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COMPULSORY ARBITRATION: THE SCOPE OF JUDICIAL REVIEW

INTRODUCTION

The City of Detroit, embroiled in a labor dispute with its policemen during the summer of 1970, ultimately reached an impasse with contract negotiators representing these discontented municipal employees. Pursuant to statutory procedures pertaining to the resolution of bargaining stalemates, the parties were required to submit the unresolved issues to final and binding compulsory arbitration.¹ Despite Detroit's precarious fiscal condition, the arbitrators awarded the police a substantial salary increase.² To satisfy the financial burden created by the award, the city announced a major austerity plan under which workers from other unions were laid off and all city employees had their workweek increased from 35 to 40 hours. As a result of the layoff, Detroit teetered on the brink of a strike by all city employees.³ The award to the city's policemen encouraged other municipal employees to refrain from settling their contract disputes with the city and eventually precipitated the 1971 Detroit sanitation workers' strike.⁴

The preceding facts comprise a well-known episode in the relatively short life of public sector compulsory arbitration.⁵ Citing the

¹ No. 312, 1969 Mich. Pub. Acts 602 (current version at MICH. COMP. LAWS ANN. § 423.231 -.247 (Supp. 1977)).

² The policemen's union was awarded a salary increase of over 10% for officers with more than 4 years service. The arbitration panel decided that the policemen were entitled to the fair value of their services and hence should not have to subsidize the city. *Detroit Police Officers Ass'n v. City of Detroit* (July 1, 1970) (Haber, Arb.), excerpted in R. SMITH, H. EDWARDS, & R. CLARK, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 833-34 (1974) [hereinafter cited as *LABOR RELATIONS*].

³ *Gov't Empl. Rel. Rep.* (BNA) No. 361, at B-9 (Aug. 10, 1970). See also Block, *Criteria in Public Sector Interest Disputes, in Arbitration and the Public Interest — Proceedings of the Twenty-Fourth Annual Meeting — National Academy of Arbitrators* 161, 172 (1971).

⁴ See *Gov't Empl. Rel. Rep.* (BNA) No. 401, at B-15 (May 17, 1971). See also *id.* No. 361, at B-9 to B-10 (Aug. 10, 1970).

⁵ For purposes of this Note, use of the word "arbitration" refers to interest arbitration unless otherwise specified. Interest arbitration has been defined as "the arbitration of a dispute of interest, which involves the negotiation of a new, collective agreement (contract) or revision of such an agreement." N.J. PUB. EMPLOYER-EMPLOYEE REL. STUDY COMM'N, REPORT TO THE GOVERNOR AND THE LEGISLATURE 143 (1976) [hereinafter cited as *N.J. REPORT*]. Compulsory interest arbitration is that which is mandated by statute. If the arbitration is "binding," the parties are obligated to comply with the terms of the award.

Interest arbitration is to be distinguished from grievance arbitration, which involves the interpretation or application of the provisions of an existing collective bargaining agreement. *Id.*

Detroit experience, opponents of legislatively mandated arbitration have emphasized the stranglehold effect an arbitrator's award can have upon city management.⁶ Nonetheless, even as critics have continued to question the propriety, if not the constitutional validity,⁷

⁶ See, e.g., R. CLARK, COMPULSORY ARBITRATION IN PUBLIC EMPLOYMENT (Public Employee Relations Library No. 37, 1972).

⁷ Many believe that should current statutes be declared invalid, lawmakers would enact the requisite constitutional laws if there is sufficient public demand for compulsory arbitration statutes. See, e.g., Anderson, *A Survey of Statutes with Compulsory Arbitration Provisions for Fire and Police*, in ARBITRATION OF POLICE AND FIREFIGHTER DISPUTES: PROCEEDINGS OF A CONFERENCE ON ARBITRATION OF NEW CONTRACT TERMS FOR THE PROTECTIVE SERVICES 8-9 (Am. Arb. Ass'n 1971) [hereinafter cited as PROTECTIVE SERVICES]. See also Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CALIF. L. REV. 678, 683 (1975) [hereinafter cited as Grodin]. Nevertheless, legal action challenging the constitutionality of compulsory arbitration statutes has had great appeal, particularly to municipalities attempting to prevent implementation of an unfavorable arbitral award, Bowers, *Legislated Arbitration: Legality, Enforceability, and Face-Saving*, 3 PUB. PERSONNEL MANAGEMENT 270, 274 & n.25 (1974), or the submission of an issue to arbitration, see, e.g., *City of Everett v. Fire Fighters Local 350*, 87 Wash. 2d 572, 555 P.2d 418 (1976) (en banc). Labor unions, on the other hand, usually view compulsory arbitration as a benefit given in lieu of the right to strike. See N.Y. Times, Dec. 5, 1976, § 1, at 90, col. 3, wherein New York police and firefighter union officials cautioned state authorities concerning the possibility of labor strikes if the compulsory arbitration process were to be abandoned. Since noncompliance with compulsory arbitration awards might encourage a legislature to abandon the schema, unions generally have acquiesced in the system. See Loewenberg, *The Effect of Compulsory Arbitration on Collective Negotiation*, 1 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 177, 185 (1972), reprinted in TRENDS IN PUBLIC SECTOR LABOR RELATIONS 132, 136 (1975); H. WELLINGTON & R. WINTER, *THE UNION AND THE CITIES* 179 (1971); Stern, *Final Offer Arbitration—Initial Experience in Wisconsin*, MONTHLY LAB. REV. Sept. 1974 at 39, 41.

The highest courts of numerous jurisdictions have upheld the constitutionality of their respective state compulsory arbitration statutes. See *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387 (Me. 1973) (equally divided court); *Town of Arlington v. Board of Conciliation & Arb.*, 352 N.E.2d 914 (Mass. 1976); *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975) (equally divided court); *School Dist. of Seward Educ. Ass'n v. School Dist.*, 188 Neb. 772, 199 N.W.2d 752 (1972); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *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 Iowa, the Attorney General recently concluded that the state's compulsory arbitration statute was constitutional on the basis of its similarity to the New York, Michigan, and Maine models. GOV'T EMPL. REL. REP. (BNA) No. 630, at B-1 to B-3 (Nov. 3, 1975).

Some courts, however, have held enabling statutes to be unconstitutional. See, e.g., *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, 234 N.W.2d 35 (S.D. 1975) (constitutional provision prohibits legislative interference with municipal functions). The principal constitutional objection has focused upon alleged violation of the nondelegation doctrine. See note 15 and accompanying text *infra*. In addition, several other ingenious but unsuccessful constitutional attacks have been directed at the compulsory arbitration process. For example, in *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969), the appellant city claimed that the one man, one vote principle was violated by the statutory scheme because the parties themselves had chosen the members of the compulsory arbitration panel, thus denying the citizenry equal participation in a body that determined the distribution of public funds. *Id.* at 190-91,

of statutes granting private persons⁸ the power to make contracts which often dictate future governmental policy, the past decade has witnessed an unprecedented increase in the implementation and use of compulsory arbitration.⁹

255 A.2d at 563-64. The court, however, rejected this theory, stating that the doctrine did not apply to nonlegislative officers such as arbitrators. *Id.* Another argument raised by the *Harney* appellant was that the city was denied due process by the statutory procedure because state laws prohibited it from raising the tax mill to pay the arbitral award. The court rejected this claim also, stating that the law did not necessarily restrict the city from raising taxes. *Id.* at 190, 255 A.2d at 564-65. For a discussion of other challenges to compulsory arbitration, see note 12 *infra*.

Specific provisions of several state constitutions have led some critics to question the validity of state legislative infringement upon home-rule power through the enactment of compulsory arbitration statutes. The courts, however, usually have found countervailing provisions which retain for the legislature the power to resolve labor disputes. *See, e.g.,* Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 245-46, 231 N.W.2d 226, 229-30 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 26, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 407 (1975); City of Everett v. Fire Fighters Local 350, 87 Wash. 2d 572, 555 P.2d 418 (1976) (en banc).

Finally, various courts have summarily rejected the argument that a compulsory arbitration act relinquishes to the arbitration panel a municipality's power to tax. Although an award might indirectly necessitate an increase in taxes, the courts stress that expenditure cuts are available as an alternative to raising the tax millage. As a result, there is no violation of the constitutional prohibition against municipal relinquishment of the power to tax. *E.g.,* Dearborn Fire Fighters Local 412 v. City of Dearborn, 394 Mich. 229, 245-46, 231 N.W.2d 226, 229-30 (1975).

⁸ Most compulsory arbitration statutes provide for three-member panels, with one member selected by each of the parties and the third selected either by mutual agreement of the partisan members or by an official stipulated in the enabling statute. McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1197 & n.28 (1972). One of the problems with this procedure is that since the panel must arrive at a majority decision, the neutral arbitrator often must compromise to persuade one of the partisan arbitrators to agree with him. AMERICAN ARBITRATION ASSOCIATION, LABOR ARBITRATION—PROCEDURES AND TECHNIQUES 21 (1973). Still, the deciding vote usually remains with the impartial arbitrator, who is generally a private individual. *See* Barr, *The Public Arbitration Panel as an Administrative Agency: Can Compulsory Interest Arbitration be an Acceptable Dispute Resolution Method in the Public Sector?*, 39 ALB. L. REV. 377, 386-87 (1975) [hereinafter cited as Barr].

⁹ The "golden age" of public employee labor relations has heralded two critical developments in municipal labor law. First, in an effort to afford public sector employees the same statutory "benefits" enjoyed by those in the private sector, many states have granted collective bargaining rights to public employees. *See* A. Anderson, *The Bargaining Table and City Hall*, Address at the Int'l Conference on Trends in Industrial and Labor Relations, Montreal, Canada (May 27, 1976) (37 states grant collective bargaining rights to at least some public employees at the end of 1975). *See generally* LABOR RELATIONS, *supra* note 2. Second, as a means of settling contract disputes between governmental bodies and key public employees, a number of states have enacted statutes providing for compulsory interest arbitration.

In essence, compulsory arbitration represents the quid pro quo for denying the public employee the right to strike. Although some states now grant public employees a limited right to strike, *see* N.J. REPORT, *supra* note 5, at 18-19 & n.3, compulsory arbitration remains the preferred procedure for dispute settlement in "strategic" areas of employment. *Id.* at 20.

