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LEGALITY AND PROPRIETY OF AGREEMENTS TO ARBITRATE MAJOR AND MINOR DISPUTES IN PUBLIC EMPLOYMENT

In traditional collective bargaining, economic warfare sets the tone for the confrontation between labor and management. Because the strike has been universally¹ banned in public employment,² this tone disappears when government is the employer. If collective bargaining in the public sector is to amount to more than "consultative management," some substitute for the strike must be devised. Arbitration has sometimes been suggested as such a substitute,³ but the legality of arbitration in resolving disputes in public employment has often been questioned.⁴ On close examination, however, illegality arguments are frequently based on policy preferences rather than legal principles. This dichotomy warrants greater attention. With only a few exceptions, this Note will focus on binding arbitration, rather than on clearly legal advisory arbitration.⁵ To facilitate analysis, arbitration of minor disputes and arbitration of major disputes will be discussed separately.⁶

I

MINOR DISPUTES

A. *Legality*

1. *State and Local Level*

Although it is estimated that ninety-five per cent of all union contracts negotiated in private industry contain provisions for arbitra-

¹ The recent case of *School Dist. of Holland v. Holland Education Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968), has made some inroads on this uniformity.

² *E.g.*, Labor Management Relations Act, 5 U.S.C. §§ 118p-118r (1964); N.Y. CIV. SERV. LAW § 210 (McKinney Supp. 1967). See K. HANSLÖWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 12 (1967); Annot., 31 A.L.R.2d 1142, 1159-61 (1953).

³ *E.g.*, R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 104 (1967); Shenton, *Compulsory Arbitration in the Public Service*, 17 LAB. L.J. 138 (1966).

⁴ *E.g.*, Belenker, *Binding Arbitration for Government Employees*, 16 LAB. L.J. 234 (1965); Doherty, *The Law and Collective Bargaining for Teachers*, 68 TEACHERS COLLEGE REC., No. 1 (1966).

⁵ There is one exception, discussed *infra* at pp. 134-35. Advisory arbitration is essentially no different from fact finding with the power to recommend.

⁶ "Minor disputes" shall be defined as those concerning interpretation and/or application of an existing labor contract, whereas "major disputes" will be considered those concerning the terms of employment to be incorporated into a collective bargaining agreement.

tion of either grievances or interpretation of the application of the contract,⁷ relatively few such provisions exist in public employment.⁸ Recently, however, a trend has developed toward arbitration as the final step in public employment grievance procedures.⁹ Such agreements have been entered into in New York City;¹⁰ New Haven, Connecticut;¹¹ Dayton, Ohio;¹² and Racine, Wisconsin.¹³ Of thirty-nine contracts recently signed by the American Federation of Teachers, thirteen provided for binding arbitration by a neutral third party as the final step in the grievance procedure.¹⁴ Thus, despite all the claims and predictions of illegality, binding arbitration of minor disputes is gaining acceptance at state and local levels.

a. *Court decisions.* Early decisions uniformly held that arbitration of grievances by government employers was an unlawful delegation of governmental power.¹⁵ One of the earliest cases to indicate that arbitration might be used at all was *Norwalk Teachers' Association v. Board of Education*.¹⁶ The court limited its approval to agreements to arbitrate specified grievances, exempting questions of policy. By way of dictum, the court indicated that an agreement to submit to arbitration all disputes over interpretation and application would probably be illegal.¹⁷

Recently, however, several courts have upheld the use of binding arbitration as part of a governmental employer's grievance procedure. In *Local 1226, AFSCME v. City of Rhinelander*,¹⁸ the parties had agreed to binding arbitration as the final step in the grievance procedure. After determining that a valid grievance existed, the union processed it through the first four steps in the grievance procedure. Dissatisfied with the results, the union then named its member of the arbitration panel as provided in the agreement. The city refused to name its arbitrator or to follow the procedures set out for naming the third member of the panel. An action was then brought by the union

7 C. SCHMIDT, JR., H. PARKER & B. REPAS, A GUIDE TO COLLECTIVE NEGOTIATIONS IN EDUCATION 70 (1967).

8 BNA GOV'T EMP. REL. REP. No. 183, A-1, A-2 (Mar. 13, 1967).

9 *Id.*; C. SCHMIDT, JR., H. PARKER & B. REPAS, *supra* note 7, at 70-71.

10 Wolf, *Grievance Procedures for School Employees*, in EMPLOYER-EMPLOYEE RELATIONS IN THE PUBLIC SCHOOLS 133, 135 (R. Doherty ed. 1967).

11 Killingsworth, *Grievance Adjudication in Public Employment*, 13 ARB. J. (n.s.) 3, 9 (1958).

12 *Id.*

13 *Id.*

14 BNA GOV'T EMP. REL. REP. No. 183, A-1, A-2 (Mar. 13, 1967).

15 *E.g.*, *Mugford v. Mayor and City Council*, 185 Md. 266, 44 A.2d 745 (1945).

