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IMPASSE RESOLUTION IN PUBLIC SECTOR COLLECTIVE BARGAINING—AN EXAMINATION OF COMPULSORY INTEREST ARBITRATION IN NEW YORK

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In the last ten years, many state and local governments have enacted statutes requiring the use of compulsory binding interest arbitration as the ultimate means for achieving labor agreements between a public employer and certain categories of public employees. Such legislation developed largely as a result of the failure of traditional impasse resolution methods to prevent work stoppages by public employees following deadlocked contract negotiations. State and local legislatures recognized a need to design a system which would provide finality in public sector collective bargaining while both protecting the public against harmful strikes by essential government employees and preserving the collective bargaining rights of these employees. The growth of statutorily mandated interest arbitration may also be described as a process of accommodating collective bargaining, historically a mechanism for establishing wages, hours, and working conditions in private industry, for use in setting the terms and conditions of public employment.

In the private sector, the union and the employer bargain over wages, hours, and working conditions, subject to the provisions of the National Labor Relations Act.¹ If agreement is reached and a

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¹ 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975).

contract is signed, labor peace has been achieved. If the parties are unable to reach agreement, the union and the employer may resort to their respective economic weapons of strike and lockout.² Such activity is not only permissible under the federal labor law, it is an important part of the national labor policy under which unions and employers may resolve their disagreements through tests of strength.³ Indeed, it is often the threat of a strike or lockout with grave consequences for employer and employees, rather than the reasoned arguments of the negotiators, that precipitates a settlement at the eleventh hour of negotiations. Under federal law, interference with economically motivated work stoppages is confined to emergency situations threatening the safety and welfare of the public.⁴ Notably, even in these limited instances this jurisdiction is exercised with restraint.⁵

In public employment, however, the traditional assumption has been that strikes are intolerable and ought to be banned completely. Long before the recognition of collective bargaining rights for state and local government workers in New York, the Condon-Wadlin Act prohibited public employee strikes and provided severe penalties for violations of this proscription.⁶ The Taylor Law,⁷ enacted in 1967, continues the ban on government-worker strikes,⁸ but also recognizes the right of public employees to "form, join and participate in" employee organizations.⁹ It is the purpose of the legislation "to

² With respect to vital national services such as the railroads, in which the potential disruptive effect of a strike or lockout is great, various statutory provisions are interposed to avoid work stoppages. See Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1970) (issuance of temporary restraining order); Labor Management Relations Act, 29 U.S.C. § 178 (1970) (injunction on petition of Attorney General); Railway Labor Act, 45 U.S.C. § 152 (1970) (duty to settle disputes); *id.* §§ 157-159 (controversy submitted to arbitration).

³ See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976).

⁴ See note 2 *supra*.

⁵ See, e.g., *United Steelworkers v. United States*, 361 U.S. 39, 41 (1959) (*per curiam*), *construing* Labor Management Relations Act, 29 U.S.C. § 178 (1970).

⁶ Ch. 790, 2 [1958] N.Y. Laws 1680. The focus of this act was on punishment rather than on procedures for resolving disputes.

⁷ N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1977).

⁸ *Id.* § 210. At least seven states currently disagree with the New York view and grant some or all of their public employees a limited right to strike. ALASKA STAT. § 23.40.200 (1972); HAW. REV. STAT. ANN. § 89-12 (Supp. 1974); MINN. STAT. ANN. § 179.64(1), (7) (West Supp. 1977); MONT. REV. CODES ANN. § 59-1603 (Supp. 1975) (as construed in *State v. Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974)); PA. STAT. ANN. tit. 43, § 1101.2201 (Purdon Supp. 1977); OR. REV. STAT. § 243.726 (1975); VT. STAT. ANN. tit. 21, § 1730 (Supp. 1976). Even in these states, however, resort to the strike as a test of strength represents not the preferred method of dispute resolution, but rather a last resort when all else has failed. See Coughlin & Rader, *Right to Strike and Compulsory Arbitration: Panacea or Placebo?*, 58 MARQ. L. REV. 205, 214 (1975).

⁹ N.Y. CIV. SERV. LAW § 202 (McKinney 1973).

promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."¹⁰

To effectuate these objectives, the Taylor Law requires collective bargaining between public employee organizations and state and local governments.¹¹ The Law also provides rather draconian penalties for violations of the prohibition against strikes, including the deduction of two days pay for each day of the strike, the imposition of a one year probationary period on each striking employee, and the possible loss of dues checkoff privileges for the union.¹² Although these harsh sanctions may prevent some strikes, they cannot prevent all strikes.¹³ Thus, an alternative means must be found to prevent recourse to the strike in those instances where the collective negotiations are deadlocked and the situation threatens to produce a further test of strength rather than a settlement. The procedures for resolving bargaining impasses in New York State, often called methods for reaching finality in contract disputes, are set forth in both the Taylor Law and the New York City Collective Bargaining Law (NYCCBL).¹⁴

One of these methods, binding interest arbitration, has gained increasing popularity and has been adopted in varying degrees by eighteen states¹⁵ and the United States Postal Service.¹⁶ This trend,

¹⁰ *Id.* § 200.

¹¹ *Id.* § 203-204.

¹² *Id.* § 210.

¹³ There were a total of 32 strikes in New York in 1975. [1975] N.Y. PUB. EMP. REL. Bd. ANN. REP., appearing in Public Employment Relations Board News No. 3, at 8 (Mar. 1975).

¹⁴ NEW YORK, N.Y. ADMIN. CODE §§ 1173-1.0 to -13.0 (1975 & Supp. 1976).

¹⁵ ALASKA STAT. § 23.40.200 (1972) (compulsory arbitration applicable to essential state workers, including policemen, firefighters, correctional employees, and hospital employees); 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-.244 (Supp. 1976) (local police, firefighters, and emergency service personnel); MINN. STAT. ANN. § 179.69(3) (West Supp. 1976) (essential public employees); NEB. REV. STAT. §§ 43-801 to -838 (1974 & Cum. Supp. 1976) (government employees) (Court of Industrial Relations); NEV. REV. STAT. § 288.200 (1975) (local government employees); N.Y. CIV. SERV. LAW § 209(4) (McKinney Supp. 1977) (local police and firefighters); OR. REV. STAT. §§ 243.742-.762 (1975) (police, firefighters and guards at 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, teachers, and municipal employees); *id.* § 36-11-9 (Supp. 1976) (state em-

however, has not escaped criticism. Requiring the parties to submit their bargaining impasses to a third party has been said to "chill" collective bargaining negotiations because the parties to the dispute may believe that they can gain more through arbitration than can be achieved from a negotiated settlement.¹⁷ Moreover, the parties are purportedly more willing to go to impasse when the result will be third-party intervention rather than the serious economic consequences of a strike or lockout.¹⁸ It has also been argued that interest arbitration is incompatible with basic principles of representative government because the policymaking responsibilities of the executive and the legislature are delegated to an ad hoc body, elected by and responsible to no one.¹⁹ Opponents of interest arbitration have further contended that this method for achieving finality adds a costly, time-consuming step to collective bargaining. According to this argument, the parties' loss of control over the negotiations often results in awards which are rendered without consideration of the public employer's ability to pay and which provide greater wage increases than those achieved through collective negotiations.²⁰

It is the purpose of this Article to examine these arguments in the light of New York State's experimental experience with compulsory interest arbitration of police and firefighter bargaining disputes,²¹ to compare the New York State experience with that of New

ployees); UTAH CODE ANN. §§ 34-20a-7 to -9 (Supp. 1975) (firefighters); WASH. REV. CODE § 41.56.450-.470 (1974) (uniformed personnel); WIS. STAT. ANN. § 111.77 (West 1974 & Supp. 1976) (police and firefighters); WYO. STAT. § 27-269 (1967) (firefighters).

¹⁶ The Postal Reorganization Act of 1970 establishes a system combining provisions of the National Labor Relations Act with a binding arbitration procedure to resolve impasses and avoid strikes, which are prohibited. See 39 U.S.C. §§ 1207, 1209 (1970). Similarly, Exec. Order No. 11,491, § 17, 34 Fed. Reg. 17,612 (1969), reprinted in 5 U.S.C. § 7301 app., at 398 (1970), which has apparently never been invoked, allows the use of arbitration to resolve impasses involving contract negotiations with employees of the executive branch of the federal government. Although there were attempts to institute compulsory arbitration in selected areas of public employment as early as 1947, the vast majority of such provisions have been enacted since 1968. See McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1193 nn.9-10 (1972).

¹⁷ For a discussion of these arguments, see McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192, 1209-10 (1972).

¹⁸ P. FEUILLE, FINAL OFFER ARBITRATION: CONCEPTS, DEVELOPMENTS, TECHNIQUES 9-12 (Public Employee Relations Library No. 50, 1975).

¹⁹ The delegation argument is discussed in Grodin, *Political Aspects of Public Sector Interest Arbitration*, 1 INDUS. REL. L.J. 1 (1976).

²⁰ Zagoria, *Compulsory, Binding Arbitration Likely to be Pushed In 1977*, L.R.M.S. Newsletter 3 (Dec. 1976).

²¹ N.Y. CIV. SERV. LAW § 209(4) (McKinney Supp. 1977) sets forth the procedures to be

York City and other jurisdictions that mandate interest arbitration, and finally, to consider the future of interest arbitration in New York State.²²

TAYLOR LAW FINALITY PROCEDURES OTHER THAN BINDING INTEREST ARBITRATION

The Taylor Law currently provides two types of finality procedures:²³ Public Employment Relations Board (PERB) assistance and a mandatory legislative hearing for most public employees,²⁴ and PERB assistance and binding interest arbitration for police and firefighters outside of New York City.²⁵ Employees of school districts and higher education facilities can obtain PERB assistance, but are not provided with a finality procedure.²⁶ Essentially, PERB assistance²⁷ includes appointment of a mediator,²⁸ subsequent designa-

followed in the event of an impasse in collective bargaining between a governmental subdivision and its police or fire department.

²² This Article will discuss the method of finality known as "interest arbitration," wherein an arbitration award is issued that resolves the dispute of the parties relating to their failure to agree on a contract. "Rights arbitration," which is a method for determining the rights of a party under an executed contract, will not be discussed.

²³ Under the original version of the Taylor Law, ch. 392, 1 [1967] N.Y. Laws 1102, the provision authorizing legislative hearings in the event of an impasse was applicable to all public employees under the jurisdiction of the Public Employment Relations Board. The present version is more limited in scope. See N.Y. CIV. SERV. LAW § 209(3)(e) (McKinney Supp. 1977).

²⁴ N.Y. CIV. SERV. LAW § 209(3) (McKinney Supp. 1977).

²⁵ *Id.* § 209(4).

²⁶ See *id.* § 209(3)(f).

²⁷ If the parties to collective negotiations fail to reach agreement "at least one hundred twenty days prior to the end of the fiscal year of the public employer" an impasse may be declared. *Id.* § 209(1). Unless the public employer and the public employee organization have agreed to "procedures to be invoked in the event of disputes which reach an impasse in the course of collective negotiations," *id.* § 209(2), PERB is empowered to render assistance to the parties. The assistance to be given by PERB, either at the request of a party or on the motion of PERB itself, consists of mandatory appointment of "a mediator or mediators representative of the public from a list of qualified persons maintained by the board." *Id.* § 209(3)(a) (McKinney 1973). If the impasse is not resolved with the help of mediation, the Board is required to "appoint a fact-finding board of not more than three members, each representative of the public, from a list of qualified persons maintained by the board." *Id.* § 209(3)(b). This factfinding board has the power to "make public recommendations for the resolution of the dispute," as well as certain unspecified powers "delegated to it by the board." *Id.*

After appointment of the factfinding board, if the contract dispute is not resolved at least 80 days before the end of the employer's fiscal year or such other appropriate date set by PERB, the factfinding board transmits its "findings of fact and recommendations for resolution of the dispute" to the chief executive of the employer. Within 5 days of such transmission the report is to be made public, and the factfinding board is empowered to "assist the parties to effect a voluntary resolution of the dispute." *Id.* § 209(3)(c).

²⁸ *Id.* § 209(3)(a).

tion of a factfinding board,²⁹ submission of PERB recommendations based on the factfinding board's conclusions, and aid in implementing voluntary arbitration.³⁰

If PERB assistance does not resolve the dispute, the final impasse procedures prescribed by the Taylor Law are invoked. In those negotiations wherein a legislative hearing is the final impasse resolution method, the chief executive officer of the government employer must submit a copy of the factfinding board's conclusions to the legislative body along with his "recommendations for settling the dispute" unless both sides accept the board's conclusions within ten days after they are received by the chief executive.³¹ If the recommendations are not accepted, the legislative body of the public employer must provide the employee group with an opportunity to submit its proposed solution and conduct "forthwith . . . a public hearing at which the parties shall be required to explain their positions with respect to the report of the factfinding board."³² Following the hearing, "the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved."³³ The action referred to is a vote by the legislature setting the terms and conditions of employment of the public employees with whom the chief executive officer has been negotiating. Thus, after months of negotiations and various types of intervention by a mediator, a factfinding board, and PERB itself, all designed to promote a voluntary settlement of contract terms, the ultimate decision on wages, hours, and working conditions will be made by the legislative body of the employer if the chief executive has not previously reached agreement with the union. Certainly, the chief executive and the legislative body cannot be considered a single employing entity. Indeed, in some cases they will be significantly divided on many issues. Nonetheless, the chief executive of a local or state government usually has significant power in the legislative body with respect to public employee collective bargaining.

The effect of these provisions is to place the resolution of a collective bargaining problem in the political arena. Prior to passage of the legislative solution to the contract dispute, both the union

²⁹ *Id.* § 209(3)(b).

³⁰ *Id.* § 209(3)(a).

³¹ *Id.* § 209(3)(e)(i).

³² *Id.* § 209(3)(e)(ii).

³³ *Id.* § 209(3)(e)(iii)-(iv).

and the chief executive officer will probably take steps other than merely participating in the legislative hearing in an attempt to influence the outcome of the vote. The political situation in the government involved will determine the form of this lobbying. The contract dispute may have progressed to impasse not because the executive opposed the union demands, but because the executive wished to place the onus for the cost of the settlement on the legislative body. In such a situation the executive may not lobby vigorously against the proposals of the union. Sometimes, both the union and the employer will be in general agreement based on the fact-finding report, but it will be more politically expedient to proceed to legislative action rather than offend certain voters or certain militant union members by compromising on a contract. Where the governmental body is experiencing fiscal difficulties in a time of inflationary trends, it is to be expected that there will be greater conflict surrounding the decision and there may be extensive voter participation at the legislative hearing and in lobbying efforts. The legislature will be faced with the uncomfortable task of weighing the undesirable effects of a tax increase necessitated by improvements for employees against possible retaliation by the unions at the next election if the most important employee demands are not satisfied. The relative importance of the union in the particular electoral situation will always be a factor. Weak unions will obtain smaller benefits from the executive through bargaining and from the legislature if the dispute goes to impasse. Further, a recognized fiscal crisis can be expected to result in smaller gains or no gains at all, regardless of the strength of the union.³⁴

The legislative hearing procedures briefly described above no longer apply to employees of school districts and higher education facilities. Originally, the school boards, as the legislative bodies with jurisdiction over these employees, were empowered to hold legislative hearings and prescribe working conditions in the event a voluntary settlement could not be reached.³⁵ Unlike most other governmental units in which the legislative body was removed from the

³⁴ In New York City, all unions were required to give up some existing benefits during the fiscal crisis; this occurred despite the recognized political power of municipal employee organizations. Financial Emergency Act, § 10, ch. 868, sec. 2, § 10, [1975] N.Y. Laws 1417 (McKinney). See Committee on Labor and Social Security Legislation, *Impact of the Fiscal Crisis and the State Financial Emergency Act on the Structure and Scope of Collective Bargaining*, 31 RECORD OF N.Y.C.B.A. 386 (1976).

³⁵ Ch. 392, sec. 2, § 209(3)(e), [1967] N.Y. Laws 1109 (current version at N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney Supp. 1977)).

contract negotiations until mediation and factfinding failed, school boards very often participated in the collective bargaining process. This system was criticized by educational employees because it "placed the power to make . . . final resolutions in the hands of a party to the dispute . . . , *i.e.*, the school board."³⁶ As a result, in 1974 the power to impose a settlement was removed³⁷ and, instead, the parties "may" now be invited to a meeting by PERB "to explain their positions with respect to the report of the fact-finding board," and "thereafter the legislative body [*i.e.*, the school board] may take such action as is necessary and appropriate to *reach an agreement*."³⁸

This amendment apparently leaves the parties to an educational employee dispute without any mechanism for achieving finality other than their own eventual agreement on a contract. If neither party can change the status quo during the period before a new contract is signed, such a procedure, it has been suggested, places pressure on both parties to reach agreement.³⁹ School boards, however, are permitted to modify unilaterally certain terms and conditions of employment,⁴⁰ and the courts often have found that incre-

³⁶ *Experiments in Public Employment Dispute Resolution: The 1974 Taylor Law Amendments*, 30 RECORD OF N.Y.C.B.A. 568, 575 (1975).

³⁷ The task force appointed by the Governor to propose an alternative procedure for the resolution of educational employee impasses concluded that the legislative hearing was an inappropriate procedure and should be abolished. In its report, the task force stated:

The policy of the Taylor Law is that public employers shall negotiate with employee organizations and enter into written agreements with them concerning the terms and conditions of employment.

These agreements do not prevail over duly enacted laws and local ordinances, but rather depend in many aspects upon legislative action to become effective.

However, where legislative action is taken in the absence of agreement between the parties, such action [the past experience, as analyzed by the Task Force in its report, demonstrates] rarely brings about full agreement between the parties and a final resolution of their dispute.

Stable employer-employee relations are thus enhanced by and in fact depend upon a combination of legislative action and agreement by the parties.

Where the parties have exhausted the statutory impasse procedures, and have been unable to reach agreement, PERB should have clear authority to continue all appropriate efforts to assist the parties in achieving agreement.

Taylor Law Task Force, Report to Governor Malcolm Wilson 4 (May 8, 1974). The legislature, however, restricted the proposed amendment to educational employees. See ch. 443, [1974] N.Y. Laws 1314 (codified at N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney Supp. 1977)).

³⁸ N.Y. CIV. SERV. LAW § 209(3)(f) (McKinney Supp. 1977) (emphasis added).

³⁹ *Experiments in Public Employment Dispute Resolution: The 1974 Taylor Law Amendments*, 30 RECORD OF N.Y.C.B.A. 568, 584 (1975).

⁴⁰ See, e.g., Central School Dist. No. 1 v. Wappinger Cent. School Faculty Ass'n, 5 PUB. EMP. REL. BD. ¶ 5-3074 (Bd. 1972) (unilateral change permitted where necessary for schools to operate). Furthermore, although PERB has found that the employer is guilty of a refusal

ments due under an expired contract need not be paid during a period of negotiations.⁴¹ Thus, the pressure to settle may rest entirely on the union.

