

COMPULSORY INTEREST ARBITRATION IN THE PUBLIC SECTOR: AN OVERVIEW

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ABSTRACT

This article presents an overview of compulsory binding arbitration of interest disputes in the public sector. Several important aspects of this topic are examined in detail. Analyses of individual state statutes are presented, and challenges to their constitutionality are explored. The article also focuses on the impact of these statutes on public policy and the problems which arise in this context. Recommendations are made for improving existing methods of dispute resolution and several alternate methods are proposed.

In our society, bargaining impasses are resolved by one side applying economic pressure to the other side. This economic pressure usually takes the form of a strike by the union or a lockout by the employer. In the private sector, these types of actions play an important role in labor relations, for the costs of disagreement are raised and a settlement can, therefore, be more quickly reached. In the public sector, however, employees are often not permitted to strike for fear that essential public services may be disrupted. This leaves public employees at a distinct disadvantage when they sit at the bargaining table to negotiate a collective agreement. To remedy this situation, many states have passed laws setting up mechanisms for solving bargaining impasses. That is, procedures have been developed that allow the parties to submit their unresolved

issues to a neutral third party so that an agreement may be reached. In a number of states, the law provides for compulsory binding arbitration of these interest disputes in the public sector. What this means is the parties must, by law, submit their unresolved issues to an arbitrator so that he may fashion an award and thus, settle the dispute.

This process of compulsory arbitration is the focus of this paper. We first describe the arbitration process and compare voluntary arbitration to compulsory arbitration. We then look at the strengths, and weaknesses, of the different types of arbitration (traditional; last best offer) with emphasis on the difference between last best package settlements and last best offer on an issue-by-issue basis. Next, we outline the individual state statutes and examine attempts to have these statutes declared unconstitutional. After discussing the constitutionality issue, we look at the impact that compulsory arbitration statutes have on public policy and the problems that arise in this context. Finally, we make recommendations for improving existing methods of dispute resolution and propose alternate methods so as to resolve the problems created by the mechanisms currently used.

BACKGROUND

The first major use of compulsory arbitration in the private sector on a continuing basis occurred during World War II when the National War Labor Board was established by Executive Order [1]. As a war emergency measure, the War Labor Board was empowered to settle labor disputes by the use of arbitration. The board was able to take jurisdiction of such disputes on its own volition. Arbitration panels established by the board were tripartite in character. After World War II, a number of states passed compulsory arbitration statutes limited to labor disputes involving public utilities. These statutes customarily prohibited strikes and required arbitration. However, these public utility antistrike/compulsory arbitration statutes ultimately met their demise at the hands of the U.S. Supreme Court on the grounds that they dealt with matters preempted by the Labor Management Relations Act of 1947 [2].

With the increase in public sector unionism in the 1960s, many states passed legislation prohibiting strikes and providing for various kinds of impasse procedures. The most common procedures are mediation and factfinding. Mediation is a process that involves the use of a third party to assist management and the union in reaching their own agreement. The mediator, who may be called in by the parties or sent in by a state agency, meets privately with the representatives of each side to help them find some common ground for agreement. Although he has no formal authority to impose a settlement on the parties, the mediator can be effective in persuading each side to modify its proposals.

In contrast, factfinding is a more formal process that usually follows an

unsuccessful mediation. The factfinder conducts a quasijudicial proceeding in which a hearing is held, evidence collected from both sides, and findings and recommendations are issued to the parties. Advisory arbitration is another name for the factfinding process.

The key to understanding the limitations of these two procedures lies in their nonbinding nature. The parties are free to reject any recommendations put forth by the mediator or the factfinder. Thus, many practitioners find these procedures to be attractive strike alternatives because they provide for third-party intervention without the risk of being forced to accept the third-party's version of a desirable settlement. However, there are two important drawbacks to these nonbinding procedures. First, the absence of finality means the impasse may still exist after mediation and factfinding have been exhausted. Second, the costs of disagreement in these nonbinding procedures may be unevenly distributed in favor of the employer. The employer may reject the third-party recommendations by making unilateral changes or by allowing the impasse to continue. The result in both cases is to the employer's advantage. If the union rejects the recommendations, it does not have the option of unilaterally changing the terms and conditions of employment, and a continuation of the *status quo* is usually to its disadvantage. Yet it is prohibited from calling a strike, and if a strike does occur, the union and/or the employees may be punished for such actions. To remedy these problems, it is obvious that binding arbitration is necessary.

Some state statutes provide for voluntary binding arbitration of interest disputes. What this means is that binding arbitration may be used as a method of settling a dispute only if both parties agree to this measure beforehand. Neither side is compelled to agree to submit the dispute to arbitration, but once they do agree, they are bound by the award of the arbitrator. In some states (e.g., Texas), should the employer refuse to submit the impasse to arbitration, a state court will settle the dispute and impose an agreement on the parties. This type of provision, although relatively uncommon, serves to bring pressure on the parties to settle the dispute themselves, for it is unlikely that either side would want a court to fix compensation or decide what the terms of employment would be. However, in states which have voluntary arbitration statutes and no other method for settlement (e.g., Montana), the procedure does not always lead to an agreement, for one party (usually the employer) may refuse to submit to arbitration. This leaves the parties deadlocked and puts the union at an extreme disadvantage. This may lead to illegal strikes and the loss of essential public services.

COMPULSORY BINDING ARBITRATION

The arguments supporting compulsory binding arbitration must, therefore, be considered. The most important reason in favor of compulsory arbitration is

that its use reduces strikes. Most of these statutes apply to police and fire-fighters – who provide government’s most vital services – and thus, they insure that the general public will continue to have protection. Arbitration reduces strikes because its binding award eliminates the opportunity for one side to conduct a work stoppage for terms more favorable than those determined by the arbitrator. In this context, arbitration cannot be viewed as the *quid pro quo* for the right to strike, for many public employees don’t have this right to begin with. However, the process does serve to keep unions from calling illegal strikes.

A second argument in favor of compulsory arbitration is that it serves to equalize power at the bargaining table. This aspect of compulsory arbitration is especially important to unions. Under an arbitration procedure, management cannot realistically adopt a “take it or leave it” bargaining position, for such a tactic may be rendered useless by an arbitrator’s binding award. Similarly, management cannot bargain to impasse and then institute unilateral changes. Further, arbitration is a much safer route for the union to take, for strikes are risky and may bring about a negative public and managerial response.

