

Fordham Law Review

Volume 56 | Issue 2

Article 2

1987

Interest Arbitration: The Alternative to the Strike

Arvid Anderson

Loren A. Krause

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

Recommended Citation

Arvid Anderson and Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 Fordham L. Rev. 153 (1987).

Available at: <https://ir.lawnet.fordham.edu/flr/vol56/iss2/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Interest Arbitration: The Alternative to the Strike

Cover Page Footnote

This Article is based on an Address delivered at the Pacific Coast Labor Law Conference, Seattle, Washington, May 7, 1987. Portions of this Article will appear in substantially similar form in a forthcoming treatise to be published by Matthew Bender & Company Inc. * President, National Academy of Arbitrators; Former Chairman, New York City Office of Collective Bargaining (retired as of Jan. 1, 1988); B.A. 1946; L.L.B. 1948, University of Wisconsin. ** Trial Examiner, New York City Office of Collective Bargaining; B.S. 1977, Cornell University, New York State School of Industrial and Labor Relations; J.D. 1983, Yeshiva University-Cardozo School of Law.

INTEREST ARBITRATION: THE ALTERNATIVE TO THE STRIKE†

ARVID ANDERSON*
LOREN A. KRAUSE**

INTRODUCTION

THE right to bargain collectively has been so connected with the right to strike in this country that legitimate questions arise as to whether genuine collective bargaining can occur without the right to strike. The thesis of this Article is that an alternative to the right to strike exists and that that alternative is final and binding interest arbitration. This Article will demonstrate the viability of interest arbitration as an alternative to the strike by examining its implementation in the public sector.

Interest arbitration is a process in which the terms and conditions of the employment contract are established by a final and binding decision of the arbitration panel.¹ It differs from grievance arbitration, which involves the interpretation of the employment contract to determine whether the conditions of employment have been breached.² Thus, interest arbitration essentially is a legislative process, while grievance arbitration essentially is a judicial process. The following anecdote is a useful starting point for understanding the significance of interest arbitration.

The Transport Workers Union ("TWU") of New York City used to cry "no contract, no work."³ The TWU struck effectively in 1966 and again in 1980, imposing great financial hardship on the city.⁴ The 1980 strike resulted in the imposition of a \$1,000,000 fine on the Union and cost each worker two days' pay for each day of the eleven day strike.⁵ The strike hurt all of the parties involved, including the riding public.

† This Article is based on an Address delivered at the Pacific Coast Labor Law Conference, Seattle, Washington, May 7, 1987. Portions of this Article will appear in substantially similar form in a forthcoming treatise to be published by Matthew Bender & Company Inc.

* President, National Academy of Arbitrators; Former Chairman, New York City Office of Collective Bargaining (retired as of Jan. 1, 1988); B.A. 1946; L.L.B. 1948, University of Wisconsin.

** Trial Examiner, New York City Office of Collective Bargaining; B.S. 1977, Cornell University, New York State School of Industrial and Labor Relations; J.D. 1983, Yeshiva University—Cardozo School of Law.

1. See F. Elkouri & E.A. Elkouri, *How Arbitration Works* 104 (4th ed. 1985). Interest arbitration, mediation and fact finding comprise the full panoply of procedures available to resolve collective bargaining impasses.

2. See *id.* at 110-11 (Grievance arbitration is synonymous for what Elkouri and Elkouri refer to as "rights arbitration").

3. See 23 Gov't Empl. Rel. Rep. (BNA) 521 (Apr. 8, 1985) ("Local 100, which represents workers in the New York City bus and subway system, has never worked without a contract since being organized in 1948.").

4. 858 Gov't Empl. Rel. Rep. (BNA) 26 (Apr. 21, 1980).

5. 862 Gov't Empl. Rel. Rep. (BNA) 34 (May 19, 1980).

As a result of these experiences, the Metropolitan Transportation Authority ("MTA") and the TWU jointly requested that the state legislature enact short-term legislation authorizing the state Public Employment Relations Board ("PERB") to appoint an arbitration panel to resolve any impasses that might arise in the 1982 contract negotiations.⁶ The enacted legislation provided that PERB, upon the joint request of the MTA, the Manhattan and Bronx Surface Transit Operating Authority, and the Union representing their employees, would appoint a panel consisting of the three impartial members of the New York City Office of Collective Bargaining's Board of Collective Bargaining, with the Chairman of the Board serving as the panel's Chairman.⁷ The Act further provided that the determination of the panel would be final and binding, except that any provision thereof that would require the enactment of a law for its implementation would not be binding until such law were enacted.⁸

Pursuant to its statutory authority, the panel commenced hearings when the 1982 new contract negotiations reached an impasse—only three days after the statute was enacted.⁹ The dispute, therefore, was settled without resorting to another burdensome strike. In 1985 the legislation was renewed in anticipation of the next round of TWU contract negotiations,¹⁰ but on that occasion the parties reached agreement and avoided the need to invoke arbitration.¹¹

In 1986, the New York legislature amended the Taylor Law,¹² which regulates labor disputes between state and local government employers and employees,¹³ to require that the MTA and the unions representing its employees who are subject to the Taylor Law submit collective bargaining impasses to final and binding arbitration.¹⁴ The amendment applies to approximately 45,000 employees who operate subways and

6. See *New York City Transit Auth. v. Transport Workers Union of Am., Local 100*, at 2 (PERB Apr. 29, 1982) (Anderson, Collins & Friedman, Arbs.) (available in the files of the Fordham Law Review); Barbanel, *Transit Arbitration Bill Signed by Carey*, N.Y. Times, Mar. 17, 1982, at B2, col. 4.

7. Act of Mar. 29, 1982, ch. 19, § 2(a), 1982 N.Y. Laws 28, 29.

8. Act of Mar. 29, 1982, ch. 19, § 2(g), 1982 N.Y. Laws 28, 30.

9. See *New York City Transit Auth. v. Transit Workers Union of Am., Local 100* (PERB Apr. 29, 1982) (Anderson, Collins & Friedman, Arbs.) (available in the files of the Fordham Law Review).

10. Act of Mar. 31, 1985, ch. 15, 1985 N.Y. Laws 18; see 23 Gov't Empl. Rel. Rep. (BNA) 521 (Apr. 8, 1985).

11. See 23 Gov't Empl. Rel. Rep. (BNA) 995 (July 15, 1985).

12. N.Y. Civ. Serv. Law §§ 200-214 (McKinney 1983 & Supp. 1988).

13. *Id.*

14. Act of Dec. 31, 1986, ch. 929, § 33.5(a), 1986 N.Y. Laws 2339, 2369-70. In making the award, the law requires the arbitration panel to consider the impact of the award on the MTA's financial condition and on commuter fares; the wages, benefits, and conditions of other New York City employees; changes in the Consumer Price Index; and other conditions. *Id.* at § 33.5(d). The law was modeled after provisions of the Taylor Law that apply to police and firefighters—the only other public employees under PERB's jurisdiction whose contract negotiations are subject to binding interest arbitration. See N.Y. Civ. Serv. Law § 209(5) (McKinney Supp. 1988).

buses.¹⁵ This statutory interest arbitration provision alleviates the threat of further crippling strikes by the TWU.

It is our view that either the right to strike or interest arbitration is needed to make collective bargaining work. The success of collective bargaining requires only one of these alternatives. The fact that the right to strike is banned¹⁶ in all cases where interest arbitration is required by statute¹⁷ bears out this point. In those states that have adopted interest arbitration, illegal strikes are virtually nonexistent.

15. Act of Dec. 31, 1986, ch. 929, § 33.5(a), 1986 N.Y. Laws 2339, 2369-70.

16. All states that mandate interest arbitration ban the strike for those employees covered by the statute. *Alaska* — Alaska Stat. § 23.40.200(b) (1984). *Connecticut* — Conn. Gen. Stat. §§ 5-279, 7-475, 10-153e(a) (1983). *District of Columbia* — D.C. Code Ann. § 1-618.5 (1987). *Hawaii* — Haw. Rev. Stat. § 89-12 (1985). *Illinois* — Ill. Ann. Stat. ch. 48, para. 1614 (Smith-Hurd 1986). *Iowa* — Iowa Code Ann. § 20.12 (West 1978). *Maine* — Me. Rev. Stat. Ann. tit. 26, §§ 979-C.2.C, 1027.2.C, 1284.2.C (1964 & Supp. 1987). *Michigan* — Mich. Comp. Laws Ann. § 423.202 (West 1978). *Minnesota* — Minn. Stat. Ann. § 179A.19 (West Supp. 1988). *Montana* — Mont. Code Ann. § 39-34-105 (1987). *Nevada* — Nev. Rev. Stat. § 288.230 (1985). *New Jersey* — N.J. Stat. Ann. § 34:13A-14 (West Supp. 1987). *New York* — N.Y. Civ. Serv. Law § 210 (McKinney 1983 & Supp. 1988); N.Y.C. Admin. Code § 12-312(e) (1986). *Ohio* — Ohio Rev. Code Ann. § 4117.15 (Anderson Supp. 1986). *Oregon* — Or. Rev. Stat. § 243.726(1) (1985). *Pennsylvania* — Pa. Stat. Ann. tit. 43, § 215.2 (Purdon 1964 & Supp. 1987). *Rhode Island* — R.I. Gen. Laws § 36-11-6 (1984); R.I. Gen. Laws §§ 28-9.1-2, 28-9.2-2, 28-9.5-2 (1986). *Vermont* — Vt. Stat. Ann. tit. 21, § 1730(2) (1978). *Washington* — Wash. Rev. Code Ann. § 41.56.490 (Supp. 1987). *Wisconsin* — Wisc. Stat. Ann. §§ 111.70(4)(l), 111.77 (West 1978 & Supp. 1987).