BINDING INTEREST ARBITRATION IN NEW YORK

The finality provisions with which this paper is most concerned were enacted in 1974 when subsection 4 was added to section 209 of the Taylor Law.⁴² Representing a 3-year experiment scheduled to expire on July 1, 1977, this subsection establishes compulsory interest arbitration as the final means of achieving a settlement when negotiations between a local government other than New York City and its police or fire officers reach an impasse.

The initial steps to be taken pursuant to section 209(4) parallel closely the procedures described above for impasses in other branches of government employment.⁴³ Once PERB determines that an impasse in collective bargaining exists, it must, on the request of a participant, render assistance in achieving a resolution of the dispute, and it may intervene, without a party's request, on its own motion.⁴⁴ If the parties have agreed on procedures to be invoked in the event of impasse, such procedures are followed in an attempt to achieve a settlement prior to PERB intervention.⁴⁵ If the agreed

to bargain if it unilaterally changes mandatory subjects of bargaining while a successor agreement is being negotiated, *see* *Triborough Bridge & Tunnel Auth. v. Local 1396, AFSCME*, 5 PUB. EMP. REL. BD. ¶ 5-3037 (Bd. 1972), PERB does not have the power to restore the status quo. *See* *Jefferson County Bd. of Supervisors v. PERB*, 36 N.Y.2d 534, 330 N.E.2d 621, 369 N.Y.S.2d 662 (1975).

⁴¹ *See, e.g., Corbin v. County of Suffolk*, 54 App. Div. 2d 698, 387 N.Y.S.2d 295 (2d Dep't 1976); *Board of Coop. Educ. Servs. v. PERB*, 50 App. Div. 2d 832, 377 N.Y.S.2d 98 (2d Dep't 1975); *Board of Educ. v. Poughkeepsie Pub. School Teachers Ass'n*, 44 App. Div. 2d 598, 354 N.Y.S.2d 589 (2d Dep't 1974) (mem.).

⁴² *See* ch. 724, sec. 3, [1974] N.Y. Laws 1883, and ch. 725, sec. 3, [1974] N.Y. Laws 1887 (codified at N.Y. CIV. SERV. LAW § 209(4) (McKinney Supp. 1977)).

⁴³ The initial § 209(4) procedures do differ slightly from those applicable to other governmental employers under the jurisdiction of PERB as set forth in N.Y. CIV. SERV. LAW § 209(3) (McKinney 1973 & Supp. 1977), *discussed in note 27 supra*. The time limits prescribed for the requisite actions are set forth more specifically in § 209(4) than in § 209(3). Section 209(3) apparently does not contemplate that the parties shall participate in the choice of a factfinder, whereas the parties to a police or firefighter dispute are given 10 days to agree on the factfinder. Further, the powers of a police or firefighter factfinder are more clearly detailed in § 209(4) than are the powers of factfinders appointed to other types of disputes under § 209(3). The rationale underlying these differences in procedure is unclear since there is no definitive legislative history explaining the binding arbitration statute.

⁴⁴ N.Y. CIV. SERV. LAW § 209(4) (McKinney Supp. 1977). An impasse is deemed to exist if the parties have not reached an accord at least 120 days prior to the end of the public employer's fiscal year. *Id.* § 209(1) (McKinney 1973).

⁴⁵ *Id.* § 209(2) (McKinney Supp. 1977).

upon procedures do not produce a contract, or if there are no such procedures, PERB appoints a mediator who is given at least 15 days to effect settlement of the controversy.⁴⁶ After 15 days, either party may "request that their differences be submitted to factfinding with advisory recommendations."⁴⁷

The parties may jointly select a factfinder, but if they are unable to agree within 10 days a factfinder is appointed by PERB from its list of qualified persons. The factfinder is required, within 10 days of appointment, to "meet with the parties . . . either jointly or separately, and [the factfinder] may make inquiries and investigations, hold hearings, and take such other steps as [the factfinder] may deem appropriate."⁴⁸ If the contract dispute is not settled within 30 days after the factfinder's appointment, he "shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only."⁴⁹ Thereafter, the parties have 10 days within which to agree on a contract. Failing agreement in this period, PERB will "refer the dispute upon petition of either party to a public arbitration panel."⁵⁰

⁴⁶ *Id.* § 209(4)(a)-(b).

⁴⁷ *Id.* § 209(4)(b).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ The composition and procedures of the public arbitration panel are delineated in § 209(4)(c), which provides in pertinent part:

(ii) the public arbitration panel shall consist of one member appointed by the public employer, one member appointed by the employee organization and one public member appointed jointly by the public employer and employee organization who shall be selected within ten days after receipt by the board of a petition for creation of the arbitration panel. If either party fails to designate its member to the public arbitration panel, the board shall promptly, upon receipt of a request by either party, designate a member associated in interest with the public employer or employee organization he is to represent. Each of the respective parties is to bear the cost of its member appointed or designated to the arbitration panel and each of the respective parties is to share equally the cost of the public member appointed jointly. If, within seven days after the mailing date, the parties are unable to agree upon the one public member, the board shall submit to the parties a list of qualified, disinterested persons for the selection of the public member. Each party shall alternately strike from the list one of the names with the order of striking determined by lot, until the remaining one person shall be designated as public member. This process shall be completed within five days of receipt of this list. The parties shall notify the board of the designated public member. The cost of the one person designated as public member from the list submitted by the board is to be paid by the board. The public member shall be chosen as chairman;

(iii) the public arbitration panel shall hold hearings on all matters related to the dispute. The parties may be heard either in person, by counsel, or by other representatives, as they may respectively designate. The parties may present, either orally or in writing, or both, statements of fact, supporting witnesses and other

This panel is tripartite in nature, with one member appointed by each party and the third member chosen by mutual agreement.⁵¹ After conducting hearings on the issues,⁵² the panel may act by a majority vote unless the members representing the parties both request that the issue be resubmitted to the disputants for further negotiations.⁵³ Although certain considerations which may be relevant to the panel's determination are enumerated in the statute, examination of these factors is required only so far as the panel "deems them applicable."⁵⁴ Thus, the panel is granted wide latitude⁵⁵ in shaping its decision which is final and binding and not

evidence, and argument of their respective positions with respect to each case. The panel shall have authority to require the production of such additional evidence, either oral or written as it may desire from the parties;

(iv) all matters presented to the public arbitration panel for its determination shall be decided by a majority vote of the members of the panel. The panel, prior to a vote on any issue in dispute before it, shall, upon the joint request of its two members representing the public employer and the employee organization respectively, refer the issues back to the parties for further negotiations;

(v) the public arbitration panel shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the panel may, but shall not be bound to, adopt any recommendation made by the fact finder, and shall, so far as it deems them applicable, take into consideration the following and any other relevant circumstances:

a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities;

b. the interests and welfare of the public and the financial ability of the public employer to pay;

c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills;

d. such other factors which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment.

(vi) the determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the panel, but in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement or if there is no previous collective bargaining agreement then for a period not to exceed two years from the date of determination by the panel. Such determination shall not be subject to the approval of any local legislative body or other municipal authority.

⁵¹ *Id.* § 209(4)(c)(ii).

⁵² *Id.* § 209(4)(c)(iii).

⁵³ *Id.* § 209(4)(c)(iv).

⁵⁴ *Id.* § 209(4)(c)(v).

⁵⁵ See *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976).

subject to legislative approval.⁵⁶

In making its determination, the public arbitration panel "may, but [is] not . . . bound to, adopt any recommendation made by the fact finder."⁵⁷ In practice some arbitrations are conducted as "show cause" proceedings to determine why the substance of the factfinding report should be modified or adopted.⁵⁸ Accordingly, comparison of a factfinder's recommendations and the subsequent determination of the arbitration panel in the same case often demonstrates considerable agreement as to the propriety of salary increases and other benefits. In seventy percent of the cases studied, salary recommendations and arbitration awards were the same,⁵⁹ and even in those cases where differences were found, they were "quite small."⁶⁰ As to nonsalary items, "arbitration panels adopted the factfinding report on approximately 75% of the other issues raised in the arbitration hearing."⁶¹

As was noted above, the panel is also directed to examine the specified statutory criteria as well as "any other relevant circumstance," but only so far as "it deems them applicable." The "elasticity" of this approach has been acknowledged by the court of appeals,⁶² which has stated that an arbitration award will be upheld on judicial review if the arbitrator's decision indicates that the criteria "were 'considered' in good faith and that the . . . award has a 'plausible basis . . .'"⁶³ It would seem that in times of economic expansion, wage and benefit comparability, one of the

⁵⁴ N.Y. CIV. SERV. LAW § 209(4)(c)(vi) (McKinney Supp. 1977). The Taylor Law does not require that a stenographic record be made of interest arbitration proceedings. Nonetheless, the rules adopted by PERB grant the right to demand such a record with the "cost of such record [to] be paid by the party requesting it or divided equally between both parties if both made such request." 4 N.Y.C.R.R. § 205.7(d) (1976). Since arbitration awards are reviewable in the courts, *see* *Caso v. Coffey*, 41 N.Y.2d 153, 156, 359 N.E.2d 683, 685, 391 N.Y.S.2d 88, 90 (1976), it appears advisable for both parties to request that minutes of the proceedings be maintained in order to reserve their right to a full record on which to base a demand for review. Moreover, the court of appeals has stated that where a party fails to request a stenographic record, it cannot rely on the absence of a formal record as a ground for setting aside the arbitration award upon judicial review. *Id.* at 159, 359 N.E.2d at 687, 391 N.Y.S.2d at 92.

⁵⁷ N.Y. CIV. SERV. LAW § 209(4)(v) (McKinney Supp. 1977).

⁵⁸ In a sample of 30 arbitration cases, it was found that 20 of the panels had adopted a "show cause" posture with respect to the factfinding report. T. KOCHAN, R. EHRENBERG, J. BADERSCHIEDER, T. JICK & M. MIRONI, AN EVALUATION OF IMPASSE PROCEDURES FOR POLICE AND FIREFIGHTERS IN NEW YORK STATE 223 (1977) [hereinafter cited as KOCHAN].

⁵⁹ *Id.* at 288.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See* *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976).

⁶³ *Id.* at 158, 359 N.E.2d at 686, 391 N.Y.S.2d at 91-92.

statutory criteria,⁶⁴ should be a significant factor in the arbitrators' decision. If a governmental entity is financially healthy, there would seem to be no reason for its employees to receive less compensation than do similarly situated employees in communities of comparable circumstances. In contrast, when the government involved in the dispute is in the throes of a financial emergency, the "ability to pay" criterion⁶⁵ of the interest arbitration statute should strongly influence the panel.

Of necessity, a public employer which intends to argue that the benefits requested by the public employee organization should be denied because the governmental ability to pay is limited must offer adequate proof of fiscal limitations at the arbitration hearing. While governmental ability to pay must guide the arbitrators' decision when relevant, it can only be fairly and intelligently considered when the panel is presented with fully documented references to such subjects as real estate and sales tax collections, constitutional debt limitations, the possibility of deficits, per capita income of citizens, economic trends in the particular locality, and recent settlements with other bargaining units by this governmental entity and other employers.⁶⁶ A public employer is not fulfilling its duties to the public when it argues to the factfinder and the arbitration panel that it cannot afford to grant the demands of the union but fails to support its allegations with any documentation, and then conducts an expensive judicial attack on the resulting unfavorable arbitration award on the ground that the panel gave inadequate consideration to the government's ability to pay.⁶⁷

⁶⁴ N.Y. CIV. SERV. LAW § 209(4)(c)(v)(d) (McKinney Supp. 1977).

⁶⁵ *Id.* § 209(4)(c)(v)(b).

⁶⁶ *See id.* § 209(4)(c)(v)(a).

⁶⁷ A similar situation was presented in *Caso v. Coffey*, 83 Misc. 2d 614, 372 N.Y.S.2d 892 (Sup. Ct. Nassau County 1975). According to the original arbitrator's decision:

[T]he County did not argue that it could not afford a larger increase; it did not claim that the PBA demanded increase could create a budget deficit; it did not argue that the demanded increase would place an unfair burden on the taxpayer. Instead, it argued that a 6.5% increase was fair and reasonable.

Id. at 618-19, 372 N.Y.S.2d at 897. Nonetheless, the county challenged the award, which included an 8.5% salary increase, on the ground that the arbitrators had not considered the county's ability to pay and thus had failed to adhere to the statutory criteria. The supreme court determined that the substantial evidence test was applicable and remanded the award to the arbitration panel for development of a written record. 83 Misc. 2d at 620-23, 372 N.Y.S.2d at 899-901. Promulgating its second decision after 25 days of hearings and the compilation of a massive amount of evidence, the panel awarded a 9.5% increase to the Nassau policemen. This award was ultimately upheld by the court of appeals, which applied a rational basis rather than a substantial evidence test while rejecting the contention that the absence of a written record precludes confirmation of an award. *Caso v. Coffey*, 41 N.Y.2d 153, 158-59, 359 N.E.2d 683, 686-87, 391 N.Y.S.2d 88, 91-92 (1976).

The court of appeals has recently stated that in a judicial proceeding to overturn an award the party challenging the arbitrator's decision bears the burden of proof on the issue of the employer's inability to pay.⁶⁸ It specifically rejected the notion that "the burden of proof to show that [the public employer] has the ability to pay the award, should be placed upon the employees under a kind of presumption that the [employer's] best offer during bargaining prior to arbitration represented its good faith statement of the most it could afford."⁶⁹ The quoted language may be interpreted as indicating that the employer bears the burden of proof on this issue not only when the award is challenged in court, but also from the very beginning of the impasse proceedings under the Taylor Law.

Of course, the statute requires that the public arbitration panel "shall make a just and reasonable determination of the matters in dispute."⁷⁰ This language apparently imposes a duty on the panel to see that sufficient information is presented by both parties that a "just and reasonable" determination is possible. Manifestly, a panel would be derelict in its duty if it permitted an inexperienced public employer representative to neglect an important aspect of the statutory criteria. Nonetheless, the panel should not be responsible for the adequacy of a party's presentation, nor should it be required to do more than indicate areas where more facts could profitably be presented.

Section 209(4)(c)(vi) provides that the arbitration panel's decision "shall be final and binding" and "shall not be subject to the approval of any local legislative body or other municipal authority."⁷¹ The final and binding nature of this determination is in marked contrast to the method for resolving impasses in all other sectors of employment under the jurisdiction of PERB. As stated above, finality for these other employee groups is dependent on legislative action or agreement by the employer and the public employee organization. In fact, when a voluntary settlement is reached, the public employer may not be free to execute a truly binding contract because the Taylor Law recognizes that certain matters, such as increased funding, require legislative authorization as well as the approval of the chief executive.⁷² Thus, the Taylor Law

⁶⁸ *Caso v. Coffey*, 41 N.Y.2d 153, 159, 359 N.E.2d 683, 687, 391 N.Y.S.2d 88, 92 (1976).

⁶⁹ *Id.*

⁷⁰ N.Y. CIV. SERV. LAW § 209(4)(c)(v) (McKinney Supp. 1977).

⁷¹ *Id.* § 209(4)(c)(vi).

⁷² *Id.* § 204-a(1) provides:

Any written agreement between a public employer and an employee organization

prevents the executive from voluntarily binding the government when the proposed contract term requires legislative implementation. Once an arbitration panel has ruled on a subject, however, "the local government must yield to the dictates of the [arbitrators' decision]" ⁷³

In *City of Amsterdam v. Helsby*,⁷⁴ the court of appeals found the Taylor Law finality procedure for police and firefighters proper, despite the assertion that the arbitration mechanism represents an unconstitutional delegation of legislative authority. The court held:

[t]here is no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment. . . . Here, the Legislature has delegated to PERB, and through PERB to *ad hoc* arbitration panels, its constitutional authority to regulate the hours of work, compensation, and so on, for policemen and firemen in the limited situation where an impasse occurs. It has also established specific standards which must be followed by such a panel We conclude that the delegation here is both proper and reasonable.⁷⁵

Consequently, if the arbitration panel follows the procedures of the Taylor Law and adheres to the statutory criteria, it has the power to establish terms and conditions of employment for police officers or firefighters involved in an impasse. Moreover, such an award may not be modified by the executive or legislative branches of government. It would seem, however, that since the panel may not render an award contrary to state law, its powers extend only insofar as the

determining the terms and conditions of employment of public employees shall contain the following notice in type not smaller than the largest type used elsewhere in such agreement:

"It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval."

⁷³ *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 407 (1975). In upholding the constitutionality of § 209(4), in *Helsby* the court of appeals stated that

once an impasse is reached and arbitration is sought, an attempt by the local government to establish the hours of work, compensation, and so on, of its policemen and firemen would be entirely inconsistent with the compulsory and binding arbitration procedures established by the Legislature. In such a situation it should be apparent that the local government must yield to the dictates of the arbitration panel convened pursuant to [the Taylor Law].

Id. at 27, 332 N.E.2d at 293, 371 N.Y.S.2d at 407.

⁷⁴ 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975).

⁷⁵ *Id.* at 27, 332 N.E.2d at 293, 371 N.Y.S.2d at 408 (citations omitted).

local government is able to act on wages, hours, and working conditions.

A comprehensive concurring opinion by Judge Fuchsberg offers an illuminating discussion of the various problems encountered by the *Helsby* court.⁷⁶ Of most significance for the limited purposes of this Article is a comment by Judge Fuchsberg with respect to the taxation power:

I do not find the arbitrators' power to decide disputed labor demands constitutes a delegation of power to impose taxes, whether by way of invasion of local governments' authority to do so or otherwise. The panels' decisions no doubt may affect the cost of police and firefighters' services to their local governments, but the cities or towns for whom they work remain free to make their own decisions as to how they will meet such cost, whether by taxation, cutbacks in spending or other means.⁷⁷

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

Judicial Review of Arbitration Awards

The method and standard of judicial review applicable to police and firefighters' arbitration awards has been delineated by the court of appeals. In *Caso v. Coffey*,⁷⁸ the court reviewed the awards which had been issued in the respective disputes between the County of Nassau and its police and the City of Albany and its firefighters. After noting that judicial review of compulsory arbitration awards

⁷⁶ *Id.* at 28-42, 332 N.E.2d at 294-303, 371 N.Y.S.2d at 408-21 (Fuchsberg, J., concurring). Judge Fuchsberg considered four challenges to the constitutionality of the arbitration provision of the Taylor Law: infringement on home rule, impermissible delegation of power to the arbitrators, illegal grant of the taxing power to the arbitrators, and denial of equal protection. He resolved all four contentions in favor of the statute's constitutionality. *Id.* at 30-42, 332 N.E.2d at 295-303, 371 N.Y.S.2d at 410-21.

⁷⁷ *Id.* at 41, 332 N.E.2d at 302, 371 N.Y.S.2d at 420, citing *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 42 Mich. App. 51, 201 N.W.2d 650 (1972), *aff'd by an equally divided court*, 394 Mich. 229, 231 N.W.2d 226 (1975).

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

is constitutionally necessary⁷⁹ despite the legislature's failure to provide for such review in section 209(4) of the Taylor Law, Judge Fuchsberg, writing for a unanimous court, carefully described the appropriate procedures and standards to be followed and applied by a court confronted with a challenge to a public arbitration panel's award.

