

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2
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It is time for a change in our labor laws. It is time for the repeal of Act 312. It doesn't work. It was a noble experiment but we now know it is a disaster.

In his state of the State address, the Governor announced he was going to have the Department of Labor review the state's labor laws and recommend any necessary changes. He told them he was specifically concerned about the impact of Act 312 on the fiscal solvency of the State's local units of government. Those departments did conduct a study and on May 21 of this year they issued their report. We were so disappointed in that Report that we felt compelled to write a criticism of it which we sent to the Director of the Department of Labor. Copies of our critique are available here today.

The Report to the Governor contained quite a few suggested modifications of Act 312, some of which are very good, but the Report did not deal with the basic problems.

First, the Report specifically rests upon the premise that a strike of public safety employees is always more costly to society when compared with the costs of an arbitration award. In other words, it is not possible for an award to hurt society more than a strike. We say no! It is possible. We have had such awards. The premise is false.

Our other quarrel with that report is that it fails to examine carefully the problem I discussed earlier: that Act 312, especially in the larger cities, has become, instead of a "strike substitute", a substitute for the collective bargaining process.

We believe those State departments should reexamine Act 312. We believe that a thorough, objective study will reveal that it is time to repeal Act 312.

There are many people who claim that if we are going to prohibit strikes then we must provide compulsory, binding interest arbitration.

They say we must have one or the other. Police and fire unions and arbitrators say we must have arbitration. They know a golden goose when they see it! I say, if that is the choice, one or the other, let it be the right to strike - exactly in the format used in the private sector

But I hasten to add that I'm not convinced we have to be on the horns of that dilemma. There are some other things we haven't thoroughly tried yet. All of them designed to improve the climate for collective bargaining.

We should consider a closely limited, carefully regulated right to strike. If we do that, of course, we should learn a lesson from the private sector and exclude supervisors from collective bargaining. There should be a reasonable attempt to balance bargaining power as is done in the private sector under the National Labor Relations Act. There should be a far greater effort made by the State government in providing mediation services. Because in the public service we have a greater desire to

avoid strikes, the mediation effort should be greater than that provided to the private sector by the federal and state governments. Most of all we should be encouraging the process of collective bargaining. Many people are afraid of it or don't understand it. It works, we know it works, we should do everything possible to make it work. And we should remove every impediment to collective bargaining that exists. Most particularly we should remove compulsory arbitration.

I would like to read to you the words of one of the prominent labor leaders of this century. This is from a paper he wrote entitled "Union Leaders and Public Sector Unions." Here are the words of the recently retired president of the AFL-CIO, George Meany:

"The success of voluntary arbitration in settling disputes unresolved at the bargaining table is based on the fact that such arbitration is itself a product of the collective bargaining process. It is not imposed by some outside authority against the will of either party.

And this is the rock against which the notion of compulsory arbitration has been shipwrecked every time it has been tried. The hasty, ill-conceived legislation with which Congress tried to break strikes in the airline and railroad industries only succeeded in making matters worse. In any guise, under any name - "mediation to finality," "final-offer" arbitration, or what have you - compulsory arbitration has been perceived by employers as an out that makes real bargaining unnecessary and by employees as a tool of tyranny that makes bargaining meaningless.

Collective bargaining is a two-handed tool that won't work unless both parties want it to work, and that goes for arbitration as well.

There are those who argue that collective bargaining is all very well in "non-critical" public services such as schools and sanitation departments, but that some substitute for the strike must be found in the areas of law enforcement, fire protection, and hospital services.

That would be fine if such a substitute could be found, but so far none has been found. There are no shortcuts and no substitutes for the bargaining table and mutual freedom of contract.

And compulsory arbitration - the favorite proposal of certain editorialists - just will not work because it is an abrogation of freedom. The crucial difference between voluntary and compulsory arbitration is the difference between freedom and its denial.

Fairly long experience convinces me that the best, surest and, indeed, only way to secure stability in labor-management relations in any area, including government service, is through the normal pattern of free negotiations on every aspect of wages and working conditions."

- End of Quote -

George is right. There is no substitute for collective bargaining. Act 312 destroys collective bargaining. Act 312 must be repealed. It's time to fold that hand and ask for a new deal.

However, Act 312 is not the only concern we have with the State's labor laws. As I'm sure you all know, there is currently pending in the House of Representatives a bill that is being called the "Right to Strike" bill. This is HB 4545.

The proponents of this bill argue that public employees should have a legal right to strike, that public employees should not be deprived of a basic right enjoyed by their union brothers and sisters in the private sector. Don't be fooled by their sophistry! They no more want to be treated like their so-called brothers and sisters than you want to go live at the North Pole. They do not want to give up the protections they enjoy under the Civil Service rules or the Teacher Tenure Act. They do not want to exclude supervisors from unions, they do not want to give up the golden goose we call Act 312, and they do not want to limit collective bargaining to the subject matters traditional in the private sector. Public employees in Michigan now have many advantages under the State's labor laws that their private sector brothers and sisters do not have. Many of these were given them because there was no legal right to strike. Now they want to have their cake and eat it too! And they're quite willing to allow their brothers and sisters to continue to pay for the advantages they enjoy.

In connection with HB 4645, the City of Detroit and other public employers have argued strenuously that the State's labor laws must provide a balance of power at the bargaining table, that, if the legislature feels we should pattern ourselves after the private sector, then we must go all the way, and adopt that kind of balance. There must be no collective bargaining for supervisory employees and the kinds of things that must be negotiated must be limited to the kinds of things that must be negotiated in the private sector. The public employee unions that endorse HB 4645 don't merely want the right to strike - they want a law that will virtually guarantee they'll win every strike. And there's an amendment to the bill before the House that would open up access to Act 312 to all public employee unions under certain circumstances.

Today the House may be voting on the Right to Strike Bill and several important amendments to it. I for one hope, and I am very confident, that the House of Representatives will act responsibly to assure that collective bargaining in this state will be given every chance to operate

in a balanced, fair, and reasonable manner.

I say to you today that the central theme of the State's Labor laws must be collective bargaining. This is the key to reasonable employee relations in the public sector in this state. We must not destroy collective bargaining with compulsory arbitration and we must not destroy it with lopsided changes in the labor laws.

Our Opinions

Suspend Arbitration

The case against Michigan's arbitration law for police and fire unions is now more convincing than ever.

Act 312, requiring compulsory arbitration of pay disputes between cities and their police and fire unions, has been often criticized. But, in light of Detroit's desperate financial plight, the case takes on a new urgency.

Not only must the city trim its payroll, swollen by arbitration, it must also finance a \$119 million deficit with bonds. Rodkey Craighead, chairman of Detroit Bank & Trust Co., recently noted that his firm would find it very difficult to buy the city's deficit bonds without some changes to narrow the gap between Detroit's costs and revenues. Not least among the changes Mr. Craighead mentioned was relief from the effects of Act 312.

The concern of Mr. Craighead, and of other Detroit bankers, is understandable. As bankers are fond of saying when they are asked to make risky investments, it's not their money. They have obligations to their depositors.

Too, Mayor Young's blue-ribbon fiscal crisis committee has noted that Act 312 contains provisions that "have had the effect of compounding Detroit's employe-compensation cost problems and have in fact directly accounted for more than half of the present deficit."

The arbitration award for the police-fire contract beginning in 1977 cost the city \$79 million more than raises for all of the city's other employes, who engaged in collective bargaining.

Arbitration is probably the soundest way to avoid dangerous police and fire strikes. But, as we've noted many times before, Michigan's law is seriously flawed — particularly with reference to a city's ability to pay.

The distortions created in Detroit's ledgers by the failure of arbitration panels to give attention to the city's fiscal position is all too apparent. Ability to pay needs much narrower definition. The law's current last-best-offer provision, which forces a panel to choose between two positions, with no room for compromise, also needs adjustment. Arbitration laws appear to be working in other states. With some amendments, Michigan's might also work.

But this is not the time for Lansing to fine tune a complicated statute. The city is asking the Legislature, as part of a package of bills enabling Detroit to issue the bonds, to suspend Act 312 for three years. This would have the effect of forcing the police and fire unions to the bargaining table, where agreements with the city's other unions have been held to reasonable levels in recent years.

If the police and fire unions won't agree to a voluntary waiver of Act 312 for this round of wage negotiations, the Legislature should act to suspend the law as an absolutely necessary part of the city's survival plan. The marketability of the bonds depends on it.

What lender or investor, surveying the damage already inflicted by Act 312, would gamble on the outcome of yet another arbitration?

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Monday, May 4, 1981

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RICHARD,

This IS WHEN
IT STARTED.

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POSITION PAPER ON PUBLIC EMPLOYMENT
LABOR RELATIONS POLICY
FOR MICHIGAN

By Louis D. Beer
Kemp, Kline, Endelman and Beer

A Prescriptive Analysis Prepared On
Behalf of the Michigan Municipal League

December 4, 1979



THE LAW OF PUBLIC EMPLOYMENT LABOR RELATIONS IN MICHIGAN

Louis D. Beer

Synopsis

The major problem, stated concisely, is that Michigan public employee unions have rather artfully structured themselves to get the best of both worlds: they strike and demand all of the rights of private employee unions, yet they seek the job protection of civil service, and systems like civil service, the availability of binding arbitration, and the right to organize employees and bargain about issues that were granted only on the assumption they would not strike. All of this is done under the regulation of an agency which for a variety of reasons has found it necessary to beat several substantial retreats from the field. The problems are many, the issues sharply divide managers and unions, and the solutions in many cases are imperfect, at best. However, it is clear there is room for improvement.

This paper provides the reader with a frame of reference in considering a number of serious difficulties involving public employee labor relations. Part I is a background statement. Part II deals with the issue of strikes by public employees. Part III concerns the collective bargaining process. Part IV covers labor dispute resolution in the absence of agreement.

I BACKGROUND:

Until 1965, Michigan operated under a statute commonly known as the "Hutchinson Act" which effectively reduced public employment labor relations to what union adherents contemptuously referred to as "collective begging". While public employee unions did exist they were not widespread, and relied for what little support they had on their powerful private sector brethren who were able to wield political influence with the public employer. Public Act 379 of that year, known as the Public Employment Relations Act, changed all of that. It provided for a system of regulation of public employee unions roughly paralleling that of the National Labor Relations Board in the Private Sector, with the pivotal exception that all Unions in the public sector were absolutely forbidden to strike. However, unlike the Hutchinson act, "PERA", as it is commonly known, provided no mandatory discharge for strikers. Instead, it set up what proved to be a rather elaborate hearing process in the case of any discipline of a striker. With what appears to be amazing naivete with the benefit of fifteen years hindsight, the legislators chose to rely on fact finding. They believed, apparently, that "the shining of the light of public opinion" on the issues in dispute would resolve disputes, making strikes unnecessary. If it worked, it was only briefly, and in only some communities, and public employee strikes, although illegal, proliferated.