Another important rationale for the use of compulsory arbitration is that it functions as a face-saving device for both management officials and union leaders, who are under considerable constituent pressure not to compromise their negotiating positions. For example, the mayor of a financially troubled city may place the blame for a need for higher tax rates on an arbitrator’s award. Similarly, a union president may respond to dissatisfied members who want “more” by telling them that the contract is the result of the arbitrator’s judgment and not the result of what the president traded away.

In sum, what sets arbitration apart from mediation and factfinding is its binding award. In impasses where the parties are unable to reach an agreement on their own, a settlement can be delivered and public services may continue uninterrupted.

Interest Arbitration

Two basic types of interest arbitration are used in settling disputes. The first of these is usually referred to as conventional arbitration. (Under this type of arbitration, the arbitrator(s) evaluate both positions and come to some sort of compromise agreement.) Most state statutes provide for tripartite panels with each side appointing one member to the panel and the two appointees choosing the third party. Although, as a practical matter, the neutral will make the final decision, the parties have an opportunity for input into the decision-making process that is not available in other forms of panels. For posthearing deliberations, the parties, through their respective members, have a second crack. “Real” positions may be aired instead of formal ones, and views may be amplified and certain points emphasized. The panel members can render valuable assistance to the neutral by interpreting data and advising on political realities left unstated at the hearing. Another form of arbitration used in the single

arbitrator. This calls for one neutral to hold a hearing and then issue a binding decision. This process does not allow input from the parties after the hearing is over. Of the two types, the tripartite panel is used much more frequently in public sector interest disputes.

The most publicized criticism of conventional arbitration is that it has a “chilling” effect on the parties’ incentive to bargain in good faith. If either party anticipates it will get more from the arbitrator than from a negotiated settlement, it will have an incentive to avoid trade-offs and to hold its final position in hopes that the arbitrator will “split the difference” and write an award favorable to its side. That is, the arbitrator will usually give less than what the union is asking and more than the employer is offering. Since conventional arbitration reduces the costs of disagreement, there is little incentive to avoid its use.

Another criticism of compulsory arbitration is that the parties may become dependent on the process. This is known as the “narcotic effect” of arbitration, meaning the parties may feel they can evade responsibility for making a decision if they allow the issue to go to arbitration. No effective way has yet been devised for limiting the use of this procedure to cases in which the collective bargaining processes have been exhausted. The record is that if arbitration is assured, the collective bargaining processes are seriously undermined [3].

A factor mitigating against compulsory arbitration in the public sector is the lack of experience on the part of many arbitrators. Although this problem has been resolved to a certain degree by the use of tripartite panels, many arbitrators have absolutely no understanding of public finance. Often awards are ambiguous and need clarification or subsequent interpretation. Sometimes sections of the award seem to conflict with other sections and, if an award is ambiguous, the parties are no better off than they were when they started the process.

Another negative effect of conventional arbitration in the public sector is the flip-flop effect. This term refers to the fact that a permanent arbitrator may award to one party the first time and the other party the next time. This occurs where an arbitrator is reasonably certain of continued assignments. The arbitrator will distribute the awards to protect his own self-interests. Assuming that negotiating parties examine past decisions when selecting arbitrators to protect themselves from “unfriendly” decisions, arbitrators tend to consider the personal as well as the labor relations consequences of their decisions. In this same light, it may also hold true that in a bargaining relationship in which one party is clearly dominant, an arbitrator may consistently side with the stronger party.

Final Offer Arbitration

One method of arbitration seems to solve some of these problems: final offer arbitration. This procedure increases the costs of disagreement to the parties by giving the arbitrator the authority only to choose one side or the other’s final

offer. That is, the arbitrator may not issue an award that is a compromise between the two positions. Since this type of arbitration involves a potential loss on all issues, the parties are induced to move closer together so as to minimize the impact should their last best offer be rejected. Usually, the fear of submitting issues to this type of arbitration will lead the parties to reach an agreement on their own.

There are two different methods of final offer arbitration. The first type calls for the parties to submit their last best package to the arbitrator so that he may choose one or the other. Under this system, the parties will likely not be very far apart on the issues, for if they lose, they lose on every issue. Four states currently use this type of compulsory arbitration: Wisconsin, Massachusetts, Nevada, and New Jersey. The New Jersey statute is interesting in that the law makes arbitration compulsory for uniformed employees, but it allows the parties to decide on the specific type of arbitration they wish to use.) The second type of final offer arbitration allows the arbitrator to select the last best offer of one party or the other on an issue-by-issue basis. (States using this approach are Connecticut, Iowa, Michigan, and New Jersey (if the parties agree to use this procedure).)

STATES USING COMPULSORY ARBITRATION LAWS

Currently, eighteen states have compulsory arbitration laws for at least some of their public employees. The states are: Alaska, Connecticut, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming. Statutes in Utah and South Dakota were recently struck down as unconstitutional. To better understand the differences and similarities among the statutes, let us look at them in more detail.

Alaska

Passed in 1972, Alaska's law requires arbitration for all public employees who perform services that may not be given up for even the shortest time. This applies to police and firefighters, jail, prison and other correctional institution employees, and hospital employees. These employees may not engage in strikes. Public employees engaged in performing services that may be interrupted for a limited period, but not for an indefinite period of time, may strike for a limited time after mediation (if the majority of employees in the bargaining unit vote to do so). This part of the statute applies to public utility, snow removal, sanitation, and public school and other educational institution employees. The strike may not be enjoined unless it threatens the health, safety, or welfare of the public. If the impasse continues after an injunction is issued, the parties must submit any unresolved issues to a single, neutral arbitrator.

Connecticut

Under the Municipal Employees Relations Act, the Board of Mediation and Arbitration (BMA) shall impose binding arbitration on the parties if they do not reach agreement within ninety days after a contract expires. The statute's provisions cover all municipal employees except teachers. Arbitration is performed by a tripartite board composed of one neutral arbitrator and two partisan representatives. The panel is to treat each unresolved issue as a separate question, and when making its award, must consider wages and conditions in the labor market, the ability of the employer to pay, and the interests and welfare of the employees. Recently, the Connecticut Superior Court held that the statute violated the home-rule provisions of the state constitution [4]. The case is currently on appeal to the Connecticut Supreme Court, and until that court rules, the law will remain in effect.

