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RESOLVING PUBLIC EMPLOYMENT DISPUTES: A GUIDE FOR WEST VIRGINIA

CHARLES MATTHEW KINCAID*

PART ONE

I. INTRODUCTION

At a press conference on March 11, 1969, Arch A. Moore, Jr., Governor of the State of West Virginia, dramatically announced that he was discharging over 3000 non-civil-service employees of the State Road Commission for engaging in a strike which arguably had left public highways unsafe for travel during inclement weather. While the motivation behind Governor Moore's decision has been subject to debate,¹ the legality of this discharge of non-tenured state employees was supported in a subsequent court opinion.² The incident illustrates a political decision which was once

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¹ Those persons skeptical of the motivation behind Governor Moore's massive discharge suspected that the snowfall of March 11, 1969, was used as a pretext for activating a large portion of what was left of the West Virginia spoils system. For an account of the sequence of events leading to the collective discharge see *Kirker v. Moore*, 308 F. Supp. 615 (S.D.W. Va. 1970), *aff'd*, 436 F.2d 423 (4th Cir. 1971), *cert. denied*, 404 U.S. 824 (1971).

In a later, unrelated case, in which the discharged non-civil-service manager of a state liquor store sued the Alcohol Beverage Control Commissioner, the district court reluctantly sanctioned use of the West Virginia political patronage system, noting that "[t]hose who, figuratively speaking, live by the political sword must be prepared to die by the political sword." *Nunnery v. Barber*, 365 F. Supp. 691, 695 (S.D.W. Va. 1973), *aff'd*, 503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975), quoting from *AFSCME v. Shapp*, 443 Pa. 527, 536, 280 A.2d 375, 378 (1971).

² *Kirker v. Moore*, 308 F. Supp. 615 (S.D.W. Va. 1970). In *Kirker*, Lyle Kirker, an official of the Laborers' District Council of Charleston, West Virginia, sued Governor Moore and other persons on behalf of the discharged employees, who had signed authorization cards designating the Laborers' District Council of Charleston as their exclusive collective bargaining representative. Prior to the filing of this lawsuit, Kirker had met with State Road Commissioner Ritchie and apparently had stated that he desired to negotiate a collective bargaining agreement for the benefit of district council members. Chief Judge Field of the district court sustained Governor Moore's discharge decision on the ground that the state employees had been engaged in a strike which was both illegal under common law and not protected by any constitutional guarantee and on the basis that the lawsuit was against the State of West Virginia and, therefore, was prohibited by the eleventh amendment to the Constitution of the United States. *Id.*

possible in most states before the advent of civil service job security and, more importantly, reflects the remnant of a rather one-sided approach to labor-management relations which has helped spur recent radical changes in the nature of the public employer-employee relationship.

Have public employee unions gone too far in their demands? Should some or all public employees have the right to strike and for what purposes and when? How are disputes between governmental bodies and their employees effectively resolved? What rights and obligations belong to governmental employees, the public, and the government? What is the relationship between public sector collective bargaining and a civil service system? What is the scope of public sector collective bargaining? What have been the effects of public employee unionization and the resultant collective bargaining? These are some of the broad questions which have been a motivating factor in the development of this paper.

In discussing possible answers to the questions just posed, this paper will concentrate solely on state and local governments and will analyze how they have approached their new roles as public managers obligated, by law or by practicalities, to deal with public employee unions. Emphasis will be placed on how management and labor in the public sector resolve their differences, with a focus on the role of arbitration in settling disputes.

Before proceeding to an analysis of various mechanisms used to resolve employer-employee disputes in the public arena, a rather lengthy overview of public sector labor-management relations is necessary to place dispute resolution in perspective. This approach is required due to the fetal state of development of government labor-management relations in West Virginia.

II. PERSPECTIVES

A. *A Statistical Overview*

Public employment relations today is a cauldron bubbling with activity. Since the early 1960's, an ever increasing number of states and local governments have enacted collective bargaining statutes governing public employees. With the onslaught of legislation combined with intensive organizational activity, membership in public employee labor unions has grown to the point that the public sector is more unionized than the private sector.³

³ Approximately 25 percent of all private wage and salary workers belong to

It probably seems ironical that West Virginia, which is considered to have the most unionized private sector, has one of the least unionized state governments.⁴ Factors which seem likely to be responsible for this irony are the lack of sizable urban communities; the essentially rural character of the populace; strong resistance from governmental decision-makers; a civil service system designed to ameliorate abuses of public management; the lack of growth in the number of state employees until recent years; a lack of cohesiveness within public employee associations, exclusive of teacher associations; a generally accepted unwillingness on the part of state employees to strike; and the absence of legislation conducive to public employee unionization.⁵ Caveat: these are sup-

labor unions. By comparison, in 1970, 38 percent of all full-time state and local government employees, excluding teachers and transit workers, were unionized. Of course, teachers, who compose about one-fourth of all state and local government employees, are even more unionized, considering their traditional affiliations with the National Education Association and with the newer, more activist American Federation of Teachers. In cities of 10,000 or more population, approximately 60 percent of all public employees are represented by unions or associations, with many of the major cities being totally unionized. J. STEIBER, *PUBLIC EMPLOYEE UNIONISM* 1-13 (1973).

Much of the union activities during the 1960's may well have been a reaction to the rapidly expanding number of state and local government employees; for example, between 1963 and 1968, their numbers swelled from 6.87 million to 9.42 million persons. BUREAU OF NATIONAL AFFAIRS, *LABOR RELATIONS YEARBOOK—1968*, at 451 (1969).

⁴ In order of degree of unionization are these state governments (numbers show percentage of state workers [presumably excluding teachers] in collective bargaining organizations, according to the 1972 Census of Governments): Hawaii—85.8; Pennsylvania—85.2; Connecticut—79.8; Oregon—76.1; New York—68.0; California—62.4; Rhode Island—61.2; Maine—57.3; Michigan—54.2; Alaska—51.6; Maryland—48.1; Vermont—47.9; North Carolina—45.0; Alabama—44.8; Washington—44.4; Wyoming—43.8; Illinois—43.4; Massachusetts—43.4; Minnesota—43.3; New Hampshire—42.8; Nevada—42.1; Delaware—40.6; New Jersey—38.7; Idaho—38.6; Utah—37.7; Ohio—36.7; Wisconsin—35.8; Colorado—35.8; Arizona—33.2; Montana—32.5; Texas—29.7; North Dakota—29.6; South Carolina—28.7; South Dakota—28.5; Virginia—26.9; Indiana—22.6; Missouri—22.4; Iowa—22.3; New Mexico—22.2; Louisiana—19.3; Nebraska—17.4; Kansas—15.0; Arkansas—13.9; Tennessee—8.3; Kentucky—6.9; Oklahoma—3.8; Florida—3.2; West Virginia—2.4; Georgia—2.0; Mississippi—1.9. *STATÈ GOV'T NEWS*, Aug. 1975, at 3.

⁵ One author, after reviewing variables which have influenced enactment of public sector legislation in all 50 states, concluded that West Virginia is a state where public sector collective bargaining laws are much less comprehensive than predicted by his analytical model. He suggested that, although private sector unionization is high in West Virginia and per capita income has increased between 1960 and 1970, significant legislation has not developed in public employment

positions only and remain untested. Much of the legislative lobbying concerning labor-management relations in the public sector of West Virginia is occurring on behalf of municipal employees, especially police and firefighter groups, which consistently have exhibited a potent influence on legislative decisions.

With the increase in public sector union membership nationally have come a variety of state statutory collective bargaining⁶ schemes. The statutory situation as of late 1975 was as follows:⁷ Only nine states, including West Virginia,⁸ lacked legislation;⁹ 18

because the United Mine Workers has not transformed its potential power into effective political effort on behalf of public employees and because there has been active opposition to such legislation by the Governor. Kochan, *Correlates of State Public Employee Bargaining Laws*, 12 IND. REL. 336 n.13 (1973).

⁶ The term "collective bargaining," as used here, means the process of establishing terms and conditions of employment through negotiations between the public employer and the exclusive representative of the public employees contained in the bargaining unit and memorializing the result thereof into a written agreement. Collective bargaining is to be distinguished from "meeting and conferring," which lacks one or more of the elements of collective bargaining. Negotiations under meet and confer statutes usually imply employer-employee discussions leading to unilateral adoption of policies by the legislative body rather than a written contract and take place with multiple employee representatives rather than an exclusive bargaining agent.

As will be explained *infra*, collective bargaining in the private sector has come to mean that the parties meet as equals at the bargaining table and are free to discuss all matters which relate to wages, hours, and working conditions. Mandatory subjects of bargaining may be negotiated to the point of impasse since neither side is required to make concessions, but permissive subjects may not be insisted upon to impasse. Practically speaking, since the mandatory subject concept has been construed so liberally, the parties are free, in effect, to negotiate upon virtually all major matters concerning the employment relationship.

It is readily assumed that most states have opted for the private sector collective negotiations model rather than the meet and confer approach. In actuality, many states have rejected pure versions of either model. Although some persons view meet and confer statutes as collective begging, not collective bargaining in any sense of the word, one author believes that recent experience shows "there is little to support the notion that there is any wide-spread difference in tactic or technique in the bargaining processes under these two models. . . . [U]nions in the public sector have pressed for the same type of demands and with the same vigor under both statutory bargaining models." Edwards, *An Overview of the "Meet and Confer" States—Where Are We Going?*, 16 L. QUADRANGLE NOTES 10-15 (1972).

⁷ In addition to the official code of each state see C. MAGEL, *GUIDE FOR LEGISLATIVE ACTION AND STATE COLLECTIVE BARGAINING LAWS* (1974); 51 GERR, RF 1011-6027 (1975).

⁸ Although West Virginia has no general legislation governing the public sector collective bargaining relationship (there are, of course, civil service statutes and other statutes related to wages, pensions, working conditions, etc.), guidance from

states and the District of Columbia had comprehensive statutes requiring broad-scope collective bargaining for many state and local government employees;¹⁰ five states had comprehensive stat-

the attorney general has been consistent since the 1930's. For example, Attorney General Robertson concluded:

In summary, you are advised that the right of collective bargaining, closed shop, strike, etc., does not exist with employees of government at the state, county, or municipal level in West Virginia. All public employees, however, have the right to join any association or labor organization of their own choosing and cannot be discriminated against because of such membership. The final determination of wages, hours, working conditions and the like, rests with the particular governmental unit and cannot be delegated away. However, recognition of a union, professional teaching association, nonteaching association, or association representing the employees, is legally permissible and in many instances highly desirable. Surely no one can object, legally or in good conscience, to the right of public officials to discuss wages, hours, working conditions and policies with their public employees or their duly constituted chosen representatives. These matters should be, and are, subject for reasonable negotiation.

49 OP. W. VA. ATT'Y GEN. 448, 452 (1962).

⁹ Arizona, Colorado, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, and West Virginia. Louisiana, while lacking collective bargaining legislation, does provide for union dues checkoff. LA. REV. STAT. ANN. § 42:457 (Supp. 1976).

¹⁰ CONN. GEN. STAT. ANN. §§ 7-467 to -478 (1972, Supp. 1976) (municipal employees); CONN. GEN. STAT. ANN. §§ 10-153a to -153h (Supp. 1976) (teachers); Conn. Pub. A. No. 75-566, §§ 1-11 (Appendix Pamphlet 1976) (state employees); FLA. STAT. ANN. §§ 447.20-607 (Supp. 1976) (public employees); HAWAII REV. STAT. §§ 89-1 to -20 (Supp. 1975) (public employees); IND. ANN. STAT. §§ 20-7.5-1-1 to -14 (1975) (teachers); IND. ANN. STAT. §§ 22-6-4-1 to -13 (Supp. 1976) (public employees); IOWA CODE ANN. §§ 20.1-.27 (Supp. 1976) (public employees); ME. REV. STAT. ANN. tit. 5, §§ 751-53 (Supp. Pamphlet 1973, Supp. 1976) (state employees); ME. REV. STAT. ANN. tit. 26, §§ 961-73 (1964, Supp. 1976) (municipal employees); ME. REV. STAT. ANN. tit. 26, §§ 979 to 979-0 (1964, Supp. 1976) (state employees); ME. REV. STAT. ANN. tit. 26, §§ 1021-34 (Supp. 1976) (university employees); MASS. ANN. LAWS ch. 150E, §§ 1-15 (1976) (public employees); MINN. STAT. ANN. §§ 179.35-.47 (1966, Supp. 1976) (charitable hospital employees); MINN. STAT. ANN. §§ 179.61-.76 (Supp. 1976) (public employees except charitable hospital employees); MONT. REV. CODES ANN. §§ 41-2201 to -2209 (Supp. 1975) (nurses); MONT. REV. CODES ANN. §§ 59-1601 to -1617 (Supp. 1975) (public employees except nurses and professional engineers); NEB. REV. STAT. §§ 48-801 to -823, -837 to -838 (1974) (public employees); NEB. REV. STAT. §§ 79-1287 to -1295 (1971) (teachers); N.H. REV. STAT. ANN. § 31:3 (1955) (town employees); N.H. REV. STAT. ANN. §§ 98-C:1-:7 (Supp. 1973) (state and nonprofessional university employees); N.H. REV. STAT. ANN. §§ 105-B:1-14 (Supp. 1973) (local government police); N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973, McKinney Supp. 1976) (public employees); ORE. REV. STAT. §§ 243.650-.782 (1975 Replacement Part) (public employees); PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Supp. 1976) (firefighters, police); PA. STAT. ANN. tit. 43, §§ 1101.101-

utes requiring broad-scope collective bargaining for local government employees only;¹¹ Alaska had a comprehensive statute requiring broad-scope collective bargaining for state employees, while leaving local government bargaining to the option of the political subdivisions;¹² three states had limited forms of mandatory collective bargaining for state employees;¹³ five states had mandatory collective bargaining statutes for specific groups of employees;¹⁴ three states had mandatory meet and confer statutes;¹⁵ 12 states in some fashion authorized collective bargaining

.2301 (Supp. 1976) (public employees except firefighters and police); PA. STAT. ANN. tit. 53, § 39951 (Supp. 1976) (transit workers); R.I. GEN. LAWS ANN. §§ 28-9.1-1 to -15 (1968, Supp. 1975) (firefighters); R.I. GEN. LAWS ANN. §§ 28-9.2-1 to -15 (1968, Supp. 1975) (police); R.I. GEN. LAWS ANN. §§ 28-9.3-1 to -16 (1968, Supp. 1975) (teachers); R.I. GEN. LAWS ANN. §§ 28-9.4-1 to -19 (1968) (municipal employees except firefighters, police, and teachers); R.I. GEN. LAWS ANN. §§ 36-11-1 to -11 (1970, Supp. 1975) (state employees); S.D. COMPILED LAWS ANN. §§ 3-18-1 to -17 (1974, Supp. 1976) (public employees); S.D. COMPILED LAWS ANN. §§ 9-14A-1 to -22 (Supp. 1976) (firefighters, police); WIS. STAT. ANN. § 66.94(29) (1965) (transit workers); WIS. STAT. ANN. §§ 111.70-.77 (1974, Supp. 1976) (municipal employees); WIS. STAT. ANN. §§ 111.80-.97 (1974, Supp. 1976) (state employees); 1 APP. D.C. CODE ANN., ORG. ORD. NO. 25 (1973).

¹¹ MICH. STAT. ANN. §§ 17.454-.455 (1975); NEV. REV. STAT. §§ 288.010-.280 (1975) (local government employees); OKLA. STAT. ANN. tit. 11, §§ 548.1-.14 (Supp. 1976) (firefighters, municipal employees, police); OKLA. STAT. ANN. tit. 70, §§ 509.1-.10 (1972) (school employees); VT. STAT. ANN. tit. 21, §§ 1721-35 (Cum. Supp. 1976) (municipal employees); WASH. REV. CODE ANN. §§ 41.56.010-.950 (1972, Supp. 1975); WASH. REV. CODE ANN. §§ 41.58.005-.901 (Supp. 1975); WASH. REV. CODE ANN. §§ 53.18.010-.060 (Supp. 1975) (port district employees).

¹² ALASKA STAT. §§ 23.40.070-.260 (1972).

¹³ DEL. CODE ANN. tit. 14, §§ 4001-13 (1974) (certified public school employees); DEL. CODE ANN. tit. 19, § 802 (1974) (transportation workers); DEL. CODE ANN. tit. 19, §§ 1301-12 (1974) (public employees); VT. STAT. ANN. tit. 3, §§ 901-1005 (1972 Replacement Edition, Cum. Supp. 1976) (state employees, state college employees); WASH. REV. CODE ANN. §§ 28B.16.010-.230 (1970, Supp. 1975) (certain employees of state institutions of higher learning); WASH. REV. CODE ANN. §§ 28B.52.010-.200 (Supp. 1975) (community college academic employees); WASH. REV. CODE ANN. §§ 41.56.010-.950 (1972, Supp. 1975); WASH. REV. CODE ANN. §§ 41.58.005-.901 (Supp. 1975); WASH. REV. CODE ANN. §§ 41.59.010-.950 (Supp. 1975) (certificated public school employees).

¹⁴ GA. CODE ANN. §§ 54-1301 to -1315 (1974) (firefighters in cities above 20,000); IDAHO CODE §§ 33-1271 to -1276 (Supp. 1976) (teachers); IDAHO CODE §§ 44-1801 to -1811 (Supp. 1976) (firefighters); KY. REV. STAT. ANN. §§ 78.470-.480 (Supp. 1976) (county police); KY. REV. STAT. ANN. §§ 345.010-.130 (Supp. 1976) (firefighters); MD. ANN. CODE art. 77, §§ 160-160A (1975 Replacement Volume, Supp. 1976) (public school employees in certain counties); WYO. STAT. ANN. §§ 27-265 to -273 (1967 Replacement Volume) (firefighters).

¹⁵ CAL. GOV'T CODE §§ 3500-11 (Deering 1973) (local government employees); CAL. GOV'T CODE §§ 3525-36 (Deering 1973) (state employees); CAL. LABOR CODE §§

for some or all public employees or granted to public employees the right to present proposals;¹⁶ and Illinois, by executive order, granted mandatory collective bargaining for executive branch employees.¹⁷

Administration of public employer-employee relations has been vested in previously established labor relations agencies,¹⁸ has been trusted to new agencies,¹⁹ and sometimes has been left to the

1960-63 (Deering 1976) (firefighters); KAN. STAT. ANN. §§ 72-5413 to -5425 (1972) (teachers); KAN. STAT. ANN. §§ 75-4321 to -4337 (Supp. 1975) (public employees except teachers); MO. ANN. STAT. §§ 105.500-.530 (Supp. 1976) (public employees except deputy sheriffs, highway patrolmen, national guard, police, and teachers).

¹⁶ Alabama—ALA. CODE tit. 37, § 450(3) (Cum. Supp. 1973) (firefighters). Arkansas—Fort Smith v. State Council 38, AFSCME, 245 Ark. 409, 433 S.W.2d 153 (1968); Op. Ark. Att'y Gen. (Sept. 19, 1972) (state and local government employees). Georgia—Op. Ga. Att'y Gen. (Sept. 1, 1966) (teachers). Idaho—Op. Idaho Att'y Gen. (Mar. 18, 1959) (local government employees). Illinois—Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966) (local government employees). Indiana—IND. ANN. STAT. §§ 22-6-4-1 to -13 (Supp. 1976) (public employees). Kentucky—Comm'r of Personnel, Policy Statement (Memo. Dec. 20, 1966) (state employees); Op. Ky. Att'y Gen. No. 64-591 (1964) (local government employees). Missouri—Op. Mo. Att'y Gen. No. 276 (1968) (teachers). New Mexico—Op. N.M. Att'y Gen. (Apr. 14, 1971) (state employees). North Dakota—N.D. CENT. CODE §§ 34-11-01 to -05 (1972 Replacement Volume) (public employees). Utah—Op. Utah Att'y Gen. No. 60-003 (1960) (state employees); Op. Utah Att'y Gen. (Oct. 1, 1945) (local employees). Virginia—VA. CODE ANN. § 2.1-114.5 (Supp. 1976) (grievance procedure for state employees); VA. CODE ANN. § 15.1-7.1 (Supp. 1976) (grievance procedure for local employees); Op. Va. Att'y Gen. (Feb. 18, 1970) (teachers); Op. Va. Att'y Gen. (July 7, 1962) (firefighters, local employees, police).

¹⁷ Ill. Exec. Order No. 6 (1973).

¹⁸ CONN. GEN. STAT. ANN. § 7-471 (1972) (municipal employees); Conn. Pub. A. No. 75-566, § 4 (Appendix Pamphlet 1976) (state employees); MASS. ANN. LAWS ch. 150E, § 1 (1976), defining "commission"; MICH. STAT. ANN. §§ 17.454(2)(c), .455(1)(b) (1975), defining "board"; NEB. REV. STAT. § 48-803 (1974) [the council was "previously established" in relationship to the collective bargaining statutes, NEB. REV. STAT. §§ 48-837 to -838 (1974)]; PA. STAT. ANN. tit. 43, §§ 1101.501-503 (Supp. 1976) (public employees except firefighters and police); R.I. GEN. LAWS ANN. §§ 28-9.3-4 to -6 (1968), describing functions of the State Labor Relations Board (teachers); R.I. GEN. LAWS ANN. §§ 28-9.4-2, -4 to -7 (1968), describing functions of the State Labor Relations Board (municipal employees); R.I. GEN. LAWS ANN. § 36-11-8 (Supp. 1975), describing functions of the State Labor Relations Board (state employees); WIS. STAT. ANN. §§ 111.70(1)(c), (4) (1974), defining and describing powers of "commission" (municipal employees); WIS. STAT. ANN. § 111.81 (1974), defining "commission" (state employees).

¹⁹ IND. ANN. STAT. § 20-7.5-1-9 (1975) (teachers); IND. ANN. STAT. § 22-6-4-10 (Supp. 1976), extending scope of Indiana Education Employment Relations Board to govern public employee relations generally; KAN. STAT. ANN. § 75-4323 (Supp.

employer.²⁰ Generally, the functions of these agencies have been patterned after the National Labor Relations Board (NLRB), which is the dominant governing body in private sector labor relations. Indeed, it is because the NLRB is precluded by Congress from exercising jurisdiction over employer-employee relations of state and local governments that these governments have the authority to develop the regulatory bodies just noted.²¹ In light of the experimentation in public sector labor relations being performed by a multiplicity of jurisdictions, it is questionable whether federal legislation is now appropriate to provide uniformity in this area of the law.²²

1975) (public employees except teachers); KY. REV. STAT. ANN. § 345.120 (Supp. 1976) (firefighters); ME. REV. STAT. ANN. tit. 5, § 751 (Supp. 1976) (state employees); ME. REV. STAT. ANN. tit. 26, § 968 (1964, Supp. 1976) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-A(2) (1964) (state employees), defining "board" and thus extending scope of Public Employees Labor Relations Board to include state employees; ME. REV. STAT. ANN. tit. 26, § 1022(2) (Supp. 1976) (university employees), defining "board" and thus extending scope of Public Employees Labor Relations Board to include university employees; MINN. STAT. ANN. § 179.63(2) (Supp. 1976) (public employees except charitable hospital employees), defining "director" and referring to creation in MINN. STAT. ANN. § 179.02 (Supp. 1976); MINN. STAT. ANN. §§ 179.71-.72 (Supp. 1976) (public employees except charitable hospital employees); NEV. REV. STAT. §§ 288.080-.110 (1975) (local government employees); N.H. REV. STAT. ANN. § 98-C:1(III) (Supp. 1973) (state and nonprofessional university employees), defining "commission"; N.Y. CIV. SERV. LAW § 205 (McKinney 1973); OKLA. STAT. ANN. tit. 11, § 548.4-1 (Supp. 1976) (firefighters, municipal employees, police).

²⁰ KAN. STAT. ANN. §§ 72-5417 to -5420 (1972), describing functions of board (teachers—state board of education); MD. ANN. CODE art. 77, §§ 160-160A (1975 Replacement Volume), defining "public school employer" and describing functions of such (public school employees in certain counties—each employer); MONT. REV. CODES ANN. §§ 41-2202, -2204, -2206 to -2208 (Supp. 1975), defining "board" and describing functions of such (nurses—state board of health); N.D. CENT. CODE §§ 15-38.1-10 to -11 (1971 Replacement Volume), describing functions of board (teachers—school board).

²¹ The definition of "employer" in the Labor-Management Relations Act, 29 U.S.C. §§ 141-97 (1970) [hereinafter denoted as LMRA], expressly excludes "any State or political subdivision thereof." LMRA § 2(2), 29 U.S.C. § 152(2) (1970). Nevertheless, the legal boundaries of the exclusion are not clear since the term "political subdivision" is not defined in the LMRA. In attempting to clarify this situation, the United States Supreme Court declared in *NLRB v. Natural Gas Utility District* that federal law determined the scope of the exclusion and that the NLRB's construction of its own statute was entitled to great respect. However, the Court then weighed numerous factors and disagreed with the NLRB's ruling by concluding that the natural gas utility district was a political subdivision of Tennessee and thereby was excluded from coverage under the LMRA. 402 U.S. 600, 602-09 (1971).

²² For a lengthy discussion of this issue by both proponents and opponents see

B. A Brief Historical Perspective

With amazing rapidity since 1961, when Wisconsin enacted the first significant state collective bargaining statute,²³ states have initiated legislation regulating public employer-employee labor relations. Shortly thereafter, in 1962, Federal Executive Order No. 10,988²⁴ provided a framework for federal employee collective bargaining. In all, during the 1960's, 22 states passed statutes concerning collective bargaining rights of state or local employees with slightly less than that number approving similar legislation in the 1970's.²⁵

To place these recent legislative activities in perspective, a glance at the past is appropriate.²⁶ As did their brethren in the private sector, skilled craftsmen in the public sector during the 1830's joined craft unions. At the state and local levels, employees were successful in shortening the length of the workday. In 1836, however, governmental resistance at the federal level led to a strike at the Washington, D.C., Naval Shipyard and a mass confrontation with the President. The Executive yielded eventually, and the federal employees won their shorter workweek. The presidential concession marked the trend that has prevailed through subsequent years—once private sector employees have gained a benefit, federal employees press for the same benefit.

Not until the 1880's did public associations become commonplace; further, because of their docility, these groups did not share in the emergence during the next few decades of the labor movement as a powerful force in the American political system. The usual pattern prevailed—the more militant private sector led the

AMERICAN ARBITRATION ASS'N & INTERNATIONAL PERSONNEL MANAGEMENT ASS'N, FEDERAL LEGISLATION FOR PUBLIC SECTOR COLLECTIVE BARGAINING (1975).

²³ Wisconsin Employment Relations Act § 1, ch. 633, § 1, [1961] Wis. Laws, as amended Wis. STAT. ANN. §§ 111.70-.71 (1974, Supp. 1976). In 1959, Wisconsin recognized the right of municipal employees to engage in concerted activities and implemented that right in 1961. See Anderson, *Labor Relations in the Public Service*, 1961 Wis. L. Rev. 601.

²⁴ Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Comp.), superseded by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Comp.).

²⁵ See statutes cited notes 10-16 *supra*.