Although compulsory arbitration is emerging from its infancy with much acclaim for its efficacy in achieving the goals first sought by its proponents, certain problems remain. Foremost among these is a need for the institution of effective procedural checks to protect both the general public and the participating parties from an improvident judgment rendered by a compulsory arbitration panel. As a result of efforts to achieve this end, the evolution of mandatory arbitration has diverged noticeably from its consensual counterpart. Whereas the voluntary arbitration panel's decision has been accorded near absolute finality by both judicial¹⁰ and statutory¹¹ prescription, an award derived from compulsory arbitration may face several impediments to finality, including, most importantly, judi-

Indeed, although an increasing number of states are instituting this procedure for other state or municipal employees, the greater part of compulsory arbitration legislation has been limited to employees with the most immediate effect on the public health and welfare, *viz.*, police and firemen. See ALASKA STAT. § 23.40.200 (1972) (mandatory compulsory arbitration for police, firefighters, and correctional employees — sanitation, school, and public utility employees must submit if the public health is imperiled); CONN. GEN. STAT. §§ 7-472, -473c, -474 (1977) (municipal employees); IOWA CODE ANN. § 22.20 (West Supp. 1976) (all public employees); LA. REV. STAT. ANN. § 23-890 (West Supp. 1976) (municipal transit employees); ME. REV. STAT. tit. 26, § 965(4) (Supp. 1977) (municipal employees and teachers); *id.* § 979-D(4) (1974) (state employees); Act of Nov. 26, 1973, ch. 1078, § 4, 1973 Mass. Acts 1135, reprinted in MASS. ANN. LAWS ch. 150E, § 9 app., at 320 (Michie/Law. Co-op 1976) (police and firefighters); MICH. COMP. LAWS ANN. §§ 423.231-.247 (Supp. 1977) (police and firefighters); MINN. STAT. ANN. § 179.69(3) (West Supp. 1976) (all public employees); NEB. REV. STAT. §§ 48-801 to -838 (1974 & Cum. Supp. 1976) (state employees) (Court of Industrial Relations); NEV. REV. STAT. § 288.200 (1975) (local government employees); N.Y. CIV. SERV. LAW § 209(4) (McKinney Supp. 1977) (police and firefighters); OKLA. STAT. ANN. tit. 11, §§ 548.1, 548.8-.9 (West Supp. 1977) (police, firefighters and municipal employees); OR. REV. STAT. §§ 243.736, 243.742 (1976) (police, firefighters and guards in correctional facilities and mental hospitals); PA. STAT. ANN. tit. 43, §§ 217.4-.7 (Purdon Supp. 1977) (police and firefighters); *id.* § 1101.805 (correctional guards and court employees); R.I. GEN. LAWS §§ 28-9.1-1 to .5-13 (1968 & Supp. 1976) (firefighters, police, schoolteachers, and municipal employees); *id.* § 36-11-9 (Supp. 1976) (state employees); UTAH CODE ANN. § 34-20a-8 (Supp. 1975) (firefighters); WASH. REV. CODE § 41.56.450 (1974) (uniformed personnel); WIS. STAT. ANN. § 111.77 (West 1974 & Supp. 1977) (police and firefighters); WYO. STAT. § 27-269 (1967) (firefighters).

¹⁰ In a series of 1960 cases known as the *Steelworkers Trilogy*, composed of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Supreme Court established a firm policy of judicial deference to the determination of a voluntary arbitration tribunal.

¹¹ See, e.g., CONN. GEN. STAT. §§ 52-418 to -419 (1975), quoted in note 65 *infra*. One authority has suggested that since an award rendered by a consensual arbitration panel is subject to review only upon "narrow and improbable grounds," the neutral arbitrators in consensual commercial arbitration "have a power second only to . . . the Supreme Court." O'Rourke, *An Analysis of Arbitration*, 3 B. BULL. 111 (1966). Although there have been suggestions that review be broadened in the area of voluntary arbitration, most consensual arbitration statutes allow an arbitrament to be vacated or modified only on grounds of fraud, misconduct, or partiality of the arbitrator. See *id.* at 117-18.

cial review.¹² Since states differ markedly in the scope of judicial review permitted, an examination of the procedures employed by the various jurisdictions is both necessary and long overdue. It is the purpose of this Note to inquire into the present role of judicial review in public sector compulsory arbitration in the several states, with particular emphasis on New York, a state in which significant judicial energy has been expended in the resolution of this issue. Through this examination, it is hoped that existing problems in this area will be brought to the forefront of legal discussion.

SCOPE OF REVIEW: THE INITIAL STEP

In the realm of compulsory arbitration, whether judicial review is available, and, if so, to whom, are questions normally answered and limited by the particular enabling statute. It is only in certain limited instances, as when a personal right is involved, that judicial review is constitutionally mandated.¹³ Ultimately, it appears that a

¹² In the past, the foremost obstacle to finality of compulsory arbitration awards has been the various constitutional challenges raised by disgruntled participants. *See note 7 supra*. A second impediment to arbitral finality exists where a statutory scheme requires legislative or municipal approval of a compulsory arbitration award prior to its implementation. *See, e.g.*, OKLA. STAT. ANN. tit. 11, § 548.9 (West Supp. 1977). Under New York state law, for example, any arbitral order that requires the amendment or enactment of a law does not become final until the appropriate legislative body so acts. N.Y. CIV. SERV. LAW § 204-a(1) (McKinney 1973). In New York City, where the state compulsory arbitration statute does not apply, an arbitral decision is binding unless an appeal is directed to the Board of Collective Bargaining which then makes a final determination. NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(e)(4) (1975 & Supp. 1976). A recent proposal recommended that the City Council of New York City be empowered to make any final determination concerning binding arbitration awards which are not satisfactory to both arbitral parties. OFFICE OF LABOR RELATIONS, PROPOSED AMENDMENTS TO THE N.Y.C. COLLECTIVE BARGAINING LAW § 1 (1976). Similarly, recommendations for reform of New York State's compulsory arbitration law, which expires July 1, 1977, urge that political accountability be returned to the political units involved by furnishing them with final review powers of arbitral awards. *See* N.Y. Times, Dec. 5, 1976, § 1, at 90, col. 3. It should be noted, however, that statutory clauses requiring legislative approval of a compulsory arbitration award are extremely few in number. The obvious objection to such provisions is that the arbitrators' decision is denied the finality that is normally associated with the arbitration process. Nonetheless, since many municipalities continue to resort to the courtroom to contest arbitral awards, new statutory procedures may yet be enacted which would restore final determination of compulsory arbitral awards to elected officials.

An interesting question arises in those states where there is no provision similar to the one in New York State requiring legislative enactment: Will a compulsory arbitration tribunal's decision be binding on the lawmaking body? The Pennsylvania Supreme Court has suggested that the Pennsylvania enabling statute impliedly authorizes court approved tax millage increases to fund awards which the public employer could not otherwise satisfy. *Harney v. Russo*, 435 Pa. 183, 193, 255 A.2d 560, 565 (1969) (dictum). *See* Holden, *Final-Offer Arbitration in Massachusetts: One Year Later*, 31 ARB. J. 26, 35 (1976).

¹³ *See, e.g.*, *Stark v. Wickard*, 321 U.S. 288, 310 (1944). *See also* F. COOPER, 2 STATE

court's determination of the applicable scope of review is contingent upon its assessment of the nature of the compulsory arbitration process. At issue is whether the compulsory arbitration schema is equivalent to either legislative, administrative, or judicial action and thereby requires a corresponding form of review, or whether it is a unique function which demands a novel form of review.

Heretofore, litigation contesting compulsory arbitration awards focused primarily upon the constitutionality of the particular enabling statute.¹⁴ The crucial question in these cases has been whether the legislature wrongfully delegated its powers.¹⁵ As long as the

ADMINISTRATIVE LAW 672-83 (1965) [hereinafter cited as COOPER]; K. DAVIS, 4 ADMINISTRATIVE LAW TREATISE §§ 28.01-.21 (1958) [hereinafter cited as DAVIS].

¹⁴ See note 7 *supra*.

¹⁵ The basic premise underlying the nondelegation doctrine is that as a result of the requirements of separation of powers and political accountability, the legislature may not delegate its powers away. The doctrine's validity, however, is not above question. One commentator has termed the tenet an "unusually murky area of constitutional law." Grodin, *supra* note 7, at 683. Another has called it an anachronism. Horton, *Arbitration, Arbitrators and the Public Interest*, 28 INDUS. & LAB. REL. REV. 497, 500 (1975). Nevertheless, the opinions of state courts are still replete with exhaustive deliberations sustaining the principle. 1 DAVIS, *supra* note 13, § 2.02, at 78. Practical necessity dictates that the legislature delegate some of its powers to others. Whether the judiciary will intervene to oppose a particular delegation is determined by the courts' "pragmatic analysis" of the consequences of a particular delegation. Should the court find the results sufficiently undesirable, it will strike down the delegation as unconstitutional. See *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 246-47, 231 N.W.2d 226, 230 (1975).

In *Dearborn*, although the constitutionality of the arbitration statute was upheld on the particular facts of the case, a plurality of the court indicated that the delegation of power to a neutral arbitrator, a private person with no accountability to the public, was unconstitutional. Justice Levin wrote:

It is the unique method of appointment . . . without accountability to a governmental appointing authority, and the unique dispersal of decision-making power among numerous *ad hoc* decision makers, only temporarily in office, precluding assessment of responsibility for the consequences of their decisions on the level of public services, the allocation of public resources and the cost of government, which renders invalid this particular delegation of legislative power.

Id. at 269, 231 N.W.2d at 241 (Levin, J.) (footnote omitted). Casting the pivotal vote which created an equally divided court and thereby affirmed the lower court's decision to uphold the statute, however, Justice Williams expressed the opinion that in this instance the delegation was constitutional because the Chairman of the Michigan Employment Relations Commission (MERC), a publicly appointed official, had selected the neutral arbitrator. *Id.* at 291, 231 N.W.2d at 252 (Williams, J.). Such an appointment normally occurs when one of the parties fails to choose an arbitrator for the panel. Consequently, according to Justice Williams the constitutionality of the delegation hinges on a party's refusal to cooperate within the system. See *id.* at 260-61, 231 N.W.2d at 237.