Hawaii

The Hawaii law calls for compulsory arbitration for firefighters. The law is flexible in that it allows the parties to use any procedure they agree on to resolve the impasse. However, should they be unable to agree on a method, the Public Employment Relations Board will implement the procedure provided for in the act. This procedure calls for the selection of a tripartite panel that renders a decision on a last best package basis. The opinion of the panel must include an explanation of its use of the statutory factors in reaching the decision.

Iowa

All public employees are covered by Iowa's 1974 binding arbitration law. Under this statute, the parties may choose either a single arbitrator or a tripartite panel, depending on their preference. Within fifteen days of the first meeting, the panel or arbitrator must choose from among the last best offers of the parties and the recommendation of the factfinder on an issue-by-issue basis. In making its decision, the panel (or arbitrator) must consider the following items: past bargaining contracts between the parties; comparison of wages, hours, and conditions of employment of the involved employees with those of other public employees; interests of the public; the ability of the employer to pay; the power of the employer to levy taxes and appropriate funds; and any other relevant factors.

Maine

The Maine law went into effect in 1974 and was challenged in court before that [5]. Four categories of workers are covered by the statute:

1. state employees;
2. municipal employees;
3. employees of the University of Maine; and
4. all public employees except county workers.

Under this statute, however, only employees of the state are required to arbitrate impasses. If, after forty-five days from the date of submission of the factfinder's report, the parties have not yet reached an agreement, the Maine Labor Relations Board shall begin the compulsory arbitration process. The executive director will investigate to determine whether an impasse does indeed exist, and should this be the case, he will order the parties to select their designate to the arbitration panel. The two representatives will then choose the third member of the panel. When the arbitration panel issues a decision, the award is advisory on salaries, pensions, and insurance, but binding on all other issues.

Massachusetts

In 1974, Massachusetts passed its version of statutory interest arbitration, which covers only police and firefighters. Under this statute, should an impasse exist, a joint labor-management committee appointed by the governor may take jurisdiction over disputes involving police and firefighters. This committee will:

1. specify the issues to be arbitrated;
2. nominate the panel of arbitrators (and select one if the parties cannot agree); and
3. determine the form of arbitration to be used.

If this committee does not exercise jurisdiction over a dispute, the dispute is to be settled by a tripartite panel of arbitrators, with each side choosing one and the third being chosen by the first two. Arbitration consists of last best package. At any time prior to making an award, a dispute may be remanded to the parties for further bargaining, for a period not to exceed three weeks. If the parties settle the disputed issues, the arbitration proceedings may be terminated. In fashioning an award, the arbitrators must be guided by ten factors listed in the statute. The statute was upheld in a 1976 court decision [6].

Michigan

Act 312 provides a means of resolving impasses in police and firefighter collective bargaining. Under this statute, the parties must submit impasses to a tripartite panel of arbitrators. The chairman is to be appointed by the Michigan Employment Relations Commission if the two delegates cannot agree on a chairman. Hearings must begin within fifteen days of the impaneling of the committee and must be concluded within thirty days (unless otherwise agreed by the parties). Mediation at this stage is encouraged although, as in Massachusetts, it is not specifically provided for in the law. However, should this fail, the panel will proceed to fashion a binding award. Last best offer arbitration will be used in deciding economic issues, whereas any other issues are to be settled by conventional arbitration. Section 9 lists nine specific

guidelines the panel must follow in rendering its decision. The Michigan law passed in 1969, survived a 1975 court test challenging the constitutionality of the statute [7].

Minnesota

The 1975 Minnesota law requires arbitration for essential employees and makes it optional for others. Prior to conventional arbitration by either a tripartite board or a single, neutral arbitrator, either party may request mediation. The right to strike is available to nonessential employees if their employer refuses to submit to arbitration or comply with an arbitrator's decision. It is written into the statute that the arbitrator must give due consideration to the obligations of public employers to efficiently manage and conduct operations within the financial limitations imposed on them. The law was challenged in court as unconstitutional, but a recent ruling found the statute constitutional [8].

Nebraska

All public employees are covered by the 1974 Nebraska statute. In this state, there exists a Court of Industrial Relations composed of five judges, from which three judge panels are formed to decide cases. This court can establish or alter wage scales, hours of labor, and/or conditions of employment, but in making its decision, the court must establish terms that are "comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions" (Sec. 48-818). This delegation of powers by the legislature was upheld in 1975 as constitutional [9].

Nevada

The Nevada law calls for compulsory arbitration of impasses involving firefighters. The dispute is to be settled by a single arbitrator agreed on by the parties. Once a hearing has been held, the arbitrator shall choose the last best package of one side or the other. In making this decision he must consider the employer's ability to pay, the health and safety of the public, and other "normal" criteria used in deciding interest disputes.

New Jersey

The state's law enforcement, fire, and correctional employees are covered by a 1977 binding arbitration statute. Of all the state laws currently in effect, New Jersey's provides the greatest flexibility in the form of arbitration, for the parties have an option to design their own terminal procedure. There are six "suggested" procedures listed in the statute. They are:

1. conventional arbitration of all items;
2. last best package;
3. last best offer — issue-by-issue;
4. a choice from among the last best package offers of the parties for the package recommended by the factfinder;
5. a choice from among the three position on each issue; and
6. arbitration of economic issues on last best package basis and arbitration of noneconomic issues on a last best offer — issue-by-issue basis.

If the parties cannot agree on a procedure, option number (6) is to be used. The arbitration is to be conducted either by a single arbitrator or by a tripartite panel. The arbitrators are to be selected from a special panel of arbitrators which is kept by the Public Employee Relations Commission. The decision of the arbitrator(s) may be vacated by a Superior Court if it does not take into consideration that criteria listed in the statute. Also, the arbitrator may not issue an opinion with respect to a public employer's participation in the State Health Benefits Program, any governmental retirement system or pension fund, or any statutory retirement or pension plan. In a recent court decision, the New Jersey Supreme Court upheld the statute as constitutional [10].

New York

Police and firefighters are covered by New York's 1974 Taylor Law. Conventional arbitration is conducted by a tripartite board. The parties shall each select one delegate and the chairman shall be selected by the parties jointly. If one party fails to designate a member, the Public Employment Relations Board shall designate a member associated with that party's interest. The panel must consider four specific criteria:

1. comparability of benefits to other public and private employments;
2. the public interest and the employer's ability to pay;
3. particular factors such as hazards, physical qualifications, educational qualifications; and
4. past collective agreements.