In 1968 the Supreme Court of Michigan, in Holland v. Holland Education Association held that strikes by public employees were not automatically enjoined, but rather required a full "due process" hearing

before an injunction could issue. The effect of this was to make it impossible for any public employer to prevent by court action a strike of at least limited duration, as long, at the least, as it took the employer to find a lawyer, write a complaint, file it, serve it, and hold a hearing, a course of events which often turned out to be time consuming indeed.

In 1969 police and firefighters, seeing little opportunity in the climate of those times for successful strike action, supported and obtained the passage of Public Act 312, which provides for arbitration of economic disputes between police and fire unions and public employers. Since that time, most public employers contend that the overwhelming number of arbitration settlements have favored the employees, resulting in serious economic consequences for the employer, and serious difficulties in settling labor disputes with other employees not covered by 312, but who believe their wages and benefits should follow the pattern assigned by their fellow employees under 312.

Through the first five (5) years of PERA settlements tended to favor the unions who often overwhelmed public managers with expertise and experience in the collective bargaining process which simply was not present in most governments. However, in the early seventies the tide of events began to turn. The generally high salaries and wages won by Michigan public employees, the entrance into the job market of the post war "baby boom" and the rising level of employer expertise in the collective bargaining process led to a much higher level of confrontation, to a general slowing down of the trend in the level of salary settlements and to many more public employee strikes.

The most significant such confrontation occurred in the Crestwood school district. In Rockwell v Crestwood the Supreme Court of Michigan affirmed the discharge of virtually the entire teaching staff of almost

three hundred (300) teachers and their replacement by new teachers. Although the Court empowered the Michigan Employment Relations Commission, or "MERC" (the agency that administers the Public Employment Relations Act) to intervene and prevent the dismissals, the Commission did not do so. Thus for the first time, a significant number of public employees permanently lost their employment for striking. Equally significant is that the strike in Crestwood had been ordered halted by court order, and the teachers had continued to strike in defiance of the order.

Since 1975, when a bill legalizing strikes for school teachers was passed by the legislature, but vetoed by the governor, there have been calls from many sources for legislative reform of the existing situation, but none have to date succeeded. Public employers of police and firefighters complain bitterly of the unfairness of Act 312. School boards complain bitterly of the fact that school teachers can "make up" salaries lost during a strike due to the mandate that school be kept 180 days per year. Unions complain bitterly that the illegality of strikes and the lackadaisical administration of the unfair labor practice provisions of the Act have led to an absence of meaningful collective bargaining in any unit not so large that sheer numbers would prevent its members from being discharged and replaced. None of these complaints, however, has of yet stimulated successful legislative action.

Overlaying the present legislative ferment is the incipient emergence of collective bargaining at the state level. State police officers have won the right to bargain collectively by electoral referendum, and the Governor's Commission on Civil Service Reform has recommended collective bargaining for state civil service employees.

This is then the present situation, with virtually no interested party satisfied with the status quo, but with no agreement between the major interest groups as to what should be done. To make the situation

even more complex, certain aspects of the situation bother certain unions, and certain types of public employers, much more than others. As a result, any type of consensus is extremely difficult to obtain. What follows is an attempt to cover the major points in dispute from a point of view which reasonably reflects the concerns of municipal officers and managers, but which has a reasonable chance of being supported by other elected officials and the public, and can at least be appreciated, if not agreed to, by the unions.

II DETERMINING WHAT IS, AND WHAT IS NOT, A STRIKE

Problem: Providing merely "the right to strike" gives the employee the right to engage in almost any kind of conduct, without fear of any adverse consequence other than the withholding of pay, plus generating as much conflict over who can get away with what as is generated over the issues of the strike.

Prescription: Any bill regulating the "right" to strike should as clearly as is possible define what a legal strike is, as well as clearly provide the right of the public employer to carry on service in the face of the strike, including the employment of permanent replacements, if necessary. PERA should provide for the right to replace strikers, without hearing, and for the waiver of job protections other than PERA in strike-related situations.

PERA presently, in outlawing a strike, uses language which includes every conceivable kind of behavior in which an employer would not want his employees to engage. The result is that every kind of action against the employer is equally illegal, from the flat out refusal to come to work, to slowdowns, vandalism, threatening other employees and the like. As a result, all behavior gets punished, as in Crestwood, or even the most flagrant violations of the rights of fellow employees,

or the public, is condoned. Since in the vast majority of cases the employer's goal is to get the employees back to work, "no reprisal" agreements after illegal strikes are an almost universal rule, and so in most public employee strikes it is "anything goes". The bizarre result therefore in declaring all activity illegal is that there is often no conduct at all which is punished. Furthermore, PERA contemplates that the only response to the unlawful conduct of a striking public employee is to fire him. In the private sector, the NLRB has worked out a system which distinguishes "unlawful" or "unprotected" activity for which a striker may be fired, and "protected" activity during a legal economic strike for which a striker may be "replaced" by a permanent employee who is willing to work during the strike. (The status of the striking employee who is replaced is roughly equivalent to that of an employee on layoff). Given the complexity and the difficulty of discharge procedures under PERA, and the conflicting application of tenure act., local civil service acts, veterans preference, and the like, it is ironically easier to "replace" a striker in the private sector where striking is legal, than it is in the public sector under PERA, where the strike is illegal!

Another problem in the PERA covered strike situation is that public employers and unions have spent large amounts of time, money and energy unproductively trying to determine who has the right to do what. When the ground rules are not clear, the parties will tend to fight over the ground rules, rather than over the issues at hand. Enraged public employers, responding often to an enraged public, have often focused more energy on suppressing certain forms of unlawful activity than they have on resolving the underlying disputes that caused it. By the same token, enraged public unionists, usually responding

to enraged union members, have continuously attempted to test PERA's vague and unsatisfactory restrictions on strikes in order to find new leverage to move what they regard as implacable managements.

Debate in the legislature, and in public, over legalizing strikes is dominated by two misconceptions. The first is that all private employee strikes are legal. This is not so. Strikes in the private sector must be the subject, in most cases, of notice to the employer, and must be limited to a complete cessation of work and the peaceful picketing of the employers work place. "Sick outs", "blue flue", "hit and run" or "rolling" strikes (strikes of first one and then another of the employers jobs while work resumes at the first job) slowdowns, and other like activity are all classified as "unprotected", which means the employees can be fired for engaging in them.

The second misconception is that all strikes succeed in halting work. This is clearly untrue. While the most heavily publicized strikes, such as those in major industries usually result in shutdowns, strikes in smaller manufacturing concerns, or in service industries, frequently do not. Such major newspapers as the Washington Post have operated during lengthy strikes, for example, because of the inability of the unions to convince sufficient employees to leave their jobs to successfully halt production.

Any legislated change that equates the "right to strike" with the guarantee that the strike will succeed in stopping the provision of services will deal a direct body blow to the fiscal well being of every community in the state. To be sure, major cities will not be able to continue bus service, for example, if the bus drivers strike, but it does not necessarily follow that a smaller community might not be able to do so, if say five or ten bus drivers struck, and there was a supervisor or two on the scene who could also drive a bus.

Similarly, it is unlikely that a major employer would, for example, replace several hundred sanitationmen. It is not unlikely, however, that a smaller unit of government would not at least consider replacing a unit of four or five.

However, the result of collective bargaining negotiations is seldom influenced only by actual pressures used in the particular situation. The possibility that certain actions might be taken often greatly influences the negotiators and their constituents. Thus, the thought that the employer might if put in a desperate enough position, replace strikers, will be sufficient in many cases to modify union demands. By the same token, a union leader anxious to shore up a failing strike by sending some of his workers back to work and suddenly pulling a few of them out again, thereby disrupting the employer's operation but still providing paychecks to his members, might well be deterred if he knew that this could result in the discharge of some of his members.

III BARGAINING PROCESS

Problem: The "ground rules" for negotiations in the public sector in Michigan are in a shambles. Who is included in bargaining, and what they should bargain about are badly defined in ways that make effective bargaining more difficult, and which disadvantage public employers. Furthermore, the agency which is charged with enforcing the ground rules, in large measure is incapable of doing so in a fashion timely enough to have any real influence on the negotiation process.

Prescription: There should be a statutory definition of "supervisor" in the Public Employment Relations Act which should follow the federal model, excluding supervisors from the bargaining process. The scope of bargaining should be limited to wages, hours and term and conditions of employment fairly defined, with no deference given to the fact that public employees cannot strike, since in fact they do. And most critically, the funding structure and operations of the Employment

Relations Commission need to be critically examined, so that whatever legislation is in existence may be effectively enforced so as to limit and bring order to whatever minimum of conflict might occur. Some suggestions for doing so include:

1. . Adopting a system for processing Unfair Labor Practice charges which provides for investigation of them and disposition rather than routine issuance of complaints.
2. Making the position of a member of the Employment Relations Commission a full time position, or at least that of the chairman.
3. Refraining from the present practice of operating by office policy rather than promulgated rule.
4. Setting of specific maximum time limits during which a party has a right to obtain the disposition of an unfair labor practice matter.
5. Assigning specific counsel directly to the Commission, rather than indirect reliance on the attorney general's office, so that injunctive relief could be obtained more readily in emergency situations, and including a broader definition of emergency.
6. Separating the function of providing arbitrators and factfinders from the personnel responsible for preliminary handling of unit determination and unfair labor practice charges.

Present bargaining practice under PERA (and under Act 312) varies from the National Labor Relations Act in three major ways. All of them have caused problems with the process, and all of them have led either directly or indirectly to the present clamor for change.

First of these is the question of what is the appropriate "scope" of bargaining. In other words, what issues must management discuss, thereby presumably sharing some control over their ultimate disposition, with the union. Unions, particularly in traditionally public

sector activities such as police protection, school teaching, and medical care service, have sought to obtain what appears to them as control over their destiny, but what appears to public employers as an attempt to gain an illegitimate voice in the determination of ultimate public policy. Unionized employees of all sorts have sought a role in determining who is to be advanced to higher paying, often supervisory, jobs which would typically not be the concern of the private sector unions. Often, to an extent far greater than in the private sector, negotiations have focused on what it is that will be discussed, rather than actually discussing it.

Michigan case law has on several occasions extended the "duty to bargain" to issues not covered in the private sector specifically because the employees covered by PERA do not have the right to strike. The argument is, of course, that if the right to bargain about an issue does not lead to a strike over it, there should not be any harm in discussing it. Of course, since strikes do occur in the public sector with alarming regularity, the argument has limited validity.

The second problem is the question of which employees are entitled to the right to bargain. In the private sector, "supervisors" are clearly excluded from bargaining, and defined not only in terms of a definition written into the law, but by many years of case law. Under PERA in Michigan, however, some supervisors, generally those not involved in the formation of policy, are allowed to bargain, and although Michigan decisions recite the federal definition, there are several cases in which apparently supervisory employees have been classified as general employees by MERC.

