593 P.2d 838 (1979).


121. *See*, e.g., Board of Ed. of Community Unit Sch. Dist. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); Board of Education, Borough of Union Beach v. New Jersey Education Ass’n, 53 N.J. 29, 247 A.2d 867 (1968). Since temporary injunctive orders are generally considered to be extraordinary remedies, some of these courts have indicated that they should be issued “only in cases of great emergency and gravity.” *See* City of Rockford v. Firefighters, Local 413, 98 Ill. App. 2d 36, 41, 240 N.E.2d 705, 707 (1968); School Committee, Town of Westerly v. Teachers Ass’n, 111 R.I. 96, 299 A.2d 441 (1973).

122. Even courts which do not generally apply conventional equity doctrines to such proceedings should seriously consider adoption of the so-called provocation defense to prevent a transgressing governmental employer from benefiting from its wrongful conduct.

defense to a request for injunctive relief against the resulting work stoppage. The court reasonably acknowledged that it would simply be unfair to allow a public entity which precipitated strike conduct by its own unlawful action to invoke the assistance of an equity court. While mere technical violations should not immunize striking workers from injunctive relief, serious and provocative transgressions often should.

Where parties disobey injunctive orders, they become subject to criminal or civil contempt citations.\textsuperscript{124} In most instances, the court will impose a fine, which may increase if the striking party does not expeditiously comply with the injunction.\textsuperscript{125} However, it should be noted that a representative union will not automatically be held liable for the strike actions of its members. It will only be held financially responsible if it can be established that it authorized, ratified, or otherwise supported the unlawful conduct.\textsuperscript{126}

On rare occasions a court may contemplate the incarceration of union officials who do not act with sufficient alacrity and enthusiasm to get their striking members to return to work. This tactic will usually not produce the anticipated results since the employees will generally not relent until their leaders indicate that they have obtained what they want. Two clearly negative consequences are also associated with this approach. Union officials who are in jail understandably find it difficult to engage in the type of collective bargaining that is likely to produce a final resolution of the underlying dispute. Furthermore, the imprisonment of union leaders generally creates a martyr situation which tends to guarantee the future re-election of the seemingly irresponsible persons.

Where labor unions instigate or support illegal work stoppages, certain penalties may be considered which would affect their status as representative organizations. The most drastic measure of this type would involve the revocation of their certification.\textsuperscript{127} The primary difficulty with this technique concerns its impact upon the represented workers and the bargaining process itself. If the employees sincerely desire a bargaining agent, it seems unfair to deprive them of the opportunity to utilize the union they most want. It is true that they can al-

\begin{itemize}
\item \textsuperscript{124} Regarding the distinction between civil and criminal contempt proceedings, see H. Edwards, R. Clark & Craver, \textit{supra} note 3, at 541-50, and authorities cited therein.
\item \textsuperscript{125} \textit{See, e.g.}, State of Wisconsin v. King, 82 Wis.2d 124, 262 N.W.2d 80 (1978); School Committee of New Bedford v. Dlouhy, 360 Mass. 109, 271 N.E.2d 655 (1971).
\item \textsuperscript{127} \textit{See, e.g.}, Md. Ann. Code, art. 77, § 160(1) (1980).
\end{itemize}
ways select another representative, but industrial democracy will be at least partially thwarted. It must also be recognized that a work stoppage rarely results entirely because of the irresponsibility of one party. Employer recalcitrance may well influence the decision of workers to strike. Unresolved employee grievances may also be a contributing factor. It would thus be anomalous to decertify the representative labor organization at the very time negotiation channels need to be re-established to enable the parties to alleviate the conditions which precipitated the improper employee behavior. For similar reasons, it is generally not beneficial to withdraw checkoff privileges from such a union. Such action simply creates unnecessary animosity which is likely to have a negative impact upon subsequent negotiations, and it does not meaningfully deter future job actions.