A court decision in 1975 left the law intact [11]. It should be noted that New York City has a separate law covering all city employees of mayoral agencies. This statute, passed in 1972, calls for the City's Board of Collective Bargaining to appoint an impasse panel should an impasse exist. The panel is chosen by the parties from a list of seven names provided by the board and is composed of as many of the seven as they can agree on. The impasse panel issues a report with recommendations. If a party rejects the panel's findings, the board reviews the case and may affirm or modify (in whole or in part) the panel's recommendations.

Oregon

The Oregon statute requires that compulsory, binding arbitration be provided to settle labor disputes involving police, firefighters, and mental hospital and correctional employees. The arbitration is to be conducted by either a single umpire or by a tripartite panel, or the parties may formulate their own procedure. In making a decision, the arbitrator must follow the guidelines set forth in the statute. It should be noted that the City of Eugene has a statute covering all of its employees. Strikes are permitted (except by public safety employees), but they may be enjoined when the public health and safety is threatened. When a strike is enjoined (or prohibited), the arbitration procedure calls for final offer by package conducted by a tripartite board that is encouraged to mediate the dispute. Recently, the Oregon Court of Appeals upheld the constitutionality of the compulsory binding arbitration provisions of this statute [12].

Pennsylvania

Pennsylvania's Public Employee Relations Act calls for compulsory arbitration for guards at prisons or mental hospitals, and for employees directly involved with the functioning of courts. There also is another statute, Act III, which provides for binding arbitration of impasses involving police and firefighters.

Under the PERA, guards and court employees must submit their impasses to a tripartite panel of arbitrators, and the method used is to be conventional arbitration. There are no guidelines listed in the statute. The method under Act III is the same, except that under this statute, the award is subject to review. The law survived an early court challenge in 1969 [13].

Rhode Island

For arbitration purposes, public employees may be placed in three groups — state employees, teachers and municipal employees, and firefighters and police. Depending on the group involved, arbitration may or may not be compulsory. Arbitration for state employees is compulsory should mediation and factfinding fail. The arbitration hearing is to be conducted by a single arbiter, and s/he shall use the conventional model in arriving at an award. The award is to be binding on all issues other than those that involve wages. There are three factors listed in this statute that the arbitrator must consider in reaching a decision:

1. comparison of wage rates and conditions with like occupations in both private and public sector;
2. comparison of peculiarities of employment in regard to other industries, trades, or professions; and
3. the interest and welfare of the public.

The other group of employees that must submit impasses to arbitration are police and firefighters. The dispute shall be heard by a panel of three arbitrators – one chosen by each party and the third chosen jointly. If the parties cannot agree on the third arbitrator, he is to be appointed by the Chief Justice of the Rhode Island Supreme Court. Under this statute, the arbitrators must consider the same three criteria as are used for state employees in making their award. The statute covering firefighters was challenged in 1969 and held to be constitutional [14].

South Dakota

South Dakota passed a binding arbitration law in 1975. The State Supreme Court ruled in the same year that the act was unconstitutional [15].

Utah

The State's Fire Fighters' Negotiation Act, which provided for binding arbitration of all matters except salaries and wages, was declared unconstitutional in 1977 [16].

Washington

Passed in 1975, the Public Employees Collective Bargaining Act calls for compulsory arbitration for all county police, and police in cities with more than 15,000 persons; it also covers all firefighters in the state. A tripartite panel will conduct the arbitration hearing with the PERC choosing one member from each party's list of three nominees. These two designates will then decide on the third arbiter. The panel must consider the legislative purpose as outlined in Section 41.56.430 in rendering a decision. The decision is final and binding on the parties, subject to review by the superior court. The statute was upheld in a 1976 court decision [17].

Wisconsin

The 1972 Wisconsin law covers all police and fire department employees, except those in cities with more than 500,000 or fewer than 2,500 persons. A single arbitrator is to conduct the hearing. The act provides for alternative forms of arbitration. In the first form, the arbitrator may decide all issues by conventional means. However, should the parties agree on it, he may use last best package in making an award. The arbitrator is required to consider the ability of the employer to pay, comparable wages, cost of living, and changes in circumstances.

In 1977, the state passed a second law providing for a mediation-arbitration scheme for municipal employees. A single arbitrator or a tripartite board conducts mediation and, if unsuccessful, final offer/package arbitration is used.

To guide the mediator-arbitrator in reaching this decision, a list of factors to be considered is included in the statute.

Wyoming

Since 1968, the state's firefighters have been covered by a law that requires arbitration of a dispute that has lasted longer than thirty days. A tripartite board conducts conventional arbitration according to the provisions of the Uniform Arbitration Act. The State Supreme Court has held that the provisions for compulsory and binding arbitration of unresolved disputes do not violate the state's constitution [18].

CONSTITUTIONALITY

The most important criticism of compulsory arbitration statutes involves the constitutionality of these types of laws. The principal constitutional challenge has been that binding interest arbitration statutes create an unlawful delegation of legislative power and discretion to arbitrators. Other objections to the validity of these laws is that they violate the separation of powers doctrine as well as provisions of the fourteenth amendment.

Issue: Unlawful Delegation of Power

It has often been argued that because the state constitution vests the legislature with the power to appropriate public funds this power cannot be delegated lawfully to arbitrators. At least seven state constitutions include a "ripper" clause [19–25], expressly prohibiting the state legislature from delegating to a special or private body any power to interfere with municipal moneys or to perform municipal functions. Four state supreme courts have interpreted the ripper clause with respect to binding interest arbitration statutes. Although there is a division among the jurisdictions, the weight of authority indicates a ripper clause prohibits a state legislature from delegating to arbitrators the power to spend public funds.

In *Erie Firefighters Local 293 v. Gardner*, the Pennsylvania Supreme Court held that a state law requiring binding arbitration was unconstitutional because it violated the ripper clause in the state constitution [26]. Following *Erie Firefighters*, the Pennsylvania ripper clause was amended to permit the legislature to delegate power pursuant to binding interest arbitrator statutes covering police and firemen. The Pennsylvania ripper clause now reads:

The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever. Notwithstanding the foregoing limitation or any other provision of the Constitution, the General Assembly may enact laws which provide that the findings of panels or commissions, selected

and acting in accordance with law for the adjustment or settlement of grievances or disputes or for collective bargaining between policemen or firemen and their public employers shall be binding upon all parties and shall constitute a mandate to the head of the political subdivision which is the employer, or to the appropriate officer of the Commonwealth if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the lawmaking body of such political subdivision or of the Commonwealth, with respect to matters which require legislative action, to take the action necessary to carry out such findings [22].