The tugging and hauling over supervisors creates several problems. The most significant relates more to operating the government than to labor relations law. If a supervisor and the employee are both

members of the same union, even if they are in different locals, is the supervisor going to be truly effective in representing management interests, or does he really have a greater community of interest with the individual he supervises? Is management going to get effective representation at lower level grievance hearings when both management and labor are members of the same union? The answers are fairly obvious. Furthermore, in the event of any strike situation, legal or illegal, it is very difficult to imagine a unionized supervisor coming to work and maintaining services.

Finally, there is the question of the level of enforcement of those ground rules which do exist. It is not uncommon for cases brought by unions complaining that a management has refused to bargain in good faith with them to take several years to reach even an initial decision as to whether their complaint is valid. In tense, volatile, confrontative situations, such as contract negotiations, the union which will wait that long is rare indeed. Similarly, a management which sincerely believes it is being forced "out of bounds" by union demands has no choice other than to simply say no. There does not exist a realistic method in Michigan of testing, short of strike activity, the willingness of a party to fairly enter into the collective bargaining process.

It bears remembering that strikes and other labor disputes are seldom simple demands for money on the part of employees, and equally simple attempts to protect a budget by employers. Almost every situation has in it a substantial element of emotion, political involvement and personality. Furthermore, it is more likely than not that when a union comes to the table and demands money it is not only seeking economic betterment, but it is translating the employees' frustrations with their job circumstances into the language of negotiation. Irritations

and even passions that may have nothing to do with the wage scale may end up on the bargaining table as economic demands. Noneconomic demands often are more a seeking of personal recognition than a demand for a real remedy.

When a management for whatever reason, good or bad, is viewed by the union as refusing to deal with these issues, unionized employees tend to view it as a denial of the legitimacy of their union, and an attempt to diminish them as human beings. Under the Michigan system when this occurs, as it inevitably does, the only practicable remedy for the employees feeling is for them to strike. It is not a totally unrespectable notion to suggest that the current drive by unions for the right to strike is fueled more by a feeling of frustration over the lack of an effective way to resolve these problems than it is over the general level of economic settlements which Michigan public employees have achieved.

The reasons for this unhappy situation are complex. First, MERC has, through a variety of policies, often announced more through decision than regulation, or simply adopted by administrative practice, attempted to avoid a number of issues which would perhaps best be confronted. For example, MERC routinely issues a complaint and schedules a hearing every time an unfair labor practice charge is filed, regardless of its merits. No investigation is made beforehand. This contrasts with the Federal system in which each charge is investigated on an administrative level, and reported to the regional director of the NLRB. He then determines whether it has sufficient merit to justify proceeding.

The result is that the MERC docket is continuously filled with a large number of frivolous charges, and also with charges which the parties have no incentive to settle, since nothing will happen for months, if not years. Furthermore, all parties are proceeding with a total lack

of knowledge as to the facts, since MERC conducts no investigation, and has uniformly for years refused to allow a party to subpoena evidence from the other party. This compares with a federal system in which the vast majority of charges never end up in hearings because either they have been dismissed by the agency, or the party complained of has settled the complaint in order to avoid needless hearings.

There are a variety of other more particular examples which need not be examined in detail. In essence, a combination of limited budget, limited staff, and a reluctance to take on the complexities of the rule making process, has resulted in a series of actions designed to keep the agency from overextending itself. The result has been that the agency has often, except for its mediation function, become irrelevant to the bargaining process, and thereby been unable to minimize the number of strikes which have occurred or limit their intensity.

The answer to all three of the problems just discussed is the same: a strong, vigorous effective regulatory body, which enforces clear rules which are carefully thought out to enhance the likelihood that the bargaining process will result in dispute resolution without outside intervention. Allowing supervisors to organize and classifying virtually every subject of bargaining as mandatory solves MERC's problem nicely. If all supervisors are employees, and all issues are bargainable then there are no decisions left to be made. However, removing a problem from MERC and dumping it back into the bargaining process simply defeats the purpose of the agency. Rather than provide a well defined arena in which conflict can be resolved, it leads to larger, more bitter confrontations, and is in large measure responsible for the present clamor to change the act.

IV DISPUTE RESOLUTION IN THE ABSENCE OF AGREEMENT.

Problem: The public and the legislature will simply not accept a system in which there is no guaranteed resolution of public employee strikes. However, guaranteeing third party arbitration inherently inflates the settlements, and tends to destroy bargaining, thereby greatly inflating the cost of government.

Prescription: Limit access to arbitration where it is not now provided at most to those situations in which the public employer requests and receives a court order terminating a strike. Where public Act 312 is in effect, provide a right for a municipality to "opt out" by vote of the people into PERA, provide for a fairer selection of arbitrators, and require that unions in fact engage in good faith bargaining prior to 312 arbitrations being convened.

It is now apparent to almost all experienced observers that public employee bargaining inevitably will breed public employee strikes. This fact leads some to the simplistic conclusion that by merely legalizing such strikes they can be easily controlled, and therefore minimized. However, the better view holds that it is not quite that easy.

In the public sector, as well as in the private, it is possible that legitimate differences exist as to what is an affordable and acceptable rate of pay. What the market should require is not always crystal clear. Furthermore, as mentioned above, collective bargaining does not occur in an emotion free laboratory atmosphere, but more often amidst the swirling winds of passion and anger. Collective bargaining is often the outlet for job related tensions and anger that have little or nothing to do with the specific issues before the parties. It is well recognized in the private sector that sometimes strikes serve a necessary air-clearing function, and it is not unrealistic to presume that this sometimes happens in the public sector as well.

However, there are significant differences. In the private sector the application of the law of supply and demand is more obvious; there are plenty of examples of companies who have gone out of business because they entered into labor agreements they could not afford. Public employers do not have that option as a weapon at the bargaining table. Also, they face the fact that bargaining in the public sector is to some extent always public, influenced by the politics of the community and the legitimate self-expressions of the interest of the citizens and taxpayers.

Finally, it should recognize that, at least as a practical matter, public employee strikes of unlimited duration are politically intolerable. The legislature simply is not going to support legislation that allows all public employees to strike indefinitely.

There exists a widespread belief that somehow the problem can be wished away through the waving of a magic wand called "arbitration". Many people seem to feel that if a public employee negotiation becomes troublesome, with emotions running high and tempers flaring, the automatic availability of arbitration will resolve the problem. Of course, in police and fire situations, arbitration now exists at the request of either party, and to date resort to formalized strike activity has been rare among these employees. Experience has proven, however, that arbitration and collective bargaining as they are practiced in the United States, do not easily mix.

In a negotiation in which the availability of arbitration is a previously known quantity, one side or the other will tend to view it as to its advantage to arbitrate, believing that its ability to persuade a third party is greater than its power, persuasive or otherwise, at the

bargaining table. The result is to either make arbitration an issue in the negotiation, or perhaps in a strike resulting from the negotiation, or conversely, if arbitration is mandated beforehand, to reduce the bargaining to a meaningless exchange of formalities, sort of an appetizer before the main course of arbitration.

Under Act 312 in Michigan the advantage has been decidedly with the public employee unions, and against the employer. There are a variety of possible reasons for this, some of which can be explained by the system, and some of which cannot:

a) Public Act 312 arbitrators tend to be people who make their livings as arbitrators, either in whole or significant part. Under the voluntary rules of the American Arbitration Association, a participant in arbitration has what is tantamount to an absolute veto over a particular arbitrator. Under Act 312, the party does not have such a veto. The result is that unions, particularly the members of federations such as the AFL-CIO are in a position to "punish" an arbitrator who finds favorably to management in a 312 arbitration, by "blacklisting" him in future arbitrations with private employers who are not particularly concerned about his findings in public pay disputes. While there is no evidence that this goes on in a blatantly organized fashion, and certainly the vast majority of arbitrators are people of integrity, it is undeniable that a continuous subtle pressure is exerted by this situation.

b) 312 arbitration presentations by unions tend to be given either by in house arbitration specialists, or by attorneys who concentrate in the area. Too often, 312 presentations by employers are given by city attorneys or others who, while quite competent, simply are

not able to keep pace with persons who are immersed in the process on a day to day basis.

c) Many 312 arbitrators have interpreted the criteria for selecting which position to choose very narrowly. In considering, for example, the finances of the municipality, they tend to ignore the pattern setting nature of a police or fire award with regard to other groups, and therefore tend to underestimate costs.

d) Political realities sometimes require an employer to espouse a public position which cannot be maintained through negotiations. If the city council for example, budgets a five (5%) percent salary increase in circumstances in which the prevailing salary pattern is eight (8%) percent, city bargainers can hardly take a position in which they would voluntarily pay more than the city budget. This, however, provides a bonus for the union. Since 312 arbitrations are "last best offer" arbitrations, meaning that the arbitrator may not "split the difference" between the proposals for the parties but must pick that one which is closest to being fair, the union can inflate its offer, knowing that the city cannot move beyond its authorized maximum. Thus, the union, in this example, can with relative safety obtain an arbitrated award of ten (10%) percent, even though eight (8%) percent is fair, because ten (10%) percent is closer to eight (8%) percent than to five (5%) percent.

In spite of these obvious problems with Act 312, it is apparent that the notion of simply allowing strikes to go on forever, even though it is not likely to happen in practice, is theoretically unacceptable to the public, or at least to its legislative representatives. Crestwood and similar situations indicate that absent the imposition of harsh measures which are not feasible in the Michigan political climate, court orders simply will not stop strikes absent some provision for the ultimate resolution of the dispute at hand.

The best answer, although not a totally satisfactory one, is to allow the employer to determine exclusively whether he wishes court intervention to prevent a strike from continuing, with the understanding that only if he so determines, may he be subject to third party arbitration of the dispute. (A possibility which should be explored in such circumstances is partial, but not total limitation of the strike, so that the public employer is impaired but not disabled from providing essential services, so that the strike can run its course without permanently damaging the community.)

Under this form of access to arbitration, no public employee group could be certain that the result will be arbitration. They must be prepared to strike, and to accept the consequences of striking, including replacement by other employees, before they could enter into an arbitration proceeding. This would hopefully introduce an element of realism into negotiation that is absent when arbitration is a foregone conclusion.

With regard to those employees who are already mandated into arbitration by Act 312, there are a number of procedural reforms which might at least help the situation. One obvious change would be to install full time 312 arbitrators, who did not engage in private practice, and who therefore would not be as susceptible to the kind of pressure which 312 arbitrators now endure. Another would be to allow municipalities by local option to be exercised some time before a contract expires to vote themselves out of 312 and into PERA. The possibility that this might occur might well have a steadying effect on both arbitrators and unions, as neither would wish to "kill the goose that lays the golden egg". Another possible reform would be to provide greater control by the parties over the selection of the arbitrator, either by permitting a

certain number of "strikes" from the total panel of arbitrators eligible for 312 arbitrations, or greater opportunity for cities to complain about appearance of a particular arbitrator on a final panel.