Confronted with a similar delegation of power challenge, the Supreme Court of Rhode Island resolved it with the novel assertion that the arbitrator becomes a public official when selected. *City of Warwick v. Warwick Regular Firemen's Ass'n*, 106 R.I. 109, 116-17, 256 A.2d 206, 210-11 (1969). See also *City of Providence v. Local 799, I.A.F.F.*, 111 R.I. 586, 305 A.2d 93 (1973). In contrast, Pennsylvania's electorate was required to approve a constitutional

courts have been able to ascertain sufficient standards within the statute¹⁶ to guide the arbitration panel in its determination, they have generally sustained compulsory arbitration legislation in the face of constitutional attack.¹⁷

amendment, *see* PA. CONST. art. 3, § 31, in order to circumvent the nondelegation prohibition which had rendered that state's compulsory arbitration legislation nugatory in a decision by the Pennsylvania Supreme Court. *See* Erie Firefighters Local 293 v. Gardner, 406 Pa. 395, 178 A.2d 691 (1962) (per curiam); J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER, & B. DENNIS, FINAL-OFFER ARBITRATION: THE EFFECTS ON PUBLIC SAFETY EMPLOYEE BARGAINING 6 (1975) [hereinafter cited as FINAL-OFFER ARBITRATION]. Subsequently, an amended compulsory arbitration statute was upheld. Harney v. Russo, 435 Pa. 188, 255 A.2d 560 (1969). Interestingly, courts in Wyoming and South Dakota, interpreting compulsory arbitration provisions based upon constitutions similar to the earlier version of the Pennsylvania constitution, arrived at conflicting decisions. State *ex rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968) (statute did not unconstitutionally delegate municipal function); City of Sioux Falls v. Sioux Falls Firefighters Local 814, 234 N.W.2d 35 (S.D. 1975) (unconstitutional legislative interference with municipal function). For an extensive discussion of the nondelegation doctrine, see 1 DAVIS, *supra* note 13, §§ 2.01 -16.

¹⁶ The standards enumerated in a compulsory arbitration statute are often crucial to the formulation of a scope of review. They are the indicia by which the legislature controls the power it has delegated. Not only do detailed standards direct the arbitrators to consider specific criteria in making the award, but they also serve as a guide for the parties as to the issues upon which they must focus, thereby shielding the arbitrator from an inundation of irrelevant material. PROTECTIVE SERVICES, *supra* note 7, at 11.

While most state compulsory arbitration statutes contain a number of legislative criteria, some courts have inferred the existence of such standards even if they have not been expressly included. *See* Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969). The Supreme Court of Pennsylvania stated that since the great advantage of arbitration is its flexibility, rigid statutory guidelines "would be sheer folly." *Id.* at 189, 255 A.2d at 563.

An important statutory criterion which has gained significance recently is the employer's "ability to pay." *See generally* Mulcahy, *Ability to Pay: The Public Employee Dilemma*, 31 ARB. J. 90 (1976). Whereas some statutes expressly contain this standard, *e.g.*, MICH. COMP. LAWS ANN. § 423.239(c) (Supp. 1977), arbitrators have customarily considered this factor even without statutory stipulation. *See, e.g.*, IMPARTIAL MEMBERS OF THE BOARD OF COLLECTIVE BARGAINING, MEMORANDUM IN RESPONSE TO PROPOSED AMENDMENTS TO THE NEW YORK CITY COLLECTIVE BARGAINING LAW RECOMMENDED BY THE OFFICE OF LABOR RELATIONS TO THE CITY ADMINISTRATION FOR ENACTMENT BY THE CITY COUNCIL 11-12 (1976). For an example of the standards contained in a typical compulsory arbitration statute, see text accompanying note 20 *infra*.

A recent statistical research analysis reveals that the factors most commonly considered by arbitrators include prevailing trends in the particular industry, ability to pay, and cost of living and conditions in comparable jobs. Stephens, *Resolution of Impasses in Public Employee Bargaining*, MONTHLY LAB. REV. Jan. 1976 at 57.

¹⁷ Constitutional challenges to compulsory arbitration based upon due process have not received extensive consideration from the judiciary. The earliest litigation testing a state compulsory arbitration statute on due process grounds was *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923). Involved in *Wolff Packing* was an experimental Kansas statute which created a Court of Industrial Relations and gave that body wide powers of compulsory arbitration over all labor disputes in certain industries. Kansas Industrial Court Act, ch. 29, 1920 Kan. Sess. Laws 35 (repealed 1925). The Supreme Court held that mandatory arbitration constitutes a taking of property and was justified only in industries sufficiently affected with the public interest. As a consequence, the Court declared unconsti-

The first case to deal directly with the scope of review of compulsory arbitration was *New Jersey Bell Telephone Co. v. Communications Workers of America*,¹⁸ a 1950 decision by the Supreme Court of New Jersey. In *New Jersey Bell* the telephone company challenged an award granting its employees a salary increase and various benefits. The applicable public utility compulsory arbitration statute¹⁹ stipulated that the arbitration tribunal base its findings and decision upon certain specified factors, including the interests and welfare of the public, the wages, hours and conditions of employment of employees doing comparable work, and all factors normally considered during voluntary collective bargaining.²⁰ Rejecting the phone company's contention that the statute was unconstitutional because the standards enumerated were "vague, illusory, insufficient and arbitrary,"²¹ the New Jersey Supreme Court sustained the law despite the generality of the statutory criteria.²²

Although the statute itself was sustained, the court ordered the case remanded to the board of arbitration, finding that the award "contravened the orderly process contemplated by the statute to insure substantial justice."²³ The most important factor militating against enforcement of the award was that the arbitrators had failed to consider all of the delineated standards.²⁴ Significantly, the court

tutional that part of the statute which provided for the fixing of wages via compulsory arbitration in the meat packing industry. 262 U.S. 522, 544 (1923). In subsequent litigation involving the same parties, *Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552 (1925), the Court made it clear that included within this ban was the regulation of hours. *Id.* at 569. Subsequently, the Kansas act was repealed. Ch. 258, § 10, 1925 Kan. Sess. Laws 335. The Supreme Court has also held the establishment through compulsory arbitration of wage regulations in the coal mining industry to be impermissible. *Dorchy v. Kansas*, 264 U.S. 286 (1924).

A later Supreme Court decision, *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), significantly weakened the due process argument against the constitutionality of compulsory arbitration statutes. The *Lincoln* Court held that states have the "power to legislate against . . . injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law." *Id.* at 536.

¹⁸ 5 N.J. 354, 75 A.2d 721 (1950).

¹⁹ N.J. STAT. ANN. § 34:13B-1 to -27 (1965). This statute was one of several similar acts intended to prevent labor strikes following World War II. See Katz, *Two Decades of State Labor Legislation: 1937-1957*, 8 LAB. L.J. 747, 755 (1957).

²⁰ N.J. STAT. ANN. § 34:13B-27(b) (1965).

²¹ 5 N.J. at 370, 75 A.2d at 729.

²² *Id.*

²³ *Id.* at 380, 75 A.2d at 734.

²⁴ The court concluded that the arbitration panel had based its decision entirely on industry "trends," which was only one of the five stipulated statutory standards. Referring to a case where the Supreme Court refused to uphold an Interstate Commerce Commission rate adjustment because the agency failed to consider all the statutory criteria, the *New*

also indicated that the judicial review provided by the statute²⁵ entailed the application of a substantial evidence standard.²⁶

Following this initial foray into the realm of judicial review, the issue remained dormant for the next two decades. During the 1950's, state public utility compulsory arbitration statutes were held to be preempted by federal legislation,²⁷ and public employee unions generally had not yet gained the strength that they would develop during the next decade.²⁸ The decline in the utilization of compulsory arbitration, with the corresponding reduction in litigation, resulted in few opportunities for the judiciary to develop a form of judicial review suited to compulsory arbitration. In the 1970's, however, as a result of a new confidence in the compulsory arbitration process, the evolution of an appropriate scope of judicial review has proceeded apace.

Mount St. Mary's Hospital v. Catherwood: THE SEMINAL OPINION

In recent years, the New York Court of Appeals has been the only state court of last resort which has given detailed consideration to the "constitutionally required breadth of review" of compulsory arbitration awards. The court squarely confronted the issue with respect to private sector compulsory arbitration in *Mount St. Mary's Hospital v. Catherwood*,²⁹ a decision involving the scope of judicial review under section 716 of the New York Labor Law.³⁰

Jersey Bell court held that it was necessary to apply all the standards which were applicable. *Id.* at 373-74, 75 A.2d at 730-31, citing *Brimstone R.R. & Canal Co. v. United States*, 276 U.S. 104 (1928).

²⁵ Discussing the scope of judicial review applied by the court, one commentator noted: "It is thus apparent that the Court insisted on Judicial control over procedure before the Board which goes far beyond the narrow scope of judicial review of arbitration awards rendered pursuant to voluntary arbitration agreements." GOVERNOR'S COMMITTEE ON LEGISLATION RELATING TO PUBLIC UTILITY LABOR DISPUTES, REPORT TO GOVERNOR ROBERT B. MEYNER (1954), quoted in M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 679 (1968).

²⁶ 5 N.J. at 354, 75 A.2d at 733. For a definition of the substantial evidence test, see note 44 *infra*.

²⁷ The import of public utility compulsory arbitration statutes was fatally weakened in 1951 when the Supreme Court declared the Wisconsin statute to be an unconstitutional interference with federal regulation under the National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975)), and the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified in scattered sections of 29 U.S.C.). *Association of St., Elec. Ry. & Motor Coach Employees, Div. 998 v. Association of Wis. Employment Relations Bd.*, 340 U.S. 383, 399 (1951).

²⁸ See generally Rehms, *Labor Relations in the Public Sector*, in LABOR RELATIONS, *supra* note 2, at 7-9.

²⁹ 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970).

³⁰ N.Y. LABOR LAW § 716 (McKinney Supp. 1977).

Modeled after Minnesota's charitable hospital act,³¹ the New York statute provides for compulsory arbitration of disputes in labor contract negotiations between employees of private voluntary or non-profit hospitals and bargaining representatives of such facilities. Section 716 specifically incorporates the provisions of article 75 of the New York Civil Practice Law and Rules (CPLR),³² which delineates the scope of review of consensual arbitration, limiting it to matters pertaining to the purity of the arbitral process, such as the arbitrator's partiality, fraud, or acts in excess of power.³³

In *Mount St. Mary's*, the appellant hospital sought a declaratory judgment invalidating the compulsory arbitration provisions of the statute, urging that review pursuant to article 75 failed to provide due process of law under federal and state constitutional mandates. Acknowledging the differences between voluntary and compulsory arbitration,³⁴ the court of appeals declared that a literal

³¹ MINN. STAT. ANN. § 179.35 (1966). The Minnesota statute, along with § 716 of New York's Labor Law, was presumably preempted by federal legislation in 1974 when Congress expanded the coverage of the National Labor Relations Act to include charitable hospitals. 29 U.S.C. § 152(2) (Supp. V 1975), *amending* 29 U.S.C. § 152(2) (1970).

³² N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney 1974).

³³ N.Y. CIV. PRAC. LAW § 7511(b)(1) (McKinney 1963) provides:

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.