17. The following states have adopted interest arbitration procedures for the indicated employees: *Alaska* — Alaska Stat. § 23.40.200(b) (1984) (police, firefighters, jail, prison and other correctional institution employees, hospital employees). *Connecticut* — Conn. Gen. Stat. Ann. §§ 5-276(a), 7-473c, 10-153f(c)(4) (West Supp. 1988) (state employees, municipal employees, and teachers, respectively). *District of Columbia* — D.C. Code Ann. § 1-618.2(d) (1987) (all public employees). *Hawaii* — Haw. Rev. Stat. § 89-11 (1985) (all public employees). *Illinois* — Ill. Ann. Stat. ch. 48, para. 1614 (Smith-Hurd 1986) (security employees, peace officers, firefighters and paramedics). *Iowa* — Iowa Code Ann. § 20.22 (West 1978) (all public employees). *Maine* — Me. Rev. Stat. Ann. tit. 26, § 979-D.4 (1964) (state employees); Me. Rev. Stat. Ann. tit. 26, §§ 1026.4 (Supp. 1987) (university employees); Me. Rev. Stat. Ann. tit. 26, § 1285.4 (Supp. 1987) (judicial employees). *Michigan* — Mich. Comp. Laws Ann. §§ 423.273 (West Supp. 1987) (state police troopers and sergeants); Mich. Comp. Laws Ann. § 423.233 (West 1978) (municipal police and firefighters). *Minnesota* — Minn. Stat. Ann. § 179A.16 (West Supp. 1988) (all public employees). *Montana* — Mont. Code Ann. § 39-34-101 (1987) (firefighters). *Nevada* — Nev. Rev. Stat. § 288.215 (1985) (firefighters). *New Jersey* — N.J. Stat. Ann. § 34:13A-16 (West Supp. 1987) (police and firefighters). *New York* — N.Y. Civ. Serv. Law § 209 (McKinney 1983 & Supp. 1988) (police, firefighters and transit workers); N.Y.C. Admin. Code § 12-311(c)(3)(b) (1986) (all public employees). *Ohio* — Ohio Rev. Code Ann. § 4117.14D (Anderson Supp. 1986) (police, firefighters, highway patrol, emergency medical personnel, employees of state schools for deaf and blind, corrections officers and guards). *Oregon* — Or. Rev. Stat. § 243.742 (1985) (all public employees). *Pennsylvania* — Penn. Stat. Ann. tit. 43, §§ 217.4, 1101.805 (Purdon Supp. 1987) (prison and mental hospital guards, court employees, police and firefighters). *Rhode Island* — R.I. Gen. Laws § 36-11-9 (1984) (state employees); R.I. Gen. Laws §§ 28-9.5-1 to 28-9.5-16, 28-9.2-1 to 28-9.2-16, 28-9.1-1 to 28-9.1-17 (1986) (state police, municipal police, and municipal firefighters respectively). *Vermont* — Vt. Stat. Ann. tit. 21, § 1733 (1978 & Supp. 1986) (municipal employees). *Washington* — Wash. Rev. Code Ann. §§ 41.56.450, 41.56.950 (Supp. 1987) (uniform personnel). *Wisconsin* — Wisc. Stat.

Undeniably, in some cases the strike weapon can be extremely effective in obtaining bargaining rights for employees as well as in achieving contract gains. Unfortunately, however, a strike can result in the self-immolation of those employees without the power to strike effectively.¹⁸ Moreover, even states that have sanctioned the right to strike for some public employees have not done so for police, firefighters and other categories of employees who have the power to threaten seriously the health and safety of the community if they strike.¹⁹ We submit that interest arbitration enables all employees to achieve favorable employment contract terms²⁰ by offering an alternative to the strike that similarly stimulates bargaining.

Ann. §§ 111.70(4)(jm), 111.77(4) (West 1974 & Supp. 1987) (city police, firefighters, and county police respectively). *Wyoming* — Wyo. Stat. § 27-10-105 (1987) (firefighters).

18. The experience of the Professional Air Traffic Controllers Organization (PATCO) provides a vivid reminder of the ineffectiveness of the strike weapon. *See generally* Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. Chi. L. Rev. 731 (1983); 924 Gov't Empl. Rel. Rep. (BNA) 5, 12, 45 (Aug. 10, 1981); 923 Gov't Empl. Rel. Rep. (BNA) 6 (Aug. 3, 1981). On August 3, 1981, PATCO went on strike in an attempt to gain new contract concessions from the government. *See* 923 Gov't Empl. Rel. Rep. (BNA) 6 (Aug. 3, 1981). The Federal Aviation Administration discharged all of the approximately 12,000 air traffic controllers who participated in the strike. *See* 924 Gov't Empl. Rel. Rep. (BNA) 5 (Aug. 10, 1981). The strike violated the federal labor-management relations provisions of the Civil Service Reform Act of 1978 which prohibits strikes by federal employees. *See* 5 U.S.C. § 7311 (1982).

19. Several states grant some or all of their public employees who are not required to submit their impasses to interest arbitration, but who may opt to, a limited right to strike. *See, e.g.*, Alaska Stat. § 23.40.(c)-(d) (1986); Haw. Rev. Stat. § 89-12 (1985); Ill. Ann. Stat. ch. 48, para. 1617 (Smith-Hurd 1984); Minn. Stat. Ann. § 179A.18 (West Supp. 1988); Ohio Rev. Code Ann. § 4117.14(D)(2) (Anderson Supp. 1986); Or. Rev. Stat. § 243.726 (1985); Pa. Stat. Ann. tit. 43, § 1101.2201 (Purdon Supp. 1987); Vt. Stat. Ann. tit. 21, § 1730 (1978).

Where the statute is silent as to the right to strike, it is unclear whether or not the right exists at all. *Compare, e.g.*, County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660, 38 Cal. 3d 564, 586-92, 699 P.2d 835, 850-54, 214 Cal. Rptr. 424, 439-43 (in the absence of a statute prohibiting strikes by public employees, such as in the case of police and firefighters, legislative grant of the right to organize and engage in concerted activities impliedly conferred the right to strike but empowered the courts to enjoin strikes that threatened community safety and health), *cert. denied*, 106 S. Ct. 408 (1985) *with, e.g.*, Compton Unified School Dist. v. Compton Educ. Ass'n, Case No. LA-CO-396, PERB Order No. 1R-50 (Calif. Mar. 17, 1987) (available in the files of the Fordham Law Review) (California Public Employment Relations Board reversed earlier decision and ruled a series of strikes by Compton Education Association illegal under State's Educational Employment Relations Act because law does not explicitly or implicitly grant teachers right to strike). For a general discussion of the public employee's right to strike, see G. Sterrett & A. Aboud, *The Right to Strike in Public Employment* (New York State School of Industrial & Labor Relations Key Issues Series No. 15, 1982).

20. For example, New York police and firefighters have achieved arbitrated salary increases that compare favorably with negotiated increases. *See infra* notes 158-63 and accompanying text. *But see* Feuille, Delaney & Hendricks, *The Impact of Interest Arbitration on Police Contracts*, 24 Ind. Rel. 161 (1985) (study suggests that although availability of interest arbitration is related to favorable police contracts, there is "almost no support for the belief that actually using arbitration will yield better contracts for the unions").

This Article demonstrates the effectiveness of interest arbitration as an alternative to the strike. Part I discusses the various types of interest arbitration procedures adopted by states and the statutory standards that guide arbitrators in reaching decisions. Drawing on our experience as arbitrators, we then propose guidelines for an effective presentation to an interest arbitration panel. Part II examines judicial treatment of interest arbitration awards and statutes, including the general failure of constitutional challenges to the statutes and the limited judicial review of interest arbitration awards. Finally, New York City's experience with interest arbitration, discussed in Part III, clinches our view favoring interest arbitration.

I. INTEREST ARBITRATION DEFINED

A. *Types of Interest Arbitration Procedures: State Laws*

At least twenty states have enacted laws providing for interest arbitration to resolve disputes over the terms of new collective bargaining agreements with their public employees.²¹ Most of the statutes apply to essential service employees, particularly police and firefighters, but some are more general.²² The type of interest arbitration procedure adopted, however, varies from state to state.

Some state statutes provide for conventional arbitration, which gives the arbitrator the discretion to decide the issues in dispute based upon the parties' evidence and arguments as measured against the relevant statutory criteria.²³ Other state statutes utilize final offer arbitration, which requires that the arbitrator pick either the employer's or the employee organization's final offer on the issues in dispute.²⁴ In some instances the statutes include provisions that permit the parties to agree voluntarily on the type of interest arbitration procedure to be used.²⁵

Some statutes adopt a combination of conventional arbitration and final offer arbitration, treating economic and non-economic issues differently. Michigan's police and firefighters statute, for example, provides for final offer arbitration on an issue-by-issue basis on economic issues and for conventional arbitration on non-economic issues.²⁶ Wisconsin's municipal arbitration law adopts a variation that allows the arbitrator to choose between the total package, both economic and non-economic, of

21. *See supra* note 17.

22. *Id.*

23. *See, e.g.*, Me. Rev. Stat. Ann. § 979-D.4 (1964); N.J. Stat. Ann. 34:13A-16.C (West Supp. 1987); N.Y. Civ. Serv. Law § 209 (McKinney 1983 & Supp. 1988); N.Y.C. Admin. Code § 12-311(c)(3) (1986); Or. Rev. Stat. § 243.756 (1985).

24. *See, e.g.*, Conn. Gen. Stat. Ann. § 5-276a(e)(3) (West Supp. 1988); Mich. Comp. Laws Ann. §§ 423.238, 423.239 (West 1978); N.J. Stat. Ann. § 34:13A-16(c)(2) (West Supp. 1987); Wisc. Stat. Ann. § 111.77 (West 1974 & Supp. 1987).

25. *See, e.g.*, N.Y.C. Admin. Code § 12-311(f) (1986).

26. Mich. Comp. Laws Ann. § 423.238 (West 1978).

the employer's or union's final offer.²⁷ New Jersey's law embodies yet another variation, requiring the arbitrator to choose either the employer's or the union's last offer as a total economic package, but allowing the arbitrator to resolve non-economic issues on a final offer, issue-by-issue basis.²⁸ Finally, Iowa provides for final offer determination of both economic and non-economic issues on an issue-by-issue basis.²⁹ Utilizing a unique tri-option procedure the Iowa framework permits the arbitrator to select either the employer's last offer, the union's last offer, or the fact finder's recommendations on each issue.³⁰ Observers credit this procedure with encouraging voluntary settlements.³¹ As a result, Iowa has reported a comparatively low percentage of collective bargaining negotiations requiring use of its interest arbitration procedures.³²

Each of the above noted procedures has strengths and weaknesses. Only one state, however, that has adopted a particular type of interest arbitration procedure has subsequently altered its approach.³³ This seems to indicate that parties have accommodated to the available scheme of interest arbitration. Our preference is for conventional arbitration,³⁴ because it gives the arbitrator the greatest latitude in deciding the issues in dispute.

B. *Statutory Standards*

Virtually all interest arbitration statutes either expressly or implicitly provide standards to guide the arbitrator's evaluation of the evidence and arguments presented.³⁵ They do so by requiring the arbitrator to focus

27. Wisc. Stat. Ann. § 111.77(4) (West Supp. 1987).

28. N.J. Stat. Ann. § 34:13A-16(d)(2) (West Supp. 1987).

29. Iowa Code Ann. § 20.22(11) (West 1978).

30. *Id.*

31. R. A. Lester, *Labor Arbitration in State and Local Government* 171 (1984).

32. *Id.* at 156.

