Interest Arbitration in the Public Sector - The Kenneth M. Piper Lectures

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INTEREST ARBITRATION IN THE PUBLIC SECTOR

ROBERT G. HOWLETT*

INTRODUCTION OF PUBLIC SECTOR COLLECTIVE BARGAINING

Prior to the 1950's, public employees had little interest in collective bargaining. Job security and working conditions in the public sector had, for many decades, been superior to those in the private sector. Public sector labor organizations developed expertise in lobbying, frequently with considerable success.¹

Gradually, employees in the private sector, through their unions, protective legislation, and employers who recognized (in order to avoid unionization or otherwise) that adequate compensation and employee benefits created a more productive work force, overcame the gap in compensation, benefits, and job security. Public employees, noting the change, began to develop an interest in collective action.²

Another factor seldom mentioned (and which should be the subject of a PhD dissertation) is the desire of every individual to participate in decisions on subjects which affect him/her. My experience in labor relations leads me to conclude that this desire to participate has been a significant factor in public sector unionization.

Wisconsin was the first state to enact a public sector collective bargaining statute. The 1959 recognition statute was implemented in 1961 through the adoption of a procedure administered by the Wisconsin Employment Relations Commission.³

¹ There was earlier collective action in the public sector. During the administration of President Andrew Jackson, federal employees, in common with private sector employees, after “demonstrations” during which “employment ceased,” gained a 10-hour work day. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE, 21 (1976). There was bargaining in TVA, the U.S. Printing Office, Navy Shipyards, and in some areas of the Department of the Interior.


³ Wisconsin Employment Relations Act, Wis. STAT. ANN. Ch. 509 (West 1959). Although Wisconsin is generally credited with having the first public employment relations act, as a resident of Michigan, I am impelled to point out that in 1947 the Hutchinson Act was enacted. It provided that the majority of any “given group” of public employees could petition the Michigan Labor
In 1962 President John Kennedy issued Executive Order 10988, which granted limited collective bargaining rights to federal employees. In 1965 four states (Delaware, Connecticut, Massachusetts, and Michigan) enacted public employment relations acts. The action in the first five states was followed by public employment relations acts which now exist in 39 states and the District of Columbia. In addition, several cities have provided for collective bargaining by ordinance or charter.

Most state statutes track the National Labor Relations Act on the scope of bargaining, although some place limitations on wages, hours, or other working conditions, and a few add areas of bargaining. A majority of the statutes provide for mediation and fact finding, the latter being the terminal procedure for the resolution of collective bargaining impasses in most bargaining situations.

**THE STRIKE PROHIBITION**

Prior to enactment of public sector collective bargaining legislation, the states had one opinion in common—at least, those states which addressed the subject: public employees had no right to strike. It was illegal to strike against the sovereign—which the sovereign be king or people. The strike prohibitions were enunciated either in statutes or in court decisions. The United States Supreme Court, by denial

Mediation Board (now the Michigan Employment Relations Commission) for the mediation of "grievances." In 1949 the Commission was authorized to engage in fact finding and issue "written findings," which, while "not binding upon the parties," were "made public." Mich. Comp. Laws Ann. § 423.207 (1949). In 1959 the Michigan Supreme Court in Garden City School District v. Labor Mediation Board, 358 Mich. 258, 263, 99 N.W.2d 485, 488 declared, "We know of no grievance more likely to provoke the sort of dispute which the Labor Mediation Board and [the statute] are designed to avoid than those concerning wages and salary." The result of this was collective bargaining in some Michigan cities, counties, and school districts.


5. The statutes range from Kentucky, which covers police in one county and fire fighters in one city, and Texas, which has a statute authorizing cities to adopt collective bargaining for police and fire fighters, to states which have statutes similar to the coverage of private sector employees under the National Labor Relations Act, e.g., New York, Ohio, Wisconsin, Pennsylvania, and Washington.


of review in two cases, has refused to upset decisions which hold that public employees do not have a constitutional right to strike.\(^8\)

One theory to support the strike prohibition in the public sector is that services performed by public employees are essential services. Analysis of this theory discloses its limited persuasiveness. There is little damage to the public from a strike by library workers, recreation employees, or highway workers in Michigan's Upper Peninsula during July. A strike by railroad employees may have a serious impact on the economy, as may a strike by airline employees. Prior to technological improvements which have rendered it possible for supervisors to supplant bargaining unit employees, a strike by public utility employees had a serious impact on people, as did a strike by mine workers prior to the increased use of gas and oil.

The flaw in the "essentiality" theory is illustrated by the fact that there are public hospitals and private hospitals, publicly owned utilities and privately owned utilities, public schools and private schools, publicly operated garbage and trash pickup trucks and privately operated garbage and trash pickup trucks. Private employees have the right to strike. Striking public employees have no greater impact on the economy, property, or peoples' living than private employees.

**Interest Arbitration—Substitute for Strike**

In spite of the dubious dichotomy advanced by strike opponents (and opponents of public sector collective bargaining) in the public sector, a strike by some public employees has the potential to cause human hardship, damage to property, and loss of life. Police departments and fire departments are obvious examples.