²⁶ For an historical perspective of the public employee union movement see W. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 17-27 (1961); J. LOEWENBERG & M. MOSKOW, COLLECTIVE BARGAINING IN GOVERNMENT 2-11 (1972); J. STIEBER, *supra* note 3, at 1-13; *Project: Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A.L. Rev. 887, 893-96 (1972).

way with public employees eventually reaping the harvest sown by the private employee labor unions. Once into the twentieth century, inflationary forces preceding World War I gave momentum to state and local government employees to affiliate with the private sector labor movement. Then came the Boston police strike of 1919, which seemed to halt the gains of governmental unionism.²⁷

With the strong labor movement upsurge in the 1930's came a revived interest in public employee unions. In 1946, the American Federation of Labor (AFL) founded the first national union for governmental employees at the state and local levels—the American Federation of State, County, and Municipal Employees (AFSCME). Other public employees, such as police, firefighters, and teachers, began to organize along more occupational lines. Major federal legislation²⁸ affecting the private sector again provided impetus for state and local government employees to stay at the heels of private sector union members, although there was an anti-labor tone to legislation following a rash of postwar strikes.

As the United States adjusted to a peacetime economy during the 1950's, the ability of labor unions, in both the private and public sectors, to effect political change began to grow. By the beginning of the administration of President John Kennedy, the passivity which had characterized the previous decade was replaced with an activism in many areas of society, including public

²⁷ The Boston police strike appears to have contributed to a hardening of the public attitude toward the aspirations of public employees, which attitude has been a major factor in shaping public sector legislation. The strike attracted front-page, coast-to-coast attention in newspapers, which often sensationalized the lawlessness resulting from the strike. Massachusetts Governor Calvin Coolidge found notoriety by proclaiming: "There is no right to strike against the public safety of anybody, anywhere at any time." S. SPERO, *GOVERNMENT AS EMPLOYER* 280 (1948). "From that time on, the dictum 'one cannot strike against the government' became a maxim of such demonstrated political efficacy that whenever politicians, Republican or Democrat, liberal or conservative, ran into serious trouble in their employment relations, they would invoke it as a substitute for a personnel policy." *Id.* at V.

²⁸ Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. §§ 141-97 (1970; Supp. V, 1975); National Labor Relations Act of 1935 (Wagner Act), 29 U.S.C. §§ 151-68 (1970; Supp. V, 1975); Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 153, 158-60, 164, 186-87, 401-531 (1970; Supp. V, 1975); Fair Labor Standards Act of 1938 (Wage-Hour Law), 29 U.S.C. §§ 201-16, 217-19 (1970; Supp. V, 1975); Railway Labor Act of 1926, 45 U.S.C. §§ 151-88 (1970); War Labor Disputes Act of June 25, 1943, ch. 144, §§ 1-11, 57 Stat. 163 (expired by its own provisions, 1947).

employee unionism; this spirited pace of increased unionization and legislative change in the public sector continues.

C. *Political Perspective*

To discuss public sector labor-management relations properly, one must also explore the political perspective, which gives the relationship its form and flavor. In order to understand how collective bargaining functions in state and local governments, examination must be made of collective bargaining as a part of the political process,²⁹ for the operation of these governments ultimately is an exercise of political decision-making. More importantly, collective bargaining in the public sector shapes political decision-making, as will be explained shortly, and thus deserves scrutiny.

1. *Differences Between Public Employers and Private Employers*

Unlike their private sector counterparts, public employees work for a different breed of employer.³⁰ First, governmental decisions as to the traditional subjects of collective bargaining—wages, hours, and working conditions—are substantially political in nature. State and local governments, when involved in political decision-making, are engaged in a balancing of demands from various groups of persons, including public employees, for government-provided money and services. To some degree these decisions are influenced by the same market forces which shape private employer decisions; for example, availability of qualified personnel and expression of wants and desires by consumers and taxpayers. However, neither the profit motive nor product competition in monopolistic governmental services influences public employer decisions.

Second, in more than just an academic sense, governmental employees work for the public constituency. This constituency is made up of consumers and taxpayers (purchasers), often overlapping roles, whose interests are largely antithetical to the desires of public employees for, *inter alia*, lighter work loads and higher

²⁹ For an excellent article with this theme see Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); cf. Love & Sulzner, *Political Implications of Public Employee Bargaining*, 11 IND. REL. 18 (1972).

³⁰ See Rhemus, *Labor Relations in the Public Sector* (1974) (paper presented to the Third World Congress of the International Industrial Relations Association); Edwards, *Labor Relations in the Public Sector*, 10 DUQUESNE L. REV. 357, 358-64 (1972); Summers, *supra* note 29, at 1159-60.

wages. In a practical vein, what is even more important is that the members of the public far outnumber their public employees (which is not to say that public employees, as members of the public, do not exert influence upon others).

Third, unlike private employers, which centralize authority for collective bargaining, governmental employers have several foci of authority for collective bargaining. American governmental bodies are characterized by a division of authority (separation of powers) accompanied by checks and balances. In particular, budgetary and personnel policy decisions are often split between executive and legislative bodies. For example, in early 1976 in Washington, D.C., after many months of collective bargaining regarding police department salaries, Mayor Washington agreed to a short term eight percent wage increase, which was promptly reduced to six percent by the city council. And in larger cities where departmental heads engage in separate efforts at collective bargaining, further fragmentation of bargaining authority exists. Add to this a host of elected officials with their own staffs and a plethora of autonomous bodies acting as employers, numerous forms of government with varying degrees of blurred lines of authority, and a lack of statutory definitiveness, and the problem grows more complex. Hence, multilateral collective bargaining, as contrasted with bilateral collective bargaining in the private sector, is a phenomenon of labor-management relations in government.

Fourth, governmental employers generally have adopted civil service or merit systems which, in principle, stress individual merit as the determinative factor in personnel selection and protect employees against patronage politics and other employer abuses. In contrast, while private employers attempt to use merit as the guiding principle in personnel selection, unions stress the role of seniority (which need not necessarily conflict with merit) and act as exclusive representatives of the bargaining unit employees.

Fifth, in private industry the lines of authority and supervision are more clearly drawn than in governmental units. Supervisors in public employment sometimes have their hiring, discharge, and discipline duties limited by civil service regulations or performed by personnel departments and are often included within employee bargaining units in contrast to private sector practice.

Sixth, local governments are subject to numerous financial constraints of which the private employer is free. State legislatures, which traditionally have been jealous of their own tax

sources, have delimited the often meager and rigid boundaries of local government taxation and rarely heed the cries of cities and counties for more progressive methods of taxation. Nor is it uncommon for two or more governmental units to depend upon the same overburdened tax base, a classic example being the West Virginia property tax, which is limited by article 10, section 1, of the West Virginia Constitution and is shared by cities, counties, school boards, and other governmental units on occasion. Too often, cities which desire to make capital improvements avoid the awkward public vote on general obligation bonds and squeeze blocks and mortar out of operating costs. Municipal governments must also worry about statutorily imposed budget deadlines, fiscal years, restrictions upon long term obligations, and fully disclosed financial records.

Seventh, the government is sovereign. Legislative bodies (absent superior legislative control), which must pay the bills for public employment, also have the power to create the public sector collective bargaining framework.

Having pointed out the major differences between public employers and private employers, there still is ample room for vigorous arguments, pro and con, as to the desirability of collective bargaining in government. Much of the disagreement concerning this issue results from an attempt to transpose the private sector collective bargaining model to the dissimilar governmental sector.³¹ Not only that, collective bargaining in state and local govern-

³¹ A major contributing factor to this approach is the presence of private sector labor unions in the governmental sphere. Actually, in contrast to the single form of labor organization in the private sphere, a variety of labor organizations exist among public employees. Most common is the mixed union, which draws its membership largely from private industry, such as the Service Employees International Union (SEIU) and the Laborers International Union of North America, both affiliated with the AFL-CIO, and the Independent International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Of the unions composed almost entirely of public employees, the American Federation of State, County, and Municipal Employees (AFSCME), affiliated with the AFL-CIO, is the largest. Uniformed protective associations for police and firefighters include the Fraternal Order of Police (FOP), the International Conference of Police Associations (ICPA), and the International Association of Fire Fighters (IAFF). Additionally, there are numerous state and local employee associations which predate public sector unions and a host of professional associations such as the National Educational Association (NEA) [the American Federation of Teachers (AFT) considers itself a trade union].

ments is viewed by many persons from a negative viewpoint, partly because management's prerogatives are restricted;³²

[h]owever, if the outcome of bargaining is regarded as problematic rather than preordained, the negotiation process appears as a variable-sum game in which a variety of joint consequences is possible [B]oth management and the union may win or lose as a result of decisions reached in collective negotiations.³³

2. *Politics: A Balancing of Competing Interests*

Viewing public sector collective bargaining as problematic fits the normal political pattern of balancing competing interests. From a political perspective, both employer and employee needs should be taken into account. Government needs include faithful performance by employees, freedom to determine manpower needs and utilization, flexibility of policy to follow majority will, and maintenance of certain functions without interruption. Public employee needs, on the other hand, include reasonable working conditions, minimum security against life's vicissitudes, psychological satisfaction from participation in managerial decisions, and preservation of political status.³⁴ The quintessential function of state legislatures with regard to designing the framework for public sector labor-management relations is to be political—to balance these competing interests of governmental bodies and their employees. In West Virginia this task has been quite difficult, as is evidenced by the lack of statutorily mandated collective bargaining in the public sphere (which may well be caused partly by the fear that the collective bargaining teeter-totter might tilt too far toward union domination of governmental decision-making).³⁵

³² It was a far easier world for public managers when decisions on employee compensation and benefits could be made unilaterally subject only to the approval of the legislative body. And, perhaps more important, the capacity to realize managerial objectives was far greater when management still had managerial prerogatives, when workload, work organization and working conditions were determined, not negotiated.

Hayes, *Collective Bargaining and the Budget Director*, in PUBLIC WORKERS AND PUBLIC UNIONS 99 (S. Zagoria ed. 1972).

³³ Lewin, *Public Employment Relations: Confronting the Issues*, 12 IND. REL. 310 (1973).

³⁴ Dotson, *A General Theory of Public Employment*, 16 PUB. AD. REV. 197 (1956).

³⁵ Whatever the merits may be as to this viewpoint, some segments of the public employee community in West Virginia exercise significant influence as to the

3. *Distortion of the Traditional Political Decision-Making Process*

a. Budget-making

Although often unarticulated, there are a number of cogent reasons which support the proposition that public sector collective bargaining distorts the traditional political budgetary process which balances the demands of competing interest groups.³⁶ First, collective bargaining provides public employees a special procedure, not available to other interest groups, for participating in budget-making; the union becomes part of a two-sided budgetary process in what is otherwise a multisided process. Second, collective bargaining requires that responsible public officials deal with union negotiators face-to-face and bargain in good faith³⁷ until either an agreement or impasse is reached. Finally, collective bargaining forecloses any change in the terms of the collective bargaining agreement, once concluded by the ultimate governmental authority, without the consent of the union; thus, unlike an ordinance or statute, which may be repealed, a collective bargaining agreement is final and binding.

Is this distortion of the traditional political budgetary process justified? A good argument can be made that government employees, particularly at the local level, occupy a precarious position which justifies their special treatment through the collective bargaining process.³⁸ Since payroll costs in most cities constitute 50

determination of their wages, hours, and working conditions, even absent formalized collective bargaining procedures. A case in point is the influence exerted by local police and firefighters, who generally are considered to provide essential services. Absent an "end run" to legislative bodies, collective bargaining in West Virginia might tend to depoliticize the existing process, which places a premium on effective legislative lobbying.

³⁶ See Summers, *supra* note 29, at 1164-65.

³⁷ Good faith bargaining is a term of art and, in the private sector, derives its meaning from LMRA § 8(d), which reads in pertinent part:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party, to agree to a proposal or require the making of a concession. . . .

29 U.S.C. § 158(d) (Supp. V, 1975).

³⁸ See Summers, *supra* note 29, at 1165-68.

to 75 percent of the operating budget,³⁹ any significant general wage increase invariably leads to a budget increase. More often than not, such a budget increase requires reductions in other expenditures, reductions in personnel⁴⁰ or services, or a tax increase. Consumers will resist cutbacks in services; taxpayers will oppose tax increases;⁴¹ and other interest groups will object to expenditure reductions affecting matters of concern to them. In the spotlight stands the public employee, whose demands attract focused resistance and few allies.⁴² Without collective bargaining, many public employees may well not be able to protect their interests effectively.

b. Multilateral collective bargaining

However persuasive may be the foregoing argument, it presents an oversimplified portrait of collective bargaining and the political process. Quite often the public employer speaks from many mouths and lacks a unified voice. While New York City is more an aberration than a commonplace example, one can hardly imagine a more blatant illustration of spiraling wage agreements, leading to political doubletalk, with politicians blaming the power of the unions and ignoring the weakness of a fragmented government.⁴³ It would be a mistake to assume that collective bar-

³⁹ D. STANLEY, *MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE* 120 (1972).

⁴⁰ In Detroit, salary increases for police led to temporary layoffs of 500 other employees. *Id.* at 79, 126. In New York City, a 15 percent salary increase for police led to a reduction of 6000 police personnel. R. HORTON, *MUNICIPAL LABOR RELATIONS IN NEW YORK CITY* 110 (1973).

⁴¹ Taxpayers oppose the most visible taxes; hence, homeowners may oppose property taxes while renters may not, and cigarette purchasers may resist a cigarette sales tax increase while nonsmokers may not. Future taxes which might result from benefits granted to public employees, *e.g.*, pension benefits, are invisible and invoke little taxpayer resistance.

⁴² A large exception to the go-it-alone approach is the teacher community since parents, who compose a sizable group of consumers of teacher services, may be receptive to teacher demands. Another element of potential public employee support is the private sector labor union movement, although private union members also are consumers and taxpayers and may resist public employee demands. Summers, *supra* note 29, at 1167.

⁴³ New York City's inability to cope with the demands of its civil servants was one factor which led to the city's virtual bankruptcy in the fall of 1975, resulting in the discharge of thousands of municipal employees and severe cutbacks in services.

Again, the problem in New York City is the absence of effective political management There is no longer a strong management group in

gaining in state and local governments always is a bilateral process between a union and unified management as in the private sector; rather, there is strong evidence⁴⁴ which points to frequent instances of multilateral collective bargaining instead of the traditional bilateral collective bargaining pattern.⁴⁵

Multilateral collective bargaining⁴⁶ in public sector labor-management relations can be defined as a "process of negotiation in which more than two distinct parties are involved in such a way that a clear dichotomy between the employee and management organizations does not exist."⁴⁷ In other words, the bilateral assumption of the collective bargaining process may be inapplicable

New York City with whom municipal unions deal, only a potpourri of disparate public officials who play managerial roles without either managerial power or perspective.

R. HORRON, *supra* note 40. Professor Horton reasons that the weak managerial role was caused by potentially influential elected officials who abdicated their managerial responsibilities to persons not equipped to assert their new roles. *Id.* at 129.

In response to the fiscal crisis in New York City, Wisconsin Governor Patrick Lucey stated that he thought public employees and their unions were becoming a scapegoat since "commentators, editorial writers, and not a few politicians, found it easier to blame unions than to discuss declining tax bases, political mismanagement and escalating demands on public services." 41 PUB. EMPLOYEE, Jan. 1976, at 14 (AFSCME).

⁴⁴ See Kochan, *A Theory of Multilateral Collective Bargaining in City Governments*, 27 IND. & LAB. REL. REV. 525 (1974). The article is based on a study of 228 cities and concludes that multilateral collective bargaining in cities is common, related to a number of union and management characteristics, and a logical outgrowth of the political process. *Id.* at 542.

⁴⁵ Most of the literature concerning bilateral and multilateral bargaining in the public sector neglects to establish a set of behaviors consistent with the bilateral process. *Id.* at 525. Kochan remedies the situation by adopting these assumptions: Formally designated negotiators represent both employer and employees; their purpose is to reach a tentative bargaining agreement; when their purpose is accomplished, the package is returned to the principals for ratification; all interactions are channelled through the negotiators; and the negotiators serve as public spokesmen for the parties on bargaining issues. Admittedly, these assumptions are an oversimplification of how bilateral collective bargaining works, but the model is helpful. *Id.* at 527.

⁴⁶ For the apparent origin of the expression "multilateral bargaining" see McLennan & Moskow, *Multilateral Bargaining in the Public Sector*, in PROCEEDINGS OF THE TWENTY-FIRST ANNUAL WINTER MEETINGS 31 (Ind. Rel. Research Ass'n 1968). They stressed the influence of community interest groups on public sector negotiations. For an expansion of their concept to include any additional parties who influence public sector collective bargaining see H. JURIS & P. FEUILLE, POLICE UNIONISM 45-49 (1973).

⁴⁷ Kochan, *supra* note 44, at 526.

to governments largely because of the influence of third parties upon management and the fragmentation of managerial structure; indeed, the tendency toward multilateral bargaining in government is inherent in the municipal political process.⁴⁸

A few examples of multilateral collective bargaining should suffice to illustrate the process. Where budget-making authority is widely diffused, a common practice is for each department head to bargain with the union representing his employees. Since the department head is concerned primarily with the continued operation of only his department and with the outlook of only his employees, a hard line attitude by the department head would threaten too many established interests and patterns. The result is a fragmented bargaining approach by management with each department head's taking care of his own domain.⁴⁹ A case which shows an outcome of multilateral bargaining is *Pennsylvania Labor Relations Board v. Pittsburgh*,⁵⁰ in which the Pennsylvania

⁴⁸ A number of reasons explain why multilateral bargaining is inherent in the political process of governmental bodies, especially cities. First, the unique pricing and monopoly characteristics of municipal government increase the interest of many citizens and interest groups in the result of labor-management negotiations. McLennon & Moskow, *supra* note 46, at 32. Second, both vertical fragmentation (federal, state, local) and horizontal fragmentation (within each branch) of government exist. Third, government officials and managers may intercede in the negotiations process on behalf of employees out of ideological convictions or as a result of interest group pressure. Fourth, the managerial negotiator responds to directions from divided management. See H. JURIS & P. FEUILLE, *supra* note 46, at 46.

Multilateral bargaining results from a number of variable union and management characteristics in government: internal conflict among management officials, weakness of the commitment of management decision-makers to collective bargaining, the number of internal conflict resolution procedures, use of union political pressure tactics, political access to city officials, union involvement in city elections, and the number of visible impasse pressure tactics that a union uses in negotiations. Kochan, *supra* note 44, at 528-32.

⁴⁹ For another illustration of departmental dependence and the political process see J. WURF, 2 CIVIL LIBERTIES REV. NO. 3 (AFSCME Reprint 1975). In 1974, the city of Baltimore, Maryland, had negotiated the terms of a new contract with the AFSCME public works local union, but a wildcat strike developed. Also, collective bargaining negotiations had broken down regarding the police department, and an epidemic of "blue flu" occurred. Allegedly, Maryland Governor Mandel met with Wurf, president of AFSCME, and agreed to no reprisals against police officers who returned to work, ratifying a similar pledge by the mayor. However, the police commissioner refused to abide by the no-reprisal pledge and directed the discharge of the police officers who had walked off the job, thereby alienating union negotiators.

⁵⁰ PLRB Case No. PERA-C-1488-W, July 30, 1973; see 521 GERR B-5 (1973).

Labor Relations Board sanctioned the Pittsburgh City Council's elimination of some city employee positions over the veto of the mayor. Obviously, this type of division of opinion among separate branches of government does not represent a unified managerial position; in fact, the separation of governmental powers encourages "end runs" by both management and unions from adverse negotiations to other sources of power, especially the legislative branch. Sometimes executive branch politicians grant a great deal to public employee unions in contract negotiations and then use the legislative branch as a scapegoat upon reduction of negotiated union benefits. A final example of multilateral bargaining is provided by the city of San Francisco, where the chamber of commerce has at times become a de facto third party at the public negotiating table, largely because of its ability to submit wage settlements to a referendum.

Realization of the potentially adverse effects to management of multilateral bargaining has prompted centralization and professionalization of the labor relations process with a goal of acquiring the benefits of bilateral bargaining.⁵¹ Centralization of bargaining authority has given the executive branches of state and local governments more control of collective bargaining negotiations.⁵² Ac-

⁵¹ Bilateral collective bargaining can be quite effective for encouraging resolution of disputes, but its effectiveness is compromised when third parties encourage labor-management interaction through persons not at the bargaining table. Vladeck, *The "New" Public Bargaining Sector and Its Implications*, in PROCEEDINGS OF THE NEW YORK UNIVERSITY TWENTY-FIFTH ANNUAL CONFERENCE ON LABOR 14 (1973). Certainly, negotiators who do not have their bargaining authority compromised are better able to influence the outcome of negotiations.

Finally, bilateral collective bargaining tends to reduce "end runs" from the negotiating table to higher authorities. L. SHAW & T. CLARK, *THE PRACTICAL DIFFERENCES BETWEEN PUBLIC AND PRIVATE SECTOR COLLECTIVE BARGAINING* 14-16 (1972). Oregon has attempted to reduce "end runs" by declaring as an unfair labor practice efforts by either side to "[c]ommunicate directly or indirectly with" employees in the bargaining unit or with public officials, as the case may be, other than the selected bargaining representatives. ORE. REV. STAT. §§ 243.672(1)(i), (2)(f) (1975 Replacement Part). In contrast, Florida requires that the chief executive or his agent "consult with, and attempt to represent the views of" the legislative branch and by formal and informal procedures to utilize the budget-making process. FLA. STAT. ANN. § 447.309 (Supp. 1976).

⁵² For example, some jurisdictions have established bargaining responsibilities by statute: KAN. STAT. ANN. §§ 75-4322(f)-(h) (Supp. 1975) (public employees except teachers), defining "public agency" or "public employer," "governing body," and "representative of the public agency" [See also KAN. STAT. ANN. §§ 75-4327 to -4331 (Supp. 1975) (public employees except teachers), describing operation

companying the centralization of bargaining authority has been the delegation of bargaining responsibilities to professionals. The risk of these two trends⁵³ is that citizens will lose influence over the outcome of governmental collective bargaining⁵⁴ since legislative influence is reduced and professional negotiators resist control of bargaining by elected officials and politicians.⁵⁵ In sum, efforts by public management to make the governmental bargaining structure more efficient and to minimize the effects of shadow parties at the negotiating table arguably lead to a further distortion of traditional political decision-making at the state and local governmental levels.

c. Merit system

Without collective bargaining civil service commissions, which are charged with administering merit systems, act unilaterally; after the introduction of collective bargaining, however, a basically bilateral system of decision-making exists regarding governmental personnel administration.⁵⁶ The traditional political process, which allows public employers, as influenced by various interest groups, to develop the rules of personnel administration, is distorted to the extent that employees and their unions are given a special position in influencing the making and administration of

of the system] (responsibilities set forth for each governmental unit); ME. REV. STAT. ANN. tit. 26, § 979-A(5) (1964) (state employees), defining "public employer" (expresses responsibilities for each branch regarding state employees); MASS. ANN. LAWS ch. 150E, § 1 (1976), defining "employer" or "public employer" (school board and local government chief executive are bargaining agents); MINN. STAT. ANN. § 179.74 (Supp. 1976) (public employees except charitable hospital employees) (cooperation with negotiating team by certain state officials required). Most state statutes define the term "employer." *E.g.*, HAWAII REV. STAT. § 89-2(9) (Supp. 1975) (governor is employer).

⁵³ See D. STANLEY, *supra* note 39, at 25-30; Burton, *Local Government Bargaining and Management Structure*, 11 IND. REL. 123-40 (1972).

⁵⁴ The problem can be expressed in the form of the following hypothesis: the "professionalization" of collective bargaining will intensify the forces of bureaucracy and elitism in government, and result in a further erosion of the citizen's capacity to govern his affairs through access to the machinery of government on a basis of equality with other citizens.

Love & Sulzner, *supra* note 29, at 24.

⁵⁵ P. BLAU & R. SCOTT, *FORMAL ORGANIZATIONS* 59-63 (1972); T. KOCHAN, *RESOLVING INTERNAL MANAGEMENT CONFLICTS FOR LABOR NEGOTIATIONS* 35 (PERL No. 41, 1973).

⁵⁶ See Camp & Lomax, *Bilateralism and the Merit Principle*, 28 PUB. AD. REV. 132 (1968).

these rules. Moreover, as governments respond to collective bargaining by centralizing and professionalizing former merit systems, further distortion of the traditional political decision-making process may evolve.

In analyzing the impact of collective bargaining upon governmental personnel administration, care must be used to distinguish between effects upon the merit system and effects upon the merit principle. The civil service system is the structure administering the merit principle, which holds that public employees ought to be selected, promoted, and retained only on account of their job qualifications (and, to some degree, job performance). In theory, it is possible for the merit system to be replaced by collective bargaining and for the merit principle to remain.

Until recent years, public employee unions staunchly supported civil service systems;⁵⁷ since the early 1960's, however, merit systems have come under increasing attack as being employer dominated,⁵⁸ a response in part to the widespread growth of civil service systems during this period of time.⁵⁹ Union criticism of managerial dominance of civil service systems has been substantiated by the National Civil Service League, a national association of civil service advocates and the original proponent of civil service systems in 1881.⁶⁰

⁵⁷ Ironically, the American Federation of State, County, and Municipal Employees (AFSCME) was founded in 1934 in Wisconsin in order to lobby against proposed legislation which would have gutted that state's civil service system. L. KRAMER, *LABOR'S PARADOX* 27-38 (1962). As late as its 1960 convention, AFSCME's official position was to encourage growth and improvement of existing civil service systems. R. SMITH, H. EDWARDS & R. CLARK, JR., *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 464 (1974).

⁵⁸ For example, Jerry Wurf, president of AFSCME, declared in a speech to the 1967 meeting of the International City Managers Association that "we should consider the whole system of civil service as just another management tool . . ." 215 GERR B-5 (1967).

⁵⁹ In 1955, 23 states had civil service statutes which covered about 65 percent of all full-time state employees. H. KAPLAN, *THE LAW OF CIVIL SERVICE* 24-25 (1958). By 1970, 84 percent of the cities, 83 percent of the counties, and 96 percent of the states in a survey reported adoption of some form of merit system. National Civil Service League, *Survey of Current Personnel Systems in State and Local Governments*, GOOD GOVERNMENT, spring 1971, 1-28.

⁶⁰ The National Civil Service League in 1971 proposed a new model public personnel statute which would scrap civil service systems, divide their functions, relieve the personnel function of any duty to be neutral while making the personnel director a part of the management team, and legitimize the bilateral collective bargaining relationship. The league's rationale for this approach was that civil

Some state legislatures have reacted to the relationship between collective bargaining and the merit system by excluding certain matters from collective bargaining in one of three ways:⁶¹ (1) blanket exclusion of all matters covered by law;⁶² (2) specific exclusion of matters covered by merit system statutes and regulations;⁶³ or (3) selective exclusion of certain merit-related items.⁶⁴ Another legislative approach has been to declare that collective bargaining decisions prevail over civil service rules and regulations.⁶⁵ One empirical study of local governments suggests that merit systems have been modified by collective bargaining so that civil service administrators have had to share or give up their power.⁶⁶ Whatever may be the proper legislative solution to separating collective bargaining and civil service functions, it is clear that some legislative action is needed, for in those states where public sector collective bargaining and the merit system coexist and the subject matters of collective bargaining have not been restricted as above, the two processes may collide.