Labor organizations which encourage or support illegal work stoppages may occasionally be sued for damages by either the affected governmental entity or third parties injured by the strike. Although a few courts have indicated that a struck employer may be able to obtain monetary relief from the responsible union, others have rejected this approach.128

In *Caso v. District Council 37, AFSCME,*130 the court expanded labor liability by recognizing that third parties injured by an illegal strike could sue the labor organization for damages. However, most courts have rejected this theory. They have concluded that such an approach was not contemplated by the legislature when it proscribed public sector strikes, nor would it be consistent with the maintenance of harmonious labor-management relations.131 Since such damage actions have such a devastating impact upon affected labor organizations, courts should only permit such suits, either by struck governmental em-


ployers or by injured third parties, where the legislature has unequivocally indicated its desire to impose such liability. Furthermore, no legislature should establish such a principle without thoroughly considering the industrial relations ramifications. The benefits which might be derived from such a doctrine might easily be outweighed by the concomitant deleterious consequences. It would also be difficult, if not impossible, to establish reasonable liability limits with respect to suits being prosecuted by indirectly injured third parties.

Individual employees who participate in an unlawful work stoppage may suffer various forms of discipline. So long as due process requirements are satisfied, they may be suspended or even dismissed.\(^3\) Although terminations were implemented with respect to those people who engaged in the 1981 air traffic controller strike,\(^3\) such drastic discipline should rarely be contemplated. It would be preferable, where a struck employer decides that it must endeavor to maintain uninterrupted operations, either to hire temporary replacements or to advertise for permanent replacements. When permanent replacements are to be sought, individuals participating in the unlawful work stoppage should generally be given the opportunity to return to their former positions. Such an option would save the governmental employer substantial training costs with respect to replacements, and other devices can be utilized to punish the illegal strikers who decide to return to work.

Employees who engage in unlawful walkouts can reasonably be punished and deterred from subsequent strike activity through the imposition of fines. For example, New York State has adopted a system which results in a two-day fine for each day an individual remains on strike.\(^4\) Such a procedure is appropriately related to the length of the service interruption attributable to each striking worker, yet it does not have an unconscionably harsh impact.

C. Limited Right to Strike

Although no state has accepted the notion that public sector employees should possess the same expansive right to engage in work stoppages as is enjoyed by their private sector counterparts, several leg-

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132. See Hartonville Joint School Dist. No. 1 v. Education Ass'n, 426 U.S. 482 (1976). The permanent replacement of striking personnel should normally not be permitted under circumstances where the governmental employer directly precipitated the job action by committing serious unfair labor practices.

133. See generally Meltzer & Sunstein, Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers, 50 U. Chi. L. Rev. 731 (1983), and authorities cited therein.

islatures have provided at least some government personnel with a limited right to strike. For example, Section 17 of the IPLRA expressly authorizes walkouts by employees who are represented by an exclusive bargaining agent where: (1) the existing contract either does not prohibit strikes or has expired; (2) the public employer and union have not voluntarily agreed to submit the disputed issues to final and binding arbitration; (3) the labor organization has requested the intervention of a mediator; and (4) five days have elapsed since the union provided the affected government entity with notice of its intention to strike. Workers who participate in a protected service interruption may not be disciplined, but they are not entitled to compensation for the time they remain away from work.

Section 18 delineates the circumstances under which a struck public employer may request a cessation of the work stoppage. If a walkout which is imminent or in progress “may constitute a clear and present danger to the health and safety of the public,” the affected entity may petition the State Labor Relations Board for an expedited investigation and hearing. However, any unfair labor practices which may have been committed by the petitioning employer shall constitute a defense to such a petition. Although the scope of this affirmative defense is not clearly defined, one would presume that the unfair labor practices in question must have meaningfully contributed to the work stoppage, either as an instigating factor or as a prolonging element.

Where the public employer has committed no relevant antecedent unfair labor practices and the State Board finds, within seventy-two hours, that “a clear and present danger to the health and safety of the


136. ILL. REV. STAT. ch. 48, § 1617 (Supp. 1983). A similar right to engage in work stoppages is provided to educational employees in Section 13 of the IELRA, ILL. REV. STAT. ch. 48, § 1713 (Supp. 1983).