First, the court held that judicial review of compulsory arbitration awards is properly conducted under article 75, rather than article 78, of the Civil Practice Law and Rules.⁸⁰ The court explained that article 75 is the "only statutory vehicle for the enforcement of arbitration," and noted that it provides an existing structure to guide the parties. Further, the real parties in interest in any challenge to a public arbitration panel award are the public employer and the employee organization. Consequently, an article 78 proceeding, which would require PERB or perhaps the panel itself to be parties respondent, would present unnecessary procedural and practical difficulties.⁸¹

Although article 75 was declared the appropriate procedural vehicle for review of public arbitration panel determinations, the standards to be applied by the courts are an expanded version of those set forth in section 7511 of the Civil Practice Law and Rules⁸² for vacating voluntary arbitration awards. Whereas the usual rule under article 75 is that a reviewing court will not vacate an arbitration award even if there has been a patent error of fact or law,⁸³ the

⁷⁹ 41 N.Y.2d at 156, 359 N.E.2d at 685, 391 N.Y.S.2d at 90, *citing* *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970). In *Mount St. Mary's* the court of appeals held that where arbitration is compulsory some judicial review is necessary to satisfy the requirements of due process. *Id.* at 508, 260 N.E.2d at 516, 311 N.Y.S.2d at 874.

⁸⁰ 41 N.Y.2d at 156, 359 N.E.2d at 685, 391 N.Y.S.2d at 90. Nassau County asserted that the proper mode of review in its action to annul the arbitrator's award was delineated in N.Y. CIV. PRAC. LAW §§ 7801-7806 (McKinney 1963 & Supp. 1977) (article 78). In the companion case, the Albany firefighters brought an article 75 proceeding, N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1963 & Supp. 1977), to *confirm* the arbitrators' award; this was joined with the city's article 78 suit to *annul* the award. *Id.* at 156-57, 359 N.E.2d at 685, 391 N.Y.S.2d at 90. The court opted for the arguments favoring article 75 review since that statute would bring the real parties in interest, the governmental body and the union, before the court and allow them to advocate their positions directly. By contrast, article 78 review would force PERB and/or the arbitrators to defend the award. The courts stated that since PERB does not participate in the arbitration hearing or decision, it need not defend the resulting award. With respect to the arbitrators, the court reasoned that as an ad hoc panel the arbitrators' responsibility is to decide the dispute and not to defend that decision in court. *Id.* at 156-57, 359 N.E.2d at 685-86, 391 N.Y.S.2d at 90-91.

⁸¹ *Id.* at 157, 359 N.E.2d at 685-86, 391 N.Y.S.2d at 90-91. *See* note 80 *supra*.

⁸² N.Y. CIV. PRAC. LAW § 7511 (McKinney 1963).

⁸³ Egregious errors of law or fact are not listed among the enumerated grounds for vacat-

standard enunciated in *Coffey* measures awards "according to whether they are rational or arbitrary and capricious."⁸⁴ Noting that a substantial evidence test had not been adopted, Judge Fuchsberg explained that it is only necessary for the arbitrators' decision to demonstrate that the statutory criteria had been considered and that the award had a "plausible basis."⁸⁵ Thus, the awards under review in *Coffey* were easily upheld since in each arbitration the specific statutory criteria had been carefully considered and ample evidence presented to support the panel's findings.⁸⁶

Applying the standards announced in *Coffey*, the Appellate Division, Fourth Department in *City of Buffalo v. Rinaldo*,⁸⁷ recently vacated a public arbitration panel's award in the dispute between the City of Buffalo and the Buffalo Police Benevolent Association. The arbitration panel had been presented with extensive evidence concerning the desperate fiscal condition of the City of Buffalo. The Association argued that the panel should reject the factfinder's recommendation of a six percent nonrecurring bonus and instead award a ten percent salary increase. The majority opin-

ing an arbitration award under § 7511. *See id.* This is because the parties select their own "judges" and a mode of dispute determination not governed either by the rules of substantive law or the rules of evidence which obtain in the courts." *Transpacific Transp. Corp. v. Sirena Shipping Co., S.A.*, 9 App. Div. 2d 316, 320, 193 N.Y.S.2d 277, 282 (1st Dep't 1959) (citation omitted) (Breitel, J.), *aff'd mem.*, 8 N.Y.2d 1048, 170 N.E.2d 391, 207 N.Y.S.2d 70 (1960). *See also* *Wenger & Co. v. Propper Silk Hosiery Mills, Inc.*, 239 N.Y. 199, 146 N.E. 203 (1924); *In re Spectrum Fabrics Corp.*, 285 App. Div. 710, 139 N.Y.S.2d 612 (1st Dep't), *aff'd mem.*, 309 N.Y. 709, 128 N.E.2d 416 (1955).

⁸⁴ 41 N.Y.2d at 158, 359 N.E.2d at 686, 391 N.Y.S.2d at 91, *citing* *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970). The *Mount St. Mary's* case arose under a New York compulsory arbitration statute, N.Y. LAB. LAW § 716 (McKinney 1965 & Supp. 1977), banning strikes by workers in voluntary hospitals and substituting arbitration to "safeguard their economic rights and to offset the curtailment of their bargaining power." 26 N.Y.2d at 499, 260 N.E.2d at 511, 311 N.Y.S.2d at 867. The *Mount St. Mary's* court recognized that consensual arbitration awards are subject to very limited review. It decided, however, that due process requires more extensive review where the arbitrators' authority is derived from a statute rather than the voluntary agreement of the parties. Thus, in cases of compulsory interest arbitration N.Y. CIV. PRAC. LAW § 7511(b) (McKinney 1963), which authorizes judicial inquiry into the propriety of the arbitrators' exercise of jurisdiction, is read to include the question "whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record." 26 N.Y.2d at 508, 260 N.E.2d at 516-17, 311 N.Y.S.2d at 875. The court explained that since interest arbitration is quasi-legislative in nature, judicial review is limited to determining that the award is not "arbitrary or capricious," and has a "reasonable basis." *Id.* at 510, 260 N.E.2d at 517, 311 N.Y.S.2d at 876.

⁸⁵ 41 N.Y.2d at 158, 359 N.E.2d at 686, 391 N.Y.S.2d at 91-92 (citation omitted).

⁸⁶ *Id.* at 158-59, 359 N.E.2d at 687, 391 N.Y.S.2d at 92.

⁸⁷ 56 App. Div. 2d 212, 392 N.Y.S.2d 146 (4th Dep't 1977), *appeal filed*, (Ct. App. Feb. 28, 1977).

ion, written by the neutral chairman and concurred in by the union member of the panel, awarded the police officers a five percent salary increase.⁸⁸ In reaching this determination, the majority balanced the city's grave financial problems against the needs of the police officers and the value of their services.⁸⁹ With respect to the city's ability to pay, the majority based its conclusion that the five percent increase was within the city's means on a projected increase in sales tax revenues and possible increases in state and federal aid.⁹⁰ Dissatisfied with the result, the city sought to vacate the award.

The appellate division, in a unanimous decision, which is now being challenged in the court of appeals, held that "there was no rational basis in the record before the Arbitration Panel for concluding that the City had the ability to fund [the award]"⁹¹ Rather, after a detailed analysis of the panel's proposed income sources and of the budget of the City of Buffalo, the court found that the overwhelming evidence demonstrated that the city would be

⁸⁸ *City of Buffalo v. Buffalo PBA*, No. CA 0092 (Sept. 7, 1976) (Rinaldo, Sgaglione & Casey, Arbs.), *vacated sub nom. City of Buffalo v. Rinaldo*, 56 App. Div. 2d 212, 392 N.Y.S.2d 146 (4th Dep't 1977), *appeal filed*, (Ct. App. Feb. 28, 1977).

⁸⁹ The majority accepted the city's contentions that it was running a large deficit and was unable to borrow in the credit markets and that "[p]roperty abandonment, shrinking tax collections, fleeing population and industry, high unemployment and a declining tax base have compounded the City's problems." On the other hand, the panel also considered the value of the services performed by the police officers and the effects of inflation on their standard of living. It concluded that an increase was warranted. *City of Buffalo v. Buffalo PBA*, No. CA 0092 (Sept. 7, 1976) (Rinaldo, Sgaglione & Casey, Arbs.), *vacated sub nom. City of Buffalo v. Rinaldo*, 56 App. Div. 2d 212, 392 N.Y.S.2d 146 (4th Dep't 1977), *appeal filed*, (Ct. App. Feb. 28, 1977).

⁹⁰ The dissent by the city's arbitrator contained a very detailed examination of Buffalo's finances, including its low bond rating and its difficulty in borrowing from commercial banks. In substance, the dissenting opinion found that there was no evidence to support a probability of increased state aid or the receipt of federal aid which could be applied to pay the arbitrators' award. The dissent analyzed Buffalo's budget, tracing further probable areas of shortfalls and deficits. Turning then to comparability factors, the dissent found that Buffalo police pay was above the national average and noted that no other Buffalo employees had negotiated pay raises in the past 2 years. *City of Buffalo v. Buffalo PBA*, No. CA 0092 (Sept. 7, 1976) (Casey, Arb. dissenting), *vacated sub nom. City of Buffalo v. Rinaldo*, 56 App. Div. 2d 212, 392 N.Y.S.2d 146 (4th Dep't 1977), *appeal filed*, (Ct. App. Feb. 28, 1977). As to the eight other items before the panel, the arbitrators were unanimous.

⁹¹ 56 App. Div. 2d at 218, 392 N.Y.S.2d at 149. The court noted that [t]here was no rational basis in the record before the arbitration panel for concluding that the City has the ability to fund a three million dollar wage increase retroactive to July 1, 1975 and any finding to the contrary must be based on pure conjecture and speculation and without regard for the demonstrated facts of the catastrophic fiscal crisis confronting the City of Buffalo. The conclusion by the arbitrators that such funding ability does exist is clearly arbitrary and capricious. *Id.*, *citing* *Caso v. Coffey*, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976).

unable to fulfill the financial obligation thrust upon it by the arbitrators' decision. Accordingly, the award was vacated and the dispute was ordered submitted to new arbitrators upon the application of either party.

In *Rinaldo*, the fourth department has erected the ability to pay standard as a barrier to any wage increase, even if justified by the other statutory criteria, where the governmental employer is in acute financial difficulty and faced with continued and substantial budget deficits and shortfalls. Presented with a "catastrophic fiscal crisis," the court allowed the ability to pay standard to override the other statutory criteria, in spite of the observation by the court of appeals in *Coffey* that the statute only requires consideration of the criteria "so far as [the panel] deems them applicable."⁹² Indeed, it seems that the *Rinaldo* court, while phrasing its holding in the language of the arbitrary and capricious standard, has, in effect, applied the substantial evidence test. Such a standard directly contradicts the court of appeals' holding that an arbitration panel's determination is to be sustained if there is "any basis" for the conclusions of the panel and if it appears that "the criteria specified in the statute were 'considered' in good faith"⁹³

The Effect of Compulsory Arbitration Under the Taylor Law

The tripartite arbitration panel created by the Taylor Law generally results in a situation where the neutral chairman has the decisive vote. When the panel retires to discuss the evidence and arguments and to formulate the award, the partisan panel members will try to convince the neutral member to accept the position of the party they represent. Ultimately, the neutral chairman must be persuaded to accept a particular position; thus, each side is forced to modify its demands so that its position becomes more acceptable to the neutral. In effect, the discussion among the three members of the panel amounts to the final round of negotiations over the terms and conditions of employment. Additionally, prior to a formal vote the panel has the power to "refer the issues back to the parties for further negotiations."⁹⁴ The resulting determination is thus likely to be a document that both sides can "live with." In fact, sixty percent of the arbitration awards issued in the 3-year experimental period during which section 209(4) has been in effect have been

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

⁹³ *Id.* (citation omitted).

⁹⁴ N.Y. CIV. SERV. LAW § 209(4)(c)(iv) (McKinney Supp. 1977).

unanimous,⁹⁵ and it has been said that approximately eighty percent of the awards confirmed the bargaining of the parties.⁹⁶

The value and merit of the experimental New York compulsory arbitration scheme has been underscored recently in a major study sponsored by the New York State School of Industrial and Labor Relations at Cornell University.⁹⁷ This study sought to determine the effect, if any, of compulsory arbitration as the final impasse procedure, on the ability of the parties to reach voluntary agreements and on the level and distribution of wages and other terms of employment.⁹⁸

Employing both macroanalysis, *i.e.*, comparison and examination of negotiations between different groups and at different times, and microanalysis, *i.e.*, examination of the bargaining relationships in individual negotiations, the Cornell study found that the change in legislation did not have a major impact on the effectiveness of the bargaining process in achieving voluntary settlements either prior to impasse or at the mediation step of the impasse procedures.⁹⁹ Between 1968 and 1973, when deadlocked negotiations were subject to factfinding and a legislative hearing but not to compulsory arbitration, approximately fifty percent of police negotiations and forty-three percent of firefighter negotiations annually went to impasse.¹⁰⁰ In 1975, the first year of the compulsory arbitration statute, 71.1% of the police negotiations and 60.5% of the firefighter negotiations went to impasse.¹⁰¹ Using contract "rounds," the instance of negotiations of a new contract, rather than calendar years as the basis for comparison, the study found that in the last round under factfinding, forty-eight percent of police units and fifty-two percent of firefighter units went to impasse; while seventy-six percent of police units and fifty-eight percent of firefighter units went to impasse in the first round of negotiations under the compulsory arbitration statute.¹⁰²

As the authors of the study indicated, however, not all of the statistical increase in the use of impasse procedures was caused by

⁹⁵ KOCHAN, *supra* note 58, at 267.

⁹⁶ *Id.* at 259.

⁹⁷ *Id.* The research was funded by the National Science Foundation, Division of Research Applied to National Needs, and carried out in cooperation with the New York State Public Employment Relations Board.

⁹⁸ *Id.* at ii.

⁹⁹ *Id.* at 162-63.

¹⁰⁰ *Id.* at 33.

¹⁰¹ *Id.*

¹⁰² *Id.* at 35.

the adoption of compulsory arbitration.¹⁰³ They noted that during the years under the factfinding statute a higher percentage of police and firefighter units were going to impasse each successive round of negotiations and that a "narcotic effect" or habitual dependence on the use of impasse procedures was developing. As a result, there was a significant probability that a bargaining unit which went to impasse in a given round of negotiations would go to impasse in the next round of negotiations.¹⁰⁴ The authors concluded that by the time compulsory arbitration was adopted, there was an increasing reliance upon impasse procedures to resolve bargaining disputes involving police and firefighters.¹⁰⁵

As a further test of the net effects of the change in the law, the Cornell study compared the experience of police and firefighters with the impasse levels for teachers in the State during 1972 and 1975.¹⁰⁶ The study found that the increase in the rate of impasse in police and firefighter bargaining after the enactment of the arbitration provisions was consistent with an increase in the rate of impasse in teacher negotiations from 56.2% in 1972 to 66.1% in 1975.¹⁰⁷ The authors suggested "that part of the explanation for [this] increase in impasses reflects either the changing economic and political climate in the state or represents a deterioration of the bargaining systems for both teachers and police and firefighters."¹⁰⁸

Indeed, after an extensive microanalysis, the study found that an impasse was more likely to result when the bargaining relationships had the following characteristics:

a high level of hostility between the union and management representatives, unions that engaged in political, public relations, and negotiations types of pressure tactics, management negotiators

¹⁰³ *Id.* at 95.

¹⁰⁴ *Id.* at 35-40, 89. Specifically, the study found that sixty-three percent of those units that went to impasse the first time they bargained also went to impasse in their second round of bargaining. The percentage of impasse use in round three of bargaining increased to seventy-seven percent for those units which went to impasse in round two and eighty percent for those units which went to impasse in rounds one and two. In contrast, the impasse rate in round three of bargaining for those units which did not go to impasse in round one or two was forty percent and the impasse rate of those units which did not go to impasse in round two, but did go in round one of bargaining was forty-seven percent. *Id.* at 89.

¹⁰⁵ *Id.* at 89.

¹⁰⁶ The authors noted that the bargaining experiences of teachers and police and firefighters are not ideally suited for comparison. Nonetheless, teacher units were chosen because they were the only public employee groups subject to the same environment as police and firefighters and for which bargaining data was available. *Id.* at 41.

¹⁰⁷ *Id.* at 43.

¹⁰⁸ *Id.*

that lack authority, and to a slightly lesser extent relationships where the union negotiators were under intense pressure from the rank and file, and where the union and the municipality hired outside negotiators.¹⁰⁹

Moreover, these pressures or sources of impasse were not unique to the last round of bargaining under factfinding. Rather, they had also affected impasse experience in previous rounds of negotiations.¹¹⁰ Because the same factors apparently recur from year to year and continually exert roughly the same effects, the authors of the Cornell study concluded that "the bargaining system was getting no better or no worse at coping with these pressures . . . as time went on."¹¹¹ Since the aggregate rate of impasse is continually rising, however, it appears that an ever growing number of bargaining relationships are being affected by these sources of impasse.¹¹²

The study found that the 1974 arbitration amendment caused an increase of approximately sixteen percent in the probability that an impasse would occur.¹¹³ Further analysis revealed that this increased probability of going to impasse was limited to small and medium size upstate cities which did not have a previous history of heavy reliance on impasse procedures.¹¹⁴ Those jurisdictions in the state which had relied on impasse procedures under factfinding were apparently unaffected by the change in the statute.¹¹⁵ Thus, one can speculate that the increased rate of impasse under the arbitration statute, primarily limited to jurisdictions with no prior history of impasses, reflects the continuation of the observed trend of deterioration in bargaining relationships as much as it reflects an increased reliance on impasse procedures induced by the change in the statute. Additionally, it is probable that some increase in cases arose because public employee unions in small and medium size communities had bargaining power—the right to go to arbitration—for the first time.

Regarding the stage of impasse procedures at which settlements were reached, the study found that the statute was partially responsible for an approximately fifteen percent increase in the probability

¹⁰⁹ *Id.* at 75-76.

¹¹⁰ *Id.* at 76-77.

¹¹¹ *Id.* at 77.

¹¹² *Id.*

¹¹³ *Id.* at 83.

¹¹⁴ *Id.* at 86.

¹¹⁵ *Id.*

that the parties would go to the terminal step of the procedures.¹¹⁶ The authors noted, however:

When compared to the other factors that were found to affect the probability of settlement or impasse, the change in the statute ranked about third or fourth in importance. The level of hostility in the bargaining relationship, the size of the city, the extent to which the union employed pressure tactics in negotiations, and the use of outside negotiators by the union all were found to be more important or at least equally important as the change in the impasse procedures.¹¹⁷

The Cornell study examined rates of movement, "the process of making compromises or concessions in an effort to produce an agreement,"¹¹⁸ and found that the adoption of compulsory arbitration "had little or no effect on the various measures of movement examined."¹¹⁹ Thus, the predicted "chilling effect" on the negotiating process does not appear to have materialized in New York. Instead, the researchers concluded that the level of experience of negotiators, the level of hostility in the relationship, and the use of pressure tactics had more effect in impeding movement than the availability of arbitration.¹²⁰

Voluntary agreement might, in fact, be encouraged by compulsory arbitration if the costs involved in an arbitration proceeding were shifted to the parties. Under the Taylor Law, PERB bears the costs of the neutral chairman of the arbitration panel unless that person is selected by the parties and is not appointed by PERB.¹²¹ In practice, this has meant that the parties rarely bear the cost of the public member. Moreover, few parties pay additional fees to the members of the panel associated in interest with them.¹²² Thus, unless the disputants order a stenographic record, the arbitration process itself is inexpensive. If one were to agree with the generally accepted view that arbitration should be discouraged and settle-

¹¹⁶ *Id.* at 85.