Despite its state's ripper clause, the Supreme Court of Wyoming in *Wyoming ex rel. Fire Fighters Local 946 v. City of Laramie* [18], upheld a statute providing for compulsory binding arbitration between firefighters and their employers. Because arbitration is common in the private sector, the court held that administration of arbitration proceedings could not be deemed a purely municipal function. The court noted that the city's status as a creature of the state made city consent to the statute necessary, and that the legislature was empowered to authorize determination of wages, hours, and working conditions of city employees. The court further reasoned that the purpose of the ripper clause was to protect the public against unlawful delegation of taxing power and other purely municipal functions to persons who might not be accountable to the electorate.

In *City of Sioux Falls v. Sioux Falls Firefighters* [15], the South Dakota Supreme Court found that the state's Police and Fire Department Arbitration Act was a violation of the state's ripper clause. In its ruling, the court rejected the notion that an arbitration panel created under the act can be distinguished as a public commission. It criticized the *Laramie* decision [18], emphasizing that the ripper clause was intended to prohibit legislative interference in municipal affairs. In finding the entire act unconstitutional, the court stated that because the entire act is so bound to the total concept of binding arbitration, the provisions of the act cannot be evaluated separately.

Consistent with the holdings of the Pennsylvania and South Dakota courts, the Utah Supreme Court upheld a lower court ruling in invalidating that state's Fire Fighters' Negotiation Act. In *City of Salt Lake City v. Firefighters Local 1645* [16], the court held that the legislature may not surrender its authority to a body "wherein the public interest is subjected to the interest of a group which may be antagonistic to the public interest." [16] Thus, in general, it appears that a state constitution containing a ripper clause will usually serve as a bar to compulsory arbitration of interest disputes.

Most state constitutions do not, however, contain ripper clauses prohibiting the delegation of legislative powers. Nevertheless, in several state supreme court cases, arbitration laws have been challenged. Four basic arguments have been made against these laws:

1. the legislature cannot delegate at all;

2. the legislature cannot delegate to arbitrators;
3. the legislature cannot delegate without providing adequate standards and safeguards; and
4. the legislature cannot delegate taxing powers to arbitrators.

Although a legislature may delegate its power if the state constitution so provides [7], most state constitutions do not describe explicitly the scope of the legislature's delegatable authority. Several state supreme courts have borrowed the language of the U.S. Supreme Court, which denies the delegation of power by Congress. On the other hand, some courts have held that the power to make a law cannot be delegated, but the power to implement an existing law may be [18]. That is, the legislature may delegate its power if it is necessary to carry out a piece of legislation that already has been passed [14].

Therefore, although a few courts have ruled to the contrary, it is likely that absent a ripper clause in the state constitution, a state legislature can delegate its authority to arbitrators.

As of now, no compulsory arbitration statutes enacted by state legislatures have been invalidated merely because the courts considered the arbitration panels to be committees of private citizens. Even courts concluding that arbitrators were private citizens have ruled that the legislature can delegate power to them, as long as there are adequate standards provided to guide them in the exercise of this power. In *Town of Arlington v. (Massachusetts) Board of Conciliation and Arbitration* [6], the court concluded it was "less concerned with the labels placed on the arbitrators as public or private, as politically accountable or independent, than with 'the totality of the protection against arbitrariness provided in the statutory scheme.'" [6, at 2046]

In *Dearborn Firefighters Local 412 v. City of Dearborn* [7], the Michigan Supreme Court examined the issue of accountability in depth.¹ Although one justice deemed the statute valid, two justices held it to be unconstitutional on its face, in that its provisions for *ad hoc* panels left the arbitrators politically unaccountable. The latter two justices asserted, however, that a law creating a permanent board of arbitrators would insure public accountability and would, therefore, withstand constitutional challenge. In that a permanent panel would be more costly and potentially biased, it is not likely the concept will be adopted. Nonetheless, to guarantee the constitutionality of such statutes, provisions insuring arbitrators' public accountability should be included. Because arbitrators are neither public officials nor required to answer to the voters or to their elected representatives, more stringent standards and safeguards are needed to guide arbitrators in their exercise of delegated authority.

Assuming that legislatures are permitted to delegate their authority,

¹ The Michigan Supreme Court, in discussing a challenge to a statute covering firefighters, said that the power to delegate resolving authority is implicit in the legislative power conferred by the constitution to enact laws providing for the resolution of disputes concerning public employees [7].

compulsory arbitration statutes still may be attacked on the grounds that adequate standards and safeguards are not provided in the laws. No arbitration law has been struck down for this reason, but the question remains one of increasing concern. Eight state supreme court decisions discuss the sufficiency of standards *vis-a-vis* compulsory arbitration statutes, and in analyzing these eight decisions, two opposing points of view can be seen.

Some courts have held that “general primary standards” are sufficient to guide arbitrators in settling disputes. The first case in which this decision was reached was *Division 85, Amalgamated Transit Union v. Port Authority* [27]. In this case, the Pennsylvania court upheld the statute stating that the announced legislative policy established primary standards sufficient to guide the arbitrators in exercising legislative intent.

In *Harney v. Russo*, the Supreme Court of Pennsylvania again reviewed the constitutional adequacy of standards [13]. There the court upheld a statute with no standards that called for compulsory arbitration of impasses involving police and firefighters on the grounds that the Pennsylvania constitution recently had been amended to permit such standardless delegations, if the arbitrators adhered to the requirements of the enabling legislation and due process. The court added that the “obvious legislative policy [of protecting] the public from strikes by policemen and firemen” [13, p. 186], would be an adequate standard for arbitrators to follow.

The only other major case in which the court ruled that “intelligible principles” derived from a legislative statement of purpose are sufficient is *City of Biddeford v. Biddeford Teachers Association* [5]. In this case, the Maine Supreme Court was evenly divided as to whether a policy statement of the legislature constituted a sufficient standard to uphold an otherwise standardless compulsory arbitration statute. Three justices held that the statute was constitutional because the legislative policy statement in conjunction with implicit guidelines created a primary standard that prevented arbitrators from exercising their powers inappropriately. In contrast, the other three justices thought the statute was unconstitutional for lack of sufficient standards to protect the employees and the public from irresponsible exercise of power delegated to arbitrators. They held that a statement of legislative intent is not “a meaningful criterion for the arbitrators’ determination, issue by issue, of the individual subject matters before them.” [5, p. 401] In addition, the three concluded the statute’s exclusion of salaries, pensions, insurance, and educational policies did not imply standards an arbitrator must consider in making an award — the statutory exclusions merely defined the boundaries within which arbitrators may act. Although conceding that the legislature expected arbitrators to act fairly and reasonably, the justices noted that such an “unspoken demand for integrity” was implicit in every statute delegating power to administrative bodies, and did not furnish standards to guide the arbitrator.