16 138 Conn. 269, 83 A.2d 482 (1951).

17 *Id.* at 279-80, 83 A.2d at 487.

18 35 Wis. 2d 209, 151 N.W.2d 30 (1967).

for specific performance of the arbitration clause. On the ground that the city had no statutory authority to enter into a binding agreement, the trial court sustained the city's demurrer. The union raised three issues on appeal: (1) Is the arbitration clause binding on the city? (2) If so, is the clause specifically enforceable in the courts? (3) Is an employee's discharge an arbitrable issue under the agreement? The court answered all three questions in the affirmative and further held that arbitration of grievances is not an unlawful delegation of the city's legislative power.

In *Local 953, AFSCME v. School District of the City of Benton Harbor*,¹⁹ a Michigan court upheld a contract clause providing for binding arbitration as the fifth step in the grievance process. Only questions of contract application and interpretation were within the purview of the arbitration clause; changing the contract was specifically prohibited.²⁰ The court stated that no law prohibited a public employer from entering into such contracts; on the contrary, implied power to do so was given by statute.²¹ Citing *Rhineland*, the court said that the use of binding arbitration in a grievance procedure, with the arbitrator's authority limited to contract interpretation, was not an abdication of any policy-making authority and was therefore lawful.²²

Subsequently the Michigan Labor Mediation Board held, in *Oakland County Sheriff's Department v. Metropolitan Council 23, AFSCME*,²³ that binding arbitration as the last step in a grievance procedure is a mandatory subject of bargaining. There the union complained that the sheriff had refused to bargain over a compulsory arbitration provision in the grievance procedure on the basis that he could not enter into such an agreement because it would detract from his legal powers, including the power to appoint and discharge deputy sheriffs at will. The Board held that this power resembled that of a private employer and could be bargained away. Citing *Benton Harbor*, the Board stated that the Michigan Public Employment Relations Act required the sheriff, as a public employer, to bargain over conditions of employment and held that the right to work and to retain employment is one of the most basic conditions of employment.

The New Hampshire Supreme Court recently dealt with this issue

¹⁹ BNA GOV'T EMP. REL. REP. NO. 216, E-1 (Oct. 30, 1967) (County Ct. Mich.).

²⁰ *Id.*

²¹ *Id.* at E-2. See also MICH. STAT. ANN. §§ 17.455(15)-(16) (Supp. 1968).

²² The statute required public employees to bargain over wages, hours and working conditions and to negotiate an agreement on any question arising thereunder, including arbitration of grievances. BNA GOV'T EMP. REL. REP. NO. 216, E-1, E-3 (Oct. 30, 1967) (County Ct. Mich.).

²³ BNA GOV'T EMP. REL. REP. NO. 227, F-1 (Mich. Jan. 8, 1968).

in *Tremblay v. Berlin Police Union*.²⁴ The court held that an agreement to submit all unresolved grievances to binding arbitration was not an unlawful delegation of the city's authority to control the police department. The court noted, however, that the agreement included a clause which stated that the arbitration award "shall comply with and be subordinate to the N. H. State Law."²⁵ The court stated that if this clause had not been included, the agreement's validity would have been seriously questioned.

Although these cases indicate that binding arbitration of grievances is lawful, such an opinion is not universally accepted. For example, many state courts still declare that collective bargaining in the public sector is not permissible and that a government may not enter into *any* binding agreements with unions representing government employees.²⁶ In *International Union of Operating Engineers, Local 321 v. Water Works Board*,²⁷ the Alabama Supreme Court held that a collective bargaining agreement, the twelfth such agreement between the parties in thirty years, was unlawful and unenforceable. The court stated that no such agreement could be lawful without express constitutional or statutory authorization.

This case suggests the relevant distinction. In all cases upholding agreements providing binding arbitration as the final step in a grievance procedure, the state had enacted a statute authorizing public employers and employees to enter into both collective negotiations and binding written contracts. In Alabama, where no such statute existed, the court would not allow any binding agreements. The validity of this distinction will be determined after an examination of selected state provisions.

b. *Statutes*. In Connecticut, school boards are required to negotiate over and execute a written contract incorporating any agreement reached on the issues of salaries and other conditions of employment.²⁸ This language is certainly as broad as that in the Michigan statute, which was interpreted in *Benton Harbor* to include binding arbitration of grievances. Examples of similar statutory language can be found in Wisconsin,²⁹ New Hampshire,³⁰ and New York³¹ public employment

24 — N.H. —, 237 A.2d 668 (1968).

25 *Id.* at —, 237 A.2d at 671.

26 See Annot., 31 A.L.R.2d 1142, 1155-59 (1953).

27 276 Ala. 462, 163 So. 2d 619 (1964).