Whether public sector collective bargaining will curb abuses⁶⁷

service systems were not capable of protecting employee rights while developing, policing, and managing personnel systems. 2 LMRS NEWSLETTER, Apr. 1971, at 1-2. The neutral function of the civil service commissions would need to be delegated to another entity.

⁶¹ Helburn & Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LAB. L.J. 618, 623-26 (1972).

⁶² N.H. REV. STAT. ANN. § 98-C:4 (Supp. 1973) (state and nonprofessional university employees); PA. STAT. ANN. tit. 43, §§ 1101.702-.703 (Supp. 1976) (public employees except firefighters and police); VT. STAT. ANN. tit. 21, § 1725 (Cum. Supp. 1976) (municipal employees).

⁶³ CAL. GOV'T CODE § 3540 (Deering Supp. 1976) (public school employees); CAL. GOV'T CODE § 3500 (Deering 1973) (local government employees); CAL. GOV'T CODE § 3525 (Deering 1973) (state employees); WASH. REV. CODE ANN. § 41.56.100 (Supp. 1975); WIS. STAT. ANN. § 111.91 (1974) (state employees).

⁶⁴ CONN. GEN. STAT. ANN. § 7-474 (1972, Supp. 1976) (municipal employees); Conn. Pub. A. No. 75-566, § 3 (Appendix Pamphlet 1976) (state employees); HAWAII REV. STAT. §§ 89-1, -9 (Supp. 1975); ME. REV. STAT. ANN. tit. 26, § 969 (1964) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-D(1) (1964) (state employees).

⁶⁵ MASS. ANN. LAWS ch. 150E, § 7 (1976).

⁶⁶ Burton, *supra* note 53, at 123. After studying 50 local governments, Burton concluded that the impact of collective bargaining on civil service systems produced one of the following: (1) Abolition of civil service commissions with a transfer of their functions to collective bargaining, (2) strict limitations upon the authority of these commissions, or (3) assumption of collective bargaining functions by civil service commissions. *Id.*

⁶⁷ Begun to curb patronage politics, civil service systems have been challenged

of the civil service system is unknown. While the debate concerning the future of civil service systems in the face of collective bargaining pressures is heated, the crystal ball remains cloudy.

Even more unclear than the impact collective bargaining may make on the civil service system is the effect it may have on the merit principle. Traditionally, public sector unions have devoted their resources to improving wages, hours, and working conditions and have expressed minimal interest in hiring and recruitment (but have shown interest in promotions).⁶⁸ Beyond that generalization, opinion is divided among opposing views as to whether collective bargaining and the merit principle are incompatible or may be reconciled.⁶⁹ A middle view⁷⁰ predicts application of a variable-sum model of collective bargaining, resulting in a gradual weakening of merit as to some facets of public personnel administration (pay and fringe benefit determinations, discipline and grievance processing, more use of seniority⁷¹ and closed exams in promotions, and shorter probational periods) and a strengthening of the merit principle as to other personnel policies (rejection of rule-of-three for rule-of-one, limited use of provisional employees, greater due process in grievance procedures, and supportive stands for existing civil service functions).⁷²

as lacking merit, prohibiting good management, frustrating able employees, inhibiting productivity, being unresponsive to the citizenry's needs, and undermining taxpayers' confidence. Savas & Ginsburg, *The Civil Service: A Meritless System*, 32 PUB. INTEREST 72 (1973).

⁶⁸ D. STANLEY, *supra* note 39, at 136-52.

⁶⁹ For a helpful analysis of these opposing viewpoints see Lewin & Horton, *The Impact of Collective Bargaining on the Merit System in Government*, 30 ARB. J. 199 (1975). Alleged threats to the merit principle include the union shop, seniority, union administration of grievance procedures (affecting an individual's right of petition), negotiated wage packages (replacing integrated position classification and pay plans), and fringe benefits common to all employees. J. TELCHOOK & H. TAHNE, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT AND THE MERIT SYSTEM 43 (1972); Morse, *Shall We Bargain Away the Merit System?*, in DEVELOPMENTS IN PUBLIC EMPLOYEE RELATIONS 154 (K. Warner ed. 1965).

⁷⁰ Lewin & Horton, *supra* note 69.

⁷¹ The relationship between seniority and merit (ability) is unclear, although many persons assume that the two principles are often incompatible. Actually, the gripe of employers about seniority is more directly related to a lessening of managerial prerogatives by contractually mandated use of seniority than to an attack on the seniority-merit relationship. There is some evidence which suggests that seniority and merit usually are harmonious principles. Healy, *The Factor of Ability in Labor Relations*, in ARBITRATION TODAY 45 (J. McKelvey ed. 1955).

⁷² Helsby & Jayner, *Impact of the Taylor Law on Local Government*, in R. CONNERY & W. FARR, UNIONIZATION OF MUNICIPAL EMPLOYEES 24-41 (1970).

d. Union pressure tactics

Unions resort to a variety of pressure tactics to influence the outcome of public sector collective bargaining—strikes, publicity in the form of news conferences and various advertisements, picketing, threats to strike, mass meetings, slowdowns, sick-outs, manipulation of the grievance procedure, lobbying, participation in elections, limited adherence to rules and production procedures, and shifting stances at the bargaining table. While some of these pressure tactics are available to other community interest groups, unions are uniquely positioned to assert pressure tactics in support of their demands made during face-to-face collective bargaining. No doubt public attention drawn to union pressure tactics and to underlying issues of broad public concern heightens the citizenry's apprehension about union pressure tactics. Where public sector collective bargaining exists, the political decision-making process is distorted to the extent that all public employee unions are empowered to exert these pressure tactics and to the extent that these unions exercise more influence over political decision-making than before collective bargaining.⁷³

Many of the pressure tactics just enumerated have been used by public employee unions for years, even prior to the existence of collective bargaining statutes for state and local governments. And while legislative bodies have by-and-large prevented public employees from engaging in the election process, this same restriction usually has not applied to public employee unions. Even so, collec-

⁷³ The power of public employee unions to influence political decision-making is unevenly distributed regardless of whether collective bargaining is allowed. Those unions which are experienced in public sector politics and craft unions which have private sector ties are better able to deliver the vote than less experienced unions or strictly public unions and, thereby, are more likely to receive favorable treatment from allied government officials. Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 431 (1970). Likewise, those public sector unions whose members' services are considered essential by the citizenry, such as the police and firefighters, are in a superior position to influence political decision-making on their behalf.

The issue at hand, therefore, given the inequalities described, is whether the ability of public employee unions, individually or collectively, to influence political decision-making is enhanced by pressure tactics exerted on behalf of their collective bargaining demands. If so, distortion of the political decision-making process has occurred. For a view that there are various deficiencies in theories asserting that public employee strikes inevitably distort the decision-making process in the public sector see Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970).

tive bargaining has provided a channel for funneling employee demands to public management and a clearer target for pressure tactics. Unfortunately, exclusive of the strike, research about the use of union pressure tactics in support of bargaining table demands has been miniscule; therefore, attention will now be devoted to the strike, realizing that only a partial picture of union pressure tactics and political decision-making will be presented.

Granting public employees the right to strike is too bitter a political pill for most state legislators to swallow; accordingly, only six states have adopted legislation granting some public employees a limited right to strike.⁷⁴ In these six states, as well as in those states where public employee strikes are forbidden, the number of strikes has increased dramatically since the early 1960's.⁷⁵ The

⁷⁴ Alaska's statute divides public employees, for strike purposes, into three categories according to essentiality of services, with employees who perform the most essential services being forbidden to strike and employees who provide less essential services being allowed to strike for a limited period of time after mediation or to strike for extended periods of time. ALASKA STAT. § 23.40.200 (1972). Hawaii allows public employee strikes after exhaustion of statutory procedures and a cooling-off period; however, where public health or safety is endangered, the employer may petition the state public employment relations board for relief. HAWAII REV. STAT. §§ 89-12(b), (c) (Supp. 1975). Pennsylvania prohibits strikes of certain categories of employees supplying essential services and allows other employees to strike until there is a clear and present danger or threat to the public health, safety, or welfare, justifying judicial relief. PA. STAT. ANN. tit. 43, §§ 1101.1001, .1003 (Supp. 1976) (public employees except firefighters and police). Montana's statute grants public employees the right to engage in specific as well as "other concerted activities," which expression has been interpreted to authorize public employee strikes. *State v. Public Employees' Craft Council*, 529 P.2d 785 (Mont. 1974), interpreting MONT. REV. CODES ANN. § 59-1603(1) (Supp. 1975) (public employees except nurses and professional engineers). Oregon prohibits strikes or recognition of union picket lines by specified groups of employees providing essential services, while other employees may strike under limited conditions (presence of appropriate unit, no binding arbitration, exhaustion of mediation and factfinding, 30-day cooling-off period, 10-day notice of strike, and no clear and present danger or threat to public health, safety, or welfare as determined by a trial court). ORE. REV. STAT. §§ 243.726, .732, .736 (1975 Replacement Part). Lastly, Vermont denies to state employees the right to strike but allows municipal employees a limited right to strike if public health, safety, or welfare is not endangered; also, teachers' strikes may not be enjoined unless there is a clear and present danger to a sound educational program. VT. STAT. ANN. tit. 3, § 903(b) (1972 Replacement Edition) (state employees, state college employees); VT. STAT. ANN. tit. 16, § 2010 (1972) (teachers); VT. STAT. ANN. tit. 21, § 1730 (Cum. Supp. 1976) (municipal employees).

⁷⁵ The statistics in the following chart relate to work stoppages which involved at least six workers and lasted a full day or full shift or longer:

YEAR	RESOLVING PUBLIC EMPLOYMENT						TOTAL						STATE GOVERNMENT			LOCAL GOVERNMENT			
	NUMBER		Person-days		idle		NUMBER		Person-days		idle		NUMBER		Person-days		idle		
	Stop- pages	Workers Involved	Stop- pages	Workers Involved	Stop- pages	Workers Involved	Stop- pages	Workers Involved	Stop- pages	Workers Involved	Stop- pages	Workers Involved	Stop- pages	Workers Involved	Stop- pages	Workers Involved	Stop- pages	Workers Involved	
1958	15	1,720	7,520	1	30	60	14	1,590	7,460										
1959	26	2,240	11,500	4	410	1,650	22	1,830	9,850										
1960	36	28,600	58,400	3	970	1,170	33	27,600	57,200										
1961	28	6,610	15,300	—	—	—	28	6,610	15,300										
1962	28	31,100	79,100	2	1,660	2,260	21	25,300	48,100										
1963	29	4,840	15,400	2	280	2,160	27	4,560	13,300										
1964	41	22,700	70,800	4	280	3,170	37	22,500	67,700										
1965	42	11,900	146,000	—	—	1,280	42	11,900	145,000										
1966	142	105,000	455,000	9	3,090	6,010	133	102,000	449,000										
1967	181	132,000	1,250,000	12	4,670	16,300	169	127,000	1,230,000										
1968	254	201,800	2,545,000	16	9,300	42,800	235	190,900	2,492,800										
1969	411	160,000	745,700	37	20,500	152,400	372	139,000	592,200										
1970	412	333,500	2,023,200	23	8,800	44,600	386	168,900	1,330,500										
1971	329	152,600	901,000	23	14,500	81,800	304	137,100	811,600										
1972	375	142,100	1,257,300	40	27,400	273,700	335	114,700	983,500										
1973	387	196,400	2,303,900	29	12,300	133,000	357	183,700	2,166,300										

large jump in government strikes began in 1966, as did the current inflationary trend, and most of these work stoppages have arisen from disputes over wages and union recognition in contrast to the prior employee emphasis on job security.⁷⁶ Even in the face of an aura of illegality, there is evidence to demonstrate that strike sanctions are often ineffective.⁷⁷ In light of this information, the logical

U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WORK STOPPAGES IN GOVERNMENT, 1973 (1975). It is important to note that in 1973 less than 1.5 percent of all government employees were on strike, as compared to 2.9 percent in the total economy, and that the duration of strikes was longer than in previous years, averaging 12.6 days for economic issues, 12.8 days for contractual issues, and 11.6 days for recognition and security issues.

Regarding teacher strikes, in the 1973-1974 school year, there were 154 teacher strikes, affecting 74,000 teachers in 20 states and involving an estimated 718,000 person-days of instruction. GERR, RF-101, 71:1051 (1975). Regarding municipal employee strikes during the years 1970-1974, the major issues underlying these strikes were in order of frequency as follows: Wages, union organization and security, wage adjustments, plant administration, and supplementary benefits. Torrence, *City Public Employee Work Stoppages: A Time-Line Analysis for Educational Purposes*, 27 LAB. L.J. 177, 179 (1976).

One study concluded that metropolitan area strikes (public and private) during 1968-1970 occurred at a low frequency rate in areas characterized by relatively low levels of industrialization and unionization, greater income inequality, and below-average quality of life, as compared to high frequency strike rate in metropolitan areas which were more populous, more unionized, more industrialized, and more well-to-do. Stern, *Intermetropolitan Patterns of Strike Frequency*, 29 IND. & LAB. REL. REV. 218 (1976).

In the October 1975 edition of the official newspaper of the American Federation of Teachers, there was a headline which proclaimed, "100,000 AFT members strike across U.S.," referring to teacher strikes during September 1975 in at least five states. *American Teacher*, Oct. 1975, at 3, cols. 1-4.

⁷⁶ White, *Work Stoppages of Government Employees*, in J. LOEWENBERG & M. MOSKOW, *supra* note 26, at 252.

⁷⁷ A study of public strikes during a three-year period in California revealed that the judicial injunctive process neither prevented nor halted illegal strikes, was invoked sporadically, and was applied unequally to strikers. Cebulski, *An Analysis of 22 Illegal Strikes and California Law*, 18 CAL. PUB. EMPLOYEE REL. 2-17 (1973).

The availability of judicial relief will depend upon the statutes and court interpretations in the jurisdiction at hand. In Rhode Island, for example, the equitable doctrine of "clean hands" applies to a public employer's request for injunctive relief. *School Comm. v. Westerly Teachers Ass'n*, 111 R.I. 96, 299 A.2d 441 (1973). Similarly, in Michigan, injunctive relief will be granted to the public employer only where irreparable damage will be caused by the strike and the employer has "clean hands." *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968). Besides injunctive relief, other court sanctions against individuals include fines, imprisonment, loss of job, loss of tenure, and loss of the gains achieved as a result of the strike. Striking organizations may lose their rights to represent employees or their rights to checkoff or may be fined, and their officers may be fined or im-

inquiry is whether public strikes have been effective in achieving their goals. Unfortunately, there has been little research done to discover that answer, so no empirically derived conclusion is presented here, only factual tidbits.⁷⁸

Despite the lack of empirical analysis regarding the effectiveness of strikes, there is lively debate over the "right" of public employees to strike. Reasons advanced for denying the right to strike in the public sector include the following: (1) Market restraints are weak in the public sector, largely because the services are essential; (2) the public places pressure on public officials to arrive at a quick settlement; (3) other public pressure groups have

prisoned for contempt. See Howlett, *History and Nature of Collective Bargaining in the United States: A Review of the Rationale and the Consideration of Its Application to the Public Sector*, in AMERICAN ARBITRATION ASS'N & INTERNATIONAL PERSONNEL MANAGEMENT ASS'N, *supra* note 22, at 31. Once an injunction has issued, courts may enforce their orders by the contempt power, and at least one court has held that taxpayers have the right to insist that anti-strike penalties be enforced. *Cincinnati v. District 51*, 35 Ohio St. 2d 197, 299 N.E.2d 686 (1973). However, states which have statutory strike penalties have used these sanctions sparingly. P. STAUDOHAR, *PUBLIC EMPLOYMENT DISPUTES AND DISPUTE SETTLEMENT* 16 (1972).

⁷⁸ For instance, two seemingly contrasting results from separate strikes in Pennsylvania are of interest. In July 1975, almost 50,000 state employees struck, the largest strike (in number of persons) of state or local government employees in United States history.

The union demanded a 30 percent pay increase, later scaling its demand down to 10 percent. But Gov. Milton Shapp (D) said it was a year to hold the line and stuck with the state's offer of 3.5 percent. Weakened by court orders sending many essential employees back to work, the union quickly settled for what amounted to only 1.25 percent more than the state's offer.

Pierce, *Showdown Year with the Public Employee Unions*, 1 STATE LEGISLATURES 10 (No. 2, 1975).

The other strike, involving 4000 Pittsburgh teachers, started December 1, 1975, and ended around January 26, 1976. Schools charged with educating the city's 62,000 students closed, leading to the school board's decision to end the strike to avoid losing a \$211,000 daily state subsidy. The resultant 30-month contract contained a three-step pay raise totalling 27.4 percent, guaranteed class size plus or minus six students, increased life insurance payments, layoff benefits but without the former guarantee of no layoffs, teacher scheduling provisions, reading program provisions, and promise of disciplinary reform. On account of the wage settlement, School Superintendent Olson has predicted future layoffs unless a tax increase is effected. During the strike the union (AFT Local 400) was fined \$105,000 for violation of an injunctive order, and individual teacher fines were also assessed but not collected because the judicial hearings would have been too time consuming. 642 GERR B-15 to -17 (1976).

See K. OCHELTREE, *SIX STRIKE STORIES* (PERL No. 20, 1969).

no weapons comparable to the strike; and (4) strikes impose a high cost since the political process is distorted.⁷⁹ In reply, the following arguments are asserted: (1) Market restraints exist in the forms of public employee wage losses during strikes, multilateral bargaining (including taxpayer resistance), fixed public utility rates, availability of subcontracting government services, and the varying degrees of essentiality of services; (2) pressure upon public managers to settle strikes depends upon the essentiality of the service cut off; (3) management lockouts can be authorized to combat strike tactics; and (4) the strike is just another, albeit necessary, political weapon and, as such, is not alien to the legislative process.⁸⁰ In rebuttal, it is argued that many governmental services should not be cut off since their essentiality depends, not necessarily upon the immediate danger to public health and safety, as when police and firefighter services are terminated, but upon the inelastic demand⁸¹ which exists for most government services (the inelasticity's being due to steady product demand, insensitivity to price changes, and lack of close substitutes) and since the public has a high intolerance for inconvenience.⁸²

As the academic debate continues about how well public employers may resist strikes,⁸³ public employee strikes continue to occur even though often they are illegal. The risk inherent in these strikes or strike threats is that public employee unions will obtain a disproportionate amount of political power to affect political

⁷⁹ Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

⁸⁰ Burton & Krider, *supra* note 73, at 425-32.

⁸¹ One investigator has verified low wage elasticities for several categories of state and local government employment. Ehrenberg, *The Demand for State and Local Government Employees*, 58 AM. ECON. REV. 366 (1973).

⁸² Wellington & Winter, *More on Strikes by Public Employees*, 79 YALE L.J. 441 (1970).

⁸³ Burton and Krider conclude that, with the exception of police and firefighter strikes, public officials are, "to some degree, able to accept long strikes." Burton & Krider, *supra* note 73, at 427. Cited as examples of prolonged government resistance are a 48-day strike by Kalamazoo, Michigan, sanitation men and laborers, an 87-day strike by welfare workers in Sacramento County, California, and a 3-month strike of hospital workers in Cuyahoga County, Ohio. *Id.* Additionally, analysis of 1965-1968 strike data prompted Burton and Krider to conclude that local governments were able to continue partial operation during 92 percent of the essential strikes, in 80 percent of the intermediate-essential strikes, and in 77 percent of the nonessential strikes. *Id.* at 435. Another commentator believes that the public can marginally reduce its reliance on police in a strike situation but is quite vulnerable to a firefighter strike. R. HORTON, *supra* note 40, at 142-43.

decision-making; the risk in disallowing such strikes is facing the unpalatable choice of punishing a multitude of striking public workers or incurring disrespect for the law by ignoring the strike ban. While some argue that public employee unions have too little relative power without the right to strike,⁸⁴ other persons disagree.⁸⁵ Whatever the proper assessment may be of granting a limited right to strike to public employees, the use of the strike and other previously dormant pressure tactics distorts the traditional political decision-making process.

4. *Impact of Collective Bargaining*

Since most states have adopted some form of public sector collective bargaining, it behooves West Virginians to study the effects of the collective bargaining in those state and local governments. Present day research is sufficiently sophisticated to make credible judgments concerning the impact of collective bargaining upon wages but offers only premature judgments as to the general effects of collective bargaining upon other aspects of the employer-employee relationship, such as hiring, promotion, training, grievances, discipline, classification, fringe benefits, subcontracting, workload and manning, work assignments, other working conditions, and management's ability to manage.

Private sector experience teaches that the impact of labor unions upon their employers is to some degree proportional to the unions' cohesiveness. Similarly, in the public sector, once the collective bargaining relationship has been established, union cohesiveness is aided by the union's exclusive representative status, dues checkoff provisions, agency shop, union shop or other related grants of dominion, and large bargaining units. Another important determinant of the impact of public sector collective bargaining is the permissible scope of negotiations since significant matters of union concern may be excluded by statute from negotiations and, thereby, be protected from the impact of collective bargaining. The topics alluded to above will be more fully discussed in part two of this paper. Finally, there is persuasive evidence to indicate that the impact of collective bargaining in the public sector is directed

⁸⁴ E.g., Burton & Krider, *supra* note 73, at 432; Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969).

⁸⁵ E.g., Shaw & Clark, *Public Sector Strikes: An Empirical Analysis*, 2 J. LAW & ED. 217 (1973); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 823-24 (1970).

more by management organizational characteristics and other factors than by union pressure tactics.⁸⁶

Presenting data which shows the impact of collective bargaining on the wage rate, by itself, can be misleading since a common practice is to make trade-offs between wage increases and increased fringe benefits, to name just one example. Moreover, literature in this area tends to ignore growth rates of wages, rather focusing upon increases in preexisting salary levels and discounting the effect of government wage increases upon nearby private sector personnel. In sum, the impact of collective bargaining on public employee wages is probably underestimated.

With these limitations in mind, a review of the research performed to date reveals that collective bargaining has increased state and local government employee wage levels up to five percent above the levels which would have prevailed in the absence of collective bargaining.⁸⁷ This small, and probably underestimated,

⁸⁶ The evidence comes from a survey of 121 cities. See Kochan & Wheeler, *Municipal Collective Bargaining: A Model and Analysis of Bargaining Outcomes*, 29 IND. & LAB. REL. REV. 46 (1975). In order of descending impact upon a union's collective bargaining goals are these elements: The existence of either factfinding or compulsory arbitration provisions, the degree of decision-making power of the management negotiator, the incompatibility between the mayor and city council, and the involvement of elected officials in the collective bargaining process once an impasse has occurred. Although not strongly related to their impacts upon collective bargaining, the union characteristics which correlate most positively with favorable union bargaining goals are union militancy and union endorsement of candidates in local elections, especially mayoral aspirants; nevertheless, union pressure tactics can cause internal management conflict and multilateral bargaining. *Id.*

⁸⁷ D. STANLEY, *supra* note 39, at 74-79; Ashenfelter, *The Effect of Unionization on Wages in the Public Sector: The Case of Firefighters*, 24 IND. & LAB. REL. REV. 191 (1971); Baird & Landon, *The Effects of Collective Bargaining on Public School Teachers' Salaries*, 25 IND. & LAB. REL. REV. 410 (1973); Ehrenberg, *Municipal Government Structures, Unionization and the Wages of Firefighters*, 27 IND. & LAB. REL. REV. 36 (1973); Fogel & Lewin, *Wage Determination in the Public Sector*, 27 IND. & LAB. REL. REV. 410 (1974); Freund, *Market and Union Influences on Municipal Employee Wages*, 27 IND. & LAB. REL. REV. 391 (1974); Hall & Carroll, *The Effects of Teachers' Organizations on Salaries and Class Size*, 26 IND. & LAB. REL. REV. 834 (1973); Kasper, *The Effects of Collective Bargaining on Public School Teachers' Salaries*, 24 IND. & LAB. REL. REV. 57 (1970); Lewin, *supra* note 33; Lipsky & Drotning, *The Influence of Collective Bargaining on Teachers' Salaries in New York State*, 27 IND. & LAB. REL. REV. 18 (1973); Perloff, *Comparing Municipal Salaries With Industry and Federal Pay*, 94 MONTHLY LAB. REV. 46 (1971); Schmenner, *The Determination of Municipal Employee Wages*, 55 REV. ECON. & STATISTICS 83 (1973); Thornton, *The Effects of Collective Negotiations on Teachers' Salaries*,

impact of state and local government collective bargaining occurs in a context of greater wage growth than in private industry⁸⁸ and better pay for comparable jobs than in the private sector, except as to high-level managers and professionals,⁸⁹ producing a more egalitarian occupational wage structure.⁹⁰

Measurements of other effects of collective bargaining have been much more imprecise than with wage impact. Generally, it may be said that the impact of collective bargaining upon state and local governments varies with the goals of the negotiators, the economic conditions of the day, and the maturity and nature of the collective bargaining relationship. Preliminary conclusions about the collective bargaining impact suggest the following: Public employee unions have expressed minimal interest and, therefore, have produced little effect on hiring and training policies but have made a modest impact on promotion policies; public sector unions, because of intense interest, have succeeded in formalizing the grievance process, which often leads to arbitration, and have caused public managers to be more cautious in meting out sanctions within a more formalized disciplinary process; more aggressive public employee union leaders have pushed for pay classification revision through collective bargaining or grievance procedures with indecisive results so far; while fringe benefits, overtime pay, and special pay arrangements have been liberalized for state and local government employees, the primary cause is unclear; parity between the salaries of police and firefighters has been widely accepted and aided by collective bargaining; firefighters have been successful in collective bargaining efforts at reducing working hours; public employee unions' resistance to the contracting-out of work currently being done by government employees has met with

11 Q. REV. ECON. & BUS. 41 (1971); Thornton, *Monopsony and Teachers' Salaries: Some Contrary Evidence*, 28 IND. & LAB. REL. REV. 574 (1975).

⁸⁸ Between 1960 and 1970, depending upon the public job performed, wage rates increased 56.7-76.6 percent in state and local governments, contrasted with a 44.8-50.5 percent wage increase for private sector employees. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1974, at 301 (1974). A similar conclusion has been drawn for federal government workers in that, in both 1960 and 1970, federal employees were paid more than comparable private sector workers both in absolute earnings differential and in the wage rate differential. Smith, *Pay Differentials Between Federal Government and Private Sector Workers*, 29 IND. & LAB. REL. REV. 186 (1976).

⁸⁹ Fogel & Lewin, *supra* note 87, at 428.