33. The exception is Wisconsin, which has deleted the mediation-arbitration feature from its municipal employees law. Compare Wisc. Stat. Ann., § 111.70(4)(c) (West 1974) with Wisc. Stat. Ann. § 111.70(4)(cm) (West Supp. 1987). For a discussion of the mediation-arbitration feature, see R. A. Lester, *supra* note 31, at 75-78.

34. See *supra* note 23 and accompanying text.

35. The following jurisdictions have enacted interest arbitration statutes that require the arbitrator to consider the indicated statutory standards in his determination of the matters in dispute: *Connecticut* — Conn. Gen. Stat. Ann. § 5-276a(e)(5) (West Supp. 1987) (history of negotiations between the parties; conditions of similar groups of employees; prevailing wages; and the employer's ability to pay); Conn. Gen. Stat. Ann. §§ 7-473c, 10-153f(c)(4) (West 1986 & Supp. 1987) (prior negotiations between the parties; public interest and financial capability of the municipal employer; interest and welfare of employee group; changes in the cost of living; conditions of employment of employee group and similar groups; the salaries, fringe benefits; and other conditions of employment in the state labor market). *District of Columbia* — D.C. Code Ann. § 1-618.2(d) (1987) (all relevant laws, rules and regulations; the District's ability to comply; the public health, safety and welfare; and the need for reasonable and consistent personnel policies). *Hawaii* — Hawaii Rev. Stat. § 89-11(d) (1985) (lawful authority of the employer; stipulations of the parties; public welfare; fiscal condition of the state, county and employer;

on particular facts in reaching his decision. Statutory standards that arbitrators must address usually include "[t]he lawful authority of the employer," "[t]he interests and welfare of the public," the comparability of

prevailing wages of similar groups of employees; cost of living; and employee's current compensation package). *Illinois* — Ill. Ann. Stat. ch. 28, para. 1614(h) (Smith-Hurd 1984) (lawful authority of the employer; stipulations of the parties; interest and welfare of the public; financial ability of the employer; cost of living; conditions of employment of comparable employees in the public and private sectors; and current overall compensation). *Iowa* — Iowa Code Ann. 20.22(9) (West 1978) (past collective bargaining contracts between the parties; prevailing compensation of comparable employees; interest and welfare of the public; employer's ability to pay). *Maine* — Me. Rev. Stat. Ann. tit. 26, §§ 97-9D.4.C, 1026(4)(C), 1285(4)(B) (1964 & Supp. 1987) (interest and welfare of the public; the financial ability of the government; working conditions of other employees in the same labor market; overall compensation employees presently receive and other factors normally taken into account). *Michigan* — Mich. Comp. Laws Ann. §§ 423.29, 423.280 (West 1978 & Supp. 1987) (lawful authority of employer; stipulations of the parties; interest and welfare of the public; employer's ability to pay; comparison of similar groups of both public and private employees; and cost of living and current compensation of the employees). *Minnesota* — Minn. Stat. Ann. § 179A.16(7) (West Supp. 1988) ("statutory rights and obligations of public employers to manage efficiently and conduct their operations within the legal limitations surrounding the financing of these operations"). *Montana* — Mont. Code Ann. § 39-34-103(5) (1987) (compensation and working conditions of employees performing similar services; interest and welfare of the public; employer's ability to pay; cost of living; and any other relevant circumstances). *Nevada* — Nev. Rev. Stat. § 288.200(7)(b) (1985) (financial ability of the local government and "normal criteria for interest disputes"). *New Jersey* — N.J. Stat. Ann. § 34:13A-16(g) (West Supp. 1987) (interest and welfare of the public; conditions of employees performing similar services; current compensation of the employees; stipulations of the parties; lawful authority of the employer; financial impact on the employer; and cost of living). *New York* — N.Y. Civ. Serv. Law § 209.4(c)(v), 209.5(d) (McKinney 1983 & Supp. 1988) (wages and conditions of public employees performing similar work; current compensation of the employees; cost of living; and the interest and welfare of the public); N.Y.C. Admin. Code § 12-31c.(3)(b)(i)-(v) (1986) (wages and conditions of employment of public and private employees performing similar work; current compensation of employees; cost of living; interest and welfare of the public; and other factors normally taken into consideration). *Ohio* — Ohio Rev. Code Ann. § 4117.14(G)(7) (Anderson Supp. 1986) (past agreements between the parties; conditions of other public and private employees doing comparable work; interest and welfare of the public; financial ability of the employer; authority of the public employer; stipulations of the parties; and other factors normally taken into consideration). *Oregon* — Or. Rev. Stat. § 243.746(4) (1985) (employer's lawful authority; stipulations of the parties; public welfare; employer's ability to pay; comparison of wages of public and private employees providing similar service; cost of living; present compensation; and other normal considerations). *Rhode Island* — R.I. Gen. Laws §§ 28-9.1-10, 28-9.2-10 (1986) (wages and working conditions of employees performing similar services; interest and welfare of the public; peculiarities of the job; and employer's ability to pay); R.I. Gen. Laws § 36-11-10 (1984) (same). *Vermont* — Vt. Stat. Ann. tit. 21, §§ 1732(d), 1733(c) (1978) (authority of the employer; stipulations of the parties; interest and welfare of the public; financial ability of the municipal employer; conditions of employees performing similar work; cost of living; and overall compensation presently received by the employees). *Washington* — Wash. Rev. Code Ann. § 41.56.460 (Supp. 1987) (employer's authority; stipulations of the parties; comparison of wages of employees providing similar services; cost of living; and other traditional factors). *Wisconsin* — Wisc. Stat. Ann. § 111.7(6) (West 1974) (employer's lawful authority and ability to meet costs; stipulations of the parties; public welfare; comparison of wages of public and private employees providing similar services; cost of living; overall present compensation; and other traditional factors).

the wages, hours and working conditions of similarly situated employees, and the cost of living.³⁶ In addition, arbitrators may be required to consider the peculiarities of a particular trade or profession,³⁷ past agreements of the parties,³⁸ the ability of the employer to finance economic adjustments,³⁹ and the effect of an award on the standard of services provided.⁴⁰

The type of interest arbitration procedure mandated by the statute, or agreed to by the parties, will have an impact on the arbitrator's application of the statutory criteria and the rationale for his decisions. When, for example, the statute requires arbitrators to use final offer arbitration,⁴¹ arbitrators exercise much more limited discretion than they do when the statute or agreement provides for conventional arbitration of both economic and non-economic issues. Indeed, in a final offer, total package scheme,⁴² the arbitrators must choose one or the other offer re-

36. See, e.g., Mich. Comp. Laws Ann. § 423.239(a) to (h) (West 1978). The statutory criteria listed in the Michigan statute comprise perhaps the most comprehensive list of the statutory standards. They are as follows:

- (a) The lawful authority of the employer.
- (b) Stipulations of the parties.
- (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:
 - (i) In public employment in comparable communities.
 - (ii) In private employment in comparable communities.
- (e) The average consumer prices for goods and services, commonly known as the cost of living.
- (f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

Id.

37. New York's Taylor Law, for example, requires the arbitration panel to consider:

- (1) hazards of employment;
- (2) physical qualifications;
- (3) educational qualifications;
- (4) mental qualifications; and
- (5) job training and skills.

N.Y. Civ. Serv. Law § 209.4(c)(v)c (McKinney 1983).

38. Iowa Code Ann. § 20.22(9)a (West 1978).

39. *Id.* at § 20.22(9)c.

40. *Id.* at § 20.22(9)b.

41. See *supra* note 24 and accompanying text.

42. See *supra* note 27 and accompanying text.

ardless of their views on the merits of individual economic and non-economic issues.

The most significant statutory standard for arbitration in the public sector is comparability. Because the profit motive is absent in the public sector, and therefore the full range of market forces generally governing the value of jobs is lacking, comparability provides an acceptable substitute measure of job worth. Comparability establishes the market value of public sector labor by analyzing, among other things, the effects of inflation and cost of living increases on compensation of comparable employees.⁴³ The arbitrators therefore must answer the question of with which employers and employees the comparison should be made.

Typically, the statute requires a comparison of the overall compensation of the employees involved in the dispute with the overall compensation of comparable employees performing similar work in both private and public employment in a particular community or like communities.⁴⁴ The overall compensation of employees includes not only the basic wages and benefits, but overtime and premium pay, health insurance, life insurance, pension programs and other benefits, such as food, clothing and transportation allowances.⁴⁵ But what constitutes "like work" and what is a "comparable employee?" Exact public sector and private sector parallels often exist. For example, a comparison of the compensation of private hospital employees with their public counterparts seems appropriate. The same is true of many other occupations. But, the comparison fails when applied to, for example, police and firefighters with private employees.⁴⁶

The general term "interest and welfare of the public," included in a number of state laws, is subject to different interpretations because it is not self-defining. In New York City, for example, the term "interest and welfare of the public" requires consideration of the employer's "ability to pay,"⁴⁷ a separate criterion in most statutes.⁴⁸ The same phrase also has

43. See Fox, *Criteria for Public Sector Interest Arbitration in New York City: The Triumph of Ability to Pay and the End of Interest Arbitration*, 46 Alb. L. Rev. 97, 101-02 (1981).

44. New York's Taylor Law, for example, directs the arbitrator to consider the following criteria: "comparison of . . . the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities." N.Y. Civ. Serv. Law § 209.4(c)(v)a (McKinney 1983).

45. See, e.g., N.Y.C. Admin. Code § 12-311b(3)(b)(ii) (1986).

46. One arbitration panel capsuled the problem of ambiguity by stating: "[c]omparability, like beauty, quite obviously, is in the eye of the beholder." *United States Postal Serv. v. National Ass'n of Letter Carriers*, at 21 (Dec. 24, 1984) (Kerr, Simon, Kheel, Nash and Mahon, Arbs.) (available in the files of the Fordham Law Review).

