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Impasse Resolution Mechanisms and Teacher Strikes

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IMPASSE RESOLUTION MECHANISMS AND TEACHER STRIKES

Public school teachers have no right to strike under Michigan law,[1] but the power to strike exists. Michigan residents witnessed forty teacher strikes in the autumn of 1973 alone.[2] Among them was the forty-four-day strike by Detroit teachers.[3] The strikes during the past fall were not an unfortunate aberration. Ninety percent of the strikes in Michigan are by school teachers.[4] In the public education context, the threat of a strike no longer brings negotiating parties together. A new mechanism for resolution of deadlocks in teacher-school board contract disputes is needed. This article describes the problem, outlines impasse resolution procedures presently used, and proposes a mechanism better suited to the needs of the public.

I. Current Laws Affecting Teachers' Strikes

Work stoppages by teachers can be traced to failures to resolve conflicting interests by less drastic means. The three major actors are the school board, the teachers, and the public. The children's interests are not independently voiced. Instead, each of the three actors sincerely declares itself to be the guardian of the children's interests. Ostensibly, quality education is everyone's only concern, and all other demands relate to its achievement. Yet, beyond this basic unanimity the protagonists' interests diverge.

With respect to economic issues, teachers demand increased salary schedules and additional fringe benefits in order to meet the rising cost of living and attract the best available people to the teaching profession. The school board may sympathize, but, in determining salary levels, it must consider other areas of the budget, such as maintenance, supplies, activities, and support personnel. Until new methods of financing public educa-

[1] Mich. Comp. Laws Ann. § 423.202 (1967). The statute states:

> No person holding a position by appointment or employment in the government of the state of Michigan, or in the goverment of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

[2] Address by Robert Howlett, Chairman, Michigan Employment Relations Commission, at the University of Michigan, Ann Arbor, Michigan, Nov. 6, 1973 [hereinafter cited as Howlett Address].

[3] BNA Gov't Emp. Rel. Rep. No. 526, at B-18 (Oct. 22, 1973). At least 10,500 teachers participated in the Detroit strike. BNA Gov't Emp. Rel. Rep. No. 524, at B-17 (Oct. 8, 1973).

[4] Howlett Address, *supra* note 2.

tion are devised, the board is also constrained[5] by millage elections,[6] which provide the voters' only opportunity to control available revenues.

Policy and programs are another source of conflict. While public pressure groups may influence some program areas,[7] the battle over policy is generally fought between the board and the teachers.[8] The teachers, as professionals who actually spend time in the classroom, consider themselves better qualified to formulate educational policy than the predominantly lay school board. On the other hand, the board often considers teacher participation to be an invasion of its previously unquestioned managerial prerogatives. Furthermore, some policy questions are integrally related to financial considerations.[9]

The public's interest in the prevention of teacher strikes must also be acknowledged. This interest includes having children in school on weekdays during the traditional school year so that the children can obtain an education and be under supervision. Parents arrange their lives and work schedules in reliance on the schools being in session. Teacher strikes defeat this interest in stability.

These conflicting interests come to the forefront when teachers' contracts are being negotiated and can lead to bargaining stalemates and strikes. During negotiations, the competition between the teachers and the board for the public's good will and support intensifies as does each side's need to believe that its position and convictions are correct. Some manner of resolving the deadlock that results from the conflict of the interests must be instituted.

Teacher strikes are but one facet of the expanding area of public sector unionism. While forty-one states[10] either require or authorize collective

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[5] Rehmus, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919 (1969).

[6] *See* MICH. CONST. art. 9, § 6. Michigan, like most states, limits the amount of millage that can be levied upon property without specific authorization from the voters.

[7] For example, sex education programs seem to arouse public debate.

[8] Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017 (1969).

[9] For example, teachers often request smaller classes as a means of improving the children's education, yet smaller classes mean more teachers and more salaries.

[10] According to the compilation of state public employee statutes in BNA Government Employees Relations Reporter, the following states either require or authorize collective bargaining or meet and confer procedures with respect to at least some groups of public employees: Alabama, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. *See, e.g.*, CAL. GOV'T. CODE § 3500 *et seq.* (West 1966); N.Y. CIV. SERV. LAW § 200 (McKinney 1973). Arizona, Colorado, Louisiana, Mississippi, Ohio, Tennessee, and West Virginia do not specifically deal with public employee bargaining. North Carolina, South Carolina, and Texas take a middle position. For example, North Carolina bars membership in any national labor organization and forbids the negotiation of any collective agreements. N.C. GEN. STAT. § 95-97 (1965). The law forbidding public employers to bargain with labor unions on wages, hours, or conditions of employment

bargaining or meet and confer procedures in the public sector, only Alaska,[11] Hawaii,[12] Montana,[13] Oregon,[14] Pennsylvania,[15] and Vermont[16] allow a limited right to strike. The Michigan Public Employment

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was said to extend to professional organizations acting as unions. 40 OP. N.C. ATT'Y GEN. 274 (1969). This interpretation would bar a school board or school district from negotiating with a teacher's association. A court found the provision prohibiting union membership unconstitutional, although it agreed that the state could forbid governmental bodies to make contracts or agreements with unions. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969). While South Carolina has no statutes authorizing public employees to organize and bargain collectively, it provides an employee grievance procedure for state employees, S.C. CODE ANN. § 1.49-11 to 1.49-14 (Supp. 1971), and for county and municipal employees, S.C. CODE ANN. § 1.66-11 to 1.66-16 (Supp. 1971). The public employee bargaining statute in Texas covers police and firefighters, but applies only in local jurisdictions in which voters petition their municipal governments for a referendum and adopt the law by a majority vote. The act grants exclusive recognition and bargaining rights, prohibits strikes, and permits binding arbitration in the event of bargaining impasses. TEX. REV. CIV. STAT. art. 5154c-1 (Supp. 1974).

[11] Alaska's Employment Relations Act, ALASKA STAT. § 23.40.200 (1972), divides public employees into three categories with respect to granting the right to strike. Essential employees are prohibited from striking; semi-essential employees are granted a limited right to strike; and nonessential employees are allowed to strike.

[12] Although Hawaii grants public employees a limited right to strike provided that they first exhaust mediation and factfinding procedures, strikes endangering the public health and safety are unlawful, and the Public Employment Relations Board may make adjustments to avoid or remove any imminent or present dangerous aspects of such strikes. HAWAII REV. STAT. §§ 89-11, 89-12 (Supp. 1973).

[13] The Montana statute, MONT. REV. CODES ANN. § 41-2209 (Supp. 1973), applies only to nurses, prohibits strikes only if another strike is in progress at any other health care facility within a 150-mile radius, and requires that the health care facility be given thirty-days notice of the date of the strike.

