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ON THE EVOLUTION OF FACTFINDING IN PUBLIC EMPLOYEE NEGOTIATIONS

William R. Word

When several states passed legislation¹ in the 1960's granting their public employees the right to bargain collectively with their employers (e. g., boards of education and city governments), most of these same states did not legalize the right to strike for the purpose of resolving negotiation impasses. Instead, many of these states authorized factfinding (or advisory arbitration) as an alternative to the strike. For those states that have as yet not legislated in the area of public sector bargaining (or only in a limited fashion), a careful evaluation should be made of this and other studies² so that these state legislatures do not fall into the trap of merely adopting another state's legislative framework without first giving careful consideration to its effectiveness.

In many states, factfinding is usually implemented when union and management negotiators are unable to terminate their negotiations with a bilateral agreement. In this case, a neutral (or neutrals when three persons are required) is designated to conduct a hearing and, based upon the facts giving rise to the impasse, to make recommendations to the negotiating parties for the resolution of their differences. The recommendations, however, are not binding on the negotiating parties; thus, factfinding is essentially only an advisory arbitration procedure.

To what level of effectiveness has public sector factfinding evolved? One possible test of an impasse procedure is its ability to (1) encourage the negotiating parties to make substantial efforts at resolving their differences, and (2) if negotiations reach an impasse, to produce a settlement. Initial speculation³ about the use of factfinding for resolving public sector interest disputes and the early studies⁴ which analyzed actual impasse situations do not seem to have produced a definitive assessment. Instead, this mixed reaction to factfinding's effectiveness in complementing public sector negotiations has generated several alternative impasse proposals. A listing of these proposals would include compulsory arbitration, mediation-arbitration, the statutory strike and final offer selection, as well as others which would combine one or more of these tools with factfinding.

Given all these proposals, one might be tempted to conclude that factfinding has failed. But has it? Robert D. Helsby recently

stated that ". . . in the past six years a workable labor relations system for the public sector has gradually evolved in New York State."⁵ According to Helsby, the critics of factfinding might be premature in their evaluation of this procedure's effectiveness in the public sector. But he goes on to say that "as experience builds in the public sector, what we really need is less ideology and more research. We need to take a hard look at what is going on in various 'experiments' which have been underway in various states for some time."⁶

Method

The analysis presented below is based on a comparison of two separate studies of the factfinding experiences in New York and Wisconsin. The first study considered both states' 1960 factfinding experiences, while the second study considered the two states' 1970 experiences with factfinding. The 1960's study⁷ analyzed the 74 factfinding cases for the first six months of 1969 in New York State and the 42 cases between July, 1966 and June, 1969 for Wisconsin. For the 1970's study⁸, the 53 cases in Wisconsin for 1971-72 were chosen while 57 cases were selected by a stratified sample in New York for 1972 and the last two months of 1971. Information for both studies was obtained from replies of union and management representatives to questionnaires administered in 1969 for the 1960's study and in 1973 for the 1970's study. The questionnaires in both instances were very similar and included a large number of identical questions for the explicit purpose of comparison. For both studies, completed questionnaires were received for over 80 percent of the cases.

Character of Negotiations

A comparison of the two studies indicated no significant change in the amount of bargaining progress achieved by the negotiating parties before the factfinding procedure was implemented. Over 70 percent of the parties in both studies thought that they had made less than substantial progress in negotiations prior to factfinding. The basic approach of the negotiating parties (especially management) appeared to offer some evidence as to why more bargaining progress was not achieved. For both studies, a majority of the union negotiators indicated that their management counterparts had bargained in bad faith. Whether management negotiators are actually bargaining in bad faith in the majority of cases or whether the unions just think so, the effect on negotiation progress would appear to be negative.

The questionnaire for the 1970's study included two additional questions which were not asked in the 1960's study. One question asked the parties whether their negotiating position was af-

ected by the possibility of using the factfinding procedure. The intent of this question was to see if the parties might have had a tendency to incorporate the possible utilization of factfinding into their bargaining strategy. Such a possibility appeared to exist since more than 50 percent of the parties in both states indicated that factfinding has some influence on their negotiating position, and more than 30 percent of the New York respondents indicated that the effect was moderate to substantial.

The other question (which was not included in the earlier questionnaire) asked the parties whether they withheld any negotiating proposals or offers in anticipation of factfinding. While 75 percent of the negotiating parties indicated that they had not withheld offers, a comment by a union negotiator seemed to diminish the importance of the responses to this question. In commenting on his negative answer, he indicated that counteroffers are sometimes withheld. In addition to this comment, over 60 percent of a sample of New York State factfinders in another study indicated that the negotiating parties withheld bargaining proposals or offers in anticipation of factfinding.⁹ An absence of offers or counteroffers in a large number of cases would be consistent with the above finding that the negotiating parties make formal proposals and perhaps a few concessions, but do not usually achieve substantial negotiating progress before the implementation of the factfinding procedure.