Pursuant to § 7511(c) a court shall modify an award if:

- 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
- 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- 3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

Id. § 7511(c). This review provision is identical in substance to those found in most general arbitration statutes. *Compare id.* § 7511, with CONN. GEN. STAT. §§ 52-418 to -419 (1975), *quoted in* note 65 *infra*.

³⁴ 26 N.Y.2d at 500, 260 N.E.2d at 511, 311 N.Y.S.2d at 867. The court stated:

At the inception it should be observed that the essence of arbitration, as traditionally used and understood, is that it be voluntary and on consent. The introduction of compulsion to submit to this informal tribunal is to change its essence. . . . The simple and ineradicable fact is that voluntary arbitration and compulsory arbitra-

application of the review furnished in article 75 would be constitutionally inadequate. The court noted that since parties may legally agree to almost anything save rare matters contrary to public policy, only the most limited review of voluntary arbitration is allowed pursuant to article 75.³⁵ As this restricted review does not permit judicial investigation into issues of law or fact,³⁶ the court characterized it as essentially an inquiry into the arbitrator's good faith.³⁷ In a compulsory arbitration situation, however, the *Mount St. Mary's* court found that the dictates of due process require that the arbitration panel's award be supported by the evidence.³⁸ Emphasizing that the tribunal's power is conferred by statute, the court declared that it would be incongruous to allow the panel to exercise power greater than that which "the Constitution permits the Legislature to delegate [by statute] to an administrative or regulatory agency."³⁹ Since delegated authority generally must, at a minimum, be supported by reasonable or rational legislative standards reviewable in a court of law,⁴⁰ the court determined that a compulsory arbitration statute must also contain sufficient statutory standards to pass constitutional scrutiny. To facilitate judicial review of the compulsory arbitration panel's compliance with these standards, the court maintained that a scope of review broader than that provided in article 75 must be formulated.⁴¹

tion are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar restrictions or deprivations, if compelled by government, must accord with procedural and substantive due process.

Id.

³⁵ 26 N.Y.2d at 507, 260 N.E.2d at 516, 311 N.Y.S.2d at 873-74.

³⁶ See 8 J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 7511.11 (1975).

³⁷ 26 N.Y.2d at 507, 260 N.E.2d at 515, 311 N.Y.S.2d at 873.

³⁸ *Id.* at 508, 260 N.E.2d at 516-17, 311 N.Y.S.2d at 875.

³⁹ *Id.*, 260 N.E.2d at 516, 311 N.Y.S.2d at 874.

⁴⁰ See *id.*

⁴¹ See *id.* at 508-09, 260 N.E.2d at 516-17, 311 N.Y.S.2d at 874-75. The leading case mandating broad judicial review when property rights are confiscated is *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). In that case, the Supreme Court held that a court must exercise de novo review of administrative determinations resulting in a confiscation of property. The viability of this doctrine has been a matter of great controversy and its application today is rare. See 4 DAVIS, *supra* note 13, § 29.09; 2 COOPER, *supra* note 13, at 672-76. In New York, the *Ben Avon* rule was adopted in *Staten Island Edison Corp. v. Maltbie*, 296 N.Y. 374, 73 N.E.2d 705 (1947). See also Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals*, 48 COLUM. L. REV. 1, 19-36 (1948). De novo review, however, has largely been replaced by the "substantial evidence" scope of review. See *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 504-05, 260 N.E.2d 508, 513-14, 311 N.Y.S.2d 863, 870-71 (1970). For a definition of the substantial evidence test, see note 44 *infra*. The *Mount St. Mary's* court indicated that if de novo review were applied, the compulsory arbitration process would be inoperable

Attempting to define the appropriate scope of review, the *Mount St. Mary's* court held that where the compulsory arbitration award is made pursuant to a dispute involving negotiations for a new contract, *i.e.*, interest arbitration, a reviewing court must ascertain whether the arbitration panel acted in an "arbitrary or capricious"⁴² manner. If a reasonable basis for the award is found, "the court's power to review . . . ceases."⁴³ In contrast, where arbitration is utilized to settle a dispute involving an existing collective bargaining agreement, *i.e.*, grievance arbitration, a court must determine whether the award was supported by substantial evidence.⁴⁴

because of "delays, the proliferation of litigation procedure, and [added expenses]" *Id.* at 509, 260 N.E.2d at 519, 311 N.Y.S.2d at 875; *cf.* Christensen, *The Disguised Review of the Merits of Arbitration Awards*, in LABOR ARBITRATION AT QUARTER CENTURY MARK: PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL MEETING—NATIONAL ACADEMY OF ARBITRATORS 99, 113 (1973) (extensive judicial review threatens voluntary arbitration). The concurring opinion in *Mount St. Mary's* expressed concern lest even the limited review outlined by the majority in its expansion of article 75 have such an effect. *See* 26 N.Y.2d at 511-20, 260 N.E.2d at 518-24, 311 N.Y.S.2d at 877-85 (Fuld, C.J., concurring). Suggesting that delays in the arbitration process might lead to "strikes and picket lines," Judge Fuld urged that the technical complexity of formulating a labor contract be left to the expertise of the arbitrator. *Id.* at 519-20, 260 N.E.2d at 523-24, 311 N.Y.S.2d at 884.

Whether the arbitrators, as private individuals, have the resources or the ability necessary for effective broad budget planning has been questioned by various authorities. *See, e.g.*, Horton, *Arbitration, Arbitrators and the Public Interest*, 28 INDUS. LAB. REL. REV. 497, 501 (1975); Primeaux & Brannen, *Why Few Arbitrators are Deemed Acceptable*, MONTHLY LAB. REV. Sept. 1975 at 27. The problem is illustrated by an article which urges arbitrators to consider thirteen detailed factors in assessing the "ability to pay" standard alone. Mulcahy, *Ability to Pay: The Public Employee Dilemma*, 31 ARB. J. 90 (1976).

⁴² *See* 26 N.Y.2d at 509-10, 260 N.E.2d at 517, 311 N.Y.S.2d at 875-76. Arbitrary or capricious action has been described as "willful and unreasoning action without consideration of or in disregard of the facts or without determining principle. A determination made by an administrative agency absent a factual rationale in the record is [also] 'arbitrary and capricious.'" *Elwood Investors Co. v. Behme*, 79 Misc. 2d 910, 913, 361 N.Y.S.2d 488, 492 (Sup. Ct. Suffolk County 1974) (citations omitted). *See also* *Fink v. Cole*, 1 N.Y.2d 48, 53, 133 N.E.2d 691, 694, 150 N.Y.S.2d 175, 179 (1956). It has been said that "[w]here there is room for two opinions, action is not arbitrary and capricious [if] exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached." *Buell v. City of Bremerton*, 80 Wash. 2d 518, 526, 495 P.2d 1358, 1363 (1972).

⁴³ 26 N.Y.2d at 509-10, 260 N.E.2d at 517, 311 N.Y.S.2d at 876.

⁴⁴ *Id.* To satisfy the substantial evidence test, a finding must be supported by evidence which is "so substantial that from it an inference of the existence of the fact found may be drawn reasonably. A mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based." *Stork Restaurant, Inc. v. Boland*, 282 N.Y. 256, 273-74, 26 N.E.2d 247, 255 (1940). It is important to note that the substantial evidence standard of review is a narrow one. The Supreme Court of Michigan has stated that it has yet to hear a case where a compulsory arbitration award was vacated or modified because it was not supported by substantial evidence. *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 267-68 & n.53, 231 N.W.2d 226, 240, 241 & n.53 (1975). One commentator has stated that this scope of review will ensure that an arbitral award escapes judicial intermeddling. *See* Anderson, *Compulsory Arbitration Under State*

In either situation, however, according to the court, the fundamental inquiry is whether the decision of the compulsory arbitration panel had a rational basis.⁴⁵

The dissimilar methods of review adopted by the *Mount St. Mary's* court is indicative of its belief that the nature of compulsory grievance arbitration differs from that of compulsory interest arbitration. Since the former process essentially involves interpretation of contract terms and is thus adjudicatory in nature, the court deemed the activities of the compulsory arbitration panel to be quasi-judicial.⁴⁶ In contrast, the court viewed interest arbitration, whereby new contract terms and conditions are formulated by the compulsory arbitration tribunal, as quasi-legislative.⁴⁷ The *Mount*

Statutes, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SECOND ANNUAL CONFERENCE ON LABOR 259 (1969). For a discussion of the problems associated with the substantial evidence rule, see Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (1958). See generally 4 DAVIS, *supra* note 13, § 29.02.

⁴⁵ See 26 N.Y.2d at 510, 260 N.E.2d at 517, 311 N.Y.S.2d at 876. One may question whether there is any real distinction between the arbitrary and capricious test and the substantial evidence test. In fact, in *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974) (citation omitted), the court of appeals concluded that "[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard." Nevertheless, in *125 Bar Corp. v. State Liquor Auth.*, 24 N.Y.2d 174, 178-79, 247 N.E.2d 157, 159, 299 N.Y.S.2d 194, 198 (1969), the court, although noting that the two tests are virtually identical, did distinguish them by stating that the substantial evidence test requires "competent common-law evidence."

⁴⁶ 26 N.Y.2d at 509-10, 260 N.E.2d at 517, 311 N.Y.S.2d at 875-76. In administrative law, quasi-judicial determinations are characterized as either determinations of fact, determinations of law, or determinations in the exercise of discretion, and the three are subject to different forms of judicial review. 1 R. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* 326-27 (1942) [hereinafter cited as BENJAMIN]. Generally, quasi-judicial determinations of law are fully reviewable by a court; exercises of discretion are reviewable only to protect against arbitrary or capricious action; and quasi-judicial findings of fact are subject to the substantial evidence rule. *Id.* at 327-28.

The Michigan Supreme Court has stated that the essential elements of compulsory arbitration, *i.e.*, a hearing, introduction of evidence, standards to guide the arbitrators, formal findings of fact, a written opinion, and judicial review, are all indicative of an exercise of quasi-judicial power. *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 264, 231 N.W.2d 226, 239 (1975). Other courts have also taken this position, noting that determinations which involve property rights are judicial in nature. *Caso v. Coffey*, 83 Misc. 2d 614, 372 N.Y.S.2d 892 (Sup. Ct. Nassau County 1975). See also 8 J. WEINSTEIN, H. KORN, & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 7803.12, at 78-84 (1976).