There are in addition several steps that cities can take on their own initiative. Maximum possible attention should be paid to the preparation of a 312 arbitration case. Greater efforts should be made to share information, both as to the presentation of cases, and also as to particular arbitrators (many lawyers in the private sector spend more time studying and selecting an arbitrator than they do actually preparing the facts of the case once he is selected.) Greater efforts should be made to insist, through unfair labor practice charges if necessary, that unions in fact engage in good faith bargaining before going to arbitration. As a practical matter, it is unlikely that changes in Act 312 can be brought about as long as the unions regard it as a form of salvation. Decisive action by employers to insure that it is something less than that will go a long way towards creating an atmosphere in which change can realistically be considered.

V CONCLUSION

There are a number of other matters which deserve mention in passing. There is not one word of Michigan law dealing with the internal regulation of Public Employee unions. Such unions, if they do not represent private employees, are not covered by the Landrum Griffin Act. Such a union is perhaps the most unregulated institution in our entire society. The public employee union member has no guarantee that his union will operate democratically, that it will manage his money fairly, or that it will honor his wishes with regard to striking or accepting offers.

Similarly, Michigan makes no provisions for some of the more vicious forms of union organizing, which have been outlawed at the Federal level. These include organizational picketing, secondary boycotts, and other activities which involve innocent third parties in labor disputes, particularly when a union is attempting to organize employees who may not wish to be organized. However, it has to be recognized that it will be difficult to convince the legislature to act in any major fashion with regard to these issues because there is no major history of difficulty relating to them.

file HB 130

Anch Daily
News
2-2-86

Teachers rally for arbitration bill

By RICHARD MAUER
Daily News reporter

More than 300 Alaska teachers spent their noon hour Saturday in a noisy outdoor demonstration in support of a bill requiring binding arbitration in contract disputes.

The teachers, attending the NEA-Alaska delegate assembly in Anchorage, called on the Alaska Senate to move the measure to a vote. It has already passed the House.

Boosted by a band, a telephone call from Gov. Bill Sheffield relayed from Juneau to the crowd, and a speech by Sen. Joe Josephson, D-Anchorage, the teachers cheered for House Bill 130 at a rally in front of the Legislative Information Office. They said the law would close a gaping hole in the resolution of collective bargaining dis-

agreements.

"This issue needs to be settled," said Jean Krause, president of NEA-Alaska. The organization is the statewide affiliate of the National Education Association, one of two national teacher unions. NEA locals bargain for contracts in about 50 of the 54 school districts in Alaska, Krause said.

In an interview after the rally, Krause said the bill would eliminate a major cause of friction between school boards and teachers. As the law now stands in Alaska, teachers have little ammunition to fire at school boards when they refuse to bargain in good faith, Krause said.

In Kotzebue, where negotiations for a contract

See Page B-3, TEACHERS

okers

Teachers rally in support of a state binding arbitration bill

Continued from Page B-1

dragged on for two years, teachers had to resort to a major public relations campaign, Krause said, while in Ketchikan, teachers engaged in "work to rule," the nit-picking observance of every contract provision. In each case, the disputes took away from time and attention for classroom instruction, she said.

Ever since the state Supreme Court ruled in 1982 that teachers don't have the right to strike, school boards have been increasingly taking advantage of the situation, Krause said.

"This year, we started the school year with 16 districts not having contracts with their teachers," Krause said.

With contract negotiations

coming up this year for bargaining units governing 80 percent of the teachers in the state, the union wants to ensure its members have the same power to force good-faith collective bargaining as other workers.

House Bill 130, introduced on behalf of Sheffield last year, would require unresolved disputes to be submitted to an arbitrator for a ruling that would be binding on both sides.

Other public employees who are forbidden to strike — police and firefighters, for instance — have similar protections, Kraus said.

The bill would also extend collective bargaining rights to clerical and blue-collar school employees, she said.

The march and rally came in conjunction with a meeting of the NEA-Alaska Delegate

Assembly, the policy-making body of the statewide organization. The organization had been meeting since Thursday under the cloud of the space shuttle Challenger disaster, which claimed the life of school teacher Christa McAuliffe among its seven victims.

Fairbanks social studies teacher Susan Stitham, Alaska's representative to the national NEA board, was still wearing a black band on her left arm Saturday and said she remained stunned by the event. McAuliffe held a special place in her heart, she said, not just because she was a teacher and an NEA activist, but because she demonstrated the best human qualities found in the profession.

Stitham eulogized McAuliffe in a convention address, and later offered some thoughts about why the disas-

ter was felt so deeply by so many people.

"I've been a teacher for 29 years, and going to these meetings for 15, and I've never seen anything like that," she said. "It's a remarkable simultaneity of reactions. She was a friend to all of us."

"It's the fact that she was a teacher that made it so different. People have a connection with teachers, despite all the mud we've had slung on us lately by the right wing." McAuliffe proved that to be brave or a hero, "you don't have to be Rambo — you can be a social studies teacher. That's very important for our kids."

She said she still chokes when she thinks of the reaction of one young child, quoted by a wire service, who said, "The rocket blew up. The teacher is dead."

Teacher arbitration bill floundering in Senate

By **RONNIE CHAPPELL**
Daily News reporter

A House bill requiring binding arbitration in contract disputes between Alaska teachers and school districts is dead in a Senate committee unless union and school officials can agree on a workable compromise.

State Sen. Mitch Abood, R-Anchorage, chairman of the State Affairs Committee which has had the bill since last session, said he was not rushing to action despite a teacher rally Saturday calling for quick action.

"I'm doing my best to have them understand their differences. I'm only asking that they sit down and work them out. Until that happens there will be no movement on any

bill on binding arbitration. I'm not even going to schedule hearings," Abood said.

The bill, HB 130, passed the House last year.

Introduced by Gov. Bill Sheffield, the bill calls for contract disputes on issues of wages and working conditions to be referred to an arbitrator when contract talks break down. The arbitrator would have the power to dictate a settlement.

More than 300 delegates at a National Education Association-Alaska assembly in Anchorage last weekend called on the state Senate to move the measure to a vote. They see binding arbitration as a fair way to settle contract issues that have gone to impasse.

Union officials also say that it will force school districts around the state to engage in good faith collective bargaining. Teachers in Alaska do not have the right to strike. As a result, they complain, school districts have little incentive to compromise on sticky issues.

School officials oppose binding arbitration. They say it will drive up the cost of education and place financial control of local school districts in the hands of non-elected arbitrators with no ties or responsibilities to local taxpayers.

"I think it's a bad piece of legislation at a time of (state budget) retrenching," said Bob Green, executive director of the Alaska Asso-

ciation of School Boards. "I don't think we should give outside arbitrators a chance to spend Alaska's money."

The laws proposed to date have been too simplistic, Green said. The union "wants all the benefits it now has with binding arbitration on top of that. That's not the way it's done."

The "seven or eight states" that have extended binding arbitration to teachers have also adopted "lots of checks and balances," he said. If binding arbitration becomes a reality in Alaska, then school districts must have authority to determine the size of their work

See Page C-3, BINDING

Binding arbitration bill hits impasse in Senate committee

Continued from Page C-1

force
"Under current Alaska statutes we cannot terminate a tenured teacher just because we have no money," Green said. If an arbitrator comes in and orders a salary increase that exceeds the ability or the willingness of the community to pay, "we could be in trouble."

Similar situations have arisen in other parts of the nation, according to Peter Denholm, president of the Public Service Research Council, a Washington, D.C.-based citizen's lobby that opposes collective bargaining for public employees.

"It's extremely rare for a community to reject an arbitrator's decision," Denholm said. "But there is a sense of helplessness about it. People believe they've elected a school board to make these decisions. Then they find out responsibility has been hand-



Sen. Mitch Abood

ed over to a third party."

On occasion, a community will refuse to raise taxes or cut services in order to fund a pay increase mandated by an arbitrator.

"The court review of these cases is mixed," Denholm said. "At first, the courts found binding arbitration statutes to be an unconstitu-

tional delegation of legislative authority."

The defective laws were amended, Denholm said, "and recently the courts have been upholding them." Communities have been ordered to honor arbitrators' decisions, and some have been forced to raise taxes in order to do it.

"It comes down to the issue of local control and the ability of local school boards to have the final say on what's going to happen in their schools," said Steve McPhetres, superintendent of the Haines Borough School District and president of the Alaska Association of School Administrators. "We're searching for some other way" to settle contract disputes. "Some compromises are in existence."

San Francisco uses "referendum arbitration" to settle labor disputes. Under this process, the last best offer made by the city is put into effect, while the last best

offer made by the union is placed on the ballot. If voters approve the union offer, it is written into the contract.

"We've certainly thrown (referendum arbitration) out as a discussion point," McPhetres said. "We are also looking at other alternatives."

Dale Sandahl, personnel director for the Kenai Peninsula Borough School District, questions the need for changes in state law. Aside from a 1979 Anchorage teacher's strike, teachers and school districts have had little difficulty reaching fair settlements, he said.

Even with a 25 percent cost of living differential factored into the comparison "we have the best paid teachers in the country," he said. "Next year the average teacher in Minnesota will earn under \$30,000." The average teacher on the Kenai Peninsula will take home \$47,000 in salary and benefits.

Please note again AB 224 if it comes to a vote. Teachers in Alaska do not have the right to strike. Arbitration is collective bargaining. This present proposal is a violation of the Alaska Constitution. It is a violation of the Alaska Constitution. It is a violation of the Alaska Constitution.

Binding arbitration ignores democratic ideals

Binding arbitration in public sector collective bargaining is a dangerous and repugnant assault on our democratic values.

Binding arbitration is a serious public policy issue that unfortunately does not receive the thoughtful analysis it deserves. Rather, it has become the rallying cry for the teacher's union as it attempts to erode one of the pillars of our Constitution: representative government.

Binding arbitration can be an acceptable method for two private parties to settle a dispute through the use of a third party who resolves the issue for them.

This concept, when applied in the public sector, however, has an entirely different dimension.

In the public sector, we citizens are the source of the power of our government. Through the democratic process we delegate some of our power to persons we elect to represent us.

We hold them accountable for their decisions and we maintain control through elections where the public can exercise its ultimate control.

In Alaska, most state and

local governments and school district employees are represented by unions. Since wages and benefits represent the major operational cost of government, the outcome of union negotiations has a profound effect on public policy.

Binding arbitration turns the tables on representative government by delegating the most important decision, the terms and conditions in union agreements, to a third party who is not elected by the public, may not even be a resident of the community and is not accountable for any public policy ramifications.

Elected officials and the public are required to observe the decision of this non-elected person just as though we had a totalitarian form of government.

In our constitutional system, when you want to go over the head of elected officials, you're supposed to amend the Constitution, not bring in a hired gun.

The teacher's union argues that binding arbitration adds finality to the negotiation process and forces school boards to negotiate in good faith.



**millett
keller**

They deliberately ignore the fact that the current process already has finality. The real issue bothering the union is who gets to make the final decision.

