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Impasse Resolutions in the Public Sector--Observation on the First Decade of Law and Practice Under Florida PERA

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IMPASSE RESOLUTION IN THE PUBLIC SECTOR— OBSERVATIONS ON THE FIRST DECADE OF LAW AND PRACTICE UNDER THE FLORIDA PERA

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I. THE NEED FOR ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

A. *Introduction*

Labor-management dispute resolution in the public sector provides a fertile testing ground for alternative dispute resolution procedures. The settlement of labor disputes in the private sector largely has been achieved by self-help with only limited governmental or third-party intervention. In contrast, experimentation with mediation, fact-finding, arbitration and other third-party alternatives has dominated the concern over public sector bargaining laws.

This article will evaluate legal doctrinal developments in impasse resolution during the first decade of experience under the Florida Public Employees Relations Act (PERA);[1] provide a normative assessment of dispute resolution procedures under the PERA; and examine special master proceedings as a "process," as compared to litigation and labor arbitration forums. Finally, building upon the first three aspects of this study, the article will propose methods of improving the current procedures.

Judicial intervention seldom provides a satisfactory resolution in labor disputes.[2] In "rights" disputes, when management and labor disagree over the interpretation of collective bargaining agreement terms, the preferred method of dispute resolution is grievance arbitration — the "industrial system of self government" so richly lauded by Mr. Justice Douglas in the *Steelworkers Trilogy*.[3] Arbitration used as an alternative to litigation or strikes is almost uniformly accepted in contemporary private sector labor relations, and increasingly accepted in the public sector. Instead of leaving grievance arbitration to the vicissitudes of collective bargaining under the new Public Employees Relations Act, passed in 1974,[4] the Florida legislature required that all public sector

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1. 1974 Fla. Laws 100 (codified as amended at FLA. STAT. § 447.201-.609 (1985)).

2. In United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), Justice Douglas commented upon the inadequacy of judicial dispute resolution as compared to arbitration of labor contract grievances, stating:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance because he cannot be similarly informed.

Id. at 582.

3. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960).

4. FLA. STAT. § 447.201-.609 (1985).

collective bargaining agreements contain a grievance procedure terminating in binding arbitration.[5]

In contrast, no single third-party procedure has received such widespread acceptance in the resolution of "interest" disputes. Such interest disputes involve collective bargaining disagreements taken to impasse when the parties are unable to negotiate settlement of prospective terms for a new or modified collective bargaining agreement. In private industry, interest disputes may be resolved by economic warfare, with the combatants in this labor-management struggle employing the self-help weapons of primary strikes, pickets, boycotts, lockouts and unilateral action by management. While the National Labor Relations Board (NLRB) and the courts regulate the use of these weapons, the tactics remain legally acceptable responses in private sector labor disputes. Frequently, the mere availability of such economic weapons, which may be used after an impasse is reached in bargaining, provides sufficient motivation to produce settlements without actual deployment of the weapons.

When strikes and related economic weapons are used, however, societal costs can be quite high. Under the traditional view, both courts and legislative bodies have considered the costs too high when applied to public sector employment. Under the common law, strikes by public sector employees were almost uniformly condemned.[6] Some state courts have perpetuated the view that, absent specific legislative authorization, state and local government agencies lack legal authority to negotiate collective bargaining agreements with employee organizations.[7] In a similar vein, the Florida Attorney General stated in 1944 that:

> [N]o organization, regardless of who it is affiliated with, union or non-union, can tell a political sub-division possessing the attributes of sovereignty, who it can employ, how much it shall pay them, or any other matter or thing relating to its employees. To even countenance such a proposition would be to surrender a portion of the sovereignty that is possessed by every municipal corporation and such a municipality would cease to exist as an organization controlled by its citizens, for after all, government is no more than the individuals that go to make up the same and no one can tell the people how to say, through their duly constituted and elected officials, how the government should be run under such authority and powers as the people themselves give to a public corporation such as a city.[8]

Because public employees are exempt from provisions of the National Labor Relations Act (NLRA),[9] their bargaining rights, if any, must spring from state

5. *Id.* § 447.401.

6. A lengthy recitation of state court opinions supporting the public sector strike prohibition may be found in Anderson Fed'n of Teachers, Local 519 v. School City of Anderson, 252 Ind 558, 251 N.E.2d 15 (1969), *cert. denied*, 399 U.S. 928 (1970).

7. *See, e.g.*, Mugford v. Mayor & City Council, 185 Md. 266, 270, 44 A.2d 745, 747 (1946).

8. [1943-1944] FLA. ATT'Y GEN. BIENNIAL REP. 391, 391, *reprinted in* C. RYHNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 252-53 (1946).

9. National Labor Relations Act § 2, 29 U.S.C. § 152 (1982).

law. The doctrine of sovereignty, which provided the major obstacle to public employee collective bargaining, gradually has been eroded by state courts even in the absence of legislative authorization of collective bargaining.[10] In 1957, the Florida Supreme Court commented on the sovereignty doctrine in the context of municipal tort liability, comparing a city to a large business institution: "To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism."[11]

State legislatures during the last two decades increasingly have recognized the societal benefits of freedom of association and collective bargaining for public employees. Since the adoption of the first public sector bargaining act in Wisconsin in 1959,[12] forty-five states and the District of Columbia have enacted laws providing at least a modicum of collective bargaining rights for certain public employees.[13] This trend has been accompanied by continuing debate over how meaningful collective bargaining may be ensured while the common law prohibition against public employee strikes is retained. Although some states simply have decided to resolve the issue by abandoning the common law prohibition and permitting such strikes,[14] the preferred approach has been to seek alternative third-party procedures of impasse resolution as substitutes for the strike. Although state legislatures generally have shown reluctance to surrender the ultimate unilateral decision-making powers of governmental empoyers, compulsory binding arbitration for certain issues or employee groups has been adopted by a substantial number of states.[15] The more popular forms are advisory arbitration, fact-finding, mediation or some combination or variation of those alternatives.

B. *Survey of State Law Trends*

1. Mediation

Most states, including Florida, provide for mediation as the initial step toward resolving an impasse in public employee bargaining.[16] Mediation is usu-

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10. *See, e.g.*, Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 276, 83 A.2d 482, 485 (1951).

11. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957).

12. 1959 Wis. Laws ch. 509.

13. The full texts of the statutes are reproduced in [1985] GOV'T EMPL. REL. REP. (BNA) pt. 51.

14. *See, e.g.*, ALASKA STAT. § 23.40.200 (1981); HAWAII REV. STAT. § 89-12 (1976); MINN. STAT. ANN. § 179A.18 (West Supp. 1985); MONT. CODE ANN. § 39-31-201 (1983); OR. REV. STAT. § 243.726 (1983); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon 1979); VT. STAT. ANN. tit. 21, § 1730 (1978); WIS. STAT. ANN. § 111.77 (West 1974).

15. For a survey of legislation establishing compulsory and/or voluntary binding arbitration, 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).

16. *E.g.*, ALASKA STAT. § 23.40.190 (1984); CAL. GOV'T CODE § 3505.2 (West 1980); CONN. GEN. STAT. ANN. § 7-472 (West 1972); DEL. CODE ANN. tit. 19, § 1310 (1979); FLA. STAT. § 447.403 (1981); HAWAII REV. STAT. § 89-11(1) (1976); IDAHO CODE § 33-1274 (1981); ILL. ANN.

ally initiated upon the request of either party. California requires both parties to request the service.[17] Michigan has a unique clause that allows a majority of the affected group's employees to petition the state employment relations commission for mediation.[18] This option is available only when a representative has not been designated.[19]

Generally, one mediator is chosen, either by agreement of both parties or by the state board responsible for enforcing the statute. Maine[20] and Idaho[21] provide for one or more mediators. Mediators are chosen from a variety of sources. For example, Alaska,[22] Kansas[23] and Tennessee[24] call for use of the Federal Mediation and Conciliation Service (FMCS). Indiana[25] and Illinois[26] have a full time staff of professional mediators. Connecticut,[27] Indiana,[28] Maine,[29] and New Jersey[30] create a privilege for any information disclosed to a mediator by either party. At the other extreme, Minnesota law requires mediation sessions to be open to the public.[31]

Only nine statutes specifically assign the cost of the mediation process to the parties.[32] Tennessee places the financial burden upon the party requesting mediation.[33] The remaining statutes are equally divided in assessing the cost; four require the parties to share costs[34] equally, while four place the burden on the appropriate state agency.[35]

STAT. ch. 48, § 1612 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 20-7.5-1-13 (Burns 1975); IOWA CODE § 20.20 (1974); KAN. STAT. ANN. § 75-4332(a) (1977) (public employees); ME REV. STAT. ANN. tit. 26, § 965 (Supp. 1985); MD. ANN. CODE art. 89, § 3 (1973); MASS. ANN. LAWS ch. 150E, § 9 (Michie/Law Coop. Supp. 1985); 3 N.M. PUB. PERSONNEL ADMIN. (P-H) § 35,014 (1979); N.Y. CIV. SERV. LAW § 209 (Consol. 1983); N.D. CENT. CODE § 34-11-02 (1980); PA. STAT. ANN. tit. 43, § 1101.801 (Purdon Supp. 1985); TENN. CODE ANN. § 49-5-613(a) (1983); TEX. LAB. CODE ANN. § 5145c-1(9) (Vernon Supp. 1981); VT. STAT. ANN. tit. 3, § 925(c) (1977).

17. CAL. GOV'T CODE § 3505.2 (West 1980).

18. MICH. COMP. LAWS ANN. § 423.207(1) (West 1978).

19. *Id.*

20. ME. REV. STAT. ANN. tit. 26, § 965.2 (Supp. 1984).

21. IDAHO CODE § 33-1274 (1981).

22. ALASKA STAT. § 14.20.570 (1981).

23. KAN. STAT. ANN. § 72-5427 (1980).

24. TENN. CODE ANN. § 49-5-613(a) (1983).

25. IND. CODE ANN. § 20-7.5-1-13 (Burns 1975).

26. ILL. ANN. STAT. ch. 48, § 1612 (Smith-Hurd Supp. 1984).

27. CONN. GEN. STAT. ANN. § 31.96 (West Supp. 1983).

28. IND. CODE ANN. § 20-7.5-1-13 (Burns 1975).

29. ME. REV. STAT. ANN. tit. 26, § 979-D(2)(D) (Supp. 1984).

30. N.J. STAT. ANN. § 34:13A-16(h) (West Supp. 1985).

31. MINN. STAT. ANN. § 179A.14 (West Supp. 1985).

32. *E.g.*, ALASKA STAT. § 09.43.100 (1983); CAL. GOV'T CODE § 3518 (West 1980); CONN. GEN. STAT. ANN. § 7-474(k) (West Supp. 1985); DEL. CODE ANN. tit. 14, § 4010 (Supp. 1984); ILL. ANN. STAT. ch. 48, § 1608 (Smith-Hurd Supp. 1985); NEV. REV. STAT. § 288.190 (1983); N.J. STAT. ANN. § 34:13A-16(f)(6) (West Supp. 1985); TENN. CODE ANN. § 49-5-613(a) (1983); WASH. REV. CODE ANN. § 41.59.120 (Supp. 1985).

33. TENN. CODE ANN. § 49-5-613(a) (1983).

34. ALASKA STAT. § 09.43.100 (1983); CAL. GOV'T CODE § 3518 (West 1980); CONN. GEN. STAT. ANN § 7-474(h) (West Supp. 1985); NEV. REV. STAT. 288.190 (1983).

35. DEL. CODE ANN. tit. 14 § 4014(d) (Michie Supp. 1984); ILL. ANN. STAT. ch. 48, § 1608 (Smith-Hurd Supp. 1985); N.J. STAT. ANN. § 34:13A-16(f)(6) (West Supp. 1985); WASH. REV. CODE ANN. § 41.59-120 (Supp. 1985).

Mediation procedures generally are the least detailed of the statutory steps of impasse resolution. Most states proceed to the next step in their established processes after a short period of mediation. Fact-finding is the most common second stage, although an exception is frequently made in statutes pertaining to fire fighters, where the parties proceed directly to arbitration.[36]

2. Fact-Finding

Most states and the District of Columbia also provide for the use of fact-finding in impasse resolution.[37] Typically, fact-finding is initiated once mediation has failed. Other common characteristics of the statutes include a requirement for a determination of the existence of an impasse, a procedure for selecting the fact-finder or panel members, and a grant of authority to the panel to hold hearings, issue subpoenas and obtain documents. Some statutes also provide factors to be considered in making recommendations. Usually the statute provides a timetable for hearings, subsequent reports, and release of the recommendations to the public. In all instances, the statutes make fact-finders' recommendations non-binding. Generally, the statute also describes the next and final step in the process and assesses the costs of the fact-finding procedure.

Within the general framework described above, a wide variety of procedures exists. Fact-finding is commonly employed as a second step in the impasse resolution process, but at that point uniformity stops. Most states allow the parties to declare that an impasse exists and to call on the state public employees relations board to initiate fact-finding. Vermont[38] and Kentucky[39] require that the mediator certify the existence of an impasse; Wisconsin requires the state Employment Relations Commission to investigate whether a deadlock exists.[40] The Oregon Public Employee Relations Board may initiate fact-finding on its own motion "if it deems it appropriate and in the public interest."[41] In North Dakota, the public employer or the employee organization must decide by a

36. *See, e.g.*, N.Y. CIV. SERV. LAW § 209(4)(b) (McKinney 1983).

37. *E.g.*, CAL. GOV'T CODE § 3548.1 (West Supp. 1985); CONN. GEN. STAT. ANN. § 7-473 (West Supp. 1985); DEL. CODE ANN. tit. 14, § 4010 (Supp. 1984); FLA. STAT. § 447.403 (Supp. 1984); GA. CODE ANN. § 34-2-6(5) (1982); HAWAII REV. STAT. § 89-11 (1976); IDAHO CODE § 44-1805 (1977); ILL. ANN. STAT. ch. 48, § 1613 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 20-75-1-13 (Burns 1975); IOWA CODE ANN. § 20.21 (West 1978); KAN. STAT. ANN. § 75-4332 (1984); KY. REV. STAT. § 345.080 (1983); ME. REV. CODE ANN. tit. 26, § 1285(3) (Supp. 1984); MASS. ANN. LAWS ch. 150E, § 9 (Michie/Law. Co-op Supp. 1985); MONT. CODE ANN. § 39-31-308 (1983); NEB. REV. STAT. § 48-816 (1984); NEV. REV. STAT. § 288.200 (1983); N.H. REV. STAT. ANN. § 273-A:12 (Supp. 1983); N.J. STAT. ANN. § 34:13A-16(b) (West Supp. 1985); 3 N.M. PUB. PERSONNEL ADMIN. (P-H) § 35,014 (1979); N.Y. CIV. SERV. LAW § 2093(b) (McKinney 1983); N.D. CENT. CODE § 15-38.1-13 (1981); OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1984); OKLA. STAT. ANN. tit. 70, § 509.7 (West 1972); OR. REV. STAT. § 243.712 (1983); PA. STAT. ANN. tit. 43, § 1101.802 (Purdon Supp. 1985); R.I. GEN. LAWS § 36-11-8 (1984); TENN. CODE ANN. § 49-5-613(b) (1983); VT. STAT. ANN. tit. 3, § 925(b) (Supp. 1984); WASH. REV. CODE ANN. § 41.59.120 (Supp. 1985); WIS. STAT. ANN. § 111.88 (West 1974).

38. VT. STAT. ANN. tit. 3, § 925(b) (Supp. 1984).

39. KY. REV. STAT. § 345.080(2) (1983).

40. WIS. STAT. ANN. § 111.88(2) (West 1974).

41. OR. REV. STAT.; § 243.712(2)(b) (1983).

vote of its membership that the dispute cannot be settled amicably prior to petitioning the mediation board.[42]

The states are divided on the structure of the fact-finding panel. Sixteen states authorize a three-person panel.[43] The tripartite panel may be chosen from a list of qualified persons maintained by the state board,[44] the FMCS or American Arbitration Association (AAA).[45] Other states allow each party to choose one member with the chairman selected either by agreement between these two members or by the appropriate state agency.[46] Where a single fact-finder is used, most statutes require the state agency to submit a list of three or five names to the parties who alternatively strike the ones that are unacceptable.[47] The Indiana Education Employment Relations Board has established a permanent staff of fact-finders who serve whenever the parties go past the mediation stage.[48] The Maine statute specifies that the person who was the mediator in the dispute may not be on the fact-finding panel.[49] Nevada law permits the mediator to serve as the fact-finder.[50]

All statutes give authority to the fact-finder to conduct hearings and investigations. The chief distinction in this area is in the grant of subpoena power. A majority of states give the panel subpoena powers.[51] Iowa law grants the panel the full powers of a district court.[52] A substantial minority maintain quasi-judicial authority in the state agency, allowing the panel to invoke the necessary powers incident to conducting hearings.[53] Some statutes allow mediation to continue during the fact-finding stage, or authorize the fact-finder to attempt mediation.[54]

Some statutes specifically state the factors for fact-finders to consider before making recommendations. For example, Vermont requires that consideration be given to (1) the lawful authority of the municipal employer; (2) stipulations of the parties; (3) the public interest and the employer's ability to pay; (4)

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42. N.D. CENT. CODE § 34-11-01 (1980).

43. CAL. LABOR CODE § 65 (West 1984); GA. CODE ANN. § 54-1006 (1982); HAWAII REV. STAT. § 89-5(a) (1976); IDAHO CODE § 72-707 (Supp. 1983); KAN. STAT. ANN., § 44-817 (1981); KY. REV. STAT. § 336.140 (1963); ME. REV. STAT. ANN. tit. 26, § 968, 979-D(4)(b) (1974); NEB. REV STAT. § 48-633 (1974) (pertains only to employment security); N.Y. CIV. SERV. LAWS § 209(b) (McKinney 1983); N.D. CENT. CODE § 34-11-02 (1980); OHIO REV. CODE ANN. § 4129.01 (repealed); OKLA. STAT. ANN. tit. 40, § 4-102 (1980); OR. REV. STAT. § 243.722(2)(a) (1983) (only requires one person, but may request three people); PA. STAT. ANN. tit. 43, § 213.8 (Purdon 1964); VT. STAT. ANN. tit. 21, § 505 (1967); WIS. STAT. ANN. § 111.88(2) (West 1974).

44. *See, e.g.*, HAWAII REV. STAT. § 89-11(b)(2) (1976).

45. ME. REV. STAT. ANN. tit. 26, § 979-D(3)(A) (1974).

46. *See, e.g.*, CAL. GOV'T CODE § 3548.1 (West 1980).

47. CONN. GEN. STAT. § 7-473(b) (1972).

48. IND. CODE ANN. § 20-7.5-1-13 (Burns 1984).

49. ME. REV. STAT. ANN. tit. 26, § 965(3) (1984).

50. NEV. REV. STAT. § 288.200(1)(b) (1983).

51. PA. STAT. ANN. tit. 43, § 1101.802 (Purdon 1984).

52. IOWA CODE ANN. § 90.21 (West 1984).

53. ILL. ANN. STAT. ch. 48, § 1613(b) (Smith-Hurd Supp. 1984).

54. FLA. STAT. § 447.201-.609 (1985); MASS. ANN. LAWS ch. 150E, § 9 (Michie/Law. Co-op. 1976).

comparisons of wages, hours and working conditions at issue with those of other employees performing similar work in comparable communities; (5) cost of living; and (6) the overall compensation package.[55] The Georgia statute, which applies only to fire fighters, requires consideration of hazards of employment and physical qualifications.[56]

Typically, deadlines are established for hearings and reports, relating either to the end of the current contract term[57] or to the public employer's budget process.[58] Nevada specifically allows the parties to agree in advance that findings and recommendations shall be final and binding.[59] Nearly all statutes allow either party to reject recommendations without stating reasons for rejection. Iowa requires that the findings be accepted or submitted to the party's membership for a vote of rejection.[60] Most states also allow the state agency or the parties to publish rejected recommendations, usually within a short time after they are reported. Pennsylvania requires the parties to give notice of acceptance or rejection a second time, after publication.[61]

Arbitration may follow the fact-finding process, but the New York Civil Service Code provides that should an impasse remain after fact-finding, the public employee relations board "shall have the power to take whatever steps it deems appropriate to resolve the dispute."[62] Finally, most statutes distribute the costs of the fact-finding proceedings equally between the parties. In Pennsylvania, the state agency pays half the costs, with the parties splitting the other half,[63] whereas Indiana assesses the total cost to the state board.[64]

3. Arbitration

Many states expressly authorize the use of arbitration as a means to resolve bargaining impasses.[65] In several instances, states that have no other laws granting collective bargaining rights nonetheless have statutes requiring arbitration in disputes involving fire fighters, police, or other "emergency" personnel.[66]

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55. FLA. STAT. § 447.201-.609 (1985); VT. STAT. ANN. tit. 21, § 1732 (Supp. 1984).
56. GA. CODE ANN. § 54-1310(3) (Supp. 1984). *See also* FLA. STAT. § 447.201-.609 (1985).
57. DEL. CODE ANN. tit. 14, § 4014 (Supp. 1984).
58. IND. CODE ANN. § 20-7.5-1-12 (Burns 1984).
59. NEV. REV. STAT. § 288.100(5) (1983).
60. IOWA CODE ANN. § 20.21 (1984).
61. PA. STAT. ANN. tit. 43, § 1101.802(3) (Purdon 1984).
62. N.Y. CIV. SERV. LAW § 209(3)(d) (McKinney 1983).
63. PA. STAT. ANN. tit. 43, § 1101.802(4) (Purdon 1984).
64. IND. CODE ANN. § 20-7.5-1-13(d) (Burns 1984).
65. ALASKA STAT. § 23.40.200 (1984); CONN. GEN. STAT. ANN. § 7-472 (West Supp. 1985); DEL. CODE ANN. tit. 19, § 1310 (1979); HAWAII REV. STAT. § 89-11 (1976); IND. CODE ANN. § 20-7.5-1-13 (Burns 1975); IOWA CODE ANN. § 20.19 (West 1978); MASS. ANN. LAWS ch. 150E, 9 (Michie/Law. Co-op. Supp. 1985); MICH. COMP. LAWS ANN. § 423.233-.238 (1978); MONT. CODE ANN. § 39-34-101 (1983); NEV. REV. STAT. § 288.200 (1982); N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1984); OHIO REV. CODE ANN. § 4117.14 (Page Supp. 1984); OR. REV. STAT. § 243.712 (1983); R.I. GEN. LAWS § 36-11-9 (1984); WASH. REV. CODE ANN. § 41.56.440 (1985).
66. *See, e.g.*, UTAH CODE ANN. § 34-20a-8 (Supp. 1983).

Many jurisdictions provide, under certain circumstances, that the arbitrator's decision is final and binding.[67] Maine, for example, allows binding arbitration regarding issues that do not involve salaries, pensions, or insurance.[68] Arbitration is binding upon Rhode Island's teachers and its state and municipal employees unless the order calls for the expenditure of money, in which case the order is advisory.[69] Rhode Island fire fighters and police, however, are entitled to binding arbitration on all matters.[70] In Illinois, the relevant governing body must ratify the order before it becomes effective.[71]

Many states use tripartite arbitration.[72] In most cases, each party selects one arbitrator; those two then choose a third neutral arbitrator as chairman. In some cases, the state agency selects the chairman, often with advice or consent from the parties' arbitrators. Most statutes are silent about whether the panel should attempt to mediate the dispute. The Iowa statute expressly forbids mediation.[73] New York law allows the panel, before a final vote on any issue, to refer that issue to the parties for further negotiation upon the request of both party-appointed arbitrators.[74]

Many states limit the scope of the issues the panel may consider or the solutions it may impose. The limitations may be in the form of distinctions between issues subject to binding orders and those subject to advisory opinions, as already discussed. Other states restrict the panel to solving the dispute by choosing between each of the parties' final offers.[75] Iowa law allows the panel to review only those issues considered by the fact-finder.[76]

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67. *E.g.*, CONN. GEN. STAT. ANN. § 7-472 (West Supp. 1985); HAWAII REV. STAT. § 89-11 (Supp. 1984); IND. CODE ANN. § 20-7.5-1-13(c) (West 1984); IOWA CODE ANN. § 20.22(13) (West 1978); MASS. ANN. LAWS ch. 150E, § 9 (Michie/Law. Co-op. Supp. 1985); ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1985); MICH. COMP. LAWS ANN. § 423.240 (1978); MONT. CODE ANN. § 39-34-101 (1983); NEV. REV. STAT. § 288.215(9) (1983); N.Y. CIV. SERV. LAW § 209(4)(c)(vi) (McKinney Supp. 1984); OKLA. STAT. ANN. tit. 11, § 51-106 (West Supp. 1985); OR. REV. STAT. §§ 243.742, .712(2)(c) (1983); PA. STAT. ANN. tit. 43, § 1101.804 (Purdon Supp. 1985); R.I. GEN. LAWS § 36-11-9 (1984); TEX. LAB. CODE ANN. § 5154c-1(10) (Vernon Supp. 1986); UTAH CODE ANN. § 34-20a-7 (Supp. 1985); VT. STAT. ANN. tit. 3, § 925 (1972); WASH. REV. CODE ANN. § 41.56.450 (Supp. 1986).

68. ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1984).

69. R.I. GEN. LAWS § 28-9.3-10 (1979) (school teachers); *id.* § 36-11-9 (state employees), *id.* § 28-9.4-13 (municipal employees).

70. *Id.* § 28-9.1-9 & 28-9.2-9.

71. ILL. STAT. ANN. ch. 48, § 1614(m) (Smith-Hurd Supp. 1985).

72. *E.g.*, ALASKA STAT. § 23.40.200 (1984); CONN. GEN. STAT. ANN. § 7-473c(a) (West Supp. 1985); DEL. CODE ANN. tit. 19, § 121 (Supp. 1971); HAWAII REV. STAT. § 89-11(b)(3) (Supp. 1984); ILL. ANN. STAT. ch. 48, § 1614 (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 20.22(13) (West 1978); ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1985); MICH. COMP. LAWS. ANN. § 423.235 (1978); NEV. REV. STAT. § 288.202 (1983); N.J. STAT. ANN. § 34:13A-7 (West Supp. 1985); N.Y. CIV. SERV. LAW § 209(4)(c)(ii) (McKinney Supp. 1984); OKLA. STAT. ANN. tit. 11, § 51-107 (West Supp. 1985); OR. REV. STAT. § 243.746 (1983); PA. STAT. ANN. tit. 43, § 1101.806 (Purdon Supp. 1985); TEX. LAB. CODE ANN. § 5154c-1(11) (Vernon Supp. 1986); UTAH CODE ANN. § 34-20a-7 (Supp. 1985); VT. STAT. ANN. tit. 3, § 925(b) (1972); WASH. REV. CODE ANN. § 41.56.450 (1985); WYO. STAT. § 27-10-106 (1983).