47. See Fox, *supra* note 43, at 114. On September 15, 1976, the City Council Committee on Civil Service and Labor turned down a proposal to amend the New York City Collective Bargaining Law to add the ability to pay criterion on the ground that such action would be superfluous. See, N.Y. Times, Sept. 16, 1976, at 24, col. 2. Nonetheless, a 1978 amendment to the Financial Emergency Act, in effect through 1986, expressly

been used in New York City to refer to bargaining patterns—the practice whereby once an agreement has been entered into by the employer and a union, the standards of the first agreement will affect the contracts of all other similarly situated unions.⁴⁹

Bargaining patterns assume particular importance in the public sector, where the employer is required to bargain with a number of different labor organizations. The economic settlements for uniformed employees, for example, influence settlements for non-uniformed employees and vice versa. The wages paid by the state also may be relevant in determining the wages that should be paid by a county or a city for persons performing similar work, such as law enforcement or clerical duties. In addition, historic parity relationships may exist, particularly among uniformed forces, police officers and firefighters.⁵⁰ Such patterns are considered under the general standard of interest and welfare of the public.

The criterion of the interest and welfare of the public determines, in part, the priority to be given to the wages and economic benefits of public sector employees. Obviously, the decision to increase wages and improve economic benefits will affect the overall allocation of the employer's resources. Should more money be spent to raise the salaries of the existing workforce, to increase the number of workers, or for capital improvements and increased services? One commentator has suggested that arbitrators should be prepared to justify their choice of priorities,⁵¹ and some statutes require arbitrators to set forth the specific bases for their decisions.⁵²

The employer's ability to pay constitutes another major factor in collective bargaining negotiations and interest arbitration.⁵³ Indeed, the

required the Board to consider the employer's ability to pay. *See* N.Y. Unconsol. Laws § 5408.3 (McKinney 1979 & Supp. 1988).

48. *See infra* notes 53-57 and accompanying text.

49. For example, in *United Federation of Teachers, Local 2 v. Board of Education*, Case No. IA-1-85 (OCB Sept. 16, 1985) (Garrett, Gill and Schienman, Arb.) (available in the files of the Fordham Law Review) the arbitration panel stated:

Each labor organization and each negotiation has its own issues and problems which need to be addressed. Often these concerns may require deviating from the general pattern. On the other hand, we are persuaded that the relationship or linkage between the major municipal unions is an important factor which cannot be ignored or minimized. The Union has long been compared to and has in fact been a participant in the municipal coalition. This relationship surely represents one of the important factors "normally and customarily considered in the determination of wages, hours, fringe benefits . . ." and is an important component in considering the "interest and welfare of the public."

Id. at 33 (footnote omitted).

50. *See generally* C. R. Morris, *The Cost of Good Intentions* 97-106, 120-24 (1980) (discussing the historical interrelationship of economic and non-economic contract gains among police, firefighters and uniformed forces in New York City).

51. *See* Howlett, *Interest Arbitration in the Public Sector*, 60 *Chi.—Kent L. Rev.* 815, 832 (1984).

52. *See infra* notes 69-93 and accompanying text.

53. *See generally* Fox, *supra* note 43, at 102-04 (ability to pay criterion analyzes the effects of inflation and cost of living increases on the employer's ability to meet compensa-

economic circumstances of a given jurisdiction may make it the decisive factor in negotiations or in arbitration.⁵⁴

Factors other than the size of the municipal fisc, however, often impact the ability to pay. Iowa's statute, for example, limits the authority of an arbitration panel by imposing budgetary constraints that narrow the scope of the employer's ability to pay.⁵⁵ In some jurisdictions, such as New York City, the statute imposes a general limitation on the authority of arbitration panels by providing that any part of an award that requires the enactment of a law in order to implement the award cannot be implemented until such law is enacted.⁵⁶ Finally, the question of ability to pay becomes particularly complex when the funding of a specific service, such as welfare, health care or education, requires substantial funding from various levels of government—local, state and federal.⁵⁷

In addition to explicit statutory standards, a number of jurisdictions use a catch-all standard that refers to "[s]uch other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment."⁵⁸ A provision like this enables the arbitrator to choose those criteria that he deems most important in a particular case as long as he discusses the other statutory factors that were also considered in the opinion.

In considering and applying any of the listed criteria of a particular state, the arbitrator must consider whether the issues submitted to him for decision fall within the employer's lawful scope of bargaining.⁵⁹ The scope of bargaining generally encompasses wages, hours, and working conditions, but the laws of a particular jurisdiction may require a more limited scope of bargaining once interest arbitration proceedings commence. In Maine and Rhode Island, for example, the award is merely advisory on economic matters, while it is final and binding on non-eco-

tion gains). The ability to pay criterion also analyzes the competing needs for increased services and capital improvements versus the need for reasonable and responsible compensation of employees.

54. During the New York City fiscal crisis, ability to pay was statutorily defined as whether or not the requested wage increase could be paid without increasing the level of city taxes over and above that which prevailed when the dispute arose. N.Y. Unconsol. Laws, § 5408.3(h) (McKinney 1979). This definition, which the parties and arbitrators were required to consider during the fiscal crisis, had an inhibiting effect on the size of the municipal unions' wage demands. See generally Fox, *supra* note 43, at 120-25.

55. See Iowa Code Ann. §§ 20.22(13), 20.17(6) (West 1978).

56. See N.Y.C. Admin. Code § 12-311c(3)(e) (1986).

57. For example, in the most recent round of negotiations between the United Federation of Teachers, Local 2 and the New York City Board of Education, the employer was able to grant teachers a significant increase in wages because of money available from the state under its Excellence in Teaching program. The New York City Board of Education's share of the state money was \$31 million in the first year and \$42 million in the second year of the three year contract. See 25 Gov't Empl. Rel. Rep. (BNA) 1285 (Sept. 14, 1987).

58. Mich. Comp. Laws Ann. § 423.239(h) (West 1978).

59. See generally 2 B. Werne, *The Law and Practice of Public Employment Labor Relations* § 15.2 (1974).

conomic matters.⁶⁰ Consideration of pensions as a subject for collective bargaining is forbidden in some states and, consequently, may not be subjected to interest arbitration.⁶¹ In addition, the determinations of applicable public employment relations boards and courts may establish other limitations on the scope of bargaining.⁶²

Last, the stipulations of the parties as to the scope of the arbitration and the standards to be applied in a particular case must be considered by the arbitrator and may affect the outcome of the arbitration. For example, in 1985, the New York City Board of Education, the City of New York, and the United Federation of Teachers entered into a voluntary agreement providing for total package, last offer binding arbitration of a contract dispute involving New York City teachers.⁶³ The parties included in their agreement the statutory standards applicable to other New York City employees.⁶⁴

C. *Presentation of Interest Arbitration Cases*

Traditional trial procedures are less than efficient in an interest arbitration proceeding because, unlike a trial, interest arbitration is essentially a legislative process. Based on our experience as interest arbitrators and as administrators of an interest arbitration statute, we propose the following guidelines for successful presentation before an interest arbitration panel.

It is our view that the most satisfactory procedure for presenting an interest arbitration case is to address the issue or issues initially by pre-hearing statements of position. The submission of pre-hearing statements enables the arbitrator to focus clearly on the positions of the parties and on the questions to be decided. This method also permits consideration of complex issues in a relatively short period of time.⁶⁵

60. See Me. Rev. Stat. Ann. tit. 26 § 965(4) (1964 & Supp. 1987); R.I. Gen. Laws § 36-11-9 (1984).

61. See, e.g., N.Y. Civ. Serv. Law § 201.4 (McKinney 1983).

62. For example, the New York City Collective Bargaining Law provides: "The report of an impasse panel shall be confined to matters within the scope of collective bargaining. Unless the mayor agrees otherwise, an impasse panel shall make no report concerning the basic salary and increment structure and pay plan rules of the city's career and salary plan." N.Y.C. Admin. Code § 12-311c(3)(c) (1986).

63. See *United Fed'n of Teachers, Local 2 v. Board of Educ.*, Case No. IA-1-85 at 2 (OCB Sept. 16, 1985) (Garrett, Gill and Schienman, Arbs.) (available in the files of the Fordham Law Review); see also, *NYC Teachers Get Three-Year Pact Through Binding Arbitration*, 23 Gov't Empl. Rel. Rep. (BNA) 1358 (Sept. 23, 1985).

64. See *United Fed'n of Teachers, Local 2 v. Board of Educ.*, Case No. IA-1-85 at 9 (OCB Sept. 16, 1985) (Garrett, Gill and Schienman, Arbs.) (available in the files of the Fordham Law Review).

65. The 1982 New York City Transit case, the Postal Arbitration of 1984 and the New York City Board of Education/United Federation of Teachers Arbitration of 1985 demonstrate that complex issues can be presented and resolved in a compressed time period when pre-hearing statements are used. See *New York City Transit Auth. v. Transit Workers Union of Am., Local 100*, at 3 (N.Y. PERB Apr. 29, 1982) (Anderson, Collins and Friedman, Arbs.) (available in the files of the Fordham Law Review); *United States Postal Serv. v. National Ass'n of Letter Carriers*, at 4 (FMCS Dec. 24, 1984)

The parties should use narration rather than the question and answer method of presentation at the hearing. The interest arbitration process is also facilitated by using the principal witnesses to explain the parties' proposals and contract demands and eliminating cross-examination except for the limited purpose of clarification. The parties are thus able to create a clear record of their positions in a relatively short period of time.⁶⁶ The parties can then rely on rebuttal to refute or to answer the opposing side's position.⁶⁷ The parties should also agree in advance how they will allot the time available for the presentation of their respective cases and the time available for rebuttal.⁶⁸

In making their presentation, the parties need not be overly concerned about rules of evidence. Some attorneys excel in their ability to conduct voir dire and in the making of objections to the admission of documents based upon either the best evidence rule or the manner in which a document was prepared. Such objections can be significant, but they are not nearly as important as arguing or explaining the relevance, or lack thereof, of a particular document submitted in support of a party's position.

II. INTEREST ARBITRATION AND THE COURTS

A. *Judicial Review of Interest Arbitration Awards*

The inclusion of statutory standards in interest arbitration statutes provides the arbitration panel with guidelines for fashioning its award. To facilitate judicial review of interest arbitration awards, some statutes explicitly require that the arbitration panel specify the basis for its award.⁶⁹ Moreover, some courts have held that it is not enough for the arbitration panel to state that it considered the statutory standards.

(Kerr, Kheel, Simon, Mahon and Nash, Arbs.) (available in the files of the Fordham Law Review); *United Fed'n of Teachers, Local 2 v. Board of Educ.*, Case No. IA-1-85 at 3-4 (OCB Sept. 16, 1985) (Garrett, Gill and Scheinman, Arbs.) (available in the files of the Fordham Law Review); see also, *NYC Teachers Get Three-Year Pact Through Binding Arbitration*, 23 Gov't Empl. Rel. Rep. (BNA) 1358 (Sept. 23, 1985); *Arbitrators Settle Postal Impasse with Three Annual Pay Hikes*, 22 Gov't Empl. Rel. Rep. (BNA) 2329 (Dec. 31, 1984).