⁹⁰ *Id.*; Lewin, *supra* note 33, at 316; Perloff, *supra* note 87.

good success; in contrast, efforts by public employee unions to influence workload, manning, and program policy have produced negligible results although these unions have been effective in creating subtle changes in working conditions; lastly, from a broader perspective, public management, in confronting collective bargaining, has retained the right to manage—to determine policy and to plan operations—while consulting with union representatives.⁹¹

When observing the results of the collective bargaining interrelationship, one must remember that scholarly investigations of the bargaining process involve generalizations not necessarily applicable to a particular locale, region, or state. Statistical reviews of collective bargaining impacts provide perspective but depersonalize the human aspect of collective bargaining. “It’s easy now to forget that Martin Luther King, Jr. lost his life in Memphis, just 6 years ago, demonstrating for garbage collectors who earned just \$1.10 an hour, and had no sick pay, vacations, or grievance procedures, and whose union the city wouldn’t even talk to.”⁹² Impressive gains in public employee wages since 1960 may well reflect the personalization of decision-making concerning wages.

Generalizations about the impact of collective bargaining upon the public sector need more study and are by no means unanimous.⁹³ The task of legislators is to unravel the maze of data

⁹¹ D. STANLEY, *supra* note 39, at 46-148.

One study of the impact of collective bargaining for teachers in school systems concluded that the freedom of local school boards to set basic policy has remained intact through collective bargaining, although administrative discretion in areas calling for significant exercise of professional judgment has been moderately altered. C. PERRY & W. WILDMAN, *THE IMPACT OF NEGOTIATIONS IN PUBLIC EDUCATION 165-71* (1970). See generally J. VLADECK & S. VLADECK, *COLLECTIVE BARGAINING IN HIGHER EDUCATION—THE DEVELOPING LAW* (1975); D. WOLLETT & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* (1974). In primary and secondary education, the three educational policy issues which are most commonly discussed at the bargaining table are class size, student discipline, and curriculum reform.

⁹² Pierce, *supra* note 78, at 11.

⁹³ Jerry Wurf, president of AFSCME, believes the following:

[S]tate-local earnings showed a substantial increase during the period [1955-1973] precisely because wages in that sector have been shamefully low until recently [M]ost . . . workers still lag behind their counterparts in private industry Actual dollar increases, as opposed to percentage increases, have been greater for several major industries, among them transportation, electrical utilities, mining, communications, and contract construction.

available and seek specific ways of structuring a collective bargaining relationship which takes into account the impact of collective bargaining as well as the needs of government workers.

5. *A Political Solution*

The normal American political process is "one in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision."⁹⁴ Much attention has been devoted here to describing how collective bargaining in state and local governments can distort the traditional decision-making process; however, this distortion does not mean a fortiori that what is defined as the normal American political process is to be warped. Instead, public sector collective bargaining, if conducted by responsible parties within a structure which reasonably balances competing interests, can alter the traditional political decision-making processes of state and local governments to conform with the normative conception of the American political process. In so doing, public sector collective bargaining can advance the goals usually attributed to that procedure in the private sector; namely, industrial peace, industrial democracy, political representation, and a needed substitute for individual bargaining.⁹⁵ In other words, collective bargaining can assure the public worker an effective voice in the formation of decisions governing his daily life.

The issue for concern is whether collective bargaining at the state and local government levels distorts the normal American political process so that public employees have a disproportionate amount of political power (beyond having an effective voice in the making of decisions which affect their lives). Stated axiomatically, state and local governments should remain sovereign in their rights through law to ensure survival of the normal American political process.⁹⁶

Wurf, *Jerry Wurf Replies*, 1 STATE LEGISLATURES 12 (No. 2, 1975). He further states that most public employees but only a minority of private employees must pay for their health benefits; state unemployment benefits are usually not available for public employees; and, while private employee pension plans are non-contributory and are protected by the 1974 Pension Reform Act, public employee pension plans have little legal protection and are contributory. *Id.*

⁹⁴ R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956).

⁹⁵ Wellington & Winter, *supra* note 79, at 1112.

⁹⁶ *Id.* at 1125-26.

Whether the normal American political process can accommodate public employee strikes is a matter of some debate. One proposition which both sides of the debate are obliged to recognize is that, for the foreseeable future, public employee strikes or threats thereof will remain a reality⁹⁷ in spite of public opposition, particularly as to strikes by police and firefighters.⁹⁸

Solutions to the strike phenomenon run the gamut from a strictly enforced no-strike policy to the legalization of nonessential services strikes.⁹⁹ Between these two extremes lies an approach which strengthens the ability of the collective bargaining process to resolve differences effectively and the use of post-impasse procedures designed to encourage or impose a solution to the conflicting positions of the parties. The second part of this article will describe and evaluate mechanisms for resolving public employment disputes.

⁹⁷ Besides the statistical evidence previously presented, the attitudes of public sector labor unions assure use or threat of use of the strike power. To illustrate this attitude, one need only look at article II, section 1 of the constitution of the AFT, which lists the following as an object of AFT: "To obtain exclusive bargaining rights for teachers and other educational workers, with the right to strike." Indeed, Albert Shankar, president of AFT, feels that, next to the right to vote and the right to speak out, "the right to strike is perhaps the most important . . ." AMERICAN FEDERATION OF TEACHERS, SPEAKING FREELY (Transcript Series No. 2, 1974). Shankar believes that the ability of teachers to strike is necessary to prod the public employer to adopt a flexible bargaining position and that the very illegality of the strike attracts welcome attention and needed public support. O. FORD, SHOULD WE JAIL PUBLIC EMPLOYEES 35, 49 (Workers Defense League 1973).

The official AFSCME position favors the right to strike in public employment. International Executive Board, AFSCME, Policy Statement on Public Employee Unions: Rights and Responsibilities 2 (1966). President Wurf embraces the view that the right to strike is fundamental to a nontotalitarian society, albeit the strike weapon is painful to workers and is needed only infrequently. Wurf, *supra* note 49, at 11-12. As for police and firefighters, Wurf, absent binding arbitration or a strike alternative, reluctantly advocates their right to strike. *Public Workers Under Fire—What Their Union Chief Says*, U.S. NEWS & WORLD REP., Dec. 29, 1975, at 50.

The AFL-CIO appears to have adopted a position endorsing an unqualified right of public employees to strike where circumstances warrant a strike. 627 GERR B-3 (1975).

⁹⁸ Widespread opposition of the American citizenry to strikes by police and firefighters was expressed in a 1975 Gallup poll. 626 GERR B-22 (1975).

⁹⁹ If one accepts the idea that the public employer-employee relationship needs collective bargaining, recognition strikes during the life of the collective bargaining agreement should be uncommon under a well-drafted collective bargaining statute. Strikes in support of bargaining demands, however, will not readily disappear with the wave of a legislative wand.

Politics permeates the process of balancing public employer-employee interests the way the pungent aroma of a West Virginia ramp feast invades a house—all areas are affected. When mayors, city managers, chambers of commerce, public employee associations and unions, and others descend upon a state capitol, legislators feel pressure to enact a solution which balances these competing interests, for the nature of politics is to find compromise solutions. Under these circumstances it seems reasonable to conclude that West Virginia eventually will accede to the *force majeure* and legislate some form of collective bargaining statute. Even with enactment of collective bargaining legislation, politics will continue to dominate the public employer-employee relationship¹⁰⁰ since collective bargaining is inescapably a creature of the political environment. What should be the nature of this political solution? Part two of this paper suggests various alternatives for legislators to consider.

PART TWO

I. INTRODUCTION

“Do you mean that you think you can find out the answer to it?” said the March Hare.

“Exactly so,” said Alice.

“Then you should say what you mean,” the March Hare went on.

“I do,” Alice hastily replied; “at least—at least I mean what I say—that’s the same thing, you know.”

—Lewis Carroll, *Alice’s Adventures in Wonderland*

Like the fictional voyager through Lewis Carroll’s Wonderland, state legislators, when confronted with the task of providing solutions for resolution of public employment disputes, sometimes feel as if they are trapped in a maze. About them is their own Cheshire cat, inexperience, pointing various paths for them to take, and whispering jabberwocky in their ears are the various interest groups ready to issue royal verdicts for whichever course of action is pursued. “Would you tell me, please, which way

¹⁰⁰ See generally LABOR-MANAGEMENT RELATIONS SERVICE, *THE ROLE OF POLITICS IN LOCAL LABOR RELATIONS* (LMRS Monograph 1973); Belasco, *Municipal Bargaining and Political Power*, in J. LOEWENBERG & M. MOSKOW, *supra* note 26.

I ought to go from here?" asked Alice. "That depends a good deal on where you want to get to," replied the Cheshire cat.¹⁰¹

Three types of disputes leading to impasse arise in the public sector employer-employee relationship: (1) representational, (2) grievance ("rights"), and (3) collective bargaining ("interests"). Representational disputes evolve from efforts by public employee unions to obtain employer recognition or bargaining rights. Grievance disputes result from differences in interpretation or application of a collective bargaining agreement. Collective bargaining disputes occur when management and a union are unable to reach agreement as to the provisions of a collective bargaining agreement. The substance of each area of dispute will be presented, and then the various methods of dispute resolution will be analyzed.

II. THE SUBSTANCE OF EMPLOYER-EMPLOYEE DISPUTES

A. *Representational Disputes*

Disputes surrounding the representative status of public employee unions are a product of the forms of recognition accorded these unions, the manner of their selection as employee representatives, and the composition and appropriateness of the bargaining units involved. Even more basic to the gestation of representational disputes is the exclusion of, or coverage given to, public employees by the various state statutes,¹⁰² because the public employer's bargaining obligation is statutorily derived.

In the private sector, the bargaining obligation flows from "employer"¹⁰³ to "labor organizations"¹⁰⁴ "designated or selected

¹⁰¹ L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND.

¹⁰² For instance, due to the influence of police and firefighter groups, several states have special collective bargaining legislation for those personnel. *E.g.*, GA. CODE ANN. §§ 54-1301 to -1315 (1974) (firefighters in cities above 20,000); IDAHO CODE §§ 44-1801 to -1811 (Supp. 1976) (firefighters); KY. REV. STAT. ANN. §§ 78.470-.480 (Supp. 1976) (county police); KY. REV. STAT. ANN. §§ 345.010-.130 (Supp. 1976) (firefighters); MICH. STAT. ANN. §§ 17.455(31)-(47) (1975); N.H. REV. STAT. ANN. §§ 105-B:1-14 (Supp. 1973) (local government police); PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Supp. 1976); R.I. GEN. LAWS ANN. §§ 28-9.1-1 to -15 (1968, Supp. 1975) (firefighters); R.I. GEN. LAWS ANN. §§ 28-9.2-1 to -15 (1968, Supp. 1975) (police); S.D. COMPILED LAWS ANN. §§ 9-14A-1 to -22 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 5154c-1, §§ 1-20 (Cum. Supp. 1976); Wis. STAT. ANN. § 111.77 (1974, Supp. 1976); WYO. STAT. ANN. §§ 27-265 to -273 (1967 Replacement Volume) (firefighters).

¹⁰³ "[E]mployer" is defined as including

any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government

for the purposes of collective bargaining by the majority of the employees¹⁰⁵ in a unit appropriate¹⁰⁶ for such purposes,¹⁰⁷ which organizations “shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”¹⁰⁸ The provision is set forth here because it has served as a model for most collective bargaining legislation. Many representational disputes arise when there is a conflict in interpretation of one of these key terms creating the bargaining obligation. Resolution of such definitional disputes generally is accomplished by petitioning for relief from the board charged with administering the state collective bargaining statute, but arbitration is sometimes used to provide a solution.¹⁰⁹

corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

LMRA § 2(2), 29 U.S.C. § 152(2) (Supp. IV, 1974).

¹⁰⁴ “[L]abor organization” is defined as

any organization of any kind of any agency or employee representation committee or plan, in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

LMRA § 2(5), 29 U.S.C. § 152(5) (1970).

¹⁰⁵ “[E]mployee” is defined as including

any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

LMRA § 2(3), 29 U.S.C. § 152(3) (1970).

¹⁰⁶ The LMRA requires the NLRB to decide whether, “in order to assure to employees the fullest freedom in exercising their rights,” the appropriate unit for collective bargaining shall be “the employer unit, craft unit, plant unit, or subdivision thereof . . .” LMRA § 9(b), 29 U.S.C. § 159(b) (1970).

¹⁰⁷ LMRA § 9(a), 29 U.S.C. § 159(a) (1970).

¹⁰⁸ *Id.*

¹⁰⁹ See Rhemus, *Arbitration of Representation and Bargaining Unit Questions*

Since the appropriate unit question is the predominant issue in literature analyzing representational disputes, only cursory attention will be devoted here to discussing types of recognition and methods of selecting the employee representative.

1. *Types of Recognition and Methods of Selection*

Most state public sector collective bargaining statutes have emulated the private sector statutory principle of exclusive representation. Establishment of exclusive representative status for a union is important, for the attractiveness of union membership is enhanced and the union is assured of avoiding bitter fights with competing labor organizations for the right to represent all the unit employees.¹¹⁰ A notable exception to the general rule is the California statute, which originally provided for representation of employees on a "members-only" basis, but which now equivocally provides for exclusive representation of local government employees and proportional representation for teachers.¹¹¹ Proportional representation exists when unions are allowed representation on a negotiating council in proportion to their memberships within the bargaining unit. Minnesota teachers were once proportionally represented in negotiations, but this statutory device was repealed in 1972.¹¹²

The most common public sector method of selecting the representative of a majority of bargaining unit employees is the secret ballot election. In some states, however, a union's representative status may be determined by the agency administering the state statute on the basis of authorization cards¹¹³ or by other suitable methods.¹¹⁴ When the election method is used, representative sta-

in *Public Employment Disputes*, in *THE ARBITRATOR, THE NLRB AND THE COURTS* 256-60 (BNA 1967).

¹¹⁰ J. STIEBER, *supra* note 3, at 127.

¹¹¹ See Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 *HASTINGS L.J.* 719 (1972).

¹¹² Minn. Law of 1967, ch. 633, §§ 1-8 (repealed 1972), *superseded by* MINN. STAT. ANN. §§ 179.61-.76 (Supp. 1976) (public employees except charitable hospital employees).

¹¹³ *E.g.*, N.Y. CIV. SERV. LAW § 207 (McKinney 1973).

¹¹⁴ Connecticut, Florida, Minnesota, and Vermont also allow for recognition without an election. CONN. GEN. STAT. ANN. §§ 7-468, -471 (1972) (municipal employees); CONN. GEN. STAT. ANN. § 10-153b (Supp. 1976) (teachers); Conn. Pub. A. No. 75-566, § 5 (Appendix Pamphlet 1976) (state employees); FLA. STAT. ANN. § 447.307 (Supp. 1976); MINN. STAT. ANN. § 179.67 (Supp. 1976) (public employees

tus is determined by a majority of the votes cast. The state public employment relations boards often must determine whether a sufficient showing of interest has been made to hold an election and whether election, certification, recognition, and contract bars to the election exist.

2. *Appropriate Unit Determination*

Since a labor union is entitled by law to represent only those public employees who are in an appropriate bargaining unit, the determination of appropriateness is an important function of public employment relations boards.¹¹⁵ Public management considers appropriate only those bargaining units which maximize management's view of efficient and effective labor relations policies, while public employee unions are somewhat more pragmatic and emphasize those bargaining units which guarantee their selections as exclusive collective bargaining representatives. Undoubtedly, policy considerations, as well as practicalities, guide public employment relations boards in exercising their quasi-judicial determinations of what are appropriate bargaining units.

The most common criteria included in state collective bargaining statutes for determining an (not "the")¹¹⁶ appropriate bar-

except charitable hospital employees); VT. STAT. ANN. tit. 3, § 941 (1972 Replacement Edition, Cum. Supp. 1976) (state employees, state college employees).

¹¹⁵ Public employment relations boards are charged with the duty to make appropriate unit determinations in almost all the jurisdictions which have collective bargaining statutes. See D. OWAGA & J. NAJITA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC COLLECTIVE BARGAINING: UNIT DETERMINATION 1 (1973). Again, California provides the exception to the rule in that there the public employer is authorized to make the judgment as to the appropriateness of bargaining units, subject to judicial review. See Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts*, 21 CAL. PUB. EMPLOYEE REL. 2 (1974). Nevada allows the public employer to make the appropriate unit determination, subject to appeal to the PERB, which must apply "the same criterion." NEV. REV. STAT. § 288.170(2) (1975) (local government employees).

¹¹⁶ In the private sector, the LMRA has not been interpreted as mandating the only or the ultimate or the most appropriate bargaining unit; rather, the LMRA requires only that the unit be "appropriate"; that is, appropriate to ensure to employees in each case "the fullest freedom in exercising the rights guaranteed by this subchapter [of the LMRA]." LMRA § 9(b), 29 U.S.C. § 159(b) (1970); *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 417-19 (1950), *enforced*, 190 F.2d 576 (7th Cir. 1951). Accordingly, there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *E.g.*, *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-23 (4th Cir. 1963). The

gaining unit are the following: (1) Whether the employees concerned have a clear and identifiable community of interest; (2) whether the proposed unit will result in effective dealings and efficiency of operations; and (3) whether the employees have a history of representation, which usually may not be a controlling factor.¹¹⁷ An emphasis on any one factor can be decisive in establishing the size and scope of a bargaining unit. Some state statutes are structured virtually to prevent small collective bargaining units;¹¹⁸ yet, a proliferation of units is sometimes allowed where professionals seek to organize.

Unions tend to favor smaller bargaining units, while governmental employers advocate larger units. Illustrative of these divergent viewpoints are Philadelphia, which contains one principal bargaining unit, and New York City, which has had over 200 collective bargaining units at one time.¹¹⁹ The arguments for large

discretion granted by statute to the NLRB to determine an appropriate bargaining unit is broad.

Against the flow of both the private sector and the public sector experiences are the Maine and Oregon statutes, which dictate that "the" appropriate unit be selected. ME. REV. STAT. ANN. tit. 26, § 966 (Supp. 1976) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-E (Supp. 1976) (state employees); ORE. REV. STAT. § 243.682 (1975 Replacement Part). To the same effect is the approach taken by the New York PERB. Crowley, *The Resolution of Representation Status Disputes Under the Taylor Law*, 37 FORDHAM L. REV. 517, 518-20 (1969).

¹¹⁷ Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 152, 152-58 (1971).

¹¹⁸ New York's Taylor Law has prompted the New York State Public Employment Relations Board to set up a small number of statewide bargaining units for public employees. N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973, McKinney Supp. 1976), with standards for defining "the appropriate employer-employee negotiating unit" set out at N.Y. CIV. SERV. LAW § 207 (McKinney 1973). In Pennsylvania, one of the appropriateness criteria is consideration of "the effects of over-fragmentization." PA. STAT. ANN. tit. 43, § 1101.604 (Supp. 1976) (public employees except firefighters and police). Additionally, the Wisconsin statute makes statewide bargaining units presumptively appropriate for state employees and, as does Hawaii's statute, even has limited the number of statewide bargaining units. HAWAII REV. STAT. § 89-6 (Supp. 1975); WIS. STAT. ANN. § 111.81(3) (1974, Supp. 1976) (state employees). New Jersey has shown a strong preference for statewide units. *E.g.*, *State v. Patterson State Fed'n of College Teachers*, 484 GERR F-1 (1972). Alaska mandates that "unnecessary fragmenting shall be avoided." ALASKA STAT. § 23.40.090 (1972).

¹¹⁹ Collective bargaining is much more manageable in Philadelphia than in New York City due to the lack of fragmentation of bargaining units. Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001, 1004-11 (1969). In New York City, as a result of political considerations, over 800 separate certificates of representation were issued between

bargaining units are as follows: They are easier and cheaper to administer than smaller units;¹²⁰ they are coterminous with broad-scope collective bargaining and encourage bargaining with upper echelon officials who possess adequate bargaining authority;¹²¹ they aid in establishing uniform benefits for performance of similar work, which, in turn, reduces personnel conflicts;¹²² they largely avoid the excessive competition spawned by a proliferation of rival labor organizations;¹²³ and they promote groupings of public employees who work under common benefit and classification programs, the same civil service system, and common laws and regulations. Arguments for smaller bargaining units are as follows: They group together public employees of specialized interests and needs, whose desires might be subjugated to majority wishes in a larger unit;¹²⁴ they may achieve better bargains at the negotiating table for their members; and they are much easier to organize and to promote unit solidarity within.¹²⁵ At times, however, unions have been inconsistent in their support of smaller bargaining units.¹²⁶

In order to avoid some of the pitfalls of bargaining with a

1958 and 1967, leading to "a crazy patchwork of bargaining units, excessive in number and highly complicated." R. HORTON, *supra* note 40, at 32.

¹²⁰ A. THOMPSON, *UNIT DETERMINATION IN PUBLIC EMPLOYMENT* 19 (1967); H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 108 (1971); Shaw & Clark, *supra* note 117, at 175.

¹²¹ Rock, *supra* note 119.

¹²² GOVERNOR'S COMM. ON PUBLIC EMPLOYEE RELATIONS, *FINAL REPORT* 24 (1966) [referred to as the Taylor Report].

¹²³ Rock, *supra* note 119. Larger units dampen union fervor to outdo their competitors in seeking greater employee benefits, referred to as the "get-more syndrome." Friedman, *Unit Determinations by Mini-PERB's*, in *PROCEEDINGS OF THE NEW YORK UNIVERSITY TWENTY-FIRST ANNUAL CONFERENCE ON LABOR* 511 (T.G.S. Christensen ed. 1969).

¹²⁴ These groupings may be organized along skill, professional, social, or other lines.

¹²⁵ Rock, *supra* note 119.

¹²⁶ Rival employee organizations occasionally take opposing sides on two different unit questions. One will argue for a narrow unit in the first situation and a wide unit in the second. Exactly the opposite position is taken by the rival organization. There are internal, political, economic, and technological reasons for such apparent contradictions.

Prasow, *Principles of Unit Determination—Concept and Problems*, in *PERSPECTIVE IN PUBLIC EMPLOYEE NEGOTIATION* 61-62 (PERL Special Issue 1969). "The matter is essentially a pragmatic issue." Statement of AFSCME general counsel, 436 GERR AA-2 (1972).

multitude of employee units, coalition bargaining¹²⁷ (where separate bargaining units bargain jointly with the governmental employer on all agency-wide issues) and multi-tier bargaining¹²⁸ (where tiered levels of employee units bargain on issues of concern to the particular tier) have been tried. The effect of either scheme is to limit the size of bargaining rather than to alter the size or scope of bargaining units.

3. Supervisors and Union Security

Two of the most troublesome representational policy issues which have confronted state legislators are whether to include supervisors in public employee bargaining units and whether to allow some form of union security in these units. Each issue is plagued with its own share of difficulties.

Supervisors¹²⁹ in the private sector are allowed to join unions but almost always are denied protection by the LMRA. In public sector bargaining units, some states have excluded supervisors, but more states have included them, although managerial or confidential employees have been excluded.¹³⁰ The basic reason for including supervisors within the bargaining unit is that they—especially “teachers, policemen, firemen, and social workers—have a strong community of interest with the rank-and-file workers they supervise.”¹³¹ Frequently, many of the supervisory duties common to the

¹²⁷ *E.g.*, Oregon, Rhode Island.

¹²⁸ *E.g.*, Michigan, New York City.

¹²⁹ “[S]upervisor” is statutorily defined as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

LMRA § 2(11), 29 U.S.C. § 152(11) (1970).

¹³⁰ D. OWAGA & J. NAJITA, *supra* note 115, at 8-10, 70-74. The statutory collective bargaining patterns regarding supervisors have been categorized as follows: Exclusion of all supervisors, exclusion of bona fide supervisors, autonomous units of supervisors with full bargaining rights, and autonomous units of supervisors with meet and confer rights. Hayford & Sinicropi, *The Bargaining Rights Status of Supervisors in the Public Sector*, IND. REL. (1976); Hayford, *An Empirical Investigation of the Public Sector Supervisory Bargaining Rights Issue*, 26 LAB. L.J. 641 (1975).

¹³¹ ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 97-98 (1970). However, a recent survey of 266 municipalities and school districts in Iowa revealed that

private sector do not inhere in public sector supervisors, whose authority is circumscribed by civil service regulations and personnel departments;¹³² hence, a definitional problem exists. Nonetheless, in opposition to the views of some commentators,¹³³ public management pushes to exclude supervisors from bargaining units in order to avoid conflicts of interest at the negotiating table and in the grievance function.¹³⁴

An even more controversial representational issue which occurs in the public sector is whether state legislatures should authorize the negotiation of union security provisions, which in various manners guarantee inclusion of bargaining unit employees within union membership and strengthen union solidarity.¹³⁵ By

[b]onafide supervisors generally viewed themselves (and all front line supervisors) as being more closely identified with the management group than with rank and file employees. The study showed that if allowed by law to bargain collectively a majority of bonafide supervisors would not choose to do so.

Hayford, *supra* note 130, at 649. Conversely, “[l]ess than bonafide supervisors generally viewed themselves (and all front line supervisors) as being more closely identified with rank and file employees, . . . [and] . . . a majority . . . would choose [to bargain collectively].” *Id.* “Bonafide supervisors and less than bonafide supervisors are unique from one another in terms of their identity groups, communities of interest, collective bargaining desires, and unit placement preferences.” *Id.* at 650.

¹³² H. WELLINGTON & R. WINTER, *supra* note 120, at 113.

¹³³ Pendleton, *Collective Bargaining in the Public Sector: Supervisors*, in REPORTS 647-48 (1970); Schmidt, *The Question of the Recognition of Principal and Other Supervisory Units in Public Education Collective Bargaining*, 19 LAB. L.J. 283 (1968); White, *Rights and Responsibilities in Municipal Collective Bargaining*, 22 ARB. J. 31 (1967).

¹³⁴ ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 131; H. WELLINGTON & R. WINTER, *supra* note 120, at 113; Hayford, *supra* note 130, at 651-53.

¹³⁵ The types of union security provisions are as follows: Closed shop, requiring the employer to hire only union members and to discharge any employee who will not join the union; union shop, requiring new employees to join the union within a specified time and current union members to retain their memberships; modified union shop, requiring new employees to join the union within a specified time and current union members to retain their memberships but allowing current nonunion members to retain that status; preferential shop, requiring employers to give preference to union members in hiring; agency shop, requiring employees who choose not to become union members to pay to the union an amount equal to the customary initiation fee and the periodic dues required of members; maintenance of membership, requiring union members to remain union members in order to retain their jobs; maintenance of dues, requiring union members who withdraw their memberships to pay dues for the life of the collective bargaining agreement;

late 1975, just 13 states and the District of Columbia had authorized some form of union security.¹³⁶ A review of these statutes prompts an admonition to other states to be cautious in drafting union security legislation to avoid conflict with other statutory guarantees.¹³⁷ A concept related to union security is checkoff of union dues by the public employer, which may be found in a number of state statutes.¹³⁸

and fair share agreement, requiring employees who choose not to become union members to contribute a pro rata share of bargaining costs.