73. IOWA CODE ANN. § 20.22(7) (West 1978).

74. N.Y. CIV. SERV. LAW § 209(4)(c)(iv) (McKinney 1983).

75. OHIO REV. CODE ANN. § 4117.14(G)(7) (Page Supp. 1984).

76. IOWA CODE ANN. § 20.22(3) (West 1978).

Most states specify criteria for determining the arbitration award. These standards are usually the same ones the fact-finders consider. Typical items include: prior negotiations and collective bargaining agreements, public interest, the public employer's ability to pay, interests and welfare of the employees, any change in the cost of living, comparisons with local private sector employment terms, public sector terms in other areas, the lawful authority of the employer, stipulations of the parties, the overall compensation package offered to employees, any changes during negotiations, and any other elements traditionally considered.[77]

Finally, a minority of states specify procedures for judicial review.[78] Typically, an otherwise binding order may be set aside only when the arbitration panel has exceeded its jurisdiction, when the order was not supported by substantial evidence, or when the award was procured by fraud.[79] The Vermont statute adds evident partiality as grounds for review.[80] Connecticut's Teachers Negotiation Act not only provides standards for judicial review, but also awards attorneys fees, costs and legal interest to the non-moving party if the decision is not vacated or modified.[81]

In many respects, the Florida Public Employees Relations Act is a progressive law in light of Florida's position as one of the deep southern right-to-work states with a long non-union tradition. The historical antecedents to the Florida PERA, however, presaged a continuing tension between countervailing state policies, and made adoption of conservative impasse procedures a virtual certainty when PERA was passed in 1974.

II. Policy Considerations for Public Sector Collective Bargaining

A. *The Florida PERA — Legislative Implementation of Constitutional Policy*

An understanding of the constitutional foundations of the Florida PERA is fundamental to a policy-oriented evaluation of the statute. The "right-to-work" movement followed soon after passage of the National Labor Relations Act in 1935. In 1943, the Florida House of Representatives approved the following proposed amendment to section 12 of the Declaration of Rights of the 1885 Florida Constitution: "The right of citizens to work shall not be denied or abridged on account of membership or non-membership in any organization."[82]

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77. *See* Conn. Gen. Stat. Ann. § 10-153(c)(4) (West 1983); Hawaii Rev. Stat. § 89-11(d) (1976).

78. *E.g.*, Conn. Gen. Stat. Ann. § 7-473c(a)(3) (West Supp. 1985); Ill. Ann. Stat. ch. 48, § 1614(j) (Smith-Hurd Supp. 1985); Me. Rev. Stat. Ann. tit. 26, § 972 (West 1964); Mich. Comp. Laws Ann. § 423.242 (1978); N.J. Stat. Ann. § 34:13A-20 (West Supp. 1985); N.Y. Civ. Serv. Law § 209(4)(c)(vii) (McKinney Supp. 1984); Tex. Lab. Code Ann. § 5154c-1(14) (Vernon Supp. 1986); Vt. Stat. Ann. tit. 3, § 925(f) (1972); Wash. Rev. Code Ann. § 41.56.450 (Supp. 1986).

79. *See, e.g.*, Tex. Stat. Ann. art. 5154c-1(14) (Vernon Supp. 1985).

80. Vt. Stat. Ann. tit. 21, § 1733(d)(2) (Supp. 1978).

81. Conn. Gen. Stat. Ann. § 10-153f(c)(7) (1983).

82. Fla. H.J. Res. 13, 29th Reg. Sess., 1943 Fla. H.J. 31 (Apr. 8, 1943), *as amended at* 1943 Fla. H.J. 42 (Apr. 19, 1943).

A proviso was added by a Senate amendment to the House's proposal: "[P]rovided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."[83] Some commentators have argued persuasively that the language added by the Senate amendment was designed only to ensure that the right-to-work provision would not be construed to deny the collective bargaining rights which had been established for certain private sector employees by federal law.[84] As amended by the Senate, this right-to-work amendment to the Florida Constitution subsequently was approved by the voters.[85] In decisions announced in 1946[86] and 1968,[87] the Florida Supreme Court concluded that this constitutional provision did not create any new collective bargaining right.

Labor-management disputes in the 1960's brought about frequent public service disruptions throughout the nation. During the 1960-1969 period, Florida public employees were involved in twenty-five strikes.[88] Most devastating of all was the state-wide teacher strike called by the Florida Education Association in 1968. This strike involved more than 35,000 public school teachers and was the first state-wide teacher strike in the nation.[89] The strike had a traumatic effect on the employment relationship, and triggered a series of events that ultimately led to passage of the Florida PERA. One of the first reactions to the strike was a proposal from the constitutional revision commission recommending specific prohibition of public employee strikes, and the inclusion of a provision which would extend collective bargaining rights to public and private employees.[90] The reference to "public and private" employees was deleted by the legislature, and the following was adopted by the electorate as article I, section 6 of the 1968 revised constitution.[91] It clearly provided that public employee strikes were prohibited, but it did not so clearly delineate the right of public employees to collectively bargain. Ample support exists for the view that the new language in article I, section 6 gave no greater bargaining rights to

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83. 1943 FLA. S.J. 148 (Apr. 29, 1943).

84. *See generally* Alley & Carvin, *Collective Bargaining for Public Employees in Florida — In Need of a Popular Vote?*, 56 FLA. B.J. 715 (1982).

85. FLA. CONST. preamble, § 12 (amended House J.R. 13, Act 1943; adopted at general election, 1944).

86. *See* Miami Waterworks Local No. 654 v. City of Miami, 26 So. 2d 194 (Fla. 1946).

87. *See* Pinellas County Classroom Teachers' Ass'n v. Board of Pub. Instruction, 214 So. 2d 34 (Fla. 1968).

88. *See* McGuire, *Public Employee Collective Bargaining in Florida — Past, Present and Future*, 1 FLA. ST. U.L. REV. 26, 42 n.64 (1973).

89. St. Petersburg Times, Feb. 15, 1968, at 1A, col. 1.

90. A discussion of the legislative history of the constitutional amendment is found in McGuire, *supra* note 88, at 42 n.64.

FLA. CONST. art. I, § 6 provides in pertinent part:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

91. *Id.*

public employees than had existed in the predecessor section 12 of the 1885 constitution, as amended. Section 12 had been interpreted by the Florida Supreme Court as not establishing public employee collective bargaining rights.[92]

The Florida Supreme Court first interpreted the new section 6 in 1969 in the case of *Dade County Classroom Teachers' Association v. Ryan.*[93] The trial court had relied upon earlier Supreme Court precedent to find that the process of collective bargaining contravened the laws and statutes of the State of Florida.[94] In an unanimous opinion written by Chief Justice Ervin, the Florida Supreme Court reversed the lower court and held that "with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by section 6."[95] The court based this decision upon its perception that the Florida Legislature intended article I, section 6 to extend to both private and public sector employees the right of collective bargaining.[96] Chief Justice Ervin urged the Florida Legislature to enact implementing legislation.

Despite numerous attempts to secure the passage of a public sector collective bargaining law, no such legislation had been passed when the Supreme Court again addressed the issue in 1972 in *Dade County Classroom Teachers' Association v. The Legislature of Florida.*[97] Upon petition for a constitutional writ, filed as a class action on behalf of 7,500 classroom teachers, the plaintiff attempted to compel the legislature to enact standards or guidelines regulating the right of collective bargaining by public employees. Although the Florida Supreme Court concluded that judicial implementation of collective bargaining rights would be premature,[98] the court indicated that unless the legislature acted within a "reasonable time" to implement the constitutional rights, the court would "have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution. . . ."[99] To demonstrate its sincerity, the court, in 1973, appointed the Supreme Court Public Employees Rights Commission to recommend guidelines for judicial implementation of collective bargaining.[100] Faced with an impending constitutional confrontation, the Florida Legislature began the serious work of drafting a public employees collective bargaining act. This effort led to the passage of PERA in 1974.[101]

Three fundamental values reflected in PERA are thus grounded in state constitutional law: (1) public employees shall not have the right to strike; (2) public employees shall have freedom of association in labor organizations; and

92. Miami Waterworks Local No. 654 v. City of Miami, 26 So. 2d 194, 198 (Fla. 1946).
93. 225 So. 2d 903 (Fla. 1969).
94. *Id.* at 904-05.
95. *Id.* at 905.
96. *Id.* at 905 n.1.
97. 269 So. 2d 684 (1972).
98. *Id.* at 686.
99. *Id.* at 688.
100. McHugh, *The Florida Experience in Public Employee Collective Bargaining, 1974-1978: Bellwether for the South*, 6 FLA. ST. U.L. REV. 263, 268 (1978).
101. FLA. STAT. §§ 447.201-.609 (1975).

(3) public employees shall have the right to collective bargaining. PERA implemented these three constitutionally-based policies in legislation modeled in part after the National Labor Relations Act. The stated purpose of PERA was:

> [T]o provide statutory implementation of s.6, Art. I of the state constitution, with respect to public employees; to promote harmonious and cooperative relationships between government and its employees, both collectively and individually; and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.[102]

Similar to the federal policy, the assumption underlying PERA is that its provisions are beneficial to the general public because it guarantees uninterrupted government services while at the same time it affords public employees the right to organize and engage in collective bargaining. The Florida PERA is neutral in that it neither encourages nor discourages organization by public employees.[103]

The Public Employees Relations Commission ("PERC" or the "Commission") was created to administer PERA with enforcement powers similar to those of the NLRB.[104] PERC is a quasi-judicial agency with jurisdiction over representation elections,[105] the adjudication of unfair labor practice complaints,[106] and the appointment of mediators and special masters.[107] It has full power to promulgate rules and regulations.[108]

The statute guarantees public employees certain rights analagous to those guaranteed under the NLRA in the private sector, including the right to form, join, and participate in employee organizations.[109] Employees are guaranteed the right to be represented by an employee organization of their choice, to negotiate collectively, and to be represented in grievance proceedings.[110] The right to engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection, is assured.[111] The corollary right of refraining from such activities, or presenting one's own grievances, also is assured.[112] Interference with that freedom of choice is an unfair labor practice.[113]

A union elected in a PERC-supervised election enjoys the preferred status of exclusive bargaining agent.[114] Public employer and employee organizations

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102. *Id.* § 447.207(6) (1983).
103. *Id.*
104. *Id.* §§ 447.201(3), .205 (1985); 10 FLA. ADMIN. CODE 38D-11.01.
105. FLA. STAT. § 447.207(6) (1985).
106. *Id.*
107. *Id.* § 447.403 (1985).
108. *Id.* § 447.207.
109. *Id.* § 447.301.
110. *Id.* § 447.301(2).
111. *Id.* § 447.301(3).
112. *Id.* § 447.301(1)-(4).
113. *Id.* § 447.501(1)-(2).
114. *Id.* § 447.307(3)(b).

have the reciprocal duty to bargain in good faith over wages, hours, and other terms and conditions of employment.[115]

Public employee strikes are specifically prohibited by PERA,[116] with severe penalties imposed for violations.[117] Either PERC or the employer may seek injunctive relief against a union that supports a strike in any positive manner.[118] Thus, the rights of organization and collective bargaining are guaranteed by the Florida PERA with statutory language that is quite similar to that protecting private sector employee rights under the NLRA. The major distinction, of course, is that when the bargaining gets tough, the strike weapon is not available.

The avowed reason behind passage of the Florida Public Employees Relations Act was the need to implement the right of collective bargaining guaranteed by Florida Constitution article I, section 6. Notwithstanding that legal requirement, however, certain policy reasons favor collective bargaining rights for public employees. Wellington and Winters have argued that four propositions advanced in support of collective bargaining in the private sector can also be applied to the public sector.[119] First, collective bargaining is a way to achieve peace in the workplace. Second, it is a way of achieving democracy in the workplace through participation by workers in their own governance. Third, unions that bargain collectively with employers represent workers in the political arena as well. Fourth (and most important for Wellington and Winter), collective bargaining is a needed substitute for individual bargaining.[120] This pro-bargaining view has not been without its detractors who view the public employee union only as one of many special interest groups.[121]

In a sense, public employees do represent an interest group in the political process. Teachers, for example, may use their collective bargaining muscle to vie with other interest groups, such as anti-tax lobbyists, for the allocation of available funds. If that bargaining muscle is too strong, the comparatively small group of teachers may skew the political process in the short run by achieving results undesired by a majority of the school board's constituency. Thus, a limit must be imposed on the extent to which public sector unions can exercise power and distort the democratic process. In Florida, the legislature has effectively limited public employees' bargaining muscle. By denying the right to strike the legislature minimized the risk that collective bargaining will side-step the political process.

The interest group characterization, however, should not necessarily connote negative influences on the quality of public services. To continue with the

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115. *Id.* § 447.501(1)(c).

116. *Id.* § 447.505.

117. *Id.* § 447.507(b).

118. *Id.* § 447.501(2)(e).

119. *See* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1111-12 (1969).

120. *Id.* at 1112.

121. Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 428-32 (1970). *See also* R. SUMMERS, COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE (Cornell Univ. IPE Monograph No. 7, 1976).

example of public schools, teachers are uniquely situated to evaluate the quality of educational services and to make meaningful recommendations for improvement. Often public policy is most effectively served if a small but well informed and vitally interested group carries the day. Increases in teachers' salaries, for example, may be unpopular with the majority of voters in a retirement community, but they also may be necessary to maintain a quality educational system which will provide the foundation for future growth of the community. Decision-making of this type is not elitist, for the democratic process will thrive where decision-making is tempered by the meaningful input of those who are both informed and vitally interested in political outcomes. Collective bargaining provides one means of securing this input from teachers and other public employees. Because few sanctions are available when the employer rejects employee proposals, political control is preserved. Thus, the critical task in addressing law reform issues in public employment dispute resolution is how to maximize input by public employees while preserving ultimate political control in governmental officials.

B. *The Promise of Meaningful Collective Bargaining in the Public Sector*

Florida is one of the few states that has elevated the right of collective bargaining for public employees to the level of a constitutional guarantee.[122] The Florida Supreme Court concluded that the legislature should implement this right through enabling legislation because it viewed the right of public employees to collective bargaining as equal to the right of private sector employees.[123] The court elaborated further on this parity of bargaining rights in *City of Tallahassee v. Public Employee Relations Commission.*[124] It held that provisions of the original PERA which exempted pension plans from negotiations[125] constituted an unlawful abridgement of the right to collective bargaining as guaranteed by article I, section 6 of the Florida Constitution.[126]

In response to a petition for declaratory statement filed by the City of Tallahassee, PERC held that section 447.301(2)[127] and section 447.309(5)[128] re-

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122. *See, e.g.*, MO. CONST. art I, § 29; N.J. CONST. art. I, § 19; N.Y. CONST art. I, § 17.
123. Dade County Classroom Teachers Ass'n, Inc. v. Ryan, 225 So. 2d 903, 905 (Fla. 1969).
124. 410 So. 2d 487 (Fla. 1981).
125. FLA. STAT. §§ 447.301(2), .309(5) (1979).
126. 410 So. 2d at 491.
127. Public employees shall have the right to be represented by any employee organization of their own choosing and to negotiate collectively, through a certified bargaining agent, with their public employer in the determination of the terms and conditions of their employment, *excluding any provisions of the Florida statutes or appropriate ordinances relating to retirement.*

Id. at 489 (quoting FLA. STAT. § 447.301(2) (1979) (subsequently amended in 1983)) (emphasis added).

128. Any collective bargaining agreement shall not provide for a term of existence of more than 3 years and shall contain all of the terms and conditions of employment of the employees in the bargaining unit during such term *except those terms and conditions provided for in any Florida statute or appropriate ordinances relating to retirement* and in applicable merit and civil service rules and regulations.

Id. (quoting FLA. STAT. § 447.309(5) (1979)) (emphasis added).

moved from public employers the obligation to negotiate over pension plans to the extent that retirement matters are controlled by state statute or local ordinance.[129] It also held that under section 447.301(2), a public employer has no statutory obligation to negotiate over a change in an ordinance or statute affecting pension plans even if the same is amended while a collective bargaining agreement is in effect.

On appeal, the First District Court of Appeal raised the question of whether the statutory exclusions of pensions from collective bargaining were rendered unconstitutional by article I, section 6 of the Florida Constitution. Citing *Dade County Classroom Teachers' Association v. Ryan,*[130] the court held that they were.[131] With the exception of the right to strike, the court recognized that public employees have the same rights of collective bargaining as are granted private employees by section 6.[132]

Upon appeal by the city, the Florida Supreme Court adopted the reasoning of the district court and upheld the finding that the statutory phrases in question were rendered unconstitutional by article I, section 6. To reach that conclusion, however, both the district court and supreme court made a quantum leap in reasoning. Each concluded that because "private employees have the right to collectively bargain as to retirement benefits, public employees must also."[133] A major deficiency in this approach is the absence of a uniform standard for determining private employee bargaining rights in Florida. The Florida Supreme Court apparently selected as its benchmark those rights enjoyed by employees organized under the National Labor Relations Act. No explanation was given, however, as to why that particular group of employees, a distinct minority of Florida's work force, was chosen to set the standard for public employee bargaining rights. Many private sector employees are not governed by the provisions of the NLRA because their employers' businesses are too small to meet the NLRB's jurisdictional standards. Many other employees in Florida specifically are exempt from the provision of the NLRA because they are agricultural workers, supervisors, managerial employees, confidential employees, independent contractors, domestic employees, or otherwise exempted. Employees of the transportation industries who are covered by the Railway Labor Act are not covered by the NLRA. In short, the Florida Supreme Court offered no rationale in the *City of Tallahassee* decision to explain why it felt compelled to select the protections of the NLRA as the standard for protections under the provisions of article I, section 6.

Moreover, to the extent the supreme court suggested in *City of Tallahassee* that the determination of legal rights under PERA must be made by analogy

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129. *In re* City of Tallahassee, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,244 (July 26, 1976).

130. City of Tallahassee v. Public Employee Relation Comm'n, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,114 (Fla. 1st D.C.A. Feb. 6), *aff'd*, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,041 (Fla. Dec. 3, 1981).

131. 225 So. 2d 903, 903 (Fla. 1969).

132. *Id.* at 905.

133. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,041, at 62.

to the NLRB's interpretations of the NLRA, it has structured its constitutional foundations for public sector bargaining upon shifting sands. The Board's interpretations of the NLRA have undergone dramatic shifts in recent years as the makeup of the Board has changed through new appointments under new administrations. The parameters of collective bargaining rights for public employees in Florida should not depend upon the vicissitudes of changing interpretations and shifting political alliances at NLRB.

Although the supreme court did not discuss these obvious problems, it did suggest that some flexibility would be required: "In so holding, we do not mean to require that the collective bargaining process in the public sector be identical to that in the private sector. We recognize that differences in the two situations require variations in the *procedures* followed."[134] However, the problems PERC will face if it is compelled to adopt interpretations by the NLRB will profoundly affect substantive as well as procedural rights.

In many respects, the *City of Tallahassee* decision vests in Florida public employees even greater bargaining rights than the National Labor Relations Act vests in private sector employees. Congress, being the creator of all bargaining rights under the NLRA, can remove certain subjects from the bargaining table (e.g., pensions) by declaring them non-negotiable. In Florida's public sector, on the other hand, the state supreme court has declared that the state constitution will override and deter such legislative attempts to limit the scope of bargaining. At the very least, this interpretation of article I, section 6 articulates a strong state policy that public employees shall have the right to collective bargaining, and that this right shall be a *meaningful* one. The extent to which PERA offers a viable alternative to the strike bears directly upon the question of whether meaningful collective bargaining will be realized for public employees.

C. *Overview of Florida PERA Impasse Procedures*

If after a reasonable period of negotiation a collective bargaining agreement cannot be reached, an impasse shall be deemed to exist when one party so declares in writing to the other party and the Commission.[135] After declaration of impasse, either party or both parties together may select a mediator to help resolve the dispute. If the parties decide not to mediate,[136] or if mediation fails to produce a settlement,[137] either party may invoke the special master process by request to PERC. The Commission will then appoint a qualified person

134. *Id.* at 63 (Emphasis added).

135. FLA. STAT. § 447.403(1) (1985). *See also* Professional Fire Fighters Ass'n, Local 2807 v. Southwest Fire Dist. 6, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,289, at 376 (Aug. 4, 1983) (quoting FLA. STAT. § 447.403(1) (1981)).

136. *See* Professional Fire Fighters, Local 2630 v. City of N. Lauderdale, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,018 (Dec. 4, 1980) (submission to mediation is voluntary).

137. Leon County Police Benevolent Ass'n v. City of Tallahassee, 7 FLA. PUB. EMPL. REL. (LAB. REL. PRESS) ¶ 12,057 (Jan 7, 1981) (mediation and fact-finding are not mutually exclusive methods of impasse resolution).

agreed upon by the parties or select a special master for them if the parties cannot agree on a selection.[138]

The statute and rules contemplate a public fact-finding hearing held by the special master, who determines and notifies the parties of the date, time and place for the hearing.[139] After the hearing is closed, the special master will make factual determinations and recommendations for settlement of all issues in his "recommended decision," which must be filed with the Commission and both parties by registered mail, return receipt requested, within fifteen calendar days after the final hearing.[140] The special master must consider the evidence presented at the hearing, including oral or written arguments provided by the parties, while giving appropriate weight to those factors set forth in Florida Statutes section 447.405.[141]

After receiving the special master's recommended decision, both parties must discuss each recommendation.[142] Failure to do so may constitute an unfair labor practice.[143] Within twenty days after receipt of the recommended decison, each recommendation not expressly rejected in writing by either party shall be deemed accepted by both sides. Either party may reject all or part of the decision by filing with PERC and the other party a written notice containing a statement of the cause for each rejection.[144] The rejection notice need not be supported by competent, substantial evidence, and either side may reject a recommendation for any reason as long as that reason is expressed.[145]

If either or both of the negotiating parties timely reject part or all of the special master's recommendations, then the chief executive officer of the governmental entity involved must, within ten days after notification of rejection, submit to the legislative body of the governmental entity a copy of the recommended decision of the special master, along with the chief executive officer's own recommendations for settling the dispute.[146] The employee organization must also submit its recommendations for settling unresolved matters to the legislative body and to the chief executive officer.[147] The legislative body, or a duly authorized committee thereof, must conduct a public hearing at which the parties may explain their positions regarding only the rejected recommendations.[148] Thereafter, the legislative body "shall take such action as it deems to be in the public interest, including the interest of the public employees involved."[149]

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138. FLA. STAT. § 447.403(3) (1985); 10 FLA. ADMIN. CODE 38D-19.07(1).
139. FLA. STAT. § 447.403(3) (1985); 10 FLA. ADMIN. CODE 38D-19.07(1).
140. FLA. STAT. § 447.403(3) (1985).
141. *See also* 10 FLA. ADMIN. CODE 38D-19.07(3).
142. FLA. STAT. § 447.403(3) (1985).
143. Osceola Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066 (Feb. 2, 1978).
144. FLA. STAT. § 447.403(3) (1985); 10 FLA. ADMIN. CODE 38D-19.09.
145. International Ass'n of Fire Fighters, Local 1321 v. City of Miami Springs, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4365 (Nov. 28, 1978).
146. FLA. STAT. § 447.403(4)(a) (1985).
147. *Id.* § 447.403(4)(b).
148. *Id.* § 447.403(4)(c).
149. *Id.* § 447.403(4)(d).

After the legislative body resolves the impasse, the parties must draw up an agreement which includes those provisions previously agreed upon by the parties, the accepted recommendations of the special master, and those provisions prescribed by the legislative body.[150] The agreement is signed by both the chief executive officer for the public employer and the bargaining agent for the public employees; it is then submitted to both sides for ratification.[151] Should ratification of the agreement fail, the terms mandated by the legislative body govern the conduct between the parties.[152] Those terms become effective on the date of the legislative body's action and remain in force until the end of the fiscal year.[153]

The statute clearly is designed to preserve, to the extent possible in a collective bargaining scheme, local political control of public services.[154] This legislative concern is manifested in a variety of ways.[155] Rather than leaving "management rights" to be negotiated by the parties, as is the case in the private sector, the Florida Legislature included a public employers' rights section in the statute itself.[156] Although the employer has the duty to bargain in good faith with the employees' certified representatives,[157] neither party must agree to a proposal or make a concession.[158]

The only significant departure from this policy of preserving employer rights is the requirement in section 447.401 that each public sector collective bargaining agreement provide for final and binding arbitration of employee grievances. The statute limits the arbitrator's jurisdiction, however, to contract interpretation questions only, and cautions the arbitrator that he "shall not have the power to add to, subtract from, modify, or alter the terms of a

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150. *Id.* § 447.403(4)(e); 10 FLA. ADMIN. CODE 38D-20.01.

151. FLA. STAT. § 447.403(4)(e) (1985); 10 FLA. ADMIN. CODE 38D-20.02 to .03.

152. *See* Florida Police Benevolent Ass'n v. Stat, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4299 (Aug. 30, 1978).

153. FLA. STAT. § 447.403(e) (1985).

154. The concern over preservation of local control of government often seems to be strongest at the school board of small town level. The truth of the matter is that local control already has been transferred in large part to the state by the vast array of state statutes, other than PERA, regulating local matters. When bargaining concerns state employees, ultimate control is of course reserved to the state.

155. *See* McGuire, *supra* note 88, at 128-29.

156. FLA. STAT. § 447.209 (1985). The statute provides:

> *Public employer's rights.* It is the right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons. However, the exercise of such rights shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation.

Id.

157. *Id.* § 447.203(14).

158. *Id.*

collective bargaining agreement.''[159] Finally, the impasse resolution procedure leaves the final and unilateral decision-making power to the employer's legislative body, while denying employees the right to strike.

Understandably, public employee organizations have expressed great dissatisfaction with the impasse procedure, which provides them very little leverage in bargaining. Perhaps the greatest strength of the special master system is its exposure of contending positions and arguments to open public scrutiny, and the endorsement of reasonable positions by an impartial and experienced fact-finder.