66. These procedures enabled presentation of ten witnesses' testimony in four days in the UFT arbitration, *United Fed'n of Teachers*, at 4-5, and sixteen witnesses' testimony in five days in the transit workers arbitration. *New York City Transit Auth.*, at 3. The postal arbitration produced "over 2,000 pages of expert testimony, . . . just under 300 exhibits and over 4,000 pages of documentation" in only seven days of public hearings. *United States Postal Service*, at 16.

67. For example, in the UFT arbitration one day was allotted for rebuttal. *United Fed'n of Teachers*, at 5.

68. The arbitration panel typically will determine the duration of the arbitration after meeting with the parties at a pre-hearing conference. The parties must then divide the time amongst themselves. It has been our experience that the parties usually will construct a plan themselves rather than be subject to a plan set by the panel.

69. See, e.g., N.Y. Civ. Serv. Law § 209.4(c)(v) (McKinney 1983) ("panel shall specify the basis for its findings"); Conn. Gen. Stat. Ann. § 5-276a(e)(4)(B) (West Supp. 1988) ("arbitrator . . . shall state with particularity the basis for such decision as to each dis-

Rather, the arbitration panel must make detailed findings of fact that support its conclusions.⁷⁰ Because the New York courts have had an opportunity to construe interest arbitration statutes and awards, New York caselaw is the focal point of the following discussion of such judicial treatment.

The grounds for vacating interest arbitration awards in New York state are broader than the grounds for vacating grievance arbitration awards. A party to a grievance arbitration can successfully challenge an award if the award was procured by fraud or undue means, if there was a lack of due process, or if the award was in excess of the authority of the arbitration panel.⁷¹ In contrast, interest arbitration awards can be vacated if the award is not based on objective and impartial consideration of the entire record, if the statutory criteria were not considered in good faith, or if there is no plausible basis for the award.⁷²

When the New York Court of Appeals was confronted with the need to formulate a standard of review for interest arbitration awards, it sought guidance from the standard used for grievance arbitration awards. A reviewing court will not vacate a grievance arbitration award even if there has been a patent error of fact or law.⁷³ Similarly, the standard for interest arbitration review, first enunciated by the Court of Appeals in *Caso v. Coffey*,⁷⁴ measures interest arbitration awards "according to whether they are rational or arbitrary and capricious."⁷⁵

At the New York City level, the Board of Collective Bargaining

puted issue and the manner in which the factors enumerated . . . were considered in arriving at such decision").

70. See, e.g., *Buffalo Police Benevolent Ass'n v. City of Buffalo*, 82 A.D.2d 635, 638, 443 N.Y.S.2d 107, 109 (1981) (arbitration panel must set forth with specificity the comparisons used in reaching their decision); *Detroit v. Detroit Police Officers Ass'n*, 408 Mich. 410, 482, 294 N.W.2d 68, 96 (1980) (arbitration panel must consider only the applicable statutory standards and its opinion must disclose the reasons for considering the various standards and explain its result).

71. N.Y. Civ. Prac. L. & R. 7511 (McKinney 1980) provides:

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

72. See *Caso v. Coffey*, 41 N.Y.2d 153, 158, 359 N.E.2d 683, 686, 391 N.Y.S.2d 88, 91 (1976).

73. See *Temporary Comm'n of Investigation v. French*, 68 A.D.2d 681, 690, 418 N.Y.S.2d 774, 779 (1979).

74. 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976).

75. *Id.* at 158, 359 N.E.2d at 686, 391 N.Y.S.2d at 91.

adopted standards of review for impasse panel determinations comparable to those applied by the courts in reviewing an administrative agency decision under Article 78 of the Civil Practice Law and Rules.⁷⁶ Courts have the statutory authority to review administrative agency decisions essentially for abuses of discretion and lack of substantial evidence.⁷⁷ Similarly, the Board's policy is to defer to the impasse panel's determination unless the appellant can show that the arbitration was unfair or biased, or that the determination is patently lacking in factual support.⁷⁸

Although the substantial evidence test applied to impasse panel reports under the New York City Collective Bargaining Law differs from the standard of review adopted in *Coffey*, experience with the two standards of review reveals very little substantive difference between them. Both the courts and the Board of Collective Bargaining focus on procedural fairness and the existence of record evidence to support the conclusions of the interest arbitration panel. Neither reviewing forum will substitute its judgment for that of the panel if it appears that the panel considered the statutory criteria.

To facilitate review, New York amended its Taylor Law in 1977 to require that "the public arbitration panel shall . . . specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the [enumerated statutory standards]."⁷⁹ Prior to this amendment, the statute required only that the arbitration panel consider the statutory standards "so far as it deem[ed] them applicable."⁸⁰ The amendment came in response to criticism that this was an overly broad delegation of municipal authority to the arbitration panels.⁸¹ The state legislature intended the newly required specificity and thoroughness to facilitate strin-

76. N.Y. Civ. Prac. L. & R. 7803 (McKinney 1981) provides that an article 78 proceeding may determine only whether there has been a failure to perform a legal duty, the official body is acting or is prepared to act beyond its jurisdiction, a decision is the result of procedural violations or an abuse of discretion, or a decision reached after a legally prescribed hearing is supported by substantial evidence.

77. *Id.*

78. See *City of New York v. Podiatry Soc'y*, No. BCB I-1-72, Decision No. B-23-72, slip. op. at 8-9 (Board of Collective Bargaining Dec. 11, 1972) (available in the files of the Fordham Law Review). The Board has stated its policy as follows:

If the impasse panel has afforded the parties full and fair opportunity to submit testimony and evidence relevant to the matter in controversy; unless it can be shown that the Report and Recommendations were not based upon objective and impartial consideration of the entire record; and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law, the Report and the Recommendations must be upheld.

Id.

79. Act of June 7, 1977, ch. 216, § 4(c)(v), 1977 N.Y. Laws 276, 280. See *infra* notes 117-120 & 144-149 and accompanying text for discussion of the Taylor Law.

80. Act of May 31, 1974, ch. 725, § 4(c)(v), 1974 N.Y. Laws 1125, 1127.

81. See Gov. Memorandum, reprinted in 1977 N.Y. Laws 2489-90.

gent judicial review of interest arbitration awards.⁸²

Three New York State Supreme Court decisions, which have set aside or remanded awards because of their failure to specify the basis of their decision, have given meaning to the 1977 amendment.⁸³ In *Buffalo Police Benevolent Association v. City of Buffalo*,⁸⁴ the court held that a statement in the award that " 'all economic issues were considered' fails to meet the explicit statutory requirement of a specific basis for findings."⁸⁵ The court in *City of Yonkers v. Mutual Aid Association of Paid Fire Department*,⁸⁶ explained that factual specificity with regard to two of the four factors listed in the amended section was inadequate.⁸⁷ Most recently, in *City of Batavia v. Local 896, Batavia Firefighters Association*,⁸⁸ the court opined that "boiler plate statutory language recited in the background portion of the award alone fails to meet the explicit statutory requirement for a specific basis for the findings."⁸⁹ It added that the "arbitration panel has some obligation to explore each criterion, not simply as an arbiter, but also as a quasi-legislative body delegated with a similar factfinding mission, and that the results of that analysis must be clearly and completely specified in its award."⁹⁰ Furthermore, the court held that "to the extent the criterion are not controverted, i.e., 'put in issue,' the panel should nevertheless elicit the position of the parties and/or pertinent facts and consider the significance of such in its decision."⁹¹

The New York City Collective Bargaining Law requires similar specificity by the impasse panel, the city's equivalent to an interest arbitration panel, in its application of the statutory standards.⁹² To facilitate review by the Board of Collective Bargaining, the statute further provides that the party appealing to the Board from the recommendations of an impasse panel must specify the recommendations from which it is appealing and the reasons therefor.⁹³

82. *City of Batavia v. Local 896, Batavia Firefighters Ass'n*, 19 PERB ¶ 7510, 7520 (Sup. Ct. 1986).

83. See *Buffalo Police Benevolent Ass'n v. City of Buffalo*, 13 PERB ¶ 7539 (Sup. Ct. 1980), *aff'd and modified*, 82 A.D.2d 635, 443 N.Y.S.2d 107 (1981); *City of Yonkers v. Mutual Aid Ass'n of Paid Fire Dep't*, Local 628, 80 A.D.2d 597, 436 N.Y.S.2d 1009 (1981); *City of Batavia v. Local 896, Batavia Firefighters Ass'n*, 19 PERB ¶ 7510 (Sup. Ct. 1986).

84. 82 A.D.2d 635, 443 N.Y.S.2d 107 (1981).

85. *Id.* at 639, 443 N.Y.S.2d at 110.

86. 80 A.D.2d 597, 436 N.Y.S.2d 1009 (2d Dep't 1981).

87. *Id.* at 597, 436 N.Y.S.2d at 1010.

88. 19 PERB ¶ 7510 (Sup. Ct. 1986).

89. *City of Batavia*, 19 PERB at 7520.

90. *Id.* at 7522.

91. *Id.* at 7521-22.

92. See generally N.Y.C. Admin. Code § 12-311c (1986).

93. N.Y.C. Admin. Code § 12-311c(4) (1986) provides:

(4) Review of impasse panel recommendations: (a) A party who rejects in whole or in part the recommendation of an impasse panel . . . may appeal to the board of collective bargaining for review of the recommendations of the impasse panel by filing a notice of appeal with said board within ten days of such rejec-

The limited number of appeals from interest arbitration awards, we suggest, serves as evidence that carefully drafted statutory standards are faithfully adhered to by arbitration panels in their determination of the matters in dispute and that misgivings about delegating legislative authority to "unaccountable" arbitrators⁹⁴ are largely unfounded.

B. *Constitutional Challenges to Interest Arbitration Statutes*

The constitutionality of public sector interest arbitration has been challenged in many of the jurisdictions that have adopted interest arbitration statutes. Constitutional challenges to interest arbitration statutes generally fall within one of two categories: (1) unlawful delegation of legislative authority,⁹⁵ or (2) unlawful intrusion into and divestment of the local government's autonomy and control which includes claims that interest arbitration statutes impair the local government's home rule powers,⁹⁶ interfere with the local government's power to tax,⁹⁷ and deny equal protection by violating the one-man, one-vote principle.⁹⁸ Although most of the challenges have either failed on the merits⁹⁹ or been dismissed on procedural grounds,¹⁰⁰ a few have succeeded.¹⁰¹

Interest arbitration statutes have been challenged most often on the

tion. . . . (b) The notice of appeal shall specify the grounds upon which the appeal is taken, the alleged errors of the panel, and the modifications requested.