We're also told that without binding arbitration, school boards will not negotiate in good faith. This argument ignores the fact that our courts exist to provide redress if a union is subjected to bad faith negotiations. What the union really wants is the authority to control the entire negotiation agenda, including the ability to set public policy regarding school management.

In our constitutional system, the union already has a method available for changing public policies it doesn't

like. Through democratic elections, it can and has made changes.

For example, each year at least two members of the school board stand for re-election. If a school board is not bargaining in good faith or is adopting policies which are injurious to the employees, the union can promote candidates who will change policies.

Sen. Mitch Abood has vowed to hold the House-passed binding arbitration bill in his Senate committee. You can expect to see enormous pressure brought on him by the teacher's union that believes a majority of the Senate support the bill. Gov. Bill Sheffield has already indicated his support for binding arbitration.

Hopefully, reason, courage, and commitment to democratic ideals will be an adequate defense to this assault on representative government.

|| Millett Keller is a business and public affairs consultant and a former member of the Anchorage School Board.

*Please give serious consideration
to this article. I am hoping you will
vote against Binding Arbitration SB 224
Betty Cuddy*

(over)

In forming coalitions with other groups and organizations NEA-Alaska members will be reaching out in their communities throughout the State to coordinate the effective effort to bring finality to negotiations through arbitration.

HOW LONG??? HOW MANY???

A recent analysis of teacher negotiations in Alaska over the last five years reveals that the process is taking longer and longer each year. During the last two years it has become the norm for negotiations to be at impasse and unsettled well into the new school year.

In some cases, this has been 12 to 18 months after the commencement of bargaining and 6 months or longer after the expiration of their previous contract.

Frustration and emotional turmoil are frequent by-products on both sides of the bargaining table when the negotiations process is unnecessarily lengthened due to the absence of a fair and equitable dispute settlement mechanism.

\$ PUBLIC SCHOOL FUNDING \$

After three long years of interim ADM (average daily membership) funding accompanied by three years of study, analysis, deliberation, discussion and debate by various combinations of consultants, contractors, Legislators, parties of interest, and a wide cross-section of the Alaskan education community, the Department of Education is about ready to present to the Legislature a revised funding formula which is theoretically designed to address the inequities of the previous formula.

While conceptual agreement on the components of the formula itself may be close among the groups mentioned above the real test of support for the implementation of such a formula will be predicated on the actual amount of funding each school district is to receive.

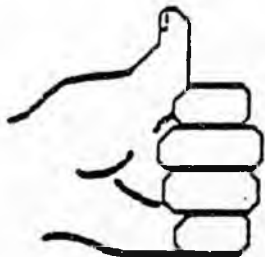
A maximum funding ceiling will significantly diminish the ability of any funding formula, no matter how carefully it is constructed, to adequately address the inequities as they have existed in the past.

NEA-Alaska is strongly encouraging that the funding levels for the 1986-87 school year be well in excess of the current level of funding and that there be serious consideration given to the concepts of forward funding.

\$ \$

DELEGATE ASSEMBLY January 30 - February 1; Anchorage

FLY-IN April 3 - 6; Juneau



H.B.

130

PROJECT RESOLVE

TOGETHER WE CAN!!!



NEA - ALASKA

file HB 130

Jan 29 1986

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

VOLUME 30, NUMBER 1

JANUARY 24, 1986

The Second Session of the Fourteenth Legislature convened on Monday, January 13, 1986 with an aura of cooperation and commitment to resolution of the major issues. Leadership in both the House and Senate has expressed a desire to complete the business of the Legislature on or before the 120th day which is May 12, 1986.

House Bill 130 ARBITRATION

Having passed the House late in the First Session, CSHB 130 (HESS) am, is now in the Senate and ready for committee work. In State Affairs Committee at this time, it must go to Finance and the Rules Committees before being calendared for a floor vote.

State Affairs: Chair, Senator Mitch Abood

Members: Senators Edna De Vries, Vic Fischer, Tim Kelly, Bill Ray

Finance: Co-Chairs, Senator John Sackett, Jan Faiks

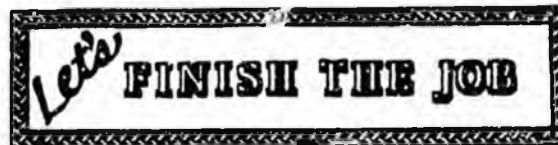
Members: Senators Jay Kerttula, Dick Eliason, Frank Ferguson, Paul Fischer, Rick Halford

Rules: Chair, Senator Tim Kelly

Members: Senators Jack Coghill, Jan Faiks, Don Bennett, Joe Josephson

PROJECT

RESOLVE



At the June 1985 NEA-Alaska Board of Directors meeting nearly all of the agenda was devoted to analysis, discussion, and planning for the task of getting HB 130 through the Senate and signed into law before the end of the Second Legislative Session.

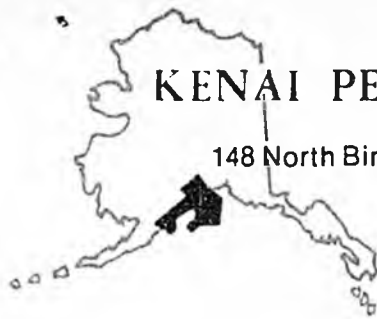
Since August, NEA-Alaska members have been busy meeting with Legislators, reaching out into their communities to inform concerned voters of the nature of the issue and need for resolution. Additionally they have been working with the labor community in their effort to provide for finality through arbitration and to insure that non-certificated employees of school districts have a statutory right to negotiate.

The reality of support by the general public for arbitration over strike was confirmed by a Hellenthal survey in Anchorage commissioned by the Anchorage School District in 1983. It has been reconfirmed by a recent Statewide survey done by Hellenthal and Associates in December 1985 which again showed the public overwhelmingly in favor of arbitration by over 85%, thus making HB 130 genuinely a public interest issue. This same Survey revealed that the public was also in strong support of the right of non-certificated employees to negotiate. Likewise a significant majority felt that public education should be the highest spending priority.

HB 130 oppose robo

FEB 12 1986

HB130



KENAI PENINSULA BOROUGH SCHOOL DISTRICT

148 North Binkley Street

Soldotna, AK 99669

Phone 907/262-5846

Send 2/24/86

February 19, 1986

Senator Bettye Fahrenkamp
Alaska State Senate
Box V
Juneau, AK 99811

Dear Senator Fahrenkamp:

Attached please find a copy of a resolution which was passed by the Kenai Peninsula Borough School District Board of Education at its February 17, 1986 meeting.

The position of the Board of Education in response to HB 130 is clearly set forth in this resolution.

We respectfully request that HB 130 or any similar legislation not be passed by the Senate during the current legislative session.

Thank you for your assistance.

Sincerely,

Fred Pomeroy

Fred Pomeroy
Superintendent

7496

bj

enc.

RESOLUTION 85-86-1

A RESOLUTION OPPOSING BINDING ARBITRATION LEGISLATION

WHEREAS, the concept of binding arbitration is currently under consideration in the Alaska Legislature, i.e., HB 130; and

WHEREAS, the Kenai Peninsula Borough School District Board of Education believes that binding arbitration is an unnecessary component of the collective bargaining process; and

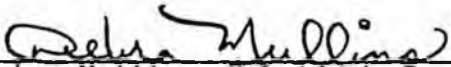
WHEREAS, the Kenai Peninsula Borough School District Board of Education believes that binding arbitration has proven to be nonproductive in other states, i.e., Michigan; and

WHEREAS, The Kenai Peninsula Borough School District Board of Education believes that binding arbitration imposes an alien third party on the process of negotiations; and

WHEREAS, binding arbitration erodes the concept of local control in conflict resolution;

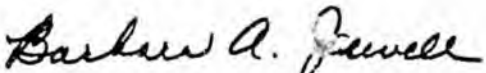
NOW THEREFORE BE IT RESOLVED that the Kenai Peninsula Borough School District Board of Education opposes all legislation that mandates binding arbitration as a part of the collective bargaining process.

ADOPTED THIS 17TH DAY OF FEBRUARY, 1986.



Debra Mullins, President
Kenai Peninsula Borough Board of
Education

ATTEST:



Barbara A. Jewell
Notary Public

file HB 130

6—Daily News-Miner, Fairbanks, Alaska, Wednesday, March 5, 1986

Teachers push binding arbitration bill

By DAN JOLING
News-Miner Bureau

JUNEAU—Fairbanks educators were out in force Tuesday night urging passage of House Bill 130, a proposal to require binding arbitration when contract talks between school boards and teachers stall.

However, Senate President Don Bennett as much as pronounced the measure dead because there's no sign of movement on it in the Senate State Affairs Committee and little chance it would clear the additional hurdle of the Senate Finance Committee.

Fairbanks teachers have been regularly showing up at the weekly teleconference sessions to urge support for binding arbitration. Tuesday, it was supported by Carole Evans, Denr's Lee and Kathy Alton.

Alton said 7,500 Alaskan teachers would profit by installing finality in the bargaining process and that Gov. Bill Sheffield supports it. She said the bill requires that the arbitrator be an Alaskan, relieving worries that a settlement would be imposed by an Outside negotiator unfamiliar with community conditions.

Lee said the bill provides for "last best offer" arbitration, where the arbitrator makes a choice between one of the two positions, not new factors that he chooses.

However, the arbitrator can also pick between individual parts of packages submitted by each side, Lee said. Alton said the risk of not having their positions picked would make both sides work harder at bargaining.

The bill has passed the House and

Lee urged Bennett and Sen. Bettye Fahrenkamp, D-Fairbanks, to push it out of the Senate State Affairs Committee, chaired by Sen. Mitch Abood, R-Anchorage.

"I know you have the power to do that," Lee said.

"I wish that you would show me the way to do that," Bennett replied.

He said he has talked to Abood at least 10 times about the bill, but that the rules of the Legislature prohibit pulling out bills from committee over the objection of the chairman.

"I think your NEA (National Education Association) representative is sending you some very erroneous information," Bennett said.

Bennett said after the meeting that NEA formal lobbying had been "inept." Bennett said NEA lobbyist Bob Manners failed to win support for the bill among members of the committees of referral and now, "He's trying to squeeze his

friends" into overriding their colleagues.

"It's just not done. It's not acceptable. You could break an entire organization doing that," Bennett said.

"For one reason or another, they don't even want to hold hearings on the bill," Bennett said.

HB 130 also would give school employees who do not need teaching certificates, such as secretaries, nurses and maintenance workers, the right to bargain.

Representatives of the Fairbanks Classified Personnel Organization Janet Patterson and Gary Patterson spoke in favor of the bill.

"I would like equity with other public employees," Janet Patterson said.

Bennett said he's been told by Senate Finance Committee Co-chairwoman Jan Faiks, R-Anchorage, that the bill would go nowhere in her committee.

"Even if it got out of State Affairs, it's not getting out of Finance," Bennett said.

**STOP RUSTY WATER AT
YOUR WATER
SOFTENER**



Binding Arbitration and Public Sector Labor Disputes

Published by The Public Service Research Council

THE PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council is an independent organization devoted to non-partisan research and education about public sector unionism and its effects upon the nation's governmental institutions and their services to the country's citizens.