¹¹⁷ *Id.* at 95.

¹¹⁸ *Id.* at 117.

¹¹⁹ *Id.* at 118.

¹²⁰ *Id.* at 95, 119. The Cornell study also found that the negotiators interviewed in the course of the research had a "dismal" view of the movement or progress that could be expected in the course of negotiation. *Id.* at 119. For a discussion of the general effectiveness of collective bargaining, see notes 282-87 and accompanying text *infra*.

¹²¹ N.Y. CIV. SERV. LAW § 209(4)(c)(ii) (McKinney Supp. 1977).

¹²² KOCHAN, *supra* note 58, at 300. The study also reports that "[s]pecial attorney or consultant fees . . . were paid by 8 percent of the public employers and 28 percent of the unions." *Id.*

ment by negotiations encouraged, then one would conclude that the present system of cost allocation under the Taylor Law does not discourage the use of arbitration and thereby does not encourage voluntary agreements.

A subject of interest in time of financial hardship is the level of awards granted by arbitration panels as compared to the level of settlements reached through negotiations without binding arbitration. The Cornell study attempted to determine whether the existence of compulsory arbitration had an effect on the cost of negotiated collective bargaining agreements and whether arbitration awards are higher or lower than negotiated settlements. The researchers concluded that the existence and availability of binding arbitration is not a significant factor in the cost of negotiated contracts.¹²³ Similarly, although the average arbitrated wage increase for police and firefighters was slightly lower than the average negotiated wage increase, the study concluded that the difference was statistically insignificant.¹²⁴

According to PERB figures comparing negotiated settlements to arbitration awards for local police and firefighters, in 1975 salary increases in negotiated police contracts averaged 10.3% while arbitration awards averaged 8.7%. Firefighter increases in the same year averaged 8.1% in negotiated settlements and 6.7% in arbitration awards.¹²⁵ As of October 1976, fifty-two police units had reached negotiated settlements averaging a 7.4% increase over the prior year, while the twenty-three arbitration awards resulted in a 6.6% average increase. The twenty-eight firefighter contracts negotiated as of October 1976 resulted in an average 8.1% increase, while six arbitration panels issued awards with an average increase of 7.8%.¹²⁶ Ultimately, these statistics and the Cornell study suggest that arbitration has a more significant effect on the distribution than on the size of wage increases among public employees. Apparently, arbitration does not necessarily place either the employer or the employee at a disadvantage. As the authors of the Cornell study stated, "we have no evidence to indicate that the arbitration statute per se, or the use of the arbitration procedure, systematically benefitted one side of the bargaining table or the other."¹²⁷

¹²³ *Id.* at 215-16.

¹²⁴ *Id.* at 216.

¹²⁵ Public Employment Relations Board News No. 3, at 9 (Mar. 1976).

¹²⁶ *Id.* No. 9, at 1, 6 (Oct. 1976).

¹²⁷ KOCHAN, *supra* note 58, at 218.

The operation and effectiveness of the compulsory interest arbitration panels is further illustrated by a brief review of some judicial decisions reviewing awards issued pursuant to section 209(4) of the Taylor Law. As noted previously, the court of appeals in *Coffey* enforced the awards challenged therein because the arbitration panels had properly considered and applied the statutory standards to the evidence presented by the parties. In an earlier case, a lower court considered a challenge to an arbitration award by seven police officers and their union.¹²⁸ In arriving at a wage increase figure, the panel had considered the total cost of employee compensation including pension benefits and increments due under the expired contract. The plaintiff police officers had demanded a percentage increase in addition to the increments, but the panel awarded a percentage increase in which the cost of the increments was included as a component. Finding that the issue of salary, which had been submitted to the panel, included consideration of the increments the court refused to disturb the award.

A recent case, *Albany Police Officers Union v. City of Albany*,¹²⁹ vividly portrays the determined resistance of one local government to the Taylor Law finality procedures for police and firefighter bargaining disputes. Upon a petition filed with PERB in November 1975, the Albany Police Officers Union requested compulsory arbitration on the ground that mediation and factfinding had failed to resolve a bargaining impasse between the union and the City of Albany. The court describes what followed:

The respondent City refused to select its member of the three-man panel or to participate in the process for selection of the public member of the panel. After one designee chosen to represent the City declined to serve, PERB, by letter dated December 16, 1975, designated appellant Corning to serve as the City's member of the panel. After appellant Corning declined to participate, he was notified by PERB that "[i]f the city of Albany does not choose to participate in the panel proceedings, there is no alternative but for the panel to proceed with two members." Hearings were held before the two-member panel on four separate dates and, although notified of each hearing date, the City was not represented at any of the hearings. Prior to the opening of the final hearing, on April 9, 1976, a representative of the respondent City's corporation counsel's office offered a packet of documents to the chairman of the

¹²⁸ *Ogdensburg PBA v. PERB*, 8 PUB. EMP. REL. BD. ¶ 8-7015 (Sup. Ct. Lawrence County 1975).

¹²⁹ 55 App. Div. 2d 346, 390 N.Y.S.2d 475 (3d Dep't 1977).

panel. Despite the fact that these documents were introduced in an irregular manner, without an appearance or any testimony concerning them, the panel ultimately decided to accept them as part of the record and to examine them. The respondent Union, in contrast, introduced numerous documents and presented witnesses in support of its various positions.¹³⁰

In June 1976, the panel issued its determination granting some of the union demands and rejecting others. Appealing from an order confirming the award, the city argued that the panel had "failed to accord the City's proof proper status," had based the award on the erroneous assumption that money could be borrowed to pay the salary increases, had incorrectly used salary comparisons with surrounding communities, and, finally, had overlooked the city's ability to pay.¹³¹ The appellate division rejected the city's first contention, noting that: "The [panel's] report contains a summary of the economic problems facing the City, as described in the material, and explains why more weight was given to data other than the City's materials in reaching the conclusion as to the fiscal condition of the City."¹³² The court also found no merit in the city's other contentions and concluded that "the panel herein considered the statutory criteria for balancing the ability of the City to pay with the interests of the employees and . . . the award has a 'plausible basis.'" ¹³³

Another challenge to an arbitration award, *Bethlehem Steel Corp. v. Fennie*,¹³⁴ which was brought by the local government's principal taxpayer,¹³⁵ illustrates the strengths of the arbitration process as well as the need for intelligent use of the statutory procedures. In May 1975, a factfinder issued a report in a contract dispute

¹³⁰ *Id.* at 347, 390 N.Y.S.2d at 476.

¹³¹ *Id.* at 348-49, 390 N.Y.S.2d at 477.

¹³² *Id.* at 348, 390 N.Y.S.2d at 477.

¹³³ *Id.* at 349, 390 N.Y.S.2d at 477.

¹³⁴ 86 Misc. 2d 968, 383 N.Y.S.2d 948 (Sup. Ct. Erie County 1976).

¹³⁵ The court, noting that the City of Lackawanna had intervened in the proceeding brought by the taxpayer corporation, did not decide whether the taxpayer alone would have had standing to challenge the arbitration result. Nonetheless, the court did state that § 7511 of the Civil Practice Law and Rules, N.Y. CIV. PRAC. LAW § 7511(b)(2)(i) (McKinney 1963), "specifically gives status to an aggrieved taxpayer." 86 Misc. 2d at 975, 383 N.Y.S.2d at 952. The *Bethlehem Steel* court also declared that General Municipal Law § 51 and Civil Service Law § 102 "are considered authority for granting status to petitioner to bring this proceeding." 86 Misc. 2d at 975, 383 N.Y.S.2d at 952. The cited laws permit taxpayer suits against officers of local government "to prevent any illegal official act," N.Y. GEN. MUN. LAW § 51 (McKinney Supp. 1977), and "to restrain illegal payment of salary or compensation" and "enjoin violation of the civil service law," N.Y. CIV. SERV. LAW § 102(1), (3) (McKinney 1973).

between the Lackawanna Police Benevolent Association and the City of Lackawanna recommending that policemen receive a nine percent wage increase. Although a settlement on this basis seemed probable, the issue ultimately proceeded to binding arbitration and the city appointed its safety commissioner, a former captain in the police department, to represent its interests on the tripartite panel.¹³⁶ The safety commissioner, a Mr. Janus, had actively supported the city's position in the prior negotiations with the Benevolent Association. He assured the city's chief negotiator that he agreed with the factfinder's salary recommendations and represented that he would adhere to the city's position throughout the arbitration proceedings.¹³⁷ In the time between the appointment of the arbitrators and the first meeting of the panel, however, a mayoral election was held and the incumbent administration was defeated. It became obvious that the safety commissioner would lose his position and return to his former post as police captain. Although the city's negotiator realized that an apparent conflict of interest now existed, he did not demand a replacement, but only complained to PERB and relied on the statements of the commissioner that "he would remain steadfast in supporting the positions of the City."¹³⁸ Contrary to his assurances, the commissioner voted with the union representative on all salary matters before the panel. Thus, the award provided for a fifteen percent wage increase for patrolmen and a twenty percent increase for superior officers, with an additional ten percent increase for the second year of the contract.

The public member dissented on the salary issue, stating that the majority's award was excessive and challenging the propriety of this arbitration. The court quoted from the dissent with approval:

"Theoretically, if each is representing the interests of those who selected them and since they are in agreement as to the issues of Salary and Duration; this award should not be necessary. Since the advocate members of the arbitration panel are able to agree it should be possible to refer the issues back to the parties to sign a collective bargaining agreement. This is clearly not the case in this impasse.

"As the Public Panel Member, I must represent the interest

¹³⁶ 86 Misc. 2d at 971, 383 N.Y.S.2d at 950.

¹³⁷ *Id.* at 969-72, 383 N.Y.S.2d at 949-50.

¹³⁸ *Id.* at 972, 383 N.Y.S.2d at 950.

of the public and I find that the interests of the citizens of Lackawanna will not be served by the award."¹³⁹

Finding that the arbitration was "improper" in that the safety commissioner "intentionally misled the City,"¹⁴⁰ the court commented:

[The City negotiator] was certainly naive to be taken in by Mr. Janus' assurances but his poor judgment, whether unintentional or deliberate, should not deprive the city of a fair arbitration. Mr. Janus' representations that he would uphold the fact finder's report, if not false and untrue *before* the elections, were certainly false and untrue *after* the election.¹⁴¹

Consequently, the court annulled the arbitration award and ordered that another arbitration be commenced.

Although its effect is not entirely clear, section 209(4) of the Taylor Law appears to have had a favorable impact on contract negotiations with police and firefighters. At the very least, the dire predictions of opponents to compulsory arbitration have not been borne out. Indeed, in a great many cases the tripartite nature of New York's public arbitration panels has afforded the opportunity, which is lost in the legislative hearing procedure, for the parties to reach a voluntary agreement through their panel representatives. In the nearly 3 years of the compulsory arbitration experiment, the courts have established the constitutionality of the scheme and the framework for judicial review of the arbitration awards. Moreover, it is evident from the several decisions discussed above that the judiciary is able and willing to protect both parties' right to equal representation on the panel and to a fair determination. At the same time, however, the courts appear willing to enforce the arbitration awards when the proper procedures have been followed and the arbitrators' decision rests on a rational basis. The statute is not without problems, of course, and a number of reform proposals have been offered.

Before examining these proposals for legislative modification of section 209(4), it is helpful to analyze several other statutory schemes for impasse resolution, including the New York City Collective Bargaining Law (NYCCBL) and the comparable laws of several other jurisdictions.

¹³⁹ *Id.* at 973, 383 N.Y.S.2d at 951.

¹⁴⁰ *Id.* at 974, 383 N.Y.S.2d at 952.

¹⁴¹ *Id.* at 972, 383 N.Y.S.2d at 950 (emphasis in original).

FINALITY IN NEW YORK CITY

Section 212 of the Taylor Law permits local governments to enact "provisions and procedures" for the regulation of public employee relations which are "substantially equivalent" to the Taylor Law.¹⁴² The effect of the exercise of such a local option is to render the provisions of section 209 inapplicable to the local jurisdiction. Utilizing its rights under section 212, New York City has enacted the NYCCBL, which provides procedures for the resolution of bargaining impasses, including mediation and the issuance of a final and binding report by an impasse panel.¹⁴³ This law is administered by the Board of Collective Bargaining, a body composed of three neutral members, two labor members, and two City of New York members.¹⁴⁴ The chairman of the Board is chosen from among the neutral members and functions as the director of the Office of Collective Bargaining.¹⁴⁵ The bargaining procedures under the NYCCBL differ in many respects from those prescribed by the Taylor Law. The discussion here will be confined to those differences which affect the finality procedures in New York City.

As originally enacted in 1967, section 1173-7.0(c) of the NYCCBL contained provisions for factfinding, but the recommendations which resulted were advisory only and there was no statutory finality procedure.¹⁴⁶ Nonetheless, the City of New York maintained a policy of voluntary compliance with impasse panel recommendations. In 1969, the Taylor Law was amended to require the mayor of the City of New York to submit a plan dealing with the need for a specified final step in the impasse procedures.¹⁴⁷

In order to develop proposed finality procedures for submission to the state legislature, a series of meetings was conducted among representatives of the City of New York, the Municipal Labor Committee,¹⁴⁸ and the Office of Collective Bargaining. Representatives

¹⁴² N.Y. CIV. SERV. LAW § 212 (McKinney 1973).

¹⁴³ NEW YORK, N.Y. ADMIN. CODE ch. 54, §§ 1173-1.0 to -13.0 (1975 & Supp. 1977).

¹⁴⁴ NEW YORK, N.Y. CHARTER ch. 54, § 1171 (1976). City members are appointed by the mayor and serve at his discretion. Labor members are designated by the Municipal Labor Committee. They are also appointed by the mayor but may be removed only for cause or upon a request for removal by the Municipal Labor Committee. These members, by unanimous vote, appoint the impartial members to 3-year terms.

¹⁴⁵ *Id.*, §§ 1170-1171.

¹⁴⁶ See N.Y.C. Local Law No. 53, 1 [1967] N.Y. Local Laws 449-450.

¹⁴⁷ Ch. 24, § 11, [1969] N.Y. Laws 79-80.

¹⁴⁸ The NYCCBL provides that membership in the Municipal Labor Committee is open to any certified employee organization to which the law is applicable. NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-9.0 (1975). Subject to certain qualifications, *id.*, § 1173-10.0, certifica-

of the mayor's office, the Municipal Labor Committee, and the city council rejected proposals to conform New York City procedures to the Taylor Law as it then stood by requiring legislative action in bargaining impasses. The city council leadership did not wish to play the part of referee in labor disputes between the mayor and the public employee unions. The unions, so long as they were denied the right to strike, preferred a finality method where the ultimate decision would be made by third-party neutrals. Therefore, a system of finality with a form of compulsory interest arbitration was agreed upon¹⁴⁹ and enacted by the New York City Council in 1972.¹⁵⁰

Under the present provisions of the NYCCBL, mediation is not mandatory upon a finding of impasse, nor is it a prerequisite to the use of other finality procedures. Instead, a mediation panel of one or more persons is appointed on request of a party or upon the initiative of the director of the Office of Collective Bargaining if he determines that "collective bargaining negotiations . . . would be aided by mediation."¹⁵¹ There is no fixed time within which the mediation panel must complete its work.

An impasse in negotiations is deemed to exist when the Board of Collective Bargaining, upon the director's recommendation, "determines that collective bargaining negotiations . . . have been exhausted, and that the conditions are appropriate for the creation of an impasse panel . . ." ¹⁵² Once the impasse determination is made, a panel is chosen by submitting a list of seven persons drawn from the roster of neutrals maintained by the Office of Collective Bargaining¹⁵³ to the parties, who then may indicate their preferences in numerical order. The director appoints those persons who are the most mutually acceptable choices.¹⁵⁴ Impasse panels commonly con-

tion is issued by the Board of Certification of the Office of Collective Bargaining to any public or municipal employee organization whose primary purpose is to represent such employees "concerning wages, hours, and working conditions." *Id.*, § 1173.3.0(i), (j).

¹⁴⁹ See Lindsay, Report Submitted Pursuant to Chapter 24, Laws of 1969, Designed to Bring New York City's Labor Relations Practices Into Substantial Equivalence With the Public Employees' Fair Employment Act 1-3, 6. The report also sought a consolidation of jurisdiction over New York City public employment relations. It suggested placing mandatory jurisdiction over nonmayoral as well as mayoral agencies. *Id.* at 3-5. In addition, it urged a continuation of the policy excluding the city from the Taylor Law requirement that collective bargaining agreements be concluded prior to budget submission dates. *Id.* at 7-8. A discussion of other minor problem areas was also included. *Id.* at 8-10.

¹⁵⁰ N.Y.C. Local Law No. 2, 1 [1972] N.Y. Local Laws 158-160 (codified at New York, N.Y. ADMIN. CODE ch. 54, §§ 1173-5.0(a)(8), -7.0(c)(3)(e), -7.0(c)(4), -7.0(f) (1975)).

¹⁵¹ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(b)(2) (1975).

¹⁵² *Id.*, § 1173-7.0(c)(2).

¹⁵³ *Id.*, § 1173-7.0(c)(1)-(2).

¹⁵⁴ *Id.*, § 1173-7.0(c)(2).

sist of either one or three members according to the agreement of the parties or the determination of the director absent such agreement.¹⁵⁵ It is important to note that inclusion on the roster of neutrals maintained by the Board of Collective Bargaining is by unanimous vote of the labor and city members of the Board.¹⁵⁶

Pursuant to rules 5.10 and 9.3 of the Office of Collective Bargaining,¹⁵⁷ the fees and expenses of mediation and impasse panels are shared by the public employer and public employee organization which are parties to the dispute, as is the cost of the mandatory stenographic record made in impasse panel hearings. Thus, under the city procedures unlike those of the state, the costs are imposed upon the parties.

The NYCCBL grants impasse panels the power to

mediate, hold hearings, compel the attendance of witnesses and the production of documents, review data, and take whatever action it considers necessary to resolve the impasse. If an impasse panel is unable to resolve an impasse within a reasonable period of time, as determined by the director, it shall, within such period of time as the director prescribes, render a written report containing findings of fact, conclusions, and recommendations for terms of settlement.¹⁵⁸

The language of this section indicates that impasse panels are encouraged to settle the bargaining dispute through mediation. Experience has shown that even if the parties do not reach formal agreement through the panel's mediatory efforts, and a report and recommendations are issued, very often the report reflects the parties' advice to the panel as to certain informal agreements existing between them.¹⁵⁹

The NYCCBL specifies certain standards which an impasse panel is to "consider whenever relevant in making its recommendations for terms of settlement."¹⁶⁰ These standards are similar to

¹⁵⁵ *Id.*, § 1173-7.0(e).