D. *Normative Standards for Evaluation of PERA*

The state constitutional provisions and legislative enactments reviewed above indicate that the people of Florida have articulated certain policies regarding the desired balance between public employer and employee rights and duties. These policies provide the foundation for normative standards by which impasse procedures of PERA may be evaluated. The following normative standards have emerged, and the public interest mandates that these five requirements be observed and harmonized:

1. Public services shall be guaranteed without interruption.

2. Employees shall enjoy the freedom of association.

3. Meaningful collective bargaining rights shall be guaranteed for public employees. This includes four sub-requirements:

   a) Employees shall enjoy the freedom to engage in concerted activities, not prohibited by law, for purposes of collective bargaining and other mutual aid and protection;

   b) Employees shall enjoy the freedom of choice in collectively selecting a representative;

   c) Employees shall have the right to present grievances to their employer;

   d) Collective bargaining shall be characterized by a mutuality of constraints and incentives to make the process truly meaningful.

4. Collective bargaining rights shall be assured with a minimum level of state intervention.

5. To the extent possible, collective bargaining rights shall be assured while preserving local political control of governmental functions.

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159. *Id.* § 447.401. This statutory language typically is found in most negotiated arbitration clauses, and states a limitation on the arbitrator's powers that most arbitrators probably would concede is an inherent limitation even if not stated in the agreement.

Individual standards considered alone may appear to serve only one of the parties in collective bargaining. For example, the requirement calling for meaningful collective bargaining directly serves the good of employees and their organizations, while the fifth requirement serves the good of the public employer by preserving local political control. All standards cumulatively should serve the general public good, however, by promoting harmonious employer-employee relationships which in turn favorably affect the delivery of public services.

Even without an evaluation of PERA's implementation, great potential obviously exists for tension among disparate elements in this model. The extent to which the overriding purpose of these standards is achieved, *i.e.* promotion of the public good, will depend not only upon the extent to which each requirement is met, but also upon the extent to which the requirements as a whole are reconciled and harmonized. Prohibition of public employee strikes, for example, is the principal method chosen to implement the first requirement. Nevertheless, this requirement removes one method of insuring satisfaction of the requirement of meaningful collective bargaining through a mutuality of constraints and incentives.[160] Therefore, some effective alternative to strikes must be provided to ensure the existence of the requisite mutuality of constraints and incentives to make collective bargaining truly meaningful. Part III of this article will evaluate legal doctrinal developments in the alternative dispute resolution procedures available under PERA during the first decade of its implementation, with particular attention given to the normative standards described above.

III. Legal Doctrinal Developments in PERA's Dispute Resolution Procedures — 1975 to 1985

A. *Economic Warfare and Other Self-help Techniques*

1. Strikes and Lockouts

A number of impasse resolution options are available to the Florida Legislature. Alternative third-party procedures will be considered in Part IV. Adoption of the private sector approach by legalizing the right to strike has been proposed but probably is the least likely alternative because the public sector strike prohibition is so deeply rooted in state policy. The statute makes a strong no-strike statement, backed by severe sanctions.

a. Strikes are Broadly Defined.

Section 447.505 implements the strike prohibition in article I, section 6 of the Florida Constitution: "No public employee or employee organization may

160. The Florida First District Court of Appeal has observed that the strike prohibition was not intended "to give public employers a power advantage over their employees in contract negotiations. Strikes are prohibited to protect the public, not to circumvent the rights of public employees to meaningful collective bargaining with their employer." School Bd. v. Public Employee Relations Comm'n, 350 So. 2d 819, 821 (Fla. 1st D.C.A. 1977).

participate in a strike against a public employer by instigating or supporting, in any manner, a strike." A strike contemplates a concerted act or omission by employees.[161] As originally enacted, the definition of "strike" in section 447.203(6) (1976) contemplated an actual withholding of services.[162] However, the legislature expanded the definition of "strike" in 1977 to include "any overt preparation such as the establishment of strike funds."[163]

Subsequently, PERC has applied the term "strike" to certain concerted activities even in the absence of withholding of services. For example, in *In re Metropolitan Dade County & Local 291, Transport Workers Union, AFL-CIO*[164] the Commission received information that transport workers had submitted an unusually high number of requests for bus repairs just before the announced effective date of layoffs. PERC concluded that if such requests were a concerted activity instigated and supported by officers, agents and/or representatives of Local 291, for the purpose of affecting terms and conditions of employment, such action would constitute a strike within the meaning of the statute. PERC issued an order requiring the parties to show cause why it should not initiate formal investigative proceedings.[165]

PERC has held that mere inaction by a union representing employees who strike will not constitute "support" of the strike:

> The plain meaning of the relevant statutes does not place such a duty on the employee organization. The word "support" is defined in pertinent part by Webster's Third New International Dictionary as ". . . to uphold by aid, countenance, or adherence actively promote the interest or cause of. . . ." Thus, in order for an employee organization to support a strike its agents or representatives must in some manner by either word or deed aid the strike. Inaction by an employee organization does not constitute support for a strike that was not instigated or authorized by that organization.[166]

Similarly, the use of a strike threat to gain concessions in bargaining does not constitute a per se violation of the Act; it is merely one indication of bad faith to be considered in the totality of circumstances.[167]

The fact that a job action is a "wildcat" strike will not insulate a union from liability if local union officials participate. In *City of Homestead v. Dade County Police Benevolent Association*, PERC set aside the hearing officer's finding

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161. FLA. STAT. § 447.203(6) (1985).

162. Duval County School Bd. v. Public Employee Relations Comm'n, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 10,027, at 26 (Fla. 1st D.C.A. 1978).

163. FLA. STAT. § 447.203(6) (1977).

164. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,383 (Apr. 15, 1982).

165. *Id.* at 333-34. *See also In re* Metropolitan Dade County, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,249, at 456 (June 11, 1982), 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,013, at 15 (Nov. 15, 1982), 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,177, at 342 (Apr. 13, 1983).

166. Dade County School Bd. v. Dade County School Maintenance Employees Comm'n, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,109, at 174 (Apr. 30, 1980).

167. City of Homestead v. Dade County Police Benevolent Ass'n, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,347, at 725 (Aug. 21, 1981).

that a union steward did not act as the PBA's agent when he participated in an unlawful strike.[168] PERC imposed strict liability on the PBA for the unauthorized action of its union steward who participated in a strike by Homestead police officers in spite of the appeals of PBA officials to avert the strike. The commission so held because the PBA did not remove the steward from his office until after the wildcat strike was in progress. PERC held that if a local employee organization desires to avoid responsibility for such a wildcat strike, it must ensure that no serving union representative or official participates in or actively assists the strike.[169]

The Third District Court of Appeal reversed, concluding that PERC had improperly substituted its judgment on a question of fact (agency) found in the union's favor by the hearing officer.[170] The Florida Supreme Court quashed the decision of the district court of appeal and reinstated PERC's order.[171] The supreme court's narrow holding was that PERC may overturn a hearing officer's ultimate determination of agency in light of what it perceives to be the applicable law and relevant policy considerations.

In *Palm Beach County School Board v. International Brotherhood of Firemen & Oilers, Local 1227*,[172] PERC dismissed an unfair labor practice charge filed by the school board, stating that a union letter that merely threatens a strike does not fall within the definition of a "strike" due to the lack of overt preparation. PERC stated that even if the letter did advocate the right to strike or contained a statement that employees will strike under certain circumstances, this would not necessarily constitute a violation of the law.[173]

Some private sector union self-help techniques are specifically forbidden to public sector employees in Florida because of the all-encompassing definition of "strike."[174] This definition may be vulnerable to constitutional challenges because of its unusually broad scope, particularly with respect to the prohibition against "concerted submission of resignations by employees." In *International Union, Local 1232 v. Wisconsin Employment Relations Board*,[175] the United States Supreme Court held that a state order prohibiting intermittent, unannounced "quickie" strikes did not violate the thirteenth amendment. The Court noted, however, that the state statute in question did not prohibit or restrict any employee from leaving the employer's service, either without reason, or without notice.[176] While the legislature or the courts may force an employee to choose between reporting for work or losing his job, presumably they could not con-

168. *Id.* at 724.

169. *Id.*

170. Dade County Police Benevolent Ass'n v. City of Homestead, 444 So. 2d 465 (Fla. 3d D.C.A. 1984).

171. Public Employee Relations Comm'n v. Dade County Police Benevolent Ass'n, 10 Fla. L.W. 221, 222 (Fla. Apr. 12, 1985).

172. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4098, at 185 (Feb. 24, 1978).

173. *See also* Duval County School Bd. v. Public Employee Relations Comm'n, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,027 (Fla. 1st D.C.A. 1978).

174. FLA. STAT. § 447.203(6) (1985).

175. 336 U.S. 245 (1949).

stitutionally prevent a state or local government employee from submitting a bona fide resignation.

b. Enforcement and Penalties

Either PERC or the employer whose employees are involved or affected by the strike may file suit in circuit court to enjoin the strike; the case will be given priority as an emergency matter.[177] If the plaintiff makes a prima facie showing that a violation of Florida Statutes section 447.505 is in progress or the danger of a strike is clear, real, and present, the circuit court shall issue a temporary injunction. After final hearing, the court may either make the injunction permanent or dissolve it.

The injunction is enforceable through contempt proceedings, with fines against the organization not to exceed $5,000, and potential fines against each officer, agent, or representative of the organization available between $50 and $100 for each calendar day that the violation is in progress.[178] Additionally, the circuit court is empowered to award damages and to enforce judgments against employee organizations by attachment or garnishment of union initiation fees or dues which are to be deducted or checked off by public employers.[179] Individual employees who participate in unlawful strikes also are subject to severe penalties, including termination of employment upon the order of PERC. Reemployment is available only upon stringent terms: a probationary period of six months during which the employee shall serve without tenure; employment subject to discharge upon a showing of just cause; and a freeze upon the employee's compensation for one year at a level not to exceed the amount received by him immediately before the time of the violation.[180]

Section 447.501(2)(e) makes participation in a strike an unfair labor practice for a public employee organization or anyone acting on its behalf. On the basis of the first amendment and the PERA "free speech" proviso,[181] Florida's First District Court of Appeal upheld PERC's finding that a teacher union's distribution of leaflets and flyers depicting the school superintendent and school board negotiator in an adverse light did not constitute an unfair labor practice.[182] The court held, however, that picketing of the school superintendent's home by disgruntled teacher union members could constitute an unfair labor practice

176. *Id.* at 251.

177. FLA. STAT. § 447.507 (1985).

178. *Id.* § 447.507(3).

179. *Id.* § 447.507(4).

180. *Id.* § 447.507(5). *See also In re* City of Coral Gables, 11 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 16,025, at 90 (Dec. 19, 1984) (The Commission agreed to drop charges against police officers participating in a public employee strike. In return, most of the officers agreed to pay to the Commission 24 hours gross pay; two others agreed to either pay 16 hours of gross pay or work two eight-hour shifts without pay).

181. FLA. STAT. § 447.501(3) (1985).

182. Duval County School Bd. v. Public Employee Relations Comm'n, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,028, at 26 (Oct. 3, 1978).

even in the absence of threats of violence.[183] The court relied heavily on NLRB and United States Supreme Court decisions in private sector labor cases.[184]

In addition to its authority to seek injunctions, PERC may take the following actions when it determines that an employee organization has violated the section 447.505 strike prohibition: (1) issue cease and desist orders; (2) suspend and revoke certification of the organization; (3) revoke the right of dues deduction and collection previously granted under section 447.303; and (4) assess damages against the organization up to $20,000 for each calendar day of such violation, or determine the approximate cost to the public due to each calendar day of the strike, if in excess of $20,000. Such fines shall accrue to the public employer to be used to replace services denied to the public as a result of the strike. In determining the amount of the damages, PERC must take into consideration any action or inaction by the public employer or its agents that provoked, or tended to provoke, the strike by the public employees.[185] An organization in violation of section 447.505 may be barred from certification for one year from the date of final payment of any fine against it.[186] The mere pendency of an appeal from imposition of strike penalties does not require a stay of implementation of PERC's order of penalties.[187]

c. Legal Prohibition Has Not Prevented all Strikes

Despite the severe sanctions for strikes against both the organization and individuals, a number of strikes and threatened strikes have occurred since PERA was implemented in 1975. Although no attempt will be made here to chronicle in detail all strike-related occurrences, examples will be given to illustrate the evolution of PERC's enforcement policies. During the early years of the Act, PERC's response to public employee strikes was characterized by swift and decisive action to obtain injunctions from the circuit courts. In 1975, the Broward County Teachers Association went on strike, and the strike was enjoined promptly upon the petition of PERC. The First District Court of Appeal upheld the circuit court's action.[188] As a result, the teacher's association agreed in a settlement stipulation to pay a $40,000 fine and to post certain notices.[189]

Between 1976 and 1978, PERC obtained injunctions when employees struck or threatened to strike the following public employers: City of Coral Gables, Broward County School Board, Halifax Hospital in Daytona Beach, Duval County School Board, City of Jacksonville, and City of Orlando. PERC at-

183. *Id.* at 26-27.

184. *Id.* at 27.

185. FLA. STAT. § 447.507(6)(a) (1985).

186. *Id.* § 447.507(6)(b).

187. City of Hollywood v. International Bhd. of Police Officers, Local 621, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 13,013, at 13 (Dec. 2, 1981).

188. Broward County Classroom Teachers Ass'n v. Public Employees Relations Comm'n, 331 So. 2d 342 (1st D.C.A.), *cert. denied*, 341 So. 2d 1080 (Fla. 1976).

189. Public Employee Relations Comm'n v. Broward County Classroom Teachers Ass'n, 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 121, 122 (Mar. 17, 1977).

torneys also were involved in an abortive strike situation at the Hollywood facility of the State Department of Health and Rehabilitative Services.[190]

In April 1978 the City of Tallahassee discharged certain blue collar workers for their involvement in a strike action. Neither the city nor PERC sought an injunction. Counsel for the discharged employees filed a complaint for declaratory relief in the circuit court of the second judicial circuit. The complaint sought a determination of the city's authority to dismiss the plaintiffs in the absence of a determination either by the circuit court or by PERC that the employees had violated the strike provisions of PERA, and an injunction requiring the city to reinstate the employees to their previous positions with back pay. The circuit court held that PERC could grant complete relief to the parties and directed the city to submit the matter to the Commission.

The Commission responded in *City of Tallahassee*[191] by concluding that section 447.507 required neither the Commission nor the public employer to file suit to enjoin a strike, but merely permitted them to do so where a strike was in active progress. It noted that in addition to filing suit under section 447.507, the public employer has the option of filing an unfair labor practice charge under section 447.503. The Commission concluded further that although it has independent authority to initiate injunctive proceedings, the statute does not require it to intrude where, as in this case, the public employer already had taken effective action to end the strike and discipline employees who had refused to work.[192] The city had authority to discipline its employees in any lawful manner.[193] The statute did not require a public employer to submit such matters to PERC for resolution before taking disciplinary action. Finally, PERC noted that although the discharged employees had the option of filing an unfair labor practice charge against the city pursuant to section 447.501(1),[194] the employees lost their right to file such ULP charges because charges were not filed within the statutory six month limitation.[195]

Thereafter, PERC changed its approach to strikes and no longer routinely sought an injunction when a possible strike action came to its attention. Strike actions were threatened, but did not materialize, in the Dade County Public Schools and in the Coral Gables Police Department. A "sick out" of employees at the Jacksonville Electric Authority did occur in 1978.[196] PERC did not seek

190. This summary is based on a report by former PERC Chairman Powers. W. POWERS, HISTORY OF STRIKES IN FLORIDA FOLLOWING THE IMPLEMENTATION OF CHAPTER 447, FLORIDA STATUTES (1980).

191. 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,100, at 122 (Apr. 9, 1979).

192. *Id.*

193. A "management rights" clause was written into the employment relationship by the legislature. FLA. STAT. § 447.209 (1985). It provides, among other things, that a public employer has the right to "direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of a lack of work or for other legitimate reasons." *Id.*

194. *Id.* § 447.501(1)(a). This section prohibits a public employee from: "Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part . . . [and from] encouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment." *Id.*

195. FLA. STAT. § 447.503(6)(b) (1985).

196. Powers, *supra* note 190, at 7.

an injunction in any of these cases. Although additional strikes and strike threats have occurred since 1978, PERC's usual approach has been to offer assistance to the employer, but to defer to the employer the decision about whether an injunction should be sought.[197] This approach emphasizes the policies of minimal intrusion by state government, while maximizing local control over the dynamics of bargaining. Fortunately, no major strikes have occurred of the magnitude of the 1968 teachers strike.[198]

During the 1979-80 fiscal year, nine potential strike situations resulted in public employee strikes in five locations yielding 1,252 workdays lost. Strikes involved sanitation workers in Clermont, Dade County, Hialeah, North Miami Beach, and Tampa, and maintenance workers in Dade County. The work stoppages ranged from one day to five days.[199]

During the 1980-81 fiscal year, eight potential strike situations resulted in four actual strikes. Three were in Hollywood, where sanitation workers, police and fire department employees participated in separate job actions. Homestead police officers also struck, bringing the total number of days lost to 508. The strikes were only of one-day durations, with the exception of the Hollywood police strike which resulted in employees being out for one to three days.[200]

d. Lockouts by Management

In the private sector, employers may under certain circumstances lawfully "lock out" employees for tactical reasons. Numerous NLRB and court decisions have upheld the legality of such lockouts when the employer was motivated by legitimate business reasons.[201]

Lockouts by public employers generally are not viable alternatives for employer self-help, due primarily to the employer's legal obligation to provide governmental services. Furthermore, lockouts are discouraged by the limitations of civil service, constitutional due process and statutory restraints on the suspension or termination of public employee services.

2. Unilateral Action by Management

a. Private and Public Sector Approaches Compared

The extent to which a public employer is permitted to take unilateral action on mandatory subjects, before and after declaration of impasse, will have a direct bearing on the reservation of local or political control of governmental services. In the private sector, employers generally may not take such unilateral action prior to impasse, although they may thereafter implement unilateral changes

197. *Id.*

198. *See* Dade County School Bd. v. Dade County Maintenance Employees Comm., 6 FLA. PUB. EMPL. REL. (LAB. REL. PRESS) ¶ 11,109 (1980).

199. PERC Chairman's Annual Report 1980, at 7 (1980).

200. PERC Chairman's Annual Report 1981, at 8 (1981).

201. Significant decisions are discussed in 18F. H. KHEEL, BUSINESS ORGANIZATIONS, ch. 35 (1984).

if the changes are not more favorable than the proposals made to the union,[202] and the impasse was not caused by the employer's refusal to bargain in good faith.[203]

PERC's approach under the Florida Act has been similar to that of the NLRB under federal labor legislation, but it accommodates the unique budgetary and other statutory restraints on the employer. The general rule in Florida is that a public employer's unilateral alteration of the wages, hours, or other terms and conditions of employment of employees represented by a certified bargaining representative constitutes a per se violation of sections 447.501(1)(a)[204] and (c).[205]

In *Pasco County School Board v. Florida Public Employees Relations Commission*,[206] the First District Court of Appeal cited with approval the principles stated by the United States Supreme Court in *NLRB v. Katz*:[207]

> The duty to bargain collectively . . . is defined . . . as the duty to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment. Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact* — "to meet . . . and confer" — about any of the mandatory subjects.[208]

The teachers association alleged that the school board had, among other things, unilaterally reduced the salaries for bargaining unit employees for the coming school year. The board argued that its action was in good faith and had been necessary under the circumstances because it feared a deficit for the coming year. Both PERC and the First District Court of Appeal, in affirming the Commission's order, rejected this argument and found that the school board was statutorily mandated to bargain collectively with the association's representative in good faith.[209] In its decision, PERC also cited with approval a decision of the New York Public Employment Relations Board,[210] stating that "where public employees are denied the right to strike [as they are in Florida],

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202. NLRB v. United States Sonics Corp., 312 F.2d 610 (lst Cir. 1963).

203. Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 625 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

204. FLA. STAT. § 447.501(1)(a) (1985). This section prohibits a public employer or an agent thereof from "[i]nterfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part." *Id.* When a public employer is found to have violated § 447.501(1)(c) for failing to bargain as a result of unlawful unilteral action, a violation of § 447.501(1)(a) generally also is found.

205. *Id.* § 447.501(c). This section prohibits an employer from refusing to bargain in good faith. Subjective good faith is not a defense. Central Fla. Prof. Fire Fighters Local 2057 v. Orange County, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,171, at 782 (Nov. 14, 1983).

206. 353 So. 2d 108 (Fla. lst D.C.A. 1977).

207. 369 U.S. 736, 742-43 (1962).

208. 353 So. 2d at 126 (Emphasis in original).

209. *Id.* at 124.

210. Triborough Bridge & Tunnel Auth., 5 PERB ¶ 3064 (N.Y. PERB 1972).

. . . 'the duty of an employer in the public sector to refrain from self help is greater than is the similar duty of private sector employers.' "[211]

b. Elements in Finding of Unlawful Unilateral Action

To find that a public employer has violated the duty to bargain by taking unilateral action, it must be proved that a change in the terms and conditions of bargaining unit employees actually occurred.[212] If an employer merely acted in conformance with prior unchallenged changes in the status quo, this compliance is not a violation of the Act.[213] The change must affect the collective interests of the bargaining unit employees;[214] must affect terms and conditions of employment for members of the bargaining unit;[215] must be a unilateral change;[216] and must occur without proper notice.[217] A unilateral change may be unlawful if it results in the granting of benefits,[218] a change in existing terms,[219] a change in expired contract terms,[220] or a change in past practice.[221]

c. Accommodation for Unique Aspects of Public Employment

While similarities exist between the approaches taken by PERC and the NLRB, significant departures may occur in the public sector to reflect the

211. Pasco Classroom Teachers Ass'n v. Pasco County School Bd., 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 9, 14 (Apr. 1, 1976) (citing Triborough Bridge & Tunnel Auth., 5 PERB ¶ 3064 (N.Y. PERB 1972)).

212. Ft. Lauderdale Fire Fighters, Local 1545 v. City of Ft. Lauderdale, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,218, at 320 (Aug. 18, 1980).

213. Local Union 1998, I.B.P.A.T. v. Franklin County School Bd., 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,111, at 266 (Feb. 13, 1981).

214. Manatee Educ. Ass'n v. Manatee County School Bd., 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,017, at 33 (Dec. 4, 1980).

215. St. Petersburg Ass'n of Fire Fighters, Local 747 v. City of St. Petersburg, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4201, at 362 (May 11, 1978).

216. *E.g.*, Hendry County Educ. Ass'n v. School Bd., 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,405, at 741 (Oct. 14, 1982) (PERC denied the school board's motion for a preliminary order requesting that the Commission authorize implementation of the school board's legislatively imposed salary schedule because the association indicated its consent in the pleadings before PERC. Thus, the proposed action of the board was in fact a bilateral change in the status quo.). *See also* Orange County Police Benevolent Ass'n v. City of Casselberry, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,126, at 217 (Mar. 4, 1982).

217. Duval Teachers United v. School Bd., 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,271 (Oct. 16, 1980).

218. *See* Dade County Employees Local 1363 v. City of South Miami, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4065, at 142-45 (Feb. 2, 1978).

219. Florida Classified Employees Ass'n v. Taylor County School Bd., 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,100 (Feb. 5, 1981).

220. Pinellas County Police Benevolent Ass'n v. City of St. Petersburg, 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 205, 208 (July 19, 1977).

221. Board of County Comm'r of Orange County v. Central Fla. Prof. Fire Fighters Ass'n, 11 FLA. PUB. EMPL. REP (LAB. REL. PRESS) ¶ 16,167, at 481 (Jan. 31, 1985). St. Petersburg Ass'n of Fire Fighters v. City of St. Petersburg, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,381, at 389 (Nov. 13, 1979); Jacksonville Ass'n of Fire Fighters v. City of Jacksonville, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4248, at 44-42 (June 22, 1978).

unique budgetary and statutory rights and duties of the public employer. In *City of Tallahassee v. Public Employee Relations Commission*,[222] the Florida Supreme Court, while reaffirming that public employees have the same right of collective bargaining as private employees, recognized that "because the bargaining process for public employees involves many special considerations,"[223] public and private employee bargaining will not be identical. One of the most notable special considerations is that a public employer must conform not only to rules and regulations governing public employee collective bargaining, but must also conform to the statutes and regulations which govern its day-to-day operations. In this regard, an act which might otherwise constitute an unlawful unilateral act on the part of a public employer may be lawful if carried out in conformance with a statute or regulation requiring the employer's conduct.

In *Broward Classroom Teachers Association v. School Board*,[224] one of the unfair labor practice charges brought by the association alleged that the school board had violated section 447.501(1)(c)[225] by unilaterally adopting a school budget for the coming year while the parties were mediating an impasse over wages and other terms and conditions of employment. PERC held that mere adoption of the school board's budget did not constitute an unlawful unilateral action. The Florida Administrative Code Rules required the board to adopt its yearly school budget within a certain time frame. The Commission also observed that common sense dictated that budgets must be adopted before the school term begins if the school system is to function in an orderly and fiscally responsible fashion.[226] Additionally, negotiations need not cease due to the adoption of the budget, because the school board would be allowed by statute to modify the budget in order to accommodate a subsequent collective bargaining agreement.[227] In actual practice, however, adoption of the budget often freezes the employer's position and provides at least a facial justification for a hold-the-line position before the special master.

In a 1982 decision involving the same parties,[228] PERC dismissed an unfair labor practice charge alleging that the board unlawfully and unilaterally had adopted a school calendar during negotiations. The school board was required by statute to adopt a school calendar before the fiscal year began. Furthermore, the board had continued to negotiate with regard to the calendar after its adoption. PERC dismissed the charge and found that the board had not violated its duty to bargain. Where the necessity of adopting at least a tentative school calendar before the beginning of the school year was dictated not only by statute, but also by common sense, PERC would not interfere with the board's procedure.[229]

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222. 410 So. 2d 487 (Fla. 1982).

223. *Id.* at 490-91.

224. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4264, at 484 (July 14, 1978).

225. FLA. STAT. § 447.501(1)(c) (1983).

226. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4264, at 484.

227. *Id.* at 485.

228. Broward County Classroom Teachers Ass'n v. School Bd., 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,353, at 626 (Aug. 31, 1982).

229. *Id.* at 627.