The other point of view with respect to standards and safeguards is that there must be standards “sufficient to confine the exercise of power to the purpose

for which the delegation was made.” [14] In *Warwick v. Warwick Regular Firemen’s Association* [14], the Rhode Island Supreme Court established criteria for evaluating standards. After asserting that one important criterion for evaluating standards is that they should allow a review panel to determine whether an arbitrator’s action was “capricious, arbitrary, or in excess of the delegated authority” [14], the court ruled that the standards outlined in the Rhode Island law were sufficient. The standards listed in the statute that must be followed by arbitrators are:

1. consideration of the general interest and welfare of the public;
2. an evaluation of wage comparisons; and
3. the hazards of employment, physical and educational qualifications, and job training and skills.

The court, in its ruling, held that these standards were adequate to protect the public against the arbitrary use of delegated power by outside third parties, but the legislative policy statement alone is an inadequate standard.

This opinion is echoed in six other cases [5–8, 11, 17]. In each case, the arbitration law covered public employees and gave the arbitrators substantial power to create public debt. If a compulsory arbitration statute empowers the arbitrators to create substantial debt by permitting wage, pension, and other monetary awards, specific standards are usually required. If, however, a statute provides for binding arbitration only on matters such as working conditions, which require small public expenditures, it is likely that primary standards would be acceptable. Thus, the more extensive the power to create public debt, the more specific the standards must be.

In examining this issue, it is necessary to comment on the notion of procedural safeguards against arbitrary exercise of delegated authority. First, judicial review of an arbitration award is always available, whether or not the statute provides for it. Also, if a statute requires arbitrators to make written findings of fact or to keep a transcript of the hearing, the safeguards are adequate. This opinion was upheld in several state supreme court cases [6, 7, 17].

Although several binding arbitration statutes have been attacked on the ground that they unconstitutionally delegate the taxing power, the courts have rejected that argument. In *Dearborn Firefighters* [7], the public employer claimed that because a wage increase could only be met by raising taxes, the power to grant pay raises constituted an indirect power to raise taxes. The court rejected that argument, noting that because the city could adjust for wage increases by raising taxes or by decreasing other public expenditures, the city’s power to tax was not threatened. In a related issue, the New Jersey Supreme Court recently issued a decision that upheld the constitutionality of that state’s compulsory arbitration law. That statute had been challenged on the grounds that it conflicted with the state’s Cap Law, which places limits on the taxing authority of local governments. The contention of the employer was that it would be unable to afford to grant patrolmen the amount awarded by the arbitrator because of the limitations placed on the town by the state’s Cap Law.

The court held, however, that the town “retains the discretion to diminish the size of its police force and limit the areas in which patrolmen will be deployed inasmuch as these decisions unquestionably are predominantly managerial functions which cannot be delegated to an arbitrator not accountable to the public at large. The arbitrator’s decision merely sets the terms and conditions of employment for those patrolmen whom the municipality desires to hire or retain on its force. As such, the amount of expenditures which must be incurred to implement the award are within the township’s control.” [10] In effect, the court denied that any conflict existed and suggested that the town could operate within the limits placed upon it by cutting back on services to the public.

Issue: “Home Rule”

Another argument used to attack compulsory arbitration statutes is that these types of laws conflict with “home rule” provisions of state constitutions, which empower municipalities to adopt resolutions and ordinances relating to their particular municipal concerns. However, home rule powers control “only to the extent that such exercise is not inconsistent with any general law enacted by the legislature.” [11] Because binding interest arbitration statutes are general laws, local governments must abide by their provisions.

In the most recent court case dealing with this issue, the Oregon Court of Appeals upheld that state’s compulsory arbitration law and dismissed the notion that it conflicted with the home rule provisions of the constitution. In deciding the case [12], the court of appeals relied on a 1978 Oregon Supreme Court case [28]. In *LaGrande/Astoria v. PERB*, the Oregon Supreme Court held that “a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community’s freedom to choose its own political form.” [28] The court thus held that under this principle, the statute did not violate the state’s constitution.

Issue: Delegation of Authority

In determining whether compulsory arbitration is constitutional where permitted or required by a city charter, but not provided for in the state constitution, it is clear that a provision of a state constitution prohibiting compulsory arbitration would void any city charter provision allowing interest arbitration. In the absence of such a prohibition, however, authority is divided over whether city charter authorization of interest arbitration is valid. The Supreme Court of California has upheld delegation to arbitrators if a city charter expressly provides for interest arbitration [29]. Most decisions, however, have invalidated charter provisions permitting interest arbitration on the grounds that delegations to arbitrators who are unaccountable to the public are unconstitutional [30–32].

The other question is whether, absent any state or local authority, a public employer and its employees may agree to submit unresolved issues to binding arbitration. Because it is doubtful that a city has power to delegate even when authorized by charter and because voluntary grievance arbitration has been held to be unlawful absent a statutory provision, it is, therefore, quite likely that interest arbitration would be found unconstitutional under similar circumstances [30, 33, 34].

Issue: Separation of Powers

All state constitutions vest legislative powers in the state legislative body and provide that these powers cannot be delegated to the judiciary or the executive branch. In light of this doctrine, compulsory arbitration statutes may be attacked in three ways. First, separation of powers-problems arise if a judge is given a statutory role in the selection process of an arbitration panel that makes decisions regarding legislative matters. Although one justice has questioned the notion that the judiciary should not select arbitrators, another court rejected this argument [18]. To prevent future challenges on this basis, state legislatures should eliminate judicial participation in the selection of arbitrators.

A second separation of powers challenge may occur in cases where a state statute provides for an appeal *de novo* from arbitration orders. The argument is that if an appeal *de novo* is permitted, a delegation of power to arbitrators becomes a delegation of power to the courts, for the court's decision is final and binding on the issues in question. This argument was raised in a South Dakota case [15], but was not discussed by the court, since that state's statute was revoked on other grounds.

A final separation of powers argument would be that compulsory arbitration statutes give the judiciary an implied power to reallocate public funds or to order tax increases even though a public employer is unable to bear the costs of an arbitration award. To guard against this claim, binding interest arbitration statutes should require arbitrators to consider the employer's ability to pay before they fashion an award.