¹⁵⁶ This practice has been followed even though the NYCCBL, *id.*, § 1173-7.0(c)(1), requires a majority including the vote of only one city and one labor member.

¹⁵⁷ NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, REVISED CONSOLIDATED RULES §§ 5.10, 9.3 (1972).

¹⁵⁸ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(c)(3)(a) (1975).

¹⁵⁹ See Anderson, *The Impact of Public Sector Bargaining: An Essay Dedicated to Nathan P. Feinsinger*, 1973 WIS. L. REV. 986, 1101. See also Doherty, *On Factfinding: A One-Eyed Man Lost Among the Eagles*, 5 PUB. PERSONNEL MANAGEMENT, 363, 366 (1976); Grodin, *Political Aspects of Public Sector Interest Arbitration*, 1 INDUS. REL. L.J. 1, 14 (1976).

¹⁶⁰ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(c)(3)(b) (1975) provides:

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

those expressed in section 209(4)(c)(v) of the Taylor Law.¹⁶¹ Although they have not been subject to judicial interpretation it is clear that they would meet the constitutional requirement, outlined in *City of Amsterdam v. Helsby*,¹⁶² that a compulsory arbitration statute contain "specific standards which must be followed by [the arbitration] panel."¹⁶³ The NYCCBL directs the impasse panel to consider "the interest and welfare of the public," but does not specifically include the criterion of "financial ability of the public employer to pay" which is found in the Taylor Law.¹⁶⁴ Nonetheless, the Office of Collective Bargaining has consistently interpreted the statutory criterion "interest and welfare of the public" to include consideration of the employer's financial ability to pay.¹⁶⁵

The NYCCBL does not specify a time within which the impasse panel must submit its report and recommendations; this decision is left to the director. The statute does provide that the report shall be made public within seven days of its submission to the parties, but this time may be extended up to thirty days to permit the parties to conclude a negotiated agreement prior to publication.¹⁶⁶ If a contract is negotiated during this time, the report will not be released except upon consent of the parties.¹⁶⁷ If a contract is not

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

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

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

(4) the interest and welfare of the public;

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

¹⁶¹ See N.Y. CIV. SERV. LAW § 209(4)(c)(v) (McKinney Supp. 1977).

¹⁶² 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975).

¹⁶³ *Id.* at 27, 332 N.E.2d at 293, 371 N.Y.S.2d at 408.

¹⁶⁴ N.Y. CIV. SERV. LAW § 209(4)(c)(v)(b) (McKinney Supp. 1977).

¹⁶⁵ The City Council Committee on Civil Service and Labor on September 15, 1976, turned down a proposal to amend the NYCCBL to add the ability to pay criterion on the ground that such action would be superfluous. See N.Y. Times, Sept. 16, 1976, at 24, col. 2. For a discussion of the consideration given the financial condition of New York City, see notes 201-03 and accompanying text *infra*.

¹⁶⁶ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(c)(3)(d) (1975).

¹⁶⁷ *Id.*

negotiated during this time, the parties must indicate acceptance or rejection of the panel report and recommendations.¹⁶⁸ A party which rejects the report and recommendations may appeal to the Board of Collective Bargaining for review.¹⁶⁹ In some cases, a party may reject the findings of an impasse panel *pro forma* and yet not pursue the rejection all the way through appeal because the findings are basically acceptable.

If both parties accept the recommendations or if neither party petitions to the Board of Collective Bargaining for review, the recommendations "shall be final and binding."¹⁷⁰ There are, however, significant checks on this finality. Impasse panels generally have the power to consider and issue recommendations on any mandatory subject of bargaining submitted by a party and any voluntary subject of bargaining submitted on consent of both parties. The recommendations of an impasse panel, however, are subject to legislative approval in those instances where they involve the enactment of a law.¹⁷¹ Furthermore, the panel's recommendations are binding only upon the particular governmental agency participating in the contract dispute submitted to arbitration.¹⁷² These provisions would be invoked, for example, if a panel were asked to rule on a matter within the ultimate jurisdiction of the civil service commission. The panel would be limited to the issuance of an advisory opinion and an alternative proposal to be implemented in the event the civil service commission does not act. Further, if an impasse panel were to rule on a subject which must be implemented by action of the

¹⁶⁸ *Id.*, § 1173-7.0(c)(3)(e).

¹⁶⁹ *Id.*, § 1173-7.0(c)(4)(a).

¹⁷⁰ *Id.* This section also provides that the Board of Collective Bargaining "may review recommendations which have been rejected" but not appealed; this action has never been taken.

¹⁷¹ *Id.*, § 1173-7.0(c)(3)(e).

¹⁷² *Id.*, § 1173-7.0(c)(3)(c), which provides:

(c) The report of an impasse panel shall be confined to matters within the scope of collective bargaining. Unless the mayor agrees otherwise, an impasse panel shall make no report concerning the basic salary and increment structure and pay plan rules of the city's career and salary plan. If an impasse panel makes a recommendation on a matter which requires implementation by a body, agency or official which it [*sic*] not a party to the negotiations: (i) it shall address such recommendation solely to such other body, agency or official; (ii) it shall not recommend or direct that the municipal agency or other public employer which is party to the negotiations shall support such recommendation; and (iii) it may recommend whether a collective bargaining agreement should be concluded prior to such implementation. Any alternative recommendations proposed by an impasse panel in the event such implementation does not occur shall not exceed the total cost of the original recommendations.

city council or the state legislature, the award would be advisory in nature until the legislature acted.

The panel's authority is further qualified by the requirement that its reports and recommendations comply with federal and state wage guidelines. Thus, in *Uniformed Firefighters Association v. City of New York*,¹⁷³ the Board affirmed the determination of the impasse panel but held that the challenged wage recommendations were subject to approval by the Federal Cost of Living Council.¹⁷⁴ Subsequent to passage of the New York City Financial Emergency Act,¹⁷⁵ the Board ruled on an impasse panel report concluding that certain considerations justified a fractional departure from the wage guidelines established by the Emergency Financial Control Board. The Board of Collective Bargaining reduced the wage increase to conform to the guidelines.¹⁷⁶ Finally, the NYCCBL, in marked contrast to compulsory arbitration under the Taylor Law,¹⁷⁷ provides that the determination of a New York City impasse panel is subject to the approval of the legislature when a law must be amended or enacted¹⁷⁸ and can only bind the governmental agency involved in the dispute.¹⁷⁹ Although there has been no judicial interpretation of this restraint on the impasse panels, the authors are of the opinion that an impasse panel award which contravened the budget voted by the city council could not be fully implemented without an amendment to the budget. To date, such a situation has not arisen.

Impasse panel recommendations may be reviewed by appeal to the Board of Collective Bargaining.¹⁸⁰ The statute provides strict time limits for filing of papers and issuance of the Board's decision. Appeals normally are decided upon the papers filed by the parties, occasionally after oral argument before the Board, and usually within 30 days after the notice of appeal is filed.¹⁸¹ Review is based

¹⁷³ No. B-7-73 (Board of Collective Bargaining Nov. 21, 1973).

¹⁷⁴ *Id.*, slip op. at 4.

¹⁷⁵ Ch. 868, [1975] N.Y. Laws 1405 (McKinney).

¹⁷⁶ See Local No. 3, *IBEW v. City of New York*, No. B-8-76 (Board of Collective Bargaining Aug. 11, 1976).

¹⁷⁷ N.Y. CIV. SERV. LAW § 209(4)(c)(vi) (McKinney Supp. 1977).

¹⁷⁸ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(c)(3)(e) (1975).

¹⁷⁹ *Id.*, § 1173-7.0(c)(3)(c).

¹⁸⁰ *Id.*, § 1173-7.0(c)(4).

¹⁸¹ *Id.*, § 1173-7.0(c)(4)(d). Notice of appeal must be filed and served upon the other party within 10 days after receipt of the impasse panel's recommendations. If there is no final determination by the Board within 30 days of the filing of the notice of appeal or within 40 days of a rejection notice which the board reviews upon its own initiative, see note 170 *supra*, the panel's recommendation is deemed to be adopted. The director may extend these periods for an additional period not to exceed 30 days. *Id.*, § 1173-7.0(c)(4)(a), (d).

on the record and evidence before the impasse panel¹⁸² and is guided by the statutory criteria that must be considered by the panel.¹⁸³ The Board is aided by rule 5.10 of the Office of Collective Bargaining,¹⁸⁴ which requires that hearings before the impasse panel be stenographically recorded.

The Board of Collective Bargaining has adopted a standard of review for impasse panel determinations comparable to the test applied by the courts in reviewing an administrative agency decision under article 78 of the New York Civil Practice Law and Rules.¹⁸⁵ The Board has stated its policy as follows:

We do not conceive it to be our function in such proceedings to substitute our judgment, in determining the facts and adjudicating the merits, for that of an impasse panel. Our principal statutory responsibility is to examine the record to determine whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel; if it does, the fact that an interested party or that the Board might be able to conceive other results is not controlling. If the impasse panel has afforded the parties full and fair opportunity to submit testimony and evidence relevant to the matter in controversy; unless it can be shown that the Report and Recommendations were not based upon objective and impartial consideration of the entire record; and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law, the Report and Recommendations must be upheld.¹⁸⁶

¹⁸² *Id.*, § 1173-7.0(c)(4)(b).

¹⁸³ In those appeals in which prejudice is alleged, the NYCCBL incorporates by reference the grounds for vacating an arbitration award provided by N.Y. Civ. Prac. Law § 7511(b)(1)(i)-(iii) (McKinney 1963). In such cases, the Board is empowered to direct a hearing on these issues separate and apart from the record of the impasse panel. NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(c)(4)(b) (1975). The Board must reach a decision within 30 days of the close of this hearing or the panel's recommendation will be adopted. The director has the discretion to extend this period for an additional period not exceeding 30 days. *Id.*, § 1173-7.0(c)(4)(d). No such appeals have been brought as of this writing.

¹⁸⁴ NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, REVISED CONSOLIDATED RULES § 5.10 (1972).

¹⁸⁵ N.Y. CIV. PRAC. LAW § 7803 (McKinney 1963) provides that questions raised in an article 78 proceeding may only concern a determination of whether there has been a failure to perform a legal duty, whether the official body is acting or is prepared to act in excess of jurisdiction, whether a decision is the result of procedural violations or an abuse of discretion, or whether a decision reached after a legally prescribed hearing is supported by substantial evidence.

¹⁸⁶ *City of New York v. Podiatry Soc'y*, No. B-23-72, slip op. at 8-9 (Board of Collective Bargaining Dec. 11, 1972).

The substantial evidence test applied to impasse panel reports under the NYCCBL is different from the standard of review adopted in *Coffey*, where the court of appeals ruled that determinations of Taylor Law arbitration panels should be accorded an expanded version of article 75 review.¹⁸⁷ It may be, however, that very little substantive difference will emerge from experience with the two standards of review. Both the courts and the Board of Collective Bargaining will be concerned with procedural fairness and with the existence of record evidence to support the conclusions of the interest arbitration panel, and neither reviewing forum will substitute its judgment for that of the panel if it appears that the statutory criteria were considered.

The Board of Collective Bargaining may "affirm or modify the panel recommendations in whole or in part," and it may set aside the report and recommendations if it finds that the rights of a party have been prejudiced.¹⁸⁸ If the Board does not act within the statutory time periods, the recommendations are deemed adopted.¹⁸⁹ The NYCCBL provides that a final determination of the Board of Collective Bargaining "shall be binding upon the parties . . ." and "shall constitute an award within the meaning of article seventy-five of the civil practice law and rules."¹⁹⁰ The binding effect of a Board determination, like the decision of an impasse panel, is qualified by the proviso that it is subject to legislative action when a law must be amended or enacted.¹⁹¹

No decision wherein the Board of Collective Bargaining reviewed the recommendations of an impasse panel has ever been appealed to the courts. Should such a case be brought, it seems probable that the courts will apply the same "expanded" article 75 review to New York City interest arbitration determinations as was mandated in *Coffey* for Taylor Law interest arbitration decisions.¹⁹²

From the preceding description of finality under the NYCCBL, it is apparent that the procedure and substance of impasse resolution in New York City differs in certain respects from the binding finality procedures provided by the Taylor Law. Although impasse panels have the authority to mediate and are

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

¹⁸⁸ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(c)(4)(c). See note 183 *supra*.

¹⁸⁹ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1173-7.0(c)(4)(d) (1975).

¹⁹⁰ *Id.*, § 1173-7.0(c)(4)(f) (1975).

¹⁹¹ *Id.*, § 1173-7.0(c)(4)(e).

¹⁹² For a discussion of the standard of review applied in *Coffey* see notes 82-85 and accompanying text *supra*.

strongly encouraged by the statute to do so, the appointment of a mediator is not mandatory under the NYCCBL and mediation is undertaken only when circumstances indicate that it might be productive. Unlike the two-tier Taylor Law system of factfinding followed by binding arbitration, the NYCCBL requires a single procedure wherein the impasse panel conducts a hearing, finds the facts, applies the appropriate law, and then issues its decision. The decisions of NYCCBL panels are appealable first to the Board of Collective Bargaining and then to the courts via article 75. Under the Taylor Law, interest arbitration awards are directly appealable to the courts by an article 75 proceeding. New York City impasse panels are composed solely of neutrals, in contrast to the tripartite structure of Taylor Law panels. The Board of Collective Bargaining, which conducts the initial review of impasse panel recommendations, however, is a tripartite body.

Experience Under NYCCBL Impasse Procedures

Over 411 contracts have been concluded since the NYCCBL was amended in 1972 to provide for binding interest arbitration.¹⁹³ Impasse panel awards have been issued in 32 of the 411 contracts open for negotiations.¹⁹⁴ Ten more cases were settled after appointment of a panel but before issuance of the award. The staff of the Office of Collective Bargaining estimates that as many as two-thirds of the awards issued represent awards written to confirm informal agreement between the parties.

In New York City police and firefighter negotiations since 1972, impasse panels have been employed by the Patrolmen's Benevolent Association twice¹⁹⁵ and by the Uniformed Firefighters Association once.¹⁹⁶ By agreement of the parties, the two police panels ruled on different aspects of the same contract dispute. Thus, of a total of 20 police and firefighter contracts settled since 1972, only two con-

¹⁹³ In 1972, the City of New York and certain of its "independent agencies" negotiated with 249 units. [1972] OCB ANN. REP. 21. By the close of 1976, a continuous process of consolidation reduced the number to 97.

¹⁹⁴ In 1972 there were 125 dispute cases filed with the OCB. [1972] OCB ANN. REP. 21. In 1973 there were 86, in 1974 there were 113, and in 1975 there were 119. [1975] OCB ANN. REP. 21. The 1976 report has not yet been issued. Records of the OCB have been used for this discussion.

¹⁹⁵ *City of New York v. PBA*, No. I-124-75 (Office of Collective Bargaining Aug. 10, 1976), *aff'd*, No. B-12-76 (Board of Collective Bargaining Sept. 13, 1976); *PBA v. City of New York*, No. I-115-74 (Office of Collective Bargaining Apr. 30, 1975).

¹⁹⁶ *Uniformed Firefighters Ass'n v. City of New York*, No. I-105-73 (Office of Collective Bargaining Nov. 11, 1973), *aff'd*, No. B-7-73 (Board of Collective Bargaining Nov. 21, 1973).

tracts have required resolution by impasse panels.

Of the thirty-two awards issued by impasse panels under the finality provisions of the NYCCBL, nine were taken to the Board of Collective Bargaining for review. Six reports and recommendations were appealed by the union involved, one was appealed by the city, and in two cases both the union and the city sought review by the Board. These latter two cases, involving federal and state wage guidelines, are discussed above.¹⁹⁷ The lone city appeal was brought after an impasse panel, responding to a well-presented union case, granted public health sanitarians larger raises than other inspectorial titles had received due to a showing that the sanitarians were distinguishable on various grounds from the other titles. The Board of Collective Bargaining unanimously affirmed the report and recommendations.¹⁹⁸ Of the six appeals brought by unions, all but one sought review of wage increase findings by impasse panels. These were all unanimously affirmed by the Board of Collective Bargaining.¹⁹⁹ The last union appeal was brought in a duty-chart, or work schedule, dispute involving the Patrolmen's Benevolent Association; the Board unanimously affirmed the panel's ruling that police officers should work 10 more days per year than had theretofore been the practice.²⁰⁰

In none of these cases did the Board find on appeal that the panel had failed to consider and apply the statutory criteria. The wage increase awards, with the one exception cited above, follow the pattern of negotiated increases set by the city and other unions with whom contracts had been concluded prior to the impasse proceeding.

It may be taken as a significant measure of both city and union general satisfaction with the impasse panel procedure that all rulings on appeals from impasse awards have been joined in by the neutral, city and union members of the Board of Collective Bargaining. Further, none of the Board decisions have been challenged in court. As a result, the authors believe that the impasse procedures

¹⁹⁷ See notes 173-76 and accompanying text *supra*.

¹⁹⁸ *City of New York v. Local 768, AFSCME*, No. B-11-74 (Board of Collective Bargaining July 15, 1974).

¹⁹⁹ *District 1, PCD, MEBA v. City of New York*, No. B-14-75 (Board of Collective Bargaining May 21, 1975); *Local 1455, AFSCME v. City of New York*, No. B-8-75 (Board of Collective Bargaining Mar. 24, 1975); *City Employees Local 237 v. City of New York*, No. B-12-74 (Board of Collective Bargaining July 15, 1974); *City of New York v. Civil Serv. Bar Ass'n*, No. B-4-73 (Board of Collective Bargaining Mar. 26, 1973); *City of New York v. Podiatry Soc'y*, No. B-23-72 (Board of Collective Bargaining Dec. 11, 1972).

²⁰⁰ *City of New York v. PBA*, No. B-12-76 (Board of Collective Bargaining Sept. 13, 1976).

of the NYCCBL are working well and that the impasse awards are generally acceptable to the public employee representatives as well as to the City of New York.

In recent years, with the increasing public awareness of the financial exigencies faced by governmental employers in the State of New York, questions have been raised concerning the ability of impasse procedures to deal with fiscal problems of local government. Of course, a third-party system for resolving bargaining impasses cannot be charged with finding a solution to a fiscal crisis. All that can be demanded of impasse procedures is that they be compatible with government efforts to restore fiscal soundness. In this respect the New York City impasse panels have been responsive to the employer's statements concerning its ability to pay as well as its insistence that public services be maintained at the lowest possible cost. For example, in recommending settlement of the first collective bargaining agreement between the Community Action for Legal Services and the Legal Services Staff Association, the one-member impasse panel, in his report and recommendations stated that he was guided by the following criteria:

As impasse panelist, my task is to make recommendations which satisfy the legitimate aspirations of LSSA to advance the interests of its members, the mandated objective of CALS to provide a meaningful legal assistance program for the poor of the City, the real concern of the City to coordinate the labor relations of CALS with that of other City agencies, and keep the program within the budget and standards of the OEO. Moreover, I am bound by the requirements of the City Labor Law [section 1173-7.0.c(3)(b)] which requires that I take into account the interest and welfare of the public. This has come to mean the ability of the City to pay and the extent to which the services rendered may have been curtailed if funds are unavailable.