28 CONN. GEN. STAT. ANN. § 10-153(d) (1967).

29 WIS. STAT. ANN. § 111.70(4)(i) (Supp. 1968).

30 N.H. REV. STAT. ANN. § 31:3 (Supp. 1967).

31 N.Y. CIV. SERV. LAW § 204(2) (McKinney Supp. 1967).

statutes. A recent fact-finding report in New York recommended binding arbitration as the final step in a grievance procedure, thus adding support to the argument that such an agreement is legal under New York's Taylor Law.³²

A Massachusetts statute covering municipal employees and teachers specifically allows binding arbitration of grievances if both parties agree to its use.³³ A Missouri statute provides for arbitration of grievances between firemen and their employers.³⁴ This survey is not exhaustive, but it adequately represents the approach in states where statutes allow collective bargaining in public employment. The vast majority of states, however, do not have such statutory provisions.

c. *Non-statutory jurisdictions.* Can a public employer, absent a statute, lawfully enter into binding contracts with labor unions representing public employees? In the several states that have answered this question in the negative, an agreement to submit grievances to binding arbitration would a fortiori be unlawful. Therefore, for the purposes of the remainder of this section, it is assumed that the jurisdiction is one in which the public employer may legally enter into binding contracts with its employees. Why should the public employer not be able to provide in such a contract for the resolution of disagreements that arise over its interpretation and application? Opponents of binding arbitration argue that to do so violates sovereign immunity, but arguably where the government has entered into a binding contract, sovereign immunity has been waived. A legislature, in authorizing a governmental unit to enter into a contract, may, by implication, authorize it to sue or be sued thereon.³⁵ If the government can be sued on the contract, then certainly it can agree to submit disputes to binding arbitration.³⁶ Agreements of this type have frequently been upheld by the courts and are perfectly lawful as long as the governmental unit involved has the capacity to enter into the contract in the first place.³⁷

³² BNA GOV'T EMP. REL. REP. No. 228, E-1 (Jan. 22, 1968).

³³ MASS. ANN LAWS ch. 149, § 178K (Supp. 1967).

³⁴ MO. ANN. STAT. § 290.350 (1965). *But see* Missouri v. Cervantes, BNA GOV'T EMP. REL. REP. No. 233, D-1 (Feb. 2, 1968) (S. Ct. Mo.), where the supreme court held that this statute did not apply to St. Louis because it is a constitutional charter city.

³⁵ Watkins v. Department of Hwys., 290 S.W.2d 28, 30 (Ky. 1956). *Watkins* was subsequently overruled by *Foley Constr. Co. v. Ward*, 375 S.W.2d 392, 396 (Ky. 1963). *See also* Shenton, *supra* note 3, at 143-44; 5 AM. JUR. 2d, *Arbitration and Award* §§ 67-68 (1962); Annot., 40 A.L.R. 1370 (1926).

³⁶ *See* BNA GOV'T EMP. REL. REP. No. 227, F-2, F-3 (Jan. 15, 1968); Cogan, *Are Government Bodies Bound by Arbitration Agreements?*, 22 ARB. J. (n.s.) 151, 160 (1967).

³⁷ *E.g.*, *Norwalk Teachers Ass'n v. Board of Educ.*, 138 Conn. 269, 279-80, 83 A.2d 482, 487 (1951).

Thus, there are three preconditions to binding arbitration of minor disputes: a statute enabling collective bargaining by government employees; reasonable standards for arbitration; and limitations of the issues to the "law of the contract." In a jurisdiction where the courts have held that it is within the public employer's power to enter into a binding labor contract, despite the absence of such a statute, the conclusion should be the same. Where the public employer is prohibited from entering into a binding labor contract, then ipso facto it would be prohibited from entering an agreement to arbitrate grievances.

2. Federal Level

The federal government has never made use of binding arbitration of grievances,³⁸ but Executive Order 10988 has authorized the use of advisory arbitration. Nearly seventy-five per cent of recent collective bargaining agreements negotiated by federal employee unions contain provisions for advisory arbitration of grievances.³⁹ Although agency heads often have accepted the results of the arbitration, some such awards are not followed.⁴⁰ Civil Service Commission Chairman John Macy has said that the Commission cannot advise agencies that "they must invariably comply with arbitration decisions, because this would be inconsistent with the provisions of Section 8(b) of the Executive Order"⁴¹ which provides that such arbitration "shall be advisory in nature."⁴² The reason usually given for rejecting a decision is that it would violate a law or a government regulation.⁴³

In 1953, the Court of Claims, in *George J. Grant Construction Co. v. United States*,⁴⁴ allowed a contract dispute arbitration. Four years later, however, much of the force was taken out of this decision by the same court. It noted, in *Aktiebolaget Bofors v. United States*,⁴⁵ that an agreement to arbitrate would not be specifically enforceable against the United States unless it had consented to waive sovereign immunity for that purpose. This impediment to grievance arbitration could probably be removed by a change in the Executive Order, at least insofar

³⁸ See Blaine, Hagburg & Zeller, *The Grievance Procedure and Its Application in the United States Postal Service*, 15 LAB. L.J. 725, 731-35 (1964).