¹³⁶ Alaska (public employees except teachers), Kentucky (firefighters), and Washington (public employees) authorize collective bargaining as to all forms of union security except the closed shop. ALASKA STAT. § 23.40.110 (1972); KY. REV. STAT. ANN. § 345.050(c) (Supp. 1976); WASH. REV. CODE ANN. § 41.56.122(1) (Supp. 1975). Delaware (certified public school employees) prohibits collective bargaining only as to a union shop, while Hawaii (public employees) mandates a fair share arrangement, and Rhode Island (state employees) mandates an agency shop. DEL. CODE ANN. tit. 14, § 4003(a) (1974); HAWAII REV. STAT. §§ 89-3 to -4 (Supp. 1975); R.I. GEN. LAWS ANN. § 36-11-2 (Supp. 1975); see Najita, *The Mandatory Agency Shop in Hawaii's Public Sector*, 27 IND. & LAB. REL. REV. 432 (1974). Michigan (public employees) and Montana (public employees except charitable hospital employees) authorize bargaining over an agency shop, while Vermont (municipal employees) does the same except that an employer may not discriminate against a nonpaying employee. MICH. STAT. ANN. § 17.455(10) (1975); MONT. REV. CODES ANN. § 59-1605(c) (Supp. 1975); VT. STAT. ANN. tit. 21, § 1726(a)(8) (Cum. Supp. 1976). Vermont (state employees) also allows payment of a fee equal to one year's union dues for a grievance service performed. VT. STAT. ANN. tit. 3, § 941(k) (1972 Replacement Edition). Pennsylvania (public employees except firefighters and police) authorizes bargaining as to a maintenance of membership dues provision. PA. STAT. ANN. tit. 43, § 1101.705 (Supp. 1976). Massachusetts (public employees) and Wisconsin (public employees) authorize bargaining over a fair share agreement. MASS. ANN. LAWS ch. 150E, § 12 (1976); WIS. STAT. ANN. §§ 111.70(1)(h), (2), .81(6), .85 (1974). Minnesota (public employees except charitable hospital employees) and Oregon (public employees) authorize bargaining over a similar provision requiring payment of a pro rata share of costs incurred in the collective bargaining process. MINN. STAT. ANN. § 179.65(2) (Supp. 1976); ORE. REV. STAT. §§ 243.650(16), .672(c) (1975 Replacement Part). For the most comprehensive article on point see Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183 (1975). For a collection of the statutes see J. NAJITA & D. OWAGA, *GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: UNION SECURITY* (1973).

¹³⁷ See Blair, *supra* note 136, at 210-19. For example, statutes that grant public employees the right to join or assist a union, or refrain therefrom, or that prohibit employers from discriminating against employees to encourage or discourage union membership can be sources of conflict with union security provisions. Numerous problems may also arise where union security clauses and civil service statutes attempt to coexist.

¹³⁸ *E.g.*, ALASKA STAT. § 23.40.220 (1972); ARK. STAT. ANN. § 81-202 (1960 Replacement Volume); CONN. GEN. STAT. ANN. § 7-477 (1972) (municipal employees); Conn. Pub. A. No. 75-566, § 11 (Appendix Pamphlet 1976) (state employees); DEL.

Arguments advanced for allowing adoption of union security clauses are that these provisions do the following: Require all public employees to share in the costs of union representation so that no free-riders are present; stabilize labor-management relations by discouraging rival unions and dissident bargaining unit members, as well as by allowing unions to devote their energies to activities other than dramatizing the advantages of membership; and grant the employer bargaining leverage in states where union security is not mandated.¹³⁹ Opponents of union security argue that union security provisions do the following: Infringe upon the individual's freedom of choice in job and union selection;¹⁴⁰ reduce the political leverage of satellite personnel within unions, such as nonteaching personnel who are locked into teacher bargaining units;¹⁴¹ conflict with both teacher tenure provisions¹⁴² and merit systems;¹⁴³ give

CODE ANN. tit. 14, § 4003(c) (1974) (certified public school employees); DEL. CODE ANN. tit. 19, § 1311 (1974); FLA. STAT. ANN. § 447.303 (Supp. 1976); HAWAII REV. STAT. § 89-4 (Supp. 1975); IND. ANN. STAT. § 20-7.5-1-8 (1975) (teachers); IND. ANN. STAT. § 22-6-4-4 (Supp. 1976); KY. REV. STAT. ANN. § 345.110 (Supp. 1976) (firefighters); LA. REV. STAT. ANN. § 23:890(F) (Supp. 1976) (transit workers); MD. ANN. CODE art. 77, §§ 160(l), 160A(m) (1975 Replacement Volume) (public school employees in certain counties); MINN. STAT. ANN. § 179.65(5) (Supp. 1976) (public employees except charitable hospital employees); MONT. REV. CODES ANN. § 59-1612 (Supp. 1975) (public employees except nurses and professional engineers); N.H. REV. STAT. ANN. § 98-C:3(IV) (Supp. 1973) (state and nonprofessional university employees); N.H. REV. STAT. ANN. § 105-B:7(III) (Supp. 1973) (local government police); N.Y. CIV. SERV. LAW § 208(1) (McKinney 1973); ORE. REV. STAT. § 243.672(C) (1975 Replacement Part); PA. STAT. ANN. tit. 43, § 1101.705 (Supp. 1976) (public employees except firefighters and police); R.I. GEN. LAWS ANN. § 36-11-2 (Supp. 1975) (state employees); VT. STAT. ANN. tit. 21, § 1734(a)(1) (Cum. Supp. 1976) (municipal employees); WASH. REV. CODE ANN. § 28B.16.100 (Supp. 1975) (certain employees of state institutions of higher learning); WASH. REV. CODE ANN. § 41.56.110 (Supp. 1975); WASH. REV. CODE ANN. § 41.59.060 (Supp. 1975) (certificated public school employees); WIS. STAT. ANN. § 111.70(3)(a)(6) (1974) (municipal employees); WIS. STAT. ANN. § 111.84(1)(f) (1974) (state employees).

¹³⁹ NEW YORK STATE COMM'N ON THE QUALITY, COST & FINANCING OF ELEMENTARY & SECONDARY EDUCATION, 3 REPORT app. C, at 10-16 (1972).

¹⁴⁰ Larson, *Are You Making It Hard for Your Teachers Not To Join a Union?*, 159 AM. SCHOOL Bd. J., Mar. 1972, at 59.

¹⁴¹ NEW YORK STATE COMM'N ON THE QUALITY, COST & FINANCING OF ELEMENTARY & SECONDARY EDUCATION, *supra* note 139.

¹⁴² *Id.*

¹⁴³ Anderson, *Legal Aspects of Collective Bargaining in Public Employment*, in DEVELOPMENTS IN PUBLIC EMPLOYEE RELATIONS, *supra* note 69, at 146; Blair, *supra* note 136, at 219; Waks, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547 (1970).

majority unions an advantage over minority unions;¹⁴⁴ raise substantial constitutional arguments;¹⁴⁵ enable unions to make political contributions and carry on effective political action programs;¹⁴⁶ and, at least beyond the amount of a fair share payment, present unfairness.¹⁴⁷ As in the private sector, union security is an issue of high emotional impact and engenders vigorous debate.

B. *Grievance Disputes*

Contractual grievance procedures are designed to allow complainants, *i.e.*, grievants, to raise issues of concern regarding the application or interpretation of the collective bargaining agreement. "The grievance procedure is, in other words, a part of the continuous collective bargaining process,"¹⁴⁸ intended to clarify contractual ambiguities and conflicts, and provides a necessary safety valve for the employer-employee relationship. A typical private sector grievance provision allows for resolution of the complaint at several steps of the management hierarchy, starting with an immediate supervisor and then proceeding up the management structure, culminating in final and binding arbitration.¹⁴⁹ On occasion, management will initiate a grievance.

In the public sector, binding grievance arbitration was most unusual at the beginning of the 1960's¹⁵⁰ but is quite common today.¹⁵¹ Generalizations about this process in governmental units

¹⁴⁴ Najita, *supra* note 136, at 442-44.

¹⁴⁵ Blair, *supra* note 136, at 190. These arguments fall within the first, fifth, and fourteenth amendments to the United States Constitution.

¹⁴⁶ *Project: Collective Bargaining and Politics in Public Employment*, *supra* note 26, at 1037.

¹⁴⁷ Blair, *supra* note 136, at 219.

¹⁴⁸ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

¹⁴⁹ In 1966, approximately 94 percent of the collective bargaining agreements in the nation's most important industries provided for arbitration as the terminal point of the grievance process. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-6, MAJOR COLLECTIVE BARGAINING AGREEMENTS 5 (1966).

¹⁵⁰ Krislov, *Prospects for the Use of Advisory Grievance Arbitration in Federal Service*, 18 IND. & LAB. REL. REV. 420, 422 (1965); Segal, *Grievance Procedures for Public Employees*, 9 LAB. L.J. 921 (1958). In 1961, one investigator located for study only 101 governmental units which had collective bargaining agreements containing grievance-arbitration provisions (this does not, however, preclude the existence of other such units). Krislov & Schmulowitz, *Grievance Arbitration in State and Local Government Units*, 18 ARB. J. 171 (1963).

¹⁵¹ In 1967, the American Arbitration Association reported that "virtually every

are difficult to make because of the sketchy information available. Preliminary assessments of the current status of the governmental grievance process show that it is slowly but surely emulating the private sector grievance-arbitration model¹⁵² as to procedures,¹⁵³ issues, and standards applied by arbitrators.¹⁵⁴

As in the private sector, the issues which may be grieved and arbitrated in governmental employment are matters set forth in the collective bargaining agreement. In contrast to the private sector, the scope of state and local government grievance procedures is diverse,¹⁵⁵ although the contractual provisions defining the ar-

collective bargaining agreement in the public sector . . . provides for arbitration of grievances." 3 ARB. NEWS, Mar. 1969. A more conservative estimate is that over 50 percent of public sector collective bargaining agreements include binding grievance arbitration. Howlett, *supra* note 77, at 32. A 1973 study of 118 of the 150 known collective bargaining agreements in higher education revealed that 84 contracts provided for binding grievance arbitration and 10 contracts provided for advisory arbitration. Benewitz, *A Modest Proposal for Improving College Arbitration*, 29 ARB. J. 43 (1974).

¹⁵² For the best general text about private sector arbitration see F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (1973).

¹⁵³ For a helpful primer on public sector arbitration procedures see A. ZACK, *UNDERSTANDING GRIEVANCE ARBITRATION IN THE PUBLIC SECTOR* (U.S. Dep't of Labor 1974).

A study of 304 representative state and local government collective bargaining agreements showed the following as to grievance procedures: Most were less specific about details than private sector agreements; 9 percent "specified complete time limits for union appeals of management decisions"; 75 percent "specified whether the grievance should be written at some stage"; over 25 percent contained no provision for handling impasses relating to arbitrator selection; only 25 percent "specified general procedural rules for arbitration"; over 50 percent "did not specify a time limit for appeal to arbitration or for arbitration selection"; and "60 percent did not specify time limits for arbitration decisions." Ullman & Begin, *The Structure and Scope of Appeals Procedures for Public Employees*, 23 IND. & LAB. REL. REV. 323, 326 (1970).

¹⁵⁴ TEELE, *CHARACTERISTICS OF PUBLIC EMPLOYMENT ARBITRATION UNDER A MASSACHUSETTS LAW* 239 (1969); Begin, *The Private Grievance Model in the Public Sector*, 10 IND. REL. 21 (1971); Berger, *The Grievance Process in the Philadelphia Public Service*, 13 IND. & LAB. REL. REV. 568 (1960); Edmondson & Simon, *Arbitration in Higher Education*, 29 ARB. J. 217 (1974); Howlett, *Arbitration in the Public Sector*, in *PROCEEDINGS OF THE SOUTHWESTERN LEGAL FOUNDATION 15TH ANNUAL INSTITUTE ON LABOR LAW* 262 (1969); Krislov & Peters, *The Arbitration of Grievances in Educational Units in the Late 1960's*, 23 LAB. L.J. 25 (1972); Krislov & Peters, *Grievance Arbitration in State and Local Government: A Survey*, 25 ARB. J. 196 (1970); Ullman & Begin, *supra* note 153.

¹⁵⁵ As related by Ullman and Begin, the scope of state and local grievance procedures falls into the following four categories: (1) One-third of the contracts

bitrability of disputes are similar.¹⁵⁶ Perhaps the factor which most confines the scope of issues to be grieved and arbitrated is the scope of public sector collective bargaining, which, in turn, determines the breadth of the collective bargaining agreement. Another complicating factor is the overlapping of grievance procedures and civil service appellate procedures.

If the grievance-arbitration procedure in the public sector, encompassing disputes as to discharge and discipline, seniority, and other topics for managerial decision, becomes as important as industrial grievance-arbitration, that process will be part of the core of the contractual relationship.¹⁵⁷ Unquestionably, private sector arbitration is still "the darling of national labor policy,"¹⁵⁸ and one wonders if arbitration can perform as important a role in governmental employment. Time will be the judge of how well the adolescent public sector grievance-arbitration process matures and changes¹⁵⁹ and to what degree the resultant judicial doctrines mirror their private sector analogues.¹⁶⁰

contain very general definitions of grievance; (2) another one-third contain no definition [presumably all issues may be grieved]; (3) one-fifth of the contracts state "that matters subject to the grievance procedure [include] matters pertaining to interpretation, application or violation of the contract"; and (4) the final one-fifth "limit the scope of the grievance procedures to the interpretation, application, or violation of the contract." Ullman & Begin, *supra* note 153, at 331-32.

¹⁵⁶ *Id.* at 332-33.

¹⁵⁷ For a discussion of the importance of the private sector grievance-arbitration process to the parties see S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 692 (1960).

¹⁵⁸ Both federal courts and the NLRB have given unwavering deference to the arbitral process as the preferred method of fostering industrial self-government and peaceful labor-management relations in the private sector. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 549 (1967).

¹⁵⁹ The need for flexible arbitration procedures to adapt to changing times is illustrated by the founding expedited arbitration concept in the steel industry. Using inexperienced young arbitrators, steel companies have attempted to combat the shortage of experienced arbitrators and transform the too costly, too complex, too lengthy, and too formal process into what the process is supposed to be—"cheap, simple, quick and informal." Cohen, *The Search for Innovative Procedures in Labor Arbitration*, 29 ARB. J. 106 (1974).

¹⁶⁰ Private sector judicial doctrines have revolved around compelling arbitration of disputes, deciding questions of arbitrability, and reviewing, enforcing, and setting aside arbitration awards. Similar judicial functions have been cultivated in the public sector labor-management system. See generally R. SMITH, H. EDWARDS & R. CLARK, JR., *supra* note 57, at 923-46.

C. *Collective Bargaining Disputes*

Disputes occurring during the negotiation of a collective bargaining agreement are common in both the public and private sectors and usually reflect the parties' inability to compromise divergent bargaining positions. For example, there is a strong tendency for public employee unions, especially those which represent professionals, to attempt to bargain about policy matters, which effort evokes fervent managerial resistance leading to frustrated unions. Other collective bargaining disputes arise from employer resistance to inclusion of controversial provisions, *e.g.*, union security, within the written agreement or result from more mundane, yet important, matters such as wage increases and reduced working hours.

The primary determinant of the subjects which may be bargained about are the state collective bargaining statutes. By late 1975, the scope of public sector collective bargaining was described in various ways as follows: 30 states imitated the private sector model of wages, hours, and working conditions or had similar terminology;¹⁶¹ nine states and the District of Columbia potentially

¹⁶¹ ALA. CODE tit. 37, § 450(3) (Cum. Supp. 1973) (firefighters); CAL. GOV'T CODE § 3504 (Deering 1973) (local government employees); CAL. GOV'T CODE § 3529 (Deering 1973) (state employees); CAL. LABOR CODE § 1962 (Deering 1976) (firefighters); CONN. GEN. STAT. ANN. § 7-468(a) (1972) (municipal employees); CONN. GEN. STAT. ANN. §§ 10-153b(c), (e), -153d, -153g (Supp. 1976) (teachers); Conn. Pub. A. No. 75-566, §§ 2(a), (c) (Appendix Pamphlet 1976) (state employees); DEL. CODE ANN. tit. 14, § 4006 (1974) (certified public school employees); DEL. CODE ANN. tit. 19, §§ 1301(3), (5) (1974); GA. CODE ANN. § 54-1304 (1974) (firefighters in cities above 20,000); HAWAII REV. STAT. § 89-9 (Supp. 1975); IDAHO CODE § 44-1802 (Supp. 1976) (firefighters); ILL. ANN. STAT. ch. 24, § 10-3-8 (Smith-Hurd 1962) (firefighters); ILL. ANN. STAT. ch. 111 2/3, § 328a (Smith-Hurd 1966) (transit workers); IND. ANN. STAT. §§ 20-7.5-1-4, -5 (1975) (teachers); IND. ANN. STAT. §§ 22-6-4-1(k) (Supp. 1976); IOWA CODE ANN. § 20.9 (Supp. 1976); KY. REV. STAT. ANN. § 78.480 (Supp. 1976) (county police); KY. REV. STAT. ANN. §§ 345.030, .050(3) (Supp. 1976) (firefighters); ME. REV. STAT. ANN. tit. 26, § 965(1)(C) (1964) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-D(1)(E) (1964) (state employees); ME. REV. STAT. ANN. tit. 26, § 1026(1)(C) (Supp. 1976) (university employees); MD. ANN. CODE art. 64B, § 37(b) (1972 Replacement Volume) (transit workers); MD. ANN. CODE art. 77, §§ 160(b), (h), 160A(b), (h) (1975 Replacement Volume) (public school employees in certain counties); MASS. ANN. LAWS ch. 150E, §§ 2, 6 (1976); MICH. STAT. ANN. §§ 17.455(11), (15) (1975); MINN. STAT. ANN. §§ 179.63(18), .65(4), .66(2) (Supp. 1976) (public employees except charitable hospital employees); MO. ANN. STAT. § 105.520 (Supp. 1976) (public employees except deputy sheriffs, highway patrolmen, national guard, police, and teachers); MONT. REV. CODES ANN. §§ 59-1603(1), (3), -1605(3) (Supp. 1975) (public employees except

had narrowed the private sector model to terms or conditions of employment or similar wording;¹⁶² three states did not define the scope of collective bargaining;¹⁶³ three states allowed the parties to determine the scope of negotiations;¹⁶⁴ various states had added provisions relating to specific subjects;¹⁶⁵ and 15 states and the District of Columbia had specifically authorized bargaining about grievance-binding arbitration procedures.¹⁶⁶

nurses and professional engineers); NEV. REV. STAT. §§ 288.033, .150 (1975) (local government employees); N.Y. CIV. SERV. LAW §§ 201(4), 203-04 (McKinney 1973, McKinney Supp. 1976); N.D. CENT. CODE § 15-38.1-09 (1971 Replacement Volume) (teachers); OKLA. STAT. ANN. tit. 11, §§ 548.2, .3(7), .4(A) (Supp. 1976) (firefighters, municipal employees, police); PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1976) (firefighters, police); PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1976) (public employees except firefighters and police); R.I. GEN. LAWS ANN. § 28-9.1-4 (1968) (firefighters); R.I. GEN. LAWS ANN. § 28-9.2-4 (1968) (police); R.I. GEN. LAWS ANN. § 28-9.3-2 (1968) (teachers); R.I. GEN. LAWS ANN. § 28-9.4-3 (1968) (municipal employees except firefighters, police, and teachers); R.I. GEN. LAWS ANN. § 36-11-1(a) (Supp. 1975) (state employees); TEX. REV. CIV. STAT. ANN. art. 5154c-1, §§ 5(a), 7(b) (Cum. Supp. 1976) (firefighters, police); VT. STAT. ANN. tit. 3, § 904 (Cum. Supp. 1976) (state employees, state college employees); VT. STAT. ANN. tit. 16, § 2004 (Cum. Supp. 1976) (teachers); VT. STAT. ANN. tit. 21, § 1725(a) (Cum. Supp. 1976) (municipal employees); WASH. REV. CODE ANN. §§ 41.56.030(4), .58.040(1) (Supp. 1975); WASH. REV. CODE ANN. § 41.59.020(2) (Supp. 1975) (certificated public school employees); WIS. STAT. ANN. § 111.70(1)(d) (1974) (municipal employees); WYO. STAT. ANN. § 27-266 (1967 Replacement Volume) (firefighters); 49 OP. W. VA. ATT'Y GEN. 448 (1962) (employees of county boards of education).

¹⁶² ALASKA STAT. §§ 23.40.070(2), .250(1) (1972); FLA. STAT. ANN. §§ 447.203(14), .301(2) (Supp. 1976); KAN. STAT. ANN. § 72-5414 (1972) (teachers); KAN. STAT. ANN. §§ 75-4324, -4327(a), (b), -4330 (Supp. 1975) (public employees except teachers); NEB. REV. STAT. §§ 48-816, -837 (1974); N.H. REV. STAT. ANN. § 98-C:4 (Supp. 1973) (state and nonprofessional university employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1976); ORE. REV. STAT. § 243.662 (1975 Replacement Part); S.D. COMPILED LAWS ANN. § 3-18-2 (1974); Op. N.M. Att'y Gen. (Apr. 14, 1971); see 1 APP. D.C. CODE ANN., ORG. ORD. No. 25 (1973).

¹⁶³ Idaho (municipal employees), Utah, and Virginia.

¹⁶⁴ IDAHO CODE § 33-1271 (Supp. 1976) (teachers); IOWA CODE ANN. § 20.9 (Supp. 1976); NEB. REV. STAT. § 79-1292 (1971) (teachers).

¹⁶⁵ ALASKA STAT. § 14.20.550 (1975) (teachers—fulfillment of professional duties); CAL. GOV'T CODE § 3543.2 (Deering Supp. 1976) (public school employees—right to consult on educational objectives, course content and curriculum, and textbook selection); MONT. REV. CODES ANN. § 41-2201 (Supp. 1975) (nurses—desirable employment practices); N.H. REV. STAT. ANN. § 98-C:4(I)(d) (Supp. 1973) (state and nonprofessional university employees—mediation and fact-finding); OKLA. STAT. ANN. tit. 70, § 509.6 (1972) (school employees—items affecting performance of professional services); WASH. REV. CODE ANN. § 28B.52.030 (Supp. 1975) (community college academic employees—school policies).

¹⁶⁶ ALASKA STAT. § 23.40.210 (1972); HAWAII REV. STAT. §§ 89-10(a), -11 (Supp. 1975); IND. ANN. STAT. § 20-7.5-1-4 (1975) (teachers); KAN. STAT. ANN. § 72-5424

Further limitations upon the scope of governmental collective bargaining are found in civil service statutes, various statutory and constitutional provisions, management rights clauses, and judicial decisions interpreting these laws. Some state statutes specifically exclude matters from the scope of collective bargaining. Another common practice is to categorize issues as either mandatory or permissive subjects of collective bargaining.

Some confusion exists as to the scope of public sector collective bargaining where there is diffusion of authority among governmental units over the conditions of public employment.¹⁶⁷ In general, state legislatures are empowered by their state constitutions to establish employment conditions for state employees. This power, in part, has been delegated to various state officials and agencies. A common practice, however, is for various state legislatures to retain this power as it relates to implementation of conditions of state employment requiring state tax expenditures. At the municipal level, power to deal with municipal employment conditions sometimes is retained by state legislatures but more often is delegated to the cities. If a state constitutional home-rule provision exists, either the municipality is empowered to regulate municipal employment conditions directly, or state legislatures are required to enact state statutes delegating such powers to local governments. In either situation the municipality is obligated to exercise

(1972) (teachers); KAN. STAT. ANN. §§ 75-4330(b), -4332(a) (Supp. 1975) (public employees except teachers); ME. REV. STAT. ANN. tit. 26, § 970 (1964) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-K (1964) (state employees); ME. REV. STAT. ANN. tit. 26, § 1031 (Supp. 1976) (university employees); MASS. ANN. LAWS ch. 150E, § 8 (1976); MINN. STAT. ANN. § 179.38 (Supp. 1976) (charitable hospital employees) (mandatory grievance procedure); MINN. STAT. ANN. § 179.70 (Supp. 1976) (public employees except charitable hospital employees) (mandatory grievance procedure); N.H. REV. STAT. ANN. § 98-C:4(c) (Supp. 1973) (state and nonprofessional university employees); N.H. REV. STAT. ANN. § 105-B:14 (Supp. 1973) (local government police); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1976) (mandatory grievance procedure); OKLA. STAT. ANN. tit. 11, § 548.12 (Supp. 1976) (firefighters, police); ORE. REV. STAT. §§ 243.706, .762 (1975 Replacement Part); PA. STAT. ANN. tit. 43, § 1101.903 (Supp. 1976) (public employees except firefighters and police) (mandatory arbitration); S.D. COMPILED LAWS ANN. § 3-18-2 (1974); WASH. REV. CODE ANN. § 41.56.122(2) (Supp. 1975); WIS. STAT. ANN. §§ 111.84(1)(e), (2)(d) (1974) (state employees); 1 APP. D.C. CODE ANN., ORG. ORD. No. 25 (1973).

¹⁶⁷ For an enlightening article on point see Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1 (1973).

its powers in accordance with state law, except where matters of local concern are vested solely within municipal discretion.¹⁶⁸

On account of this diffusion of power, preexisting statutes are often a source of conflict with collective bargaining laws, as is illustrated by the overlapping of civil service personnel policies and the same matters as encompassed within the scope of collective bargaining subjects. Where such a conflict exists, legislatures are obligated to provide a statutory solution to the problem.¹⁶⁹ A less common statutory conflict arises where teacher tenure statutes have been enacted.¹⁷⁰ Finally, home rule charter provisions of municipalities at times conflict with state collective bargaining statutes.¹⁷¹

The collective bargaining statute, itself, may restrict the scope of bargaining by expressly precluding negotiations of matters such as civil service policies, educational policies, and inherent managerial decisions. The same effect is accomplished by the use of statutorily prescribed management rights clauses,¹⁷² which are quite

¹⁶⁸ See generally Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

¹⁶⁹ While various solutions exist as to the conflict between civil service policies and the scope of collective bargaining, usually that of making one or the other statutory scheme superior, Connecticut offers a compromise solution. As explained and endorsed by one authority, in Connecticut the employment and promotion functions of the merit system are excluded from collective bargaining, but negotiated agreements prevail otherwise (so long as they are consistent with constitutional and other statutory standards). Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations*, 30 MD. L. REV. 179, 195-96 (1970).

¹⁷⁰ For a discussion of the conflict between teacher tenure provisions and bargaining subjects see Anderson, *The Impact of Public Sector Bargaining: An Essay Dedicated to Nathan P. Feinsinger*, 1973 WIS. L. REV. 986, 1003.

¹⁷¹ In Michigan, municipal home rule charter provisions dealing with uniform pay plans and municipal employee residency requirements have been litigated when they were in conflict with state collective bargaining statutes. See Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 912 (1973).

¹⁷² A model management rights clause, suggested by the Advisory Commission on Intergovernmental Relations, reads in part as follows:

State labor relations laws should provide that public employers retain the unrestricted right: (a) to direct the work of their employees; (b) to hire, promote, demote, transfer, assign, and retain employees in positions within the public agency; (c) to suspend or discharge employees for proper cause; (d) to maintain the efficiency of governmental operations; (e) to relieve employees from duties because of lack of work or for other legitimate reasons; (f) to take actions as may be necessary to carry out

common.¹⁷³ Another way in which collective bargaining statutes determine the scope of negotiations is statutory ambiguities¹⁷⁴ or conflicts,¹⁷⁵ compelling judicial interpretation of statutory provisions. Lastly, statutes sometimes provide wide avenues for bargaining, such as where certain educational policies are negotiable or where productivity bargaining¹⁷⁶ is allowed.