Public employers also are in a unique position in that certain subjects which constitute terms and conditions of employment for bargaining unit employees may be under the direct control of a governmental agency or board independent from the public employer itself. This problem, and how it is dealt with in Florida's public sector, is illustrated by *Orange County Police Benevolent Association v. City of Orlando*.[230] The city had a Civil Service Act which granted exclusive power to regulate promotional procedures to the Civil Service Board. While the city had no authority to control the action of the Civil Service Board, it nevertheless was found to have violated its duty to bargain with the union when changes in the civil service rules were promulgated. The violation of the duty to bargain occurred not because the board had implemented the changes, but because the city had requested the board to make the changes. Under section 447.309(3),[231] a public employer has authority to request changes in rules over which the employer has no amendatory power "*after agreement* upon a collective bargaining agreement provision which is in conflict with an existing . . . rule."[232] Because the city had failed to bargain with the union before making the request for the rule change, and thus had attempted to do indirectly that which it could not have done directly,[233] the city had violated the duty to bargain under section 447.309(1).[234] The discretion of a statutorily independent board therefore will not necessarily insulate its parent public employer from the duty to negotiate in good faith.[235]

Another difficulty in drawing analogies to private sector law on unilateral action is that the Florida PERA requires certain administrative steps when impasse occurs as a precondition to unilateral imposition of changes. Unlike the private sector, where the parties essentially are left to their own devices once impasse is declared, third party procedures of mediation and fact-finding in the public sector are extensions of the negotiations process. When third party procedures are exhausted or waived, and the legislative body has held the required public hearing, then the statute prescribes unilateral action.[236] If the parties waive mediation and/or special master proceedings, the legislative hearing nevertheless is mandatory. Responses to the special master's recommended decision, and legislative action by the employer, will be discussed in Part III, section D.

B. *Mediation*

1. Invoking the Mediation Process

Mediation is a process by which an impartial third party assists the parties in efforts to reconcile their differences. The mediator has no power of com-

230. 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,019 (Dec. 5, 1980).
231. FLA. STAT. § 447.309(3) (1985).
232. 7 FLA. PUB. EMPL. REP (LAB. REL. PRESS) ¶ 12,019, at 44 (Emphasis in original).
233. *Id.*
234. FLA. STAT. § 447.309(1) (1985).
235. 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,019, at 44. *See also* Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Auth., 11 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 16,102 (March 25, 1985).
236. FLA. STAT. § 447.403(4)(d) (1985).

pulsion, but must depend on powers of persuasion, logic, suggestion and advice. Mediation is strictly voluntary in Florida's public sector. At any time after the commencement of negotiations, either party may file a "Notice of Negotiations" supplying PERC with certain essential information about the parties and information relevant to bargaining.[237] After receiving notice, PERC will consult with the appropriate regional office of the Federal Mediation and Conciliation Service (FMCS) and notify the parties about availability of a mediator.

When an impasse occurs, either party may invoke the services of PERC to secure the appointment of a mediator or the parties may jointly appoint a mediator on their own initiative.[238] At least in theory, any person selected upon mutual agreement of the parties may serve as mediator. In practice, PERC invariably has appointed a mediator through the FMCS.[239] Although FMCS may decline to assert jurisdiction over a dispute, it does provide mediators to public sector disputants without charge. PERC has authority to maintain a roster of mediators to serve in the event FMCS declines jurisdiction.[240] In that event, the parties would bear the cost of mediation.[241] This roster has been inactive, however, and PERC has no record of ever having appointed a private mediator in lieu of an FMCS appointment.[242]

2. How Mediation Works

In the typical mediation session, the mediator brings both parties together in a joint session to identify the issues in dispute. Thereafter, the mediator sends the parties to separate rooms and meets with them in a series of independent sessions. The separate meetings enable the mediator to discover possible grounds for settlement while shuttling back and forth between management and labor representatives. Because the mediator is merely a nonjudgmental facilitator of settlement and does not make official recommendations nor render an award, the parties are more likely to reveal their true limits and bargaining objectives during such private sessions. To encourage the parties to place trust in the mediator, the regulations prescribe confidentiality of all information and papers received or prepared by the mediator during the course of his official duties. Reports issued by the PERC Chairman disclose a high settlement rate for disputes referred to mediation.[243]

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237. 10 FLA. ADMIN. CODE 38D-19.01. This provision provides that such notice "may" be submitted, indicating its voluntary nature. *Id.*

238. FLA. STAT. § 447.403(1) (1985).

239. 10 FLA. ADMIN. CODE 38D-19.02.

240. FLA. STAT. § 447.207(5) (1985).

241. FLA. STAT. § 447.407 (1985).

242. Interview with Millie Seay, Executive Assistant to the PERC Chairman (Jan. 17, 1985).

243. The following data for 1978-1981 was derived from Chairman's Annual Report 1981; data for 1981-1984 was derived from PERC Chairman's Annual Report 1984:

3. Mediation and the "Sunshine Law"

Since the passage of PERA, mediators have conducted public sector mediation in completely closed sessions, following the approach that proved so advantageous in mediation of private sector disputes. However, the countervailing state policy favoring full public disclosure of government business limits blanket application of this confidential approach in public sector mediation. In 1983, the Florida Circuit Court of Palm Beach County held in *Fire Fighters, Local 1560 v. City of Boca Raton*[244] that pursuant to Florida's "Sunshine Law,"[245] the city was enjoined from conducting face-to-face bargaining sessions in private, whether or not a mediator was present. The court rejected the city's argument that the Sunshine Law applied to negotiation sessions only, not to mediation sessions.

Because mediation is an extension of negotiation, this application of the Sunshine Law probably comports with the legislature's intention to ensure that government meetings be open to the public. The inability of the mediator to conduct such joint sessions in private, however, strikes a crippling blow to this otherwise salutary process. Ironically, mediation must be conducted in a fishbowl atmosphere even when the underlying impasse might have been triggered in part by the posturing and fixation of positions brought on by open public bargaining sessions.

State circuit courts have jurisdiction to issue injunctions to enforce Florida's Sunshine Law upon application by any citizen of the state.[246] PERC's General Counsel has ruled that the Commission's jurisdiction is limited to administering and enforcing Chapter 447, Part II,[247] and does not extend to enforcement of

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1978-1984
Mediation: Percentage Rate of Settlements

Results	FY 1978	1979	1980	1981	1982	1983	1984
Agreement by the parties	84%	66%	82%	89%	85%	85%	66%
Referred to Special Master	9%	20%	13%	5%	5%	1%	2%
No need for mediation	7%	14%	5%	6%	4%	6%	3%
Other	-	-	-	-	6%	8%	29%

Note: The "other" category was added after the 1981 report.

244. 10 FLA. PUB. EMPL. REP. (LAB. REL PRESS) ¶ 15,043 (Dec. 3, 1983).
245. FLA. STAT. § 286.011 (1985).
246. *Id.* § 286.011(2).
247. "By order issued May 23, 1984, Order No. 84-101, the Commission delegated to its General Counsel the authority to determine the sufficiency of every unfair labor practice charge filed with the Commission and to notify the respective parties of his determination." Cumbie v Harber, 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,159, at 298 (June 28, 1984).

the Sunshine Law.[248] Therefore, although private mediation might thwart statutory intent, unless someone protests these meetings they remain confidential.

4. Mediation is a Voluntary Process

Most states with collective bargaining legislation for public employees have provided for some form of mediation.[249] Generally, mediation is a voluntary process available at either party's request. In a small minority of states, the agency responsible for administering the bargaining law may require the parties to submit to mediation.[250]

Mediation is strictly voluntary in Florida; neither PERC nor the mediator has any power of compulsion in the mediation process, and neither party can be compelled to utilize fully the mediation process.[251] If a party withdraws from or refuses to engage in mediation as retaliation for protected activities, PERC concludes that an adequate remedy is available in unfair labor practice proceedings.[252] Although the generally held view is that mediation should be a voluntary process, this element of voluntarism proves to be a weak link in the chain of events leading to settlement when the stronger party has no incentive to settle. The public has a vital interest in disputes between government and its employees, and different dynamics are involved than when a private sector employer and its union are at impasse. Understandably, mediators might prefer to deal only with parties who submit willingly to mediation. Nevertheless, some employers might not wish to mediate because they do not want an agreement — any agreement — with a union. At certain times a union will prefer to strike rather than to express a willingness to compromise by seeking mediation. In short, PERC should have authority to compel the parties to submit to the salutary process of mediation.

C. *Special Master Proceedings*

1. Criteria for Effective Special Master Proceedings

If mediation fails to resolve all impasse issues, or if the parties elect to waive mediation entirely, special master proceedings are then available. Because the special master has wide latitude and discretion in making hearing arrangements, ruling on motions, and conducting the hearing, each proceeding will take on the imprint of the individual special master's style. The special master is given a general mandate to recommend a decision with the objective of achieving "a prompt, peaceful, and just settlement of disputes."[253] In view of

248. *Id.*

249. *See supra* notes 16-30 and accompanying text. The statutes are reproduced in [1985] GOV'T EMPL. REL. REP. (BNA) pt. 51.

250. *See, e.g.*, KAN. STAT. ANN. § 44-826 (1981); N.Y. CIV. SERV. LAW § 209 (McKinny Supp. 1984).

251. *E.g.*, Professional Fire Fighters, Local 2630 v. City of N. Lauderdale, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,018, at 39 (Dec. 4, 1980).

252. *Id.*

253. FLA. STAT. § 447.405 (1985).

this mandate and other purposes and policies expressed by state statutes and the state constitution, the effectiveness of a special master proceeding may be evaluated by the following criteria:

1. *Both the process and the special master should be readily accessible to the parties.* Although the parties should not communicate with the special master on the merits of the case ex parte, the master should be readily accessible to and responsive to communications on other appropriate matters, such as hearing arrangements, motions, and requests for subpoenas.

2. *The hearing process should proceed expeditiously toward the prompt rendition of a recommended decision.* Prompt attention should be given to scheduling and holding of hearings, filing of transcripts and briefs, and filing of the special master recommended decision. PERC is obligated to ensure that neither the parties nor the special master unduly delays the proceedings, for the public has an interest in prompt resolution of public employment labor disputes. A special master who cannot hear and decide cases on a timely basis because of a heavy caseload or other reasons should decline appointments, or in the alternative, be removed from the special master list by PERC.

3. *The rights of the parties should be protected.* The special master should give particular attention to the parties' rights to a full and fair hearing on all issues in dispute. In addition, the parties must be allowed the following rights: To be present and represented at the hearing; to have reasonable access by subpoenas to evidence and information necessary to the preparation of the case; to present witnesses; and to confront and cross-examine witnesses of the opposing party. In short, the special master should accord to the parties at least a modicum of due process at each stage of the proceedings.

4. *The process should be time-efficient.* Because a prompt settlement is one of the overall objectives of the process, the special master should move quickly to each successive step in the process. Although the evidence presented is largely controlled by the parties, the special master should be responsive to objections on such grounds as irrelevancy, duplication or cumulative evidence, or waste of time. Stipulations of evidence during the course of the hearing often can be obtained at the special master's urging.

5. *The process should be perceived by the parties as fair, just and impartial.* The regard for a time-efficient hearing must be balanced with the equally important objective that each party perceives it is receiving a full and fair opportunity to present its evidence and challenge that of its opponent. Sometimes, the special master will permit a party representative or a witness to speak at length even though a more concise presentation would serve the purpose. The special master permits this because the venting of one's full position and frustrations to an impartial person may in itself have a therapeutic effect on the bargaining relationship. Above all, however, the special master must be impartial, because without evident impartiality, otherwise acceptable recommendations might be rejected as the result of a perceived bias.

6. *The special master should attempt to foster good labor relations between the parties.* This objective may be extremely difficult when the parties come to the hearing with a long history of bitter labor relations, marred by personal animosities. The special master likely will have numerous opportunities to inject the more

reasoned views of an objective observer when hostilities surface. For example, personal invective and attack should be courteously but firmly prohibited. If mediation appears appropriate, the special master may be able to broaden the parties' range of vision to encompass alternatives other than direct confrontation on mutually unacceptable positions. The special master should write his decision with candor, fairly assessing each party's position. Overly harsh criticisms of either party should be avoided because it can place the criticized party in a defensive posture, detrimental to good labor relations. In short, the special master should use every opportunity to be a peacemaker as well as adjudicator.

7 *The recommended decision should provide a final resolution to each issue.* The recommendations should be sufficiently clear, explicit and unambiguous to permit implementation by the parties. The mere expression of general concepts or ideas, however laudable, can result in rejection simply because the parties cannot agree on what the recommendations will actually mean at the implementation stage. Sometimes, of course, the special master will not have enough information or the subject matter will be too complex to render a detailed program for adoption.

8. *The recommendation should be credible and express a sense of justice.* Because the special master's decision is an advisory recommendation only, he can ill afford merely to announce his disposition of the issues, as if by fiat, without the benefit of a persuasive rationale supporting each decision. The special master in effect is called upon to sell his recommendations to the parties and the public. The recommendations should fall within the realm of reasonable acceptability For example, to suggest that teacher salaries should be doubled to reflect the contributions teachers make to our society might be a wise and accurate judgment in the abstract, but unacceptable in the context of a poor county school system that already pays its teachers as much or more than other school systems in the local operating area.

The above criteria, while drawn from state policies articulated by the legislature, PERA and the constitution, necessarily reflect personal value judgments of this author/special master. Variations on these criteria may also be acceptable. Satisfaction of these criteria, however, will almost invariably improve upon the decisional process, and should meet the expectations of state law and policy

2. The Mandatory Character of Special Master Proceedings

Prior to the 1984 amendments, special master proceedings were mandatory in cases of bargaining impasse.[254] In the case of *In re FTP-NEA*,[255] PERC held that the special master proceeding was not waivable by the parties because the statute used the words "shall appoint." PERC reasoned that the parties cannot waive a right unless that right is intended solely for the parties' own benefit. PERC concluded that the legislature intended the statute to benefit the "public interest," as well as the negotiating parties. Waiving the special master pro-

254. *Id.* § 447.403(2) provides that: "[U]pon the request of either party, the Commission *shall appoint*, and submit all unresolved issues to, a special master." (emphasis added).

255. 5 FLA. PUB. EMPL. REP (LAB. REL. PRESS) ¶ 10,023, at 23 (Jan. 22, 1979).

ceeding would be antithetical to collective bargaining, and therefore antithetical to the most fundamental policy of the Act.[256]

In 1984, the Florida Legislature passed House Bill 87 and amended section 447.403 specifically to permit the parties, by mutual agreement in writing, to waive special master proceedings entirely and proceed directly to resolution of the impasse by the legislative body.[257] This provision became effective October 1, 1984. In *City of Casselbery v. National Association of Governmental Employees*, however, PERC granted the parties' joint motion for leave to waive the special master hearing prior to the effective date of the amendment.[258] PERC apparently viewed strict enforcement of the special master hearing requirement unnecessary in light of the legislature's more relaxed position on such hearings. PERC was concerned that a contrary ruling would cause some parties to stall the special master proceedings until the October 1st deadline.[259]

The impact of the new waiver option is difficult to assess at this early date. On the positive side, the amendment permits the parties to avoid the expense of special master proceedings if resolution by third-party intervention seems unlikely. A waiver requires the consent of both parties, however, and it is unlikely this will occur in a majority of the cases.

The need for this amendment is not readily apparent. The Bill Summary on House Bill 87[260] included a fiscal impact statement which speculated that a typical special master hearing costs approximately $2,500, split evenly by the parties. Based on the assumption that *all* impasse situations would result in a waiver, approximately $36,250 would have been saved by public employers during fiscal year 1983. This amount is miniscule in the context of a state Florida's size. Considering that these savings would have been offset by an estimated fifty percent increase in the number of legislative body hearings, and that those hearings likely would have been longer and more complex as a result of not having the benefit of a fact-finder's recommendations, any anticipated savings quickly vanish. The increased cost of legislative body hearings would not be split by the parties, but would be absorbed entirely by the governmental entity involved. Furthermore, even a substantial decrease in the number of special master hearings would result in only a negligible fiscal savings to PERC.[261]

When special master proceedings are waived, the dispute proceeds to resolution by the legislative body pursuant to section 447.403(4)(d). Therefore, the parties should obtain an understanding of the nature of the hearing conducted by the legislative body before that body takes final action.

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256. *Id. See also In re* Melbourne Fire Fighters Ass'n, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,041 (Jan. 30, 1979); Broward Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4350 (Nov. 9, 1978). *Compare* International Ass'n of Fire Fighters, Local 2135 v. City of Ocala, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,167, at 206 (May 24, 1979).

257. 1984 Fla. Laws 228.

258. 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,204, at 401 (Aug. 9, 1984).

259. *Id.* at 402.

260. Bill Summary HB 87, Comm. on Retirement, Personnel & Collective Bargaining (Dec. 14, 1983).

261. *Id.* at 3.

On balance, however, the amendment may not be in the public's best interest because it serves to deny the public, the ultimate beneficiary of special master proceedings, of the informed judgment of a neutral hearing officer. Further, it will relieve the parties of the difficult but important step of identifying and isolating those issues of critical concern in the bargaining impasse. Although special master proceedings can be costly, the salutary effects of having the final arguments and positions of the parties tested in public before an informed and impartial decision-maker would seem to inure to the best interests of the general public. In cases decided under PERA when special master proceedings were mandatory, such proceedings were considered an essential step in protecting the public interest and insuring a degree of impartiality in the dispute resolution process.[262]

In summary, the amendment permitting waiver of the special master proceedings is ill-conceived and, on balance, not in the public's best interest. Once negotiation and mediation efforts have failed, the public trial of each party's position before an impartial decision-maker is the best way to ensure that the process is open to public scrutiny. In the absence of the right to strike or lock out, little is left to encourage compromise.

3. Agreement in Advance to be Bound by the Special Master's Decision

Apart from the question of whether special master proceedings can be waived is the question of whether the parties can ascribe to the special master's decision in advance a greater weight of authority than that provided in the state statute. Generally, PERC has left open the possibility of voluntary waiver or alteration of certain statutory procedures, provided mutual consent is present. In dicta, PERC stated in a 1978 decision that parties may, by mutual consent, bargain to impasse resolution instead of following the statutory scheme.[263] When a teacher union refused to participate in special master proceedings unless the school board employer would agree to accept the master's award in advance, PERC held that such deviations could occur only upon a mutual agreement.[264] In *In re City of Boynton Beach*,[265] however, PERC approved the parties' mutual waiver of their statutory right to reject the special master's recommendation. They agreed to submit all unresolved mandatory subjects of bargaining to the special master and to be bound by his decision.

In 1984 the Fourth District Court of Appeal held unconstitutional a proposed city ordinance that would have bound the city to accept special master decisions in cases involving fire fighters. In *West Palm Beach Association of Fire Fighters v.*

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262. *In re* FTP-NEA, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,023, at 22 (Jan. 22, 1979); *In re* Indian River School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4192, at 353 (May 4, 1978).

263. International Ass'n of Fire Fighters, Local 1365 v. City of Orlando, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4214, at 388 (May 18, 1978), *aff'd*, 384 So. 2d 941 (Fla. 5th D.C.A. 1980).

264. Broward Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4350, at 595 (Nov. 9, 1978).

265. 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,090, at 221 (Jan. 28, 1981).

City of West Palm Beach,[266] the court concluded that the proposed statute violated article VIII, section 2(b) of the Florida Constitution and clearly was inconsistent with the provisions of section 447.403(3) of the Florida Statutes.[267]

In *Board of Commissioners v International Association of Fire Fighters, Local 2577*,[268] a Florida circuit court granted the union's motion to compel binding interest arbitration pursuant to a collective bargaining agreement that required the parties to participate in such interest arbitration in the event that reopener negotiations did not produce an agreement within thirty days. The court expressed reservations about this arrangement because PERA clearly places final responsibility for determining public interest on the agency Board.[269] The court suggested, however, that having agreed to arbitrate this interest dispute, the employer should at least go through the arbitration proceeding and thereafter submit any reasons it has for requesting the court to relieve it of its agreement. This approach would serve the PERA policy because it would be tantamount to a special master proceeding with the question as to the binding nature reserved.[270] However, the court required arbitration only with respect to mandatory subjects of bargaining, expressing the opinion that binding interest arbitration could not be used for permissive subjects of bargaining.[271]

For at least two major reasons, PERA does not permit such agreements to be submitted to binding interest arbitration. First, the Florida Legislature had the opportunity to enact binding interest arbitration provisions when PERA was drafted, but instead chose to make special master recommendations advisory only. In doing so, the legislature articulated the state policy of preserving local or political control of the ultimate decision by the legislative body. This legislative intent will be frustrated if a public employer may submit to binding interest arbitration without express authorization from the legislature.

Second, Florida has followed a very strict requirement for "adequate standards" when legislative powers are delegated. A public employer which attempts to delegate its powers to an arbitrator with neither legal authorization nor

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266. 448 So. 2d 1212 (Fla. 4th D.C.A. 1984).

267. *Id.* The proposed ordinance provided:

> In any contract involving terms or conditions of employment, between the City of West Palm Beach and its firefighter employees acting through its employee organization, where unresolved issues are submitted to a special master pursuant to Florida Statutes chapter 447.403 and 447.405, it shall be deemed to be in the public interest including the interest of the employees involved for the commission of the City of West Palm Beach to accept the recommended decision of the Special Master, and such recommended decision shall be accepted unless there was not competent substantial evidence to support that recommended decision, provided: however, if the firefighter employees strike in violation of state law to coerce acceptance of the recommended decision, this provision shall not be applicable. In the event there is any disagreement concerning this provision, the matter shall be resolved by application of either party to the Circuit Court of the Fifteenth Judicial Circuit in and for the State of Florida.

Id. at 1213 n.1.

268. 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,283 (Fla. 20th Cir. Ct. Sept. 4, 1984).

269. *Id.* at 649.

270. *Id.* at 650.

271. *Id.*

adequate standards to guide the arbitrator, violates article II, section 3 of the Florida Constitution. Because of the importance of the "adequate delegation standards" issue, it is treated in detail in Part III, section D.

4. Variations in Procedural Requirements

PERC has held that certain other statutory requirements can be altered upon mutual consent of the parties.[272] For example, joint requests for extensions of time in which to file the written notice of rejection of special master's recommendations have been liberally granted.[273] Generally, if consent by either party is withdrawn, the parties must return to the statutory procedures.[274]

Provided PERC takes appropriate steps to ensure that the special master process will not be unduly delayed, such minor variations from the statutory procedure are appropriate if both parties agree and PERC finds that such variations enhance the prospects for settlement. The ultimate goal of the special master proceeding is not the master's recommended decision, but the peaceful resolution of the labor dispute. The entire process is designed to achieve that end, and should not be frustrated by insistence upon mechanistic application of procedural steps and timetables. Although the process should move along on an expeditious basis, reasonable flexibility should be permitted. If, however, the parties are unduly delaying the process or otherwise attempting to vary the statutory procedure in ways that are inimical to the public interest, then PERC should not permit such variations.

5. The Selection and Appointment of the Special Master.

PERC maintains a list of approximately forty special masters, appointed on the basis of their education, experience, skill in written expression, neutrality, and willingness to undertake continuous training as special masters.[275] When the employer and the bargaining agent for the public employees cannot agree upon a special master, PERC employs a "striking system" to select one for them.[276] PERC sends each party a list containing the names and biographies of three special masters. The parties must then respond in writing within fifteen days of receipt of the list stating either rejection or acceptance of the listed persons.[277] If the parties choose the same individual, he or she will be appointed

272. *See* City of Miami Beach & Int'l Ass'n of Fire Fighters, Local 1510, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4196, at 356 (May 8, 1978).

273. *See* School Bd. v. Broward Classroom Teachers Ass'n, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,077 (Jan. 14, 1983); City of Hollywood v. International Ass'n of Fire Fighters, 9 FLA. PUB. REL. REP. (LAB. REL. PRESS) ¶ 14,045 (Dec. 9, 1982); Broward County v. International Ass'n of Fire Fighters, Local 2019, 9 FLA. PUB. REL. REP. (LAB. REL. PRESS) ¶ 13,197 (Apr. 28, 1982); Lake County School Bd. v. Lake County Educ. Ass'n, 8 FLA. PUB. REL. REP. (LAB. REL. PRESS) ¶ 13,079 (Jan. 19, 1982).

274. International Ass'n of Fire Fighters, Local 1365 v. City of Orlando, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4214, at 388 (May 18, 1978).

275. 10 FLA. ADMIN. CODE 38D-19.04.

276. FLA. STAT. § 447.403(2) (1985).

277. 10 FLA. ADMIN. CODE 38D-19.05(3).

special master.[278] If they reject the same person, the Commission will select a special master from the remaining two names.[279] If the above procedure fails, the Chairman will appoint a special master at his discretion from the roster maintained by PERC.[280]

6. "Impasse" — A Prerequisite to Special Master Proceedings

The special master has jurisdiction only in the case of an impasse in bargaining. In the common parlance of labor relations, an impasse exists at that point in negotiations when the differences of the parties are so substantial or prolonged that further meetings would be futile. Under the Florida PERA, however, the parties need not be totally deadlocked;[281] either party may create a statutory state of impasse by so declaring in writing to the other party and PERC, provided a "reasonable" period of negotiations has occurred.[282] Thus, one or both parties may declare impasse even though bargaining has not yet become completely futile, and despite the fact that further bargaining is contemplated. This standard for declaring impasse is more liberal than its counterpart in private sector labor law.[283]

To establish that a party has prematurely declared an impasse, the charging party must show that a "reasonable period of negotiation" has not transpired, or that the respondent party has refused to negotiate any mandatory subject prior to declaration of impasse.[284] PERC has been reluctant to find bad faith in such circumstances,[285] although it has stated that declaration of impasse may not be used to discontinue meaningful bargaining after impasse has been declared.[286] Unlike the private sector, the duty to bargain under Florida's PERA thus survives even a bona fide declaration of impasse.[287] Once an impasse has been declared, the question of whether impasse has been declared prematurely

278. *Id.* 38D-19.05(3)(b).

279. *Id.* 38D-19.05(3)(c).

280. *Id.* 38D-19.05(4).

281. Dade County Employees Local 1363 v. City of N. Miami Beach, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,317, at 635 (Sept. 8, 1983). *See also* Hollywood Firefighters Local 1375 v. City of Hollywood, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,333, at 597-98 (Aug. 18, 1982) (Renovitch, Comm'r, concurring).