Factfinder's Recommendations

For the 1970's study, one or both of the negotiating parties rejected the factfinder's recommendations in 67 percent of the cases, as compared to 39 percent for the 1960's study. This sizable increase in the rejection rate can largely be attributed to the negotiating parties in New York. Such a high rejection rate along with the previously cited absence of substantial negotiation progress in the majority of cases would tend to reinforce the position taken by those experts in the public sector that believe a greater familiarity with factfinding does not necessarily enhance the procedure's effectiveness or promote bilateral negotiations.

Dispute Resolution

Even though the rejection rate for the factfinder's recommendations increased, mutual agreements were still eventually concluded in the great majority of cases. According to the negotiating parties in both states, mutual agreements were reached for both studies in over 80 percent of the cases in which one or both of the parties had previously rejected the factfinder's recommendations. For those cases in the 1970's study where a

mutual agreement was not reached, two were resolved by a legislative body, six by the public employer, and one union disbanded.

Comparing such a low initial acceptance rate for the factfinder's recommendations with a rather high percentage of mutual agreements suggested that an increasing amount of hard bargaining occurred after the factfinder issued his report, and that even greater stress was placed on this post-recommendation phase of the impasse procedure. For both studies the influence of the factfinder and his recommendations during the post-recommendation phase of the impasse procedure appeared to be considerable. The negotiating parties expressed moderate to substantial confidence in their factfinder in 75 percent of all cases studied, and the parties eventually reached mutual agreements that in two-thirds of the rejection cases were moderate to substantial approximations of the factfinder's recommendations. Thus, it seems that even though his recommendations might be initially rejected, a competent factfinder can have a significant impact on subsequent negotiations, either through his report being a guide for an agreement and/or through his post-recommendation efforts. In fact, several union and management representatives went so far as to say that the factfinding procedure is only as good as the factfinder.

Post-recommendation bargaining also appeared to be encouraged to some extent by a degree of strike activity. Strike activity was defined as actual strikes and explicit strike threats that were acknowledged by management. There was little change, however, in the incidence of strike activity for the two studies; strike activity occurred in about one of four rejection cases.

Analysis

Although a large percentage of the impasse cases which utilized factfinding resulted in mutual agreements, the circumstances under which the agreements were reached appear to be somewhat different than was originally anticipated when this dispute procedure was adopted in the public sector. More experience with public sector bargaining does not seem to have enhanced the amount of negotiation progress between the parties before the implementation of the factfinding procedure, and the factfinder's recommendations have been increasingly subject to rejection. These observations seem to seriously question whether factfinding has been able to encompass a sufficient degree of finality to adequately substitute for the strike. And of those who expressed an opinion in the 1970's study, eighty-six (86) percent of the union representatives and forty-eight (48) percent of their

management counterparts indicated that factfinding in public employment was **not** an adequate substitute for the legal right to strike.

Conclusion

Instead of adding yet another recommendation to the already growing list of intricate impasse procedures that have recently been proposed in the literature, it seems more appropriate to conclude this study by reporting the preferences of the negotiating parties for settling **their** interest disputes. For this purpose the parties were asked: "Given your choice, how would you prefer to settle negotiation impasses in the public sector?" It is interesting to note that no single procedure received overwhelming support from either union or management negotiators. Union respondents mentioned binding arbitration more frequently, while management representatives indicated a preference for factfinding. But for all parties in both states, factfinding's preference rating was only 22 percent. This failure of any particular impasse procedure to receive anywhere close to majority support from the negotiating parties emphasizes once again the necessity of careful study and evaluation of alternatives before legislating in the area of public sector bargaining.

REFERENCES

¹For a particular state's legislative framework, see Reference File, **Government Employee Relations Report**, Bureau of National Affairs.

²A sample of these studies is listed in the references below.

³Jean T. McKelvey, "Fact-Finding in Public Employment Disputes: Promise or Illusion?" **Industrial and Labor Relations Review**, Vol. XXII, No. 4 (July, 1969), pp. 528-543; George W. Taylor, "Public Employment: Strike or Procedures," **Industrial and Labor Relations Review**, Vol. XX, No. 4 (July, 1967), pp. 617-636.

⁴James L. Stern, "The Wisconsin Public Employee Fact-Finding Procedure," **Industrial and Labor Relations Review**, Vol. XX, No. 1 (October, 1966), pp. 3-29; Byron Yaffe and Howard Goldblatt, **Factfinding in Public Employment Disputes: More Promise Than Illusion** (Ithaca, New York: Cornell University, New York State School of Industrial and Labor Relations, 1971); William R. Word, "Factfinding in Public Employee Negotiations," **Monthly Labor Review**, Vol. 95, No. 2 (February, 1972), pp. 60-64.

⁵Robert D. Helsby, "A Political System for a Political World—In Public Sector Labor Relations," **Labor Law Journal**, Vol. 24, No. 8 (August, 1973), pp. 509-10.

⁶*Ibid.*, p. 511.

⁷Word, *op. cit.*

⁸Research for the 1970's study was funded by the Faculty Research Committee at Georgia Southern College.

⁹William R. Word and Russell W. Chaby, "Factfinders' Views on Public Sector Factfinding," **Akron Business and Economic Review**, Vol. 5, No. 4 (Winter, 1974), p. 52.

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