³⁹ BNA GOV'T EMP. REL. REP. No. 183, A-1 (Mar. 13, 1967).

⁴⁰ *Id.*; see also Rock, *Role of the Neutral in Grievance Arbitration in Public Employment*, BNA GOV'T EMP. REL. REP. No. 191, D-1 to D-3 (May 8, 1967).

⁴¹ BNA GOV'T EMP. REL. REP. No. 132, A-3 (Mar. 21, 1966).

⁴² 3 C.F.R. 521 (1968), 5 U.S.C. § 631 (1964).

⁴³ *Id.*; see also Report of the Committee on the Law of Government Employee Relations, 1964 ABA SECTION OF LABOR RELATIONS LAW 355, 359.

⁴⁴ 109 F. Supp. 245, 247 (Ct. Cl. 1953).

⁴⁵ 153 F. Supp. 397, 399 (Ct. Cl. 1957).

as the grievance involves a discretionary executive decision. For matters outside that discretion, a legislative enactment probably would be necessary.

Critics will undoubtedly charge that such an enactment would be an unlawful delegation of legislative authority, but the delegation would certainly be less than that involved in giving the Civil Service Commission the power to review dismissals, establish wage rates, and set conditions of employment. This authority has been held not to be an illegal delegation of legislative power.⁴⁶ It is difficult to perceive why the delegation of a much lesser power, the power to interpret and apply existing collective bargaining agreements, would not also be valid.

B. Propriety

The basic objection to the propriety of binding arbitration as the final step in a grievance procedure is similar to the legal arguments against it; even if the use of arbitration is not an unlawful delegation of legislative authority, it is at least improper and unwise to "remove from the . . . people a power rested in them."⁴⁷ Underlying this argument is the fear that arbitration may compel management to accept decisions which violate existing laws or official rules and regulations.⁴⁸ This fear is founded on the belief that the arbitrator is going to ignore the law and act capriciously. This flies in the face of the American experience with arbitration and judicial review of arbitration awards.⁴⁹ Of the several reasons behind the reluctance of public employers to agree to binding arbitration of grievances, the most important appears to be the desire not to relinquish unnecessarily any power to the unions.

Binding arbitration of grievances, however, has much to commend it. First, the collective bargaining agreement is more meaningful because the confidence of the workers in the equity of the agreement is strengthened when they know that any dispute over the meaning of the contract may be submitted to an impartial third party for decision.⁵⁰ Second, it encourages more careful decision making by the government

⁴⁶ See Shenton, *supra* note 3, at 143; Blaine, Hagburg & Zeller, *supra* note 38, at 734-35; Cogan, *supra* note 36, at 100.

⁴⁷ Hildebrand, *The Public Sector*, in *FRONTIERS OF COLLECTIVE BARGAINING* 125, 145-46 (J. Dunlop & N. Chamberlain eds. 1967). See also Howlett, *Resolution of Impasses in Employee Relations in Public Education*, in *EMPLOYER-EMPLOYEE RELATIONS IN THE PUBLIC SCHOOLS* 116, 124 (R. Doherty ed. 1967).

⁴⁸ Blaine, Hagburg & Zeller, *supra* note 38, at 734. See also BNA GOV'T EMP. REL. REP. No. 132, A-3 (Mar. 21, 1966).

⁴⁹ Blaine, Hagburg & Zeller, *supra* note 38, at 734.

⁵⁰ Wolf, *supra* note 10, at 137; Blaine, Hagburg & Zeller, *supra* note 38, at 730.

employer. If he knows that his actions may be subjected to the scrutiny of an arbitrator whose decision will be binding, he will be less likely to make hasty decisions and more likely to calculate the effect of his order.⁵¹ Third, it would create pressure to settle grievances at lower levels. The natural reluctance of management officials to have their decisions reviewed by outside parties reduces the tendency of upper-level management to uphold unjust decisions made by lower-level management.⁵² Fourth, if the parties must bear the cost of arbitration by outside parties, they are likely to attempt to resolve their differences before such expense is incurred.⁵³

The federal government has impliedly agreed to the propriety of binding arbitration of grievances by requiring it in the Railway Labor Act,⁵⁴ which, unlike the Labor Management Relations Act,⁵⁵ does not exclude public employers from its provisions. In *California v. Taylor*,⁵⁶ the Supreme Court held that the State Belt Railroad, a common carrier owned and operated by the State of California, was governed by the Railway Labor Act regardless of the fact that the railroad's employees were appointed under the state civil service laws. Thus, binding arbitration is already a fact where the public employer is a railroad under the jurisdiction of the Railway Labor Act.