[14] The new Oregon public employees law authorizes strikes by public employees only under the following conditions: the employees must be in an appropriate and certified bargaining unit; they must have complied, in good faith, with the specified mediation and factfinding procedures; they must have given ten-days notice of their intent to strike; proceedings to prevent any prohibited practice must have been exhausted; and thirty days must have elapsed since the publication of the factfinder's recommendations. A public employer may petition a county circuit court for injunctive relief in the event that the permissible strike "creates a clear and present danger or threat" to the public health, safety, and welfare. The relief then granted must include an order to submit the dispute to final and binding arbitration. The statute also provides for binding arbitration of labor disputes involving public employees not permitted to strike: policemen, firemen, and correctional or mental health institution guards. Ch. 536, § 16, [1973] Ore. Acts, *amending* ORE. REV. STAT. § 243.735 (1971).

[15] Pennsylvania allows public employees, other than guards at prisons or mental hospitals, or employees directly involved with and necessary to the functioning of the courts, a limited right to strike, provided that the strike occurs after exhaustion of mediation and factfinding procedures and unless or until the courts determine that the strike creates a clear and present danger or threat to the health, safety, or welfare of the public. PA. STAT. ANN. tit. 43 §§ 1101.1001-1101.1003 (Supp. 1973).

[16] Under the new Vermont act strikes by municipal employees, policemen, and firefighters are not prohibited unless called within thirty days after a factfinding report has been issued; after both parties have voluntarily submitted a dispute to final and binding arbitration; after a decision or award has been issued by the arbitrator; or if the strike will endanger the health, safety, or welfare of the public. VT. STAT. ANN. tit. 21, § 1730 (Supp. 1973). Strikes by teachers are prohibited, but an injunction can be issued by a court only after a finding that the strike action "poses a clear and present danger to a sound program of school education which in the light of

Relations Act[17] extends bargaining rights to all public employees except those in the state classified service.[18] In addition, the Michigan statute proscribes strikes by public employees including teachers[19] and provides for elections,[20] mediation of grievances,[21] and review of disciplinary actions following prohibited strikes.[22]

In spite of this legislation, teacher-school board negotiations have been fraught with problems rising from three sources:[23] the courts' ambivalence in dealing with the strike proscription,[24] the lack of effective sanctions for unlawful strikes,[25] and the paradoxical situation created by the legislation itself, which allows teachers to organize and bargain collectively, yet denies them a right to strike[26] without providing an alternative procedure to meet their legitimate demands.[27] Other idiosyncrasies of

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all relevant circumstances it is in the best public interest to prevent." VT. STAT. ANN. tit. 16, § 2010 (Supp. 1973).

[17] Michigan Public Employment Relations Act (PERA), MICH. COMP. LAWS ANN. §§ 423.201-423.216 (1967).

[18] MICH. CONST. of 1963, Art. 11, § 5; MICH. COMP. LAWS ANN. § 423.204(a) (1967); Welfare Emp. Union v. Michigan Civil Service Comm'n, 28 Mich. App. 343, 184 N.W.2d 247 (1970).

[19] MICH. COMP. LAWS ANN. § 423.202 (1967).

[20] MICH. COMP. LAWS ANN. § 423.212 (1967).

[21] MICH. COMP. LAWS ANN. § 423.207 (1967).

[22] MICH. COMP. LAWS ANN. § 423.206 (1967).

[23] Address by Professor Harry T. Edwards, Teachers Strikes, Striking Back, Phi Alpha Delta Luncheon, Ann Arbor, Michigan, Oct. 18, 1973.

[24] Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 892 (1973); Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 265-68 (1969).

[25] The ineffectiveness of sanctions in teacher strikes was demonstrated in the Detroit strike. Settlement between the Detroit teachers and the school board was finally reached when the school board agreed not to press its suit against the union for strike-related damages, including salaries of administrators, custodians, and others which the board paid while the schools were closed. The damages were estimated at more than one million dollars. In return for the school board's dropping its damage suit, the union agreed to abandon its $22 million unfair labor practice action against the board. The fines, imposed by Wayne County Circuit Judge Thomas Foley, of $11,000. per day assessed against the Detroit Federation of Teachers and a total of $1,000. per day against the union's three chief officers, are being appealed. BNA GOV'T EMP. REL. REP. No. 526, at B-18 (Oct. 22, 1973); Detroit Free Press, Oct. 18, 1973, at 1, col. 5.

[26] The argument that the withholding of services by teachers in the fall of the year is not a strike was dispensed with by the Michigan Supreme Court in Holland School Dsit. v. Education Ass'n, 7 Mich. App. 569, 152 N.W.2d 572, *rev'd*, 380 Mich. 314, 157 N.W.2d 206 (1968). The argument was that since the teachers had not signed new contracts after the expiration of their old agreement, they were not public employees subject to PERA and could not be considered on strike. The majority found sufficient holdover contact with the employment to justify a finding that the teachers were in fact public employees subject to PERA. The court also ruled that the refusal to sign contracts constituted a strike within the statutory definition. MICH. COMP. LAWS ANN. § 423.201 (1967). Despite these findings and a conclusion that an injunction was a permissible remedy, the court reversed, denied injunctive relief, and remanded the case for proceedings on the merits.

[27] For a discussion of how to prevent strikes by public employees without denying them the right to organize and bargain collectively see Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969). *But see* Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 947 (1969).

teacher strikes concern the aftermath of the strike. Striking teachers, unlike other employees, lose no work days as a result of the strike.[28] Schools almost always remain in session the full 180 days, and teachers are subject to only the inconvenience resulting from the extension of the school year,[29] an inconvenience shared by students and their families.

Thus, current legislation prohibiting teacher strikes, while promoting collective bargaining, does not confront the unconventional labor relations context of teacher-school board negotiations. This past fall, Detroit teachers struck in spite of the statutory prohibition, ignored a court order to return to work,[30] and, when the Board refused to capitulate, they took their disagreement to binding arbitration.[31] In short, Michigan's legislative proscription of teachers' strikes has been largely disregarded. The consequent lack of balance and coherence in the law[32] could be alleviated by a more effective impasse resolution device which would provide a viable alternative to the frequent, although statutorily prohibited, strikes.

II. IMPASSE RESOLUTION DEVICES

Many commentators feel that the disputing parties best understand their problems, and, since the parties must live with the final agreement, they should negotiate without interference.[33] Yet, work stoppages are

[28] In unions with strike funds sufficient for the duration of the strike, striking workers similarly do not lose any money.

[29] Detroit schools will remain in session until July 12 this year as a result of the fall strike. Telephone interview with Grace Butts, Detroit Board of Education, in Detroit, Michigan, Oct. 22, 1973.