Interest arbitration, is a dispute resolving process which is not unknown in the private sector. It is a procedure which has been used in the transit and newspaper industries.\(^9\) Several states attempted to man-

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date interest arbitration for public utilities. This experiment, which operated with considerable success, came to a screeching halt when the United States Supreme Court decided in the *Wisconsin Bus Company* case that the Wisconsin statute was preempted by the National Labor Relations Act.

Because a strike by employees performing essential services has the potential for serious damage to people and property, neutrals, union representatives, government officials, and a few employers have proposed interest arbitration as an appropriate substitute for the strike. It is surprising that the first state public sector interest arbitration statute was in Wyoming. The statute, applicable to fire fighters, was enacted in 1965.


11. Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of America v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951). The dissent of Justices Frankfurter, Burton, and Minton makes sense; the majority opinion does not. If the three dissenters had prevailed, labor relations in the public utilities would have been improved substantially. See also *Grand Rapids City Coach Lines v. Howlett*, 137 F. Supp. 667 (W.D. Mich 1955), which held that a Michigan statute which provided for fact finding rather than arbitration (as the Wisconsin statute did) was preempted by federal law on the basis of the *Wisconsin Bus Company* decision. See also Division 1287, Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Missouri, 374 U.S. 74, reh. denied, 375 U.S. 870 (1963), which held that a Missouri statute which authorized the seizure of public utilities had been preempted by federal statute.


INTEREST ARBITRATION

THE FIRST INTEREST ARBITRATION STATUTES

The early statutes were limited to the uniformed forces; later statutes extended interest arbitration to employees performing the more essential services. Currently 25 states (plus the City of New York and other municipalities) have statutes either mandating or permitting the arbitration of collective bargaining impasses.14

LEGAL STRIKES

In the meantime, some states, departing from the "no strike against the sovereign" philosophy, have authorized strikes, with limitations, by some public employees.15

Limitations on strikes are not confined to the public sector. Section 206 of the Labor-Management Relations Act16 and the limitations included in the Railway Labor Act17 are examples. As indeed, are the prohibitions against specified strikes under the National Labor Relations Act.18

In addition, strikes may be enjoined under the Boys Market doctrine,19 and strikes in breach of contract may result in successful actions for damages.20


Most public officials who have spoken on the subject oppose interest arbitration.21 This paper is concerned primarily with interest arbitration mandated by a legislature. Such an impasse resolving procedure is generally called "compulsory" arbitration. I think the term "mandated arbitration," or "legislated arbitration" is preferable. The term "compulsory" excites emotions. Perhaps the adjective was first used by opponents of interest arbitration with the hope it might help it to be rejected. Generally opponents of legislated arbitration do not oppose the use of interest arbitration, if chosen voluntarily by public employer and public sector union.

ARGUMENTS: CON AND PRO

The arguments against mandated arbitration are:

1. It is an unconstitutional delegation of legislated authority;
2. It damages collective bargaining, because parties fail to bargain;
3. It is not effective, because there is no practical way to enforce compliance, i.e., employees may go on strike;
4. It may result in administrative awards of high wages;
5. It works to the advantage of weak unions;
6. Outside third parties who are unfamiliar with the practicalities of the enterprise write the contract;22 and
7. It does not encourage cooperation, which is the essential aspect of on-going employment relations, but rather, it pushes the parties further apart.23

The arguments in favor of mandated arbitration are:

21. Mayor Coleman A. Young of Detroit, Michigan, on December 4, 1979, delivered a vigorous attack on interest arbitration before a legislative forum on "New Directions for Public Employee Labor Relations" (manuscript). Mayor Young, as State Senator Young, was one of the sponsors of the Michigan Police/Fire Fighter Arbitration Act, commonly known as Act 312. The author of this paper was one of the two arbitrators who were the subject of Major Young's diatribe. Among other things, he said, "This is why we are appealing these awards (two police cases and one fire fighter case), asking the courts to save us from these maniacs." For a choleric attack on interest arbitration as well as public sector collective bargaining, see Petro, Compulsory Public Sector Bargaining and Arbitration in the Courts, 3 GOVT UNION REV. 3 (Summer 1982).

22. The same argument was heard from employers and some unions opposed to grievance arbitration during past years. "[N]o outsider" should be "allowed to dictate a grievance decision." SCHLECTER, HEALEY AND LIVERNASH supra note 9 at 749-50; WATKINS AND DODD, LABOR PROBLEMS 852 (3d ed. 1940).

23. An argument was made in some states that mandatory arbitration violated constitutional Home Rule provisions. The New York Court of Appeals held there was no violation in City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290 (1975). See particularly the concurring opinion of Judge Fuchsberg. The Colorado Supreme Court held to the contrary under the language of the Home Rule provision in the state constitution: Greeley Police Union v. City Council of Greeley, 191 Colo. 419, 553 P.2d 790 (1976).
INTEREST ARBITRATION

(1) When strikes are prohibited, the states must provide a substitute for resolving impasses;
(2) It is essential that there be no work stoppages in services endangering the health and safety of the public; and
(3) It is a civilized method of dispute resolution.24

The unconstitutional argument is that arbitration changes representative democracy, because it removes from the legislature the determination of government employees' compensation and working conditions. Legislators, the argument goes, are elected to decide political and policy issues which include the establishment of working conditions for government employees. Legislators represent all their constituents, including public employees.