Issue: 14th Amendment

The third major challenge to compulsory arbitration centers around the fourteenth amendment of the U.S. Constitution. First of all, compulsory arbitration has been challenged as a violation of fourteenth amendment procedural due process guarantees on two theories. For example, the New York law has been challenged on the grounds that the statute's failure to provide expressly for judicial review of arbitration awards denied the city due process [35]. The court, however, rejected this idea and held that due process was guaranteed, for the courts still had the power to review an award, whether or not the statute provided for such action.

A second type of due process arose in *Harney v. Russo* [13]. In that case, the employer claimed a denial of due process because it could be held in

contempt of court for failure to implement an arbitration award, even though tax limitations left the employer unable to pay. This charge could be avoided by requiring arbitrators to consider the employer's ability to pay.

Some courts have ruled that the method by which arbitrators are selected under compulsory arbitration statutes violates the "one man — one vote" principle and therefore does not allow for equal protection. The Massachusetts Supreme Court addressed this issue in *Town of Arlington* [6], and held this doctrine was not applicable to arbitration statutes. In deciding the case, the court looked to two supreme court decisions [36, 37], indicating that the doctrine applies only to bodies having general legislative powers. An arbitration panel is purely administrative and does not possess any legislative powers. Thus, the charges that compulsory arbitration statutes violate the equal protection doctrine appear to be unfounded.

The constitutionality of compulsory arbitration will undoubtedly become of greater importance as more states pass public employee bargaining laws.

IMPACT OF COMPULSORY ARBITRATION STATUTES

It has been said that an arbitrator's decision is a substitute for the decision of a legislative body. Arbitration can thus be said to establish a closed legislative process from which the play of political forces is, for all practical purposes, excluded. In many situations a public sector arbitrator faces issues that extend beyond those over which labor and management traditionally bargain. These issues can, and often do, involve significant elements of social planning.

Three basic types of issues may face the arbitrator:

1. salary issues;
2. other issues involving cost to the employer; and
3. nonsalary issues involving no significant cost.

Salary Issues

In structuring a system of public sector arbitration, there must be boundaries set up within which an arbitrator can operate. Under one model that may be used with respect to salary issues, the arbitrator would be limited to determining the "proper wage" for a group of employees without regard to the fiscal impact of the decision. In some cases, the proper wage could be defined in terms of a precise formula based on objectively ascertainable facts, such as cost-of-living increases or the collectively bargained wage rates of private employees who perform similar jobs. Under this system, the fiscal impact of the award would not be considered by the arbitrator, which could lead to changes in public policy so as to accommodate the award. Should the employer be unable to afford an award, it would have to choose one of the following courses of action:

1. the jurisdiction could do without the labor, or part of it;
2. cuts could be made elsewhere in the budget;

3. taxes could be raised; or
4. money could be borrowed.

Under the “proper wage” model, the arbitrator would not consider any of these options, but only issue a decision.

This model suffers from two defects, one technical, the other political. The technical defect is that determination of the proper wage is a highly subjective decision. For example, a public employer may have a policy that calls for public employees to be paid at the same rate as private sector employees who perform similar work. However, in implementing this policy, it is not always clear as to what private sector group the public employees should be compared to. Where wage scales for the same work vary considerably, the decision becomes purely subjective. Also, if the work involved is unique to the public sector, no comparison is possible. This puts the arbitrator in the position of trying to find a reference group that is not too far from the employees whose wages he is setting.

A policy that public employees should be paid by reference to comparable rates in other public employment is likely to be artificial in a context in which the wages paid by other public employers are themselves determined by arbitration on the basis of the same criteria — the process becomes circular, with each arbitrator looking to the results of arbitration in other areas.

The other flaw in this model is political in nature. The current state of the economy is placing public employers in a fiscal squeeze. Several factors undermining the ability of central cities to meet the collective bargaining demands of municipal employees are inflation, suburbanization, and recession. The erosion of purchasing power by inflation leads to increased union demands, while suburbanization and recession reduce the amount of money cities have to meet those demands. Citizens of a municipality on the verge of bankruptcy may be reluctant to authorize an arbitrator to grant wage increases as he or she sees fit.

An alternative model also insulates arbitrators from the political consequences of their decision but forces them to act within much stricter parameters. This model, known as the residual model, limits the arbitrator’s discretion over money issues to whatever funds were available on the basis of the budget prepared by the governing body. If the arbitrator were required to accept that authority’s determinations regarding the available revenues and their allocation among competing claims, he or she would simply determine how the residual amount should be divided among salary and other cost benefits. This “residual” model would undoubtedly appeal to public administrators, but would be completely unacceptable to organized labor, for it undermines collective bargaining and puts the arbitrator in the position of being a rubber stamp for predetermined management decisions.

A third model, a compromise between the first two, is the ability-to-pay model. In most state statutes that use this model, it is unclear how the factor should be taken into account and what weight it should be given in relation to other factors. Moreover, the same difficulty arises with this model as with the proper wage model, for if there are insufficient funds to meet the arbitrator’s

award, he or she implicitly or explicitly determines what items are to be cut from the budget or whether taxes should be increased.

In evaluating these models *vis-a-vis* salary issues, it is apparent that both of these models place the arbitrator in the position of determining broad issues of social policy that would be better resolved through the legislative process. Even though some arbitrators realize their limited expertise in some areas (e.g., public finance), others feel it is necessary for arbitrators to make these types of decisions even though they have an impact on public policy.

The proper wage, residual, and ability-to-pay models are also applicable to the settlement of other issues involving monetary costs and therefore have an impact on finances. Three additional considerations, however, must be taken into account. First, it is more difficult to establish what demands are reasonable or unreasonable outside the area of wages. If other employees have a certain benefit (e.g., dental care), but the benefit varies in quality from group to group, it becomes difficult to characterize any demand as unreasonable except in relation to the total package of wages and benefits. Comparison on the basis of the total package, however, is also difficult, for there are items in the package that are a cost to the employer but provide little monetary benefit to the employee. An example of this might be reduced class size for teachers.

Second, nonwage cost items may have little present cost, but may have fiscal impact in the future. A pension plan with deferred funding, for example, may have a great deal of impact on future budgets. Some demands may lead to the need for additional facilities and, hence, an investment of capital. If arbitrators are given the authority to decide such issues, their impact on social policy is heightened.