[30] The 10,500 teachers were ordered, on September 26, 1973, to return to work the next day by a circuit court, and on October 4 the same court found the union guilty of contempt (Wayne County Circuit Court, Sept. 26, 1973) in Detroit Free Press, Sept. 27, 1973, at 1, col. 2; BNA GOV'T EMP. REL. REP. No. 524, at B-17 (Oct. 8, 1973).

[31] The most hotly disputed issues—salaries, class size, and teacher accountability—were submitted to arbitration proceedings. A three-member panel will make binding decisions on salaries and class size, while teacher accountability will be considered by a governor's arbitration panel that will render a nonbinding opinion in the spring of 1974. Detroit Free Press, Oct. 17, 1973, at 3, col. 6; BNA GOV'T EMP. REL. REP. No. 526, at B-18 (Oct. 22, 1973).

[32] Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQUESNE L. REV. 357 (1972). The article notes:

> The net result [has been] to allow the judiciary to make the law in a vital area affecting not only numerous employees but the public at large. It should be noted that the court makes this law, not as a carefully debated and reasoned outgrowth of a full appreciation of the problems involved, but rather on the basis of the equities of a particular case.

Id. at 375. Edwards' comment concerns the effect of inadequate comprehensive planning by states with regard to the right of public sector employees to strike. Although Michigan has legislation in force proscribing public employee strikes, the problems mentioned still arise because the proscription has been ineffective. *Id.*

[33] Gould, *Public Employment: Mediation, Fact Finding and Arbitration*, 55 A.B.A.J. 835, 836 (1969). Kheel notes that "there is no workable substitute for collective bargaining—even in government—and that our best chance to prevent strikes against the public interest lies in improving the practice of bargaining." Kheel, *supra* note 27, at 941.

becoming a more frequent part of the process of reaching agreement in the public sector.[34] Therefore, it becomes imperative to explore the use of outside assistance to aid in impasse resolution.

Any impasse resolution method utilized in the field of public education must have two particular characteristics. First, the machinery must be designed to avoid giving either party the impression that it can gain more through the impasse mechanism than it can at the bargaining table. Secondly, the method must offer the teachers an adequate substitute for the strike.[35]

The basic impasse resolution devices are mediation,[36] factfinding,[37] and various forms of arbitration. Arbitration can be voluntary or compulsory, of interests or of grievances. Although grievance arbitration[38] has

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[34] Kheel, *supra* note 27, at 932; McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector,* 72 COLUM. L. REV. 1192 (1972). *See generally* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REP. NO. 348, WORK STOPPAGES IN GOVERNMENT 1958-1968 (1970); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1727, ANALYSIS OF WORK STOPPAGES 1970 (1972), as quoted in Shaw & Clark, *Public Sector Strikes: An Empirical Analysis,* 2 J.L. & EDUC. 217 (1973). "In the past ten years, the number of public sector strikes has increased dramatically. In 1960 there were only 36 strikes accounting for 58,400 lost man-days of work; in 1970 there were 412 strikes resulting in 2,023,300 lost man-days of work." *Id.* at 217.

There are essentially four different kinds of strikes: recognitional strikes, jurisdictional strikes, strikes during the term of an agreement, and economic strikes. A significant portion of the public sector strikes to date have been recognitional. Of the 412 strikes by public employees during 1970, fifty-nine were over union organization and security. DEP'T OF LABOR, BULL. NO. 1727, at 37. The purpose of a strike for recognition is to force the public employer to recognize and bargain collectively with the union. A jurisdictional strike involves an attempt by the striking union to gain or protect its jurisdiction over work assigned to or claimed by another group of employees. Although the incidence of such strikes in the public sector has been relatively low, several have occurred and they are likely to continue. Shaw & Clark, *supra* at 219. Strikes during the term of the agreement can be prevented, as in the private sector, by including a no-strike clause in the contract and providing for the arbitration of grievances that arise during the term of the agreement. *Id.* at 221. The most common type of strike in the public sector is the economic strike. In an economic strike the union attempts to pressure the public employer to resolve the issues disputed in negotiations. *Id.* at 223.

[35] Johnson, *Collective Bargaining and the California Public Teacher,* 21 STAN. L. REV. 340, 377 (1969).

[36] The mediator utilizes his neutral position to offer compromises and resolve disputes regarding the underlying facts in issue. Thus, mediation can help parties focus on the issues and find solutions.

[37] Factfinding is sometimes used in conjunction with mediation, but can be used independently. Each side presents its positions and arguments to an expert outsider who makes recommendations for settlement of the disputed issues. Even if one or both parties are not receptive to the recommendations, the value of factfinding is that when the recommendations are made public, they offer some advantage to the party whose views the factfinder more nearly supports. In addition, a factfinder's recommendations carry moral force which can cause considerable public pressure on the recalcitrant party to accept the recommendations rather than to resort to a strike or lockout.

[38] Ninety-four percent of collective bargaining agreements negotiated between labor and management in the United States contain grievance arbitration clauses, and all but 1 percent permit one of the two sides to obtain arbitration during the term of the contract without obtaining an agreement from the other side to arbitrate the dispute

been used successfully for some time, interest arbitration, the determination of certain terms of a new collective bargaining contract by an impartial third person, is a fairly recent development and is not as widely accepted.[39]

A. Nonbinding Devices

The utility of both mediation and factfinding is considerably circumscribed because they are nonbinding. These mechanisms do not provide the element of coercion often necessary to force a compromise and, therefore, can not be effective if the parties refuse to yield.[40] Furthermore, factfinding may result in a hardening of the positions on each side,[41] thus deterring collective bargaining.[42] For example, when it is known that factfinding will follow mediation, parties often hold back offers for initial presentation to the factfinder.[43] In addition, when mediation and factfinding have been used in teacher-school board negotiations, teachers have often been willing to accept the recommendations, while the more powerful school board has rejected or simply ignored them.[44] School board disregard of the nonbinding recommendations lends support to the teachers' belief that they are in an inferior position in the collective bargaining process.[45] Consequently, neither mediation nor factfinding provides an adequate substitute for the strike.[46] As long as resort to a strike is the teachers' most effective way of resolving impasses, the public's interest in uninterrupted education will not be met.