PSRC was founded in 1973 by citizens concerned with this problem. The Board of Directors is responsible for the activities of the Council, relying in large measure upon the advice and counsel of an advisory committee of outstanding citizens from publishing, business, education and the public sector.

BINDING ARBITRATION AND PUBLIC SECTOR LABOR DISPUTES

The major labor relations phenomenon of the last two decades has been the spread of unionization and collective bargaining in the public sector. Presently, thirty-seven states have mandated a form of bargaining for at least some types of employees at the state and/or local government level. The latest report by the Bureau of the Census indicates that in 1979, 47.9 percent of full-time state and local government employees were organized into unions. The significance of this is more apparent when it is recognized that less than 20 percent of the private sector work force belongs to unions.

With only slight modification, it is the private sector collective bargaining model that has been transplanted to the public sector. Experience with labor relations in government employment is demonstrating that certain critical differences between the two employment sectors make private sector labor relations practices incompatible with our traditions of democratic governance and, therefore, unsuited for use in the public sector. One particularly troublesome area is the increased advocacy and use of binding arbitration as a disputes resolution mechanism in the public sector.

WHAT IS ARBITRATION?

Although the use of arbitration is increasingly common in public sector labor relations and demand for its increased use grows, there is widespread lack of understanding of the process and what it entails. This is true for many public officials as well as the public at large. An excellent capsule description of the process has been provided by Myron Lieberman in Public Sector Bargaining.

Basically, arbitration is a procedure whereby an impartial third party makes a decision in a labor dispute. Arbitration may be voluntary (the parties have agreed to it) or involuntary (it is imposed on the parties by law). Arbitration may also be advisory (the arbitral decision is recommended) or binding (the parties are bound by the decision). Binding arbitration is sometimes further divided into two additional categories: final (the parties cannot appeal the decision to the courts), and binding but not final (the arbitral decision is binding but can be appealed to the courts.)

Essentially, two kinds of labor disputes may be subject to arbitration. One type is commonly referred to as "interest disputes," that is, disputes over what the terms of a labor contract should be. A situation in which the employer and union were at impasse over salaries for the coming year and agreed or were required by law to turn the dispute over to an arbitrator would be an interest dispute. Suppose however, that the employer and union already have a contract covering salaries, but a dispute arises over what X should be paid pursuant to such a contract. If X files a grievance alleging that he was not paid in accordance with the contract and if the grievance is ultimately carried to arbitration, then that procedure would be called "rights arbitration," that is, arbitration over the meaning, interpretation and/or application of a labor contract.

Both types of arbitration are of concern for each has serious implications for our system of governance. This discussion will address interest arbitration and its attendant problems before moving on to rights or grievance arbitration.

For the purposes of this analysis, the term arbitration will mean binding arbitration. It is the ability of an outside third party to impose a binding settlement on the parties that is of concern. Although the compulsory nature of involuntary arbitration make it more onerous, the consequences of participating in the arbitration process are the same whether the parties voluntarily or involuntarily entered into it. Furthermore, a nonfinal form of arbitration is preferable to the final form which does not provide for judicial review of the arbitration award. However, experience with the courts has shown that in most cases, an arbitrator must have acted in an extremely capricious manner or significantly exceeded his statutory authority before an award will be overturned.

INTEREST ARBITRATION

The rapid increase in public sector collective bargaining in the last twenty years has been accompanied by an attendant rise in the level of public sector strike activity. Whereas strikes against government were rare in the early 1960's (28 in 1961, for example) they have become commonplace. According to data compiled by the Bureau of Labor Statistics, there were a record 593 public sector strikes in 1979 and 536 in 1980. The decade of the seventies averaged in excess of 400 government work stoppages per year.

The heightened public awareness of, and experience with public sector strikes makes it unnecessary to provide an enumeration of the dangers and disadvantages of such activity. Suffice to say that these strikes are generally held to be undesirable in that they pose a threat to the public welfare.

The increased resort to the strike by unions of public employees, despite the undesirability and general illegality of such actions, has spawned a search for a means of preventing strikes. Increasingly binding interest arbitration is advocated as that preventive device. It has been reasoned, and public sector unions have argued, that the only fair substitute for the strike is a process in which a neutral party arrives at a decision that is binding on both parties.

To date, nineteen states have accepted this reasoning and mandated arbitration to settle bargaining impasses most commonly those involving public safety employees. In addition, several other statutes permit interest arbitration upon the agreement of both parties. The overwhelming majority of these statutes were enacted in the 1970's.

OPPOSITION GROWS

Public officials and public sector unions increasingly find themselves on opposite sides of the arbitration question. As experience with interest arbitration mounts, more and more public officials see less harm in weathering a strike than in submitting negotiations impasses to arbitration. The Seattle Post Intelligencer reported on March 7, 1976:

Mayor Wes Ulman said yesterday he'd rather go through a strike by public employees than wind up with a binding agreement made by an "irresponsible" arbitrator whose decision could bankrupt the city.

Mayor Uhlman's concern about the deleterious fiscal effect of binding interest arbitration is an all too unpleasant reality for Detroit Mayor Coleman Young. An original sponsor of Michigan's compulsory police and fire arbitration statute when he was a member of the state legislature, Young now considers the vote a mistake and the legislation responsible for much of the financial difficulty now facing his city. The February 7, 1981 National Journal reported:

The mayor said he will urge the state legislature to repeal Michigan's compulsory arbitration law, a statute, ironically, that he co-sponsored in 1969. "We know that compulsory arbitration has been a failure," he said. "Slowly, inexorably, compulsory arbitration destroys sensible fiscal management," and the arbitration awards, he added, "have caused more damage to the public service in Detroit than the strikes they were designed to prevent."

Officials of the Washington D.C. Metropolitan Area Transit Authority have approached the legislatures of Maryland, Virginia and the District of Columbia City Council seeking repeal of the statute providing for binding arbitration of disputes with the transit system's unions. Metro argues that arbitration awards have been so generous as to threaten the financial solvency of the system. Some local jurisdictions, citing costs disproportionate to levels of service, have withdrawn from the regional transit system, and other local governments are threatening to do the same. The February 2, 1981 Washington Star reported:

It is arbitration awards, handed down by the professional arbitrators who don't live in the Washington area, which Metro officials feel are responsible for the cost of living clause that yearly costs Washington area taxpayers millions of dollars.

While it is one of those battles that rarely excites public interest, the stakes are high. In 1980, every man, woman and child in the Washington area paid \$4 toward the \$12.3 million in cost-of-living increases granted Metro's 5,000 union employees.

Many arbitration statutes stipulate that the arbitrator must consider the government's ability to pay in forming his decision, but this may provide little protection from overly costly awards. John Baker, former Assistant City Manager of Oakland, California, who has described that city's experience with arbitration as "disastrous," made this observation in a speech reported in the October 23, 1981 Government Union Critique:

Although Oakland's arbitration ordinance states that the city's ability to pay is a factor the arbitrator must consider when in reaching a decision, Baker felt that it was rarely an important consideration. He personally queried arbitrators about three of Oakland's cases as to the importance of the ability to pay in their decision-making. In only one case did the arbitrator indicate he had included it in his considerations. In one case, the arbitrator replied it had occurred to him as an "afterthought," and he hadn't given it much weight. The other arbitrator replied that ability to pay did not matter, because the city could take the money from other programs.

Support for interest arbitration, though, has continued to grow among unions active in the public sector. Originally advocated for public safety employees who were denied the ability to strike, arbitration is now sought for all types of public employees. This advocacy reflects the changing nature of public sector labor relations. From a tactical perspective, the strike weapon is not as effective as it once was, particularly for employee groups providing non-critical services. As public sector management has become more experienced in labor relations, they have become better able to weather a strike. Some actually realize budgetary savings as a result of not having to meet payroll during a work stoppage.

In addition, participants in illegal strikes are frequently fined and occasionally dismissed from their jobs. Penalties are also assessed against unions that lead illegal strikes. President Reagan's response to the air traffic controllers' strike is graphic illustration of this, and many unions fear other public officials may emulate the President's action.

From the union's point of view, the potential for relief from the legislative branch is not bright. Attempts to legalize strikes have not been well received in state legislatures, and opinion polls point to a growing dissatisfaction with strikes against government. The President, for example, has received high marks for his handling of the PATCO strike.

These realities have not been lost on union officials. Robert Chanin, former General Counsel of the National Education Association, addressed this point at a January 15, 1981, conference on public sector labor relations jointly sponsored by the Labor Management Relations Service of the U.S. Conference of Mayors and the American Arbitration Association. Chanin said:

During the 1960's teacher strikes were something new. They got lots of attention and had an effect. But now the novelty has worn off, and school boards have learned they can take a teacher strike. After all, people generally recognize that teacher strikes do not pose an immediate threat to the health and safety of the community.

The courts are turning tough. The fines are getting big. But more than money, teachers have begun to see the insides of jail cells. . . .

So there's an increasing recognition on the part of the (National Education) Association that strikes are not the answer. The Association is looking at alternatives to strikes, and binding interest arbitration is one of them.

In addition, many public sector unions have come to view the arbitration process as a "no lose" situation. The arbitrator's tendency is to issue an award that falls between the final positions of both parties. After negotiating the maximum concession from management, the union can declare an impasse and invoke binding arbitration with the certain knowledge that the arbitration award will not be any less than what has already been negotiated.

Some may view this debate as merely part of the normal, on-going struggle between labor and management. On surface examination, compulsory binding interest arbitration does seem to embody the proverbial "Wisdom of Solomon." What could be more reasonable than having an impartial third party settle a labor relations dispute, particularly if it will prevent an undesirable strike? However, this rather simplistic view fails to take into account the long-range effect of arbitration on both the bargaining process and the special relationship that exists between a government and its citizens in a democratic society.

DISTORTION OF THE BARGAINING PROCESS

There is a growing body of evidence to indicate that the availability of compulsory binding arbitration as an impasse resolution procedure results in a distortion of the collective bargaining process. Instead of negotiating to agreement, the union, seeing minimal risk in arbitration, is more likely to declare an impasse and allow the arbitrator to make the decision. A two and one-half year study funded by the New York State Public Employee Relations Board and the National Science Foundation and conducted by Cornell University found "a 16 percent increase in the probability of an impasse occurring in negotiations" when compulsory arbitration was available.

The April 1978 issue of the U.S. Conference of Mayors Labor Management Relations Service (LMRS) Newsletter reported:

The new Wisconsin law amendments giving city and school employees the right to interest arbitration in impasses results in 44 petitions filed in the first 44 days of the new provisions, Morris Slavney, Chairman of the Wisconsin Employment Relations Commission, disclosed.

Wisconsin school board officials complained that union leaders believe arbitrators will tend to be more sympathetic to public workers than taxpayers in awarding settlements.