The monetary cost of an interest arbitration award is not the only factor having political overtones. Issues that bear no significant costs to the employer may have political implications. Some routine personnel matters such as seniority, protection against unjust dismissal, and scheduling of vacations can take on a political dimension. The Supreme Court of Michigan, for example, held that a police residency requirement relates to working conditions and is therefore a mandatory subject of bargaining under Michigan law [38]. The court found the parties had bargained to impasse over the issue and concluded the city was free to take unilateral action in the form of an ordinance imposing the residency requirement.

In this case, and in a similar one in California [39], the judicial determination that the issues in dispute were proper subjects of mandatory bargaining seems correct as a matter of statutory interpretation. Yet the political implications of a system that subjects such disputes to binding arbitration are substantial. It means that an arbitrator is to be given the task of assessing the impact of proposed rules on the interests of the broader community as well as on the interests of the employees.

This analysis is not meant as an indictment of compulsory arbitration statutes; its purpose is to point out some of the weaknesses in the procedure so they may

be corrected. At this point, we offer some recommendations for strengthening compulsory arbitration in the public sector and propose some methods for implementing these ideas.

RECOMMENDATIONS

The first area of "reform" involves the statutes themselves. Several contain flaws that may undermine their effectiveness. Statutes allowing negotiation to continue into the arbitration proceeding are self-defeating. This aspect negates the risk aspect of final-offer arbitration. The parties have little incentive to make a concession at an earlier stage of bargaining if they know concession can be made at the arbitration hearing. By allowing negotiation to continue to this step, the pressure of losing in final-offer arbitration is relieved. To make these statutes more effective, this practice should be eliminated, and the parties must be required to present their last best offer at the outset of the arbitration hearing.

A second area in which reform is needed is the degree to which the factfinders' report is relied on by the arbitration panel. Often the final arbitration proceeding becomes merely a "show cause" hearing as to why the recommendations of the factfinder should not be accepted. This two-step procedure tends to lessen the risk inherent in final-offer arbitration and hence reduces the incentive for negotiation. The parties will be reluctant to bargain seriously before the issuance of the factfinding report because it tends to predetermine the award.

This problem may be solved quite easily by excluding the factfinder's report and recommendations from the arbitration hearing. The possibility that the arbitrator may resolve the issues differently from the factfinder places additional uncertainty on the eventual outcome. Also, exclusion of the factfinder's report will insure an independent analysis of the issues by the arbitrator. Unlike the arbitrator, the factfinder is not bound by law to consider certain criteria listed in the statute. It would be unfair to a municipality for an arbitrator to base an award on a report that may not have considered the "ability to pay" criteria.

A third major area in which changes are needed encompasses the procedures for selecting neutral arbitrators and evaluating their qualifications. It has been suggested that arbitrators may be made more politically responsible by electing them, or by having them appointed by elected officials to serve on a continuing basis. This proposal, however, poses a dilemma. The problem of political responsibility arises initially from the fact that arbitrators have been delegated authority by the legislature to determine policy issues. But if the arbitrator is made politically responsible to the local electorate, which is in effect a party to the dispute, then the arbitrator loses his/her neutral character. On the other hand, if the parties are given a free hand in choosing the arbitrator, incompetent or biased arbitrators may be selected, who in turn fashion awards burdensome to the general public.

To alleviate this problem, it is necessary to compromise the two positions.

Parties should be allowed to choose the arbitrator, but only from lists of very select individuals. Although experience in private sector labor relations should be recognized as extremely valuable, it should not automatically qualify someone for public sector interest arbitration. The public sector arbitrator should have an understanding of public finance and a sensitivity to the policy issues involved. Governmental agencies, educational institutions, and organizations of arbitrators (e.g., American Arbitration Association) could establish training programs to provide aspiring public sector arbitrators with relevant information and exposure. Governmental or private organizations that submit lists of arbitrators' names for selection by the parties could develop separate public sector arbitration lists.

In conjunction with this recommendation goes the idea that there should be some way of assuring that arbitrators meet certain standards of competence. One way of making this determination would be to have arbitrators go through an examination process in the same way as do doctors, lawyers, and accountants. This proposal, if implemented, would serve as a screening device and would ensure that all arbitrators have at least a minimum amount of the knowledge and skills necessary to perform their function.

An issue closely tied to the preceding one is the basis for other recommendations. Some statutes provide guidelines the arbitrator must follow in rendering a decision. It is highly recommended that all state statutes adopt this policy, for it serves to make arbitrators more accountable for their actions.

It has been argued that these criteria may cause many problems for the arbitration panel, for their expertise is limited in certain areas. For example, if "ability to pay" is interpreted literally, the panel may wind up being converted into a substitute for the entire budgetary process.

It is questionable whether any *ad hoc* arbitration panel, left solely to its own devices, in a limited amount of time, can determine all the relevant and applicable facts the statutory standards require. Nevertheless, it is appropriate to expect a good faith effort. Thus, because of the complex issues a public arbitration panel must evaluate, it should not be required to rely solely on the evidence produced by the parties. The panel should be permitted (and encouraged) to seek relevant information from other sources. An obvious source is the research staff of the state's public employer relations board, where one exists. It may even be appropriate to establish a formal, continuing research department to gather data to be used by arbitration panels so they can perform more effectively.

Because salary and other cost determinations involve political decisions, statutes governing public sector interest arbitration should require arbitrators to consider the employer's ability to pay in fixing awards. Should outside assistance be necessary, the panel should be free to obtain help. Also, wage disputes of various groups of employees of the same employer should (if possible) be arbitrated concurrently. The "ability to pay" factor will be equally important to all groups. By consolidating arbitral proceedings involving more than one group of employees, the potential for conflicting awards may be reduced.

It is believed that by incorporating these suggestions into the laws and procedures governing public sector interest arbitration, the process will be strengthened. However, an underlying issue is whether compulsory arbitration should be extended to cover all public employees.

The view that all public employees should be prohibited from striking leads one to believe that arbitration of public employee disputes is the fair alternative to strikes. However, this is not necessarily so. In that there are problems with interest arbitration in the public sector, it should be used only in situations where a strike would have disastrous results. These situations are few and far between. In other words, it would be better for public employees to have the same right to strike as private employees have. This would allow public employers the same right to take a strike as private employers have. In the long run, this would allow the two sides to work out their differences themselves without need for a third party. There would, of course, be strikes and interruption of public services. However, the problems associated with the use of arbitration would be alleviated.

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