Id.

94. See *infra* notes 102-05 and accompanying text.

95. See *infra* notes 102-05 and accompanying text.

96. See *infra* notes 106-09 and accompanying text.

97. See *infra* notes 110-13 and accompanying text.

98. See *infra* notes 114-16 and accompanying text. The one-man, one-vote principle seeks to ensure that each person has an equal voice in government. See generally L. Tribe, American Constitutional Law §§ 13-1 to 13-7 (1978).

99. See, e.g., *Town of Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 352 N.E.2d 914 (1976); *Dearborn Fire Fighters Union, Local No. 412 v. City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975); *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); *Medford Firefighters Ass'n Local #1431 v. City of Medford*, 40 Or. App. 519, 595 P.2d 1268 (1979); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *City of Warwick v. Warwick Regular Firemen's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969); *City of Spokane v. Spokane Police Guild*, 87 Wash. 2d 457, 553 P.2d 1316 (1976) (en banc); *State ex rel. Fire Fighters Local 946 v. City of Laramie*, 437 P.2d 295 (Wyo. 1968).

100. See, e.g., *Connecticut Ass'n of Educ., Inc. v. Shedd*, 197 Conn. 554, 499 A.2d 797 (1985); *Town of Berlin v. Santaguida*, 181 Conn. 421, 435 A.2d 980 (1980).

101. See, e.g., *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 400 (Me. 1973) (statute failed to provide standards necessary to protect parties from arbitrator's "possible arbitrary and irresponsible exercise of this delegated power"); *Maryland Classified Employees Ass'n, Inc. v. Anderson*, 2 Pub. Bargaining Cas. (CCH) ¶ 20,414 at 21,384-85 (Md. Cir. Ct. 1976) (because statute failed to include standards to guide arbitrators, it constituted an unlawful delegation of power); *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, 89 S.D. 455, 460, 234 N.W.2d 35, 37-38 (1975) (court perceived compulsory arbitration to be unconstitutional interference with municipal functions); *Salt Lake City v. International Ass'n of Firefighters, Local 1645*, 95 LRRM (BNA) 2383, 2385 (Utah 1977) (act failed to provide any protection against arbitrariness nor did it

ground that they unconstitutionally delegate legislative authority to unaccountable arbitrators.¹⁰² Courts generally have rejected this argument when the interest arbitration statute sets forth criteria to govern the arbitration proceeding and limits the scope of arbitration.¹⁰³ In those instances, interest arbitration panels are a reasonable method for the legislature to deal with the wide variety of issues that may arise in a labor dispute.¹⁰⁴ This avenue of attack, however, has met with some success

provide for the accountability necessary for constitutional exercise of political power in a representative democracy).

In Pennsylvania, after the state's highest court had found a previous arbitration statute unconstitutional, *see Erie Firefighters Local No. 293 v. Gardner*, 406 Pa. 395, 178 A.2d 691 (1962) (per curiam), it was necessary to amend the constitution to allow compulsory arbitration. *See* Pa. Const. art. III, § 31.

102. Howlett, *Interest Arbitration in the Public Sector*, 60 Chi.—Kent L. Rev. 815, 821-22 (1984); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 Yale L. J. 805, 834 (1970).

103. *See* *Town of Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 352 N.E.2d 914 (1976); *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); *Medford Firefighters Ass'n Local #1431 v. City of Medford*, 40 Or. App. 519, 595 P.2d 1268 (1979); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *City of Warwick v. Warwick Regular Firemen's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969); *City of Spokane v. Spokane Police Guild*, 87 Wash. 2d 457, 553 P.2d 1316 (1976) (en banc); *State ex rel. Fire Fighters Local 946 v. City of Laramie*, 437 P.2d 295 (Wyo. 1968). In *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975), the leading New York case, the Court of Appeals held that:

there is no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment. . . . Here, the Legislature has delegated to PERB [the Public Employment Relations Board], and through PERB to *ad hoc* arbitration panels, its constitutional authority to regulate the hours of work, compensation, and so on, for policemen and firemen in the limited situation where an impasse occurs. It has also established specific standards which must be followed by such a panel. . . . We conclude that the delegation here is both proper and reasonable.

Id. at 27, 332 N.E.2d at 293, 371 N.Y.S.2d at 408 (citations omitted).

Also relevant are the comments of Judge Fuchsberg in a concurring opinion:

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 . . . 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. . . . [W]hen 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.

Id. at 34-35, 332 N.E.2d at 297-98, 371 N.Y.S.2d at 414-15 (Fuchsberg, J., concurring) (emphasis and citations omitted).

104. One judge has explained the rationale succinctly:

where the statutes were lacking the necessary standards to guide the arbitrators.¹⁰⁵

Interest arbitration statutes also have been challenged on the ground that the powers given to interest arbitrators infringe upon the home rule powers reserved to local governments.¹⁰⁶ Home rule provisions permit local governments to adopt charters or ordinances pertaining to issues of local concern.¹⁰⁷ The courts, however, have held that the local government's power to act applies only if its action is not inconsistent with the state constitution or any general law.¹⁰⁸ Since interest arbitration statutes constitute general laws, the courts have determined that they do not violate the home rule provision.¹⁰⁹

Another basis upon which the constitutionality of interest arbitration statutes has been challenged concerns the power to tax.¹¹⁰ Opponents of interest arbitration argue that, since an arbitration panel may issue an award which raises the cost of municipal services, the enabling statute is an inappropriate delegation of taxing power.¹¹¹ Courts have rejected this argument, finding that a tax does not derive from an act merely because it "may result in the need for . . . taxation."¹¹² Judge Fuchsberg of the New York Court of Appeals clarified this distinction by observing that,

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*.

Id. at 35, 332 N.E.2d at 298, 371 N.Y.S.2d at 415 (Fuchsberg, J., concurring).

105. See cases cited *supra* note 101.

106. See, e.g., *Carofano v. City of Bridgeport*, 196 Conn. 623, 629, 495 A.2d 1011, 1014 (1985); *Town of Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 770-71, 352 N.E.2d 914, 916 (1976); *Dearborn Fire Fighters Union, Local No. 412 v. City of Dearborn*, 394 Mich. 229, 243, 231 N.W.2d 226, 229, (1975); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 26, 332 N.E.2d 290, 292, 371 N.Y.S.2d 404, 407 (1975); *City of Roseburg v. Roseburg Firefighters Local 1489*, 292 Or. 266, 268, 639 P.2d 90, 91-92 (1981).

107. See generally 1 C.D. Sands & M.E. Libonatti, *Local Gov't Law* §§ 4.01 to 4.15 (1987) (sections authored by D.L. Callies).

108. See, e.g., *Carofano*, 196 Conn. at 629-31, 495 A.2d at 1014-15; *Town of Arlington*, 370 Mass. at 773-74, 352 N.E.2d at 918; *Dearborn Fire Fighters Union*, 394 Mich. at 244-45, 231 N.W.2d at 229-30; *City of Amsterdam*, 37 N.Y.2d at 26-27, 332 N.E.2d at 292-93, 371 N.Y.S.2d at 407-08; *City of Roseburg*, 292 Or. at 274-78, 639 P.2d at 95-97.

109. See, e.g., *Carofano*, 196 Conn. at 629-31, 495 A.2d at 1014-15; *Town of Arlington*, 370 Mass. at 773-74, 352 N.E.2d at 918-19; *Dearborn Fire Fighters Union*, 394 Mich. at 243-46, 231 N.W.2d at 229-30; *City of Amsterdam*, 37 N.Y.2d at 26-27, 332 N.E.2d at 292-93, 371 N.Y.S.2d at 407-08; *City of Roseburg*, 292 Or. at 274-78, 639 P.2d at 95-97.

110. See, e.g., *Dearborn Fire Fighters Union, Local No. 412 v. City of Dearborn*, 394 Mich. 229, 245, 231 N.W.2d 226, 230 (1975); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 27-28, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); *City of Spokane v. Spokane Police Guild*, 87 Wash. 2d 457, 461-63, 553 P.2d 1316, 1318-19 (1976).

111. See, e.g., *Dearborn Fire Fighters Union*, 394 Mich. at 245-46, 231 N.W.2d at 230; *City of Amsterdam*, 37 N.Y.2d at 27, 332 N.E.2d at 293, 371 N.Y.S.2d at 408; *City of Spokane*, 87 Wash. 2d at 461, 553 P.2d at 1318.

112. *City of Spokane*, 87 Wash. 2d at 461, 553 P.2d at 1319; accord *Dearborn Fire*

although arbitration awards may impact on the cost of municipal services, the municipality remains free to choose the method of meeting these costs.¹¹³

This observation accords with the obvious fact that, in the public sector, neither arbitration awards nor collective bargaining agreements are self-implementing. If legislative authorization to finance a contract or an arbitration award does not already exist, the executive must secure funding from the legislature, reduce services, decline to fill vacancies, or take other management action to implement the agreement. The important point remains that the legislature must, either before or after contract negotiations, determine the appropriate level for government operations and provide the required funding.

Last, interest arbitration statutes have been challenged on the ground that arbitrators are not selected in a manner consistent with the one-man, one-vote principle,¹¹⁴ thereby denying equal protection of the law.¹¹⁵ The courts consistently have rejected this argument, finding that because the power of the arbitration panel is administrative, not legislative, the one-man, one-vote principle does not apply.¹¹⁶

In sum, constitutional challenges to interest arbitration statutes largely have been unsuccessful. A claim that the statute is an impermissible delegation of legislative authority is the only assertion that has met with any success. Where, however, the statute limits the arbitrator's discretion and authority, the courts uniformly deem the statute constitutional.

III. EXPERIENCE WITH THE LAW: NEW YORK CITY

Interest arbitration has proven an effective method of avoiding and resolving employment disputes. The following discussion considers the operation of interest arbitration in New York City, one jurisdiction in which it has been successfully utilized.

Two statutes regulate labor disputes between the City of New York and its employees: the New York State Taylor Law¹¹⁷ and its local

Fighters Union, 394 Mich. at 245-46, 231 N.W.2d at 230; *City of Amsterdam*, 37 N.Y.2d at 41, 332 N.E.2d at 302, 371 N.Y.S.2d at 420 (Fuchsberg, J., concurring).