It is clear that if salaries and other costs are increased and the federal and the City governments fail to provide the funds to meet the increased costs, services may have to be curtailed. This would be unfortunate because it would mean not only that some poor people could not be served but that CALS would have to lay off some of its employees. A proposal which fully satisfies the legitimate objectives of LSSA, CALS and City and OEO is not possible. My recommendations are, admittedly, a compromise intended to balance the conflicting interests and to have the least damaging impact on the quality and range of services rendered by CALS and the number of people it employs.²⁰¹

²⁰¹ Community Action for Legal Servs., Inc. v. Legal Servs. Staff Ass'n, No. I-110-74, slip op. at 4-5 (Office of Collective Bargaining Nov. 13, 1974).

Similarly, the report and recommendations of an impasse panel in a contract dispute between the City of New York, the New York City Health and Hospitals Corporation, and the Licensed Practical Nurses of New York, Inc. noted:

The City has been going through a steadily worsening financial situation, resulting in part from precisely the same causes as have produced the Association's rationale for the salary proposals here. It is appropriate to take into account, in weighing the proposals of the parties and in developing a wage structure to recommend to the parties, the very troubled economic condition of the City, just as it is appropriate to take into account the effect of inflationary pressures on the pay rates of the City's employees.

. . . .

The panel also notes the current series of articles in the New York Times regarding the adverse financial condition of the New York City Health and Hospitals Corporation, the employer of perhaps 80% of the employees in this unit. However sympathetic she may be to the argument advanced by the Association and however much she may recognize the hard work and contribution made by the [employees] to the health care services rendered by the City, she cannot consider that this is a time, when the principal employer is considered to be "bankrupt," to grant greater financial recognition to this unit of employees than has been negotiated elsewhere in the City.²⁰²

Finally, the language of the impasse panel appointed in the police officer duty-charts dispute referred to above is significant. The panel said:

Whatever the theoreticians may think in general about increasing the length of the day, we must be concerned with the circumstances involved in this particular dispute occurring at a time of critical financial distress for the City. Here, as we have stated, the highest priority should be given to maximizing the amount of street time for which patrolmen are available.

. . . .

New York has always been a pace setter in standards and working conditions, but it is not improper in a time of imperative need to bring City employees back to a standard comparable with those enjoyed in similar communities throughout the country.²⁰³

²⁰² Licensed Practical Nurses v. City of New York, No. I-113-74, slip op. at 14, 19 n.1 (Office of Collective Bargaining Jan. 7, 1975).

²⁰³ City of New York v. PBA, No. I-124-75, slip op. at 26-27 (Office of Collective Bargaining Aug. 10, 1976), *aff'd*, No. B-12-76 (Board of Collective Bargaining Sept. 13, 1976).

COMPULSORY INTEREST ARBITRATION — A COMPARISON OF STATE STATUTES

Eighteen states have adopted legislation mandating the use of binding interest arbitration to resolve collective bargaining impasses between public employers and specific classes of public employees.²⁰⁴ At the national level, binding arbitration of contract terms between the federal government and its employees may be used by the parties when authorized or directed by the Federal Services Impasses Panel.²⁰⁵ The Postal Reorganization Act of 1970 provides for a system of binding arbitration if no agreement is reached between the Postal Service and its employees within a specified period following the commencement of negotiations.²⁰⁶ Many of these arbitration statutes differ significantly because each is directed toward a particular condition in the jurisdiction. The differences among the statutes also reflect the various theoretical approaches to the attainment of the dual goals of compulsory arbitration: preventing work stoppages and encouraging voluntary agreements. In this section of this Article, several finality procedures will be examined as a basis for comparison with the New York police and firefighter arbitration statute.

The New York interest arbitration procedure is popularly termed conventional arbitration. Under such procedures, an arbitration panel resolves a bargaining impasse according to its best judgment based, almost always, on express or implied statutory standards. The "reasonable" award is a result of compromise and may contain bits and pieces of the positions of both parties. Thus, conventional arbitration "can function as a face-saving device for both management officials and union leaders who perceive themselves under considerable constituent pressure not to compromise their negotiating position."²⁰⁷

Critics of conventional arbitration have argued that it has a "chilling" or deterrent effect on the parties' incentive to bargain in good faith.²⁰⁸ The critics contend that the parties, believing that an

²⁰⁴ See note 15 *supra*.

²⁰⁵ Exec. Order No. 11,491, § 17, 34 Fed. Reg. 17,612 (1969), *reprinted in* 5 U.S.C. § 7301 app., at 398 (1970).

²⁰⁶ 39 U.S.C. § 1207(c)-(d) (1970).

²⁰⁷ P. FEUILLE, FINAL OFFER ARBITRATION: CONCEPTS, DEVELOPMENTS, TECHNIQUES 7 (Public Employee Relations Library No. 50, 1975) [hereinafter cited as FEUILLE].

²⁰⁸ See Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5 INDUS. REL. Feb. 1966, at 38, 38-44. It has also been suggested that conventional arbitration does not in fact eliminate strikes, see FEUILLE, *supra* note 207, at 10-11, and that awards issued by

arbitrator will generally "split the difference," will maintain unrealistic bargaining positions whenever there is a possibility that binding arbitration will be instituted. Under the influence of such perceptions, it is argued, each party believes that the arbitrator will arrive at a result that is more favorable to that party than the result offered by the other party immediately prior to going to arbitration. The parties will then employ tactics designed to ensure arbitration by bargaining without a sincere desire to reach agreement. As a result, compulsory arbitration will replace collective negotiations as the rule in contract disputes and will no longer be an exceptional solution to an impasse situation.

This criticism provided the impetus for the development of an alternative interest arbitration procedure, popularly termed final offer arbitration. There are two variations of this arbitration scheme: "total package" and "issue-by-issue." The former category of final offer arbitration is exemplified by the Massachusetts finality procedure for police and firefighter bargaining impasse, which requires each party to submit simultaneously its last best offer to a tripartite arbitration panel within 10 days of the close of hearings on the dispute.²⁰⁹ Limited to a choice of one of these last best offers in its entirety, the arbitrators may not fashion a compromise award. The arbitration panel is required to consider ten statutory criteria in making its selection, and its award is final and binding upon the

arbitration panels are unduly inflated because the "process is insulated from market and power constraints." *Id.* at 11. The initial assertion is "largely unfounded," as there has been a noticeable absence of strikes by labor groups covered under compulsory arbitration legislation. *Id.* at 10. In New York, although this fact cannot be conclusively attributed to arbitration, affected employee groups have not gone on strike during the time § 209(4) has been in effect. See KOCHAN, *supra* note 58, at v. The second criticism, although conceptually plausible, also is not supported by recent research. Although it is difficult to isolate and assess the effect of arbitration panels alone on wage increases, see J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER & B. DENNIS, FINAL-OFFER ARBITRATION 29-30 (1975) [hereinafter cited as FINAL-OFFER ARBITRATION], two studies have revealed that the only relation positively identified between arbitration or the threat of its use and wages has been the "catchup" effect it has had for employees who had initially suffered substandard earning levels. See *id.* at 31-32; KOCHAN, *supra* note 58, at 215-18. The Cornell study in fact concluded that "the arbitration process had a stronger impact on the distribution of wages than on the average size of the wage increases." *Id.* at 218.

²⁰⁹ 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). The Massachusetts final-offer arbitration mechanism may only be initiated upon a police or firefighter group's petition to the state labor board. Four conditions must be met: (1) The police or firefighter organization must have participated in mediation and factfinding; (2) 30 days must have elapsed since the factfinder issued his report; (3) all proceedings for prevention of prohibited practices must have been exhausted; and (4) an impasse still exists. *Id.*

local legislative body as well as upon the parties.²¹⁰

Proponents of the final offer procedure have argued that under the total package format "an arbitrator would not be free to compromise between the positions of the parties but would be required to accept one position or the other *in toto* . . . [T]he theory is that the process, instead of chilling bargaining, will induce the parties to develop their most 'reasonable' position prior to the arbitrator's decision."²¹¹ The procedure is said to act as a "strikelike" mechanism in that it presents the possibility of potentially severe costs of disagreement since either party "may lose the entire ballgame." Thus, as Arnold Zack has stated, "[i]n theory, the prospect of the other party's final offer being more appealing to an arbitrator, will encourage each party to present an eminently reasonable final offer, and, indeed, may even bring the parties to agreement without the need to resort to an arbitrator's decision."²¹²

Ideal as the theory of total package final offer appears, it has been criticized as having defects of its own. One commentator has noted that there are two problems inherent in the total package final offer approach: First, "the necessity of making an all or nothing choice . . . tends to negate the proper utilization of standards," and second, "if either party or both parties are in an inflexible position on [a] major issue . . . the neutral may find himself in a position where he cannot [render] an acceptable or even workable award."²¹³ Similarly, Joseph Grodin warns that in disputes involving multiple issues, if the bargainers lack experience and sophistication and therefore make unreasonable offers, the arbitrators' deci-

²¹⁰ According to one commentator, the mandatory factfinding process incorporated in the Massachusetts statute, *id.*, has become the "cornerstone of the entire impasse procedure." Holden, *Final-Offer Arbitration in Massachusetts: One Year Later*, 31 *ARB. J.* 26, 28 (1976). Under this hypothesis, factfinding represents the initial stage of a "two-step arbitration proceeding." *Id.* at 29. Normally, the factfinder's recommendations are guided by the same statutory criteria applicable to the arbitration proceeding, and they have usually been acceded to in the latter proceeding. *Id.* Of the ten statutory criteria, the cost of living, comparability with similar employees and communities, and the public employer's ability to pay have been the most significant factors considered by the factfinders and arbitrators. *Id.* at 33. The arbitration proceeding itself, as the final stage of the two-step process, has represented a "safety valve" for the parties because it allows them to retract terms which might eventually be damaging to their package in a last best offer arbitration mechanism. *Id.* at 30.

²¹¹ Grodin, *Either-or Arbitration for Public Employee Disputes*, 11 *INDUS. REL.* 260, 263 (1972) [hereinafter cited as *Either-or Arbitration*].

²¹² Zack, *Final Offer Selection—Panacea or Pandora's Box?*, 19 *N.Y.L.F.* 567, 573 (1974).

²¹³ Anderson, *Compulsory Arbitration in Public Sector Dispute Settlement—An Affirmative View*, in *Dispute Settlement in the Public Sector 7-8* (Center for Labor and Management, University of Iowa 1972).

sion will also be unreasonable.²¹⁴ Fred Witney, one of the arbitrators in a 1972 total package final offer decision involving the city of Indianapolis and a municipal employees' union, notes that under the sudden death procedure, an arbitrator may be presented with a choice of undesirable alternatives due to the inclusion of a single unreasonable item in an otherwise preferable package.²¹⁵ Witney explains that a more equitable settlement of the Indianapolis dispute could have been reached if the arbitration panel had not been limited by the total package final offer format.²¹⁶

Mollie Bowers and David Cohen emphasize that collective bargaining has historically sought "to achieve settlements which are mutually acceptable to the parties."²¹⁷ Clearly, it is in the best interest of all concerned to reach an agreement which will form a basis for workable labor-management relationships. Bowers and Cohen state that

this objective is more likely to be achieved when both parties emerge from an arbitration proceeding with some needs satisfied rather than as total winners and total losers. Too frequently, and understandably so, losers tend to devote a substantial amount of energy getting back at the winner, under the terms of win-lose awards and agreements.²¹⁸

Grodin suggests that such problems could be alleviated if the parties were encouraged or required to agree upon isolation of certain issues, or groups of issues, for submission to the arbitrator.²¹⁹

²¹⁴ *Either-or Arbitration*, *supra* note 211, at 264.

²¹⁵ Witney, *Final-Offer Arbitration: The Indianapolis Experience*, MONTHLY LAB. REV., May 1973, at 20, 22-25.

²¹⁶ Witney reports that the arbitration board was obliged to choose the city's final offer because of the union's unreasonable demands concerning family insurance and sick leave benefits. *Id.* at 22. Had the board been granted authority to exercise discretion, however, the resultant award would have reflected the union's more reasonable wage demands. *Id.* at 23. As recapitulated by Witney,

Although the Board kept faith with the parties and reached a decision based on their instructions and on the evidence, it was not satisfied that the decision was the right one under the circumstances of the dispute. Driven to the wall, the Board picked the city's final offer as the most reasonable and rejected the union's as unreasonable. But what may be "most reasonable" in a final-offer arbitration may not meet the needs of the parties or conform to the tests of equity and desirability.

Id. Unconvinced that final offer arbitration compelled the parties to make reasonable demands, Witney maintains that it may simply motivate the parties to seek the least unreasonable offer. *Id.* at 25. Such an offer would have no guarantee of being reasonable in and of itself. *Id.*

²¹⁷ Bowers & Cohen, *Drafting Public Sector Arbitration Legislation*, 30 ARB. J. 253, 261 (1975).

²¹⁸ *Id.*

²¹⁹ *Either-or Arbitration*, *supra* note 211, at 264-65. According to Grodin, the greatest

Other commentators have proposed an "issue-by-issue" format, in which the arbitrator is not obligated to select the final offer of either party in toto, but could choose between the final offers of the parties on an issue-by-issue basis.²²⁰ The Michigan Police-Firefighters Arbitration Act²²¹ combines these proposals in its finality procedure,²²² which has been described as follows: "(1) The panel makes the final determination of issues in dispute and whether they are economic or noneconomic; (2) the last, best-offer determination applies only to economic issues; (3) non-economic issues are subject to conventional arbitration; and (4) the opinion and award are to be written."²²³

Issue-by-issue final offer selection has also not escaped criticism. Peter Feuille and Gary Long note that the issue-by-issue procedure reduces the parties' incentive to reach agreement on any single issue since they might conclude that inflexibility on particular issues is necessary in order to enhance the selectability of its offers on other issues.²²⁴ Grodin points out that the issue-by-issue selection method does not induce the parties to narrow the area of disagreement to the extent that the whole package selection method

problem with final offer arbitration is that as more issues are presented to the arbitrator, the likelihood that he will be able to decide rationally between offers is greatly diminished. *Id.* The intermixture of wage items, noneconomic benefits, and grievance procedures simply do not lend themselves to effective evaluation. By isolating groups of issues, Grodin suggests that the arbitrator would be able to render the offers a "high degree of principled evaluation." *Id.* at 264. Alternatively, Grodin suggests that the parties be able to submit more than one final offer. *Id.* at 264-65. This would allow the arbitrator somewhat more discretion and "flexibility in effectuating priorities which he considers appropriate." *Id.* at 265. Gary Long and Peter Feuille, commenting on the Eugene, Oregon final offer scheme which allows the parties to make two final offers, noted at least three beneficial aspects of the multiple offer concept: First, the parties have more flexibility in making their presentations; second, the parties get the benefit of "loading" one of the offers with politically expedient, but practically unreasonable offers; and third, the second offer increases the uncertainty and "sudden death" aspect of the final offer mechanism thereby increasing the likelihood of a negotiated settlement. See Long & Feuille, *Final-Offer Arbitration: "Sudden Death" in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 197-98 (1974). Zack contends, however, that "[t]he risk of keeping the case before the arbitrator is heightened by allowing only one final offer," and that therefore, the prospect of voluntary settlement is increased if the parties are not permitted to present more than one offer, nor allowed to modify the offer once it is submitted. Zack, *Final Offer Selection—Panacea or Pandora's Box?*, 19 N.Y.L.F. 567, 581 (1974).

²²⁰ See, e.g., Garber, *Compulsory Arbitration in the Public Sector: A Proposed Alternative*, 26 ARB. J. 226, 232 (1971).

²²¹ MICH. COMP. LAWS ANN. §§ 423.231-.247 (Supp. 1976-1977).

²²² *Id.* § 423.238.

²²³ FINAL-OFFER ARBITRATION, *supra* note 208, at 46.

²²⁴ See Long & Feuille, *Final-Offer Arbitration: "Sudden Death" in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 203 (1974).

does.²²⁵ Moreover, as Arnold Zack has stated, "the final offer selection procedure does not easily lend itself to issue by issue determination. Multiple proposals are too often intertwined and dependent upon one another."²²⁶ Indeed, Charles Rehmus has observed that Michigan arbitration panels have, at times, arrived at unusual and inconsistent decisions on the question whether a particular issue is economic, and thus subject to final offer arbitration, or noneconomic, and thus subject to conventional arbitration.²²⁷

Evaluations of the Massachusetts and Michigan experiences with their respective compulsory arbitration statutes indicate that while there is a high rate of declared bargaining impasses, the finality procedures do in fact encourage continued negotiations after third-party intervention. A study of final offer arbitration in Massachusetts found that in 1975, impasses were declared in fifty-three percent of the police and firefighter negotiations.²²⁸ Only twenty-eight percent of these impasses, however, continued on to petition for arbitration, and of that number only sixteen percent required issuance of an award.²²⁹ Similarly, under the Michigan statute, public safety employees requested arbitration at the rate of one negotiation in every three or four, but awards were rendered in only one negotiation in six.²³⁰ Presumably, the number of awards issued would exceed the number of strikes if strikes were permitted. Nonetheless, as Charles Rehmus noted, this ration "does not show that the availability of arbitration has substantially eroded the possibilities of settlement through the parties' own collective bargaining efforts."²³¹

The significant number of disputes which were settled in Massachusetts and Michigan after the petition for arbitration but before issuance of an award demonstrates what commentators have termed

²²⁵ *Either-or Arbitration*, *supra* note 211, at 264.

²²⁶ Zack, *Final Offer Selection—Panacea or Pandora's Box?*, 19 N.Y.L.F. 567, 579 (1974).

²²⁷ FINAL-OFFER ARBITRATION, *supra* note 208, at 71. Rehmus reports that under final offer arbitration for economic issues, there was no significant departure from practices that had developed under conventional arbitration. *See id.* at 69-70. Specifically, parties who often resorted to arbitration under the conventional format continued to do so under the revised plan. *Id.* at 70. Parties who normally negotiated their agreements also remained true to their previous habits. *Id.* Furthermore, the anticipated reduction of issues presented to the arbitrators under the issue-by-issue format seemingly did not materialize in practice. *Id.*

²²⁸ P. Somers, *An Evaluation of Final Offer in Massachusetts* 23 (Nov. 1976) (Personnel and Labor Relations Bulletin, Massachusetts League of Cities and Towns).

²²⁹ *Id.* at 26.

²³⁰ FINAL-OFFER ARBITRATION, *supra* note 208, at 53.

²³¹ *Id.* at 53-54.

the mediation-arbitration or "med-arb" effect.²³² The parties are encouraged to continue negotiations by both the arbitration panel and the statutory procedures. This effect is achieved through the use of tripartite arbitration panels which, along with the statutory procedures, encourage continued negotiations. The neutral arbitrator may convey his informal opinion on the disputed issues to one of the partisan panel members who can then inform the party he represents of the opinion of the neutral arbitrator. After this party modifies its position, the neutral panel member can use the same technique with the other party, thereby, narrowing the dispute and in some cases foregoing a settlement. As a result of the informal nature of the proceedings, an effective neutral can resolve the parties' differences far better than can the "threat" of final offer arbitration.