282. FLA. STAT. § 447.403(1) (1985).

283. *Compare id. with* Latrobe Steel Co. v. NLRB, 630 F.2d 171, 179 (3d Cir. 1980) (illustrates the difference between private and public sector labor law).

284. International Bhd. of Police Officers, Local 621 v. City of Hollywood, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,334, at 598 (Aug. 18, 1982).

285. *Id.*

286. *Id.*; Leon County Police Benevolent Ass'n v. City of Tallahassee, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,057, at 138 (Jan. 7, 1981).

287. Professional Fire Fighters Ass'n, Local 2807 v. Southwest Fire Dist. 6, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,289, at 575 (Aug. 4, 1983); International Bhd. of Police Officers, Local 621 v. City of Hollywood, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,334, at 598 (Aug. 18, 1982); Hollywood Fire Fighters, Local 1375 v. City of Hollywood, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,333, at 597 (Aug. 18, 1982); Pinellas County Police Benevolent Ass'n v. City of St. Petersburg, 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 205 (July 19, 1977).

should be raised in unfair labor practice proceedings, not in a petition for a declaratory statement.[288]

If both parties agree that an impasse exists and some bargaining has occurred, PERC will probably not inquire into the "reasonableness" of the period of bargaining. Although a negotiator's persistent cancellation of meetings, late arrivals, and failures to attend meetings may evidence an overall course of conduct constituting a refusal to bargain,[289] a declaration of impasse may be reached before all scheduled meetings are completed if the parties remain open-minded to future proposals. In *City of Lakeland v. Lakeland Firefighters IAFF, Local 2350*,[290] the city filed charges against the IAFF, alleging that the union committed an unfair labor practice when it declared an impasse after completing only eighty percent of the agreed-upon schedule of negotiating meetings. The parties had met only a few times and had negotiated for less than sixty days; moreover, the budget submission date was more than seventy days from the date impasse was declared.[291] PERC found no violation by the union, noting that the union had "considered" all employer proposals and had stated a willingness to consider proposals.[292]

A declaration of impasse does not relieve a party of the continuing duty to bargain in good faith, and declarations of impasse will not be permitted to "cleanse" a prior illegal refusal to bargain.[293] The negotiator who anticipates making a declaration of impasse should ensure that the record reflects serious good faith efforts to discuss and resolve items at issue. If a party acts upon a premeditated intent to accelerate negotiations to a state of impasse for strategic reasons (for example, to enable the employer to implement its offer unilaterally after legislative hearing), PERC may find that an impasse does not exist and that the party's overall conduct establishes a violation of the duty to bargain. PERC, however, has taken a rather lenient approach to finding that an impasse exists. If neither party objects, PERC will generally declare an impasse regardless of the extent to which the parties actually have engaged in bargaining. As a result, special masters may hear evidentiary presentations at the hearing from parties who have not exhausted all reasonable possibilities for settlement.

To invoke the special master proceedings, the impasse must be over an "interest" dispute. In the case of *City of Margate v. Broward County Police Benevolent*

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288. *In re* Edison Community College, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4292 (Aug. 24, 1978).

289. *See, e.g.*, Escambia Educ. Ass'n v. School Bd., 2 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 93 (May 13, 1976).

290. 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 94 (April 19, 1977).

291. FLA. STAT. § 447.403 provided at times pertinent to this case that an automatic state of impasse would occur if no agreement was reached within 60 days of the commencement of bargaining, or at least 70 days prior to the budget submission date.

292. "We're willing to consider any kind of settlement that can be made in the period of time we're waiting for the [special master] and there's nothing that says we can't settle it if we get to that stage . . . ." 3 FLA. PUB. EMP. REP. (LAB. REL. PRESS) at 95.

293. Duval Teachers United v. Duval County School Bd., 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 96, 101-02 (Apr. 19, 1977).

Association,[294] the city and the PBA were parties to a collective bargaining agreement which contained the following language: "The City agrees to review salary structure pertaining to patrolmen and sergeants to determine if any inequities exist between these two pay grades." After the city reviewed some pay grades, it notified the PBA that it would upgrade the pay scale for two sergeants but would not upgrade the pay scale for two other sergeants. The PBA then notified the city manager that they were at impasse regarding the salary adjustments and requested that PERC appoint a special master. The city opposed the appointment and petitioned PERC to abate the impasse proceedings. PERC granted the abatement, reasoning that the dispute did not involve an impasse in collective bargaining. Instead, the disagreement arose from a "rights" dispute over the interpretation of contract language, and rights disputes are more appropriately resolved through grievance-arbitration procedures. PERC therefore concluded that this was a contract interpretation dispute and not an "impasse" in negotiations over terms and conditions of employment as contemplated by the special master provisions of the statute.

7. Objections to the Appointment; Disqualifications

No code of ethics exists specifically for special masters to address questions of disqualification.[295] Special masters should disclose to PERC and to the parties any relationship, fact or circumstance which would tend to give the appearance of impropriety if undisclosed. A special master who is concerned that he should not serve in a case because of a disqualification or potential conflict of interest may recuse himself. To avoid unnecessary delay in the proceedings, such a recusal should be made as soon as a special master finds cause for such action. In that event, PERC immediately can appoint another special master to proceed with the hearing.

Provided the parties follow statutory procedures for appointing a special master, PERC generally has held that such appointments are proper and timely. In *School Board v. Escambia Education Association*,[296] PERC denied a school district's request for withdrawal of the appointment of a special master when both parties had participated in the "alternate striking" method of selecting a special master. Neither party removed from the list the name of the special master who subsequently was selected by the chairman. PERC found that prior to the special master's appointment each side had had time and opportunity to object to the selection of that special master. Because they did not do so, their attempt to withdraw his appointment was untimely.

In *Sarasota Professional Fire Fighters, Local 2546 v. City of Sarasota*,[297] the city

294. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,086 (Jan. 22, 1982).

295. In 1977 the author chaired an ad hoc study commission of special masters charged by the PERC chairman to develop informal guidelines for special masters. Those guidelines were developed, approved by the chairman, and circulated to special masters to assist them in discharging their duties under the new law. However, the guidelines were advisory only and were not promulgated as formal regulations.

296. 1 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 44 (Nov. 26, 1975).

297. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,391 (Sept. 29, 1982).

claimed that the special master list submitted to them contained biased special masters. More specifically, it claimed that one special master had a tendency not to decide cases on the merits but to lean toward ruling in favor of the employee organization. The city also asserted that the other two special masters came from states other than Florida and these states had labor-management philosophies inconsistent with those of Florida. As a result of this alleged bias, the city moved for an extension of time for the selection and appointment of a special master, and in the alternative, requested a new special master list. PERC held that the motion for requesting a new special master list was too vague in the one case and in the other two cases was legally insufficient. In all three cases the motion was without demonstrative foundation.

8. Stays of Special Master Proceedings

In determining whether to allow a motion for a stay of special master proceedings, the Commission employs a balancing test which consists of weighing the interest of the public and the prejudice to the requesting party against prejudice to the other party.[298] The balance is heavily weighted in favor of proceeding with statutory procedures. Expense and waste of time do not constitute serious enough prejudice to justify a stay.[299] In *Coral Gables Professional Fire Fighters Association, Local 1210 v. City of Coral Gables*,[300] the fire fighters union requested a stay of special master proceedings pending the union's challenge in court of the constitutionality of PERA's impasse procedures. PERC denied the stay and stated its reasoning:

> The orderly process for resolving disputes is a significant aspect of the overall collective bargaining process constructed by the Legislature. It is a process which has been in place and working since public employee bargaining began in Florida. If the dispute resolution mechanism were halted at this juncture of bargaining, the bargaining process would fall into limbo. The existing contract may expire, the City's budgeting and tax millage setting schedule may be jeopardized in direct contravention of Title XIV, Florida Statutes (1979). Neither the employees, those who administer the City, the City's legislative body, nor the public would be able to determine those important issues relating to City services until the Court rules at some uncertain time in the future.[301]

PERC further observed that until a court order mandated otherwise, it would presume the statute constitutional.[302] In another case, a circuit court denied a union's request for a stay of the special master proceedings while a constitutional challenge was pending because there was no showing of irreparable harm.[303]

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298. Coral Gables Prof. Fire Fighters Ass'n, Local 1210 v. City of Coral Gables, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,033 (Dec. 16, 1981).

299. *Id.* at 42.

300. *Id.*

301. *Id.*

302. *Id.*

303. Deerfield Beach Fire Fighters Ass'n, Local 1673 v. City of Deerfield Beach, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,389 (Sept. 24, 1981).

The Commission has granted stays pending the outcome of a declaratory statement filed by one of the parties. In *City of Boynton Beach v. Boynton Beach Professional Fire Fighters, Local 1891*,[304] such a stay was granted. Subsequently, the declaratory statement was rendered[305] and the fire fighters requested an extension of the stay. The collective bargaining agreement between the fire fighters and city contained a provision by which binding arbitration of impasse could be compelled. Because this arbitration provision was being contested in the circuit court, the fire fighters argued that an extension of the stay should be granted until the circuit court rendered a decision. PERC denied the extension, stating that the original stay had been granted pending resolution of the declaratory statement petition. Because the circuit court action concerned the collective bargaining agreement, the circuit court might not deal with the same issues that would be heard by the special master. Therefore, PERC saw no reason to extend the stay.

In *District Board of Trustees, Palm Beach Junior College v. United Faculty of Palm Beach Junior College*,[306] PERC denied the employer's motion to stay special master proceedings pending the outcome of a decertification, because the mere filing of a decertification petition does not remove the certification of the union nor does it relieve the employer of the duty to bargain. Until the Commission revokes certification of the bargaining representative, the public employer's obligation to bargain collectively continues.[307]

Under Florida Statutes section 447.403(2),[308] the parties may have a mediator appointed to assist in resolving the impasse, or they can request the immediate appointment of a special master. Mediation and fact-finding are not mutually exclusive methods for impasse resolution. They are complementary techniques and may be employed simultaneously. PERC has, therefore, held that the appointment of a mediator at the request of one party is not grounds for staying special master proceedings pending efforts of the mediator.[309]

Section 447.401 requires that each collective bargaining agreement negotiated in the public sector contain a grievance procedure terminating in binding arbitration.[310] PERC has employed a unique system of deferral to arbitration. It granted a stay of special master proceedings in a case where the parties were

304. 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,087 (Jan. 23, 1981).

305. *In re* City of Boynton Beach, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,090 (Jan. 28, 1981).

306. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4069 (Jan. 4, 1978).

307. *In re* City of Ocala, 392 So. 2d 26 (Fla. 1st D.C.A. 1980).

308. *See also* 10 FLA. ADMIN. CODE 38D-19.05.

309. Leon County Police Benevolent Ass'n v. City of Tallahassee, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,057 (Jan. 7, 1981).

310. Each public employer and bargaining agent shall negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective bargaining agreement. Such grievance procedure shall have as its terminal step a final and binding disposition by an imparital neutral, mutually selected by the parties.

FLA. STAT. § 447.401 (1985).

enmeshed in a related "rights" dispute over the interpretation of language in the collective bargaining agreement. In *Florida Police Benevolent Association v. State*, PERC deferred the special master case pending the outcome of arbitration, stating that arbitration more effectively promotes the fundamental policy of having the parties provide their own solutions to collective bargaining agreement disputes.[311]

Section 9.310(b)(2) of the Florida appellate procedure rules granted public bodies an automatic stay of any lower tribunal decision upon the filing of a notice of appeal by the public employer. In *In re Edison Community College*,[312] the employer requested a stay on the ground the union had prematurely declared an impasse. PERC denied the stay, and the employer appealed to the Second District Court of Appeal. The employer renewed its request for a stay with PERC while its appeal was pending. PERC concluded the statute was not intended to operate as a stay to the special master hearing while PERC's order denying a stay was on appeal. Applying the balancing of interests test, PERC concluded that even if a stay were automatic by operation of the statute, PERC could vacate it. The harm the union might suffer if the stay were granted would greatly outweigh the harm the college would suffer if the special master hearing were allowed.

PERC did grant a stay, however, in a similar situation. In *Marion County School Board v. District Council 66*,[313] the school board had stated in a letter to PERC its intention not to join in the special master proceedings requested by the union. PERC treated this letter as a motion to postpone the special master proceedings. Meanwhile, a PERC order certifying the employee organization as the collective bargaining representative had been appealed by the employer and affirmed by the Florida First District Court of Appeal. The employer timely filed a notice invoking the certiorari jurisdiction of the Florida Supreme Court. Citing the automatic stay provision in the Florida appellate rules section 9.310(b)(2), PERC held that a notice of appeal automatically stayed the order of the Commission while the order was under review.[314]

The *Edison Community College* decision is distinguishable from the *Marion County* decision. In *Edison*, the employer's motion to stay the special master proceeding was premised only upon its claim that the union had declared impasse prematurely. It did not challenge the union's underlying right to collective bargaining. In *Marion County*, the appeal challenged the original PERC order certifying the employee organization as exclusive bargaining agent. If the Florida Supreme Court had taken away this certification, a definite and substantial impact upon the parties' rights would have resulted: dissolution of the union's right to engage in collective bargaining and related impasse procedures.

Additional cases illustrate the requirement of a direct and substantial impact on special master proceedings for a stay to be issued on the basis of a pending

311. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4108 (Mar. 7, 1978).
312. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4354 (Nov. 24, 1978).
313. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4363 (Nov. 28, 1978).
314. FLA. R. APP. P. 9.310(b)(2) (1978).

unfair labor practice. In *Lake Worth Utilities Authority v. International Brotherhood of Electrical Workers, Local 323*,[315] the authority moved to stay the appointment of a special master in the 1982-83 contract dispute. The authority claimed that appointment of a special master was premature because an unfair labor practice charge dealing with the interpretation of the 1981-82 agreement was pending. PERC stated the issues contained in the unfair labor practice charge concerned negotiations of the previous year and these issues had nothing to do with the current proceedings. When an unfair labor practice charge is filed merely to circumvent the operation of chapter 447, PERC should deny any subsequent motion to stay special master proceedings.

In *International Association of Fire Fighters Local 2135 v. City of Ocala*,[316] the city moved in April 1979 to cancel special master proceedings based on an impasse in negotiations of the 1977-78 agreement because the issues had become moot. In denying the motion, PERC noted the special master proceedings had been stayed while unfair labor practice proceedings filed by the city were pending. PERC's general counsel found no prima facie evidence of an unfair labor practice.[317] PERC observed the purposes of the Act would be frustrated if an unmeritorious unfair labor practice charge could become an instrument to prevent resolution of contractual impasse under Florida Statutes section 447.403.[318]

PERC will grant stays of special master proceedings pending the resolution of an unfair labor practice charge if resolution of the charge would "obviate the need for a special master" or if the conduct complained of in the unfair labor practice charge "directly impacts the special master proceedings."[319] PERC generally will not stay special master proceedings solely because of an unfair labor practice charge which does not directly affect the special master proceeding. If resolution of the unfair labor practice would not obviate the need for a special master, PERC will deny the motion to stay.[320]

One reason PERC stays special master proceedings is to avoid putting the parties through unnecessary proceedings and expense. The cost of a special master hearing alone, however, does not constitute serious enough harm to justify granting a stay of a special master hearing.[321]

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315. 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,139 (Mar. 17, 1983).

316. 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,167 (May 24, 1979).

317. PERC Order No. 78 U-310 (Dec. 21, 1978).

318. 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,167, at 207 (May 24, 1979). However, PERC did stay the proceedings because the employee organization alleged that no useful purpose would be served by conducting special master proceedings.

319. Jacksonville Port Auth. v. UBC, S. Council of Indus. Workers, Local 2981, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,414 (Oct. 29, 1982); City of New Smyrna Beach v. International Ass'n of Fire Fighters Local 2271, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,025 (Dec. 10, 1980); City of Opa Locka v. Police Benevolent Ass'n, Dade County, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,002 (Nov. 20, 1980); AFSCME Local 3032 v. City of Hialeah, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,113 (May 5, 1980); City of Miramar v. General Ass'n of Miramar Employees, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4130 (Mar. 24, 1978).

320. City of Hollywood v. Hollywood Fire Fighters Local 1375, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,335 (Aug. 18, 1982); International Ass'n of Fire Fighters, Local 1621 v. City of Riviera Beach, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,244 (May 18, 1981).

321. Coral Gables Prof. Fire Fighters Ass'n, Local 1210 v. City of Coral Gables, 8 FLA. PUB.

9. Pre-hearing Considerations

a. Hearing Arrangements

The special master sets the time and place for the hearing and other pre-hearing arrangements. Such arrangements need not be made through PERC offices. Hearings may be held at any location selected by the special master. The special master usually requests that the parties determine a mutually acceptable hearing location, generally at or near the situs of the employment in question. Because the hearing must be open to the public, the hearing room should be large enough to accommodate a reasonable number of observers.

b. The Commitment to Special Master Proceedings

No special master can become as familiar with all the factual details, political nuances, history of bargaining, unwritten agreements, and unstated bargaining goals as the parties themselves. The best settlement therefore is one which is arrived at by the employer and the employee organization through negotiation. This is particularly true when many issues are in dispute because the probability of a misinterpretation or factual error by the special master is heightened. Because special master proceedings can now be waived,[322] the parties should first determine whether special master proceedings are truly necessary. If they can resolve the dispute through further discussions, with or without a mediator, special master proceedings are unnecessary. Commissioners from the Florida offices of the FMCS are highly qualified professionals who generally are available to the parties, but they will become involved in a dispute only upon invitation. The parties may invoke mediation at any time.[323]

Too frequently, the special master is confronted with a plethora of issues, some of which are relatively insubstantial. When this happens, the special master proceeding may be reduced to quibbling over minor details that are better left to settlement by the parties. This is counterproductive because it does not allow proper focus upon issues that can be deemed truly substantial. The scope of special master proceedings can be narrowed significantly if more effort is concentrated in the negotiations process. In short, special master proceedings should not be viewed as a substitute for serious collective bargaining.

c. Selection of the Spokesperson

Once the decision has been made to commit to a special master hearing, preparations should begin immediately for the selection of a spokesperson who will present the case. The spokesperson need not be an attorney.[324] Theoretically, anyone can present the case, but professional representation is always justified

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EMPL. REP. (LAB. REL. PRESS) ¶ 13,033 (Dec. 16, 1981); *In re* Edison Community College, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4354 (Nov. 14, 1978).

322. FLA. STAT. § 447.403 (1985).

323. *Id.* § 447.403(2).

324. Compare the requirements in ULP proceedings in Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980).

because of the high stakes involved in presenting the party's position to public scrutiny.

d. Preparation

The preparation level of advocates appearing in special master proceedings varies over a wide range of competence. It is generally not as high as ordinarily expected in a judicial proceeding. This may be because persons who are not trained in oral advocacy frequently present cases to the special master,[325] but it also may result because both parties realize that the special master's recommended decision is advisory only. Special master proceedings, however, demand a substantial commitment of time and resources. When the parties fail to give the case their best efforts, the legislative policy favoring prompt settlement of public employee labor disputes is frustrated.

e. Stipulation and Submission of Issues

During the early years of the Act, the parties often approached the hearing with no agreement on the relevant issues. PERC subsequently has promulgated rules[326] providing that within ten days after a special master is appointed, each party shall serve upon the special master and the other party a written list of issues at impasse. The special master should remind the parties of their obligations to submit a stipulation of issues. When no pre-hearing stipulation of issues is reached, the special master must identify the issues at the hearing prior to addressing the merits of the case. A pre-hearing conference between representatives of the parties to define the issues, without the special master present, is recommended because it can assist in defining and refining the issues, and often results in a narrowing of the scope of the hearing.

Precise identification of the issues submitted to the special master takes on special importance in view of PERC's position that the legislative body may only take unilateral action on those issues treated in the master's recommended decision.[327] Thus, if the parties reach impasse on an issue, but fail to submit that issue to the special master and obtain his or her recommendation, the initiating party has the right to insist upon post-special master negotiations in lieu of final legislative action.[328]

Special masters often will face a large number of issues which involve both financial and philosophical considerations. If, in his preparation, the advocate has formulated a clearly developed "theory of the case," he is more likely to assist the special master in understanding his client's position. For example,

325. Each year, PERC conducts an annual training conference for both advocates and special masters.

326. 10 FLA. ADMIN. CODE 38D-19.06.

327. Manatee Educ. Ass'n v. Manatee County School Bd., 8 FLA. PUB. EMPL. REP. (LAB REL. PRESS) ¶ 13,408 (Oct. 25, 1982).

328. *Id.* at 744.

"inability to pay"[329] may provide the common thread of anlaysis throughout an employer's case, not just on an isolated issue such as wages.

In the 1978 case of *Osceola Classroom Teachers Association v. School Board*,[330] PERC held that parties at bargaining impasse must submit their positions to the special master as they existed at the point of impasse. In a 1981 decision, PERC clarified its *Osceola* decision in holding that a party may submit its initial offer to the special master rather than its last "package" offer on any individual item at impasse.[331] A party submitting a completely new topic at the special master hearing may violate the duty to bargain in good faith.[332] However, a mere announced intention to submit a new topic does not violate the good faith obligation.[333]

f. Discovery

Discovery is not available in special master proceedings to the same extent it is available in judicial proceedings. This is true in grievance arbitration as well, and comes as no surprise to the experienced labor attorney.[334] PERA requires that relevant records be made available to the special master upon written request to any party.[335] Notice of such requests shall be furnished to all parties, and any records made available to the special master also shall be made available to any other party upon written request. Additionally, the public employer is subject to the state public records act ("Sunshine Law"),[336] giving the employee organization a potentially helpful discovery tool.

The special master may also issue subpoenas, either on his own initiative or upon the request of either party.[337] The issuance of subpoenas should be planned well in advance; they may be helpful in obtaining the testimony of even "friendly" witnesses who otherwise could not absent themselves from normal work duties without loss of pay.

10. Scope of the Special Master's Jurisdiction

State law and the submissions of the parties determine the scope of the special master's jurisdiction. Special masters are not appointed for the purpose

329. *See* FLA. STAT. § 447.405(5) (1985).

330. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066 (Feb. 2, 1978).

331. City of Miramar v. Genral Ass'n of Miramar Employees, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,357 (Sept. 1, 1981).

332. Broward Community College v. United Faculty, 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,172 (July 6, 1984). *See also* Escambia Educ. Ass'n v. School Bd., 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,160 (June 28, 1984) (introduction of new topic before legislative body, not considered by special master, is indicia of bad faith bargaining).

333. Broward Community College v. United Faculty, 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,172 (July 6, 1984).

334. *See* FLA. STAT. § 682.08(2) (1985) (authorizing arbitrators to permit depositions).

335. *Id.* § 447.409.

336. *Id.* § 286.011.

337. *Id.* § 447.403(3) (1985).

of hearing, de novo, collective bargaining proposals. They are appointed to recommend a resolution of issues which the parties have negotiated to impasse.[338] PERC has found that a school board failed to bargain in good faith when it submitted to the special master a proposal on salaries less than the proposal it had submitted to the association at the time impasse was declared.[339] Subsequent decisions have clarified this position to allow a party to recede back to its initial offer if its proposal was part of a "package" offer.[340] Moreover, an overly rigid application of this requirement would tend to stifle efforts by the parties to structure alternative proposals during special master proceedings. Special masters should be receptive to hearing alternatives (in addition to the last best offer) that may result in a mediated settlement.

The current debate over the role of "external law" in grievance arbitration decisionmaking[341] is analogous to the special master process, although the special master's resolution of legal issues is not binding on the parties. For example, a party may object to the other party's proposal on the grounds that it is not a mandatory subject for bargaining under PERA.[342] A non-mandatory subject may not be pursued to impasse over the objections of the other party. The mandatory scope of bargaining is a frequent issue in public sector labor law, and special masters can become embroiled in the controversy when such jurisdictional questions are raised at the hearing.

External law issues also may be raised when a party objects to a proposal because it would cause the objecting party to commit a violation of state law or policy if adopted. For example, school board negotiators frequently have objected to teacher union proposals that arguably interfere with management prerogatives vested by state law[343] in the school board or superintendent in the non-renewal of probationary teacher contracts.[344] A special master has no independent authority to render binding decisions on legal issues such as whether a subject is a mandatory subject of bargaining as a matter of law. As a practical matter, however, he may rule on the objections in order to keep the hearing process moving forward. Such interlocutory rulings on external law could result in litigation. If a special master rules that a proposed topic is a lawful proposal

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338. City of Miramar v. General Ass'n of Miramar Employees, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,357, at 774 (Sept. 1, 1981); Osceola Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066, at 149 (Feb. 2, 1978).

339. Osceola Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066, at 149 (Feb. 2, 1978).

340. City of Miramar v. General Ass'n of Miramar Employees, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,357 (Sept. 1, 1981).

341. To be published in Labor Law Symposium, Stetson Law Review, Publication date Spring 1986: Anderson, *Arbitrators and the Interpretation and Application of External Law*, 15 STETSON L. REV. ____ (1985); Coulson, *"Expanding Roles for Labor Arbitration and Other Third Party Dispute Resolution: A Review of Recent Trends*, 15 STETSON L. REV.____ (1985).

342. Orange County Police Benevolent Ass'n v. City of Casselberry, 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,284 (Fla. 1st D.C.A. 1984).

343. FLA. STAT. § 231.36 (1985).

344. Lake County Educ. Ass'n v. School Bd., 360 So. 2d 1280, 1285 (2d D.C.A.), *cert. denied*, 336 So. 2d 882 (Fla. 1978). *But cf. In re* Palm Beach County Ass'n of Educ. Secretaries & Office Personnel, 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,177 (July 10, 1984).

and then renders a recommended decision requiring the employer to take certain action, his decision may be challenged if the employer fails to object to the recommendation within the statutory twenty-day period and thereby becomes bound to comply by taking action of questionable legality. Finally, if the parties mutually accept, or if the employer by legislative action unilaterally imposes, the terms of a special master recommendation that does not meet the requirements of law, for example, a pension plan that the Auditor General declares "not in compliance," then the terms may not be implemented and the matter will be subject to further negotiations.[345]

11. Deferral to Mediation and Mediation by the Special Master

PERC rules provide that in appropriate circumstances, the special master may, after conferring with the mediator, defer special master hearings, pending satisfactory resolution of the impasse.[346] Although deferral may be for a reasonable length of time only, mediation and special master proceedings can run concurrently. PERA specifically preserves the parties' right to engage in mediation at any time during the bargaining process.[347]

A considerable diversity of opinion exists regarding the propriety of mediation efforts by a special master. Some special masters utilize mediation techniques with success; others are more proficient at deciding issues in dispute. If mediation is attempted by the special master, however, he should be aware of limitations imposed by Florida Sunshine Law requirements.[348]

12. Conduct of the Hearing

a. The Hearing Record

The parties at special master hearings normally do not request that a stenographic record by a court reporter be taken. The special master, however, should honor such a request. PERC has held that a transcript taken at the request of one party becomes a public record when submitted to the special master, and therefore is available to the other party upon payment of reasonable copying costs.[349] The statute prescribes that the cost of stenographic records and other expenses of the hearing should be borne equally by the parties.[350] If only one party requests the stenographic record, the special master should obtain an advance stipulation from the parties allocating stenographic costs and expenses.