⁴⁷ 26 N.Y.2d at 509-10, 260 N.E.2d at 517, 311 N.Y.S.2d at 875-76. An early Supreme Court case distinguished legislative from judicial actions as follows:

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Prentiss v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). Compulsory arbitration is

St. Mary's court apparently considered the compulsory arbitration panel to be tantamount to an administrative agency, which similarly engages in both quasi-judicial and quasi-legislative activities.⁴⁸ Thus, the scope of review chosen by the court for the different functions of the compulsory arbitration process parallels the scope of review applicable to an administrative agency.⁴⁹

analogous to legislative action in that it affects the allocation of public resources, the level of public services provided to the community as a whole, and the cost of government. *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 262-63, 231 N.W.2d 226, 238 (1975). As one commentator has noted, compulsory arbitration is not merely an adjudication between right and wrong, but, more importantly, it is a balancing of priorities and an accommodation of varying interests. *PROTECTIVE SERVICES*, *supra* note 7, at 6-7. One arbitrator, remarking that an arbitrator is often the only person in the arbitration process who represents the public interest, has urged that the neutral arbitrator not make awards "inimical to the welfare of the public." *Gov't Empl. Rel. Rep. (BNA) No. 658*, at B-2 (May 24, 1976) (remarks of Eric Schmertz). This criterion is often included in the arbitration statute. *E.g.*, *MICH. COMP. LAWS ANN.* § 423.239 (West Supp. 1977).

⁴⁸ See 26 N.Y.2d at 509-10, 260 N.E.2d at 516-17, 311 N.Y.2d at 875-76. In order to determine the proper scope of review, later courts have similarly considered whether a compulsory tribunal should be equated with an administrative agency. In New York, this inquiry has consistently been resolved in the affirmative. See, *e.g.*, *Caso v. Coffey*, 83 Misc. 2d 614, 372 N.Y.S.2d 892 (Sup. Ct. Nassau County 1975). It has been suggested that this approach is appropriate due to

[t]hree essential features distinguishing compulsory arbitration of negotiation disputes in the public sector [from voluntary arbitration]: 1) it is, by law, compulsory; 2) it delegates to neutral "experts" powers previously exercised by a legislative body; and 3) statutory standards and guidelines circumscribe the decision-making power of the experts. It is evident that these features describe a governmental mechanism significantly different from that customarily understood as arbitration.

It is also clear that they define the usual administrative agency.

Barr, *supra* note 8, at 384 (emphasis added). Most importantly, the fact that the compulsory arbitration panel's powers of discretion are circumscribed by legislatively prescribed criteria designed to ensure that the panel engages only in legislative activities, *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 288, 231 N.W.2d 226, 250 (1975), truly reflects an administrative process. See *Fox, Reviewability of Quasi-Legislative Acts of Public Officials in New York Under Article 78 of the CPLR*, 39 *ST. JOHN'S L. REV.* 49, 72 (1964). The statutory criteria, however, are not a directive to the panel to follow one particular course of action when confronted with two reasonable but opposite positions presented by opposing parties. It is therefore submitted that the compulsory arbitration process is most analogous to an administrative exercise of discretion as distinguished from a quasi-judicial determination of fact, in that from the latter only one decision can result, whereas the former provides no such certainty. 1 *BENJAMIN*, *supra* note 46, at 344. Significantly, administrative exercises of discretion may be reviewed only to determine whether the action was arbitrary, capricious, or not predicated upon the prescribed standards. *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974); *People ex rel. N.Y. & Queens Gas Co. v. McCall*, 219 N.Y. 84, 113 N.E. 795 (1916), *aff'd*, 245 U.S. 345 (1917); 1 *BENJAMIN*, *supra* note 46, at 344-46.

⁴⁹ See 26 N.Y.2d at 509-10, 260 N.E.2d at 516-17, 311 N.Y.S.2d at 875-76

THE SCOPE OF JUDICIAL REVIEW UNDER MODERN STATUTORY PROCEDURES

There has been a dearth of judicial inquiry into either the nature of the compulsory arbitration process or the appropriate scope of judicial review. In many states, the scope of review is delineated by statutes which either expressly proscribe any review or specifically delineate a particular scope of review. Several states, however, have statutes which contain no explicit provision concerning appeal or review.

Review Unspecified

Where a compulsory arbitration statute fails to articulate a scope of review,⁵⁰ the courts nevertheless are generally inclined to find a limited power to review in situations involving alleged "fraud, lack of impartiality or wrongful assumption of power by the [arbitration] panel."⁵¹ At times an even more extensive authority to review has been inferred. For example, in *City of Warwick v. Warwick Regular Firemen's Association*,⁵² the Supreme Court of Rhode Island, while upholding the validity of that state's compulsory arbitration statute for policemen and firemen, noted in dicta that the standards enumerated in the statute serve

a dual purpose. They not only operate to direct or limit the action of [the arbitrators], but they are standards pursuant to which on judicial review a court may determine whether the action taken by the [arbitrators] was capricious, arbitrary, or in excess of the delegated authority.⁵³

In formulating this scope of review, the Rhode Island court was guided by its determination that the arbitration panel's "power to fix the salaries of public employees [was] clearly a *legislative function*."⁵⁴ It would seem that in situations where the compulsory arbitration panel is perceived to be engaged in quasi-judicial activities and the enabling statute is silent as to judicial review, a review-

⁵⁰ See, e.g., IOWA CODE ANN. §§ 20.1-27 (West Supp. 1976); OKLA. STAT. ANN. tit. 11, §§ 548.1-.14 (West Supp. 1977); R.I. GEN LAWS §§ 28-9.1 to -9.4 (1968); UTAH CODE ANN. §§ 34-20a-8 to -9 (Supp. 1975).

⁵¹ McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1204 (1972); cf. 2 COOPER, *supra* note 13, at 677 (review of administrative determinations).

⁵² 106 R.I. 109, 256 A.2d 206 (1969).

⁵³ *Id.* at 116-17, 256 A.2d at 211.

⁵⁴ *Id.* at 116, 256 A.2d at 210 (emphasis added).

ing court will be predisposed to apply the substantial evidence standard.⁵⁵

Review Proscribed

Several states have enacted statutes which explicitly preclude any appeal from the determination of a compulsory arbitration tribunal.⁵⁶ For example, Pennsylvania's act 111 of 1968 provides that "[t]he determination of the [arbitration] board . . . shall be final . . . and binding No appeal therefrom shall be allowed to any court."⁵⁷ The Pennsylvania courts, however, have not construed the statute literally. In *City of Washington v. Police Department*,⁵⁸ the city sought review of a compulsory arbitration award, claiming that the Pennsylvania Constitution guaranteed it the right of appeal from a determination by an administrative agency.⁵⁹ Noting that the Pennsylvania legislature's power to preclude appeals has long been recognized,⁶⁰ the *City of Washington* court not only rejected this proposition, but also refused to treat the compulsory arbitration

⁵⁵ The distinguishing feature of judicial or quasi-judicial activity is that it affects property right. 8 J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 7803.12 (1976). In New York, such action has traditionally been subject to review based upon the substantial evidence test, which is particularly suited to situations where a hearing has been held and facts amassed in a record. *See id.* ¶ 7803.09; 1 BENJAMIN, *supra* note 46, at 329. *See also* N.Y. CIV. PRAC. LAW § 7803(4) (McKinney 1963). Similarly, in the compulsory arbitration schema, courts have applied the substantial evidence test in cases where the arbitral panel's function is characterized as quasi-judicial. *See, e.g.,* note 110 *infra*; *cf.* GOV'T EMPL. REL. REP. (BNA) No. 630, at B-1 (Nov. 3, 1975) (Iowa attorney general views state's compulsory arbitrations as reviewable under substantial evidence test).

⁵⁶ *E.g.,* LA. REV. STAT. ANN. § 23-890(E) (West Supp. 1977); MINN. STAT. ANN. § 179.72(7) (West Supp. 1977); PA. STAT. ANN. tit. 43, § 217.7 (Purdon Supp. 1977).

⁵⁷ PA. STAT. ANN. tit. 43, § 217.7(a) (Purdon Supp. 1977). the no review provision is favored by many unions. *See* PROTECTIVE SERVICES, *supra* note 7, at 94 (speech by John J. Harrington). The Pennsylvania statute was passed following a successful campaign waged by Pennsylvania's police and firefighter organizations. *See* FINAL-OFFER ARBITRATION, *supra* note 15, at 6. Whether there was a strong legislative intention to preclude review, however, was questioned by one commentator who remarked critically that the "no review" provision may have passed simply because of the great haste with which the legislation was enacted and because of the preferences of the police and firefighter unions. *Id.* at 18. One authority has noted that statutory provisions for review of administrative determinations "[u]sually . . . appear well down at the end of the statutes. Statutes are long and I suspect by the time the legislators draft them and get down to these provisions, they get rather tired, and they do not pay much attention to them." Stason, *Methods of Judicial Relief from Administrative Action*, 24 A.B.A.J. 274, 276 (1938).

⁵⁸ 436 Pa. 168, 259 A.2d 437 (1969).

⁵⁹ The Pennsylvania constitution states in pertinent part: "There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court . . ." PA. CONST. art. 5, § 9.

⁶⁰ 436 Pa. at 172, 259 A.2d at 439-40.

panel as the equivalent of an administrative agency.⁶¹ The court did conclude, however, that the arbitration panel, as a decision-making tribunal, must proceed in accordance with due process mandates. Consequently, it permitted an appeal in the nature of a narrow certiorari⁶² limited to "1) the question of jurisdiction; 2) the regularity of the proceedings before the [panel]; 3) questions of excess in exercise of powers; and 4) constitutional questions."⁶³

Scope of Review Specified

A comparison of those statutes which delineate a specific scope of review reveals a lack of uniformity as to the treatment accorded this subject by the states. A trend, however, does seem to be emerging, and it appears that both the broadest and narrowest forms of review eventually will be abandoned in favor of either the limited review associated with the "arbitrary and capricious" and "substantial evidence" tests or a judicially evolved review concerned with whether the statutorily prescribed standards have been considered by the compulsory arbitration panel.

Several states provide for review of compulsory arbitration awards by cross-reference to their voluntary arbitration act.⁶⁴ In these states, the traditional limited review associated with consensual arbitration is applied and the role of the courts is to ensure the arbitrator's integrity.⁶⁵ It has been suggested, however, that this

⁶¹ 436 Pa. at 172, 259 A.2d at 440. See notes 46-49 and accompanying text *supra*.