113. See *City of Amsterdam*, 37 N.Y.2d at 41, 332 N.E.2d at 307, 371 N.Y.S.2d at 420 (Fuchsberg, J., concurring); see also *Dearborn Fire Fighters Union*, 394 Mich. at 245-46, 231 N.W.2d at 230 (arbitration awards may be implemented by an increase in taxes or a decrease in municipal expenditures); *City of Spokane*, 87 Wash. 2d at 461, 553 P.2d at 1319 (that an award "may result in the need for local taxation, does not itself impose any 'burden or charge'").

114. See *supra* note 98.

115. See, e.g., *Town of Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 777, 352 N.E.2d 914, 920 (1976); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 27-28, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); *Harney v. Russo*, 435 Pa. 183, 190-91, 255 A.2d 560, 563-64 (1969).

116. See, e.g., *Town of Arlington*, 370 Mass. at 777-78, 352 N.E.2d at 920-21; accord *City of Amsterdam*, 37 N.Y.2d at 42, 332 N.E.2d at 303, 371 N.Y.S.2d at 421 (Fuchsberg, J., concurring).

117. N.Y. Civ. Serv. Law §§ 200-214 (McKinney 1983 & Supp. 1988).

complement, the New York City Collective Bargaining Law ("NYCCBL").¹¹⁸ Where local law is silent, or contrary, the Taylor Law governs.¹¹⁹ For example, the NYCCBL contains no strike prohibition per se, but the Taylor Law, which applies to New York City, bans strikes by public employees.¹²⁰

The NYCCBL is administered by the Board of Collective Bargaining, a body composed of three neutral members, two labor members, and two City of New York members.¹²¹ The two labor members and the two city members choose the chairman of the Board from among the neutral members.¹²² The Chairman, who must be elected by unanimous vote, also functions as the director of the Office of Collective Bargaining.¹²³

The NYCCBL provides procedures, including mediation and the issuance of a final and binding report by an impasse panel for the resolution of bargaining impasses.¹²⁴ Impasse panels are endowed with the broad power to resolve collective bargaining negotiation disputes.¹²⁵ Impasse panel determinations are equivalent to compulsory interest arbitration awards.¹²⁶ The NYCCBL also specifies certain standards that an im-

118. N.Y.C. Admin. Code §§ 12-301 to 12-316 (1986).

119. See N.Y. Civ. Serv. Law § 212 (McKinney 1983). The Taylor Law permits local governments to enact "provisions and procedures" for the regulation of public employees relations which are "substantially equivalent" to the Taylor Law. *Id.*

120. N.Y. Civ. Serv. Law § 210(1) (McKinney 1983).

121. N.Y. City Charter Ch. 54, § 1171 (1986) states:

The mayor shall have the power to appoint the city members of the board to serve at his pleasure, and the labor members of the board from designations by the municipal labor committee. Each labor and city member shall have an alternate, who shall be appointed and removed in the same manner as the member for whom he is the alternate. The chairman and other impartial members shall be elected by the unanimous vote of the city and labor members, and shall serve for three year terms. . . .

122. *Id.* at §§ 1170-1171.

123. *Id.*

124. N.Y.C. Admin. Code §§ 12-301 to 12-311 (1986).

125. The NYCCBL grants impasse panels power to:

mediate, hold hearings, compel the attendance of witnesses and the production of documents, review data, and take whatever action it considers necessary to resolve the impasse. If an impasse panel is unable to resolve an impasse within a reasonable period of time, as determined by the director, it shall, within such period of time as the director prescribes, render a written report containing findings of fact, conclusions, and recommendations for terms of settlement.

N.Y.C. Admin. Code § 12-311c(3)(a) (1986). The language of this section indicates that impasse panels are encouraged to settle bargaining disputes through mediation. Experience has shown that even if the parties do not reach formal agreement through the panel's mediatory efforts, and a report and recommendations are issued, very often the report reflects what the parties informed the panel regarding certain informal agreements existing between them. See Anderson, *The Impact of Public Sector Bargaining: An Essay Dedicated to Nathan P. Feinsinger*, 1973 Wis. L. Rev. 986, 1011-15. See also Grodin, *Political Aspects of Public Sector Interest Arbitration*, 1 Indus. Rel. L.J. 1, 14 (1976) (the arbitral process as viewed as an extension of the negotiating process).

126. As originally enacted in 1967, the NYCCBL contained provisions for factfinding, but the recommendations that resulted were only advisory and there was no statutory finality procedure. See 1967 N.Y. Local Laws 449 (amending N.Y.C.C.B.L. Ch. 54,

passee panel is to "consider wherever relevant in making its recommendations for terms of settlement."¹²⁷ These standards are similar to those set forth in the Taylor Law.¹²⁸

The report of the impasse panel must be published within seven days of its submission to the parties.¹²⁹ The time may be extended, to no more than thirty days, to permit the parties to conclude a negotiated agree-

§ 1173-7.0(c)). Nonetheless, the City of New York maintained a policy of voluntary compliance with impasse panel recommendations. In 1969, the Taylor Law was amended to require the Mayor of the City of New York to submit a plan dealing with the need for a specified final step in the impasse procedures. 1969 N.Y. Laws Ch. 24, § 11, 79-80.

To develop proposed finality procedures for submission to the state legislature, representatives of New York City, the Municipal Labor Committee, and the Office of Collective Bargaining conducted a series of meetings. Representatives of the mayor's office, the Municipal Labor Committee, and the City Council rejected proposals to conform New York City procedures to the Taylor Law as it then stood—that is, to require legislative action in bargaining impasses. The city council leadership did not wish to play the part of referee in labor disputes between the Mayor and the public employee unions. The unions, so long as they were denied the right to strike, preferred a finality method where the ultimate decision would be made by neutral third parties. See Lindsay, *Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices Into Substantial Equivalence With the Public Employees' Fair Employment Act 6*.

The report also sought a consolidation of jurisdiction over New York City public employment relations. It suggested giving the Office of Collective Bargaining mandatory jurisdiction over non-mayoral as well as mayoral agencies. *Id.* at 3-5. In addition, it urged a continuation of the policy excluding the city from the Taylor Law requirement that collective bargaining agreements be concluded prior to budget submission dates. *Id.* at 7-8. A discussion of other minor problem areas also was included. *Id.* at 8-10. A form of compulsory interest arbitration, therefore, was agreed upon and enacted by the New York City Council in 1972. 1972 N.Y. Local Laws 158-60 (codified at N.Y.C. Admin. Code §§ 12-309a (8), 12-311c(3)(e), 12-311c(4), 12-311f (1986)).

127. N.Y.C. Admin. Code § 12-311c(3)(b) (1986) provides:

(b) An impasse panel . . . shall consider wherever relevant the following standards in making its recommendations for terms of settlement:

(i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities;

(ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;

(iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;

(iv) the interest and welfare of the public;

(v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.

128. See N.Y. Civ. Serv. Law § 209(4)(c)(V) (McKinney 1983).

129. See N.Y.C. Admin. Code § 12-311c(3)(d) (1986).

ment prior to publication.¹³⁰ If a contract is negotiated during this time, the panel will not release the report, except upon consent of the parties.¹³¹ If the parties fail to negotiate a contract during this time, they must indicate acceptance or rejection of the panel recommendations.¹³² A party that rejects the recommendations may appeal to the Board of Collective Bargaining for review.¹³³

The statute provides strict time limits for filing an appeal of the panel's report and for issuance of the Board's decision.¹³⁴ The Board normally decides appeals upon the papers filed by the parties, but it occasionally will hear oral argument. The Board will issue a decision within thirty days after the notice of appeal has been filed.¹³⁵ The Board bases its review on the record and evidence before the impasse panel and is guided by the statutory criteria that the panel must consider.¹³⁶

The Board of Collective Bargaining may "affirm or modify the panel recommendations in whole or in part."¹³⁷ It may also set aside the recommendations if it finds that the rights of a party have been prejudiced.¹³⁸ If the Board takes no action within the statutory time periods, the recommendations are deemed adopted.¹³⁹ The NYCCBL provides that a final determination of the Board of Collective Bargaining "shall be binding upon the parties" and "shall constitute an award within the meaning of article seventy-five of the civil practice law and rules."¹⁴⁰ The binding effect of a Board determination is qualified by the proviso that it is subject to legislative action when a law must be amended or enacted.¹⁴¹

If both parties accept the panel's recommendations or if neither party petitions the Board of Collective Bargaining for review, the recommendations "shall be final and binding."¹⁴² The recommendations of an impasse panel, like the Board's determinations, are subject to legislative

130. *Id.*

131. *See id.*

132. *See id.* at § 12-311c(3)(e).

133. *See id.* at § 12-311c(4)(a).

134. *See id.*

135. *See id.* at § 12-311c(4)(d). Notice of appeal must be filed and served upon the other party within ten days after receipt of the impasse panel's recommendations. *See id.* at § 12-311c(4)(a). If there is no final determination by the Board within thirty days of the filing of the notice of appeal or within forty days of a rejection notice which the board reviews upon its own initiative, the panel's recommendation is deemed adopted. *See id.* at § 12-311c(4)(d). The director may extend these periods for an additional period not to exceed thirty days. *See id.*

136. *See id.* at § 12-311c(4)(b).

137. *See id.* at § 12-311c(4)(c).

138. *See id.*

139. *See id.* at § 12-311c(4)(d).

140. *Id.* at § 12-311c(4)(f).

141. *See id.* at § 12-311c(4)(e).

142. *Id.* at § 12-311c(4)(a). This section also provides that the Board of Collective Bargaining "may review recommendations which have been rejected" but not appealed. *Id.* This action has never been taken.

approval, however, in those instances where they require the enactment of a law.¹⁴³

The preceding description of finality under the NYCCBL reveals that the procedure and substance of impasse resolution in New York City differs in certain respects from the binding finality procedures provided by the Taylor Law. Although impasse panels have the authority to mediate and are strongly encouraged by the statute to do so,¹⁴⁴ the appointment of a mediator is not mandatory under the NYCCBL and mediation is undertaken only when circumstances indicate that it might be productive.¹⁴⁵ Under the Taylor Law, interest arbitration awards are directly appealable to the courts by an article 75 proceeding,¹⁴⁶ whereas, under the NYCCBL, impasse panel recommendations are appealable first to the Board of Collective Bargaining.¹⁴⁷ Last, unless the parties stipulate otherwise, New York City impasse panels are composed of neutrals,¹⁴⁸ whereas the Taylor Law panels have a tripartite structure.¹⁴⁹

When New York City's final and binding impasse procedures were first introduced, critics claimed that the procedures would encourage the use of third parties in fashioning contract settlements to the detriment of concerted efforts at the bargaining table.¹⁵⁰ The experience to date, however, refutes this contention.¹⁵¹ In the fifteen years since the adoption of finality in impasse procedures, only 63 of the 761 reported contract settlements—or 8.3% percent—used the process.¹⁵² Of these 63 impasse

143. See *id.* at § 12-311c(3)(e).

144. See *id.* at § 12-311c(3)(a).

145. See *id.* at § 12-311b(2).

146. See N.Y. Civ. Serv. Law § 209.4(c)(vii) (McKinney 1983); N.Y. Civ. Prac. L. & R. 7511 (McKinney 1980).

147. See N.Y.C. Admin. Code § 12-311c(4)(a) (1986).

148. See N.Y.C. Admin Code §§ 12-301 to 12-311 (1986).

149. See N.Y. Civ. Serv. Law § 209.4(c)(ii) (McKinney 1983).

150. Generally, critics of interest arbitration have claimed that its use will have a "chilling" or deterrent effect on the parties' incentive to bargain in good faith. See, e.g., McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 Colum. L. Rev. 1192, 1209-10 (1972).