One of the chief virtues of binding arbitration is that the entire grievance process is made more meaningful to the grievant, and therefore more useful. Where the ultimate arbiter of the dispute is a representative of one side of the dispute, adverse decisions will be hard to accept and the tendency toward alienation will be strong—witness the experience under the post office grievance procedure.⁵⁷ Where the ultimate decision is made by a neutral third party, however, the grievant is much more likely to feel that he has had a fair hearing and the goal of harmonious relations will be best served.⁵⁸ A 1963 study showed that employer-employee relations usually improved after adoption of grievance arbitration; most of the governmental units questioned recommended that other governmental units adopt such a procedure.⁵⁹ The benefits arising from binding arbitration of grievances, and its legality or the ease with which it could be made legal, invite its adoption.

⁵¹ Wolf, *supra* note 10, at 138.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ § 3(e) 44 Stat. 579 (1926), 45 U.S.C. § 153(f) (1964).

⁵⁵ 29 U.S.C. § 152(2) (1964).

⁵⁶ 353 U.S. 553, 568 (1957).

⁵⁷ Blaine, Hagburg & Zeller, *supra* note 38, at 732-33.

⁵⁸ Krislov & Schmulowitz, *Grievance Arbitration in State and Local Government Units*, 18 ARB. J. (n.s.) 171 (1963).

⁵⁹ *Id.* at 173.

II

MAJOR DISPUTES

The use of binding arbitration to resolve impasses in bargaining has been frequently suggested but little used. Perhaps the most widely known use of binding arbitration came at the conclusion of the recent New York City Sanitation Department strike. Mayor John Lindsay and the union agreed to submit their differences to an impartial third party and to be bound by his decision.⁶⁰ Mayor Lindsay stated at the time that City Corporation Counsel J. Lee Rankin had studied the problem and had assured the mayor that the agreement was completely lawful.⁶¹

A. *Legality*1. *Voluntary Arbitration*

At least two states have statutory provisions specifically allowing the use of voluntary arbitration. Section 209(2) of the New York Taylor Act states in part:

Public employers are hereby empowered to enter into written agreements with recognized or certified employee organizations setting forth procedures to be invoked in the event of disputes which reach an impasse in the course of collective negotiations.⁶²

The Taylor Report, although stating that compulsory arbitration was undesirable,⁶³ advocated the use of voluntary arbitration on an ad hoc basis.⁶⁴ Nebraska specifically allows the parties involved in a public employment dispute, upon mutual agreement, to submit unresolved bargaining issues to the Court of Industrial Relations for final, binding arbitration.⁶⁵

Where there is no express or implied statutory authorization for the use of arbitration to solve bargaining disputes, different considerations prevail. Does the official have the power to negotiate a collective bargaining agreement? May a mayor or an agency head delegate his lawful authority to a third party? Such power carries with it the implied power to bargain away some unilateral authority⁶⁶—the very essence of

⁶⁰ BNA GOV'T EMP. REL. REP. No. 232, B-8 (Feb. 19, 1968).

⁶¹ *Id.*

⁶² N.Y. CIV. SERV. LAW § 209(2) (McKinney Supp. 1967).

⁶³ STATE OF NEW YORK GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 46 (1966) [hereinafter cited as FINAL REPORT].

⁶⁴ *Id.* For a discussion of the New York view that voluntary arbitration is advisable even though compulsory arbitration is illegal, see R. DOHERTY & W. OBERER, *supra* note 3, at 109.

⁶⁵ NEB. REV. STAT. § 48-820 (1960).

⁶⁶ See *Oakland Co. Sheriff's Dep't v. Metropolitan Council No. 23, AFSCME*, BNA GOV'T EMP. REL. REP. No. 227, F-1 (Jan. 15, 1968) (Mich. Lab. Med. Bd.).

collective bargaining. Therefore, an official capable of agreeing to a union contract is also capable of delegating any unilateral authority that is within his discretion to set conditions of employment. The mayor cannot, of course, bind the city council; nor can an agency head bind the state legislature by agreeing to arbitrate a dispute. The legislative body would not, and could not, be bound to comply with the arbitrator's award unless it so consented. To do otherwise would violate the principle of separation of powers.

There is no good reason, however, why the official could not bind himself to do all he could to implement the arbitrator's decision. This ability varies, of course, with the official involved. The Mayor of New York has tremendous power because of his "slush" fund.⁶⁷ Mayors and agency heads with less power may be limited to becoming co-advocates with the union before the legislative body, urging the requisite appropriation, change in law, or regulation.⁶⁸ An agency head cannot raise taxes or appropriations, but in many cases he has considerable discretion over disbursements within the agency. He could therefore commit himself to use that discretion to whatever extent possible to meet the arbitrator's decision. Through these methods, the public official could meaningfully agree to be bound by the results of arbitration.

All of the above arguments would apply equally to collective bargaining at the federal level but for Executive Order 10988.⁶⁹ Section 8(b)(2) of that Order has been interpreted to bar even *advisory* arbitration of bargaining disputes,⁷⁰ and would have to be amended or replaced before binding arbitration could take place at the federal level.