⁶² Professor Cooper has stated that review by petition for writ of certiorari normally is granted at the discretion of the court and historically has been denied unless the administrative agency's activities were considered judicial or quasi-judicial in nature, 2 COOPER, *supra* note 13, at 644-49. The scope of review on certiorari varies from state to state. *Id.* at 650. A "narrow" certiorari, as is employed in Pennsylvania, involves consideration only of questions relating to jurisdiction, whereas a "broad" certiorari involves consideration of the entire record. *Id.*

⁶³ 436 Pa. at 174, 259 A.2d at 441, *citing* Keystone Raceway Corp. v. State Harness Racing Comm'n, 405 Pa. 1, 5-6. 173 A.2d 97, 99 (1961). *City of Washington* involved an appeal from a compulsory arbitration panel's award which required the city to pay hospitalization insurance premiums for the families of its policemen. This was specifically prohibited by legislation allowing the city to contract for insurance only for its employees. Interpreting the award as an "excess of power," the court found that the award conflicted with the words "in accordance with law," 436 Pa. at 175, 259 A.2d Pa. at 175, 259 A.2d, which appear in the constitutional amendment authorizing compulsory arbitration in Pennsylvania. See PA. CONST. at 3, § 31.

⁶⁴ *E.g.*, ALASKA STAT. § 23.40.200 (1972); CONN. GEN. STAT. § 7-474(j)(3)(1977).

⁶⁵ For example, the Connecticut general arbitration statute provides that an award can be vacated:

- (a) If the award has been procured by corruption, fraud or other undue means;
- (b) if there has been evident partiality or corruption on the part of the arbitrators
- . . . ; (c) if the arbitrators have been guilty of misconduct in refusing to postpone

type of review is insufficient in the public sector, and that at least as to issues of law the arbitration panel's determination should not be conclusive.⁶⁶ Since the statutory standards are intended to establish strict guidelines for the arbitrators, any transgression of these standards, as occurs when a law is erroneously interpreted, is beyond the legislative mandate and therefore unlawful.⁶⁷

Maine's statute, which otherwise adheres to the traditional limited review, accounts for this possibility by stipulating that a compulsory arbitration award may be reversed if it was predicated upon an "erroneous ruling or finding of law."⁶⁸ In *City of Biddeford v. Biddeford Teachers Association*,⁶⁹ a case challenging the constitutional adequacy of the Maine Municipal Employees Labor Relations Law,⁷⁰ one justice suggested that under this broadened review procedure the court might be permitted to conduct an independent inquiry into questions of law and fact.⁷¹ In the course of its decision, the evenly divided *City of Biddeford* court considered whether the compulsory arbitration act contained sufficient standards to validate the delegation of a "clearly legislative" function. Noting that compelling a party to submit to binding arbitration constitutes "police power" measure, the court searched the statutory language for a legislatively prescribed "intelligible principle" or "primary standard."⁷² Half the justices concluded that the express statutory

the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy . . . ; (d) if the arbitrators have exceeded their powers

CONN. GEN. STAT. § 52-418 (1975). An award may be modified or corrected:

(a) If there has been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (b) if the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted; (c) if the award is imperfect in matter of form not affecting the merits of the controversy.

Id. § 52-419.

⁶⁶ See Grodin, *supra* note 7, at 698-99.

⁶⁷ *Id.*

⁶⁸ ME. REV. STAT. ANN. tit. 26, § 979-M(3) (1974).

⁶⁹ 304 A.2d 387 (Me. 1973).

⁷⁰ ME. REV. STAT. ANN. tit. 26, § 979 (1974).

⁷¹ 304 A.2d at 408, 412 (Wernick, J., concurring and dissenting).

⁷² Where standards are not specifically defined in the enabling statute, courts sometimes search for an intelligible principle or primary standard to limit the legislative power delegated to bodies not directly responsible to the electorate. *Id.* at 400, 403-15. See note 15 *supra*. Suggesting a measure of review broader than that statutorily prescribed in Maine, one justice quoted a dissenting opinion by Justice Harlan which concluded that the use of statutory standards serves two primary functions:

First, it insures that the fundamental policy decisions in our society will be made . . . by the body immediately responsible to the people. *Second*, it prevents judicial

purpose of "promot[ing] the improvement of the relationship between public employers and their employees"⁷³ constituted a sufficient standard to guide the arbitrators. In the eyes of these justices, a court exercising its power of review must ascertain whether the arbitration panel applied the statutory standard, thereby assuring that the panel has not made an arbitrary, capricious, or unreasonable determination.⁷⁴

Other methods of review expressly provided for in the spectrum of state statutes include the arbitrary or capricious test contained in Washington's uniformed personnel compulsory arbitration statute,⁷⁵ the substantial evidence test utilized in Michigan⁷⁶ and Oregon,⁷⁷ and de novo review.⁷⁸

Washington's statute, which provides for "review . . . solely upon the question of whether the decision of the panel was arbitrary or capricious,"⁷⁹ has been strictly construed by that state's highest court. In *Local 1296, IAFF v. City of Kennewick*,⁸⁰ the Supreme Court of Washington reversed a lower court decision which had vacated a compulsory arbitration award rendered after contract negotiations between the city and its firemen had proven unsuccessful. The city contested the award on the basis of facts indicating that the neutral member of the arbitration panel might not have been completely impartial. This, the city contended, removed the "appearance of fairness from the arbitral award." The city's argu-

review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

304 A.2d 387, 407 (Wernick, J.), quoting *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, Stewart, Douglas, JJ., dissenting) (emphasis in original) (deletions by Judge Wernick).

⁷³ 304 A.2d at 411 (Wernick, Webber, Pomeroy, JJ.). While all the *City of Biddeford* justices concurred in the belief that the delegation to an arbitral tribunal was valid, the court divided three-to-three as to whether there were sufficient standards in the statute to guide the arbitrators in their decision. As a result, the statute was upheld.

⁷⁴ *Id.* at 408, 412. Although the other three members of the *Biddeford* court approved of the legislative delegation to the arbitrators, *id.* at 398, they refused to uphold the compulsory arbitration provisions of the statute. They objected to what they considered to be an absence of precedential safeguards in the form of specific criteria for the arbitrators to consider. *Id.* at 402. Moreover, these justices objected to the statutory scope of judicial review, stating not only that the arbitration panel was not subject to review of its findings of fact, but also that the panel was not required to make findings of fact. Obviously, this "seriously limits the ability of the courts on appeal to protect against unbridled discretion." *Id.* (Weatherbee, Dufresne, Archibald, JJ.).

⁷⁵ WASH. REV. CODE § 41.56.450 (1974).

⁷⁶ MICH. COMP. LAWS ANN. § 423.242 (Supp. 1977).

⁷⁷ OR. REV. STAT. § 243.752 (1976).

⁷⁸ See notes 90-94 and accompanying text *infra*.

⁷⁹ WASH. REV. CODE § 41.56.450 (1974) (emphasis added).

⁸⁰ 86 Wash. 2d 156, 542 P.2d 1253 (1975) (en banc).

ment was based on a doctrine created in Washington zoning cases which states that "[i]t is important not only that justice be done but that it also appear to be done."⁸¹ Decisions by "administrative tribunals acting in judicial or quasi-judicial capacities" lacking the necessary appearance of fairness are rendered invalid thereby. In *City of Kennewick*, the Washington court stressed the importance of differentiating between this appearance of fairness doctrine and the arbitrary and capricious rule.⁸² Although the arbitration procedure in question might have "appeared" unfair, there existed insufficient evidence for the court to conclude that the award itself had been arbitrary or capricious. In view of the explicit statutory language, the court felt constrained to uphold the arbitrament.⁸³

The Michigan compulsory arbitration statute for firemen and police specifically requires that an arbitral award be supported by competent, material, and substantial evidence based upon the whole record.⁸⁴ In *Dearborn Fire Fighters Local 412 v. City of Dearborn*,⁸⁵ the Michigan Court of Appeals went beyond this explicit statutory mandate and adopted an expanded standard of review. Agreeing with the Supreme Court of Rhode Island in its *City of Warwick* decision,⁸⁶ the *Dearborn* bench was of the opinion that the well-defined standards delineated in the act "not only properly directed and limited the authority of the arbitrators, but also formed an adequate basis for judicial review."⁸⁷ On appeal, the Supreme Court of Michigan affirmed the lower court's result in a split decision. Justice Coleman, in a separate opinion, stated: "Although not specifically described in the statute, failure to follow the legislatively-mandated criteria is always available as grounds for judicial review."⁸⁸

⁸¹ *Buell v. City of Bremerton*, 80 Wash. 2d 518, 523, 495 P.2d 1358, 1361 (1972) (en banc). Since this appearance of fairness doctrine is intended to apply to actions of quasi-judicial tribunals rather than to legislative or administrative bodies, see *id.* at 528, 495 P.2d at 1365 (Neill, J., dissenting), a reading of *Buell*, in juxtaposition with *Kennewick* and the Washington compulsory arbitration schema, suggests that the highest court of Washington views the compulsory arbitration panel as essentially performing a quasi-legislative function.

⁸² 542 P.2d at 1256.

⁸³ *Id.*

⁸⁴ MICH. COMP. LAWS ANN. § 423.242 (Supp. 1977). One commentator, suggesting that an appeal as of right is almost always afforded by our judicial system, concluded that there should always be judicial review in compulsory arbitration and characterized the Michigan provision as "juridically correct," Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47, 70 (1973).

⁸⁵ 42 Mich. App. 51, 201 N.W.2d 650 (1972), *aff'd by divided court*, 394 Mich. 229, 231 N.W.2d 226 (1975).

⁸⁶ See notes 52-55 and accompanying text *supra*.

⁸⁷ 42 Mich. App. at 56, 201 N.W.2d at 652.

⁸⁸ 394 Mich. at 297-98, 231 N.W.2d at 255 (Coleman, J.).

Oregon's compulsory arbitration statute, which also stipulates that the award be supported by substantial evidence, specifically adds the qualification that the award be "based upon the factors" enumerated in the statute.⁸⁹ A reading of the Oregon statute together with the Maine court's opinion in *City of Biddeford*, suggests that the courts may well favor a decidedly narrow scope of review, one limited to determining whether the arbitration panel considered and applied the statutory standards. Such review would assure compliance with the legislative intent, while maintaining a minimum of judicial interference with the compulsory arbitration process.

An alternative mode of statutory review, *de novo* review, has been rejected by the courts.⁹⁰ When exercising this type of review, a court conducts an independent inquiry into the circumstances of the case. It is permitted to substitute its own judgment as to the law and the facts without regard to the arbitral record.⁹¹ In the context of compulsory arbitration, *de novo* review would, in effect, allow a reviewing court to make a legislative determination based upon a preponderance of the evidence standard.⁹² Critical questions concerning the separation of powers doctrine are presented by such a procedure.⁹³ This problem, however, has been rendered somewhat moot, for the only state statute to provide for *de novo* review of compulsory arbitration awards is no longer effective.⁹⁴

⁸⁹ OR. REV. STAT. § 243.752 (1976).