The Report of the Task Force on State and Local Government Relations, summarizing the first two objections, states that, "[G]overnment bodies cannot lawfully delegate legislative responsibility to outsiders. . . . [U]nder compulsory arbitration negotiators will develop a strategy for presenting and holding to extreme positions because they are aware that all unresolved disputes will ultimately be presented to third parties."25

Arbitration can change representative government. Indeed, it does. It may result in a redistribution of government resources, change managerial authority, affect the cost of government, influence the amount of taxes required to operate government, impact on the quantity and quality of government public service, and allow government executives and legislators to escape responsibility for acts which they normally and should perform.

But if a legislature finds that the arbitration process is in the public interest, should there be objection to interest arbitration?

CONSTITUTIONALITY OF THE STATUTES

Most of the courts which have faced the constitutional question have upheld the constitutionality of the statutes.26 The courts which

have upheld the constitutionality of interest arbitration statutes have answered the legal attacks that have been made on the statutes. The primary opposition argument is that granting authority to an arbitrator or arbitration panel, delegates legislative power to a third party not responsive to the public, which is contrary to the state constitution. An answer to this contention was well stated in the concurring opinion of New York Court of Appeals Judge Fuchsberg:

It is settled law that a delegation of power by the legislature to a subordinate body is constitutional, provided it is accompanied by sufficiently specific standards for its use and provided that the delegation is of power to carry out law, not power to make law. . . .

In several (cited) cases, the courts have held that the delegation is of legislative power but that it is, nevertheless, permissible because the arbitration panel in performing a public function, becomes a public body. . . .

I do not find it useful to try to determine with precision whether the particular delegation of power made here is most accurately classified as legislative, judicial, or administrative. . . . When courts in the past have upheld or invalidated delegations of power, they have most frequently done so by first determining whether the delegation had a rational purpose and adequate safeguards, and only then have they applied the labels "legislative" or "administrative"—and we might add "judicial"—to the results of their assessments.

v. Spokane Police Guild, 87 Wash. 2d 457, 553 P.2d 1316 (1976); Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976) (the Massachusetts statute was repealed in a referendum vote); City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979); City of Bangor v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981); City of Amsterdam, supra note 23; Medford Fire Fighters Ass'n v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979); Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978); City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980); Milwaukee County v. Milwaukee Dist. Council 48, AFSCME, 109 Wis. 2d 14, 325 N.W.2d 350 (1982); Newark Firemen's Mut. Benevolent Ass'n, Local 4 v. City of Newark, 90 N.J. 44, 447 A.2d 130 (1982). Franklin County Prison Bd. v. Pennsylvania Labor Relations Bd., 491 Pa. 50, 417 A.2d 1138 (1980), involved the statute applicable to prison guards. Under the statute, panel decisions on economic issues are advisory only. The Pennsylvania Supreme Court said that if a legislative body rejected an award of a financial subject, the only remedy was to amend the constitution (as occurred in the case of police and fire fighters) or through the political process. The Supreme Court of South Dakota in City of Sioux Falls v. Sioux Falls Fire Fighters Local 814, 89 S. Dakota 455, 234 N.W.2d 35 (1975), held that the Police/Fire Fighter Arbitration Act constituted an unlawful delegation of legislative power contrary to a provision of the South Dakota constitution, which was identical to a provision in the Pennsylvania constitution under which a Pennsylvania statute had been found to be unconstitutional. The Pennsylvania constitution was amended to affirmatively authorize legislation to provide for the arbitration of collective bargaining impasses. See also Greeley Police Union, supra note 23. In 1955, the Supreme Court of Washington in Everett Fire Fighters Local No. 350 v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955), held that an amendment to a city charter adopted by the initiative procedure providing for interest arbitration was an unconstitutional delegation of the city council's legislative authority. The City of Everett voters were ahead of their time; the 1955 Supreme Court had not become modern. See 69 A.L.R. 3d 885.
The case before us is a good example. Disputes between cities and their uniformed services generate an infinity of special circumstances and facts. No legislature could devise a law which would deal fairly with every issue which could arise in a specific dispute. Instead, the legislature has chosen to create a new way to handle such disputes by delegating powers which may be partly legislative, partly judicial, and partly administrative; they may even be described as *sui generis.*

The cases upholding the constitutionality of interest arbitration statutes have enunciated a similar principle. Some courts have stressed the standards established by the legislature.

What of the charge that interest arbitration damages collective bargaining? The opinion of those experienced in the process who are not public management oriented is that damage to the collective bargaining process has been small.

It was my observation during 1969-76 when I administered the Michigan statute, that its adverse impact on collective bargaining was minimal. In Detroit there were problems with police and fire fighter bargaining, but I am reasonably certain that they would have been present without Act 312.

The argument that interest arbitration may not be effective because there is no practical procedure to enforce compliance and that therefore, employees may strike—appears to be a theory without evidentiary support. In Michigan, during the first year after the statute's enactment, there was one strike related to an award, which was due to a misunderstanding by the police officers in the City of Marquette who were involved in the second award under the statute. Since 1969 there has been one job action due to a delay in an award. A few other job actions, such as the slowdown in Detroit because of the reorganization of the police department, have not been related to the statute. The eleven replies from the several state agencies to which I wrote, all reported that job action has not been a problem.