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345. *In re* Lake Worth Util. Auth., 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,178, at 347 (Apr. 13, 1983).

346. 10 FLA. ADMIN. CODE 38D-19.07.

347. FLA. STAT. § 447.403(2) (1985).

348. FLA. STAT. § 286.011 (1985) requires that meeting of governmental entities when official action will be taken must be open to the public, with the minutes recorded and open for inspection. *See* Firefighters of Boca Raton v. Boca Raton, 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,043 (Dec. 3, 1983).

349. FLA. STAT. § 447.407 (1985).

350. Lake Worth Util. Auth. v. Local 323, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,051 (Dec. 15, 1982).

The special master has discretion to permit tape recordings by the parties. In most cases, the special master simply keeps his own notes and personal record of the hearing.

b. Proceeding in the Absence of a Party

If a party fails to attend a scheduled hearing, the special master should determine whether the recalcitrant party has just cause for its absence. In the absence of just cause or acceptable excuse for the failure to attend, the special master may proceed with the hearing in the absence of the party.[351]

c. Level of Formality — Order of Proof

Generally, special master proceedings resemble arbitration proceedings and therefore are much less formal than courtroom proceedings. The special master's predisposition sets the tone, and the advocate should adapt his style to the level of formality established by the special master.

No legally prescribed procedure exists. Normally, the special master will open the hearing, identify the case for the record, recite issues received in pre-hearing submissions or attempt to obtain stipulations of issues from the parties if none appear in pre-hearing submissions. After each party has been given the opportunity to make an opening statement, each will then present its case in chief on the merits, offering oral testimony of witnesses and exhibits if appropriate. The special master determines the procedure to be followed in submission of evidence, testimony, and argument. The moving party (usually the employee organization) normally proceeds first on each issue. The order of testimony typically will include direct examination by the party who called the witness, cross-examination by the opposing party, usually followed by re-direct and re-cross examinations. The special master may vary the procedure, but in any case should afford full and equal opportunity to all parties for presentation of relevant proofs. Closing arguments normally are allowed if requested by the parties.

d. Rules of Pleading and Burdens of Proof

Rules regarding burden of proof or burden of pleading in special master hearings do not exist. The process is similar to the informal processes of arbitration; it does not resemble formal judicial proceedings in which burdens of proof and rules of pleading are more clearly defined. At the very least, however, a party proposing an increase in salaries, new language or benefits, or other changes in the existing collective bargaining agreement, has the burden of raising the issue and persuading the special master that legitimate and bona fide objective reasons exist for making the change. Otherwise, the status quo normally will be preserved if the current practice or contract language has proved to be workable and no problems have emerged which necessitate a change.

351. *See* Broward Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4350 (Nov. 9, 1978).

The moving party must present enough relevant and probative evidence to convince a reasonable person that the advantages of adopting the proposal outweigh the disadvantages. Reliance upon bare assertions that the change is desired by the moving party's constituency, or that it is in the "best public interest" is an approach too frequently used but seldom successful. When a party relies merely upon bare assertions of its desire for change, with little or no supporting evidence or proof, the special master is left with little recourse but to deny the proposal.

A special master should, nevertheless, be creative in drafting new language to break a deadlock in negotiations. Sometimes creativity, tempered by experience, is one of the greatest assets the special master has to offer. The parties, however, must present the master with sufficient evidence and proof upon which a reasoned judgment can be formed. The master's resulting proposal should emanate from the record before him.

e. Rules of Evidence

Compliance with the judicial rules of evidence is not required, but the special master is the judge of the relevancy and materiality of the evidence offered. The parties may offer such evidence as they desire and are obligated to produce any additional evidence the special master deems necessary to an understanding and determination of the dispute. All evidence should be taken in the presence of the special master and both parties, except when a party is absent in default, or has otherwise waived the right to be present. The special master may receive and consider the evidence of witnesses by affidavit, but should give it only such weight as he deems appropriate after considering any objections made to its admission. When necessary, the special master may make an inspection or view facilities in connection with the subject matter of the dispute. In doing so, he should give both parties notice and permit their representatives to be present.

f. Testimony of Witnesses

Both the parties and the special master may call and examine witnesses.[352] Witnesses who are examined orally should be placed under oath.[353] After a witness is sworn, he should be asked to state his name and position, or other identifying information for the record before offering testimony. While courtroom formality is unnecessary, the special master should make sure the questioning process does not degenerate to mere bickering between advocate and witness. Personality differences often arise in this setting. The advocate conducting the questioning and/or the witness often has served as negotiator or as a key partisan during negotiations that preceded impasse.

The special master may interject questions at any point he deems appropriate. When the testimony of a witness is concluded, the special master should ask the witness to remain available in case either party or the master wishes

352. 10 FLA. ADMIN. CODE 38D-19.07(3).
353. *Id.*

to recall the witness. If a witness refuses to answer any question the special master considers proper, the master may strike all testimony previously given by such witness on related matters. PERC rules require the special master to submit an affidavit describing any misconduct at a hearing for action by PERC.[354]

g. Submission of Briefs

Written briefs submitted at the hearing may be of considerable assistance to the special master. Post-hearing briefs may be permitted upon request by either party, but should be permitted only if the request is made prior to the close of the hearing and the special master sets a filing date. Copies of all post-hearing submissions to the special master also should be delivered or mailed to the other party. Briefs or other papers filed by the parties need not be sent to PERC.

Briefs should not contain new evidence. To allow either party to submit new evidence by way of "exhibits" attached to the post-hearing brief, for example, would render it virtually impossible for the opposing party to challenge the authenticity, veracity, or relevancy of those documents through cross-examination or to counteract such documents with rebuttal evidence. Moreover, if the submission of post-hearing briefs is used as a vehicle for introducing new evidence, the other party would of course wish to submit additional evidence in rebuttal, resulting in a never-ending cycle. In those unusual cases where the special master needs supplemental evidence, he can require that such evidence be submitted upon stipulation of both parties, reserving jurisdiction to resume oral hearings prior to decision if requested by either party.

13. Preparing and Filing the Recommended Decision

When the presentation of proof is concluded, the special master may either close the hearings, or adjourn the hearing and reserve judgment regarding the need for further hearings until he has reviewed the submissions. Closure of the hearing is usually postponed until the master receives all post-hearing submissions, including any briefs and transcripts. When hearings are closed, the special master must review and consider all the relevant evidence presented during the hearing, including oral or written argument provided by the parties, and prepare a recommended decision.[355]

The special master transmits his recommended decision by registered mail, return receipt requested, to both parties and PERC within fifteen calendar days of the close of hearing.[356] When a large number of impasse items are submitted to the special master for decision, the fifteen day deadline may not be reasonable. The special master is appointed on an ad hoc basis and frequently is an arbitrator with a heavy case load.[357] Although PERC has liberally allowed extensions of the filing date when requested by the special master and approved

354. *Id.* 38D-19.07(5).
355. *Id.* 38D-19.08(1).
356. FLA. STAT. § 447.403(3) (1985); 10 FLA. ADMIN. CODE 38D-19.08(2).
357. *See* FLA. STAT. § 447.403 (1985).

by the parties,[358] such filings should not be unduly delayed because the public interest demands a prompt resolution of public sector labor disputes.

Although no specific format is required, the recommended decision should be in writing and contain a statement of issues, findings of fact, and a recommended decision of each item in dispute.[359] Negotiation, mediation and special master hearings are often lengthy and expensive, and a special master should propose a clear and final solution to each issue before him.

14. Administrative or Judicial Review of the Recommended Decision

Neither the statute nor the rules provide for administrative or judicial review of the special master's recommended decision. Because the decision is advisory, and subject to unilateral rejection by either party, PERC is reluctant to inject itself into impasse disputes prior to exhaustion of all statutory impasse resolution procedures set forth in section 447.401(4) of the Florida Statutes.[360] PERC's reluctance, however, does not mean that it lacks power to reinstate the special master's jurisdiction in appropriate circumstances.

15. Reinstatement of Special Master's Jurisdiction

The special master's authority and jurisdiction ends upon transmittal of his recommended decision to the parties and to PERC.[361] Special masters have no inherent power to issue revised or reconsidered decisions, even if both parties discover a mistake in the decision and request that it be corrected. Such post-decision proceedings should be invoked, if at all, only if essential issues are involved, and only upon PERC's direction. For example, in *City of Hollywood v. International Association of Firefighters Local 1375*,[362] the special master issued his recommended decision but failed to address three issues which both parties had jointly submitted to him. PERC granted the special master renewed jurisdiction to issue a supplemental recommended decision, but limited his renewed authority to the three unaddressed issues.

16. Cost and Expenses of the Special Master

Fees of the special master must be borne equally by the parties.[363] The

358. Usually, such extensions are granted administratively by the chairman's office without formal adjudication.

359. FLA. STAT. § 447.403(3) (1985) provides that "[t]he special master shall hold hearings in order to define the area or areas of dispute, to determine facts relating to the dispute, and to render a decision on any and all unresolved contract issues. . . ."

360. Where a union petitioned PERC to require a special master to amend or correct his report to the extent that he allegedly had exceeded his authority and ruled on issues not before him, PERC declined, stating PERC involvement would detract from dispute resolution. City of Orlando v. Orlando Prof. Fire Fighters, Local 1365, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,043 (Dec. 7, 1982).

361. City of Miami Beach & Int'l Ass'n of Fire Fighters, Local 1510, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4196 (May 5, 1978).

362. 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,018 (Jan. 15, 1979).

363. FLA. STAT. § 447.407 (1985). *See also* Volusia County Police Benevolent Ass'n v. City of Port Orange, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,251 (July 27, 1979).

special master submits the fee and expense statement directly to the parties with a copy to PERC, usually when the recommended decision is filed. PERC may impose sanctions on a party that is delinquent in payment. For example, in *Florida State Lodge, Fraternal Order of Police v. North Bay Village*,[364] PERC entered an order allowing the union fifteen days to show cause why its certification should not be suspended or terminated for failure to fulfill its obligation to pay half the fees of the special master.[365]

The statute also provides that stenographic expenses and other expenses of the special master shall be borne equally by the parties.[366] In *Lake Worth Utilities Authority v. Local 323, IBEW*,[367] the public employer hired a court reporter to transcribe the special master hearing. The union subsequently obtained a copy of the transcript from the special master, but refused upon demand by the public employer to pay half the expense of the court reporter. PERC held that Florida Statutes section 447.407 intended the parties to share the expenses incurred by the special master, but this section did not apply to costs which the parties themselves incurred. In this case, the cost of the stenographic record was incurred by unilateral action of the employer. PERC concluded that once the transcript was presented to the special master, it became part of the public record within the meaning of the Public Records Act,[368] and therefore the union was entitled to obtain a copy upon payment of reasonable copying charges. PERC also has reasoned that each party is independently responsible for paying witness fees for the witnesses it calls at a special master hearing. Consequently, a public employer's refusal to pay for the union's witnesses does not amount to unlawful discrimination.[369]

D. *Responses to the Special Master's Recommended Decision and Legislative Action*

1. Rejection of the Decision

Florida Statutes section 447.403(3) requires that subsequent to receiving the special master's recommended decision, the parties shall discuss each recommendation. Failure to do so may constitute an unfair labor practice.[370] Twenty days after receipt of the recommended decision, each item not expressly rejected

364. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4189 (May 1, 1978).

365. *Id. See also* Volusia County Police Benevolent Ass'n v. City of Port Orange, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,251 (July 27, 1979).

366. FLA. STAT. § 447.407 (1985).

367. 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,051 (Dec. 15, 1982).

368. FLA. STAT. § 286.011 (1985).

369. Sarasota Prof. Fire Fighters, Local 2546 v. City of Sarasota, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,316 (July 23, 1982); St. Petersburg Junior College Faculty Ass'n v. St. Petersburg Junior College Bd. of Trustees, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,096 (Feb. 3), *aff'd*, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,450 (Fla. 1st D.C.A. 1981).

370. Osceola Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066, at 146 (Feb. 2, 1978); Orlando Prof. Fire Fighters, Local 1365 v. City of Orlando, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,042 (Dec. 7, 1982).

in writing by either party is deemed accepted by both parties.[371] Failure to respond to the special master's decision does not, however, constitute an unfair labor practice.[372] This interpretation is consistent with the language of the statute, which requires action only by the party seeking to reject the recommended decision.[373]

In *Lake Worth*, the Utilities Authority filed an unfair labor practice charge against the union alleging, among other things, that the union failed to submit any recommendations to the Utilities Authority's chief executive officer to settle impasse issues after receipt of the special master's recommended decision.[374] Consistent with its prior decisions, PERC held this oversight did not constitute a failure to bargain.[375] The Utilities Authority listed six additional specifications in attempting to establish that the union failed to follow ratification procedures mandated by Florida Administrative Code chapter 38D-20. PERC responded that an employer has no standing to assert the interests its employees have in seeing that proper contract ratification procedures are followed.[376] The rules are designed, PERC stated, primarily to ensure that all bargaining unit members are fairly represented by their bargaining agent.[377] PERC may still, however, consider a party's conduct subsequent to special master proceedings as indicia of a refusal to bargain in good faith.[378]

The parties may reject any item by filing with PERC and the other party written notice containing a statement of the cause for each rejection.[379] The rejection notice need not be supported by competent, substantial evidence. Either side may reject a recommendation for any reason as long as that reason is expressed.[380]

2. Requests for Extensions of Time

PERC has liberally granted motions for extension of time to accept or reject the special master's recommended decision, particularly when the request is made jointly by both parties.[381] When the parties are negotiating a collective bargaining agreement, and it appears the negotiations might result in an agree-

371. FLA. STAT. § 447.403(3) (1985); 10 FLA. ADMIN. CODE 38D-19.09.

372. School Bd. v. Hernando Classroom Teachers Ass'n, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,178, at 330 (Apr. 9, 1982).

373. FLA. STAT. § 447.403(3) (1985).

374. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,389 (Sept. 28, 1982).

375. *Id. See also* School Bd. v. Hernando Classroom Teachers Ass'n, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,178 (Apr. 9, 1982).

376. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,389 (Sept. 28, 1982).

377. *Id. See* Anderson v. International Bhd. of Painters, Local 1010, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,114 (May 5, 1980), *aff'd*, 389 So. 2d 1111 (Fla. 5th D.C.A. 1981).

378. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,389 n.1 (Sept. 28, 1982).

379. *Id.*; 10 FLA. ADMIN. CODE 38D-19.09.

380. International Ass'n of Fire Fighters, Local 1321 v. City of Miami Springs, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4365 (Nov. 28, 1978).

381. *See, e.g.*, Lake County School Bd. v. Lake County Educ. Ass'n, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,079 (Jan. 19, 1982).

ment without legislative action, PERC allows an extension of time beyond the statutory twenty-day response period upon the request of both parties.[382]

In one case,[383] the parties had negotiated a tentative agreement which was submitted to the legislative body for ratification. The twenty-day rejection period, however, had lapsed. A motion for an extension of time to file a rejection notice was granted by PERC. PERC subsequently granted a second extension because the public employer's legislative body was not scheduled to meet until after the deadline stated in the first extension.[384]

3. Post-Rejection Hearing Procedure

Should one or more of the negotiating parties reject any of the special master's recommendations, the legislative body of the public employer must hold a public hearing to resolve the dispute.[385] The public employer's chief executive officer must, within ten days of rejection, submit to the legislative body a copy of the findings of fact and recommendations of the special master, along with the chief executive officer's own recommendations for settling the dispute.[386] The employee organization also must submit to the legislative body and the chief executive officer its recommendations for settling the unresolved matters.[387] The legislative body, or a duly authorized committee thereof, must then conduct a public hearing at which the parties explain their positions.[388] The legislative body shall promptly act in the public interest, including the interest of the public employees involved.[389] Interim negotiations may be continued prior to such final action.[390] The Act requires that the parties be given a chance at the public hearing to explain their positions regarding the special master's recommendations; PERC has therefore said the public employer has a duty to give the employees notice before presenting the special master's recommendations to its legislative body for action.[391]

382. City of Hollywood v. International Ass'n of Fire Fighters, Local 1375, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,045 (Dec. 9, 1982).

383. Broward County v. International Ass'n of Fire Fighters, Local 2019, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,177 (Apr. 9, 1982).

384. *Id. See also* School Bd. v. Broward Classroom Teachers Ass'n, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,077 (Jan. 14, 1983).

385. City of Orlando v. International Ass'n of Fire Fighters, Local 1365, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,173, at 265 (Fla. 5th D.C.A. 1980); FLA. STAT. § 447.403(4)(c) (1985).

386. City of Orlando v. International Ass'n of Fire Fighters, Local 1365, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,173 (Fla. 5th D.C.A. 1980); FLA. STAT. § 447.403(4)(a) (1985).

387. FLA. STAT. § 447.403(4)(b) (Supp. 1984). *See also* City of Orlando v. International Ass'n of Fire Fighters, Local 1365, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,173 (Fla. 5th D.C.A. 1980).

388. FLA. STAT. § 447.403(4)(c) (1985).

389. City of Orlando v. International Ass'n of Fire Fighters, Local 1365, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,173 (Fla. 5th D.C.A. 1980); Teamsters Local 444 v. City of Winter Haven, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4287 (Aug. 16, 1978); FLA. STAT. § 447.403(4)(d) (1985).

390. City of West Palm Beach, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,172 (Fla. 1st D.C.A. 1980).

391. City of Orlando v. Orlando Prof. Fire Fighters Local 1365, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,042 (Dec. 7, 1982).

4. Role of the Employer *qua* Legislative Body

The legislative body should observe strictly the principles of fairness and impartiality. This duty of fairness attaches once the special master's recommended decision is rejected by one of the parties and the cause is submitted to the legislative body for a hearing. The primary measure of the legislative body's fulfillment of its duty of fairness is whether the parties received a full, fair and adequate opportunity to present their positions to full and fair consideration.[392]

The duty of fairness applies even when members of the legislative body also are members of the employer's governing body. Upon rejection of the special master's report, the Act contemplates that the status of the public employer converts from disputant to representative of the general public. The legislative body/public employer must divorce itself from its role as a negotiating party. Impasse resolution action by the legislative body must be based on consideration of all parties, including the employees.[393]

The notion that the employer-negotiator can simply switch hats and assume the role of impartial legislative body in dictating final terms to the union is so unreasonably idealistic as to impugn the credibility of the entire statutory scheme. No matter how good the intentions of the public employer may be, if it has held fast to an impasse position throughout mediation and fact-finding procedures, it likely will have done so because it already believes its bargaining position is based upon an accurate assessment of the "best public interest," however it may define that term. By the time the employer is called upon for action as legislative body, the relative positions of the parties may have become so polarized that the employer-negotiator will not likely reverse itself on a newfound definition of the "best public interest." This dual role becomes particularly troublesome when the employer as negotiator is attempting to use its final leverage as legislative body to enforce upon the union a take-it-or-leave-it position under the threat of final legislative action.[394]

The Florida Legislature designed this scheme to bring impasse proceedings to a final close. The policy of maintaining political or local control obviously was given paramount importance. For the system to survive with any semblance of fairness, the legislative body must make all possible efforts to approach its final task with an open mind, and with a renewed sensitivity to its obligation to the public, including the affected employees.

5. Limitations upon Unilateral Changes Prior to Legislative Body Action

Upon the expiration of an agreement and until the legislative body takes action pursuant to Florida Statutes section 447.403, or a new agreement is

392. Boca Raton Fire Fighters Local 1560 v. City of Boca Raton, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4040, at 88 (Jan. 12, 1978).

393. City of Orlando v. International Ass'n of Fire Fighters, Local 1365, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,173, at 265 (Fla. 5th D.C.A. 1980); Dade County Employees, Local 1363 v. City of Miami, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4065, at 142 (Feb. 2, 1978).

394. *See* City of Orlando v. International Ass'n of Fire Fighters, Local 1365, 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,173 (Fla. 5th D.C.A. 1980).

ratified, the employer has the duty to maintain the status quo. Even if a predecessor contract has expired, maintenance of the status quo means the employer must maintain terms and conditions of the expired agreement in the same state the terms existed on the expiration date of the agreement.[395] PERC's definition of the "status quo" can determine the legislative body's authority. In an early case, *Osceola Classroom Teachers Association v. School Board*, PERC required a school board to maintain salary levels that existed at the agreement expiration date.[396] PERC did not, however, require the board to provide the step increase for each employee at his anniversary date as set forth in the expired agreement during the hiatus between agreement expiration and legislative action or ratification of a new agreement. Under the facts of that case, PERC viewed those step increases as beyond the public employer's contemplation at the time of the original agreement's ratification.[397]

Recent PERC decisions have tended to recognize an obligation by the employer to pay annual salary increments when they have been established by past practice or agreement. This obligation exists during negotiations for a first contract when a precontractual or extra-contractual established past practice exists for paying annual increments.[398] PERC also has determined that such an obligation exists after contract expiration when a past practice was established precontractually and maintained through several years of bargaining agreements.[399] The obligation also exists during reopener negotiations on salary.[400] In *Hendry County Education Association v. School Board*, PERC explained its rationale as follows:

> Teachers' salary schedules usually provide an annual increase for each year of teaching experience. Therefore, unless parties contractually limit the payment of annual teaching experience increases to the terms of their contract, the Commission has held that such increases are part of the status quo that continues during the hiatus between contracts.[401]

Where a school board rejected special master recommended language governing the selection of summer school teachers, and the language was substantially identical to language in the board's proposal, PERC found the rejection did not constitute a per se unfair labor practice but was only evidence of a

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395. Pinellas County Police Benevolent Ass'n v. City of St. Petersburg, 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 205, 208 (July 19, 1977). *See also* Osceola Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066, at 148 (Feb. 2, 1978).

396. 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066, at 148 (Feb. 2, 1978).

397. *Id.*

398. Marion County Police Benevolent Ass'n v. City of Ocala, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,088 (Apr. 3, 1979), *aff'd*, 392 So. 2d 26 (Fla. 1st D.C.A. 1980).

399. Duval Teachers United v. Duval County School Bd., 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,150 (June 3, 1980).

400. Nassau Teachers Ass'n v. School Bd., 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,206 (Apr. 30, 1982).

401. 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,059, at 84 (Dec. 23, 1982). *See also* Escambia Educ. Ass'n v. School Bd., 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,160, at 300-01 (June 28, 1984).

failure to bargain in good faith.[402] PERC explained why the board's action was not per se unlawful:

> Conditions may change between the time a proposal is made and a Special Master issues his recommended decision. In addition, certain proposals may be keyed to others. Both parties should be free to weigh the validity of each of the provisions recommended by the Special Master in light of conditions in existence at that time and in conjunction with other related recommended provisions. In the absence of a showing of arbitrary rejection, therefore, the Commission will not find a failure to bargain in good faith where a party rejects a Special Master's recommendation which is similar to one submitted by that party during negotiations.[403]

6. Scope of Legislative Body's Authority

The legislative body has authority to resolve only the rejected recommendations of the special master.[404] In *Manatee Education Association v. Manatee County School Board*,[405] the parties negotiated various items to the point of impasse, including four issues under the grievance procedure (group grievance, formal grievance presentations, informal conferences and tape recording of proceedings), transfers, and summer school salaries. Impasse was declared on all items except informal grievance conferences, tape recording of grievances, transfers and summer school salaries. Thus the latter four issues, although negotiated to impasse, were not submitted to the special master and were not the subjects of special master recommendations. Following rejection of the special master's recommended decision, however, the legislative body (school board) took unilateral action on those four issues. When challenged in unfair labor practice proceedings by the association, the board was found to have violated the duty to bargain in good faith by taking unilateral action on matters not presented to and acted upon by the special master. The fact that the special master had acted upon the issues of group grievances and formal grievance presentations was held not to have opened the door for legislative action on other unresolved grievance procedure issues. The parties were subject to a continuing duty to negotiate in good faith those issues not acted upon by the special master.[406]

Similarly, in *Hendry County*,[407] PERC held the school board violated its duty to bargain in good faith by refusing to implement a revised salary schedule recommended by the special master and accepted by the board. The fact that

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402. Osceola Classroom Teachers Ass'n v. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4066, at 149 (Feb. 2, 1978).

403. *Id.*

404. FLA. STAT. § 447.403(4)(c) (1985). *See also* Hendry County Educ. Ass'n v. School Bd., 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,059, at 93 (Dec. 23, 1982); Manatee Educ. Ass'n v. Manatee County School Bd., 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,408, at 747 (Oct. 25, 1982); *In re* FTP-NEA, 5 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 10,023, at 23 (Jan. 22, 1979).

405. 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,408 (Oct. 25, 1982).

406. *Compare* Hendry County Educ. Ass'n v. School Bd., 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,268 (June 24, 1982).

407. 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,059 (Dec. 23, 1982).

the teachers association had failed to sign the document prior to submitting it to its membership for an unsuccessful ratification vote was not a defense to the board's action.[408] The board had unilaterally included in the agreement a provision which had not been presented to the special master. The document submitted to the association therefore did not represent the parties' agreement and the union was not obligated to sign prior to submitting it to its membership. The board was thus obligated, as a legislative body, to implement the salary schedule it had adopted notwithstanding the association's failure to adopt.