151. The experience of other states, such as New Jersey, similarly rebut this contention. The Chairman of the New Jersey Public Employment Relations Commission recently reported on that state's ten year experience with an interest arbitration statute that combines final offer package arbitration for economic issues and final offer, issue-by-issue arbitration for non-economic issues. See J. Mastriani, *Interest Arbitration in State and Local Government*, Remarks at Arbitration Day Meeting of the American Arbitration Association (May 7, 1987). First, he reported that strikes and job actions were virtually non-existent, whereas they had been commonplace prior to the act. *Id.* at 2-3. He also reported that the arbitration deadline—the employer's budget submission date—had been a major stimulus to bargained results aided by mediation. *Id.* at 4. The Chairman, however, was more critical of the quality of arbitration awards and called attention to the need for arbitrators to address the statutory criteria. *Id.* at 5-6. Lastly, he observed that arbitration has been a stabilizing and moderating factor in salary determinations. *Id.* at 6.

152. Finality Report of Office of Collective Bargaining 1972-1986 (available in the files of the Fordham Law Review)

cases, the parties accepted the panel's recommendations in 49.¹⁵³ In the remaining 14 cases, a party appealed to the Board for final determination.¹⁵⁴ In 12 of those cases, the Board affirmed the report and recommendations of the impasse panel, while the Board acted in the remaining two cases to reduce the award to conform the recommendations to the city's fiscal plan.¹⁵⁵

Another indicator of success of a public sector bargaining law, like New York's Taylor Law, which provides for arbitration and outlaws the strike, is whether strikes have occurred. Since the enactment of the New York City interest arbitration provisions in 1972, only three strikes have occurred over new contract terms in the course of negotiations of over 750 separate municipal contracts.¹⁵⁶ In contrast, in the four years prior to the amendment there were ten strikes in the course of negotiations of over 517 separate municipal contracts.¹⁵⁷ These figures support the viability of interest arbitration as an effective alternative to the strike.

Comparison of arbitration awards with negotiated settlements also demonstrates the effectiveness of the process. The New York State Public Employment Relations Board 1986-87 Annual Report¹⁵⁸ states that the arbitrated salary increases statewide for police averaged 6.45%, just slightly below that of negotiated salary increases which averaged 6.52%.¹⁵⁹ For firefighters, the arbitrated awards averaged 5.78%, while negotiated increases averaged 5.81%.¹⁶⁰ This report indicates that the negotiated settlements and awards closely parallel each other.¹⁶¹ As

153. *Id.*

154. *Id.*

155. *Id.*; see *infra* note 162.

156. In 1973, New York City firefighters went on strike for five and one-half weeks over the issue of wages. See generally 540 Gov't Empl. Rel. Rep. (BNA) B-21 (Feb. 4, 1974); 638 Gov't Empl. Rel. Rep. (BNA) B-5 (Jan. 5, 1976). In 1979, employees of the New York City Off-Track Betting Corporation went on strike for twenty days, again over the issue of wages. See 913 Gov't Empl. Rel. Rep. (BNA) 33 (May 18, 1981). Last, in 1981, resident physicians in municipal hospitals went on strike for several days over a demand for guaranteed minimum staff levels for physicians, nurses and technicians. *Id.* As a result of the illegal strike the Union was held in contempt and fined \$175,000 for staging the strike. *New York City Health and Hosp. Corp. v. Committee of Interns and Residents of the City of New York*, N.Y.L.J. May 8, 1981, at 7, col. 1 (Sup. Ct. N.Y. County).

157. The source of this data is the Division of Research and Statistics, New York State Department of Labor (as reported in the 1973 OCB Annual Report at 27) (available in the files of the Fordham Law Review).

158. 20 PERB News 4 (1987) (Annual Report Edition).

159. *Id.* at 9. The report also revealed that, out of a universe of 219 contracts, only 39 were submitted to interest arbitration in the period 1986-87, of that number, 21 were settled by interest arbitration. *Id.*

160. *Id.*

161. The report is also consistent with non-PERB studies. Peter Feuille and John T. Delaney conducted a detailed study of collective bargaining interest arbitration and police salaries. P. Feuille & J. Delaney, *Collective Bargaining, Interest Arbitration and Police Salaries*, 39 *Indus. & Lab. Rel. Rev.* 228 (Jan. 1986). They surveyed 900 cities during the 1971-81 period and, based upon their survey, concluded that "bargaining and arbitration's availability have very strong associations with high police salaries, but our results

noted previously, during the fifteen-year history of final and binding arbitration in New York City, there have been only two cases where the Board found awards to be inconsistent with negotiated settlements.¹⁶² On appeal, the tripartite Board of Collective Bargaining, by unanimous decision, reduced those awards to conform to the city's basic wage patterns.¹⁶³

CONCLUSION

After nearly two decades of interest arbitration, it is clear that the

also indicate that, in general, arbitration's availability has done relatively little to cause these high salaries." *Id.* at 238 (footnote omitted). The authors added that "availability of arbitration has had a positive but modest impact on police salaries." *Id.* at 238.

162. See Local No. 3, Int'l Bd. of Elec. Workers v. City of New York, No. BCBI-11-76, Decision No. B-8-76, slip. op. at 8 (Board of Collective Bargaining Aug. 11, 1976) (available in the files of the Fordham Law Review); City of New York v. Patrolmen's Benevolent Ass'n of the District Attorneys' Offices, City of New York, Inc., No. BCBI-13-77, Decision No. B-3-77, slip. op. at 19-20 (Board of Collective Bargaining Apr. 20, 1977) (available in the files of the Fordham Law Review), *aff'd sub nom.* Higgins v. Anderson, 97 LRRM 2481 (N.Y.C., Sp. Term. Pt. 1 1977).

163. See Local No. 3, Int'l Bd. of Elec. Workers v. City of New York, No. BCBI-11-76, Decision No. B-8-76, slip. op. at 7-8 (Board of Collective Bargaining Aug. 11, 1976) (available in the files of the Fordham Law Review); City of New York v. Patrolmen's Benevolent Ass'n of the District Attorneys' Offices, City of New York, Inc., No. BCBI-13-77, Decision No. B-3-77, slip. op. at 20 (Board of Collective Bargaining Apr. 20, 1977) (available in the files of the Fordham Law Review), *aff'd sub nom.* Higgins v. Anderson, 97 LRRM 2481 (N.Y.C., Sp. Term. Pt. 1 1977).

Interest arbitration awards have not been used primarily to determine the basic wage pattern of the city and its major unions. Of course, wage disputes can go to interest arbitration and some awards concern attempts to increase the basic wage pattern of the city because of special conditions of employment. See, e.g., United Fed'n of Teachers, Local 2 v. Board of Educ., Case No. IA-1-85 at 3-4 (OCB Sept. 16, 1985) (Garrett, Gill and Scheinman, Arbs.) (available in the files of the Fordham Law Review) (award determined what the minimum and maximum salary rate should be for teachers in the New York City school system, which was plagued by recruitment and retention problems). The award of the arbitrators in determining what the proper rate of compensation should be for two-men sanitation crews assigned to do the work previously performed by three-men crews is a good example. See City of New York v. Uniformed Sanitationmen's Ass'n, Local 831, Case No. I-157-80 (OCB Dec. 10, 1980) (Kelley, Arb.) (available in the files of the Fordham Law Review). A dispute arose over the city's decision to utilize side loading collection trucks operated by two-men crews in some sanitation districts instead of rear loading trucks operated by three-men crews. *Id.* at 5. The Union argued that since "the City would save \$13,000 per man operating the side loading trucks; that they 'expected a fifty-fifty split . . . a differential of \$6,500' per annum per man working on the side loaders." *Id.* at 9. The Union claimed that the employees "are entitled to their just due and should be compensated and paid a differential for their extra effort, added responsibilities and improved productivity." *Id.* The City, on the other hand, believed no differential was due. *Id.* The arbitrator carefully examined the evidence which showed that "cities operating such equipment have without exception provided a salary differential to the Driver/Loaders of the side loader when reducing crew size. None, however, provide a differential of the magnitude proposed by the Union in these proceedings. . . ." *Id.* at 10. Taking into consideration the estimated increases in productivity resulting from the implementation of the side loaders and the differentials awarded in other jurisdictions under similar circumstances, the arbitrator awarded a salary differential of \$11 per shift per employee. *Id.*

practice of interest arbitration is here to stay. It has become a significant adjunct to the public sector collective bargaining process where the parties reach an impasse in their negotiations. The acceptance of the constitutionality of interest arbitration by the courts and the acceptance of the process by the parties demonstrates that this important means of dispute settlement has been developed in accordance with our democratic principles.

The task of interest arbitration is analogous to that of legislation—to establish the conditions of employment. Each party must try to persuade the arbitrator why a particular position is, or is not, supported by the evidence produced under the governing statutory standards. Because the task is to legislate the terms of employment, not to prove or disprove a particular set of facts, an interest arbitration should not be presented to an arbitrator as a trial lawyer would present a civil case to a judge or jury.

Interest arbitration enables the labor participants to retain the leverage necessary to bargain effectively in negotiating a contract. At the same time, the harmful effects of a strike are avoided. Experience shows that the ends achieved with interest arbitration are analogous to those achieved in jurisdictions that do not prohibit the strike. In short, the experiences during the past two decades of the various jurisdictions that have adopted interest arbitration demonstrate that interest arbitration is a better way to surmount collective bargaining impasses than the trial by combat method of the strike.