One would be naive to assert that there never would be collective

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28. City of Warren; Harney; Div. 540, Amalgamated Transit Union; Medford Fire Fighters Ass'n City of Richfield; and City of Detroit, supra note 26.
action by employees. If employees feel sufficiently frustrated, they will make that frustration known, e.g., employees in Poland.

Generally, employees in the categories covered by interest arbitration statutes have been ready for this "civilized" process; hence, there is no significant interest in using collective action against an award with which employees may not agree.

Some years ago there was a bill before the Michigan Legislature which provided for interest arbitration for school employees. The newspapers reported my statement before the House of Representatives Labor Committee correctly when they stated that the MERC chairman offered "mild" support for the bill. I stated that while I approved of the concept of interest arbitration, I was not sure that school employees were ready for it, and that if there were strikes against disliked awards, the arbitration process would be damaged—and that would be unfortunate for its future use.

**IMPACT ON SALARIES AND WAGES**

Have arbitration awards provided for "high wages"?

While municipal officials have, from time to time, charged that arbitration awards of compensation are higher than negotiated settlements, there appears to be no study which discloses a significant variance. Professor Ernst Benjamin of Wayne State University in his "Final-Offer Arbitration Awards in Michigan 1973-1977" concludes, "[I]t seems a reasonable inference from the available data that arbitration awards average no more than one or two percentage points more per year than negotiated settlements. But a precise estimate must wait improved data on both negotiated and arbitrated salaries."\(^31\)

Because comparability is the primary factor or guideline used by arbitrators in determining compensation for employees, it is reasonable to believe that both negotiated compensation and awarded compensation will be considered by arbitrators in reaching a decision. Compensation awarded in a neighboring city does have an effect on negotiations. Such data as is available, does not support the contention that arbitrators' awards result in "high wages."

There is also no study which I have been able to find to support the contention that a public sector interest arbitration statute works to

\(^31\) Benjamin, *supra* note 29. That interest arbitration has not resulted in excessively high wages during the early years of the statute is the opinion of the authors in *Final-Offer Arbitration*, *supra* note 29, in which Pennsylvania, Michigan and Wisconsin experiences are reviewed.
the advantage of weak unions.32 It is reasonable to believe, however, that some unions may hope to gain more from arbitration than from negotiations. However, the fact that uniformed employees and "essential" employees subject to arbitration statutes have not used the strike weapon (illegal in all states), suggests that whether a union is "strong" or "weak" is a minimal factor, if a factor at all, in the use of the statutory arbitration process.

On the other hand, Herman Torosian, Chairman of the Wisconsin Employment Relations Commission, says, "In terms of balancing power, especially in smaller cities and school districts, the law has been successful."33

The experience of PATCO demonstrates that when there is a government dedicated to enforcing the "no strike" provisions of the law, the so-called strength of the union is a non sequitur.

I do not imply that some unions may not be more effective in presenting cases to arbitrators and arbitration panels than other unions. Indeed, I have had enough cases to note a significant difference in the presentations, but I am not sure, from my experience, that the quality of the presentation has in fact, made a difference in the final award.

COOPERATION—OR LACK OF IT

I know of no study to support the contention that interest arbitration does not encourage cooperation. I have seen no evidence of this. Indeed, if one considers arbitration vis-a-vis strike, it would appear that arbitration is a far more cooperative venture than a strike (or a lockout).

Arvid Anderson, Chairman of the Office of Collective Bargaining of the City of New York, concludes that interest arbitration is not "an arms length adjudicatory process," but "is a process of adjustment and accommodation."34

ALLEGED DAMAGE TO COLLECTIVE BARGAINING

The "damage" to collective bargaining has often occurred in cities where the political atmosphere is such that city administrators, and sometimes union officials, would rather have an arbitrator render a decision than "bite the bullet." It affords the mayor the opportunity to

demand that the legislature provide him with the money to fund the "unwanted" and "expensive" award.

There are also instances where the parties lack experience in collective bargaining, but this factor is not confined to Police/Fire Fighter Arbitration Act situations.

On a number of occasions, I refused to appoint a panel chairman (thereby probably violating the statute) and directed that the parties return to the bargaining table with a state mediator. This resulted in some settlements and, in other cases, reduced the number of issues.

**DECISION BY A THIRD PARTY**

What of the charge that outside third parties unfamiliar with the practicalities of the unit of government write the contract? In every case before a trial court (whether judge alone or with jury), an outside party, i.e., judge or jury, renders decisions involving private and public enterprises which have significant economic and policy impacts on the parties before the decision maker. Judges and juries are unfamiliar with the "practicalities" of almost every litigant in front of them. With competent counsel who present evidence and argument, judges and juries are able to render decisions which have been reasonably satisfactory to the public since our Anglo/American jurisprudence began.35

Is there a difference between court proceedings and interest arbitration proceedings? The answer is obviously "no." If the arbitrator or arbitration panel is educated by counsel, as circuit judges and juries are, the "third party" need not be "unfamiliar with the practicalities of the unit of government (and union) involved."