137. ILL. REV. STAT. ch. 48, § 1618 (Supp. 1984). An identical standard applies under § 13 of the IELRA, ILL. REV. STAT. ch. 48, § 1713 (Supp. 1983), but there is no requirement for Education Labor Relations Board proceedings prior to the filing of an injunction request in a circuit court.
IMPASSE RESOLUTION

public" does exist, the governmental employer is directed to petition the Circuit Court "for appropriate judicial relief to stop the strike or to set conditions and requirements which must be complied with by the exclusive representative, to avoid or remove any such clear and present danger."

The statute appears to indicate the selective measures designed to eliminate the actual danger to the public health and safety should be utilized where feasible, before any blanket injunction is issued against the entire work stoppage.

No injunctive relief shall be granted except upon a showing that the strike constitutes a clear and present danger to the health and safety of the public. The court may allow the strike to occur or continue under conditions which it finds will avoid or remove any such clear and present danger. The court shall designate the essential employees within the affected unit whose services are necessary to avoid or remove any such clear and present danger. Such employees may be ordered to return to work under conditions and requirements which the court finds to be appropriate and such order may be only for a limited duration, and may be extended only upon demonstration that such extension is necessary to protect the public health and safety from a clear and present danger.138

A court should thus refuse to enjoin work stoppages in their entirety where other means are available which could more narrowly be tailored to eliminate the health and safety threat.139

Courts must be careful to recognize that "a clear and present danger to the health and safety of the public" involves more than the typical inconvenience associated with conventional work stoppages.140 A relatively certain threat to public health and safety which is rather imminent must be present before judicial relief should be permitted.141 For example, a strike by refuse collectors might reasonably continue for a meaningful period of time before any threat to public health and safety would become real. Furthermore, through the use of a narrowly drawn injunctive order once this danger point has occurred, a court could eliminate the immediate threat while simultaneously allowing other refuse collectors to remain on strike until the continued withholding of their services has created such a danger vis-a-vis their customers.

Even where a clear and present danger to public health and safety


139. Where a narrow order has been formulated to eliminate the health and safety threat, the striking labor organization may decide to end the remaining portion of the work stoppage, in recognition of the fact that the effectiveness of its strike weapon has been substantially diminished.


has been established, a petitioning governmental employer may still be unable to obtain injunctive relief. Section 18(b) specifically recognizes that traditional equity defenses, such as unclean hands or the commission of antecedent unfair labor practices by the petitioning employer, shall be applicable. Thus a government entity which has precipitated a work stoppage through its own improper conduct may not invoke the equity jurisdiction of a circuit court to enjoin that strike. Section 18(a) also requires a court which grants injunctive relief against a walkout to direct the parties to participate in the interest arbitration procedures set forth in Section 14 for security personnel.\textsuperscript{142} This guarantees that employees who have been judicially deprived of their statutory right to strike because of the need to protect the public health and safety will be able to use the arbitration alternative to enhance their interests.\textsuperscript{143}

V. Conclusion

Most states have provided public sector employees with collective bargaining rights. Through voluntary negotiations and the occasional assistance of professional mediators, most parties are able to achieve mutual accommodations of their competing interests. In those instances where bargaining impasses occur, fact-finding procedures may be beneficial. The relevant facts are determined, and advisory recommendations are made to guide the parties. If fact-finding efforts are not successful, many states permit the use of binding interest arbitration. A few states even allow employees who are not satisfied with negotiation progress to engage in work stoppages. As a result of these diverse dispute resolution alternatives, governmental employers and representative labor organizations are normally able to achieve collective contracts without significant public inconvenience.

\textsuperscript{142} See supra note 23. It is interesting to note that § 13 of the IELRA does not contain language requiring a court enjoining a work stoppage to direct the petitioning employer to participate in binding interest arbitration procedures. If such a school district does not voluntarily consent to interest arbitration, it will be able to completely deprive dissatisfied educational personnel of their economic leverage. This result is exacerbated by the fact that § 13 does not direct circuit courts to use selective injunctive orders, where possible, to permit continuing strike activity by non-essential employees. See supra note 138 and accompanying text.

\textsuperscript{143} It will be interesting to see whether some governmental employers will be reluctant to enjoin a disruptive work stoppage because they fear that the resulting interest arbitration procedures would deprive them of the managerial discretion they continue to retain even during a severe strike.