B. Binding Interest Arbitration

Because nonbinding impasse resolution mechanisms have often proved ineffective,[47] interest arbitration may be the only viable alternative to a strike when agreement can not be reached. Arbitration is the only method that binds both parties to the result. Like a strike, interest arbitration imposes a cost of disagreement and, of necessity, involves concessions by both parties. By enhancing the weaker party's bargaining power in this

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in question. Gould, *Substitutes for the Strike Weapon*, 28 ARB. J. 111, 112-13 (1973). The Supreme Court strongly endorsed voluntary grievance arbitration (arbitration pursuant to a prior agreement to arbitrate defined disputes during a contract term) in the Steelworkers Trilogy. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[39] Fleming, *"Interest" Arbitration Revisited*, 7 U. MICH. J.L. REFORM 1 (1973).

[40] The history of teacher-school board disputes demonstrates that both the teachers and the board are often unyielding. Dupont & Tobin, *Teacher Negotiations into the Seventies*, 12 WM. & MARY L. REV. 711 (1971).

[41] Gould, *supra* note 33, at 838.

[42] Stevens, *The Management of Labor Disputes in the Public Sector*, 51 ORE. L. REV. 191, 200 (1970).

[43] Dupont & Tobin, *supra* note 40, at 729; Stevens, *supra* note 42, at 200.

[44] Dupont & Tobin, *supra* note 40, at 726, 730; Johnson, *supra* note 35, at 377.

[45] Note, *Striking a Balance in Bargaining with Public School Teachers*, 56 IOWA L. REV. 598, 611 (1971).

[46] Dupont & Tobin, *supra* note 40, at 727; Stevens, *supra* note 42, at 200.

[47] *E.g.*, Johnson, *supra* note 35, at 377; McAvoy, *supra* note 34, at 1192.

way, arbitration redresses the perceived imbalance of bargaining power and lessens the felt need to strike.[48]

A frequent and serious objection to compulsory arbitration, whether in the private[49] or public sector, is that it undermines good faith collective bargaining.[50] The thrust of the argument is that parties required to submit their dispute to compulsory interest arbitration will not make a serious attempt to reach agreement during negotiations or through mediation and factfinding. Therefore, neither side will concede in the preliminary stages of negotiation for fear of prejudicing its case in the arbitration proceedings. Anticipating that the arbitrator will split the difference, neither side will want to disclose how far it is really willing to compromise on each issue. Consequently, these critics contend that collective bargaining ending in compulsory arbitration will provoke extreme positions by the parties.

One response of interest arbitration apologists is that, once all other procedures are exhausted, efficient resolution of collective bargaining disputes without strikes justifies some erosion of free collective bargaining. Interest arbitration does not necessarily mean the demise of collective bargaining if arbitration is used sparingly and if the parties are uncertain about the outcome of arbitration.[51] Moreover, experiments with compulsory interest arbitration have demonstrated that the availability of arbitration does not harm the collective bargaining process.[52]

A great deal of the sentiment against legislated mandatory arbitration stems from its compulsory nature, which conflicts with the concept of voluntarism in employer-employee relations.[53] Some believe that compulsory arbitration would destroy self-determination, which is a hallmark of

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[48] Johnson, *supra* note 35. *See also* McAvoy, *supra* note 34; Stevens, *Is Compulsory Arbitration Compatible With Bargaining,* 5 IND. REL. 38, 50 (1966); Note, *supra* note 45, at 611-12.

[49] Many argue against compulsory arbitration in the private sector. *See, e.g.,* Farmer, *Compulsory Arbitration—A Management Lawyer's View,* 51 VA. L. REV. 396 (1965); Feller, *Compulsory Arbitration—A Union Lawyer's View,* 51 VA. L. REV. 410 (1965). *But see* Rubenstein, *The Bugaboo of Compulsory Arbitration,* 23 LAB. L.J. 167 (1972). Seinsheimer, *What's So Terrible About Compulsory Arbitration?* 26 ARB. J. 219 (1971).

[50] Bernstein, *Alternatives to the Strike in Public Labor Relations,* 85 HARV. L. REV. 459, 468 (1971); Garber, *Compulsory Arbitration in the Public Sector: A Proposed Alternative,* 26 ARB. J. 226, 230-31 (1971); Gould, *supra* note 33, at 839; Johnson, *supra* note 35, at 378, quoting M. LIEBERMAN & M. MOSKOW, COLLECTIVE NEGOTIATIONS FOR TEACHERS 319 (1966), quoting A.T.A. MAGAZINE, Oct., 1964, at 116; Zack, *Dispute Settlement in the Public Sector,* 14 N.Y.L.F. 249, 259 (1968). *But see* Howlett, *Contract Negotiation Arbitration in the Public Sector,* 42 U. CIN. L. REV. 47, 57-61 (1973).

[51] Gould, *supra* note 33, at 840.

[52] *See* part III *A infra.* The Minnesota experience since 1947 with compulsory arbitration has been similar. MINN. STAT. ANN. § 179.35-179.39 (1966). Less than 26 percent of contract negotiations in hospitals went to arbitration. Howlett, *supra* note 50, at 60.

[53] Zack, *supra* note 50, at 258.

democracy.[54] Although the concept of voluntarism has persisted throughout the history of collective bargaining, for many years arbitration has been used in resolving grievance disputes.[55] Given the changing circumstances in society and labor relations since the advent of collective bargaining, it might now be appropriate to arbitrate collective bargaining disputes as well.

Opposition to legislated arbitration is sometimes grounded in the assertion that arbitration will detrimentally affect the relationship between the parties.[56] It is claimed that arbitration, unlike collective bargaining, does not have the beneficial side effect of developing mutual respect and rapport. Arbitration, however, need not eliminate bargaining table negotiations. Collective bargaining can continue until a deadlock is reached, if it ever is. When and if arbitration does become necessary, if an arbitrator is competent and gives attention to the employer-employee relationship in formulating his award, neither arbitration nor the resulting award should damage employer-employee relations.

Although agreeing that compulsory arbitration was efficient, one critic summarized the opposition to arbitration by pointing out that efficiency was only one consideration and noting that a dictatorship was the most efficient system. He advised that a conscientious and proper use of fact-finding would accomplish the same result sought by those who propose compulsory arbitration as a panacea.[57]

Particular objections to interest arbitration arise in the public sector because of the peculiar status of the employer. Legislated interest arbitration may involve an unconstitutional delegation of public sovereignty,[58] since elected officials can not delegate their duty to settle questions of resource allocation. These decisions are political and properly reserved for the discretion of public officials.[59] This objection coincides with the

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[54] Interview with Arbitrator A, in Birmingham, Michigan, Jan. 2, 1974. During the month of January, the author interviewed a number of arbitrators in the Detroit area. These gentlemen were extremely gracious and cooperative in answering questions. They asked not to be quoted or identified, however, and for that reason will not be referred to by name in this article.

[55] *See* note 38 and accompanying text *supra*.

[56] Zack, *supra* note 50, at 260-61.

[57] *See* note 54 *supra*.