⁹⁰ See *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 504-05, 260 N.E.2d 508, 513-14, 311 N.Y.S.2d 863, 870-71 (1970).

⁹¹ See *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963).

⁹² See Smyser, *Public Employees and Public Employees Unions: Their Rights and Limitations in South Dakota*, 17 S.D.L. REV. 65, 78-79 (1972).

⁹³ See 2 COOPER, *supra* note 13, at 679-80.

⁹⁴ In *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, 234 N.W.2d 35 (S.D. 1975), the court found one section of South Dakota's compulsory arbitration statute, ch. 70, §§ 1-15, 1971 S.D. Sess. Laws 72, to be invalid. Determining that the invalid section was not severable, the court ruled the statute unconstitutional in its entirety. As a consequence, the section calling for *de novo* review of appeals from compulsory arbitrations, *id.* § 12, was also invalidated.

Several states have enacted compulsory arbitration statutes with *de novo* review procedures to settle certain types of civil suits, such as small claims. For example, in Arizona, where all civil claims of less than \$3000 must be submitted to arbitration, appeals are accorded *de novo* review in civil court. ARIZ. REV. STAT. § 12-133(F) (Supp. 1977). See generally 31 N.Y.U.L. REV. 1316 (1956); 8 STAN. L. REV. 410 (1956); see also M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 683-90 (1968). Under Nebraska's unique dispute settlement statute, labor impasses between public employees and government employers are referred to the Nebraska Court of Industrial Relations for resolution. See NEB. REV. STAT. §§ 48-801 to -838 (1974 & Cum. Supp. 1976). The court is considered an administrative body, *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 785, 199 N.W.2d 752, 760 (1972), and appeals therefrom are tried *de novo*, NEB. REV. STAT. § 48-812 (1974).

NEW YORK: THE SCOPE OF REVIEW UNDER SECTION 209 OF THE TAYLOR LAW

In 1974, section 209(4) of New York's Taylor Law, a part of the state's Civil Service Law, was amended on an experimental basis to provide for compulsory arbitration of disputes arising during collective bargaining negotiations between a municipality and its police and firemen.⁹⁵ In contrast to its private sector precursor, section 716 of the New York Labor Law,⁹⁶ section 209 contains no provision for judicial review. Although section 213(a) of the Civil Service Law⁹⁷ stipulates that orders of the New York Public Employee Relations Board (PERB) are reviewable pursuant to the procedures outlined in article 78 of the CPLR,⁹⁸ neither section 209 nor section 213(a) expressly refers to awards granted by a compulsory arbitration panel.

Article 78 of the CPLR provides the procedural framework for review of administrative actions. The statute, which by its terms incorporates both the substantial evidence and arbitrary and capricious tests, limits judicial review to the following considerations:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded . . . without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was *arbitrary and capricious* or an *abuse of discretion* . . . ; or
4. whether a determination made as a result of a hearing held . . . is, on the entire record, *supported by substantial evidence*.⁹⁹

New York courts have grappled with the question whether the scope of review for section 209 awards is properly delimited by article 78 or by article 75 as expanded by the court of appeals in *Mount St. Mary's*. Indeed, a sharp divergence of opinion developed between two of the judicial departments of the appellate division.

In *Buffalo PBA v. City of Buffalo*,¹⁰⁰ the New York Supreme

⁹⁵ Chs. 724, 725, [1974] N.Y. Laws 1122-28 (McKinney) (codified at N.Y. CIV. SERV. LAW § 209(4)) (McKinney Supp. 1977) (amending N.Y. CIV. SERV. LAW § 209 (McKinney 1973)). The law expires by its own terms on July 1, 1977.

⁹⁶ N.Y. LABOR LAW § 716(6)(b) (McKinney Supp. 1977).

⁹⁷ N.Y. CIV. SERV. LAW § 213(a) (McKinney 1973).

⁹⁸ N.Y. CIV. PRAC. LAW § 7803 (McKinney 1974).

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ 81 Misc. 2d 172, 364 N.Y.S.2d 362 (Sup. Ct. Erie County 1975) (mem.).

Court, Erie County, concluded that the proper scope of review for awards made pursuant to section 209 was specifically provided for by reference to section 213 of the Taylor Law, which in turn mandates article 78 review. To reach this conclusion, the *Buffalo PBA* court equated the award of a compulsory arbitration tribunal with an order issued by PERB.¹⁰¹ This position found support in the concurring opinion by Judge Fuchsberg to the New York Court of Appeals decision in *City of Amsterdam v. Helsby*.¹⁰² In discussing the scope of review under section 209, Judge Fuchsberg stated that a compulsory arbitration award issued pursuant to that statute "is sufficiently administrative so as to come within the purview of article 78 review."¹⁰³ He indicated that in considering the proper scope of review for a compulsory arbitration statute the court should focus on the amount of power delegated by the legislature: "the desideratum should be safeguards proportionate to the grant; the larger the grant, the greater the safeguards required."¹⁰⁴ The judge further stated that review of compulsory arbitration awards, whether interest or grievance, must test both the substantiality of the evidence and the degree of due process afforded the parties.¹⁰⁵

A contrary result was reached in *Albany Permanent Professional Firefighters Association, Local 2007 v. Corning*.¹⁰⁶ There, the Supreme Court, Albany County, commenting on the proper scope of review under section 209, stated:

[R]eview procedures of CPLR article 75, as modified by [*Mount St. Mary's*] are appropriate This means that the instant award should be confirmed if it appears that in reaching their determination the public arbitration panel considered those matters which the statute says they must consider and that their determination is supported by any evidence which was before them and, therefore, has a rational basis.¹⁰⁷

¹⁰¹ *Id.* at 173, 364 N.Y.S.2d at 363.

¹⁰² 37 N.Y.2d 19, 28, 332 N.E.2d 290, 294, 371 N.Y.S.2d 404, 408 (1975) (Fuchsberg, J., concurring). In *Helsby* the court upheld the constitutionality of § 209(4) notwithstanding the city's allegations that the statute violated the state's home rule provisions, contravened the one man, one vote principle, and constituted an improper delegation of legislative power and municipal power to tax. *Id.* at 27-28, 332 N.E.2d at 293-94, 371 N.Y.S.2d at 407-08.

¹⁰³ *Id.* at 39, 332 N.E.2d at 301, 371 N.Y.S.2d at 418.

¹⁰⁴ *Id.* at 36, 332 N.E.2d at 299, 371 N.Y.S.2d at 416.

¹⁰⁵ *Id.* at 40-41, 332 N.E.2d at 302, 371 N.Y.S.2d at 420.

¹⁰⁶ 84 Misc. 2d 759, 376 N.Y.S.2d 796 (Sup. Ct. Albany County 1975), *aff'd*, 51 App. Div. 2d 386, 381 N.Y.S.2d 699 (3d Dep't), *aff'd*, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976).

¹⁰⁷ 84 Misc. 2d at 761, 376 N.Y.S.2d at 799; *accord*, *PBA v. City of New York*, 52 App. Div. 2d 43, 382 N.Y.S.2d 494 (1st Dep't 1976) (mem.), *aff'g* 173 N.Y.L.J. 123, June 26, 1975, at 12, col. 1 (Sup. Ct. N.Y. County).

In affirming the lower court's decision, the Appellate Division, Third Department, explicitly rejected the contention that the compulsory arbitration award should be deemed an order of PERB.¹⁰⁸ The court maintained that to allow an article 78 proceeding directly against the arbitrators would place an undue burden upon them, while a review based upon an expanded article 75 "would allow the real adversaries to protect their own interests."¹⁰⁹

In contrast to the position adopted by the Third Department, the Appellate Division, Second Department, in *Caso v. Coffey*,¹¹⁰ aligned itself with the *Buffalo PBA* court, holding that article 78 provides the proper scope of review for awards issued under section 209. The court emphasized that section 213 of the Taylor Law expressly provides for article 78 review.¹¹¹ Since PERB is specifically required to refer an unresolved dispute to compulsory arbitration and no procedure exists for PERB to review the award, the court decided that the compulsory arbitral panel should be treated as PERB's surrogate and its award deemed an order of PERB.¹¹²

The split within the judicial departments concerning the proper scope of review under the Taylor Law was recently resolved by the New York Court of Appeals in *Caso v. Coffey*,¹¹³ wherein the court

¹⁰⁸ 51 App. Div. 2d at 390, 381 N.Y.2d at 702.

¹⁰⁹ *Id.* Article 78 proceedings may be brought against a broad category of defendants, including "every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article." N.Y. CIV. PRAC. LAW § 7802(a) (McKinney 1963).

¹¹⁰ 53 App. Div. 2d 373, 385 N.Y.S.2d 593 (2d Dep't), *aff'd*, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976). In *Coffey*, the county sought to have an adverse compulsory arbitration award reviewed under either article 75 or 78. The Supreme Court of Nassau County ruled that article 78 provided the proper scope of review. Since compulsory arbitration affects property rights and is quasi-judicial in nature, the supreme court found the award reviewable under the substantial evidence rule. *Caso v. Coffey*, 83 Misc. 2d 614, 372 N.Y.S.2d 892 (Sup. Ct. Nassau County 1975). The court then remanded the case to the arbitrators for the purpose of establishing a record. See note 122 *infra*. On rehearing the arbitration panel increased the award for the policemen's union. The county again sought review, this time basing its appeal upon article 78 alone. Since New York law provides that such actions are transferable directly to the appellate division, the case was not relitigated at the supreme court level. See N.Y. CIV. PRAC. LAW § 7804(g) (McKinney 1963).

¹¹¹ See 53 App. Div. 2d at 379-80, 385 N.Y.S.2d at 597, *citing* N.Y. CIV. SERV. LAW § 213 (McKinney 1973).

¹¹² 53 App. Div. 2d at 382-83, 385 N.Y.S.2d at 599. The second department, unlike the *Corning* court, saw "no problem in the fact that 'the panel consists of three individuals serving on an *ad hoc* basis with no budget to defend its award'" or that the real adversaries would not necessarily be the parties in the appellate proceedings. *Id.* It concluded that "[a] court of equity should have no difficulty resolving these matters since, if need be, independent counsel to enforce or defend the award may be selected by PERB, and a nonjoined 'adversary' may be added as a party to the proceeding." *Id.* (footnotes omitted).