**THE IMPORTANCE OF MEDIATION**

A factor in the successful operation of the Michigan Police/Fire Fighter Arbitration Act (as well as the Public Employment Relations Act) is the high competence of Michigan mediators.36

**TYPES OF ARBITRATION**

The states have experimented with several types of arbitration:

- Tripartite panels;
- Single arbitrators appointed by the parties;

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35. I recognize that centuries ago, jurors were partisans chosen to support the litigator's cause. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 115 (5th ed. 1956).

36. Some states depend on the Federal Mediation and Conciliation Service for performance of the mediation function. This is an abdication of state responsibility.
Single arbitrators appointed by an administrative agency;
Conventional arbitration, i.e., the arbitrator or panel is not limited to the positions of the parties;
Last offer with the panel or arbitrator required to adopt a proposal of one of the parties on all issues (package v package);
Last offer on each issue separately (issue v issue);
Last offer on economic issues with other issues subject to conventional arbitration;
Last offer issue by issue on noneconomic issues and package v package on economic issues;
Two last offers;
Last offers of the parties and the fact finder's recommendations;
and
Such procedure as the parties may adopt.

Nebraska has a state commission consisting of five "judges" appointed by the governor. In Nevada there is a fact finder, then a three-member panel decides whether the fact finder's recommendations will be binding.

Several of the states have alternate procedures, generally at the election of the parties, with a specified procedure mandated if the parties fail to agree.

"LAST OFFER" ARBITRATION

The theory of "last offer" is that the parties will move more closely together in bargaining, thus increasing settlements. Does it serve this purpose?37

The only persuasive statistics are in Michigan, which has experience with both conventional and last offer arbitration. Based on this experience, the answer to the question is "yes."

Professor Peter Feuille agrees. He said, "Michigan is the first (and only) jurisdiction . . . where we can compare arbitration experience on a before and after basis . . . [t]he Michigan procedure seems to be quite successful in inducing compliance."

When the Michigan Police/Fire Fighter Arbitration Act became effective on October 1, 1969, it provided for conventional arbitration. Effective January 1, 1973, the Michigan Legislature instituted last offer arbitration for economic issues, each issue to be submitted separately to the panel. During the first three years of Act 312 under conventional

37. REHMUS, supra note 29; BOWERS, supra note 29; LOWENBERG, THE PENNSYLVANIA ARBITRATION EXPERIENCE, FINAL OFFER ARBITRATION (1975).
38. FEUILLE, FINAL OFFER ARBITRATION 21 (1975).
arbitration, 176 petitions for arbitration were filed. During these three years, 71 cases were settled during the arbitration process without an award. During the next three years, under last offer arbitration, there were 172 petitions and 126 settlements. Surprising to me was that last offer arbitration did not reduce the number of impasses submitted to arbitration; these remained about the same.

Settlements in Michigan under last offer are continuing to be satisfactory. The 1979-82 record follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Petitions Filed</th>
<th>Settled During Process (by the parties or with assistance of mediation)</th>
<th>Awards Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>92</td>
<td>68</td>
<td>24</td>
</tr>
<tr>
<td>1980</td>
<td>99</td>
<td>61</td>
<td>27</td>
</tr>
<tr>
<td>1981</td>
<td>83</td>
<td>57</td>
<td>24</td>
</tr>
<tr>
<td>1982</td>
<td>106</td>
<td>55</td>
<td>28</td>
</tr>
</tbody>
</table>

Data from other states discloses that the settlement rate varies. Thus, in Iowa, 53 percent of the impasses are settled after lists of arbitrators have been forwarded to the parties and before an award is issued.

The chairman of the Iowa Public Employment Relations Board reports that as a percentage of all negotiations, the number of awards issued during 1976-83 range from a low of 4.5 percent to a high of 7.1 percent.

In Minnesota, the record for 1973 to 1983, inclusive, discloses that under 30 percent of the cases certified to impasse are resolved before an award.

In Minnesota the parties may agree on last offer arbitration either as a package or issue by issue; otherwise, there is conventional arbitration. The fewer settlements in Minnesota as compared with Michigan

39. Professor Ernst Benjamin of Wayne State University in Final Offer Arbitration Awards in Michigan 1973-1977, supra note 29, states that there were 176 petitions filed between December 16, 1969, the date of the first petition, and December 31, 1972, the date that conventional arbitration ended. One hundred eighty-four petitions were filed, but I dismissed eight for lack of jurisdiction—the employers were not covered by the statute.


41. In Iowa, parties are authorized to adopt their own procedures; hence, it is probable that there are some arbitrators appointed by the parties without clearing through the Iowa Public Employment Relations Board.
may support the theory that the last offer requirement in Michigan has resulted in more settlements.

**The Effect Of Interest Arbitration In The States**

I wrote to several state agency representatives prior to the preparation of this paper. I asked for their opinions on the success of interest arbitration in their states. The replies which addressed my questions follow.

**MONTANA:** "The interest arbitration process has worked well in Montana... I don't feel it has damaged collective bargaining in any way."

**NEBRASKA:** "[T]he Commission has had a 27 percent settlement rate in the past two years and Nebraska has had no public strikes except for a one-day strike not sanctioned by the union (in 1975)."

**HAWAII:** "The arbitration process has worked in that settlements have been reached without the withholding of services."