[58] Bernstein, *supra* note 50, at 467; Garber, *supra* note 50, at 233-34; Gould, *supra* note 33, at 840.

[59] *See, e.g.*, Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962); Washington *ex. rel.* Everett Firefighters Local 350 v. Johnson, 46 Wash. 114, 278 P.2d 662 (1955) (City charter provision for compulsory arbitration of firemen's wage dispute was held an unlawful delegation of power.). *Cf.* Comment, *supra* note 24, which notes:

> [M]ost of the cases in which arbitration has been held an impermissible delegation are distinguishable from those which would arise in the present setting in that in these cases there was no statute authorizing even public employee bargaining itself. Since, under such circumstances bargaining itself could be construed as an impermissible delegation, it followed logically that an agreement to submit disputes to arbitration was likewise invalid.

Id. at 282.

school board's interest in protecting its managerial prerogatives and traditional authority from encroachment not only by teachers but by outsiders, such as arbitrators. When statutory criteria guide the arbitrator, however, the argument of unconstitutionality should be considerably weakened.[60] Moreover,

> endorsement of collective negotiations is a tacit acknowledgement that the right to make unilateral decisions must be relinquished. . . . [B]y granting to public employees the right to negotiate collectively, the legislature has already relinquished a portion of its sovereignty.[61]

When collective bargaining has failed, further legislative delegation of power to an arbitrator is merely the next step. Grievance arbitration in the public sector was also once considered an unlawful delegation of authority.[62] Thus, while compulsory interest arbitration may indeed require some modification of traditional beliefs with respect to representative government, such delegation is now recognized as constitutional.[63]

Some critics suggest[64] that few arbitrators possess the sophistication and expertise in public finance that is needed to deal with problems in public labor disputes, many of which involve government budgets. Arbitrators should have developed a familiarity with public finance, however, through their work in mediation and factfinding in public sector disputes.[65]

Many commentators question[66] whether an outside arbitrator will adequately consider the public interest and welfare. A related concern is that arbitration assignments might become political appointments, and, consequently, political considerations might become the arbitrators' primary concern. The integrity of arbitrators could then be questioned, and the process of arbitration would be "dismembered."[67] This potential problem would be mitigated in jurisdictions with arbitration statutes containing decision-making criteria, including the public interest.[68] Further,

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[60]Fire Fighters Local 412 v. City of Dearborn, 42 Mich. App. 51, 201 N.W.2d 650 (1972); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); City of Warwick v. Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); State *ex. rel.* Fire Fighters Local 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968).

[61] Garber, *supra* note 50, at 233.

[62] *See* Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962); Ringer, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 121, 129-37 (1968).

[63] *See* note 60 and accompanying text *supra*.

[64] *E.g.*, Bernstein, *supra* note 50, at 468.

[65] Interview with Arbitrator B, in Southfield, Michigan, Jan. 2, 1974.

[66] *E.g.*, Garber, *supra* note 50, at 233.

[67] *See* note 54 *supra*.

[68] *See, e.g.*, MICH. COMP. LAWS ANN. § 423.239(c) (Supp. 1973); WIS. STAT. ANN. § 111.77(6)(c) (Supp. 1973). According to the Michigan statute the following factors are to be considered:

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the

there is no evidence that arbitrators have subordinated the public good to other concerns in previous mediation, factfinding, or grievance arbitration situations. Besides, the arbitrator does not have absolute discretion in making the decision. If the arbitrator's decision is arbitrary or if it does not take into account the public interest, the award may be set aside by the courts or by a Public Employment Relations Board, according to the particular review procedure established in the statute.[69]

Another concern[70] is that the arbitrator's award will not necessarily settle the dispute or prevent the work stoppage since the parties will be unsatisfied unless they work out their own solution. Intransigence is possible, yet it seems likely that public pressure will force compliance or else the award will have to be judicially enforced.[71] In light of the availability of binding arbitration as a viable alternative to a strike, courts should not be hesitant in enjoining unlawful strikes and enforcing arbitration awards.[72]

Thirteen states[73] are now experimenting with legislated interest arbi-

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

MICH. COMP. LAWS ANN. § 423.239 (Supp. 1973).

[69] *E.g.*, MICH. COMP. LAWS ANN. § 423.242 (Supp. 1973). Arbitration orders will be reviewed

> only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means.

Because review of awards is so limited, the review procedure will be effective as a check only in instances of great abuse.

[70] Anderson, *Compulsory Arbitration Under State Statutes*, in PROCEEDINGS OF N.Y.U. 22ND ANNUAL CONF. ON LABOR 259, (1970); Zack, *supra* note 50, at 259.

[71] Howlett, *supra* note 50, at 62.

[72] *Id.*

[73] These states are Alaska, Maine, Michigan, Minnesota, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming. ALASKA STAT. § 23.40.200 (1972); ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1973); MICH. COMP. LAWS ANN. § 423.231 (Supp. 1973); MINN. STAT. ANN. § 179.72 (Supp. 1974); NEB. REV. STAT. § 48-810 (1972); NEV. REV. STAT. § 288.200 (1973);

tration in the public sector. The state statutes are somewhat different. In no case has interest arbitration been applied to teacher contract negotiations.

III. LAST FINAL OFFER ARBITRATION BY ISSUE

A. Michigan Policemen's and Firemen's Arbitration Act: An Example

Since 1969, Michigan has had a compulsory arbitration statute[74] covering all of the state's police and firefighters. Under the statute, hereafter referred to as the Police-Firefighters Act, arbitration can be initiated by either the employees or the employer and usually begins after an impasse which more conciliatory measures were unable to resolve.[75] The orders of arbitration panels are reviewable only if the panel was without or exceeded its jurisdiction, the order is unsupported by competent, material, and substantial evidence on the whole record, or the order was procured by fraud, collusion, or other similar and unlawful means.[76]

Statistics from 1969 through August, 1973, indicate the success of the legislation. There were no firefighter strikes and only ten police strikes during that period. Three of the police strikes involved noncollective bargaining issues.[77] In each instance of a strike, neither the police officers nor the city involved understood the procedures to be followed under the new statute.[78] By comparison, from 1965 to 1969 there was a total of twenty-four city employee strikes.[79]

OKLA. STAT. tit. 11, § 548.1 (1973); PA. STAT. ANN. tit. 43 § 1101.101 (1973); R.I. GEN. LAWS ANN. §§ 28-9.1-2, 28-9.2-2 (1969); S.D. COMPILED LAWS ANN. § 9-14A-1 (1973); VT. STAT. ANN. tit. 21, § 1721 (1973); WIS. STAT. ANN. § 111.70(4)(jm) (Supp. 1973); WYO. STAT. ANN. § 27-265 (1967).