2. *Compulsory Arbitration*

Compulsory arbitration is arbitration imposed upon the parties by law. Several statutes imposing such an obligation on public employers and employees exist, or have existed, in various jurisdictions.⁷¹ These statutes have been held constitutional so long as they apply only to employment affected with the public interest and the statute provides reasonable standards and guidelines for the arbitrator's decision.⁷²

⁶⁷ This "slush" fund consists of monies appropriated for increases in public employee salaries which are put in the mayor's hands to allocate among the various city employees as he sees fit.

⁶⁸ FINAL REPORT, *supra* note 63, at 35-36.

⁶⁹ 3 C.F.R. 521 (1968), 5 U.S.C. § 631 (1964).

⁷⁰ *Report of the Committee on the Law of Government Employee Relations*, in 1966 ABA SECTION OF LABOR RELATIONS LAW 130, 135.

⁷¹ See Annot., 55 A.L.R.2d 432, 444 (1957).

⁷² *Id.*

At least five such statutes exist. A Louisiana statute covering all publicly-owned transportation facilities requires the public transportation authority, in the event the parties are unable to reach an agreement through bargaining, to offer to submit the dispute to binding arbitration.⁷³ In Nebraska any controversy concerning terms, tenure, or conditions of employment between municipally owned utilities and their employees will be sent to binding arbitration at the request of either party should an impasse develop.⁷⁴ A Pennsylvania statute requires county agencies administering toll bridges, toll roads, and ferry boats to offer to submit all unresolved disputes to binding arbitration.⁷⁵ In Rhode Island two separate acts, one for teachers⁷⁶ and one for municipal employees,⁷⁷ provide for arbitration of unresolved issues at the request of either party. The arbitrator's decision is final and binding on all matters not involving the expenditure of money.⁷⁸ Where expenditures are involved, the decision is advisory only.

Since 1947 Minnesota has outlawed strikes by employees of charitable, nonprofit hospitals⁷⁹ and provided for compulsory arbitration of their labor disputes.⁸⁰ A charitable hospital is defined by the act to include "all *state, university, county and municipal hospitals.*"⁸¹ The statute requires the submission of any unsettled dispute over "maximum hours and minimum wages" to final and binding arbitration,⁸² and that phrase has been interpreted broadly to include almost everything but union security.⁸³ The statute was upheld in *Fairview Hospital Ass'n v. Public Building Service and Hospital Employees Union, Local 113*.⁸⁴ The union challenged its constitutionality on three grounds: (1) denial of equal protection and deprivation of rights without due process of law; (2) unlawful delegation of legislative power without adequate standards; and (3) vagueness and lack of susceptibility to judicial construction. Responding to the first argument, the court noted that the equal protection clause does not require a law to apply

⁷³ LA. REV. STAT. ANN. § 23:890(E) (Supp. 1967).

⁷⁴ NEB. REV. STAT. §§ 48-801 to -823 (1960).

⁷⁵ PA. STAT. ANN. tit. 55, § 563.2 (1964). This statute was upheld against constitutional attack in *Division 85, A.T.U. v. Port Auth.*, 417 Pa. 299, 208 A.2d 271 (1965).

⁷⁶ R.I. GEN. LAWS ANN. § 28-9.3-9 (Supp. 1966).

⁷⁷ R.I. GEN. LAWS ANN. § 28-9.4-10 (Supp. 1967).

⁷⁸ R.I. GEN. LAWS ANN. § 28-9.3-12 (Supp. 1966); § 28-9.4-13 (Supp. 1967).

⁷⁹ MINN. STAT. ANN. § 179.36 (1966).

⁸⁰ *Id.* § 179.36-8.

⁸¹ *Id.* § 179.35(2). (Emphasis added).

⁸² *Id.* § 179.38.

⁸³ *Fairview Hosp. Ass'n v. Public Bldg. Serv. Employees Local 113*, 241 Minn. 523, 64 N.W.2d 16 (1954).

⁸⁴ *Id.*, noted in 39 MINN. L. REV. 322 (1955).

with "rigid sameness" to all persons. Rather, only an arbitrary or unreasonable law will be struck down. The court then held that the compulsory arbitration section, which limited the bargaining power of both parties, was neither arbitrary nor unreasonable.⁸⁵ The second argument was handled by stating that the basic policy of the statute,⁸⁶ when coupled with the definitions and rules set forth in the sections prohibiting strikes and lockouts and providing for compulsory arbitration,⁸⁷ provided sufficient guidelines for the just and equitable determination of the issues.⁸⁸ In answering the third argument, the court pointed to the National Labor Relations Act⁸⁹ which does not define wages or hours any more specifically than does the Minnesota statute and which has never been challenged on those grounds.⁹⁰ The court concluded that since the statute contained specific standards and policy for the arbitrator to follow, it could not be declared void for vagueness.⁹¹