Eugene F. Berroddin, Assistant Director of the Michigan Municipal League, in a paper entitled, "What's Wrong With Compulsory Arbitration?" stated similar concerns. He wrote:

In entering arbitration, most of the risk is assumed by the employer, who is subject to a costly award. It is rare to the point of non-existence, for the union to risk any decrease in current wages, salaries or working conditions. Therefore, experience to date indicates that many unions consider arbitration to be a non-risk or low-risk venture. Employers may urgently seek to arrive at a settlement in order to minimize their risk in arbitration. This combination of forces under Michigan labor law leads to the conclusion that there has been an inflationary bias in compulsory arbitration which has led some employers to grant wage increases and benefits in excess of what would have been granted in the absence of compulsory arbitration.

Mayor Don Johnston of Coeur d'Alene, Idaho, writing in the November 1977 issue of Idaho City Magazine, noted the tendency of arbitrators to more frequently accept the union's position. Mayor Johnston wrote:

Public employee unions and associations have nothing to lose and, frequently, a great deal to gain by holding out for binding arbitration. In Massachusetts, as of March 28, 1977, arbitrator's awards have favored union's proposals 28 times as opposed to favoring management's proposals only 13 times. On three occasions both parties submitted indential last best offers.

Philadelphia's experience with Act 111, Pennsylvania's statute mandating arbitration of police and firefighter impasses, graphically illustrates the chilling effect of arbitration. Writing in the December 1980 LMRS Newsletter, Ellis M. Saull, Assistant City Solicitor, and William Grab, Personnel Technician for the City of Philadelphia, describe what now passes for collective bargaining in the City of Brotherly Love.

From 1956 to 1968, collective bargaining was informal. In June of 1968, Pennsylvania Act No. 111 was enacted by the State Legislature, providing for binding compulsory arbitration for interest disputes involving police and fire employees of the Commonwealth and its political subdivisions. . . .

Beginning with fiscal year 1971 (7/1/70 to 6/30/71), to present, every police and fire contract has been determined through binding arbitration under Act 111

There have been no police or firefighter strikes since the inception of arbitration. However, since Act 111 went into effect, the negotiating process has been chilled to the extent that, in most years there have been five or less negotiating sessions prior to reaching of impasse and the invocation of arbitration, with little serious movement from the parties' initial positions. In all of these cases, the impasse has been declared and arbitration requested by the Unions.

During the 1980 negotiations, for the first time (since 1969) a tentative negotiated agreement was reached with one of the employee representation organizations. Local 22's executive board and the City reached an agreement for a four year pact in February 1980. However, the rank and file membership, hoping to do better in arbitration, overwhelmingly rejected the pact.

The arbitration process also entails certain administrative costs. The California Department of Finance, in January of 1976, prepared an estimate of the costs of extending compulsory binding arbitration to disputes involving fire and public safety employees. The study estimated there would be 300 negotiations per year. Based on research done by James L. Stern and others in Final Offer Arbitration, it was calculated that 30 percent of all negotiations would go to arbitration. It was further calculated that, on average, an arbitration process would cost the government involved an amount in excess of \$12,000. This meant California taxpayers would be paying some \$1,089,000 per year in arbitration costs. In his earlier cited speech, John Baker noted that it cost the city of Oakland from \$25,000 to \$90,000 to prepare for a single arbitration case.

DEMOCRATIC PROCESS THWARTED

More important than these fiscal and administrative costs associated with the use of compulsory binding arbitration are the political costs involved in its use. Dr. Sylvester Petro in his March 1974 Wake Forest Law Review article "Sovereignty and Compulsory Public Sector Bargaining" wrote: "Compulsory arbitration of public sector bargaining impasses is, if possible, even more destructive of governmental -- and -- popular sovereignty than are public sector bargaining and strikes."

Harry H. Wellington and Ralph K. Winter, Jr. in their 1971 Brookings Institution study The Unions and the Cities, noted that strikes by public sector

unions may be so effective a weapon as to "distort 'the normal American political process.'" This is one of the considerations that spawned the search for an alternative to strikes. However, it must be recognized that the alternative, binding arbitration, also possesses the power to distort the political process.

Compulsory public sector collective bargaining diminishes citizen control of government by requiring elected officials to share what had been unilateral decision-making authority with unions. Compulsory binding arbitration completely destroys the concept of citizen control by turning over absolute decision-making power to third parties who are in no way accountable to the citizens of any governmental unit.

In "Final-Offer Arbitration and Teacher Contract Bargaining" published in The Journal of Collective Negotiations in the Public Sector, Vol 7, No. 4, Dr. Richard A. King wrote:

The costs of teacher bargaining include not only potential fiscal losses by both parties and the disruption of a necessary service to the public, but also the potential destruction of local fiscal control

By establishing a procedure for deciding one offer or another by a private, non-elected board, legislators are in effect delegating governmental decision-making power in a manner that might be unconstitutional. By mandating school boards to accept a binding award that must then be funded by the public, legislators may be instituting a form of taxation without representation.

This very concern has been echoed by public officials and labor relations experts of varying philosophies and approaches to public sector bargaining problems. Paul R. Soglin, former Mayor of Madison, Wisconsin, wrote in an article in the November 1977 LMRS Newsletter: "By requiring compulsory, final, and binding arbitration, the responsibility of administering government is taken away from elected officials." It follows that, if decision-making power is taken from elected officials, it is taken from the citizens.

Former Massachusetts Governor Michael S. Dukakis, in a statement vetoing reenactment of compulsory binding arbitration for public safety employees in his state, wrote:

By imposing binding arbitration on all communities - no matter how willing and able the given city or town has been to negotiate in good faith with its employees - the law has made normal collective bargaining irrelevant. It has taken the responsibility of determining the financial future of the city or town, at least insofar as the cost of public safety services affect that financial future, from the local elected officials and given that responsibility to an unelected arbitrator who may not even live in the community. I do not believe that this broad delegation of local fiscal powers is consistent with any reasonable notion of home rule

Perhaps the most damning indictment of the process comes from an arbitrator. In a 1972 Columbia Law Review article entitled, "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector," Joan McAvoy quotes a member of a three-man arbitration panel which resolved a dispute between the City of Marquette, Wisconsin, and its police union. This somewhat disenchanted arbitrator stated:

. . . Who elected the arbitration panel of which I am a part? To whom is this panel responsible or responsive? What pressure can the citizens of the City of Marquette bring to bear on the panel? How do they express their satisfaction or dissatisfaction with the panel's decision?

. . . With no reflection on their integrity intended, it is a simple fact that the two panel members who endorse the majority decision are not citizens of the City of Marquette nor even of Marquette County. And yet their decision, which has very far reaching implications, and will ultimately, no doubt, result in increased taxes for the people of the City of Marquette, is final and binding upon those people, their government and its employees.

VIOLATION OF ONE-MAN, ONE-VOTE

In addition to the previously stated concerns, it is also charged that arbitration suffers a constitutional flaw.

Compulsory arbitration statutes have been attacked as violating the Equal Protection Clause of the Fourteenth Amendment, via the one-man, one-vote principles enumerated by the United States Supreme Court in Gray v. Sanders, 372 U.S. 368 (1963) and Reynolds v. Sims, 377 U.S. 533 (1964). The argument is that the selection of an arbitrator by each party, and appointment of a third arbitrator by the first two, not only deprives citizens of an equal voice in selecting the panel, but removes from the public their right to equal representation in the decision-making process as well.

The one-man, one-vote argument has been generally rejected on the theory that an arbitration panel's responsibilities are not purely legislative in character. City of Amsterdam v. Helsby, supra. Using the argument discussed above that arbitration panels can only affect spending, and not actually determine costs, courts have generally regarded arbitration panels as non-legislative in nature and, therefore, isolated from the one-man, one-vote principles.

(Helsby, Wayne L., "The Constitutionality of Legislatively Mandated Binding Interest Arbitration: A Guide for the Practitioner," The Review, Spring 1980, Center for Employment Relations and Law, College of Law, Florida State University, Tallahassee.)

The question, then, is whether arbitrators perform a legislative function and whether their decisions affect policy matters. Although the courts in previous cases have not accepted this contention, there is growing evidence that arbitrators do wander into legislative areas and do shape public policy.

The February 23, 1981, Government Employee Relations Report (GERR) includes an account of a recent Ohio case relating to arbitration. Judge Daniel B. Quillian of the Summit County Court of Common Pleas in Local 330, Akron Firefighters Association v. City of Akron overturned an arbitration award. GERR reports his reasons for doing so:

The power to fix the compensation of municipal employees is "one of the basic functions of municipal government," he finds. "It is not a mere incident of government but goes to the heart of the purpose of municipal government, that is to provide services to its citizens," the court finds.

Whether firefighters should work eight-hour shifts and 40 hours per week or 24 hour shifts and a 52 hour week is a "subject about which there can be honest debate." Judge Quillian finds changing the fire fighters' schedules is a "fundamental change in city policy which should not and cannot be brought about by the unreviewable decision of a single arbitrator purporting to construe an ambiguous clause in an agreement." (emphasis added)

Robert Chanin, former General Counsel of the National Education Association, has acknowledged the link between public sector collective bargaining and strikes and public policy matters. In an interview published in the February 28, 1981, Political Action Report, Chanin said, "the purpose of many strikes is not to

pressure governments into running higher debts, but rather to determine the priority of allocations - how available funds should be spent." If bargaining and strikes influence policy matters, then an arbitrator whose function is to resolve bargaining disputes and prevent strikes must surely deal with and issue binding decisions on policy matters.

In a February 1978 Labor Law Journal article entitled "Interest Arbitration in Public Employment: An Arbitrator Views the Process" Tim Bornstein, a practicing arbitrator, provided a clear and concise statement of the critique of binding arbitration.

Elected officials and political scientists warn that interest arbitration is inconsistent with the fundamental tenets of self-government. They perceive the interest arbitrator as one who has not been elected by the citizenry and is not accountable to them, who has not been appointed by the governor, and is not accountable to him, who is probably not a citizen of the community over whose fiscal fortunes he presides, and who may not even be a citizen of the same state; yet this stranger has the authority to fix wages, hours, working conditions for the community's employees and indirectly influence its tax rates and allocation of its resources.

Bornstein's comments include a remarkably candid recognition of the fact that this criticism has merit.

An interest arbitrator is no longer basically a judge, instead, his role is legislative. While it is sometimes thinly veiled in judicial guise, compulsory interest arbitration involves policy choices, a legislative function which requires the arbitrator to fashion a wage and benefit package for the parties based on his judgement of what is fair, reasonable and appropriate. (Emphasis added)

There is another force at work which increases the likelihood of an arbitrator exercising authority over policy matters - that is, performing a legislative function. As a bargaining relationship evolves, matters of policy are more likely to be decided at the bargaining table. A February 1979 Rand Corporation study, Organized Teachers in American Schools, noted this phenomenon.