[74] Policemen's and Firemen's Arbitration Act, MICH. COMP. LAWS ANN. §§ 423.231-423.246 (Supp. 1973).

[75] A hearing is conducted by the arbitration panel which consists of an employer's delegate, an employee's delegate, and an impartial arbitrator, who serves as chairman. The arbitrator-chairman is chosen by the employer and employee delegates unless they cannot agree, in which case the mediation board appoints the arbitrator. During the course of the hearing, the chairman can remand the dispute to the parties for further collective bargaining for a period not to exceed three weeks. A majority decision of the arbitration panel is final and binding upon the parties and may be enforced by either party or by the arbitration panel in the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside. MICH. COMP. LAWS ANN. §§ 423.234-423.242 (Supp. 1973).

[76] MICH. COMP. LAWS ANN. § 423.242 (Supp. 1973).

[77] These statistics were obtained in a telephone interview with Robert Howlett, Chairman, Michigan Employment Relations Commission, in Grand Rapids, Michigan, Oct. 23, 1973.

[78] Howlett Address, *supra* note 2.

[79] [1968-1969] MICH. DEP'T OF LABOR ANN. REP., Table 12, at 75. The Department of Labor's classification "city employees" include police, firemen, Department of Public Works, and municipal employees. Statistics on teacher strikes from 1965-1966 to 1968-1969 show that there was a total of seventy-nine strikes: nine in 1965-1966; four in 1966-1967; forty-three in 1967-1968; and twenty-three in 1968-1969. During 1969-1970 alone there were fifty-two strikes by school professionals. [1969-1970] MICH. DEP'T OF LABOR ANN. REP., Table 18, at 86. For the period of 1970-1973

Between 1969 and 1973, 233 cases were submitted under the Police-Firefighters Act.[80] Ninety-seven awards were issued, thirty-five of which were unanimous decisions. Sixty-two cases are still officially pending, but the Michigan Employment Relations Commission (MERC) believes that several of these cases have been settled. Equally significant, well over three hundred cases were settled without going to arbitration. Thus, experience under the Police-Firefighters Act decisively refutes the contention that the presence of compulsory arbitration results in deterioration of collective bargaining.[81] Firemen and policemen remain enthusiastic about the law.[82] The Michigan statute was amended in 1972, effective January 1, 1973, to provide for last final offer arbitration as to all economic issues.[83]

B. Characteristics of Last Final Offer Arbitration

Last final offer arbitration by issue is a refinement of the "either-or" arbitration procedure, sometimes referred to as the "selector method."[84] Under the selector method, when negotiations reach impasse, each party submits its last final offer and a neutral third party selects *in toto* the offer which seems more reasonable. The underlying theory is that

> [the] [e]mployer and union, [each] realizing that the arbitrator's power is limited to accepting the entire proposed contract of one or the other party will bargain in good faith and in great earnestness to reach an agreement. If this process fails to produce agreement, it will, nevertheless, narrow very substantially the area of disagreement as each party strains for a favorable decision from the arbitrators by attempting to make its position the more reasonable of the two.[85]

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there were fifty strikes by school professionals: twenty-five in 1970-1971; nine in 1971-1972; and sixteen in 1972-1973. [1972-1973] MICH. DEP'T OF LABOR ANN. REP., Table 8, at 166. In 1973 there were forty strikes. Howlett Address, *supra* note 2.

[80] *See* note 77 *supra*.

[81] For instance, statistics from the Mediation Division show that during 1972-1973, the basis for closing the forty-nine cases under the Police-Firefighters Arbitration Act was legislatively required arbitration. There were 202 cases reported for police and firemen in 1972-1973. "Thus, a minimum of 75% of police-firefighter cases were resolved by agreement of the parties without going to arbitration." [1972-1973] MICH. DEP'T OF LABOR ANN. REP. at 139, Table 6, at 165.

[82] Howlett Address, *supra* note 2.

[83] MICH. COMP. LAWS ANN. § 423.238 (Supp. 1973). Each party is to submit its last final offer on the issues identified by the arbitration panel as economic. The panel is then to adopt the last offer of settlement that more nearly complies with the criteria listed in the Act. *See* note 106 *infra*. Noneconomic issues are to be decided by the traditional methods of arbitration. The panel is required to make written findings of fact and to promulgate a written opinion or order upon the issues presented. Except for the addition of these provisions, the compulsory arbitration statute of 1969 remains intact.

[84] *See generally* Stevens, *supra* note 42; Stevens, *supra* note 48.

[85] H. WELLINGTON & R. WINTER, THE UNIONS AND THE CITIES, 180 (1971), as quoted in Howlett, *supra* note 50, at 72.

Nonetheless, the effectiveness of "either-or" arbitration is hampered by its lack of flexibility, for the arbitrator must select one or the other of the proposals in its entirety even though the package chosen might contain a particularly unreasonable element.[86] Last final offer arbitration *by issue* furnishes the missing flexibility by allowing the arbitrator to choose between the final offers of the parties on an issue by issue basis. The arbitrator does not, however, have the power to compromise any differences between the two proposals or to determine an award in any way independent of the parties' own offers.

The basic premise of last final offer arbitration is that it would seldom have to be used. Since the arbitrator could not compromise the difference between the parties in order to arrive at a reasonable solution, each party would be forced to develop a realistic position, at least on important issues, or risk the possibility that the arbitrator might choose the other party's offer. In the process of trying to present the more reasonable offer, the parties' negotiating positions would move closer and closer together. With the area of disagreement already substantially narrowed, it is hoped that they would decide that voluntary agreement would be preferable to the uncertainty involved in submitting the issues to arbitration. Thus, the primary goal of assuring that the parties reach agreement through negotiations would be enhanced.[87] The uncertainties of last final offer by issue and the fact that the arbitrator has ultimate authority can motivate the parties to reach agreement. Thus, because the outcome of last final offer arbitration is outside the parties' control, it provides a real incentive to bargain.[88]

C. Criticisms of Last Final Offer Arbitration

In spite of the theoretical merits of the last final offer procedure, considerable opposition to it exists.[89] The objections[90] to more traditional forms of compulsory arbitration are also raised against last final offer arbitration, but the argument that compulsory arbitration will undermine collective bargaining and lead to extreme positions[91] is weakened by last

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[86] Bernstein, *supra* note 50, at 468-69.

[87] The emphasis on the parties reaching agreement through negotiation reflects the democratic values of self-determination and voluntarism which have been advanced in employer-employee relations. Support for a voluntary rather than an arbitrated agreement also stems from a feeling that the parties will not be truly satisfied unless they work out a solution for themselves. *See* notes 49-55 and accompanying text *supra*.