A similar New Jersey statute, covering public utilities, survived attack on four constitutional grounds—free speech, involuntary servitude, federal pre-emption, and due process.⁹² The statute was struck down, however, for failure to prescribe sufficient standards for arbitration.⁹³ Shortly thereafter, an amended version of the same statute was held a proper delegation of legislative power.⁹⁴

The federal government recently enacted a single-use compulsory arbitration statute. Congress, seeking to avert a nationwide rail strike, directed the railroads and railroad unions, in effect, to submit their unresolved differences to binding arbitration.⁹⁵ The unions promptly challenged the act and the arbitration award, but both were upheld in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Burlington & Quincy Ry.*⁹⁶ The court held that the act was a proper delegation of power and that the general policies set forth in the act provided sufficient standards for the arbitrator.⁹⁷

⁸⁵ 241 Minn. at 543-44, 64 N.W.2d at 29-30.

⁸⁶ MINN. STAT. ANN. § 179.40 (1966).

⁸⁷ *Id.* §§ 179.35-.38.

⁸⁸ 241 Minn. at 544-47, 64 N.W.2d at 30-31.

⁸⁹ 29 U.S.C. §§ 151-87 (1964).

⁹⁰ 241 Minn. at 544-47, 64 N.W.2d at 30-31.

⁹¹ *Id.*

⁹² *Van Riper v. Traffic Tel. Workers' Fed'n*, 2 N.J. 335, 66 A.2d 616 (1949).

⁹³ *Id.*

⁹⁴ *New Jersey Bell Tel. Co. v. Communication Workers*, 5 N.J. 354, 75 A.2d 721 (1950).

⁹⁵ Act of Aug. 23, 1963, Pub. L. No. 88-108, 77 Stat. 132.

⁹⁶ 225 F. Supp. 11 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964).

⁹⁷ *Id.* at 22-23.

Although these cases do not bind other courts in determining the validity of statutes calling for compulsory arbitration, they are a fair indication of the probable result. If the statute prescribes reasonable standards for the arbitrator's decision and covers only public employees, it should be upheld.

B. Propriety

1. Voluntary Arbitration

The most frequent objection to the propriety of arbitration of disputes in public employment is that it involves an unwise delegation of power. In reality it is a policy argument against a system of uninhibited collective bargaining in the public sector stemming from the fear that by submitting disputes to arbitration, powers that have been entrusted to government officials will be given to individuals having no responsibility to the electorate.⁹⁸ As noted above, however, experience demonstrates that where disputes have been submitted to arbitration, the arbitrator is not likely to subordinate public interests.⁹⁹ An endorsement of collective bargaining in public employment requires a realization that the power to make unilateral decisions on the subjects of wages, hours, and conditions of employment must be relinquished. Otherwise, the end result would be merely the adoption of a system of "consultative management."¹⁰⁰ If parties unable to reach a mutually acceptable settlement of their dispute at the bargaining table agree to abide by the decision of a neutral third party, the public is the winner because the traditional method of settling impasses, the strike, is avoided.

Voluntary arbitration in the public employment sector has found support from both labor and management. AFL-CIO President George Meany recently stated that it is effective in settling public employment impasses and is worthy of consideration.¹⁰¹ The Taylor Report also advocates its use.¹⁰² The strongest argument for voluntary arbitration is that it can be of great aid in the peaceful settlement of disputes. But the parties must agree to use it before it can be of help and it is doubtful that such agreement will be forthcoming in all, or even most, disputes. Where the parties cannot, or will not, agree to the use of voluntary

⁹⁸ See Hildebrand, *supra* note 47, at 145; Howlett, *supra* note 47, at 124.

⁹⁹ BNA GOV'T EMP. REL. REP. No. 234, B-1 (Mar. 4, 1968); *Id.* No. 129, B-12 (Feb. 28, 1966).

¹⁰⁰ See Hart, *The Impasse in Labor Relations in the Federal Civil Service*, 19 IND. & LAB. REL. REV. 175 (1966).

¹⁰¹ BNA GOV'T EMP. REL. REP. No. 233, B-1 (1968).

¹⁰² FINAL REPORT, *supra* note 63, at 35-36.

arbitration, the possibility of a strike is greatly increased. Therefore it is often argued that something beyond voluntary arbitration is needed.¹⁰³

2. *Compulsory Arbitration*

The argument favoring the use of compulsory arbitration can be stated as follows: (1) collective bargaining is desirable; (2) strikes are not; (3) the only way to avoid strikes is to provide a substitute; (4) the most effective substitute is binding arbitration;¹⁰⁴ and (5) without compulsion the parties are unlikely to use arbitration.