One of the controversial areas of concern in the scope of governmental bargaining is the desire by many professional employees to negotiate about policy-making. This desire is fueled by the professional employee's quest for intellectual status equivalent to management's, a resistance to traditional management-oriented

the mission of the agency in emergencies; and (g) to determine the methods, means and personnel by which operations are to be carried on.

51 GERR, RF 101, 112 (1973).

¹⁷³ Management rights clauses exist in the public employment statutes of Alaska, California, Connecticut, Kansas, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Vermont, Washington, and Wisconsin. See generally J. NAJITA, GUIDE TO STATUTORY PROVISIONS IN THE PUBLIC SECTOR COLLECTIVE BARGAINING: SCOPE OF NEGOTIATIONS (1973).

¹⁷⁴ As with any legislative statute in which terms are general in nature, some forum must be the arbiter of legislative intent. Query: What is a "working condition"?

The trend in public sector bargaining statutes is to enumerate bargainable and nonbargainable subjects. Those states which follow the private sector example and use the broad mandatory-permissive scheme of defining bargainable subjects, however, leave the determination of bargainable subjects to the courts or public employment relations boards. Since the private sector mandatory-permissive distinction is based on the premise that private employee unions can strike after a bona fide impasse is reached as to mandatory subjects (but neither party may insist to impasse regarding permissive subjects), the dichotomy makes little sense in the public sector, where the right to strike is rare. Kilberg, *supra* note 169, at 187-89.

¹⁷⁵ Where the definition of bargainable subjects is phrased as wages, hours, and working conditions, or in similar language, and the state legislature is not included within the collective bargaining statute as an employer, a conflict will appear whenever public employees seek to bargain about subjects which traditionally may be regulated by the legislature through its exercise of undelegated powers or which have already been regulated by the legislature prior to enactment of the collective bargaining statute. See Blair, *supra* note 167, at 10-17.

¹⁷⁶ Productivity bargaining involves labor-management efforts to negotiate improved worker benefits in exchange for increased productivity through modification of work rules and the use of incentive systems. See generally J. GREINER, TYING CITY PAY TO PERFORMANCE (LMRS 1974); H. HATRY & O. FISK, IMPROVING PRODUCTIVITY AND PRODUCTIVITY MEASUREMENTS IN LOCAL GOVERNMENTS (National Comm'n on Productivity 1971).

principles,¹⁷⁷ and the fact that policy decisions directly affect working conditions. In particular, teachers often have been adamant in seeking to bargain about policies affecting their professional judgment, professional growth, and professional status.¹⁷⁸ Interestingly enough, New York, which has a collective bargaining statute allowing binding contracts on educational policy issues but does not mandate bargaining as to these issues, and California, which has a meet and confer statute requiring only that school boards discuss educational policy issues, have produced similar impacts upon the determination of educational policies.¹⁷⁹ In addition to teachers, employees in the public health and safety fields have sought to bargain about policies of substantial public concern.¹⁸⁰ Whether the negotiation of policy issues affecting the working conditions of public employees is considered to be unwise or to be a blessing depends largely upon one's viewpoint.¹⁸¹

¹⁷⁷ Johnson & Hill, *Managements' Dilemma—The Professional Employee*, 5 CAL. MANAGEMENT REV., spring 1963, at 37, 41.

¹⁷⁸ In greater detail, teacher concerns are threefold: (1) professional judgment—curriculum development, textbook selection, innovation and experimentation, instructional techniques, planning of new buildings, (2) professional growth—conferences, observation visits, sabbatical leaves, restrictions to areas of competence, and (3) professional status—academic freedom, professional ethics, student discipline, class size, teacher aides, extracurricular work, teacher personnel files. For an analysis of the experiences of New York and California as to these issues see Comment, *Teacher Collective Bargaining—Who Runs the Schools?*, 2 FORDHAM URBAN L.J. 505 (1974). See also Jascourt, *Faculty Collective Bargaining in Higher Education: An Overview*, 3 J. LAW & EDUC. 409 (1974).

For a detailed analysis of the class size issue see J. WEITZMAN, *THE SCOPE OF BARGAINING IN PUBLIC EMPLOYMENT* 247 (1975). Weitzman leaves no doubt that teachers will continue to push hard for negotiation of optimum class size (from the teachers' perspective).

¹⁷⁹ Comment, *supra* note 178, at 559. As stated in that article: "[N]o significant diminution of the local school boards' control over the formation of educational policy was observed . . . [T]he most significant intrusions of teachers in this area were agreements and contracts establishing a system of formal advice and consultation." *Id.* at 560.

¹⁸⁰ In arguing against inclusion of public health and safety issues within the class of bargaining subjects, one commentator points to the efforts by New York City police and firefighters to bargain about the number of personnel to be assigned to police cars and fire engines, respectively. Kilberg, *supra* note 169, at 196.

¹⁸¹ For a situation in point see Dunlop, *Major Issues in New Sector Bargaining*, in S. WOLFBEIN, *EMERGING SECTORS OF COLLECTIVE BARGAINING* 19 (1970). In his article, Dunlop suggests that inclusion of limitations on class size in collective bargaining agreements (to counter employer efforts to increase class size in return for wage increases) freezes class size, producing an obstacle to adaptation to future

What should be the scope of governmental collective bargaining?¹⁸² Proponents of broad-scope collective bargaining argue that placing excessive restrictions on what may be negotiated will not foster harmonious governmental labor-management relations; will ensure bilateralism to be an employer-dominated process; will not keep pace with developments in the private sector, particularly as to management rights clauses (which are negotiated, not legislated); will encourage lobbying and other political activities;¹⁸³ and will inhibit the effective functioning of professionals. Opponents of broad-scope collective bargaining usually argue that important areas of decision-making should be left to public management so as to ensure that these decisions are not removed from the ordinary political process, such decisions' being related to "inherent" managerial functions (goals, discipline, staffing, etc.), public health and safety, and continuation of established principles such as the merit principle. Under this latter view, collective bargaining is appropriate where budgetary and, perhaps, level of service considerations are dominant.¹⁸⁴ Which view should prevail, of course, is a matter of much rhetoric and debate.¹⁸⁵

needs. Nevertheless, in late 1975, New York City teachers struck to restore limitations on class size.

¹⁸² For a fine summary of opposing viewpoints on the scope of collective bargaining see J. WEITZMAN, *supra* note 178, at 72-90.

¹⁸³ Lowenberg, *Policemen and Firefighters*, in S. WOLFBEIN, *supra* note 181, at 159. See J. SEIDMAN, *THE HAWAII LAW ON COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* (1973).

¹⁸⁴ Summers, *supra* note 29, at 1192-97.

The special political structure and procedure of collective bargaining is particularly appropriate for decisions where the employees' interests in increased wages and reduced work load run counter to the combined interests of taxpayers and users of public services. Therefore, decisions as to wages, insurance, pensions, sick leave, length of work week, overtime pay, vacations, and holidays should be considered proper subjects for bargaining.

Id. at 1194.

¹⁸⁵ For several interesting scope of bargaining proposals, discussed despite all the rhetoric, see Wellington & Winter, *supra* note 85, at 868-70. In Maine, collective bargaining is required as to wages, hours, working conditions, and contract grievance arbitration, whereas public employers are required to meet and confer with teachers with respect to educational policies. As alternatives to the Maine approach, Wellington and Winter suggest the following: Multi-party bargaining as to subjects relating to employee services, such as employer-employee-community bargaining about educational policies, intervention of third parties into negotiations by petition or procedures requiring a referendum upon aspects of the negotiated agreement, e.g., San Francisco's approach, and the use of advisory commissions to

In summary, the nature of collective bargaining disputes is shaped in large part by legislative, judicial, and administrative determinations of the scope of collective bargaining. Practical considerations of political lobbying and extensiveness of bargaining units¹⁶⁶ are two common factors and, thus, are also shaping forces. When public managers and unions are unable to consummate an agreement, numerous methods have been devised to encourage or impose resolution of these collective bargaining disputes. The next portion of this paper will explore the various dispute resolution mechanisms.

III. METHODS OF RESOLVING PUBLIC EMPLOYMENT DISPUTES

Public employment disputes essentially stem from the administration and negotiation of the collective bargaining agreement. Consequently, resolution of public employment disputes is performed by enforcement of that agreement and by ending impasses in negotiations.

A. *Enforcement of the Collective Bargaining Agreement*

Public employment relations boards, courts, public management, and public employee unions are intimately involved in the enforcement of contractual and statutory obligations relating to the collective bargaining agreement. Some of these obligations are at the heart of representational and grievance disputes, as discussed previously, and require little elaboration. Representational disputes are most often resolved by public employment relations boards, while grievance disputes are usually settled by the parties or by arbitrators, in which case judicial enforcement of contractual obligations is precluded,¹⁶⁷ absent fraud, lack of substantive arbi-

hold hearings and propose legislative modification of the collective bargaining statute. *Id.*

Will the scope of public employment bargaining be expanded as desired by public employee unions and opposed by public management? In describing how Michigan's PERB has performed well in giving flexibility to the mandatory-permissive dichotomy of bargainable subjects, one scholar, based upon the experiences of Michigan, New York, Wisconsin, and Pennsylvania, predicts an expanded scope of public employment bargaining. Edwards, *supra* note 171, at 916-23.

¹⁶⁶ Unions representing smaller bargaining units have demonstrated interest in membership concerns and frequently are disinterested in issues affecting employer-wide units or broad-based units within multilevel bargaining units.

¹⁶⁷ R. SMITH, H. EDWARDS & R. CLARK, JR., *supra* note 57, at 916.

trability, a breach of the union's duty of fair representation to its members, or noncompliance with the arbitral award.

Once the collective bargaining agreement has been executed, the trend of the law is that the public employer must do everything reasonably within its power to implement the agreement. Accomplishment of this objective is aided by two practices.¹⁸⁸ First, the public employer can make economic benefits under the collective bargaining agreement a priority item in its budget.¹⁸⁹ Second, the public employer can make the appropriate legislative body aware of the fiscal need to fulfill contractual obligations. Legislative awareness of executive fiscal needs has been facilitated by direct participation of the legislative body in collective bargaining,¹⁹⁰ by submission of tentative agreements to the legislative body for approval,¹⁹¹ and by coordination of collective bargaining and budget-making deadlines.¹⁹² Legislative consideration also should be given

¹⁸⁸ See Edwards, *supra* note 171, at 929-32.

¹⁸⁹ In *State v. AFSCME Local 1726*, in which the court legitimized a contractual insurance provision but stated it could not compel payment of insurance premium money until those funds were appropriated properly, the court admonished the State Department of Health and Social Services to "pursue every step within its power to see that the insurance is provided." 298 A.2d 362, 368 (Del. Ch. 1972). Other judicial bodies have instructed legislative bodies to honor their contractual monetary commitments to public employees. *E.g.*, *Scituate v. Scituate Teachers Ass'n*, 110 R.I. 679, 296 A.2d 466 (1972); *Wheatley v. Covington*, 440 GERR B-3 (Ky. Cir. Ct. 1972); *Union Free School Dist. No. 5*, 5 N.Y. PERB 3101 (1972).

Vermont (municipal employees) has made the employer's failure to appropriate funds to implement contractual requirements an unfair labor practice, whereas Indiana (teachers) prohibits deficit financing for contractual obligations and Iowa provides for reduction of contractual benefits or for further bargaining when legislative funding is inadequate. IND. ANN. STAT. § 20-7.5-1-3 (1975); IOWA CODE ANN. § 20.17(6) (Supp. 1976); VT. STAT. ANN. tit. 21, § 1726(a)(6) (Cum. Supp. 1976).

¹⁹⁰ *E.g.*, Milwaukee (weak mayor-strong city council).

¹⁹¹ KAN. STAT. ANN. § 75-4330(c) (Supp. 1975) (public employees except teachers); WIS. STAT. ANN. § 111.92 (1974) (state employees).

¹⁹² Several states have enacted legislation tying together collective bargaining and budget-making deadlines. CONN. GEN. STAT. ANN. § 7-474 (1972, Supp. 1976) (municipal employees); CONN. GEN. STAT. ANN. § 10-153d (Supp. 1976) (teachers); Conn. Pub. A. No. 75-566, § 9 (Appendix Pamphlet 1976) (state employees); MASS. ANN. LAWS ch. 150E, § 7 (1976); NEB. REV. STAT. § 48-837 (1974); N.Y. CIV. SERV. LAW §§ 204-a, 208(2) (McKinney 1973); R.I. GEN. LAWS ANN. § 28-9.1-13 (1968) (firefighters); R.I. GEN. LAWS ANN. § 28-9.2-13 (1968) (police); R.I. GEN. LAWS ANN. § 28-9.3-8 (1968) (teachers); R.I. GEN. LAWS ANN. § 28-9.4-9 (1968) (municipal employees except firefighters, police, and teachers); WIS. STAT. ANN. § 111.92 (1974) (state employees). See Derber, Jennings, McAndrew & Wagner, *Bargaining and Budget Making in Illinois Public Institutions*, 27 IND. & LAB. REL. REV. 49 (1973).

to the effect of "sunshine" laws in disclosing the substance of negotiations at the bargaining table.

Most states have adopted the private sector concept of unfair labor practices as a means of enforcing contractual and statutory responsibilities.¹⁹³ Like the private sector, public employment relations boards or, in their absence, the courts determine and remedy unfair labor practices. Yet, unlike the single example provided by the private sector, public sector bargaining statutes have experimented with a number of unfair labor practice concepts.¹⁹⁴ With

¹⁹³ ALASKA STAT. § 23.40.110 (1972); CONN. GEN. STAT. ANN. § 7-470 (1972, Supp. 1976) (municipal employees); Conn. Pub. A. No. 75-566, § 3 (Appendix Pamphlet 1976) (state employees); HAWAII REV. STAT. § 89-13 (Supp. 1975); IND. ANN. STAT. § 20-7.5-1-7 (1975) (teachers); KAN. STAT. ANN. § 75-4333 (Supp. 1975) (public employees except teachers); KY. REV. STAT. ANN. §§ 345.050, .070 (Supp. 1976) (firefighters); ME. REV. STAT. ANN. tit. 26, § 964 (1964) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-C (1964) (state employees); ME. REV. STAT. ANN. tit. 26, § 1027 (Supp. 1976) (university employees); MD. ANN. CODE art. 77, §§ 160(j), 160A(k) (1975 Replacement Volume) (public school employees in certain counties); MASS. ANN. LAWS ch. 150E, § 10 (1976); MICH. STAT. ANN. §§ 17.455(10), (16) (1975); MINN. STAT. ANN. § 179.68 (Supp. 1976) (public employees except charitable hospital employees); MONT. REV. CODES ANN. § 41-2203 (Supp. 1975) (nurses); MONT. REV. CODES ANN. §§ 59-1605, -1607 (Supp. 1975) (public employees except nurses and professional engineers); MONT. REV. CODES ANN. § 75-6120 (1971 2d Replacement Volume) (teachers); NEV. REV. STAT. § 288.270 (1975) (local government employees); N.H. REV. STAT. ANN. § 105-B:11 (Supp. 1973) (local government police); N.Y. CIV. SERV. LAW § 209-a (McKinney 1973); OKLA. STAT. ANN. tit. 11, § 548.3(8) (Supp. 1976) (firefighters, municipal employees, police); ORE. REV. STAT. §§ 243.672, .676 (1975 Replacement Part); PA. STAT. ANN. tit. 43, § 1101.1201 (Supp. 1976) (public employees except firefighters and police); R.I. GEN. LAWS ANN. § 28-9.3-6 (1968) (teachers), referring to R.I. GEN. LAWS ANN. § 28-7-13 (1968); R.I. GEN. LAWS ANN. § 28-9.4-7 (1968) (municipal employees except firefighters, police, and teachers), referring to R.I. GEN. LAWS ANN. § 28-7-13 (1968); R.I. GEN. LAWS ANN. § 36-11-6 (1970) (firefighters, police, state employees), referring to R.I. GEN. LAWS ANN. §§ 28-7-1 to -47 (1968, Supp. 1975); VT. STAT. ANN. tit. 3, §§ 961-62 (1972 Replacement Edition) (state employees, state college employees); VT. STAT. ANN. tit. 21, §§ 1726-27 (Cum. Supp. 1976) (municipal employees); 1 APP. D.C. CODE, ORG. ORD. No. 25(III) (1973); for New Mexico's concept, defined in accordance with regulations of the State Personnel Board, see 51 GERR, RF-99, at 4018-19 (1975).

¹⁹⁴ For a list of novel unfair labor practice concepts collected from public sector bargaining statutes see Howlett, *supra* note 77, at 15-16. The provisions include the following: Refusal to comply with the statute [Indiana (teachers), South Dakota], racial discrimination (District of Columbia, New Mexico, Vermont), engaging in a strike [Kansas, Maine, Minnesota, Montana (teachers), New Hampshire (police), New Mexico (state employees), Pennsylvania], locking out [Kansas, New Hampshire (police), Oklahoma], failure to comply with impasse and mediation procedures [Hawaii, Minnesota, Nevada, New Hampshire (police), Pennsylvania], denying recognition rights to a certified or recognized union [District of Columbia,

regard to unfair labor practices, however, it is fair to say that most of these state statutes are less comprehensive than the Labor-Management Relations Act.¹⁹⁵

An unexplored area of governmental labor-management relations is the effectiveness of the methods used to enforce collective bargaining responsibilities. Private sector experience teaches that legislative drafters neglected this most important topic when creating the Labor-Management Relations Act.¹⁹⁶ Since many states, along with the private sector, have sought to enforce the duty to bargain in good faith through the unfair labor practice device, legislators should be diligent to ensure effective enforcement of collective bargaining duties.¹⁹⁷ The trend among the states is to encourage public management and public employment unions to resolve their collective bargaining differences with the help of neutral third parties whenever an impasse in negotiations is reached. Accordingly, as opposed to the private sector, where an employer may implement its best offer after a bona fide impasse in negotiations has been reached, public employers may not unilaterally implement their bargaining offers (mandatory subjects of bargaining) "until after all impasse procedures have been exhausted."¹⁹⁸

New Mexico (state employees), Vermont], failure to comply with contract (Hawaii, Minnesota, Nevada, Oregon), engaging in politics [Kansas, Montana (using agency shop fees to support political parties)], blacklisting of employees [Maine, Minnesota, New Hampshire (police), Rhode Island], interfering with management's rights (New Hampshire), and extortion (Vermont). *Id.*

¹⁹⁵ Public sector collective bargaining statutes rarely regulate secondary boycotts and jurisdictional strikes, for example. Minnesota, Pennsylvania, and Vermont, however, do regulate these two facets of governmental labor-management relations. MINN. STAT. ANN. §§ 179.68(3)(6), (7) (Supp. 1976) (public employees except charitable hospital employees); PA. STAT. ANN. tit. 43, §§ 1101.1201 (b)(6), (7) (Supp. 1976) (public employees except firefighters and police); VT. STAT. ANN. tit. 3, §§ 962(6), 964 (1972 Replacement Edition) (state employees, state college employees); VT. STAT. ANN. tit. 21, § 1726(b)(5) (Cum. Supp. 1976) (municipal employees).

¹⁹⁶ Congressional oversight hearings on this subject were begun in the early months of 1976.

¹⁹⁷ Only time will tell how effective the unfair labor practice device is for enforcing the duty to bargain in good faith in the governmental labor-management arena. In the private sector, neither party can be compelled to concede on any contractual issue, so hard bargaining is permissible; hence, the NLRB's lack of power to force concessions, combined with administrative and judicial delay and the inability to exact punitive measures, make the NLRB a toothless tiger when enforcing the duty to bargain in good faith.

¹⁹⁸ Edwards, *supra* note 171, at 924.

B. *Impasse Resolution*

Procedures designed to encourage or impose resolution of collective bargaining impasses in the governmental sector are varied, and most state statutes require multiple forms of impasse resolution.¹⁹⁹ A major underlying purpose of collective bargaining impasse resolution mechanisms is to avoid public employee strikes, but these measures should not be viewed as substitutes for good faith bargaining.²⁰⁰ Methods of impasse resolution are as follows: Strikes (after failure of conciliation efforts), mediation, factfinding, voluntary interest arbitration, compulsory interest arbitration, and some variations of these concepts.

1. *Strikes*

In response to the inevitability of some strikes²⁰¹ and to the undesirability of compulsory interest arbitration,²⁰² as well as to

¹⁹⁹ See generally T. GILROY & A. SINICROPI, DISPUTE SETTLEMENT IN THE PUBLIC SECTOR, (U.S. Dep't of Labor 1972).

²⁰⁰ There simply cannot be an effective ban on strikes if public employees believe that they are being treated in a relatively unfair fashion, unless, perhaps, we were prepared to accept the consequences of a major political crisis in which the ultimate coercive power of the state were used on a large scale against its own employees.

Wellington & Winter, *supra* note 85, at 824. The quoted passage has particular applicability to economic strikes occurring during the course of collective bargaining negotiations, resolutions of which can be aided by impasse resolution mechanisms.

Two authors recommend that, in addition to reducing the frequency of strikes by increasing the competence of labor relations personnel, recognition strikes can largely be avoided through secret ballot elections, jurisdictional strikes can be minimized by LMRA-type machinery to resolve the underlying dispute, and strikes occurring during the term of the agreement can be greatly reduced by grievance-arbitration procedures. Shaw & Clark, *supra* note 85, at 233-34.

²⁰¹ "Neither sanctions nor impasse procedures, alone or in combination, can do more than ease the situation. In some cities and states this will be enough. . . . In other localities, the prohibition on strikes may not work, no matter what." Wellington & Winter, *supra* note 85, at 842. Of interest is one analysis of teacher strikes in 27 states, which shows that teacher strikes, presumably exclusive of recognition strikes, have not lessened but have tended to increase following enactment of collective bargaining legislation. Thornton & Weintraub, *Public Employee Bargaining Laws and the Propensity to Strike: The Case of Public School Teachers*, 3 J. COLLECTIVE NEGOTIATIONS 33 (1974).

²⁰² Although the strike is technically illegal in Minnesota, a successful defense to the strike prohibition is the public employer's refusal to submit a bargaining dispute to binding arbitration or to abide by the arbitral award, assuming the employees are not engaged in essential services and are not charitable hospital

notions of employee freedom, a few states have authorized nonessential-personnel strikes after exhaustion of statutory impasse resolution procedures. Since these statutes were discussed previously, attention will be devoted to several thought provoking proposals. Where legislatures have legalized some form of governmental striking, public employers would be well advised to begin contingency planning to withstand the adverse effects of a strike.²⁰³

Use of the conventional strike as a part of the bargaining dispute resolution process in Canada serves as a possible model for United States legislation.²⁰⁴ In Canada, the public labor organization must choose between two procedures for resolving a collective bargaining impasse: (1) conciliation with the right to strike (for basically nonessential employees) if conciliation fails to resolve the impasse or (2) final and binding interest arbitration. American versions of this plan would mandate mediation as a first step, perhaps followed by factfinding; thereupon, the public employee union would choose a strike or binding arbitration; then either a tripartite panel or a court (upon petition by an affected citizen) would sanction the strike if it did not threaten immediate danger to public health or safety; and, finally, if the strike were unlawful, further mediation, voluntary arbitration, or compulsory arbitration would be in order.²⁰⁵

Use of the nonstoppage strike and the graduated strike are alternatives to the conventional strike. The nonstoppage strike "is no strike at all. It is . . . designed to impose the costs of a strike

employees. MINN. STAT. ANN. § 179.36 (1966) (charitable hospital employees); MINN. STAT. ANN. § 179.64 (Supp. 1976) (public employees except charitable hospital employees).

²⁰³ The following have been suggested as possible employer strategies to counter public employee strikes: Use of alternative medical facilities (hospital strike) and alternative traffic/parking patterns (transit strike), automation, prepared instructions for consumers, partial operations, notification of voters of the employer's bargaining position by publishing employee salary lists and by specifying in tax bills where expenditures go, creation of tax districts coextensive with bargaining units, and public referenda on negotiated contracts. Wellington & Winter, *supra* note 85, at 847-52.

²⁰⁴ See generally Coughlin & Rader, *Right to Strike and Compulsory Arbitration: Panacea or Placebo*, 58 MARQ. L. REV. 205, 220 (1975); Kruger, *Canadian Legislation and Experience*, 21 LAB. L.J. 455 (1970).

²⁰⁵ Wollett, *Mutual Anxiety: A California Proposal*, 96 MONTHLY LAB. REV., Sept. 1973, at 51; Zack, *Arbitration and Fact-finding in Public Disputes*, in PROCEEDINGS OF THE NEW YORK UNIVERSITY TWENTY-FIRST ANNUAL CONFERENCE ON LABOR, *supra* note 123, at 535, 543-45.

upon the parties to an impasse without a concomitant cessation of work.²⁰⁶ After impasse in negotiations, the public employee union could call a nonstoppage strike, wherein the employees would continue to work as, each week, a portion of their take-home pay would be placed in a special fund, which would be matched by an equivalent sum from the employer. The union would be empowered to increase the sum placed in the fund each week by both parties, but the employer could require the union to switch to a graduated strike. Money tucked away in the fund would be allocated for desirable public projects by a special community committee.²⁰⁷ In a graduated strike the daily number of hours worked by public employees would be reduced gradually with a resulting loss of services to the public employer and loss of wages to the employees.²⁰⁸

The foregoing authorities propose use of the strike threat to encourage consummation of a collective bargaining agreement, and implicit in their reasoning is the thought that "successful avoidance of the strike is brought about substantially through perfecting procedures and policies to provide an effective alternative to conflict."²⁰⁹

2. Mediation

Mediation of collective bargaining impasses occurs when a neutral third party is called upon to help public management and public employee unions voluntarily settle their differences and reach an agreement. The success or failure of a mediator depends upon his ability of persuasion only, for his function is to prod the parties into meaningful negotiations.²¹⁰ A mediator is obligated to

²⁰⁶ Harrison, *The Strike and Its Alternatives: The Public Employment Experience*, 63 Ky. L.J. 431, 463 (1975).

²⁰⁷ For a detailed account of how the non-stoppage strike would function in public employment see Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971).

²⁰⁸ See *id.*; Brookshire & Holly, *Resolving Bargaining Impasses Through Gradual Pressure Strikes*, 24 LAB. L.J. 662 (1973).

²⁰⁹ Taylor, *Public Employment: Strikes or Procedures*, 20 IND. & LAB. REL. REV. 617, 635 (1967).