**IOWA:** "No strikes, few arbitrations."

**NEW JERSEY:**

For the most part, we have had very few aberrational awards and the conservative nature of the interest arbitration process has resulted in near comparability of interest arbitration awards and voluntary settlements. The acceptability of the process has been further enhanced by the fact that police and fire interest arbitration awards and the voluntary settlement have been equivalent to or less than settlements in public education.42

**WASHINGTON:** Although the process "was working rather badly prior to the 1979 amendments" when "interest arbitration was a complete re-hash of the fact finding exercise," since the 1979 amendments, "we have been somewhat more effective in mediation. (Hence), I would have to give our current process pretty good marks."

**OREGON:** "The process has worked well in Oregon."

**MAINE:** "Since it is a relative rarity for interest cases to proceed all the way to interest arbitration... we consider that the current processes have been successful."

**MICHIGAN:** "On the whole, it is my opinion that the last offer process has somewhat distorted the final settlements, but the 'issue by issue' approach still permits the arbitrator some room to fashion his

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42. Robert M. Glasson, Director of the Public Employment Relations Commission, commented on the "time-consuming" process and the cost of the process. This appears to be indigenous to the process. I was concerned about it when I administered the Michigan statute; it has concerned me in every case in which I have served as panel chairman.
own recommendations."

WISCONSIN:

[T]he procedure itself has not presented any significant problems. . . . In terms of balancing the bargaining power, especially in smaller cities and school districts, the law has been successful. . . . I would conclude that last offer binding arbitration, while maybe not damaging collective bargaining, has definitely impacted collective bargaining. Collective bargaining has changed. Whereas before parties relied on strategy, tactics, and the willingness to devote as much time as necessary in reaching a settlement . . . , now the parties tend to meet once with the investigator (who attempts to mediate the dispute), at which time they are inclined to direct their attention to comparables and argue about the same, knowing they have the right to go to arbitration.

"PACKAGE V PACKAGE" OR "ISSUE V ISSUE"

Professor Peter Feuille and his colleague Gary Long argue that package v package is superior to issue v issue as a means of forcing settlement:

There have been two noticeable impacts of the entire package selection requirement. First, it forces each party to be "reasonable" with each proposal on each issue. . . .

Second, entire package selection prevents arbitrators from imposing their version of desirable compromises upon the parties in multi-issue disputes, a freedom they would appear to have under issue-by-issue selection.44

Professors Gerhart and Drotning of Case Western Reserve University also aver that in the package offer systems, "there is (or should be) a maximum pressure on the parties to resolve their dispute short of the arbitration process." They further state that:

The major impact of final-offer-arbitration-by-package in Wisconsin appears to be the reduction in the number of issues submitted to arbitration. That is, the parties are much less likely to insert "bogus issues" into the final offer package.45

However, Gerhart and Drotning criticize last offer arbitration:

There are certain advantages to conventional arbitration, or disadvantages to final-offer arbitration, which make the former prefera-

43. I did not observe that last offer had "distorted" final settlements during the three years I administered the statute under last offer. However, in two Michigan cases in which I served, this could have been true, but I was able to persuade my panel colleagues to waive the last offer requirement; we issued unanimous awards.


ble. One of these is the importance of "acceptability" as a criterion for arbitrator decisions. Potentially, the "last-offers" of both parties may be totally unacceptable to the opponent.46

Gerhart and Drotning then somewhat inconsistently state, "Our general conclusion with respect to the use of final offer arbitration is that the particular type of arbitration has little impact on its utilization or likelihood of earlier bilateral settlements in the bargaining process."47

Joyce Najita and Helen Tanimoto of the University of Hawaii conclude:

[T]he final-offer process works to increase the incentive to bargain by posing the possibility of an unfavorable arbitrator's decision. The availability of arbitration at the request of either party helps the weaker party, and the stronger party is forced to take bargaining more seriously. The process facilitates the collective bargaining process by narrowing the gap between the parties on issues through maintenance of the flow of communications (hearing, tripartite panel, timing of offer) and the possibility of remand to negotiations at the discretion of the arbitration panel.48

My friends in Wisconsin tell me that they like their package v package system.49

If there is to be arbitration, what is wrong with an arbitrator "imposing his/her version of desirable compromises upon the parties?" This is what conventional arbitration is all about. It has been my experience that often the "bargain" should be somewhere between the last offers of the parties. Indeed, I have been concerned in some cases over the necessity of selecting one of the parties' last offers.

The first last-offer arbitrations which I am aware of were held in Indianapolis, Indiana, and Eugene, Oregon. Both were package v package. The arbitrators were not happy with the process.50

I have had only one experience with package v package arbitra-

46. Id. at 169.
47. Id. at 172.
49. But as with all labor laws, there have been "problems." Fleischli, Some Problems with the Administration of Compulsory Final Offer Arbitration Procedure, 56 CHI-KENT L. REV. 559 (1980).
50. Long and Feuille, Final Offer Arbitration, Sudden Death in Eugene, 27 INDUS. AND LAB. REL. REV. NO. 2, 186 (Jan. 1974); Whitney, Final Offer Arbitration: The Indianapolis Experience, 96 MONTHLY LAB. REV. 20 (May 1973). The opinion of the chairman of the first Eugene arbitration stated that under conventional arbitration procedures, the majority of the arbitration board would have adopted the labor organization's proposal after eliminating some clauses. 451 BNA Gov't Employees Report F-1.
tion. It was a Michigan school district case in which the school board and teachers association chose three neutrals.51 We were forced to choose one of the packages. We stated in our opinion that we disliked doing so, and pointed to one item which we thought should have been awarded to the other party.