Improper delegation of power is again an objection and can be countered by the same arguments given above. A stronger objection is that compulsory arbitration will damage or kill free collective bargaining; the parties might not engage in serious collective bargaining, maneuvering instead for better positions to place issues before the arbitrator.¹⁰⁵ This argument disregards the fact that the strike is illegal in public employment. It is often noted that serious negotiations do not really begin in the private sector until a strike deadline is announced, but if no such ultimate threat exists, there is little compulsion for compromise. Theoretically, arbitration replaces the strike threat, and can be viewed as merely an extension of collective bargaining.¹⁰⁶ The argument might also be defeated by requiring, by statute, that the arbitrator's decision be limited to a choice between the last offers of the parties.¹⁰⁷ Under such a system the parties would have to "realistically appraise [their] . . . position[s], and present the arbitrator with [their] . . . minimum of acceptability and maximum concession."¹⁰⁸ Such a rule would also encourage the parties to reach an agreement on their own after arbitration had begun, but before the arbitrator's decision was made.

A final argument against the use of compulsory arbitration is that there is no guarantee that it would prevent strikes. If the union is dissatisfied with the arbitration decision, it is still likely to resort to a

¹⁰³ See generally Shenton, *supra* note 3.

¹⁰⁴ R. DOHERTY & W. OBERER, *supra* note 3, at 104; Howlett, *supra* note 47, at 123; Shenton, *supra* note 3, at 147.

¹⁰⁵ R. DOHERTY & W. OBERER, *supra* note 3, at 104; Hildebrand, *supra* note 47, at 146; Howlett, *supra* note 47, at 124. Howlett notes that this frequently happened under the National War Labor Board. *Id.* at 125.

¹⁰⁶ R. DOHERTY & W. OBERER, *supra* note 3, at 104-05.

¹⁰⁷ The "last offer" of the parties should be the position each takes at the conclusion of arguments before the arbitrator. This would allow the parties to compromise their differences during arbitration if they decided that doing so would improve their case.

¹⁰⁸ Howlett, *supra* note 47, at 126.

strike to get what it wants.¹⁰⁹ This may be true, but the enforcement of antistrike penalties would probably be easier and more popular if the union rejects an arbitration award and goes out on strike.¹¹⁰

Compulsory arbitration also tends to equalize the bargaining power of the parties. Powerful unions would no longer be able to blackmail the public employer into submission by denying essential services to the public. Public employers, on the other hand, would not be able to ignore the demands of a group of employees simply because their union is weak or their services not quite as essential as others. The result would be wage determinations more nearly on the basis of what a job is really worth to the public, rather than on the basis of how much the union can force the public to pay for it.

III

A WORKABLE SYSTEM OF ARBITRATION IN PUBLIC EMPLOYMENT

* A system of compulsory arbitration of major disputes should be adopted in the public sector.¹¹¹ The law should forbid strikes and provide workable antistrike penalties. An exception to the no-strike rule should be made when the public employer refuses to abide by the decision of the arbitrator,¹¹² a decision limited to choosing between the last offers of the parties. Finally, to quell at least some of the frequently expressed misgivings on the part of unions,¹¹³ only the union should be able to initiate the arbitration process.¹¹⁴ Thus, if the union feels that adequate progress is being made through negotiations, it cannot be forced into arbitration. The union could avoid the uncertainty of the arbitration process and the basically repugnant idea of having an outsider deciding contract terms. Management would attempt to reach an

¹⁰⁹ *Id.*

¹¹⁰ R. DOHERTY & W. OBERER, *supra* note 3, at 105. This is also true, but to a lesser extent, where the union rejects the decision of the fact finder and goes on strike. The difference is that the fact finding is admittedly not binding on the parties here, whereas it is expected to be legally binding on the parties in compulsory arbitration.

¹¹¹ This was recently suggested by a committee formed by Gov. Romney to study the problem. The committee recommended that it be tried on an experimental three year basis and initially cover only police and firemen. *Report of the Committee on the Law of Government Employee Relations*, 1967 ABA SECTION OF LABOR RELATIONS LAW 175, 184.

¹¹² R. DOHERTY & W. OBERER, *supra* note 3, at 105.

¹¹³ *See, e.g.*, BNA GOV'T EMP. REL. REP. No. 233, B-1 (Feb. 26, 1968); N.Y. Times, Feb. 19, 1968, at 1, col. 1.

¹¹⁴ Although this concept may be logically or politically distasteful to some, one must note that the proposed plan deprives the union of a weapon, the strike, while not directly disarming management.

agreement under such a system without forcing the issue to arbitration because it is no more likely than the unions to want an outsider to determine the terms of a contract and, like the unions, it will want to avoid the uncertainty of the arbitration process. Further, the assumption that management will always want to go to arbitration includes the unwarranted assumption that management will always refuse to bargain in good faith. In the final analysis perhaps the best reason for leaving the choice of arbitration to the union alone is the fact that arbitration is meant to replace the strike; both are methods of last resort. As long as the unions are forbidden to strike there is no valid reason why they should not have the sole power to force an issue to arbitration.

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