²¹⁰ The role of a mediator was described by W. E. Simkin, former head of FMCS, as follows:

At one end, the spectrum begins by a decision not to intervene at all—to provide no third party assistance. At the other end of the band, the mediator can issue public recommendations: A major principle is to max-

remove himself from a case when one of the following occurs: (1) Agreement is reached; (2) one of the parties requests his departure; (3) the agreed-upon time comes for appeal to the next step in the procedure; or (4) he feels his acceptability or effectiveness is exhausted.²¹¹ In essence, a mediator's creed is that he "cannot begin to be useful until he maintains a strong belief in the strengths of the collective bargaining process."²¹² Sometimes a mediator plays a dual role—as mediator and factfinder or as mediator and arbitrator (med-arb).

imize bargaining and minimize the role of the mediator—to exercise enough patience to let bargaining work. But the mediator must also be able and willing to "grasp the nettle"—to recognize when patience is not a virtue and to act accordingly. Most mediation decisions are decisions as to strategy and timing—not decisions on the specified issues.

In the hands of a skilled mediator, facts are potent tools. It is seldom that publication of facts is either necessary or desirable. But they can be most useful in hard-hitting deflation of extreme positions. This is accomplished in separate head-to-head conferences or meetings, absent the embarrassment of the other side's presence and certainly not in the press. Public reference to the facts, if required at all, comes after a settlement to help save face.

Speech by W. E. Simkin, in D. WOLLETT & D. SEARS, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 201-02* (1971).

For another description of mediation see TWENTIETH CENTURY FUND, *PICKETS AT CITY HALL 21* (1970):

The function of mediation . . . is to maintain communication between the parties, who may believe they have said everything they have to say and done everything they are able to do; to inject a neutral presence into what, because of the impasse, has become an adversary situation; to strip away the nonessential matters and frame the core issues in dispute; and to propose suggestions for settlement.

. . . .
Mediation has no power to compel. It is fruitful only through logic and persuasion.

See generally W. MAGGIOLO, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* (1971); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

²¹¹ A. ZACK, *UNDERSTANDING FACT FINDING AND ARBITRATION IN THE PUBLIC SECTOR* (U.S. Dep't of Labor 1974).

²¹²W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 29* (1971).

Mediation is sometimes distinguished from conciliation in that the latter only assists the parties in reaching settlement of differences by suggesting grounds for agreement whereas the mediation function adds to the process the intervenor's recommendations to the parties for settlement. As a practical matter there is really no difference between mediation and conciliation and the terms are usually used interchangeably.

P. STAUDOHAR, *supra* note 77, at 41.

Mediation is the most commonly used method of resolving public sector bargaining impasses.²¹³ At least 29 states provide for some form of mediation of impasses in negotiations.²¹⁴ One survey

²¹³ Aaron, *Final Report of the Assembly Advisory Council on Public Employee Relations*, in J. GRODIN & D. WOLLETT, *LABOR RELATIONS AND SOCIAL PROBLEMS* 251 (1975). In the first two to three years of New York's Taylor Law, nearly one-half of all bargaining impasses acted upon by PERB were settled by mediation. Pegnetter, *Fact Finding and Teacher Salary Disputes: The 1969 Experience in New York State*, 24 *IND. & LAB. REL. REV.* 230 (1971). See also Helsby, *Resolution of Public Sector Labor Disputes*, in J. FERGUSON & J. NAJITA, *GOVERNMENT EMPLOYEES AND COLLECTIVE BARGAINING*, HAWAII PERB 16 (1971). Michigan, Connecticut, New Jersey, Wisconsin, and Oregon also have relied heavily and successfully on mediation. P. STAUDOHAR, *supra* note 77, at 48. A nationwide survey in 1973 of a multitude of jurisdictions revealed that mediation was used to resolve a majority of bargaining impasses. International Personnel Management Ass'n, *Impasse Techniques Survey*, 1 *PUB. PERSONNEL ADM'N/LAB. MANAGEMENT REL.* 3139-48 (1973).

²¹⁴ ALASKA STAT. §§ 14.20.570, .580 (1975) (teachers); ALASKA STAT. § 23.40.190 (1972); CAL. GOV'T CODE § 3505.2 (Deering 1973) (local government employees); CONN. GEN. STAT. ANN. § 7-472 (Supp. 1976) (municipal employees); CONN. GEN. STAT. ANN. § 10-153f (Supp. 1976) (teachers); Conn. Pub. A. No. 75-566, §§ 7-8 (Appendix Pamphlet 1976) (state employees); DEL. CODE ANN. tit. 14, § 4010 (1974) (certified public school employees); HAWAII REV. STAT. § 89-11 (Supp. 1975); IDAHO CODE § 33-1274 (Supp. 1976) (teachers); IOWA CODE ANN. § 20.20 (Supp. 1976); KAN. STAT. ANN. § 75-4332 (Supp. 1975) (public employees except teachers); ME. REV. STAT. ANN. tit. 26, § 965(2) (1964, Supp. 1976) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-D(2) (1964, Supp. 1976) (state employees); ME. REV. STAT. ANN. tit. 26, § 1026(2) (university employees); MD. ANN. CODE art. 77, §§ 160(i), 160A(i) (1975 Replacement Volume) (public school employees in certain counties); MASS. ANN. LAWS ch. 150E, § 9 (1976); MICH. STAT. ANN. §§ 17.454(27), .455(7) (1975); MINN. STAT. ANN. § 179.69 (Supp. 1976) (public employees except charitable hospital employees); Mo. ANN. STAT. § 105.525 (Supp. 1976) (public employees except deputy sheriffs, highway patrolmen, national guard, police, and teachers); MONT. REV. CODES ANN. § 59-1614 (Supp. 1975) (public employees except nurses and professional engineers); MONT. REV. CODES ANN. § 75-6123 (1971 2d Replacement Volume) (teachers); NEB. REV. STAT. § 48-816 (1974); NEB. REV. STAT. § 79-1293 (1971) (teachers); NEV. REV. STAT. §§ 288.063, .190 (1975) (local government employees); N.H. REV. STAT. ANN. § 98-C:4(I)(d) (Supp. 1973) (state and nonprofessional university employees); N.H. REV. STAT. ANN. § 105-B:8 (Supp. 1973) (local government police); N.J. STAT. ANN. §§ 34:13A-2, -5.1, -6 (Supp. 1976); N.Y. CIV. SERV. LAW § 209 (McKinney 1973, McKinney Supp. 1976); N.D. CENT. CODE § 15-38-1-13 (1971 Replacement Volume) (teachers); N.D. CENT. CODE §§ 34-11-01 to -05 (1972 Replacement Volume); ORE. REV. STAT. § 243.712 (1975 Replacement Part); PA. STAT. ANN. tit. 43, §§ 1101.801-.803 (Supp. 1976) (public employees except firefighters and police); R.I. GEN. LAWS ANN. § 28-9.3-9 (1968) (teachers); R.I. GEN. LAWS ANN. §§ 28-9.4-10, -17 (1968) (municipal employees except firefighters, police, and teachers); R.I. GEN. LAWS ANN. § 36-11-8 (Supp. 1975) (state employees); S.D. COMPILED LAWS ANN. § 3-18-8.1 (1974), referring to S.D. COMPILED LAWS ANN. § 60-10-2 (1967); TEX. REV. CIV. STAT. ANN. art. 5154c-1, § 9(c) (Cum.

of state mediation provisions relating to the public sector has revealed the following: Mediation is almost universally used in connection with other bargaining impasse measures; most states allow initiation of mediation by either party, but some states require both parties to request mediation services;²¹⁵ there are a variety of types of state agencies offering mediation services; a single mediator, as opposed to a mediation panel, is usually used; and sometimes the parties share in the costs of mediation.²¹⁶

If there is one criticism about mediation, it is that mediation is not used enough in the resolution of collective bargaining impasses. Although mediation and factfinding may be difficult concepts to distinguish in practice, the two processes should remain separate so as to encourage vigorous, voluntary collective bargaining.²¹⁷ Similarly, resort to mediation should be withheld until needed.²¹⁸ When used appropriately, mediation serves as an educational tool for inexperienced negotiators²¹⁹ and provides the parties in the governmental sector with a last, or next to last, chance at achieving a fully voluntary collective bargaining agreement.

Supp. 1976) (firefighters, police); VT. STAT. ANN. tit. 3, §§ 924(c), 925(d), (e) (Cum. Supp. 1976) (state employees, state college employees); VT. STAT. ANN. tit. 16, § 2006 (Cum. Supp. 1976) (teachers); VT. STAT. ANN. tit. 21, § 1731 (Cum. Supp. 1976) (municipal employees); WASH. REV. CODE ANN. § 28B.52.060 (Supp. 1975) (community college academic employees); WASH. REV. CODE ANN. §§ 41.56.100, .440, .58.020 (Supp. 1975); WASH. REV. CODE ANN. § 41.59.120 (Supp. 1975) (certificated public school employees); WIS. STAT. ANN. §§ 111.70(4)(c)(1), .77(1)(e) (1974) (municipal employees); WIS. STAT. ANN. § 111.87 (1974) (state employees).

²¹⁵ In 1973, the FMCS announced a policy of serving as a source of mediators where only one public sector party requested the services of a mediator, although the FMCS usually declines to proffer its services when adequate state mediation facilities exist. Howlett, *supra* note 77, at 24.

²¹⁶ Sinicropi & Gilroy, *The Legal Framework of Public Sector Dispute Resolution*, 28 ARB. J. 6 (1973).

²¹⁷ "All too often, the parties make only perfunctory use of mediation in their unseemly haste to get on to the fact finding stage . . . Only as a last resort should the parties move on to fact-finding." T. GILROY, *DISPUTE SETTLEMENT IN THE PUBLIC SECTOR* 17 (1972). To ensure the attractiveness of mediation as the preferred method of resolving bargaining impasses, one commentator suggests barring the use of mediation data in factfinding and compelling the parties in factfinding to share the expenses. Zack, *Improving Mediation and Fact Finding in the Public Sector*, 21 LAB. L.J. 272 (1970).

²¹⁸ The Michigan experience with mediation shows that a state agency in its early days of administering mediation procedures tends to apply the mediation device too hastily. P. STAUDOHR, *supra* note 77, at 53.

²¹⁹ Gilroy & Sinicropi, *Impasse Resolution in Public Employment: A Current Assessment*, 25 IND. & LAB. REL. REV. 499 (1972).

3. Factfinding

When mediation fails to end a collective bargaining impasse in the public sector, factfinding, sometimes called advisory arbitration,²²⁰ is a logical next step—indeed, usually the terminal step—in attempting to resolve the impasse. A general description of the factfinding process is as follows:

In this procedure a neutral or neutrals, known as a fact finder (or fact finding panel) conducts a hearing at which the opposing parties define the issues in dispute and propose their prospective resolutions therefor with supporting evidence and argument. Following the hearing, the fact finder(s) issues recommendations for a solution, usually in writing.²²¹

Thus, the expression “factfinding” is a misnomer, for the concept is much more complex than discovering facts. In any event, the one aspect of factfinding which gives meaning to that process as an impasse resolver is the neutral’s recommendation.

Factfinding is a common provision of state public sector collective bargaining statutes,²²² and its use antedates public em-

²²⁰ Strictly speaking, factfinding may or may not include recommendations to the parties, whereas advisory arbitration always results in recommendations. Factfinding without recommendation is uncommon and ineffective. Factfinding with recommendation resembles grievance arbitration but does not stem from an existing contract and is not final and binding.

²²¹ A. ZACK, *supra* note 211, at 1.

²²² ALASKA STAT. § 23.40.160 (1972); CAL. GOV'T CODE §§ 3548.1-3 (Deering Supp. 1976) (public school employees); CONN. GEN. STAT. ANN. § 7-473 (1972, Supp. 1976) (municipal employees); CONN. GEN. STAT. ANN. § 10-153f(c) (Supp. 1976) (teachers); Conn. Pub. A. No. 75-566, § 8 (Appendix Pamphlet 1976) (state employees); DEL. CODE ANN. tit. 14, § 4010 (1974) (certified public school employees); GA. CODE ANN. § 54-1309 (1974) (firefighters in cities above 20,000); HAWAII REV. STAT. § 89-11(b) (Supp. 1975); IDAHO CODE § 33-1275 (Supp. 1976) (teachers); IDAHO CODE §§ 44-1805 to -1806, -1809 to -1810 (Supp. 1976) (firefighters); IOWA CODE ANN. § 20.21 (Supp. 1976); KAN. STAT. ANN. §§ 75-4330(b), -4332 (Supp. 1975) (public employees except teachers); KY. REV. STAT. ANN. § 345.080 (Supp. 1976) (firefighters); ME. REV. STAT. ANN. tit. 26, § 965(3) (Supp. 1976) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 979-D(3) (1964, Supp. 1976) (state employees); ME. REV. STAT. ANN. tit. 26, § 1026(3) (Supp. 1976) (university employees); MASS. ANN. LAWS ch. 150E, § 9 (1976); MICH. STAT. ANN. § 17.454(27) (1975); MONT. REV. CODES ANN. § 59-1614 (Supp. 1975) (public employees except nurses and professional engineers); MONT. REV. CODES ANN. § 75-6123 (1971 2d Replacement Volume) (teachers); NEB. REV. STAT. § 48-816 (1974); NEB. REV. STAT. § 79-1293 (1971) (teachers); NEV. REV. STAT. §§ 288.045, .110, .200-.220 (1975) (local government employees); N.H. REV. STAT. ANN. § 98-C:4(I)(d) (Supp. 1973) (state and nonprofessional university employees); N.H. REV. STAT. ANN. § 105-B:8 (Supp. 1973) (local

ployment bargaining statutes.²²³ Variations in state statutes largely revolve around whether the parties or the state pays for factfinding costs,²²⁴ whether a single factfinder or a tripartite panel of factfinders (with at least one neutral) is used,²²⁵ whether the factfinder may also serve as a mediator, how budget-making and factfinding deadlines are coordinated, whether a show-cause hearing is to be held if the parties do not abide by the factfinder's recommendation,²²⁶ whether further collective bargaining is man-

government police); N.J. STAT. ANN. § 34:13A-6(b) (Supp. 1976); N.Y. CIV. SERV. LAW § 209 (McKinney 1973, McKinney Supp. 1976); N.D. CENT. CODE §§ 15-38.1-03 to -06, -13 (1971 Replacement Volume) (teachers); OKLA. STAT. ANN. tit. 70, § 509.7 (1972) (school employees); ORE. REV. STAT. §§ 243.712, .722 (1975 Replacement Part); PA. STAT. ANN. tit. 43, §§ 1101.503, .802-.803 (Supp. 1976) (public employees except firefighters and police); R.I. GEN. LAWS ANN. § 36-11-8 (Supp. 1975) (state employees); S.D. COMPILED LAWS ANN. § 3-18-8.1 (1974), referring to S.D. COMPILED LAWS ANN. § 60-10-2 (1967); VT. STAT. ANN. tit. 3, § 925 (Cum. Supp. 1976) (state employees, state college employees); VT. STAT. ANN. tit. 16, § 2007 (Cum. Supp. 1976) (teachers); VT. STAT. ANN. tit. 21, § 1732 (Cum. Supp. 1976) (municipal employees); WASH. REV. CODE ANN. § 28B.52.060 (Supp. 1975) (community college academic employees); WASH. REV. CODE ANN. § 41.56.440 (Supp. 1975) (uniformed personnel); WASH. REV. CODE ANN. § 41.58.020 (Supp. 1975); WASH. REV. CODE ANN. § 41.59.120 (Supp. 1975) (certificated public school employees); WIS. STAT. ANN. § 111.70(4)(c)(3) (1974) (municipal employees); WIS. STAT. ANN. § 111.88 (1974) (state employees); for the inclusion of a factfinding procedure in the New Mexico State Personnel Board Regulations see 51 GERR, RF-99, at 4012, 4018 (1975).

²²³ Michigan initiated factfinding for public employees in 1954. Factfinding, not widely used in the private sector, was originated in the Railway Labor Act of 1926, 45 U.S.C. §§ 151-88 (1970), and is part of the emergency strike provisions of the LMRA, 29 U.S.C. §§ 171-83 (1970; Supp. IV, 1974).

²²⁴ Several states do pay for factfinding costs. *E.g.*, HAWAII REV. STAT. § 89-11(b)(4) (Supp. 1975); KAN. STAT. ANN. §§ 75-4323(c), -4332(e) (Supp. 1975) (public employees except teachers); MICH. STAT. ANN. § 17.454(14.3) (1975) (hospital and public utility employees); N.Y. CIV. SERV. LAW § 205(4)(a) (McKinney 1973). The majority of states, however, require the parties to assume factfinding costs on the theory that the parties' expenditures impose a burden on the parties sufficient to deter half-hearted use of factfinding procedures.

²²⁵ Tripartite factfinding panels, whose functions are to resolve public sector bargaining impasses, usually consist of one neutral and one partisan from each side. The main advantages of a tripartite factfinding panel are that, because of its make-up, partisan members give valuable advice and assistance to the neutral members and that, after some horse trading leading to a unanimous recommendation, the tripartite panel report invites acceptance by labor and management. A single factfinder's utility, however, rests with the quickness, efficiency, and thriftiness deriving from the simplicity of the sole factfinder process.

²²⁶ A few states require the parties to present their respective positions to an appropriate tribunal after failure to abide by the factfinder's recommendations. *E.g.*, KAN. STAT. ANN. § 75-4332(d) (Supp. 1975) (public employees except teach-

dated after rejection of the factfinder's recommendation, and the nature of the criteria used by the factfinder in making his decision [Note: criteria to be discussed later under interest arbitration].

Most authorities are skeptical about the effectiveness of publishing the factfinder's report as a means of bringing public pressure to conclude a contract to bear on the parties; nevertheless, the practice may be worthwhile at times.²²⁷ On the other hand, most commentators are optimistic about the usefulness of factfinding as an impasse resolving tool, and available data bears witness to this optimism.²²⁸ Even where the factfinder's recommendation does not directly lead to settlement, his report may serve as a basis for further negotiations.²²⁹ Despite these indications of the success of factfinding as a Solomon-like mechanism, the fear persists that factfinding will become an automatic step in the collective bargaining process.²³⁰ Also, to date, research on the impact of factfind-

ers); N.Y. CIV. SERV. LAW § 209(3)(e) (McKinney Supp. 1976). Query: Should a court or legislative body be authorized to impose a binding contract on a reluctant party in governmental negotiations?

²²⁷ Publication of the factfinder's recommendation may backfire and cause parties to become inflexible; therefore, the parties should be forewarned of publication, and their comments should be sought. See Krinsky, *Avoiding Public Employee Strikes—Lessons from Recent Strike Activity*, 21 LAB. L.J. 468 (1970).

²²⁸ Accepting the limitation that measurement of the effectiveness of factfinding is difficult, especially since comparison of the recommendation of a factfinder with the negotiated settlement is not reported by most writers on the subject, assessments concerning the efficacy of factfinding in resolving bargaining impasses are positive. The factfinder's recommendation has been estimated to serve as a basis for settling bargaining impasses in 60-70 percent of the cases going to factfinding. T. GILROY & A. SINICROPI, *supra* note 199, at 59. A more conservative estimate of the success of factfinding, based upon the experiences of the states which use factfinding most—New York, Michigan, Wisconsin, and New Jersey—is that 40-60 percent of factfinders' reports are accepted by the parties. P. STAUDOHR, *supra* note 77, at 70-77; cf. LABOR-MANAGEMENT RELATIONS SERVICE, *FACTS ABOUT FACT-FINDING* (1973). *But see* Coughlin & Rader, *supra* note 204, at 232-33; Word, *Implications for Fact Finding: The New Jersey Experience*, 3 J. COLLECTIVE NEGOTIATIONS 339 (1974).

²²⁹ One survey indicates that public management and public labor unions in New York frequently use the factfinder's report for further negotiations. B. YAFFE & H. GOLDBLATT, *FACT-FINDING IN PUBLIC EMPLOYMENT DISPUTES IN NEW YORK STATE* 41 (1971).

²³⁰ One author uses the experiences of Connecticut, Massachusetts, Michigan, New York, and Wisconsin to put this fear to rest by showing that 60-80 percent of mediated cases were resolved without resort to factfinding. Anderson, *The Use of Fact Finding in Public Employee Dispute Settlement*, PROCEEDINGS OF THE TWENTY-SECOND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 112-14 (1970). *But see*

ing in inflating contractual settlements has been miniscule.²³¹

Nevada's experiment with factfinding as a binding last step in the collective bargaining continuum may be of interest to West Virginia, which, like Nevada, has a relatively small population and just a handful of urban centers. In Nevada's factfinding process the parties may agree to final and binding recommendations or, at the request of either party, elect to take their chances with the governor, who may order the factfinder's prospective report to be final and binding.²³² The unique feature of the Nevada approach is that an elected official is empowered to give finality to the factfinding process. In so doing, the governor is bound by statutory criteria,²³³ and the factfinder, in turn, must use the employer's ability to pay as an overriding precondition to a monetary award.²³⁴ Preliminary indications are that collective bargaining is blossoming in Nevada.²³⁵

Word, *supra* note 228, at 38. For various suggestions as to how factfinding can be improved see A. ZACK, *supra* note 211; Seamon, *Fact Finding in the Public Sector: A Proposal to Strengthen the Fact Finder's Role*, 3 J. COLLECTIVE NEGOTIATIONS 121 (1974).

²³¹ The 1966-1968 experience in Michigan found factfinding not to be a significant factor in inflating impasse settlements. Bain, *Third-Party Settlements in Education*, 26 ARB. J. 41, 43-44 (1971). But, in New York during 1969, factfinders relied heavily on area-wide teacher salary comparisons, thereby tending to inflate salaries and fringe benefits for teachers. Pegnetter, *supra* note 213, at 242.

²³² NEV. REV. STAT. §§ 288.200(6)-(7) (1975) (local government employees).

²³³ The exercise of this authority by the governor shall be made on a case by case consideration and shall be made on the basis of his evaluation regarding the overall best interests of the state and its citizens, the potential fiscal impact both within and outside the political subdivision, as well as any danger to the safety of the people of the state or a political subdivision.

NEV. REV. STAT. § 288.200.7 (1975) (local government employees).

²³⁴ NEV. REV. STAT. § 288.200(8) (1975) (local government employees).

²³⁵ One author credits Nevada's novel statute with fostering improved labor-management relations in the public sector and comments as follows:

Nevada's experience is not for everyone. The sort of personal role that the governor has played in that state is based on a familiarity with local conditions and personnel that would be unlikely in larger states, and the impact of such a scheme is also bound to be different where there exist well-developed bargaining relations, militant unions, and the potential for effective strikes. The Nevada experiment does suggest however, that public sector dispute resolution through arbitration can be consistent both with effective bargaining and with political responsibility.

Grodin, *Arbitration of Public Sector Labor Disputes: The Nevada Experiment*, 28 IND. & LAB. REL. REV. 89, 102 (1974).

4. *Voluntary Binding Interest Arbitration*

The search for finality in the collective bargaining process ends at the doorstep of binding interest arbitration. Loosely speaking, binding interest arbitration is equivalent to factfinding with a binding report. By late 1975, 19 states authorized voluntary binding interest arbitration; that is, arbitration to be initiated by both parties.²³⁶ Use of jointly requested arbitrators to resolve collective bargaining impasses, however, has been infrequent in both the public sector²³⁷ and the private sector.²³⁸ Considering the normal resistance of public managers to the arbitration concept, their unenthusiastic response to the invocation of voluntary binding arbitration is not surprising.

State statutory provisions regarding jointly requested interest arbitration vary, with limitations on the subject matter to be arbi-

²³⁶ CAL. PUB. UTIL. CODE § 70120 (Deering 1970) (transit workers); CONN. GEN. STAT. ANN. § 7-472 (Supp. 1976) (municipal employees); Conn. Pub. A. No. 75-566, § 7 (Appendix Pamphlet 1976) (state employees); DEL. CODE ANN. tit. 2, § 1613 (1975) (transportation workers); DEL. CODE ANN. tit. 19, § 1310 (1974); HAWAII REV. STAT. § 89-11(b)(3) (Supp. 1975); ILL. ANN. STAT. ch. 111 2/3, § 328a (Smith-Hurd 1966) (transit workers); IND. ANN. STAT. § 20-7.5-1-13(c) (1975) (teachers); IND. ANN. STAT. § 22-6-4-11(h) (Supp. 1976); IOWA CODE ANN. § 20.22 (Supp. 1976); KAN. STAT. ANN. § 75-4322(q) (Supp. 1975) (public employees except teachers); ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1976) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 1026(4) (Supp. 1976) (university employees); MASS. ANN. LAWS ch. 150E, § 9 (1976); MINN. STAT. ANN. § 179.69(3) (Supp. 1976) (public employees except charitable hospital employees); MONT. REV. CODES ANN. § 59-1614(9) (Supp. 1975) (public employees except nurses and professional engineers); NEV. REV. STAT. § 288.200(6) (1975) (local government employees); N.J. STAT. ANN. § 34:13A-5.2 (Supp. 1976), referring to Pub. L. 1941, ch. 100, § 7 (codified at N.J. STAT. ANN. § 34:13A-7 (1965)); N.Y. CIV. SERV. LAW § 209(3)(d) (McKinney 1973); OKLA. STAT. ANN. tit. 11, § 548.7 (Supp. 1976) (firefighters, municipal employees, police); PA. STAT. ANN. tit. 43, § 1101.804 (Supp. 1976) (public employees except firefighters and police); R.I. GEN. LAWS ANN. § 28-9.3-9 (1968) (teachers); R.I. GEN. LAWS ANN. § 28-9.4-10 (1968) (municipal employees except firefighters, police, and teachers); VT. STAT. ANN. tit. 3, § 925 (Cum. Supp. 1976) (state employees, state college employees); VT. STAT. ANN. tit. 21, § 1733 (Cum. Supp. 1976) (municipal employees).

²³⁷ P. STAUDOHAR, *supra* note 77, at 83. Much of the public sector experience with voluntary interest arbitration has occurred in the transit industry. See generally Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 IND. & LAB. REL. REV. 95 (1971).

²³⁸ It has been noted that only about 2 percent of collective bargaining agreements in the private sector provide for interest arbitration. F. ELKOURI & E. ELKOURI, *supra* note 152, at 7.

trated being quite common.²³⁹ Also, legislated criteria for use by the arbitrator in rendering his decision are gaining favor [Note: to be discussed under compulsory interest arbitration], and, sometimes, coordination of arbitration and budget-making deadlines is mandated.²⁴⁰ As with grievance arbitration, legislation on interest arbitration should address itself to the possibility of either enforcement or appeal of the arbitral award.