The mediation process is further encouraged by the use of flexible time requirements and criteria. Under the law of both Massachusetts and Michigan, the parties are not required to file their statements of last best offers until a fairly late stage in the arbitration proceedings.²³³ The broad scope of the criteria which the arbitration panel must consider together with a provision allowing the panels to examine all factors normally considered in collective bargaining permits the parties in both states a degree of flexibility in formulating their respective positions on bargaining issues.²³⁴ A study of the Michigan compulsory arbitration experience revealed that this flexibility in the timing and nature of final offers acted as an open invitation to mediation during the course of the arbitration proceedings.²³⁵ As Charles Rehmus observed, "any experienced ne-

²³² Kagel & Kagel, *Using Two New Arbitration Techniques*, MONTHLY LAB. REV., Nov. 1972, at 11.

²³³ Michigan's statute permits the parties to submit their final offers at any time in the proceedings, and in both Massachusetts and Michigan, the parties are not required to submit their final offers until the close of the arbitration hearings. Act of Nov. 26, 1973, ch. 1078, § 4(4), 1973 Mass. Acts 1135, reprinted in MASS. ANN. LAWS ch. 150E, § 9 app., at 320 (Michie/Law. Co-op 1976); MICH. COMP. LAWS ANN. § 423.238 (Supp. 1977).

²³⁴ Both statutes authorize the arbitrators to consider:

Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact-finding arbitration or otherwise between the parties, in the public service or in private employment.

Act of Nov. 26, 1973, ch. 1078, § 4(4)(9), 1973 Mass. Acts 1135, reprinted in MASS. ANN. LAWS ch. 150E, § 9 app., at 321 (Michie/Law. Co-op 1976); MICH. COMP. LAWS ANN. § 423.239(h) (Supp. 1977).

²³⁵ Rehmus, *Is a "Final Offer" Ever Final?*, in ARBITRATION — 1974 — PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING — NATIONAL ACADEMY OF ARBITRATORS 79 (1975). Reh-

gotiator knows, a fixed and unalterable 'final offer' is ordinarily a contradiction to the terms of good-faith bargaining. This is simply because the parties' so-called 'final' offers frequently are not and will not stay final."²³⁶

In addition to these implicit inducements to voluntary settlement, both statutes explicitly provide that the arbitration panel, at any time before rendering an award, can remand the dispute to the parties for further negotiations for a period of up to 3 weeks.²³⁷ Under the Massachusetts provisions, the neutral panel member may serve as a mediator at the request of the parties during this time period.²³⁸ Thus, the Massachusetts and Michigan mechanism can be termed "mediation with clout." If it is necessary, the third party who is petitioned to resolve the dispute can compel the parties to reach agreement by utilizing the fear that the neutral will support an award which incorporates the other party's final offer on the disputed issues.

Clearly, the framers of the Massachusetts and Michigan arbitration statutes intended their respective finality procedures to supplement, not replace collective bargaining. As the studies discussed above indicate, what has evolved in both jurisdictions is a system which most frequently produces accommodative settlements rather than normative awards. Nonetheless, despite the generally desirable results of the two compulsory arbitration statutes, municipalities in both Massachusetts²³⁹ and Michigan²⁴⁰ have attacked the constitutionality of their respective arbitration procedures, alleging, *inter alia*, that the statutes impermissibly delegate legislative authority to an ad hoc panel.²⁴¹ While both provisions have withstood

mus finds that as part of the extended negotiation process during the arbitration hearing, not only do the parties seek to modify their offers upon the basis of the other party's position, but especially to accord with the feedback or inferences they can elicit from the neutral arbitrator. *Id.*

²³⁶ *Id.* at 78.

²³⁷ Act of Nov. 26, 1973, ch. 1078, § 4(4), 1973 Mass. Acts 1135, reprinted in MASS. ANN. LAWS ch. 150E, § 9 app., at 320 (Michie/Law. Co-op 1976); MICH. COMP. LAWS ANN. § 423.237a (Supp. 1977).

²³⁸ RULES OF THE MASSACHUSETTS BOARD OF CONCILIATION AND ARBITRATION, ch. 2, § 2.09(B), reprinted in 1 MASS. LAB. REL. REP. 3019 (1974).

²³⁹ *Town of Arlington v. Board of Conciliation & Arb.*, 352 N.E.2d 914 (Mass. 1976).

²⁴⁰ *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975).

²⁴¹ Other constitutional infirmities often alleged by recalcitrant municipalities include violation of home rule charters, see, e.g., *Town of Arlington v. Board of Conciliation & Arb.*, 352 N.E.2d 914, 918 (Mass. 1976), contravention of the one man, one vote principle, see, e.g., *id.*, at 920, and forfeiture of the municipality's right to tax, e.g., *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 394 Mich. 229, 245, 231 N.W.2d 226, 230 (1975). These arguments,

such challenges,²⁴² other states have avoided the delegation question by enacting statutes which require either that independent state courts or "agencies" resolve bargaining disputes²⁴³ or that the public employer must approve the interest arbitration awards before the award becomes binding.²⁴⁴

In Nebraska, the legislature has created an independent court of industrial relations with jurisdiction over industrial disputes concerning terms, tenure, or conditions of employment involving governmental service.²⁴⁵ The court consists of five judges appointed by the governor,²⁴⁶ and its proceedings are conducted under the Nebraska civil rules of evidence.²⁴⁷ The court was originally created to resolve labor disputes involving public utilities²⁴⁸ and proprietary activities of the state, but the enabling legislation was amended in 1969 to include all governmental employees.²⁴⁹

as well as the assertion that compulsory arbitration constitutes an improper delegation of legislative authority, have generally been rejected by the courts. See cases cited in note 242 *infra*.

²⁴² *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), *aff'g by an equally divided court* 42 Mich. App. 51, 201 N.W.2d 650 (1972). In addition to these cases in Massachusetts and Michigan, compulsory arbitration has been held constitutionally valid in the following cases: *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387 (Me. 1973); *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).

Not all compulsory arbitration legislation, however, has survived constitutional attack. See *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, 234 N.W.2d 35 (S.D. 1975), where the court perceived compulsory arbitration to be an unconstitutional interference with municipal functions. In Pennsylvania, it was necessary to amend the constitution to allow compulsory arbitration, see PA. CONST. art. III, § 31, after the state's highest court had found a previous arbitration statute unconstitutional, see *Erie Firefighters Local 293 v. Gardner*, 406 Pa. 395, 178 A.2d 691 (1962) (per curiam).

²⁴³ See, e.g., notes 245-57 and accompanying text *infra*.

²⁴⁴ See OKLA. STAT. ANN. tit. 11, § 548.9 (West Supp. 1977).

²⁴⁵ NEB. REV. STAT. §§ 48-801 to -838 (1974 Cum. Supp. 1976).

²⁴⁶ *Id.* § 48-804 (Cum. Supp. 1976). The statute provides that the legislature is to give its advice and consent to the governor in his choice of appointments and that these "judges shall be representative of the public." *Id.* The term of appointment is for 6 years. See *id.*

²⁴⁷ *Id.* § 48-809 (1974).

²⁴⁸ See ch. 178, § 1, 1947 Neb. Laws 586. The statute's coverage of employees of public utilities is subject to the restrictions enunciated by the Supreme Court's holding in *Association of Street, Elec. Ry. & Motor Coach Employees v. Missouri*, 374 U.S. 74 (1963). In that case, the Court held that a provision of a Missouri statute mandating mediation of public utility bargaining disputes was preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975), to the extent that the state statute prohibited strikes against employers whose businesses affect interstate commerce. *Id.* at 82.

²⁴⁹ Ch. 407, § 1, 1969 Neb. Laws 1405 (codified at NEB. REV. STAT. § 48-801 (1974)).

The court of industrial relations has been held to be an administrative body which has been granted a combination of administrative, legislative, and judicial powers.²⁵⁰ Specifically, in bargaining disputes the court may order the parties to conduct good faith negotiations²⁵¹ and it may establish or alter the scale of wages, hours of labor, or conditions of employment.²⁵² In settling disputes, the court is directed to fashion terms "which are comparable to the prevalent wage rate . . . and conditions of employment" enjoyed by similarly situated workers.²⁵³ The jurisdiction of the court is invoked by the

²⁵⁰ See *School Dist. of Seward Educ. Ass'n v. School Dist.*, 188 Neb. 772, 785, 199 N.W.2d 752, 760 (1972).

²⁵¹ NEB. REV. STAT. § 48-816 (1974).

²⁵² *Id.* § 48-818. Although the statute provides the court with these remedial powers, the extent to which the court may exercise them has been the subject of controversy. Section 48-810.01 provides that:

Notwithstanding any other provision of law, the State of Nebraska and any political or governmental subdivision thereof cannot be compelled to enter into any contract or agreement, written or otherwise, with any labor organization concerning grievances, labor disputes, rates of pay, hours of employment or conditions of work.

Id. § 48-810.01. Avoiding the apparent conflict between the sections of the statute, the Supreme Court of Nebraska has held that an order of the court of industrial relations does not force a governmental entity to enter into a contract, but is an exercise of the court's "power to settle a dispute." *School Dist. of Seward Educ. Ass'n v. School Dist.*, 188 Neb. 772, 783, 199 N.W.2d 752, 759 (1972).

²⁵³ NEB. REV. STAT. § 48-818 (1974). In establishing wages, hours, and working conditions, the statute mandates that:

[T]he Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees.

Id. The court of industrial relations has interpreted the statutory terms "comparable" and "prevalent" to require it "to measure the settlement of the industrial dispute before the court by the standards set by the 'peers' of the parties before the Court." Good, *Public Employee Impasse Resolution by Judicial Order: The Nebraska Court of Industrial Relations*, 2 J.L. & Educ. 253, 256 (1973), quoting *School Dist. of Seward Educ. Ass'n v. School Dist.*, No. 34, at 8 (Neb. Ct. Indus. Rel. Aug. 9, 1971). The Nebraska Supreme Court has stated that in establishing who the "peers" of the parties are,

the standard now is one of general practice, occurrence or acceptance, but the question of how general is general is left to the good judgment or feeling of the judges. The requirement of similarity of working conditions helps the judge develop that judgment or a receptivity to the proper connotation of the word 'prevalent'. Similarity tends to decrease with increasing distance among what are to be compared and to become more pronounced with increasing proximity.

Crete Educ. Ass'n v. School Dist., 193 Neb. 245, 254-55, 226 N.W.2d 752, 758 (1975), quoting *Fremont Educ. Ass'n*, No. 50 (Neb. Ct. Indus. Rel. Mar. 14, 1972).

filing of a petition by "[a]ny employer, employee, or labor organization, or the Attorney General of Nebraska on his own initiative or by order of the Governor,"²⁵⁴ with the limitation that parties to disputes involving teachers must exhaust the mediation and fact-finding requirements of the Nebraska Teachers' Professional Negotiations Act²⁵⁵ before petitioning the court of industrial relations.²⁵⁶ Finally, the decisions of the court of industrial relations are subject to de novo review in the Supreme Court of Nebraska.²⁵⁷

Clearly, each variation of the compulsory interest arbitration concept has advantages and disadvantages. Since none of these has as yet shown itself to be beyond reproach, there appears to be no convincing reason for New York to radically modify its procedures or to abandon the conventional arbitration which has operated effectively during the past 3 years. Moreover, unlike some states in which the constitutionality of public sector conventional compulsory binding interest arbitration may be doubtful, the New York judiciary has not only upheld, but has clarified and enlarged the current Taylor Law provisions.

THE FUTURE OF INTEREST ARBITRATION

In considering the future of interest arbitration in New York, it is necessary to evaluate the legal and practical issues raised by both its supporters and its opponents and to assess the various proposals for modification of the current Taylor Law provisions. Of special significance are two proposals recently presented to the Legislature. The Governor has submitted a bill which would eliminate factfinding in police and firefighter disputes subject to the Taylor Law and convert the binding interest arbitration provisions into an advisory process.²⁵⁸ The proposal would establish a 2-year experi-

In reviewing determinations of the court of industrial relations, the Supreme Court of Nebraska has adopted the dictionary definition of "comparable" as "having enough like characteristics or qualities to make comparison appropriate," *Crete Educ. Ass'n v. School Dist.*, 193 Neb. 245, 253, 226 N.W.2d 752, 757, quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 461 (unabr. 16th ed. 1971), and has limited its review to whether, as a matter of fact, the labor market areas selected for comparison are sufficiently similar to the area in which the bargaining dispute exists. See *Omaha Ass'n of Firefighters Local 385 v. City of Omaha*, 194 Neb. 436, 440-41, 231 N.W.2d 710, 713-14 (1975); *Crete Educ. Ass'n v. School Dist.*, 193 Neb. 245, 253-55, 226 N.W.2d 752, 757-58 (1975).

²⁵⁴ NEB. REV. STAT. § 48-811 (1974).

²⁵⁵ *Id.* §§ 79-1287 to -1295 (1971).

²⁵⁶ *Id.* § 48-810.

²⁵⁷ See *id.* § 48-812.

²⁵⁸ N.Y.S. 1337, N.Y.A. 1637, 200th Sess. (1977).

mental program similar in some ways to the legislative hearing method now applied to other public employee disputes. The determination of the arbitration panel would have no effect until approved by the local legislature following a public hearing; if within 20 days after the public hearing the legislature does not vote to approve or reject the determination, it shall be deemed approved. The legislature would have no power to alter or amend the determination, and if it should be rejected the parties could renew their negotiations.²⁵⁹ In contrast to the Governor's proposal, PERB has submitted a statement favoring continuation, without amendment, of the interest arbitration statute.²⁶⁰ Essentially, PERB has found that the experiment seems to be working well and that a longer period of experimentation is required before any definitive conclusions concerning the statute's strengths and weaknesses can be drawn.²⁶¹

In addition, the views of many concerned parties, including representatives of state and local government, public employee unions, and neutrals active in the public employment field, were expressed at a recent symposium on police and firefighter arbitration sponsored by PERB.²⁶² As evidenced by the opinions expressed at this conference, the proposals to the Legislature will embody the widely divergent views of labor and management. Public employer groups at the PERB symposium strongly urged a return to the legislative hearing procedure. They contended that the arbitration process usurped the power of elected officials to set terms of employment for public employees and that the arbitrators who were now given such authority in interest arbitration cases had no commitment to the long term welfare of the government involved. Employer representatives argued that the power to determine budget priorities must rest with public officials and that binding arbitration results in "the erosion and subversion of elective government."²⁶³

Police and firefighter groups at the PERB conference were united in their support of interest arbitration. They declared that permitting an employer unilaterally to impose terms and conditions of employment on its employees was unfair. Further, the union

²⁵⁹ *Id.* at 14.

²⁶⁰ New York State Public Employment Relations Board, Statement Concerning Binding Arbitration for Officers or Members of any Organized Fire Dep't or Police Force of any County, Town, Village or Fire District (Except City of New York) 8 (1977).

²⁶¹ *See id.* at 8.

²⁶² *See* GOV'T EMPPL. REL. REP. (BNA) No. 687, at B-1 to B-13 (Dec. 13, 1976).

²⁶³ *Id.*, at B-3.

officials noted, interest arbitration has the beneficent quality of imposing a finality, since "win or lose, it must be accepted."²⁶⁴ Both the police and firefighter representatives warned of strikes if section 209(4) were not continued, asserting that a retreat from binding arbitration would bring about "a revolt among the rank and file."²⁶⁵

Although doubts as to the constitutionality of section 209(4) were settled by the court of appeals in *City of Amsterdam v. Helsby*,²⁶⁶ the battle over the wisdom of compulsory binding interest arbitration in the public sector will continue for some time to come. The arguments relating to political power and the requirements of fairness which were raised by the various interest groups at the PERB conference have been voiced by many commentators.

The most basic objection to interest arbitration is that granting the power to determine wages, hours, and working conditions of public employees to arbitration panels is a significant encroachment on an important power of elected officials in a democratic government. At the core of this argument is the notion that the compulsory binding interest arbitration statute grants to an arbitrator, as a substitute for the legislative body, the power to render a decision in a forum which is essentially a closed legislative process from which other competing political forces are excluded. Included in this group of critics who object to binding interest arbitration on the ground that it is undemocratic are those who are in reality objecting to the very idea of collective bargaining for public employees.²⁶⁷ The Cornell study discussed above²⁶⁸ found that those respondents to its research questionnaires who were opposed to interest arbitration also indicated that they were opposed to collective bargaining for public employees.²⁶⁹ This Article does not propose to enter into an extended philosophic dispute on the wisdom of collective bargaining in the public or private sector: The authors firmly believe in collec-

²⁶⁴ *Id.*

²⁶⁵ *Id.*, at B-4.

²⁶⁶ 37 N.Y.2d 19, 26-28, 332 N.E.2d 290, 292-93, 371 N.Y.S.2d 404, 407-08 (1975).

²⁶⁷ See R. SUMMERS, COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE (IPE Monograph No. 7, 1976), wherein the author states: "Thus, the conflict between democratic processes and public employee collective bargaining is *inherent* and diminishes democratic decision making, for it requires the sharing of public authority with private bodies (unions)." *Id.* at 4 (emphasis in original). Summers questions whether private sector collective bargaining can be "justified," *see id.* at XI, and concludes that "public sector collective bargaining is not a good thing for society and should be abandoned in all states that have it." *Id.* at 57.

²⁶⁸ See notes 97-124 and accompanying text *supra*.

²⁶⁹ KOCHAN, *supra* note 58, at 312, 320.

tive bargaining. This Article was based on the fact that collective bargaining has been a matter of public policy for more than four decades in the private sector and, in the last two decades, has been extended by law to the public sector on the federal level and in most states. The intent of the authors was to discuss the relevant experience with various methods for resolving the disputes which arise in the course of such bargaining.

Some commentators have displayed confusion as to the significance of statutory criteria. It has been suggested that statutory directions to interest arbitrators to consider the public employer's ability to pay are ineffective because the ability to pay standard usually is not placed at the top of the list of criteria.²⁷⁰ Of course, no importance should be attached to the physical order of a list unless the statute indicates that the criteria at the beginning are more important than those at the end.

Critics have also asserted that arbitrators are more concerned about the needs of the employees whose wage increase claims are under consideration than the ability of the citizenry to bear the burden of these increases. Wherever this assertion appears, however, it does not seem to be supported by citation to specific examples.²⁷¹ Analysis of interest arbitrations, court decisions, and the published research leads the authors to the opposite conclusion. The many cases examined reveal a great concern with current governmental fiscal difficulties and an acknowledgment by the arbitrators that public services must be maintained or increased at the lowest possible cost. Only two arbitration awards under section 209(4) have been annulled in court: one was set aside because of fraud and misconduct on the part of the employer representative;²⁷² the other was vacated by the appellate division because the court found that the award lacked a rational basis since the city did not have the ability to finance the award.²⁷³ As for the awards issued under the New York City binding impasse procedures, all but one were affirmed by the tripartite Board of Collective Bargaining in unanimous decisions. The one award which required modification involved reduction by a small fraction of the wage award in order to

²⁷⁰ Zagoria, *Compulsory, Binding Arbitration Likely to be Pushed in 1977*, 7 L.M.R.S. Newsletter 3 (Dec. 1976).