[88] Interview with Arbitrator D, in Detroit, Michigan, discussing a recent experience under the Act, Jan. 4, 1974. This arbitrator felt that his clarification, at the prehearing conference, of what last final offer entailed had been a sobering experience for the parties. After he had explained the process to be followed, the parties settled without arbitration.

[89] *See generally* Long, *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, 116-22 (1973).

[90] *See notes* 49-72 and accompanying text *supra*.

[91] *See* note 50 *supra*.

final offer's tendency to drive the parties together. In fact, the 1972 amendments to the Michigan Police-Firefighters Arbitration Act, which provided for last final offer arbitration by issue, "were specifically designed to strengthen the collective bargaining process in the resolution of impasses."[92]

Although the arbitrator does, in a sense, impose a settlement on the parties when he combines portions of each side's proposals to make up a whole contract, it is less of an imposition than under traditional arbitration because the arbitrator's award is composed solely of the last offers of the parties. Accordingly, last final offer arbitration involves less delegation of authority and less of an infringement on the concept of voluntarism in employer-employee relations than is commonly attributed to conventional arbitration.[93] Since the arbitrator selects between the parties' alternatives, the parties will be forced to take part in negotiations. If the collective bargaining process actually furthers the employer-employee relationship,[94] the last final offer method will promote the relationship between the parties, encouraging them to reconcile their conflicting interests.

There are, however, some criticisms specific to this type of arbitration. The first is that this procedure will not drive the parties closer together, but will result, at best, in gamesmanship or, at worst, in collusive agreement.[95] A related criticism is the possibility that practice with last final offer will only sharpen the parties' skill in determining what the arbitrator will deem acceptable and, therefore, they may not negotiate or yield beyond that point.[96] The consequences of losing the gamble minimize the likelihood of parties engaging in brinkmanship or submitting outrageous proposals. In addition, an arbitrator can be given the power to send both parties back to the bargaining table and to ask for revised final offers if he suspects that they are not being entirely forthright.[97] Last final offer could, however, introduce a greater sense of responsibility into the bargaining process because the arbitrator, under the law, must take one of the offers.[98]

Critics also claim that the arbitrator's selection between the final offers

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[92] [1972-1973] MICH. DEP'T OF LABOR ANN. REP., at 159.

[93] *See* notes 53, 58 *supra*.

[94] *See* note 56 *supra*.

[95] Since in this situation the risks run by a party engaging in gamesmanship are so great, a party wishing to gamble by offering only objectionable terms of settlement would have to convince the other party to do likewise.

> [T]hey would need to make, in effect, a collusive agreement . . . . And since no dispute-settling procedure which yielded such (objectionable and arbitrary) results would be acceptable, the gamble would have to be construed as a collusive attack on the procedure itself, rather than as an attempt to get a favorable result from the use of that procedure.

Stevens, *supra* note 42, at 197-98. Moreover, since the parties were not able to agree on the terms of a contract, it is unlikely that they will be able to reach the level of accord necessary to design and execute a collusive agreement.

[96] *See* note 54 *supra*.

[97] *See, e.g.*, MICH. COMP. LAWS ANN. § 423.237a (Supp. 1973).

[98] Interview with Arbitrator E, in Ann Arbor, Michigan, Jan. 23, 1974.

for each issue is impractical on two counts.[99] First, they are concerned about the difficulty that the parties will have in stipulating which issues are economic and which are noneconomic and in separating out the issues in each category. Indeed, almost every issue can in some sense be reduced to economic considerations. One arbitrator who is experienced in last final offer arbitration stated that the economic and noneconomic issues were not hard to separate.[100] Only experience with last final offer will show whether there are so many "hybrid" issues that segregating economic from noneconomic issues will be impossible.

Secondly, in the event that a selection must be made, critics wonder how arbitrators will be able to decide which offer is more reasonable. Probably arbitrators will continue to look to the same factors that have guided them in traditional arbitration proceedings.[101] This problem will also be alleviated if the statute sets forth criteria for determining reasonableness, as the Michigan statute does.[102] Under the Michigan scheme, a catchall provision provides that arbitrators are not confined to the enumerated factors, but may refer to any other standards normally taken into consideration.[103]

A serious problem does exist with regard to the last final offer selection mechanism. Arbitrators do not like being constrained by the parties' last final offers; they would rather have the complete discretion that they had in the traditional form of compulsory arbitration.[104] One arbitrator stated that he was generally uncomfortable with his role in selection under last final offer because he could no longer study both sides and decide what he thought was a fair or reasonable offer in terms of the equities and exigencies of the situation, but could only decide which offer was more reasonable in comparison to the others.[105]

The fairness of a last final offer award is also questioned. There is some sentiment[106] that the offer selected may be overly advantageous to the winning party and too harsh on the loser. If last final offer operates according to its theory, a selection between offers will never have to be made. When, however, the arbitrator must make a selection, the mechanism guards against such an untenable outcome.[107] If mediation or fact-finding must be invoked as a matter of course before the last final offers are submitted, the danger of an unfair award will be even further reduced. The disgruntled party also could have taken precautions against

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[99] Long, *supra* note 89, at 117-19.

[100] *See* note 88 *supra.*

[101] *See* notes 65, 88 *supra.*

[102] MICH. COMP. LAWS ANN. § 423.239 (Supp. 1973). *See also* note 68 *supra.*

[103] MICH. COMP. LAWS ANN. § 423.239(h) (Supp. 1973).

[104] *See* notes 65, 88, 101 *supra.*

[105] *See* note 65 *supra.*

[106] Long, *supra* note 89, at 120-22.

[107] The arbitrator under last final offer may select only the reasonable elements of each party's offer in putting together his award. Under some systems he may even reject both sides' final offers and send the parties back to the bargaining table.

being subjected to harsh contract provisions by continuing to negotiate or by presenting the more reasonable offer.[108]

Perhaps the most serious criticism of the last final offer process is that there are certain types of issues, such as working rules, technological change, and other policy considerations, that simply do not lend themselves to this procedure and need the flexibility that traditional arbitration provides. Under this view, traditional arbitration is superior because the arbitrator has power to review these noneconomic considerations and to arrive at a fair accommodation of the interests involved. As one arbitrator stated, some issues of principle are compromisable but not divisible.[109]

D. Experience with Last Final Offer Arbitration

Last final offer arbitration is the most recent innovation in impasse resolution mechanisms. A few states besides Michigan have noted the promise of last final offer and have implemented it. Wisconsin is now experimenting with last final offer arbitration.[110] Massachusetts legislated last final offer for police and firemen at the end of 1973.[111] Since 1947, Minnesota has had an arbitration law that contains a modified version of last final offer.[112]

The Michigan experience with last final offer arbitration has been limited to date. Because the fiscal year-end for most cities is June 30, no cases were submitted under last final offer until June, 1973, in spite of the fact that the authorizing amendment took effect on January 1, 1973.[113] As of October 26, 1973, forty-nine cases have been submitted.