The legislative body may not take action with regard to any item negotiated to agreement by the parties, no matter how insubstantial it may be.[409] The legislative body may consider all negotiated items agreed to by the parties in making its decision, but it may take final unilateral action only on those items contained in the special master's recommended decision. With respect to those latter items, the legislative body is restrained only by its duty of fairness.[410]

Even if the specific subject matter was negotiated by the parties and ruled upon by the special master, however, the legislative body may not unilaterally implement the employer's position if it constitutes a non-mandatory subject of bargaining. In *District Board of Trustees, Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College*,[411] the college insisted upon a stringent "management rights" clause, which required the union to relinquish much of its future collective bargaining rights. The special master rejected the proposal. Acting as a legislative body, the college board of trustees then attempted unilaterally to implement the clause. PERC struck down the clause, finding that it violated the union's constitutional right to collective bargaining[412] and therefore was not a subject that could be pressed to impasse.[413]

In *City of Winter Park v. Public Employee Relations Commission*,[414] Florida's Fifth District Court of Appeal upheld the legislative body's action in unilaterally establishing a two-year duration for its legislatively mandated contract terms. The union was thereby precluded from initiating bargaining over a new contract for the subsequent year. The Florida Legislature promptly responded by amending PERA specifically to preclude such unilateral action with respect to pro-

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408. *See also* Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,098 (Fla. 1st D.C.A. 1982); School Bd. v. Hernando Classroom Teachers Ass'n, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,178 (Apr. 9, 1982); United Faculty of Palm Beach Junior College v. Palm Beach Junior College Bd. of Trustees, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,300 (July 10, 1981).

409. Madison County Educ. Ass'n & Dist. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4006, at 16 (Dec. 12, 1977).

410. *In re* Indian River School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4192, at 354 (May 4, 1978).

411. 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,098, at 159 (Fla. 1st D.C.A. 1982).

412. *See* City of Tallahassee v. Public Employee Relations Comm'n, 410 So. 2d 487, 490 (Fla. 1981).

413. Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,098, at 159 (Fla. 1st D.C.A. 1982).

414. 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,096 (Fla. 5th D.C.A. 1980).

415. FLA. STAT. § 447.403(4)(e) (1985).

visions which cannot be effective without a contract, such as preambles, recognition clauses and duration clauses.[415]

7. Duration of Terms Mandated by Legislative Action

The 1981 amendments also provide that the legislatively imposed terms shall take effect as of the date of the legislative body's action, but only for the remainder of the first fiscal year which was the subject of negotiations.[416] The employer normally must commence negotiations concerning a successor agreement for the next fiscal year upon timely request by the union.[417] Thus, a union's attempt to negotiate a multi-year contract does not expose it to the risk that the employer will unilaterally dictate terms, following impasse and special master proceedings, which cover the entire period subjected to negotiations.

The provisions of this limiting amendment were tested in a case where the parties' negotiation and impasse proceedings over a proposed two-year contract extended into the second year of the proposed agreement. In *Hillsborough County Police Benevolent Association v. City of New Port Richey*, the parties negotiated to impasse terms and conditions for a two-year agreement covering the period 1982-1984.[418] Thirteen months after negotiations began, the legislative body imposed salaries and other terms for the 1983-1984 fiscal year, and the new terms were not to apply retroactively to the 1982-1983 fiscal year. The union ratified the terms as applied to the 1983-1984 fiscal year, but filed an unfair labor practice challenging the city's failure to apply the changes retroactively. PERC upheld the legislative body's action, reasoning that it did not violate Florida Statutes section 447.403(4)(e) because the union had ratified the terms as applied to 1983-1984. The union's claims that the city had held the contract "hostage" and put the union to a Hobson's choice by presenting only the 1983-1984 terms for ratification were found to be without merit.[419]

Terms and conditions of employment unilaterally imposed by a legislative body under authority of Florida Statutes section 447.403, but not ratified by the union, do not constitute part of the collective bargaining agreement between the parties.[420] Because those terms are not incorporated into the agreement, they are not susceptible to an automatic extension clause in the agreement.[421] However, where a union failed to assert its right to reopen negotiations on a timely basis and the existing contract thereby was automatically extended by

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416. *Id.* § 447.403(4)(e) (1981). The purpose of the amendment was to reverse City of Winter Park v. Public Employee Relations Comm'n, 383 So. 2d 653 (Fla. 5th D.C.A. 1980), which held the legislative body could impose a duration clause without agreement by the union.

417. Laborers' Int'l Union, Local 517 v. City of Winter Park, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4278 (Aug. 9, 1978).

418. 10 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 15,191 (July 20, 1984).

419. *Id.* at 385.

420. Hillsborough County Police Benevolent Ass'n v. City of Inverness, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,208, at 409 (May 27, 1983).

421. *Id.*; Laborers' Int'l Union, Local 517 v. City of Winter Park, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4278 (Aug. 9, 1978).

its own terms for an additional year, PERC held the other terms which previously had been legislatively imposed would continue in effect as a result of the employer's duty to maintain the status quo.[422]

8. Agreement Contemplated After Legislative Body Action

After resolution of impasse issues by the legislative body, the parties have a duty to reduce the resulting agreement to writing.[423] Failure to do so could constitute an unfair labor practice.[424] Once the agreement is in written form it must be signed by the chief executive officer of the public employer and the bargaining agent for the public employees.[425] The agreement need not be signed immediately and neither side must sign a copy.[426] Although a union has no obligation to negotiate with the employer on legislatively imposed terms in a contract submitted for ratification, PERC has held that a union violates the duty to bargain in good faith by failing either to submit the proposed agreement to a ratification vote or to state promptly and plainly to the employer why the agreement was not submitted to a vote.[427]

The meaning of the word "agreement" in the statute has been the subject of litigation.[428] In one case the Commission stated that "agreement," as used in the Act, consists of those items to which the parties agreed in negotiations and those items resolved by the legislative body.[429] The school board had attempted to include an additional item; therefore, the writing did not strictly constitute an "agreement" under the statute. Consequently, the Commission determined that the union was not required to sign the writing.

After the legislative body takes final action and resolves the disputed impasse issues, it loses jurisdiction to act with regard to those items. The public employer cannot later attempt to impose upon the union its own interpretation of its decision.[430] The legislatively imposed terms and conditions of employment become part of the status quo and the public employer cannot change any of these terms without first going through negotiations.[431] Once the legislatively

422. Hillsborough County Police Benevolent Ass'n v. City of Inverness, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,208, at 409 (May 27, 1983).

423. FLA. STAT. § 447.403(4)(c) (Supp. 1984). *See* Madison County Educ. Ass'n & Dist. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4006, at 17 (Dec. 12, 1977).

424. City of Lake Worth v. Palm Beach County Police Benevolent Ass'n, 7 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 12,069 (Jan. 15, 1981).

425. FLA. STAT. § 447.403(4)(e) (1985).

426. School Bd. v. Hernando Classroom Teachers Ass'n, 8 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13,178, at 330 (Apr. 13, 1982).

427. City of Hollywood v. Hollywood Mun. Employees, 11 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 16,196 (Fla. 1st D.C.A., May 3, 1985).

428. *Id.* at 551.

429. Hendry County Educ. Ass'n v. School Bd., 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,059, at 94 (Dec. 23, 1982).

430. Madison County Educ. Ass'n v. District School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4006 (Dec. 12, 1977).

431. Hillsborough County Police Benevolent Ass'n v. City of Inverness, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,208, at 409 (May 27, 1983).

mandated terms are embodied in a contract, the employer may not revise the provisions of the labor contract to clarify its intent.[432]

As stated previously, the written agreement consists of those items negotiated to agreement by the parties and the disputed issues resolved by the legislative body's action.[433] The Act states that the agreement must be submitted to the public employer and the public employees for ratification.[434] All the terms resolved by the legislative body, however, need not be ratified to be effective and binding between the parties.[435] After resolution of the impasse by the legislative body, the obligation to negotiate terminates with respect to provisions mandated by the legislative body for the remainder of the fiscal year.[436]

9. Failure of Agreement Ratification

The legislatively imposed terms and conditions of employment are effective regardless of ratification by the parties.[437] If the agreement is not ratified by the parties, the legislatively imposed terms become effective on the date of the legislative action and remain in force for the rest of the fiscal year.[438] If the agreement sent to the parties for ratification is subsequently ratified, the legislatively imposed terms become effective on the date of ratification.[439] Any provision in the agreement that was previously negotiated by the parties and was not subject to legislative action will not be binding on the parties until the agreement has been ratified.[440]

If the agreement fails ratification, it will be returned to representatives of both parties with instructions to continue negotiations. The obligation to continue negotiations extends only to those provisions in the agreement which were not legislatively imposed.[441] The Commission has held that when an agreement

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432. Teamsters Local No. 444 & City of Winter Haven, 3 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) 56, 57 (Jan. 28, 1977).

433. FLA. STAT. § 447.403(4)(e) (1985). *See* Dade County Employees Local 1363 v. City of S. Miami, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4065 (Feb. 2, 1978); Madison County Educ. Ass'n v. District School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4006 (Dec. 12, 1977).

434. FLA. STAT. § 447.403(4)(e) (1985).

435. *In re* City of Winter Haven, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4137 (Mar. 28, 1978); Madison County Educ. Ass'n & Dist. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4006 (Dec. 12, 1977).

436. City of Hollywood v. Hollywood Mun. Employees Local 2432, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,277 (July 28, 1983); Manatee Educ. Ass'n v. Manatee County School Bd., 6 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11,253 (Oct. 2, 1980).

437. Madison County Educ. Ass'n & Dist. School Bd., 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4006 (Dec. 12, 1977).

438. FLA. STAT. § 447.403(4)(e) (1985).

439. City of Hollywood v. Hollywood Mun. Employees Local 2432, 9 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 14,277 (July 28, 1983).

440. *In re* City of Winter Haven, 4 FLA. PUB. EMPL. REP. (LAB. REL PRESS) ¶ 4137 (Mar. 28, 1978).

441. Dade County Employees Local 1363 v. City of S. Miami, 4 FLA. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 4065 (Feb. 2, 1978).

fails ratification, an obligation to negotiate upon terms and conditions not legislatively mandated arises upon the request of either party.[442]

10. Failure of Implemented Terms to Meet Requirements of Law

If the legislative body unilaterally implements a term or condition of employment, even though recommended by the special master, the matter is subject to further negotiation by the parties if the term fails to meet an independent legal condition precedent to its implementation. For example, in *In re Lake Worth Utilities Authority*,[443] the petition posed the following question to PERC regarding pensions, a mandatory subject for bargaining:[444]

> Assume the matter is submitted to a special master and he adopts the union's position for the change. Assume the Authority enacts the change as adopted by the special master. Finally, assume that the Authority's actuary, retained as a requirement pursuant to F.S. 112, Part VII, refuses to sign or submit the actuarial report required by F.S. 112.63 and the Auditor General declares the pension plan "not in compliance." Can the Authority then revert to the pension plan in effect prior to the union's change?[445]

PERC responded that in the unlikely event the above coincidence of events occurs, the plan could not be implemented and would be subject to further negotiation by the parties.[446] Finally, when the state legislature has vested a matter within the exclusive discretion of the public employer and made it nonnegotiable, the matter should not be included in the collective bargaining agreement even as a result of legislative body action. To do so would create a contractual clause that is unlawful and voidable by the employer.[447]

IV. Alternative Impasse Procedures

A. *Overview of Alternatives*

Some commentators have suggested that pubilc employees, or at least those not providing essential services, should have the right to strike.[448] In addition to the constitutional prohibition on strikes, the Florida Legislature has shown a general disdain for the notion of permitting public employee strikes. Because

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442. *Id. See also* Manatee Educ. Ass'n v. Manatee County School Bd., 6 Fla. Pub. Empl. Rep. (Lab. Rel. Press) ¶ 11,253 (Oct. 2, 1980).

443. 9 Fla. Pub. Empl. Rep. (Lab. Rel. Press) ¶ 14,178 (Apr. 13, 1983).

444. City of Tallahassee v. Public Employee Relations Comm'n, 410 So. 2d 487 (Fla. 1982) (court held that retirement provisions are necessarily a part of the collective bargaining process).

445. 9 Fla. Pub. Empl. Rep. (Lab. Rel. Press) ¶ 14,178, at 347 (Apr. 13, 1983).

446. *Id.*

447. *See* Lake County Educ. Ass'n v. School Bd., 360 So. 2d 1280, 1285 (1st D.C.A.), *cert. denied*, 366 So. 2d 882 (Fla. 1978). *But see* City of Tallahassee v. Public Employee Relations Comm'n, 410 So. 2d 487 (Fla. 1981).

448. *See, e.g.*, Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 Cornell L. Rev. 1055, 1066-78 (1982); Note, *Collective Bargaining Under the Meyers-Millias-Brown Act — Should Local Public Employees Have the Right to Strike?*, 35 Hastings L.J. 523 (1984).

public employers are under many legal restraints regarding suspension or termination of governmental services, a lockout is not a feasible alternative for management. When the self-help measures of strike and lockout are unavailable, meaningful collective bargaining will occur only if a viable alternative dispute resolution procedure is available to promote fairness and provide incentive. Mediation may assist the parties in the negotiation process, but it cannot be required under the present statute.

Four alternative approaches often are considered for the final step in third-party dispute resolution in the public sector: (1) fact-finding with no recommended decision; (2) fact-finding or advisory arbitration with the recommended decision being advisory only; (3) fact-finding or advisory arbitration with a recommended decision that is presumptively binding unless either party rejectes the decision within a stated period of time; or (4) compulsory binding arbitration with neither party having the option to reject the arbitrator's decision. Vestiges of the sovereignty theory are sufficiently strong in many states to prevent legislatures from adopting compulsory binding arbitration. Ultimately, however, fact-finding or advisory arbitration leaves the final determination as to wages, hours, and conditions of employment within the employer's unilateral discretion.

B. *Fact-Finding*

The majority of states with public sector collective bargaining laws have incorporated fact-finding into statutory impasse procedures.[449] Fact-finding is based on the theory that an impartial person or panel will hear the factual presentations of both parties, identify issues in dispute, and discern those facts relevant to resolving the controversy. The fact-finder does not resolve issues for the parties. Identification of issues and fact-finding by an impartial hearing officer is often useful because parties at impasse are caught up in the personalities, emotions, and pressures of the dispute. They often fail to focus on the real issues separating them. Moreover, an unimpassioned description of the facts, including party positions, may cause the parties to moderate unreasonable positions, particularly when findings of fact are made public.

When fact-finding alone is used, without a recommended settlement from the impartial fact-finders, the system is fatally flawed. From the hearing officer's perspective, the "facts" to be found exist only to the extent they are revealed with truth and clarity to the finder of fact. Although fact-finders may conduct investigations on their own initiative outside the confines of the formal hearing, they are unlikely to do so given time limitations, their unfamiliarity with the local situation, and other practical constraints. Thus, the quality and quantity of facts to be found depend largely on the extent to which the parties are able to educate the fact-finder during the course of formal hearings. When no ultimate decision or recommended settlement is expected from the fact-finder, the parties' discharge of their responsibility to educate may be superficial at best. In short, pure fact-finding provides little benefit in itself.

449. *See generally* [1985] GOV'T EMPL. REL. REP. (BNA) pt. 51.

If the fact-finder is empowered to make recommendations (albeit advisory only), the parties are more likely to present the case vigorously. This enhances the possibility that the fact-finder's recommendations will provide a logical focus for public opinion and a persuasive argument leading to the settlement of the dispute. Assuming the parties are motivated to more vigorous advocacy as the stakes are raised, the quality of fact-finding can be elevated if the resulting decision is at least presumptively binding.

In adopting PERA, the Florida Legislature opted for this third model, making the recommended decision of the fact-finder (special master) binding unless at least one party takes affirmative and formal action to reject the decision, stating in writing its reasons for rejection. This procedure has the advantages inherent in the fact-finding process discussed above, and it places upon the parties a burden to react to the recommendations if they choose not to be bound. The parties, however, can reject the recommended decision for any reason whatsoever. The rejecting party need not support the rejection beyond a fairly casual statement of "reasons."

The above alternatives are all designed to submit the dispute to an impartial third party fact-finder or arbitrator. The hearing officer should be selected on the basis of specialized experience and proven abilities in such third-party dispute resolution procedures. The use of arbitrators and fact-finders for this purpose is consistent with more than fifty years of satisfactory experience in the settlement of private sector disputes.

The lessons of that experience are lost if the task is assigned to the judicial branch, where the judge is a legal generalist rather than a labor relations specialist. In 1984, the Florida Legislature considered House Bill 839, which would have given the circuit courts jurisdiction to render final and binding decisions in police and fire interest disputes. That proposal was ill-conceived not only in that it vested powers in a forum entirely unsuitable for the development of collective bargaining agreements, but it also disregarded the state constitutional requirement of separation of powers.[450] House Bill 639 died on the calendar June 1, 1984.

C. *Compulsory Binding Arbitration*

The fourth alternative, compulsory binding arbitration, is far more controversial because it divests the public employer of the ultimate power to impose its unilateral solution on the dispute. Although many states now use binding arbitration for public sector interest disputes involving police or fire fighters, most states disdain its generalized use for public sector labor disputes. Both labor and management in the private sector traditionally have opposed binding arbitration. Public sector employees, however, are more likely to favor binding arbitration when the collective bargaining statute prohibits strikes but leaves ultimate power over contract terms, even after exhaustion of advisory procedures, in the employer.

450. FLA. CONST. art. II, § 3. *See also* International Ass'n of Fire Fighters, Local Union No. 2390 v. City of Kingsville, 568 S.W.2d 391 (Tex. Civ. App. 1978) (a similar Texas statute was found to be an unconstitutional delegation of legislative functions to the judicial branch).

Prior to the passage of the Florida PERA in 1974, the Florida Supreme Court considered implementing collective bargaining by rules of court. A special commission appointed by the court then recommended binding arbitration in its proposed guidelines for judicial implementation.[451] The legislature rejected this approach. Despite periodic lobbying attempts, the legislature has remained unpersuaded that binding arbitration is an appropriate alternative. Nonetheless, efforts to prohibit binding arbitration by constitutional amendment also have been unsuccessful.[452]

Numerous legal arguments have been raised in other jurisdictions to caution against binding arbitration in the public sector. Those arguments have included the following: binding arbitration constitutes an illegal delegation of legislative authority to a private person or group;[453] the state legislature has failed to establish sufficient standards for the delegation of powers;[454] the delegation of powers to an arbitrator violates the one-man, one-vote standard[455] or some other equal protection standard;[456] binding arbitration is inconsistent with home rule powers;[457] arbitration hearings fail to comply with minimum due process standards;[458] and binding arbitration is illegal absent provision for an appropriate scope of judicial review.[459] Careful drafting, however, could eliminate all of the

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451. The report and recommended guidelines are on file with the clerk of the Florida Supreme Court.

452. The November 7, 1978, statewide ballot included eight revisions proposed by the Constitutional Revision Commission. Revision 1, covering the basic document, included almost 60 changes of varying importance. One of those proposed changes would have added the following language to art. I, § 6: "Binding arbitration is prohibited to resolve impasses in collective bargaining negotiations concerning wages, hours and conditions of employment between public employees and a public employer." Revision 1 was defeated by the voters by a 3-1 margin. However, the circumstances under which the issue was presented to the voters make it virtually impossible to draw any meaningful conclusions about public sentiment on the issue. The large number of issues lumped together under Revision 1, coupled with the fact that the ballot referred only to changes in the "basic document," with no explanation of the subjects included in the proposal, could lead one to the conclusion that most voters probably had no idea that they were voting on a proposed prohibition of binding arbitration in public sector labor relations.

453. *E.g.*, Bagley v. City of Manahattan Beach, 93 L.R.R.M. (BNA) 2435 (Cal. Sept. 16, 1976).

454. *E.g.*, Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969).

455. *E.g.*, Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 777-78, 352 N.E.2d 914, 920-21 (1976).

456. *E.g.*, Hortonville Educ. Ass'n v. Hortonville Joint School Dist. No. 1, 66 Wis. 2d 269, 225 N.W.2d 658 (1975), *rev'd on other grounds*, 426 U.S. 482 (1976).

457. *See, e.g.*, City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 234 N.W.2d 35 (S.D. 1975).

458. This argument was discussed briefly in Caso v. Coffey, 83 Misc. 2d 614, 619, 372 N.Y.S.2d 892, 899-900 (Sup. Ct. 1975), *aff'd after remand*, 93 L.R.R.M. (BNA) 2136 (App. Div. 1976).

459. Amsterdam v. Helsby, 37 N.Y.2d 19, 38, 332 N.E.2d 290, 300, 371 N.Y.S.2d 404, 417 (1975) (Fuchsberg, J., concurring) (mentioned briefly); Weisberger, *Constitutionality of Compulsory Public Sector Interest Arbitration Legislation: A 1976 Perspective*, in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 40-43 (A. Knapp ed. 1977) (A.B.A. Section of Labor Relations Law Publication) (also discussed in this publication).

above objections. Arbitration statutes have survived constitutional challenge in Maine,[460] Massachusetts,[461] Michigan,[462] Nebraska,[463] New Jersey,[464] New York,[465] Pennsylvania,[466] Rhode Island,[467] Washington,[468] and Wyoming.[469]

D. *The Delegation-Adequate Standards Issue*

Binding interest arbitration legislation in Florida must be drafted carefully to ensure that it constitutes a lawful delegation of powers.[470] Florida courts strictly construe the issue of adequacy of guidelines or standards. On the federal level, the United States Supreme Court traditionally has recognized that Congress by necessity must delegate some of its legislative power to administrative agencies or officials despite the separation of powers doctrine.[471] Not since the *Panama Refining Co. v. Ryan*[472] and *Schechter Poultry Corp. v. United States*[473] decisions in 1935 has the Supreme Court invalidated a congressional delegation to government authorities. The Court has held that phrases such as "just and reasonable"[474] and "public interest" constitute adequate standards.[475]

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460. City of Biddeford Bd. of Educ. v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973) (interpreting ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1984)).

461. Town of Arlington v. Board of Conciliation & Arb., 370 Mass. 769, 352 N.E.2d 914 (1976) (interpreting MASS. GEN. LAWS ANN. ch. 150E, § 7 (West 1974) with regard to policemen or firefighters).

462. Dearborn Fire Fighters Union, Local No. 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975) (interpreting MICH. COMP. LAWS ANN. § 423.233-.237, .237A, .238 (West 1974)).

463. Orleans Educ. Ass'n v. School Dist., 193 Neb. 675, 229 N.W.2d 172 (1975) (interpreting NEB. REV. STAT. § 48-818, R.R.S. 1943 (1947) in response to a challenge of the statutory authorization of set pay rate and benefits for teachers).

464. Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 1978 Pub. Bargaining Cas. (CCH) ¶ 36,270 (N.J. 1978) (interpreting N.J. STAT. ANN. § 34:13A-16(h) (West Supp. 1985)).

465. City of Amsterdam v. Helsby, 37 N.Y.2d 892, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975) (interpreting N.Y. CIV. SERV. LAW § 200-14 (Consol. 1974) with regard to public employers and their firemen and policemen).

466. Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969) (interpreting PA. STAT. ANN. tit. 43, § 217.4-.7 (Purdon 1968) as applied between council and policemen).

467. City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969) (interpreting R.I. GEN. LAWS §§ 28-9.1 to 28-9.13 (1955)).

468. City of Spokane v. Spokane Police Guild, 87 Wash. 2d 457, 553 P.2d 1316 (1976) (declining the constitutionality of WASH. REV. CODE ANN. § 41.56.450 (1973)).

469. State v. City of Laramie, 437 P.2d 295 (Wyo. 1968) (interpreting WYO. STAT. §§ 27-265 to -273 (1966) with regard to firemen).

470. The author acknowledges with appreciation the research work of former student John Rains on the delegation-adequate standards issue.

471. *See* Wayman v. Southand, 23 U.S. (10 Wheat.) 1, 43 (1825). *See generally* Martin, *The Delegation Issue in Administrative Law — Florida v. Federal*, 53 FLA. B.J. 35 (1979).

472. 293 U.S. 388 (1935).

473. 295 U.S. 495 (1935).

474. *Id.*

475. New York Cent. Sec. Corp. v. United States, 287 U.S. 12 (1932). It should be noted, however, that in 1976 the Supreme Court, in upholding a citizen referendum, commented in City of Eastlake v. Forest City Enter., 426 U.S. 668 (1976), that "a congressional delegation of power

In contrast, Professor Davis has observed: "If the Florida test were used, approximately 100 percent of federal legislation conferring rulemaking authority on federal agencies would be unconstitutional."[476] Unlike the federal Constitution, the Florida Constitution specifically provides for the separation of powers. Article II, section 3 mandates "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. *No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.*"[477]

In *Delta Truck Brokers v. King*,[478] the Florida Supreme Court invalidated an attempted legislative delegation of licensing power to the Florida Railroad and Public Utilities Commission. In finding that the statute lacked adequate standards, the court observed:

> The Constitution vests the legislative power of the state in the State Legislature. . . . The Legislature may, of course, delegate the performance of certain functions to administrative agencies provided that in doing so it announces adequate standards to guide the ministerial agency in the execution of the powers delegated. The Legislature cannot delegate to an administrative agency, even one clothed with certain quasi-judicial powers, the unbridled discretion to adjudicate private rights. It is essential that the act which delegates the power likewise defines with reasonable certainty the standards which shall guide the agency in the exercise of the power.[479]

If a special master were appointed as an agent of PERC in an interest arbitration case, he would be an administrative officer under the executive branch of government, exercising legislative powers delegated by the state legislature. Decisions of the Florida Supreme Court indicate that such a delegation would be suspect under article II, section 3 of the state constitution.

In *Askew v. Cross Key Waterways*, a unanimous court struck down a portion of the Florida Environmental Land and Water Management Act as an invalid delegation of legislative authority.[480] The Act required the Division of State Planning to designate boundaries for proposed areas of critical concern.[481] Florida Statutes section 380.05(2) set forth the criteria to be used in recommending to the Cabinet a particular area as one of critical concern.[482] In defending the

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to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will." *Id.* at 675.

476. K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.05 (3d ed. 1972) (supplement to ADMINISTRATIVE LAW TREATISE).

477. FLA. CONST. art. II, § 3 (emphasis added).

478. 142 So. 2d 273 (Fla. 1962).

479. *Id.* at 275.

480. 372 So. 2d 913 (Fla. 1978). *See also* D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977); Lewis v. Bank of Pasco County, 346 So. 2d 53 (Fla. 1977); Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974).