²⁷¹ See, e.g., *id.*

²⁷² *Bethlehem Steel Corp. v. Fennie*, 86 Misc. 2d 968, 383 N.Y.S.2d 948 (Sup. Ct. Erie County 1976), discussed in notes 134-41 and accompanying text *supra*.

²⁷³ *City of Buffalo v. Rinaldo*, 56 App. Div. 2d 212, 392 N.Y.S.2d 146 (4th Dep't 1977), appeal filed, (Ct. App. Feb. 28, 1977), discussed in notes 87-93 and accompanying text *supra*.

meet the wage guidelines of the Emergency Financial Control Board.²⁷⁴

On a purely economic basis, the statistics show that interest arbitration awards issued under the Taylor Law provided lower average wage benefits than did voluntary negotiations in the same period.²⁷⁵ Thus, there is no apparent factual support for the criticism that interest arbitrators will be overly generous with the public fisc. Certainly, an occasional case such as the Buffalo controversy may arise,²⁷⁶ but even this award has been subjected to strenuous judicial review.

Some opponents of interest arbitration have argued that it has a chilling effect on negotiations. Their rationale is that the availability of a final step will discourage hard bargaining and compromise by negotiators who know that the dispute can ultimately be settled by a neutral. There is no evidence to the effect that compulsory arbitration has had a chilling effect on the bargaining process. Indeed, the statistics for New York City indicate a relatively light utilization of binding arbitration compared to a large total of negotiated settlements.²⁷⁷ Moreover, the Cornell report found that factors other than the availability of arbitration under the Taylor Law were most important in determining whether impasse procedures would be necessary to achieve finality.²⁷⁸ Further, the evidence from employee groups subject to Taylor Law impasse procedures other than interest arbitration does not support the conclusion that these groups have a greater tendency toward contract settlement by negotiations than do the police and firefighters under interest arbitration.²⁷⁹ For example, two recent sets of negotiations between the State of New York and the Civil Service Employees Association for the major units of state employees have required the use of impasse procedures. Under the 1973-1976 contracts, salary negotiations took place subject to a reopener clause. These negotiations were resolved by legislative action pursuant to section 209(4)(d) after settlement efforts had failed.²⁸⁰ In an attempt to reach agreement under the successor contracts to those mentioned above, a factfinding panel

²⁷⁴ See notes 197-200 and accompanying text *supra*.

²⁷⁵ Public Employment Relations News No. 9, at 1, 6 (Oct. 1976).

²⁷⁶ See notes 87-93 and accompanying text *supra*.

²⁷⁷ See notes 193-94 and accompanying text *supra*.

²⁷⁸ See text accompanying note 117 *supra*.

²⁷⁹ See notes 106-08 and accompanying text *supra*.

²⁸⁰ Letter from Leonard R. Kershaw, Assistant Director of Executive Department, New York Office of Employee Relations, to Eleanor MacDonald (Feb. 18, 1977).

was convened. After the Governor rejected the factfinder's recommendations, the dispute was referred to the Legislature. Prior to legislative action, however, agreement was finally reached on the eve of the union strike deadline.²⁸¹

The Cornell report concluded that the collective bargaining process has not been effectively utilized in New York²⁸² and that the parties to police and firefighter negotiations have indicated a lack of any real movement by either side during bargaining.²⁸³ It has been suggested that collective bargaining cannot be effective unless some "threat" is present to induce labor and management negotiators to agree on a contract.²⁸⁴ In the private sector, the threat is very real since strikes and lockouts have severe economic consequences for unions and employers. In the public sector, it may be that the prospect of a decision by a third party will prove to be the incentive for voluntary agreement. Certainly, the high rate of unanimous decisions under section 209(4)(d)²⁸⁵ would seem to indicate that agreement has been reached prior to issuance of the public arbitration panel award. Similarly, the low rate of appeals from interest arbitration awards under the NYCCBL and the unanimous Board decisions on those appeals²⁸⁶ indicate labor and management satisfaction with the awards. The authors do not believe that the sole reason for any paucity of serious negotiations in the public sector is the structure of the Taylor Law. It appears that the general inexperience of local government authorities and police and firefighter unions with the bargaining process has been a more significant obstacle to real negotiations than the current finality procedures. The employers are generally loath to surrender their traditional prerogative of determining conditions of employment and some are not yet strongly committed to public employee collective bargaining. Public employer-employee contract negotiations are in part a political process wherein the employer shares power with employee representatives, and government officials are understandably reluctant to share political power with any group. What is required in New York State is an increased commitment by government employers to the bargaining process. Such a commitment, of course, will de-

²⁸¹ N.Y. Times, Apr. 18, 1977, at 54, col. 6.

²⁸² See KOCHAN, *supra* note 58, at 323.

²⁸³ *Id.* at 119.

²⁸⁴ See, e.g., *id.* at 125; Kagel & Kagel, *Using Two New Arbitration Techniques*, MONTHLY LAB. REV., Nov. 1972, at 11-12.

²⁸⁵ See note 95 and accompanying text *supra*.

²⁸⁶ See notes 197-200 and accompanying text *supra*.

velop only over time. As experience with the bargaining process increases, it may be hoped that there will be more movement and true negotiation and less reliance on intervention by third-party neutrals. Similarly, as public employee unions gain experience with the techniques of bargaining, they will be better able to persuade employers to negotiate and they may learn to avoid actions that will stiffen the opposition into an intransigent position.²⁸⁷

The great majority of contracts subject to the NYCCBL are settled by agreement rather than by interest arbitration. Awards were issued in only 7.8% of the 411 contracts open since the 1972 enactment of binding arbitration.²⁸⁸ In the authors' view, the low rate of utilization of compulsory arbitration in New York City results from the historically strong commitment to bargaining on the part of both the municipal administration and the local public employee unions. Experienced negotiators prefer, if possible, to settle their own disputes without third-party intervention. Since the NYCCBL provides that the parties shall share the cost of impasse procedures,²⁸⁹ there is an economic sanction militating against the use of the impasse procedures.

For any improvement to take place, public employers must recognize that public employee bargaining is here to stay. Each side of the table must have a commitment to the bargaining process and a sincere desire to reach voluntary accommodation. Until this attitudinal change occurs, there will undoubtedly be a very heavy reliance on such outside intervention as factfinding and arbitration. The repeated use of compulsory arbitration, however, should not be viewed as harmful in these circumstances.²⁹⁰ Nor is it logical to assume that if the arbitration provisions of section 209(4) are repealed, parties will negotiate any more effectively than they do now.

²⁸⁷ See KOCHAN, *supra* note 58, at 4-6.

²⁸⁸ See note 194 and accompanying text *supra*.

²⁸⁹ NEW YORK, N.Y. ADMIN. CODE ch. 54, § 1174(b) (1976).

²⁹⁰ Other commentators have expressed the view that the lack of commitment to and expertise in public sector labor relations is responsible for the number of disputes that require third-party intervention. See authorities cited in Veglahn, *Education by Third Party Neutrals: Functions, Methods, and Extent*, 28 LAB. L.J. 20, 21 nn.1-4 (1977). A recent study of public sector collective bargaining in northern New York State concluded that inexperience and naivete were characteristics on both sides of the table. The author found that there was a lack of commitment to the negotiating process on the part of management and a lack of mutual trust by both management and labor. *Id.* at 24. The parties generally believed that neutrals could help them by fulfilling certain educational functions; these were development of mutual trust, pointing out the advisability of negotiating in private, developing among inexperienced bargainers the ability to define the issues, and encouraging the sharing of information. *Id.* at 25-26.

If there is a return to the legislative hearing process, it is conceivable that public employers, realizing that they have little to lose by a failure to make significant movement during negotiations, will include legislative action as a part of their negotiating strategy. The police and firefighter unions have already warned that they will not quietly return to a situation wherein the employer has the ultimate voice in setting terms and conditions of employment.²⁹¹ The Cornell researchers expressed the following ominous speculation:

[T]here is some indirect evidence to suggest that serious pressures were building up within some of the largest bargaining relationships during the last years under the [former impasse procedure]. The fact that no serious work stoppages occurred throughout the difficult economic period that the arbitration statute has been in effect might be interpreted as an indication of the strength of arbitration as a strike deterrent. A return to [the legislative hearing] in the present economic and political climate would therefore possibly result in eruption of the pressures that appeared to be mounting in previous years. We should caution, however, that this judgment is based more on our general impressions obtained from interviews than on any hard quantitative evidence."²⁹²

It seems clear that for any system of wage and benefit determination to prevent strikes, it must be perceived as essentially fair and just. Professor Morris, in discussing the high rate of strikes under the Australian system of compulsory arbitration, has observed that "the law could not contain workers and unions who felt that they were not getting their fair share from the award process."²⁹³ Any action taken by the legislature to extend or modify the provisions of section 209(4) must be based on a realization that unless the police officers and firefighters of the State of New York believe that the impasse resolution provisions of the Taylor Law are equitable, these provisions are not likely to prevent interruptions of essential services.

There have been no strikes by police or firefighters subject to compulsory binding interest arbitration under the Taylor Law.²⁹⁴ Since the amendment of the compulsory arbitration provisions of

²⁹¹ See note 265 and accompanying text *supra*.

²⁹² KOCHAN, *supra* note 58, at 330.

²⁹³ MORRIS, *The Role of Interest Arbitration in a Collective Bargaining System*, in *FUTURE OF LABOR ARBITRATION IN AMERICA* 197, 223 (1976).

²⁹⁴ New York State Public Employment Relations Board, Statement Concerning Binding Arbitration for Officers or Members of any Organized Fire Dep't or Police Force of any County, Town, Village, or Fire District (Except City of New York) 11 (1977).

the NYCCBL, there has been only one illegal strike among employees subject to its jurisdiction over a contract dispute. This was a 5 1/2 hour walkout by firefighters in 1973.²⁹⁵ There have been a few other strikes by city employees, including two in response to fiscally mandated layoffs arising out of the city's financial crisis, but these were not related to negotiations over the terms of a new contract.²⁹⁶

A frequently heard objection to interest arbitration in the public sector is that it removes from elected officials the ultimate power to fix wages and other terms and conditions of employment and thus constitutes a "threat to the ability of elected officials to continue to set public policy priorities for use of public funds"²⁹⁷ Some of these opponents of interest arbitration have urged a return to legislative action since, in their view, public sector collective bargaining is a political process which must have a political rather than an administrative or judicial resolution.²⁹⁸ Although the superficial symmetry of this argument may seem appealing, closer examination discloses that the theory is faulty. First, it is a false assumption that public sector bargaining is entirely a political process. The will of the electorate and the individual political aspirations of the various negotiators are tempered by the play of economic forces and the requirements of public safety. Second, while collective bargaining negotiations between a government and its employees are in part a political process which very often finds a political solution, those negotiations which result in impasse have obviously failed to find a purely political resolution. These impasses must be resolved in a manner that will produce labor peace and create a general belief that some sort of justice and equity have been accomplished. The purely political solution proposed by local government employers—a return to legislative action—will not be perceived as equitable by public employees because they will view it as affording the employer the final word. There is certainly little incentive to participate in fruitful negotiations when the employer is aware that its persistence will enable it to obtain a determination of the terms and conditions of employment from a body over which it exercises considerable influence. Thus, a return to legislative action may itself

²⁹⁵ [1973] OCB ANN. REP. 9.

²⁹⁶ [1975] OCB ANN. REP. 24.

²⁹⁷ Zagoria, *Compulsory, Binding Arbitration Likely to be Pushed in 1977*, L.M.R.S. Newsletter 3 (Dec. 1976).

²⁹⁸ See Symposium on Police and Firefighter Arbitration in New York State 2.29 (Dec. 3, 1976) (unpublished transcript of proceedings sponsored by New York State Public Employment Relations Board) (remarks of Mr. Wollett).

exert a chilling effect on public employee negotiations.

It is submitted that the tripartite public arbitration panel established by section 209(4), combined with the current judicial review procedures, provide a reasonable method of resolving impasses. The panel is a part of the political process in that both labor and management name a representative to the panel and both sides jointly select the neutral chairman. The deliberations of the panel are an extension of the negotiating process. But the decision of the panel is not purely political, for the panel's award must adhere to the statutory standards, and be within the lawful scope of bargaining and is subject to judicial review. The existence of judicial review does not mean that it will always be utilized, nor that the judges will find themselves compelled to decide terms and conditions of employment for public employees. If past experience is taken as a guide, the majority of arbitration awards will be confirmed by the courts, and any awards that are found to be contrary to law will be sent back for a further arbitration proceeding.

Some of the management spokesmen who oppose interest arbitration argue that "some arbitrators, coming largely from the private sector, are inadequately prepared to understand the realistic limitations on a city's ability to raise taxes or the ripple effects of a change in pay or benefits" and that, in any case, the "outside professional" should not be given the power to make far reaching and complex public policy decisions.²⁹⁹ One answer to this argument is that the parties should select only experienced arbitrators who have shown an ability to rule intelligently in complex cases. Since arbitration decisions are widely reported in a variety of services, there is sufficient available information to guide a party in its choice of an arbitrator.³⁰⁰

The second answer to the criticism concerning the accountability of arbitrators requires an examination of the assumptions underlying the criticism. Is it true that legislators and local government officials will usually be more concerned with fiscal integrity and the public interest than an arbitrator will be? There have been many instances where elected officials have reached generous settlements that have been criticized as being fiscally disastrous.³⁰¹ Further, it

²⁹⁹ Zagoria, *Compulsory, Binding Arbitration Likely to be Pushed in 1977*, L.M.R.S. Newsletter 3 (Dec. 1976).

³⁰⁰ Arbitration awards are reported by, among others, the American Arbitration Association and in the Government Employee Relations Report (BNA).

³⁰¹ For example, San Francisco Mayor Alioto's approval of a substantial wage increase for police officers was opposed by that city's board of supervisors for financial reasons. See Gov't EML. REL. REP. (BNA) No. 546, at B-10 (Mar. 18, 1974).

is not unknown for legislative bodies reacting to union pressure to vote benefits for public employees which are unequalled in the private sector and thereby produce what may be charitably characterized as anomalous situations. For example, the "Heart Bill,"³⁰² renewed regularly by the New York State Legislature,³⁰³ establishes a presumption that any heart ailment occurring during paid employment in a police or fire department arose as a result of such employment. Consequently, disability pensions have been awarded to some former public employees who do not seem disabled. These include "police surgeons" who typically worked 24 hours per week for the police department and are now collecting disability pensions of over \$20,000 per year while admittedly attending to their busy private practices.³⁰⁴ The experience with the "Stavisky-Goodman" legislation³⁰⁵ similarly illustrates that when a powerful union is frustrated at the bargaining table it may resort to direct legislative action.

The point of this discussion is not to castigate either public employers or public employees, but to introduce some balance into a discussion which is usually characterized by statements such as: "if you're ready to let an arbitrator levy a first mortgage on your City Hall or County Building, you're ready for compulsory arbitration."³⁰⁶ All the evidence to date indicates that to the extent city hall is mortgaged by decisions affecting employment relations, that mortgage actually has been necessitated by management or legislative actions and not by decisions rendered by interest arbitrators. It should be recognized that there are competent, public-spirited arbitrators who are well able to analyze arguments relating to budgetary matters and fiscal priorities.

While compulsory arbitration is useful as a pressure valve where a strike by public employees is forbidden, it should not take the place of collective bargaining, but rather should be used as a supplement or aid. Although a tripartite arbitration panel can serve as an extension of the negotiating process, it does involve third-party intrusion, and thus its use should continue to be the exception

³⁰² N.Y. GEN. MUN. LAW § 207-k (McKinney Supp. 1977).

³⁰³ See N.Y. RETIRE. & SOC. SEC. LAW § 480 (McKinney Supp. 1977).

³⁰⁴ See N.Y. Times, Feb. 9, 1977 at 1, col. 2.

³⁰⁵ Ch. 132, [1976] N.Y. Laws 342 (McKinney), amending N.Y. EDUC. LAW § 2576(5) (McKinney Supp. 1977). This legislation was reviewed and upheld in *Board of Educ. v. City of New York*, No. 101 (Ct. App. April 5, 1977), *rev'g* 54 App. Div. 2d 630, 387 N.Y.S.2d 614 (1st Dep't 1976), *aff'g* 88 Misc. 2d 179, 387 N.Y.S.2d 195 (N.Y. County 1976).

³⁰⁶ Zagoria, *Compulsory, Binding Arbitration Likely to be Pushed in 1977*, L.M.R.S. Newsletter 3, 4 (Dec. 1976).

rather than the rule. Voluntary agreement is preferable, and the parties should work toward that goal. Clearly, training and experience in methods of preparing for and conducting negotiations will help promote the goal of fair and reasonable public employment contracts. The New York experience with interest arbitration and the court decisions upholding it show that interest arbitration does work in cases where the strike is banned, and that it is a far preferable alternative to unilateral action by the employer or an illegal strike by employees.

Authors' Note: As this Article went to print, the New York Court of Appeals unanimously reversed the appellate division in *City of Buffalo v. Rinaldo*, No. 414 (N.Y. Ct. App. June 6, 1977), *rev'g* 56 App. Div. 2d 212, 392 N.Y.S.2d 46 (4th Dep't 1977), *discussed in notes* 87-93 and accompanying text *supra*, and reinstated the award of the arbitrators. In so ruling, the court reaffirmed the principle enunciated in *Caso v. Coffey*, 41 N.Y.2d 153, 158, 359 N.E.2d 683, 686, 391 N.Y.S.2d 88, 91 (1976), *discussed in notes* 78-86 and accompanying text *supra*, that judicial review of arbitration awards is limited to a determination of whether the award is rational or arbitrary and capricious. Finding that the arbitration panel had considered numerous factors in formulating its award, including testimony regarding the City's final problems and "identified, nonspeculative sources of additional revenue," No. 414, slip op. at 4, the *Rinaldo* Court held that the award was not irrational. The Court of Appeals stated that "it must be recognized that the statute, the wisdom of which is for others to decide, vests broad authority in the arbitration panel to determine municipal fiscal priorities within existing revenues." *Id.* Thus, the court concluded, "the Appellate Division should not have drawn its own conclusions from the weight of the evidence or substituted its judgment for that of the arbitrators." *Id.* at 5.

On June 7, 1977, Governor Carey signed a bill extending New York State's local police and fire arbitration statute for another 2 years. Ch. 216, § 1, [1977] N.Y. Laws. The legislation made various changes in § 209 of the Taylor Law, N.Y. Civ. SERV. LAW § 209 (McKinney Supp. 1976). The most significant changes are the elimination of the factfinding step prior to arbitration, the addition of a requirement that the parties share the cost of the neutral member of the panel as well as the cost of any transcript made, and the addition of a requirement that the panel consider certain enumerated criteria and "specify the basis for its findings." Ch. 216, § 1, [1977] N.Y. Laws.