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

reviewed the awards in both *Coffey* and *Corning*. Judge Fuchsberg, writing for the court, made an abrupt about-face from his concurring opinion in *City of Amsterdam*,¹¹⁴ and declared that article 75, as expanded by *Mount St. Mary's*, provides the preferred scope of review under section 209.¹¹⁵ The court stated that "it is not the PERB or the arbitration panel but the local governments and their employees who are the real parties in interest; it is under article 75 procedure . . . that both parties in interest will be brought face to face with one another as advocates of their respective positions."¹¹⁶ In addition, Judge Fuchsberg noted, "[a]rticle 75 is our only statutory vehicle for the enforcement of arbitration."¹¹⁷

After selecting article 75 as the appropriate means of review, the court embarked upon a determination of the specific standard of review to be applied in such an award. Judge Fuchsberg determined "that the essential function of these compulsory arbitration panels [under section 209] is to 'write collective bargaining agreements for the parties.'"¹¹⁸ Since this is a quasi-legislative function,¹¹⁹ the court concluded that on judicial review the resultant awards "are to be measured according to whether they are rational or arbitrary and capricious in accordance with the principles articulated in *Mount St. Mary's Hospital v. Catherwood*."¹²⁰

By selecting the arbitrary and capricious test as the standard of review of a quasi-legislative activity, the court apparently was reaffirming the distinction drawn in *Mount St. Mary's* between judicial review of interest and grievance arbitrations.¹²¹ Consequently, the substantial evidence test, and not the arbitrary and capricious

¹¹⁴ See notes 102-105 and accompanying text *supra*.

¹¹⁵ 41 N.Y.2d at 156, 359 N.E.2d at 685, 391 N.Y.S.2d at 90.

¹¹⁶ *Id.* at 157, 359 N.E.2d at 685-86, 391 N.Y.S.2d at 90.

¹¹⁷ *Id.* at 156-57, 359 N.E.2d at 685, 391 N.Y.S.2d at 90.

¹¹⁸ *Id.* at 158, 359 N.E.2d at 686, 391 N.Y.S.2d at 91 (citations omitted).

¹¹⁹ Despite the detailed factors enumerated in § 209, the court stated that the panel must nevertheless be afforded great latitude, elasticity, and discretion in reaching its decision. 41 N.Y.2d at 157-58, 359 N.E.2d at 686, 391 N.Y.S.2d at 90. Indeed, the court stressed that the statutory criteria need only be "considered." The award itself, to be affirmed, must have merely a rationale basis. *Id.*

Interestingly, in *Helsby*, in which the court had sustained the constitutionality of § 209, Judge Fuchsberg had stated that he "did not find it useful to try to determine with precision whether" the arbitral panel's power was legislative, judicial, or administrative. 37 N.Y.2d at 35, 332 N.E.2d at 298, 371 N.Y.S.2d at 415 (Fuchsberg, J., concurring). Rejecting the *Mount St. Mary's* analysis in his *Helsby* concurrence, Judge Fuchsberg declared that he did not believe the distinctions between interest and grievance arbitrations to be relevant to the issue of scope of review. *Id.* at 40-41, 332, 371 N.Y.S.2d at 420.

¹²⁰ 41 N.Y.2d at 158, 359 N.E.2d at 686, 391 N.Y.S.2d at 91 (citation omitted).

¹²¹ See notes 42-44 and accompanying text *supra*.

test, would still appear to be the proper standard for judicial review of a grievance arbitration.¹²²

¹²² See 41 N.Y.2d at 158, 359 N.E.2d at 687, 391 N.Y.S.2d at 92. Judicial demarcation of interest and grievance arbitration may be further evidenced by the *Coffey* court's express rejection of the substantial evidence test. *Id.* Interestingly, this bifurcation of the scope of review is possible under article 78 as well as under "expanded" article 75. As the third department suggested in *Corning*, review under both articles is functionally identical. 51 App. Div. 2d at 389-90, 381 N.Y.S.2d at 701-02. Article 78 not only expressly mandates that a court apply both the arbitrary and capricious and substantial evidence tests when exercising its power of review, but also categorizes each test as a separate inquiry. See N.Y. CIV. PRAC. LAW § 7803(3), (4) (McKinney 1963). The two tests are meant to be applied under different circumstances, however, depending upon whether the administrative action involved is quasi-judicial or discretionary. See Weintraub, *Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules*, 38 ST. JOHN'S L. REV. 86, 123-24 (1963).

The court of appeals also disposed of a subsidiary problem which had been raised in both *Coffey* and *Corning*, namely, the absence of a record of the arbitration proceeding for use in judicial review. New York, unlike some states, see, e.g., Act of Nov. 26, 1973, ch. 1078, § 4, 1973 Mass. Acts 1135, reprinted in MASS. ANN. LAWS ch. 150E, § 9 app., at 320 (Michie/Law. Co-op 1976); WASH. REV. CODE § 41.56.450 (1974), does not require that a record or transcript of the arbitration proceeding be maintained by the compulsory arbitration tribunal. The problem created by this lapse was stated succinctly by the supreme court in *Coffey* when it remarked:

Critical is the fact that there was no written record. Instead, the court has only an unattractive mosaic of conflicting written and oral statements and affidavits, sophisticated arguments and inconsistent, ambiguous and irreconcilable claims as to what information and data was before the Panel on the crucial issue of ability to pay. This forecloses meaningful judicial review since there can be no evaluation of "substantiality" without a record.

83 Misc. 2d at 621, 372 N.Y.S.2d at 899-900. Under the substantial evidence test, the record is viewed as a whole. *Kopec v. Buffalo Brake Works*, 304 N.Y. 65, 71, 106 N.E.2d 12, 15 (1952). See *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 508, 260 N.E.2d 508, 516-17, 311 N.Y.S.2d 863, 875 (1970).

In addition to being indispensable for the proper application of the substantial evidence test, a record would provide a body of precedent which would be useful in subsequent arbitration proceedings. This could be especially helpful in jurisdictions where minimal standards are not provided for in the enabling statute. Cf. Hines, *Mandatory Contract Arbitration — Is It a Viable Process?*, 25 INDUS. & LAB. REL. REV. 533 (1972) (continuity through precedents necessary for compulsory arbitration). *But cf.* Communications, *Mandatory Contract Arbitration: A Viable Process or Not, It Works (Sometimes)*, 26 INDUS. & LAB. REL. REV. 1009 (1973) (role of arbitrator is to settle present dispute, not establish future guidelines). The necessity of a full record under the arbitrary and capricious rule is not so apparent. An accurate account, with written findings of facts which reveal the reasoning behind the decision, will suffice to afford a basis for review. See Bowers & Cohen, *Drafting Public Sector Arbitration Legislation*, 30 ARB. J. 253, 263 (1975). Nonetheless, a written record, indicating why the arbitrators made the choice they did, will help effectuate the spirit of the arbitral system. See GOV'T EMPL. REL. REP. (BNA) No. 628, at B-14 (Oct. 20, 1975). To require a verbatim transcript, however, might be objectionable because of the loss of informality, Bowers & Cohen, *supra* at 259, and the inhibitive cost, PROTECTIVE SERVICES, *supra* note 7, at 40 (speech by Ross Atwood). See also Lythgoe, *On Improving Arbitration: The Transcript Trauma*, MONTHLY LAB. REV. June 1974, at 47.

CONCLUSION

As a result of the court of appeals' decision in *Coffey*, the question of the proper scope of review for compulsory arbitration awards has been settled in New York. This decision will no doubt be weighed by the New York Legislature when it considers whether to extend section 209(4) of the Taylor Law beyond its current expiration date of July 1, 1977. Indeed, even if section 209 is reenacted without change, continued inquiry into the scope of judicial review of compulsory arbitration would appear to be both advisable and, in light of the stakes involved, inevitable.

Compulsory arbitration is still in its infancy and doubtless will continue to suffer growing pains. Its success will depend in great part upon the formulation of an effective scope of judicial review. In those states where judicial review is statutorily proscribed, courts may well have to consider the more fundamental question whether due process mandates a minimal level of review. In the past the judiciary has been loath to go beyond its scrutiny of the constitutionality of the delegation of legislative power to arbitral panels.¹²³ In light of recent experience and case law, it seems clear that a better defined role for the judiciary is in order.

The goal of compulsory arbitration is to arrive at a resolution that the parties might have agreed to had they settled their dispute themselves. The danger of minimal review is that it affords an arbitration panel excessive latitude in determining both the rights of the parties compelled to arbitrate and the interests of the public. In

In *Coffey*, the court of appeals summarily dismissed the contention that there could be no judicial review without a transcript of the arbitration proceeding. The court noted that the city of Albany, in *Corning*, had declined to request that a record be kept, even after the arbitrators had broached the subject. 41 N.Y.2d at 159, 359 N.E.2d at 687, 391 N.Y.S.2d at 92. Perhaps, in reaching its conclusion, the court was reaffirming former Chief Judge Fuld's observation that compulsory arbitration was chosen by the legislature because it "would not be hampered by the usual rules of evidence or the need to prepare a formal record." *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 512, 260 N.E.2d 508, 519, 311 N.Y.S.2d 863, 877-78 (1970) (Fuld, C.J., concurring). In any event, it is now apparently settled in New York that the absence of a written record of the arbitral proceeding will not thwart judicial review.

¹²³ See, e.g., *Fairview Hosp. Ass'n v. Public Bldg. Serv. & Hosp. Employees Local 113*, 241 Minn. 523, 64 N.W.2d 16 (1954), wherein the court specifically declined to consider whether due process mandates judicial review of compulsory arbitration, although it did subject the challenged statute to due process scrutiny. The court stated that to satisfy constitutional requirements "a legislature . . . may not act *arbitrarily or unjustly* and ordinarily should provide a *substantial and reasonable* substitute for the [strike] rights withdrawn." *Id.* at 539, 64 N.W.2d at 27 (emphasis in original). It is important to note that the statute involved in *Fairview* concerns private voluntary hospitals, makes no provision for review, and specifically states that the arbitrators' award is to be final and binding. MINN. STAT. ANN. § 179.38 (1966). For a discussion of the case, see 39 MINN. L. REV. 322 (1955).

contrast, a system of compulsory arbitration with an overly broad scope of judicial review would threaten the schema's *raison d'être*, its informality, expertise, speed, and most importantly, its finality. Although it is possible that no means exists to balance the conflicting considerations, the states must reconsider and refine the role of judicial review in the compulsory arbitration process.

Victor Cohen

Editor's Note. New York State's compulsory arbitration statute was extended, with minor revisions, for another 2 years on June 7, 1977. Ch. 216, § 1, [1977] N.Y. Laws.