**Statutory Standards**

Most of the state statutes include standards to be followed by the arbitrator or panel.52

Standards perform three significant functions:

(1) They have been the basis for upholding the constitutionality of statutes, although some courts have not been deterred by the lack of standards.53

(2) Standards have a role in states which provide for appeal of an arbitration award, as Michigan does. Unless the opinion discloses that the arbitration panel has considered the statutory standards, the award will be reversed.54

(3) The presence of standards discloses to advocates the areas they must consider in preparation—called by the late Arthur Vanderbilt, Chief Justice of New Jersey, “the persistent drudgery” of litigation.55

Some state statutes provide for an appeal to a court;56 other states’ statutes do not.57

The Michigan statute requires that the award is to be supported by “competent, material and substantial evidence on the whole record.” (MSA 423; MCLA 242)

Interest arbitration has such a significant role in determination of government policy and economics that statutes should provide an ap-

51. The other two were Ronald Haughton, member and former chairman of the Federal Labor Relations Authority, and James McCormick, one-time MERC Administrative Law Judge and now a Michigan District Judge.

52. Illinois, Iowa, Maine, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Rhode Island (in three of six statutes), Texas, Vermont, Washington, and Wisconsin.

53. *E.g.*, *City of Laramie*, supra note 26, and *Harney*, supra note 26. The standards were one reason for the Michigan Supreme Court upholding the constitutionality of the statute in *City of Detroit*, supra note 26.


56. States where there are affirmative statements that an arbitration award may be appealed are: Alaska, Connecticut (to the legislative body in two of three statutes), Illinois, Michigan, Nebraska, New Jersey, Ohio, Rhode Island (three of five statutes), Texas, Vermont, Washington.

57. The Oregon statute does not include an appeal provision. But as an award must be supported by competent, material, and substantial evidence, it would appear that appeal may be possible.
peal on the same basis as the Michigan statute.\textsuperscript{58}

**THE ILLINOIS STATUTES**

The Illinois Public Labor Relations Act, which covers public employees, except education employees (who are subject to the Illinois Education Labor Relations Act), and local police and fire fighters, provides for arbitration of collective bargaining impasses in units of security employees, state peace officers, state fire fighters, and employees whose work is sufficiently essential so that a strike, as determined by a circuit court, would “constitute a clear and present danger to the health and safety of the public.”

Unless the parties adopt a contrary procedure, arbitration is conducted by a tripartite arbitration panel, one delegate selected by each of the parties and a chairman chosen from a roster of seven persons furnished by the Board.\textsuperscript{59}

Economic issues, as determined by the panel, are subject to last offer issue by issue, the offers to be submitted “at or before” the conclusion of the hearing. Noneconomic issues are determined by conventional arbitration.

The Illinois Act includes time tables for the initiation of mediation and of arbitration, selection of delegates and the chairman, the date of the hearing, the completion of the hearing, and the issuance of the award.

If Illinois’ experience is similar to that of Michigan, the time limits will be meaningless. This was my experience as administrator of the Michigan Police/Fire Fighter Arbitration Act and as a panel chairman in both police and fire fighter cases. I have learned in my 31 years as an arbitrator, the difficulty of finding hearing dates satisfactory to lawyers—or non-lawyer representatives of employers and unions.

The Illinois statute includes “factors” upon which awards shall be based.

Panel awards are reviewable by a circuit court, but only on the grounds for review of rights arbitration awards. The statute, unlike the

\textsuperscript{58} More grievance awards are being appealed because of the important role of rights arbitration in the private sector and in the determination of policy in the public sector. This is as it should be, some arbitrators to the contrary notwithstanding. The courts have—as they should—exercised their review power with restraint.

\textsuperscript{59} There are two labor relations boards: The Illinois State Labor Relations Board has jurisdiction over governmental units with a population not in excess of 1,000,000 and over the Regional Transportation Authority and its employees; the Illinois Local Labor Relations Board has jurisdiction in government units in excess of 1,000,000 persons, i.e., the City of Chicago and Cook County.
Michigan statute and some other arbitration statutes, does not require that the award be supported by competent, material, and substantial evidence on the whole record.

I repeat, the significant role of arbitration in determining government policy and economics renders court review on evidence desirable.

In the case of a frivolous appeal, the appellant may be required by the court to pay reasonable attorney's fees and costs to the successful party. This is a new concept in the statutes, and a good one.

Increases in the rate of compensation may be made retroactive to the beginning of a fiscal year which commenced after the initiation of arbitration proceedings.

Quaere: Is an award final? Under the statute, a governing body may review each "term" awarded by a panel, and if it "fails to accept or reject one or more terms of the arbitration panel's decision," such term or terms shall become part of the collective bargaining contract. However, if the governing body "affirmatively" rejects one or more terms of the arbitration panel's decision, the statute requires that the parties "return to the arbitration panel for further proceedings and issuance of a supplemental decision with respect to the rejected terms." Any supplemental decision by the panel is resubmitted to the governing body.