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[108] Long, *supra* note 89, at 122.

[109] Interview with Arbitrator F, in Ann Arbor, Michigan, Jan. 24, 1974.

[110] In Wisconsin, last final offer arbitration (by package) is limited to municipal law enforcement and firefighter personnel. WIS. STAT. ANN. § 111.77 (1972). The procedure became effective April 21, 1972. Between April 21 and June 30, 1972, nine such cases were initiated. Eight cases remained pending as of June 30, 1972. One case was closed prior to the appointment of the arbitrator. During the fiscal year July 1, 1972, through June 30, 1973, forty-one cases were received, thirty cases were closed, and nineteen cases remained pending. Awards were issued in only ten cases. The offer of the employer was selected in five cases, while the offer of the labor organization was selected in the other five. The remaining closed cases were closed either through mediation during the investigation of the petition for arbitration or were resolved prior to the investigation. However, in three cases the issues were resolved after the appointment of the arbitrator but prior to the arbitration hearing. In one case, the Commission dismissed the petition since the conditions precedent to arbitration had not been met. Letter from Morris Slavney, Chairman, Wisconsin Employment Relations Commission to Diane Kaye, Jan. 8, 1974, on file with the *University of Michigan Journal of Law Reform.*

[111] BNA GOV'T EMP. REL. REP. No. 533, at B-6 (Dec. 10, 1973).

[112] Under the Minnesota law, MINN. STAT. ANN. § 179.92 (Supp. 1974), public employees and labor organizations are required to submit their final position on each issue to the Public Employment Relations Board, but the arbitration panel is not required to select either of the last positions. However, with respect to "essential employees," the parties may agree that the panel shall select one of the parties' last offer. Since the statute went into effect Minnesota has never had a strike in its hospitals. Moreover, of the approximately 1,315 contract negotiations in hospitals, only 251 (less than 26 percent) went to arbitration.

[113] Howlett Address, *supra* note 2.

One decision has been handed down, but it involved only noneconomic issues. Thirteen cases were settled prior to submission to an arbitrator, while three cases were settled after an arbitrator had been appointed. Twenty-five cases are still open in the hands of the arbitrator. Seven cases are open, but have probably been settled without appointment of an arbitrator and without notice to MERC of settlement. That so many of the cases were settled short of actual arbitration is an encouraging sign.[114]

IV. CONCLUSION

The ultimate question is whether last final offer arbitration can be effective in teacher-school board negotiations. If teachers and school boards cannot resolve their differences through the preferred method of collective bargaining, last final offer may well be the best alternative. In the words of one arbitrator, last final offer gives the parties more say in their own destiny.[115] Moreover, in the hands of a competent arbitrator, last final offer arbitration is not a rigid mechanism, but can be adapted to deal with the idiosyncrasies of each case. For instance, the arbitrator has the flexibility to invoke mediation or to encourage further negotiations while the parties are formulating their offers. Thus, he can incorporate some of the benefits of the progressive impasse resolution procedure[116] or the blue ribbon commission,[117] and yet retain a certainty of resolution within a specified period of time.

Last final offer also seems well suited to some of the particular characteristics of teacher contract negotiations.[118] These characteristics include the teachers' individuality, their inexperience in collective bargaining,

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[114] Statistics compiled under the Police-Firefighters Arbitration Act between October 1, 1969, and September 30, 1972, disclosed the following:

Cases submitted to arbitrator	161
Awards	78
Settled prior to award	43
Pending	35
Unanimous decisions	27

Howlett, *supra* note 50, at 58.

[115] *See* note 101 *supra*.

[116] Under a progressive impasse resolution system, the parties would be permitted a limited right to strike provided that they had first utilized mediation and factfinding in good faith and had still been unable to reach agreement. The strike would be declared unlawful and compulsory arbitration required only upon a determination that the public welfare was imperiled by the strike.

[117] A blue ribbon commission could be composed of labor, management, and public members appointed on a non-partisan basis by the governor with the advice and consent of a person in a key position in labor relations. Should the commission conclude that a strike endangers the public well-being, it could exercise any of its alternative powers. The choice of procedures would include mediation, factfinding, compulsory arbitration, and the ability to obtain an injunction or a mandamus order to bargain in good faith. The theory is that fear of having the power of the commission invoked would drive the parties to the bargaining table.

[118] *See* text accompanying notes 86-92 *supra*.

their militancy and adamance,[119] and the many policy considerations, such as class size, which retard the progress of negotiations each year. Teachers in Detroit in 1973 were not enthusiastic about the prospect of compulsory arbitration. By comparison, the enhanced control over the terms of the settlement should make last final offer arbitration more acceptable to teachers.

Whether the last final offer statute governing policemen and firemen could be extended to cover teachers, or whether a new act should be designed specifically for teachers can also be debated. While the teachers' negotiations are not identical to those of policemen and firemen, sufficient parallels exist so that insight can be gained from the experience with police and firefighters. The statutory criteria that constrain the arbitrator's discretion would probably be basically the same, particularly if noneconomic issues continue to be decided by traditional arbitration and not by last final offer.[120] One desirable change might be a requirement that settlement be reached by the date on which schools are scheduled to open.

Upon reflection it seems that the situation last fall may have foreshadowed an annual fall event. The desirability of having resolution of contract disputes between teachers and school boards without a protracted strike was demonstrated, as was the need for a new impasse resolution mechanism. The experience with policemen and firemen in Michigan has shown that legislated arbitration is an effective approach, and the last final offer variation thus far appears to be a potential improvement of such arbitration. Last final offer arbitration seems to have a chance for success in resolving teacher contract disputes. Given what is at stake, it is at least worth the experiment.

—*Diane L. Kaye*

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[119] *See* note 79 *supra*. The annual report of the Michigan Department of Labor points out that while in 1972-73 most categories did not show significant changes and other public employees' strike activity decreased during that period, there was an increase in the number of strikes by public school professionals and public school nonprofessionals. [1972-1973] MICH. DEP'T OF LABOR ANN. REP. 141. *See generally* Hazard, *Collective Bargaining in Education: The Anatomy of a Problem*, 18 LAB. L.J. 412 (1967); Leddy, *Negotiating with School Teachers: Anatomy of a Muddle*, 33 OHIO ST. L.J. 811 (1972).

[120] *See* text accompanying note 109 *supra*.