Voluntary arbitration of interest disputes is limited to the issues contained in the submission of the parties. When the parties have been unable to bridge the gap between bargaining positions, they may wish to submit unresolved contractual issues to the arbitrator because of political (using the arbitrator as a scapegoat) or practical (avoiding a test of strength) reasons. For either reason, labor and management are seeking a finality to collective bargaining unobtainable through mediation or factfinding efforts. Yet, "indiscriminate use of 'interests' arbitration is to be avoided In particular, parties who abdicate to arbitrators the responsibility of writing the bulk of the collective bargaining agreement risk serious disappointment."²⁴¹

5. *Final-Offer Arbitration*

An intriguing and promising form of collective bargaining impasse resolution is final-offer (either-or) arbitration. Whereas in conventional interest arbitration the arbitrator has wide latitude in fashioning a contract based upon statutory criteria and the merits of the situation, in the final-offer format the arbitrator must select contractual provisions from the two offers of the competing parties. To date, only five states have enacted such legislation, giving the arbitrator choices between the following: The entire package as proposed by either side;²⁴² the entire package of either

²³⁹ *E.g.*, DEL. CODE ANN. tit. 19, § 1310 (1974) (excludes wages and salaries); ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1976) (excludes salaries, pensions, insurance matters—municipal employees); PA. STAT. ANN. tit. 43, § 1101.804 (Supp. 1976) (excludes provisions requiring enactment—public employees except firefighters and police); R.I. GEN. LAWS ANN. § 28-9.3-12 (1968) (excludes matters requiring expenditures of money—teachers); R.I. GEN. LAWS ANN. § 28-9.4-13 (1968) (excludes matters requiring expenditures of money—municipal employees except firefighters, police, and teachers).

²⁴⁰ *E.g.*, CONN. GEN. STAT. ANN. § 7-472(a) (Supp. 1976) (municipal employees).

²⁴¹ F. ELKOURI & E. ELKOURI, *supra* note 152, at 53.

²⁴² ORE. REV. STAT. §§ 243.742-.756 (1975 Replacement Part); WIS. STAT. ANN.

party and the factfinder's report;²⁴³ item-by-item as proposed by either party;²⁴⁴ item-by-item as to economic issues defined by the arbitrator.²⁴⁵ In Minnesota, the two sides must submit their final offers as to contractual areas of disagreement to the Director of Mediation Services, who renders a decision thereon.²⁴⁶ A variation of the total-package choice has been codified in Eugene, Oregon, where each side may submit two final offers.²⁴⁷ An analogous process to the Eugene ordinance may exist in mediation-arbitration (med-arb) when the parties tailor multiple contractual offers to suit the mediator-arbitrator.

As with other forms of interest dispute resolution, the arbitrator is given a statutory framework of criteria within which to make his decision [Note: to be discussed under compulsory arbitration]. Further, the parties limit the issues to be decided by the arbitrator by the nature of their offers, which may or may not be confined to the issues in dispute. Where final-offer arbitration involves a single issue such as wages, the total-package concept is ideally suited to the task.²⁴⁸ Where, however, a number of proposed contractual items, particularly non-economic items, are in dispute, the item-by-item approach is much better.²⁴⁹ Typically, in

§§ 111.77(4), (5) (1974, Supp. 1976) (municipal employees).

²⁴³ MASS. ANN. LAWS ch. 150E, § 9 (1976), referring to MASS. ANN. LAWS ch. 150C, § 1-16 (1976).

²⁴⁴ IOWA CODE ANN. § 20.22(3) (Supp. 1976).

²⁴⁵ MICH. STAT. ANN. § 17.455(38) (1975) (firefighters, police).

²⁴⁶ The statutory mandate to the Director of Mediation Services is as follows: "The director shall determine the matters not agreed upon based upon his efforts to mediate the dispute." MINN. STAT. ANN. § 179.69(5) (Supp. 1976) (public employees except charitable hospital employees). Exactly what form of final-offer arbitration is authorized by this statutory section is a matter of interpretation.

²⁴⁷ Long & Feuille, *Final-Offer Arbitration: "Sudden-Death" in Eugene*, 27 IND. & LAB. REL. REV. 186, 192 (1974). The Eugene, Oregon, statute is patterned after a Nixon administration proposal for the transportation industry. See Note, *National Emergency Disputes in the Transportation Industry: An Analysis of Final Offer Selection as a Solution to the Problem*, 42 U. CIN. L. REV. 101, 115-16 (1973). "High-low arbitration" is the term attributed to the Eugene style of final-offer arbitration.

²⁴⁸ For a private sector example of the utility of final-offer selection as to wages see Seitz, *Footnote to Baseball Arbitration*, 29 ARB. J. 98 (1974).

²⁴⁹ One supportive view of the item-by-item approach states:

In the case of a multi-issue dispute involving a number of noneconomic as well as economic issues, the job of the arbitrator is much more difficult. Not only are the criteria for noneconomic items like the grievance procedure, seniority, and union security less clear, but each final-offer involves trade-offs between the various issues with each party trying

this latter situation the arbitrator must select the more (most) reasonable offer in light of statutory criteria.²⁵⁰ Other nuances of the final-offer process involve how the offers are made and altered, with various methods including the following: “[E]ither by presenting the arbitrator with the positions of the parties, on the basis of their prior negotiating record, without further hearing; or by holding a post-negotiation hearing before a tripartite arbitration board, during the course of which the parties might be allowed to modify their positions prior to final decisions;”²⁵¹ or by mandating continued negotiating for a specified period of time after the arbitration procedure has begun.²⁵²

So far, the assessment of how well final-offer arbitration works is cautiously optimistic.²⁵³ The premise upon which final-offer arbitration functions is that public employee labor unions and public management will be compelled to adopt reasonable bargaining positions since arbitrators will select the more (most) reasonable final offer. Thus, where one party’s offer is unrealistic, the other party’s final offer will prevail. The rub comes when the final offers from both sides are unreasonable, for then the arbitrator is

to present the most reasonable combination of proposals. In such a situation, it becomes difficult for the arbitrator to justify his final-offer selection. Yet, in final-offer arbitration, where compromise by the arbitrator is not possible, justifying or rationalizing the arbitration decision is especially important. Unless the arbitrator is able to rationalize his selection, acceptance of final-offer awards by the public and the parties may be in jeopardy.

Nelson, *Final-Offer Arbitration: Some Problems*, 30 *ARB. J.* 50 (1975). Thus, the problem of acceptability is minimized where the arbitrator can choose between each item of an offer instead of between each offer as a whole.

The Indianapolis experience with total package final-offer arbitration demonstrates that arbitrators loathe accepting or rejecting all of the proposals from either party and desire greater flexibility. Witney, *Final-Offer Arbitration: The Indianapolis Experience*, 96 *MONTHLY LAB. REV.* 20, 23 (1973).

²⁵⁰ Limiting the arbitrator to selection of the most reasonable final offer is a concept first advocated in relation to the total package final-offer concept (“selector method”). Stevens, *Is Compulsory Arbitration Compatible with Bargaining*, 5 *IND. REL.* 48 (1966). See also Garber, *Compulsory Arbitration in the Public Sector*, 26 *ARB. J.* 226, 232 (1971) (“most reasonable” concept should be applied to final-offer arbitration).

²⁵¹ Grodin, *Either-Or Arbitration for Public Employee Disputes*, 11 *IND. REL.* 263 (1972).

²⁵² E.g., Eugene, Oregon.

²⁵³ See Howlett, *supra* note 77, at 34 (Michigan); Long & Feuille, *supra* note 247, at 203 (Eugene, Oregon); Nelson, *supra* note 249, at 58.

stuck on the horns of a dilemma. Alternatively, perhaps both labor and management representatives may attempt to second-guess the arbitrator and gear their proposals to what will be acceptable to the neutral. Finally, there is some risk that the item-by-item approach to arbitrating contracts may not bear a sufficient element of risk to the parties (compare the total-package approach) to spur voluntary compromises toward reasonable bargaining offers. Beyond these generalizations, the nascent state of development of public sector experience with final-offer arbitration has prompted more theoretical analyses than case studies; the verdict as to final-offer arbitration has not yet been rendered.²⁵⁴

6. *Compulsory Binding Interest Arbitration*

The search for a substitute to public employee strikes and for finality in the collective bargaining process has led 11 states to adopt compulsory binding interest arbitration, applicable after a bargaining impasse has been reached, with invocation of the process either being mandated or occurring automatically at the behest of either party.²⁵⁵ Criticism has been voiced of the insistent use of the expression “compulsory” arbitration since interest arbitration “is simply a process of dispute settlement directed by a

²⁵⁴ One author concludes the following:

The adoption of final-offer arbitration on a trial basis by additional states and municipalities seems desirable. The final-offer procedure not only protects the public from the damage and inconvenience caused by public employee strikes but it minimizes the adverse effect of arbitration on contract negotiations. In addition, limited experience indicates that the procedure can be used successfully by parties with little collective bargaining experience.

Nelson, *supra* note 249, at 58.

²⁵⁵ ALASKA STAT. § 23.40.200(b) (1972) (police, firefighters, detention and hospital employees); LA. REV. STAT. ANN. §§ 23:890(B), (E) (Supp. 1976) (transit workers); ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1976) (municipal employees—excludes salaries, pensions, insurance); NEB. REV. STAT. § 48-819 (1974); N.Y. CIV. SERV. LAW § 209(4)(c) (McKinney Supp. 1976) (firefighters, police); PA. STAT. ANN. tit. 43, §§ 217.4-.8 (Supp. 1976) (firefighters, police); R.I. GEN. LAWS ANN. §§ 28-9.1-7 to -11 (1968, Supp. 1975) (firefighters); R.I. GEN. LAWS ANN. §§ 28-9.2-7 to -11 (1968, Supp. 1975) (police); S.D. COMPILED LAWS ANN. §§ 9-14A-2 to -19 (Supp. 1976) (firefighters, police) [declared unconstitutional in *Sioux Falls v. Firefighters Local 814*, 234 N.W.2d 35 (S.D. 1975)]; VT. STAT. ANN. tit. 21, § 1733 (Cum. Supp. 1976) (firefighters, police); WASH. REV. CODE ANN. §§ 41:56:450-:480 (Supp. 1975) (uniformed services); WYO. STAT. ANN. §§ 27-269 to -271 (1967 Replacement Volume) (firefighters).

legislature";²⁵⁶ nonetheless, the term is sufficiently useful to be adopted here. Another definitional qualification of "compulsory binding interest arbitration" is that the process is binding only after all appellate remedies have been exhausted.²⁵⁷

Experience with compulsory binding interest arbitration is largely of recent vintage, although there has been some long term use of the mechanism in the United States²⁵⁸ as well as in foreign countries.²⁵⁹ Evidence of the impact of legislated contract arbitration on reducing the incidence of strikes,²⁶⁰ inflating or deflating

²⁵⁶ Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47, 53 (1973). Howlett states: "The word 'compulsory' is unfortunate; when that word appears to describe legislated arbitration, the reasoning process of many city officials and union representatives disappears." *Id.*

²⁵⁷ Howlett describes the divergent statutory approaches toward providing appeal from the arbitration award. As of 1972, some states granted no appeal (Minnesota, Nevada, Pennsylvania, Rhode Island, Wyoming); three states listed fraud and collusion as grounds for appeal [Maine (also, erroneous ruling or finding of law), Vermont (also, error of law not concerning the admissibility of evidence), Wisconsin]; other states provided for normal civil action appellate channels—circuit court to supreme court (Nebraska, South Dakota); and Michigan provided a rather comprehensive appeal provision with review limited to the local circuit court. *Id.* at 69-70.

²⁵⁸ In 1920 Kansas enacted a compulsory arbitration act, which set up a court of industrial relations for disputes in industries affecting the public interest. A similar interest arbitration court in Nebraska was modified in 1969 to apply to public employment disputes. See Good, *Public Employee Impasse Resolution by Judicial Order: The Nebraska Court of Industrial Relations*, 2 J. LAW & ED. 253 (1973). The National War Labor Board of World War II settled over 20,000 interest disputes, which traversed practically the entire range of collective bargaining issues. F. ELKOURI & E. ELKOURI, *supra* note 152, at 52. Shortly after the end of World War II, a handful of states established compulsory binding interest arbitration or related measures for public utilities, although such measures had to fall in conflict with the LMRA. In 1963 Congress enacted its first peacetime compulsory arbitration statute, which statute dealt with railroad diesel firemen, and followed with a 1967 statute relating to the railroad shopcrafts dispute.

²⁵⁹ The most extensive experience with compulsory binding interest arbitration is the 60-plus years of its use in Australia. See H. NORTHROP, *COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES* 35-44 (1966). British Columbia has used the compulsory binding interest arbitration process since 1937. See Feuille, *Analyzing Compulsory Arbitration Experiences: The Role of Personal Preferences*, 28 IND. & LAB. REL. REV. 432 (1975); Thompson & Cairnie, *Compulsory Arbitration: The Case of British Columbia Teachers*, 27 IND. & LAB. REL. REV. 3 (1973). New Zealand is another country with some experience in this area. See Howells, *Causes and Frequency of Strikes in New Zealand*, 25 IND. & LAB. REL. REV. 524 (1972).

²⁶⁰ After investigating United States firefighter strikes occurring in the 1969-1972 period, one author concluded that 28 strikes had taken place but that none

the size of public employee wage increases,²⁶¹ or inhibiting collective bargaining²⁶² is tentative at best. In order for compulsory binding interest arbitration to dampen the growing proclivity of public sector unions to strike, legislated arbitration has to serve the functions of a strike. That is to say, arbitration needs to act as a powerful impetus to concession and compromise in collective bargaining in order to create a sense of urgency in negotiations and to impose direct costs of disagreement upon the parties.²⁶³ Indeed,

had occurred in jurisdictions with compulsory arbitration statutes. Wheeler, *An Analysis of Fire Fighter Strikes*, 26 LAB. L.J. 17, 18 (1975). The experiences of Michigan, Pennsylvania, and Wisconsin have also been favorable, revealing few police and firefighter strikes. Anderson, *supra* note 170, at 1019-20; Howlett, *supra* note 256, at 63-64. The major problem with equating preliminary positive conclusions about compulsory binding interest arbitration with success of the process is that this dispute resolution mechanism has been tested largely with police and firefighters, who, presumptively, are not prone to strike. Bowers, *The Dilemma of Impasse Procedures in the Public Safety Services*, 28 ARB. J. 167, 171 (1973). In Australia, most authorities agree that legislated arbitration has not eliminated strikes in the public sector. F. ELKOURI & E. ELKOURI, *supra* note 152, at 19. Yet, the use of this process in British Columbia probably has averted a rash of public teacher strikes. Thompson & Cairnie, *supra* note 259, at 14. A dramatic exception to the general trend in avoidance of police strikes through compulsory binding interest arbitration is the Montreal police strike of 1969.

²⁶¹ A study which compared Michigan police and firefighter salaries determined through negotiations or through compulsory arbitration between 1969 and 1972 showed no significant difference between the two methods in terms of mean salaries and rates of salary increase produced. Bezdek & Ripley, *Compulsory Arbitration Versus Negotiations for Public Safety Employees: The Michigan Experience*, 3 J. COLLECTIVE NEGOTIATIONS 167 (1974); *accord*, Howlett, *supra* note 256, at 64.

²⁶² The early years of compulsory binding interest arbitration in Pennsylvania, Wisconsin, and Michigan tend to demonstrate a chilling effect on collective bargaining. Such effect, if any, however, appears to be warming in later years. Anderson, *supra* note 170, at 1020-22; *see* Howlett, *supra* note 256, at 57-61; Loewenberg, *Compulsory Arbitration for Police and Firefighters in Pennsylvania in 1968*, 23 IND. & LAB. REL. REV. 367 (1970). The evidence regarding British Columbia is mixed, although collective bargaining has not atrophied. Thompson & Cairnie, *supra* note 259, at 12-13. Minnesota's experience with binding interest arbitration for charitable hospitals has demonstrated that the 30-year-old statute may even have strengthened collective bargaining. Howlett, *supra* note 256, at 60.

The fear is that, in the face of compulsory binding interest arbitration, negotiating parties will desert good faith bargaining and, in order to save face or for other reasons, foist upon the arbitrator the unenviable task of writing the contract from scratch. The arbitration process was never intended for that purpose but only for resolving disputes.

²⁶³ Bowers, *supra* note 260, at 174; Stevens, *supra* note 250, at 40. One survey of Rhode Island police unions and public employers revealed that both sides favored

some public employee unions have made the argument that compulsory binding interest arbitration is the *quid pro quo* for their promise to refrain from exercising their de facto (not de jure) right to strike.²⁶⁴

Giving arbitrators (and factfinders) unfettered discretion in deciding public employment interest disputes creates the unwelcome risk of arbitrariness. Consequently, legislated criteria to guide the arbitrator (and factfinder) in formulation of a decision are appropriate. The most frequently observed public and private sector guides for use in interest arbitration are the following: Comparison of prevailing practices (*i.e.*, wages and fringe benefits) within appropriate geographical areas, comparison of peculiarities of employment in regard to other trades and professions (particularly as to police and firefighters), cost of living, living wage, maintenance of take home pay, productivity, ability of the employer to pay the costs of the award, past practice and bargaining history of the parties, effect of the award on departmental practices and policies, other factors normally considered by arbitrators (and factfinders), public interest, and changes in any of these circumstances during the arbitration (factfinding) proceedings.

One will observe that these criteria represent substantially the same factors considered by the negotiating parties. The advantage of interjecting a neutral third party into the picture is that a measure of objectivity is obtained, or so it would appear. There is a deep-rooted suspicion, however, that the neutral third party is less concerned with applying criteria to his decision-making than with promoting acceptability of the award and advancing his own sense of equity about the situation.²⁶⁵ Perhaps acceptability and equity as determined by the arbitrator are what state legislatures desire in interest arbitration, for the nebulous nature of legislative cri-

legislated arbitration rather than the use of strikes essentially for these reasons. Overton & Wortman, *Compulsory Arbitration: A Strike Alternative for Police*, 29 ARB. J. 33 (1974).

²⁶⁴ Jerry Wurf, president of AFSCME, takes this position in direct opposition to the stance of George Meany, president of the AFL-CIO. AFSCME reprint of a newspaper article by columnist Clayton Fritchey (date and source unknown).

²⁶⁵ Doering, *Impasse Issues in Teacher Disputes Submitted to Fact Finding in New York*, 27 ARB. J. 1, 13-15 (1972); cf. Wheeler, *Is Compromise the Rule in Fire Fighter Arbitration*, 29 ARB. J. 176 (1974), for the conclusion that arbitrators and factfinders usually do not adopt intermediate bargaining positions but accept either the union or the employer's proposal.

teria undoubtedly promotes broad discretion in an arbitrator's decision-making. A legislative body which wishes certain factors to be predominant in the resolution of interest disputes must say so if its wishes are to be fulfilled.²⁶⁶ And where a legislature seeks to reduce the arbiter's traditional discretion, legislated criteria should be specific and avoid the use of catch-all provisions.²⁶⁷ On the other hand, the use of broadly stated criteria, according to one view, can evoke diverse expectations and create uncertainty in the minds of the parties as to the outcome of the award, thereby encouraging vigorous collective bargaining.²⁶⁸

Determination of wage increases offers an illuminating example of the complexities and problems encountered when legislators define compulsory interest arbitration criteria. Using the formula developed by David Ross,²⁶⁹ an arbitrator would compare an ex-

²⁶⁶ The public employer's ability to pay the costs of an award was made the preeminent concern in Nevada's factfinding statute [factfinding can be binding]. NEV. REV. STAT. § 288.200(8) (1975) (local government employees). The statute reads in part as follows:

Any factfinder, whether acting in a recommendatory or binding capacity, shall base his recommendations or award on the following criteria:

(a) A preliminary determination shall be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer, and with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health

(b) Once the factfinder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, he shall use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute. The fact finder's report shall contain the facts upon which he based his recommendations or award.

Id.

²⁶⁷ The "normal criteria" phrase of the Nevada statute is a catch-all provision. *Id.* The prior Michigan statute, after enumerating various criteria, added the general criterion: "[s]uch other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment" MICH. STAT. ANN. § 17.455(39)(h) (1975). That same section contains the anomalous provision that the arbitration panel shall base its award upon factors listed in the statute "as applicable"; hence, the neutral panel may ignore one or more of the legislated criteria. Klapper, *Legislated Criteria in Arbitration of Public Safety Contract Disputes*, 29 ARB. J. 117-18 (1974).

²⁶⁸ Stevens, *supra* note 250, at 48-49.

²⁶⁹ Ross, *The Arbitration of Public Employee Wage Disputes*, 23 IND. & LAB. REL. REV. 3 (1969).

penditure for a given service in one community with expenditures for the same service in other communities in the state.²⁷⁰ The subject of arbitration would be the relative effort of the community in utilizing fiscal resources, taking into account the total resources available and the community's need for a particular service. This approach would exclude the cost of another service desired by the community (except in emergencies) from consideration of the community's ability to pay and would focus on personnel expenditures, producing a resource utilization ratio. The second element of this wage analysis, available tax resources, would be the same as the potential tax base per unit of need for these taxes, *e.g.*, potential tax resources per public school pupil. In rendering a decision as to wage increases, the arbitrator would rank state communities as to resource utilization ratios and available tax resources and would award a wage increase if the community in question ranked below the median in the statewide distribution of resource utilization but above the median in distribution of resources available.²⁷¹

Ross catalogues several problems with this approach to arbitration of wage disputes.²⁷² A more fundamental consideration,

²⁷⁰ The comparative expenditures factor is used because it is relied upon heavily by arbitrators and factfinders. See Pegnetter, *supra* note 213. For an argument that the psychological force of equitable comparison of wages is the most important factor in wage determination see D. ROSS, *TRADE UNION WAGES* 49-53 (4th ed. 1956).

²⁷¹ Ross, *supra* note 269.

²⁷² Difficulties in Ross' approach are threefold. First, there is some difficulty in defining the potential tax base, including various adjustments for valuations of income or property, since the tax base could be considered as consisting of the property tax, a mixed assortment of taxes, or the total income of the community. Moreover, communities may be able to export their tax burdens to varying degrees by a levy, the incidence of which falls on outside residents, necessitating adjustments to the tax base such as exclusion of the commercial base. More importantly, governments do not obtain revenues only by general taxes, and such devices as user taxes should be imputed to the tax base. However, these problems are surmountable with adequate data.

Second, the measurement of the varying amounts of public need for a service is difficult because the need concept is riddled with ambiguities. Assumptions of the appropriate unit for measuring need must be made where heterogeneous rendition of services exists and even though each individual's service consumption leads only to nominal reduction in other individuals' consumption of the same service. Nevertheless, attendance data may be a fair measure for educational services, and labor inputs a fair measure for police and firefighter services.

Third, an arbitrator by necessity must exclude nonessential expenditures from the ability-to-pay criterion and rest this judgment on his assessment of the requirements for adequate quality of service, using as guides both technical evidence of production efficiency and evidence of past and present practices.

beyond the technical feasibility of the wage arbitration concept, is whether this type of decision more properly belongs to legislative bodies. The arbitrator may be viewed as an agent of the governing body in the sense that he has been assigned the task of making legislative decisions; consequently, the question of illegal delegation of legislative authority comes into play. In rebuttal, the lawful refrain is that no illegal delegation of legislative power exists where specific standards to guide the arbitrator's judgment have been enacted.²⁷³

And what of sovereignty? If an arbitrator decides that a governmental unit is not fully utilizing its available tax resources, requiring some sort of tax increases, or if he finds that wages are more essential than alternative governmental expenditure plans, requiring a reordering of fiscal priorities, has not the arbitrator encroached on traditional concepts of governmental sovereignty?²⁷⁴ Granted, the arbitrator leaves to the legislative body the decision of which taxes to increase or which expenditures to cut, but the underlying decision to increase taxes or cut expenses already has been made by the neutral third party.²⁷⁵ Should an arbitrator assume this essentially legislative function?²⁷⁶

²⁷³ The illegal delegation of legislative authority argument and other juristic theories attacking the constitutionality of collective bargaining statutes which possess legislated arbitration provisions have failed. For a thorough review of relevant cases see Anderson, *supra* note 170, at 1015-18; Howlett, *supra* note 256, at 54-57.

²⁷⁴ For a lengthy and rambling attack on the scholarly trend favoring legislated arbitration (as well as on public employee unionization and public sector collective bargaining) see Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974). Petro's concept of sovereignty is the "undivided and unchallengeable power to perform the functions it [the government] assumes or has allocated to it by its constituents." *Id.* at 66. "Between sovereignty and compulsory public-sector bargaining there can be no reconciliation, no viable harmony. One or the other must give way." *Id.* at 71-72.

²⁷⁵ There is some authority supporting an arbitrator's decision which requires governmental units to raise taxes to fund employee wage increases. For a collection of cases on the subject see Anderson, *supra* note 170, at 1015-18; Howlett, *supra* note 256, at 54-56. Numerous public employment arbitration awards have required governmental units to pay wage increases out of available funds over the assertion by the public employer of its inability to pay. For a number of these cases see F. ELKOURI & E. ELKOURI, *supra* note 152, at 776-78.

²⁷⁶ One negative response to legislated arbitration is as follows: "Arbitrators are seldom equipped to weigh the interests of government employees against the full array of claims on the public treasury. Legislators are elected in a democratic society to make such evaluations of the public welfare and priorities." D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 337 (1970). For a somewhat more

Other intricacies of compulsory binding interest arbitration could be explored, but such discussion is unnecessary here.²⁷⁷ The essential legislative decision to be made in opting for public sector legislated arbitration is whether the potential benefits of strike avoidance and finality in the collective bargaining process outweigh the loss of legislative authority to exercise normal discretion in financing and ratifying collective bargaining agreements and the potential chill exerted on collective bargaining by legislated arbitration.

IV. CONCLUSION

Public sector employment relations in the United States are rapidly changing. As shown by the diverse nature of the state collective bargaining statutes explored in this paper, states are fulfilling their roles as the social laboratories of the American body politic. Each state legislature has made a judgment of how best to balance philosophical ideals and pragmatic considerations, employer and employee desires, and interests of the public constituency. If recent legislative activity is a proper gauge, now is the time for reassessment by West Virginia legislators of the basic assumptions which form the underpinning of West Virginia public employment relations.

Pressure upon West Virginia legislators from representatives of public management and public employee unions will be intense when collective bargaining statutory proposals are made. How much influence the public at large will have in this political thicket is an unanswered but perhaps decisive question.²⁷⁸ Due to the com-

eclectic approach to this issue see Horton, *Arbitration, Arbitrators, and the Public Interest*, 28 IND. & LAB. REL. REV. 497 (1975). In his incisive article, Horton states the following: Political democrats are more concerned about the process of labor-management relations decision-making than about the nature of those decisions; political accountability is lessened by legislated arbitration; arbitrators are inherently political actors; arbitration decisions are among the most significant of political decisions; delegation of legislative authority to nongovernmental identities is commonplace, making the unlawful delegation argument sound anachronistic or at least futile; too many arbitrators are not equipped to resolve the types of competing bargaining issues; thus, the perception of arbitrators as nonpolitical experts may be misleading. *Id.*

²⁷⁷ See generally McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972).

²⁷⁸ A recent survey of 262 local governmental units throughout the United States disclosed that

plexities of designing prudent legislation, special legislative committees should study and prepare alternative public-sector collective bargaining bills for consideration by the legislature as a whole. Hopefully, this paper will make that difficult job easier.

the public policy environment is more important in determining bargaining outcomes than actual bargaining statutes This is not to say that statutes are irrelevant; on the contrary, statutes probably have a leveling influence, because agreements in states with bargaining statutes tend to be more homogeneous than those in states without laws.

Gerhart, *Determinants of Bargaining Outcomes in Local Government Negotiations*, 29 IND. & LAB. REL. REV. 331, 340 (1976).