481. FLA. STAT. § 380.05(1)(a) (1975).

482. Section 380.05(2) provided:

An area of critical concern may be designated only for: (a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources

statute, the Governor contended (1) that the specificity of standards and guidelines should depend on the subject matter and the degree of difficulty in drafting standards; and (2) that the delegation doctrine focusing on legislative standards should be relaxed, with the focus instead on the existence of "procedural safeguards."[483]

The court rejected the Governor's first contention on two grounds. First, the "guidelines" were so minimal that the agency was making the law instead of administering it.[484] The standards were too vague for a reviewing court to determine whether the agency complied with the legislature's intent.[485] Second, the statute did not provide a "legislative delineation of priorities among competing areas and resources which require protection in the State interest."[486] This "priority" requirement is potentially significant in either fact-finding or binding interest arbitration.

The court in *Cross Key Waterways* also declined to follow the Governor's second contention and shift the emphasis from legislatively imposed standards to procedural safeguards in the administrative process.[487] Justice Sundberg acknowledged that this modern trend in the law was reasonable; however, it was not the view followed in Florida. The court adhered to the express limitation contained in the second sentence of article II, section 3 of the Florida Constitution.[488] In concurrence, Justice England indicated that Florida courts will likely continue to march to the sound of a different drummer on the delegation issue.[489] When the legislature delegates its authority, therefore, it should dictate meaningful standards.

A small crack developed in the Florida Supreme Court's position with the court's 1979 decision in *Florida State Board of Architecture v. Wasserman*.[490] The court upheld a statute giving the Florida State Board of Architecture authority to determine which applications for admission to the practice of architecture in Florida should be granted.[491] The statute contained general requirements for admission. For example, it required a candidate to hold a degree from a school or college of architecture, or have training fully equivalent to such a degree.

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of regional or statewide importance. (b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment. (c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.

FLA. STAT. § 380.05(2) (1985).

483. 372 So. 2d at 918.

484. *Id.*

485. *Id. See also* Department of Bus. Reg. v. National Mfr. Hous. Fed., Inc., 370 So 2d 1132 (Fla. 1979). In this decision, rendered shortly after *Cross Key Waterways*, the Florida Supreme Court viewed the availability of judicial review as a corollary of the doctrine of unlawful delegation. *Id.* at 1135.

486. 372 So. 2d at 919.

487. *Id.* at 918. *See* Florida Administrative Procedure Act, FLA. STAT. ch. 120 (1977).

488. 372 So. 2d at 924.

489. *Id.* at 925-26.

490. 377 So. 2d 653 (Fla. 1979). *See also* Straughn v. O'Riordan, 338 So. 2d 832 (Fla. 1976).

491. 377 So. 2d 653 (upholding FLA. STAT. § 467.08(1)(b)(5) (1973) (current version at FLA. STAT. § 481.209 (1985)).

The Board had authority to determine whether the applicant's training was adequate as a substitute for the requisite degree. The statute was challenged on the basis of an unconstitutional delegation of authority to the Board. In upholding the statute the court said:

> The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regualtions for the complete operation and enforcement of the law within its expressed general purpose. This principle of the law is peculiarly applicable to regulations under the police power, since the complex and everchanging conditions that attend and affect such matters make it impracticable for the Legislature to prescribe all necesary rules and regulations. . . .[492]

The court acknowledged that the exercise of some authority or discretion may be incidental or necessary to the performance of administrative duties. The exercise of such authority is acceptable as long as sufficient legislatively enacted standards exist to make the use of such authority or discretion judicially reviewable.[493]

Statutes which have survived delegation challenges in other states provide guidance in framing a successful binding arbitration statute in Florida. In New York, the compulsory arbitration statute for police and fire fighters was challenged, among other grounds, as an unconstitutional delegation of legislative authority because of the absence of meaningful standards.[494] The statute listed

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492. *Id.* at 655 (quoting Bailey v. Van Pelt, 78 Fla. 337, 352, 82 So. 2d 789, 793 (1919)).

493. *Id.* at 656. In Husband v. Cassell, 130 So. 2d 69 (Fla. 1961), the court held that a state statute giving a state board authority to determine which applicants should be certified to practice in Florida as psychologists was unconstitutional. The court let its decision in *Husband* stand by making a distinction between *Husband* and *Wasserman*. The court noted first that the state law required that applicants had to pass an exam on the field of psychology, and that they had to have a Ph.D. with a major in psychology from a university approved by the state board. The court held that this gave the board unbridled discretion because the field of psychology is so broad that the board was left with complete power to determine the nature and scope of exam to be given to applicants and because the legislature failed to give the board any standards for approving universities. By contrast the court reasoned that architecture is a professional field that is specific and concrete in scope and that widely recognized standards exist with regard to educational requirements of professional schools of architecture. 377 So. 2d at 656.

494. The statute provided in part:

> The public arbitration panel shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the panel shall specify the basis for its findings, taking into consideration, *in addition to any other relevant factors, the following*: a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities; b. the interests and welfare of the public and the financial ability of the public employer to pay; c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills; d. the

specific factors, "in addition to any other relevant factors" to be considered by the public arbitration panel. The New York Court of Appeals in *City of Amsterdam v. Helsby* held the panel must follow the established specific standards set forth in the statute.[495] Judge Fuchsberg, in his concurring opinion, stated that he found Professor Davis' analysis persuasive in that the threshold question is whether adequate safeguards exist rather than whether power is legislative or administrative.[496]

Given Florida's strict approach to the meaningful standards issue, the first question is whether the New York standard provides a sufficient basis for court review of the agency action.[497] Although the term "relevant" limits what the arbitrator can consider, the arbitrator must determine relevancy. Consequently, PERA will not meet the Florida test unless the arbitrator's award is drafted solely on the basis of the specified standards.[498] Moreover, the statute nowhere contains a "legislative delineation of priorities."[499] Consequently, under the *Cross Key Waterways* analysis the New York statute probably does not provide adequate standards.

The Massachusetts police and fire fighters binding arbitration statute required the arbitration panel to consider, among others, ten specific factors in reaching a decision.[500] In contrast to the New York statute, the Massachusetts statute qualified the phrase "such other factors," with the condition that these other factors must "normally and traditionally" be taken into consideration in

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terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

N.Y. CIV. SERV. LAW § 209(4)(c)(v) (McKinney 1977) (emphasis added).

495. 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975).

496. 37 N.Y. 2d at 36, 332 N.E.2d at 298, 371 N.Y.S.2d at 415.

497. *See* N.Y. CIV. SERV. LAW § 209(4)(c)(v) (McKinney 1983).

498. *Id.*

499. *See* No. 52, 251 (Fla. Nov. 22, 1978).

500. The Massachusetts statute provides:

The factors *among others*, to be given weight by the arbitration panel in arriving at a decision shall include: (1) The financial ability of the municipality to meet costs. (2) The interests and welfare of the public. (3) The hazards of employment, physical, education, and mental qualifications, job training and skills involved. (4) A comparison of wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public and private employment in comparable communities. (5) The decisions and recommendations of the fact finder. (6) The average consumer prices for goods and services, commonly known as the cost of living. (7) The overall compensation presently received by the employees, including direct wages and fringe benefits. (8) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings. (9) *Such other facts*, not confined to the foregoing, *which are normally or traditionally taken into consideration* in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties, in the public service or in private employment. (10) The stipulation of the parties.

MASS. ANN. LAWS ch. 150E, § 8n4 (West 1974) (cited in Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 775-76 n.5, 352 N.E.2d 914, 919 n.5 (1976)) (emphasis added).

public or private employement. In *Town of Arlington v. Board of Conciliation and Arbitration*, the Supreme Judicial Court of Massachusetts upheld the statute. The specificity of the ten standards made the delegation equivalent to a mere implementation of a detailed legislative policy.[501]

Finally, the Washington binding arbitration statute added an additional element by specifically requiring the arbitration panel to consider the statute's purpose when making awards.[502] In *City of Spokane v. Spokane Police Guild*, the public employer contended the arbitration statute violated the delegation doctrine.[503] The Washington Supreme Court noted that delegation of legislative power is justified if (1) the legislature provides guidelines "in general terms" as to what is to be done; and (2) procedural safeguards exist to control any arbitrary action and/or any abuse of administrative discretion.[504] The court held that in light of the legislative purpose and the specific guidelines, the first prong of the test was met. Furthermore, the provision for review in superior court ensured sufficient procedural safeguards.[505]

The Massachusetts and Washington statutes narrow the "other factors" which may be weighted by the arbitrator by requiring that these other factors be those "normally and traditionally" considered in proceedings involving the terms and conditions of employment.[506] This prerequisite might provide a reviewing court with an adequate basis to determine if the arbitration award conforms to the legislative intent. Such a statute is arguably acceptable in Florida, given the Florida Supreme Court's approval in *Wasserman* of a state board's discretion to determine what training will be deemed equivalent to a degree in architecture.[507]

Under the existing special master procedure, the master's recommended decision becomes binding if neither party rejects it. The decision, of course, is subject to funding by the legislative body of the public employer.[508] Although

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501. 370 Mass. 769, 352 N.E.2d 914 (1976).

502. The Washington statute provided:

> In making its determination, the panel shall be *mindful of the legislative purpose* enumerated in RCW 41.56.430 and as additional standards or guidelines to aid it in reaching a decision, it shall take into consideration the following factors: (a) The constitutional and statutory authority of the employer; (b) Stipulations of the parties; (c) Comparison of the wages, hours and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of employment of life personnel of like employers of similar size on the west coast of the United States; (d) The average consumer prices for goods and services, commonly known as the cost of living; (e) Changes in any of the foregoing circumstances during the pendency of the proceedings; and (f) 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.

WASH. REV. CODE ANN. § 41.56.460 (1973) (emphasis added).

503. 87 Wash. 2d 457, 553 P.2d 1316 (1976).

504. *Id.* at 463, 553 P.2d at 1319-20.

505. *Id.*

506. *See* MASS. ANN. LAWS ch. 150E § 8n4 (Michie/Law. Co-op. 1974); WASH. REV. CODE ANN. § 41.56.460 (1973).

507. *See* Florida Bd. of Architecture v. Wasserman, 377 So. 2d 653 (Fla. 1979).

508. FLA. STAT. § 447.309(1)-(2) (1985).

Section 447.405 provides in pertinent part: "The factors, *among others*, to be given weight

a party with authority to reject a recommended order will seldom allow it to become binding and then contest it, the meaningful standard requirement would be a significant issue if this were to occur.

In developing his recommended decision, the special master gives weight to certain factors listed in Florida Statutes section 447.405.[509] These factors are not exclusive because, like the New York, Massachusetts, and Washington statutes, the special master looks to the specified factors "among others." Furthermore, the special master is not even limited by the "relevant" condition, as in the New York statute, nor by the concept that the "other factors" must "normally or traditionally" be taken into consideration, as in the Massachusetts and Washington statutes. Consequently, Florida's rejection of Professor Davis' liberal approach to the delegation doctrine makes it possible that the Florida statute, as presently drafted, would not survive a strict application of the *Cross Key Waterways* rule. A reviewing court must have a basis for determining whether the arbitration award conforms to the legislature's intent.

Furthermore, Florida Statutes section 447.405 does not give any particular priority to the specified factors.[510] Under *Cross Key Waterways*, the statute must also provide a "legislative delineation of priorities."[511] Under section 447.405, the special master determines which competing factors should receive the greatest weight. The priority requirement established in *Cross Key Waterways* may be surmountable. To the extent that any "trend" can be suggested, the current trend of the Florida Supreme Court is to look to the stated governmental purpose of legislation resulting in any delegation of power or authority and determine whether such delegation is necessary in accomplishing the stated purpose. Although it has reiterated the strict *Cross Key Waterways* test in numerous

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by the special master in arriving at a recommended decision shall include:

(1) Comparison of the annual income of employment of the public employees in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.

(2) Comparison of the annual income of employment of the public employees in question with the annual income of employment of public employees in similar public employee governmental bodies of comparable size within the state.

(3) The interest and welfare of the public.

(4) Comparison of peculiarities of employment in regard to other trades or professions, specifically with respect to:

(a) Hazards of employment.
(b) Physical qualifications.
(c) Educational qualifications.
(d) Intellectual qualifications.
(e) Job Training and skills.
(f) Retirement plans.
(g) Sick leave.
(h) Job security.

(5) Availability of funds."

FLA. STAT. § 447.405 (1985) (emphasis added).

510. *Id.*

511. 372 So. 2d 913, 919 (Fla. 1978).

decisions, the court has been ambivalent on occasion.[512] Recent cases suggest the court might find constitutionally adequate the special master standards in Florida Statutes section 447.405.

In *Rosslow v. State*,[513] the Florida Supreme Court upheld two statutes which made it unlawful to sell or transport fresh citrus unless maturity standards established by the Department of Citrus were met and unless a certificate of inspection by a citrus inspector of the Department of Agriculture and Consumer Services had been issued. The Department of Citrus was authorized to exempt certain categories of citrus from the certification requirement. In upholding the statute the court stated the law was designed to accomplish a general public purpose and expressly authorized designated officials, within valid limitations, to provide rules and regulations for complete operation and enforcement of the law within its expressed general purpose.

The court reinforced this position in *The Coca-Cola Co., Food Division v. Department of Citrus*.[514] The Department of Citrus was delegated general and specific powers including, but not limited to the power:

> To adopt and, from time to time, alter, rescind, modify, or amend all proper and necessary rules, regulations, and orders for the exercise of its powers and the performance of its duties under this chapter and other statutes of the state, which said rules and regulations shall have the force and effect of law when not inconsistent therewith.[515]

The only issue was whether the legislature gave the Florida Citrus Commission, via the Department of Citrus, the power to determine the law, or whether the legislature merely gave the Commission authority to set policy and standards for the agency to follow in implementing the legislatively directed law. The court opted for the latter interpretation and upheld the validity of the delegation. The court noted the legislature had given the Department responsibility for advertising and promoting Florida citrus and increasing citrus sales. The court held that in delegating such authority the legislature established sufficient guidelines and directives to enable a court to determine whether the Department was properly carrying out the intent of the legislature.[516]

In *Department of Insurance v. Southeast Volusia Hospital District*,[517] the Florida Supreme Court gave further insight into its procedure for determining whether an unconstitutional delegation of power or authority exists. The supreme court agreed with the district court's conclusion that the crucial test is whether the statute contains sufficient standards to enable a reviewing body to determine whether the agency is carrying out the legislature's purpose or intent.

The controversy in *Southeast Volusia Hospital* concerned the Department of

512. *See* Florida Bd. of Architecture v. Wasserman, 377 So. 2d 653 (Fla. 1979); Straughn v. O'Riordan, 338 So. 2d 832 (Fla. 1976).
513. 401 So. 2d 1107 (Fla. 1981).
514. 406 So. 2d 1079 (Fla. 1981).
515. FLA. STAT. § 601.10(1) (1977).
516. Coca-Cola Co., Food Div. v. State Dept. of Citrus, 406 So. 2d 1079, 1084 (Fla. 1981).
517. 438 So. 2d 815 (Fla. 1983).

Insurance's authority to levy assessments against participants in the Florida Patient's Compensation Fund under Florida Statutes section 768.54(3)(c).[518] The lower court held the provision allowing the department to adjust base fees downward for any fiscal year in which a lesser amount would be adequate was an invalid delegation of authority due to vagueness and a lack of meaningful standard for making such a determination. The supreme court disagreed. It stated the Fund could exercise total discretion in determining whether monies collected in a given fund year were in excess or insufficient to satisfy claims made against the fund year. Such discretion is a technical issue of implementation — not a fundamental policy decision. The court concluded that requiring constant legislative supervision of all decisions concerning deficits is neither practical nor required by the Florida Constitution.

So long as the special master's recommended decision is advisory only, the delegation/adequate standards issue probably will not be decided. It may be raised under the present law, however, if a master's decision becomes binding by the failure of the parties to reject it within twenty days. The better reasoned view would hold that the standards set forth in Florida Statutes section 447.405 are adequate guidelines for the special master. Those guidelines state specifically the legislative intent and enable the reviewing court to assess compliance with the legislative purpose. This view would require a liberalization of the strict *Cross Key Waterways* approach, but could be justified in view of more recently decided cases.

V. Recommendations and Conclusion

The last decade of experience under the Florida PERA, evaluated according to the normative model suggested in Part I of this article,[519] suggests that a workable model has emerged. The no-strike law provides for prompt and decisive action to ensure continuation of public services. Although a number of fairly short-lived local work stoppages have occurred, no major strikes have caused substantial impairment of public service. Employees are guaranteed the right to present grievances to employers, to engage in concerted activities for purposes of collective bargaining and other mutual aid and protection, and to select collectively representatives of their own choosing. To the extent collective bargaining rights are granted, they are assured with a minimum level of governmental intervention. Local political control is preserved. If this scheme has a weakness, it lies in the balance among the various state policies. Collective bargaining in Florida's public sector is not characterized by a mutuality of constraints and incentives which would make the process as meaningful as it should be.

Florida's public employees should not have the right to strike. Benefits gained by unions would not outweigh the societal costs or even the cost to the unions themselves. A more meaningful alternative to the present optional mediation-special master process is needed; the current process is followed by final, uni-

518. Id. at 819.

519. *Supra* text accompanying notes 1-81.

lateral legislative body action. If employees and their unions view the procedure as unavoidably loaded against them and inherently unfair, they will increasingly utilize forms of self-help.

One common form of self-help used by public sector unions is the political "end run" around employer representatives. Attempts by private sector union negotiators to circumvent management negotiators by directly approaching top management or employing secondary pressure may result in unfair labor practice charges against the union. In contrast, the public employer serves in the dual capacity of employer and political representative of the voting constituency. By exercising their constitutional rights to petition government and to vote, public employees and their representatives may be able to effect a more favorable outcome in negotiations by political pressures upon elected officials. When these political end-run maneuvers are employed at the local level, they may embarass one or both parties, intensify hostilities between negotiators, and place barriers to any future negotiations. A union frustrated by management intransigence at the bargaining table, however, may conclude that it has no other recourse than a direct political assault.

Although public employers clearly have the upper hand in the bargaining relationship in Florida, the author's experience as a special master in Florida during the first decade of PERA's administration has been that public employers generally exercise reason and restraint in their dealings with unions. This may reflect a recognition that with ultimate power in a continuing relationship comes the responsibility on the part of the powerful to use that advantage sparingly. When that power is abused, however, the union almost always chooses to fight rather than succumb to ignominious defeat.

At the state level, public employee organizations may be successful in securing the passage of legislation that accomplishes goals unsuccessfully pursued in local negotiations.[520] This is one of the distinctive features of public sector bargaining. Intensive lobbying efforts by public sector unions can elevate the collective bargaining process from the local level to the state level, where the legislature has the power to mandate better salaries, benefits, and employment standards on a state-wide basis.

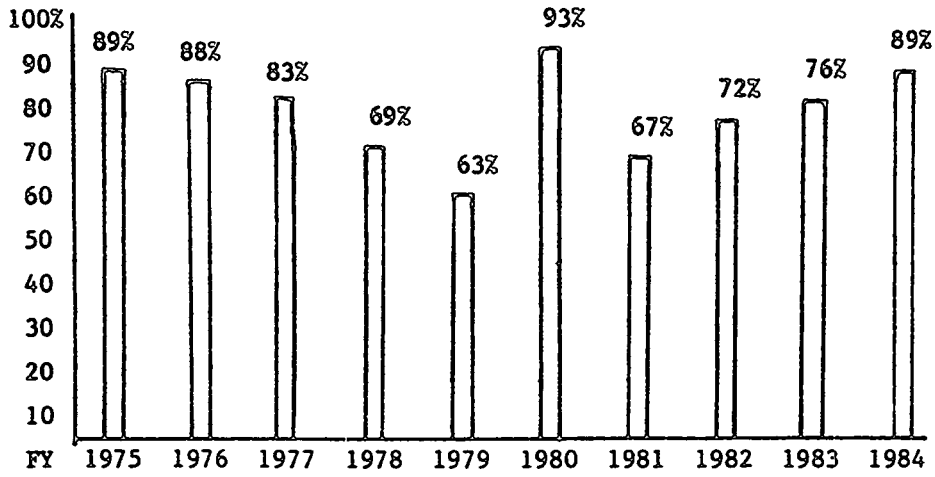
"Local control" of local government has long been a motivation for office holders in municipalities, school boards and other local political positions to endure the slings and arrows of political life. Many local government officials opposed the collective bargaining relationship in Florida in the early years of PERA because they thought it divested them of local control. Many continue to believe their fears were well-founded; in many respects, they were forced by this new legislatively-imposed relationship at least to postpone the exercise of unilateral decisionmaking power in the employment relationship.

The greatest threat to local control posed by collective bargaining occurs not when the process works, but when it fails. When employees have their

520. *See generally* COLLECTIVE BARGAINING IN GOVERNMENT 216-35 (Lowenberg & Moskow eds. 1972); Love & Sulzner, *Political Implications of Public Employee Bargaining*, 11 INDUS. REL. 18 (1972) (examination of the political ramifications of union growth in the public sector).

expectation level raised by the prospect of collective bargaining only to be frustrated by a gross imbalance of constraints and incentives in the bargaining relationship, the unions will seek state legislative action. A host of statutes that regulate many details of the employment relationship at the local level already exist. Each time such a statute is passed, local discretion on the subject is preempted, and local control is lost. Weak unions collectively may be strong, and this strength may be manifested at the state legislature if collective bargaining at the local level fails. Thus, the special conditions placed on public sector bargaining in most states, such as the strike prohibition and the reservation of unilateral decisionmaking power to the employer in impasse procedures, also ensures that governmental solutions to impasse issues ultimately may be sought at the highest state level if employees perceive that no satisfactory solution is available at the local level.

The rates of rejection of special master recommended decisions during the fiscal years 1975 through 1984 are as follows:[521]



The rejection rate steadily declined from FY 1975 to FY 1979. It then rose progressively to the most recent year, FY 1984. Except for the aberrant jump in 1980 (when the number of reports filed were only twenty-four, the lowest in many years), the fall and rise of the rejection rate resembles an inverse bell curve. For legislative reform purposes, it would be interesting to know what factors caused this progressive change. Were they external forces such as changes in the socio-economic climate, political forces, or the influence of hired consultants? Were they internal forces such as changes in the makeup of the special master panel, trends in special master recommended decisions that were unresponsive to external demands for resources, or changes in the level of so-

521. Data for FY 1975 through FY 1978 taken from 1980 FLA. PUB. EMPL. COMM'N CHRM'S ANN. REP., at 9; Data for FY 1981 through FY 1984 taken from Inter-office Reports from Millie Seay, Executive Assistant, to Florida Public Employees Commission Chairman (on file at PERC, Tallahassee, Florida).

phistication of the negotiators? Unfortunately, little is known about this phenomenon.

The above rejection rates are at best little more than crude averages, because under the PERC reporting system, a single rejected item in a recommended decision is counted as a "rejection" regardless of the number of other items accepted by the parties. Additionally, the records maintained by PERC, particularly in the early years of the Act's administration, are incomplete because not all incidents of rejection have been reported. Recent PERC administrations have improved the accounting system.

The record of PERC's special master case processing experience reveals that during the period from 1978 to 1984, 489 requests were filed with PERC for special master panels but only 214 reports were received and processed.[522] These are only gross numbers, a compilation of discrete transactions occuring within a finite fiscal year period, with no allowance made for the overlapping of cases into the previous or next fiscal year.[523] The figures nevertheless suggest that a substantial number of cases may have been resolved before the special master issued a recommended decision. In addition, the fact that over three-fourths of the recommended decisions were rejected by one or both parties strongly suggests that the level of acceptance of the entire process continues to be quite low. Although no final conclusions follow from the above data without deeper inquiry into the dynamics of the acceptance-rejection response in individual cases, a few tentative proposals warrant consideration.

One of the deficiencies in the present statute occurs at the mediation stage. Rather than leaving mediation as an option for the parties, mediation should be required in every case of impasse unless the parties can show compelling reasons why mediation would be fruitless. The mere fact the parties are deadlocked should not constitute sufficient reason to forego mediation. If PERC is given power to require the parties to participate in mediation, the likelihood of settlements should increase. At the very least, the possession of such power should decrease the number of issues advancing to the next higher step.

The above review of the delegation/adequate standards doctrine illustrates that while the present statutory language may be vulnerable to constitutional attack, careful drafting could produce a lawful binding arbitration statute for Florida's public sector. Such a statute, however, is an extreme measure that should be considered only if other alternatives, less intrusive on local control, cannot be adopted. Because the best settlement almost invariably is that settlement arrived at through negotiations rather than higher governmental fiat, a system that maximizes the opportunity for a negotiated solution would be preferable.

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522. Extracted from records on file with the office of the Executive Assistant to Chairman Renovitch, the Florida Public Employees Relations Commission, Tallahassee, Florida. Records on special master proceedings prior to the 1978-1979 fiscal year are not in a form readily adaptable to this type of comparison. A new record-keeping system was instituted in 1978.

523. *E.g.*, of the 81 appointments prepared in 1978-1979, some may have been from requests filed during the 1977-1978 fiscal year, thus distorting the accuracy of any direct comparisons of "requests filed" and "appointments prepared" in a given year.

PERA's present system of "presumptively binding" fact-finding, where the special master's recommended decision becomes binding as a matter of law if not rejected by either party within twenty days, should be retained because it forces the parties to consider the recommendations and to respond on a timely basis. The prospects for a mutually acceptable recommendation emerging from the process can be increased by utilizing tripartite hearing panels, rather than placing sole responsibility for the decision upon a solitary special master.

Under the tripartite approach, the union and the employer each would select a fact-finder, who could be decidedly partisan. The two party-selected fact-finders would in turn select a third neutral fact-finder. The panel would be better positioned to issue a more acceptable decision. Too often, the special master's findings appear to be inaccurate or to ignore more significant facts not revealed at the hearing. This stems not necessarily from the special master's deficiencies, but may result from gaps, omissions or other deficiencies in the proof offered at the hearing. If the special master is flanked by two party-appointed panel members during the hearing and formulation of the recommended decision, those errors or omissions are more likely to be avoided. Moreover, the tripartite approach enables the neutral decision-maker to consider the interests of both parties as the recommendation is formulated. This may result in a form of "negotiation" among the special master and the two party-appointed panelists, but this is a perfectly acceptable method of decision-making if it results in decisions that are more acceptable to the parties.

On balance, the alternative chosen by Florida for public sector dispute resolution works in the sense that widespread and devastating strikes have not occurred, and political or local control has been preserved. Whether the relatively low level of strike activity has existed because of the present impasse resolution system, or in spite of it, remains to be seen. At the very least, improvement can be and should be made in the law to ensure that the promise of true collective bargaining is realized in every public sector jurisdiction in Florida.