If there is a second rejection, the parties must again return to the panel for further proceedings and the issuance of a supplemental decision. The statute does not state that the second supplemental decision is binding on the parties.

If the governing body may review and reject, of what value is an appeal to a circuit court? Litigation seems certain!

The Illinois Educational Labor Relations Act does not mandate arbitration, but authorizes employers and unions to agree to final and binding impartial arbitration of unresolved issues.

The Federal Sector

A form of interest arbitration exists in the federal sector. As stated above, collective bargaining for federal employees started with Executive Order 10988. Not only was the scope of bargaining narrow, but there was no procedure for administration of the order. In 1967, President Lyndon Johnson appointed a committee to study and recommend changes. The recommended changes, included in a report issued in
early 1969,\textsuperscript{60} were incorporated by President Richard Nixon in Executive Order 11491, dated October 29, 1969.

The order established a Federal Labor Relations Council to administer and interpret the order, and a Federal Service Impasses Panel (FSIP), consisting of at least seven part-time individuals appointed by the President to take such action as was necessary to resolve collective bargaining impasses.\textsuperscript{61} Executive Order 11491 was revised on August 26, 1971, by Executive Order 11616.\textsuperscript{62}

In addition, President Nixon issued Executive Order 11636, applicable to the three Foreign Service agencies: Department of State, United States Information Agency, and the Agency for Industrial Development. The Foreign Service Impasse Disputes Panel (FSIDP) administers the Order.

In 1978 Congress enacted the Civil Service Reform Act.\textsuperscript{63} Title VII of the Act involves federal sector labor relations. Title VII replaced the Federal Labor Relations Council with the Federal Labor Relations Authority, a three-member agency having power similar to the powers exercised by the National Labor Relations Board in the private sector. FSIP was continued. Under the Foreign Service Reform Act of 1980, FSIDP became statutory.\textsuperscript{64}

Section 7119 of CSRA provides that if voluntary arrangements between agencies of the federal government and unions representing federal employees, following the services of the Federal Mediation and Conciliation Service or other third party mediation, fail to resolve a negotiation impasse, either party may request FSIP for assistance.

Title VII vests broad powers in FSIP. FSIP may recommend to the parties procedures for the resolution of the impasse; or may assist the parties in resolving the impasse through "whatever methods and procedures, including fact finding and recommendations, it may consider appropriate to accomplish the purpose of (the law)."

This power, which was also included in the Executive Order, has been interpreted by FSIP to include ordering the inclusion of provi-


\textsuperscript{61} Presidents have limited membership to seven since FSIP was first established. For experience under the Executive Order, see Howlett, The Duty to Bargain in the Federal Government, \textit{Labor Relations in the Public Sector} 115 (ABA 1977).

\textsuperscript{62} E.O. 11491 as amended is quoted in a note at 5 USC 7101, Legislative History of 5 USC § 7101, and the court cases construing the order are summarized.


\textsuperscript{64} 94 Stat. 2071 (1980).
sions in contracts. This interpretation of the order and statute has never been challenged. An order by FSIP is binding arbitration.

Under Executive Order 11491, FSIP generally issued recommendations which in most cases were followed by the federal agency and federal sector unions.

Since 1981, due in part to reduction of FSIP's budget, it has been impossible for FSIP to send a professional staff representative to the locale of every impasse. Instead, FSIP has found it necessary to direct parties to submit the impasses in writing. This procedure reduced significantly the number of settlements, and consequently, there was a substantial increase in orders issued by FSIP. From 1970 to 1978, 75 orders (six percent of closed cases) were issued; under the statute, there have been 193 orders (29 percent of closed cases) issued.

In addition to issuing orders, FSIP has directed agencies and unions to outside arbitration, or has assigned a member or professional staff person of FSIP to serve as arbitrator or to engage in arbitration/mediation.

The parties may agree to outside arbitration, although the approval of FSIP is required for this dispute resolving procedure.

**WHAT SHOULD BE THE ROLE OF INTEREST ARBITRATION?**

In my opinion, interest arbitration is the civilized procedure for the resolution of all collective bargaining impasses. Everyone knows the reasons that the strike—and in some cases the lockout—became the vehicle for resolving collective bargaining contracts. During the last half of the 19th century and the first third of the 20th century, the only means (with few exceptions) by which employees could secure the compensation and working condition to which they believed they were entitled—and in more cases than not, were entitled—was through collective action, generally in the form of a strike.

In a world where a significant percentage of the human race does not have enough to eat and adequate places to live, any diminution of the production of goods and services borders on the immoral.

In this country when there is a controversy or impasse between individuals or enterprises, the controversy is resolved through a judicial or quasi-judicial procedure. Labor disputes involving representation

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65. FSIDP has similar power.
66. See generally ROBINSON, NEGOTIABILITY IN THE FEDERAL SECTOR (1980); Nesbitt, supra note 1.
issues and unfair labor practices are submitted to such procedures. It is only in collective bargaining that resolution is through trial by combat.

Should not we, in this country, have become sufficiently civilized so that collective bargaining impasses, in both the public and private sectors, are to be settled by judicial or quasi-judicial procedures rather than through trial by combat?