The phase one analysis indicated that collective bargaining gains by teachers follow a distinct pattern. Teacher organizations first bargain over and obtain increases in salary and fringe benefits; they then move on to working

conditions and job security and only lastly, to issues of educational policy. Although noncompensation gains have not been universal, teachers have significantly improved their working conditions and increased their influence over school and classroom operations. Regulation of class size may be one of the most dramatic gains, but negotiated provisions covering assignment and transfer policy are another important collective bargaining achievement. At the same time, organized teachers now play a major role in the decisions about the length and composition of the school day, how teachers are evaluated, and how supplementary personnel are used in the schools. (Emphasis added)

If these policy issues are brought to the bargaining table and cannot be resolved there, they will be placed in the hands of an arbitrator for resolution. There now arises a situation in which an unelected, outside third party is rendering binding decisions on staffing requirements, class size, or any number of policy matters directly and significantly affecting the operations of a public enterprise.

Furthermore, to assert that arbitration has no policy implications, it is necessary to assume that an arbitration award affects only that group of employees and that bargaining unit at which it is directed and not any other program in the wide range of governmentally provided services and benefits. This view is, at best, naive. The public sector negotiation and arbitration processes do not occur in a vacuum. An arbitrator's decision on the wage and benefit package for one group of employees can have an immediate effect on other departments and other services, possibly forcing a reduction in the level of service or an alteration in their method or quality of delivery.

LEGAL CHALLENGES

The constitutionality of compulsory binding arbitration provisions have been challenged before state supreme courts fourteen times. In ten cases, the challenges were denied. Pennsylvania's police and fire arbitration statute was upheld because the state constitution had been amended to specifically provide for such provisions. In Michigan, only four of the seven Supreme Court Justices heard the challenge to that state's arbitration law. The Justices split two-two, and therefore, a lower court decision upholding the statute was allowed to stand. Connecticut's arbitration law was declared unconstitutional by the

Hartford County Superior Court, but the Supreme Court reversed the decision. The Connecticut Supreme Court did not address the constitutional questions raised in the lower court opinion, but reversed on the grounds that the plaintiffs, eight municipalities and an individual taxpayer, lacked standing.

The supreme courts of four states - South Dakota (1975), California (1976), Colorado (1976), and Utah (1977) - have held compulsory binding interest arbitration to be unconstitutional. In all of these cases, the courts have handed down remarkably similar decisions, finding arbitration to be an unconstitutional delegation of authority to an unaccountable third party.

The Colorado Supreme Court stated:

The trial court ruled that the amendment provisions concerning compulsory binding arbitration constitute an unlawful delegation of legislative power. This is an issue of first impression in Colorado. We are persuaded that this view is correct. . . . A contrary holding in our view, would seriously conflict with basic tenets of representative government. Fundamental among these tenets is the precept that officials engaged in governmental decision-making (e.g., setting budgets, salaries and other terms and conditions of public employment) must be accountable to the citizens they represent. Binding arbitration removes these decisions from the aegis of elected representatives, placing them in the hands of an outside person who has no accountability to the public. (Greeley Police Union and Donald O'Leary v. City Council of Greeley, et al; Colorado Supreme Court, Case No. 26992, Aug. 23, 1976)

In the previously mentioned Connecticut case, Judge Joseph H. Goldberg of the Hartford County Superior Court wrote:

The Court concludes that the Act's compulsory arbitration provisions, which delegate legislative power affecting municipal affairs to a politically unaccountable body without appropriate safeguards against arbitrariness, are so unreasonable and capricious as to violate the due process clauses of both the Connecticut and United States Constitutions. (Town of Berlin, et al v. Frank Santaguida, et al; Hartford County Superior Court, June 26, 1978)

SUMMARY

In summary, one of the most succinct enumerations of the deficiencies of compulsory binding arbitration was authored by Sam Zagoria, well-known labor

relations expert, supporter of collective bargaining in the public sector, and former director of the U.S. Conference of Mayors' Labor Management Relations Service. In the April 1977 LMRS Newsletter, Zagoria listed the problems associated with the use of arbitration:

- (1) It discourages honest, good-faith collective bargaining. As long as this extra step is available, there is a possibility that a party will hold back on the compromise-making accommodations on which effective bargaining relies. . .
- (2) It places far-reaching power in the hands of a person, not elected, not accountable to elected officials and not necessarily a resident of the community or even the state involved. He is unlikely to be trained or experienced in municipal finances or administration. Yet his decision constitutes, nonetheless, a mandate on the community leadership, which can force substantial changes in taxation, public policy priorities and the ability to manage the work force . . .
- (3) The arbitrator is an ad hoc appointee with no continuing responsibility to make an award that is workable as well as just. There is no year-round accountability, contrary to the principles of representative government and sound public administration . . .
- (4) It is probably impossible to make an award for one group of workers without affecting other groups of municipal workers, yet an arbitrator has neither the authority nor responsibility to examine their situation. The 'ripple' affect of his decision could have a tidal wave effect on the city administration.
- (5) Contracts are not negotiated in isolation from past or future arrangements. It is difficult to make an award for one contract without dealing with how it fits generally into long-term labor relations, into future city plans, some of which are not yet formulated or expressed . . .
- (6) The process is unbalanced since it makes a no-risk or low-risk step available to a union or employee organization. Rarely will an arbitrator even consider awarding a union less than what management has already offered.
- (7) Arbitrators . . . tend to provide something for each side in their award regardless sometimes of the actual merits involved. Some cynics suggest this may be part of an arbitrator's job-preservation program . . .

- (8) Arbitration is an expensive add-on to the bargaining process. There are the steadily rising fees of arbitrators and now a growing use of economic consultants to prepare a case and accompanying exhibits, and as one side goes down this path, the other almost has to follow in self-defense.
- (9) It is a time-consuming process. . . . The Massachusetts League of Cities and Towns found the average length of time consumed in the arbitration phase alone was more than a full year.
- (10) There are serious questions of constitutionality

RIGHTS OR GRIEVANCE ARBITRATION

Rights or grievance arbitration, as was noted earlier, is a process for resolving disputes over the interpretation, meaning or application of an existing collective bargaining contract. The typical grievance procedure involves several progressive steps through an agency's hierarchy. The final or terminal step would be binding arbitration. As is the case with interest arbitration, a third party neutral -- grievance arbitration usually employes a single arbitrator -- renders a decision that is binding on both parties.

It is the grieving party, the union, which controls the decision to pursue a grievance through the various steps, including the decision to submit to arbitration. As with interest arbitration, it is the union rather than the employer which will invoke arbitration.

There are two ways by which arbitration is provided as the terminal step of a grievance procedure -- by statute or as part of the negotiated grievance procedure found in the contract. Many public sector collective bargaining statutes mandate arbitration of grievances.

EARLY CONCERN UNHEEDED

As the private sector bargaining model was put to use in the public sector, grievance arbitration was generally accepted as part of the process. Gerald M. Pops, in his book Emergence of the Public Sector Arbitrator, has noted that this transfer was accomplished with little questioning:

The process of transferring their function from the private to the public sector has, on the whole, been undertaken with little forethought as to the difference between private and public employment. In fact, the transition has occurred almost automatically as the institution of collective bargaining has taken root in public employment. There has been an implicit assumption that, although the institution of collective bargaining and the employment relationship have a somewhat different character in the two environments, the grievance arbitration process -- and the arbitrator -- would and should perform the same function in the same way.

There were some who raised questions relatively early in the development of collective bargaining in the public sector. Pops quotes arbitrator Peter Seitz, speaking before a 1967 seminar:

Arbitration, I am persuaded, is a more sensitive plant than is generally appreciated. Its utility as an institution can easily be impaired or even destroyed by freighting it with missions it is ill-equipped to discharge; by making it an instrument of national, state or local public policy; or by diluting its special private and voluntary character. Yet there are many well-intentioned persons who believe that if arbitration worked well in adjudicating private grievances, it should be a nostrum and cureall for a variety of other diseases. This gives me serious concern.

In their 1971 Brookings Institution study The Unions and the Cities, Wellington and Winter expressed concern over the importation of grievance arbitration to the public sector:

One of private management's major complaints about grievance arbitration is that, because it tends to accommodate interests as well as adjudicate rights, unions frequently gain what they have not been able to win at the bargaining table....

How frequently arbitrators in fact do what employers say they often do is difficult to judge. But it does happen, because unions press for it and because grievance arbitration involves, to some extent at least, the accommodation of interests as well as the adjudication of rights. Nor, in the private sector, is there much check on the arbitrator. The scope of judicial review has been sharply limited by the Supreme Court.

Whatever one's judgement on the wisdom or unwisdom of accommodation in private sector grievance arbitration, it is dangerous business in the public sector. Because the scope of bargaining has vast social implications in public employment, arbitrators should not be allowed to extend the area of union control through the settlement of grievances.

Yet these warnings went unheeded by legislators and public officials or were deftly parried by the unions that sought the extension of grievance arbitration

to the public sector. The defense of the process was a simple and, initially, a convincing one: the arbitrator does not create the terms of a contract but merely interprets language previously agreed to by the parties:

IMPLICATIONS FOR POLICY DETERMINATION

As the collective bargaining process has evolved in the public sector, it has become apparent that the grievance process involves matters of public policy. For one thing, the collective bargaining agreement is a statement of public policy having the force of law. This is a point the unions concede. In fact, they have used this argument when seeking judicial enforcement of contract terms.

The previously cited Rand Corporation study of collective bargaining by teachers pointed out that, as the process develops, the scope of bargaining -- those items which are included as part of the contract -- broadens to include more and more matters of public policy. It can safely be assumed that this same evolutionary pattern would occur in other areas of public employment. As contract language expands in this fashion, arbitrators will increasingly be put in the position of rendering decisions on issues of public policy.

Defenders of grievance arbitration, however, will argue that the arbitrator's role remains interpretative rather than formulative. If there is a problem here, it is with the scope of bargaining not the grievance procedure. The arbitrator is still only interpreting contract language not making policy.

But as the grievance arbitration process is examined further, this defense begins to lose credibility. For one thing, Wellington and Winter's concern about the grievance arbitrator's tendency "to accommodate interests" appears to have been well-founded. Many public officials feel the unions seek, often successfully, to use grievance arbitration as an extension of the negotiating process. One school board official with long experience in public sector labor relations has observed, "Unions have probably gained more through grievance arbitration than they have at the bargaining table."

At the bargaining table, unions seek to expand the number and types of items that are grievable and, hence subject to arbitration. A reason for doing this, it may be argued (as did Wellington and Winter), is to create a situation "through which the union extends its area of control over issues that belong to the political process."

TO INTERPRET IS TO FORMULATE

A bargaining demand that surfaced recently in Oregon provides illustration. A teacher union sought contract language that would have made alleged violations of school board policy subject to grievance arbitration. Fortunately, the Oregon Employment Relations Board refused to require negotiations on the demand. In rejecting the union position the Board pointed to the policy implications. The majority opinion stated:

We emphasize that a proposal's effect in restricting educational policy is not significantly changed by whether the proposal would require the two parties to bargain those policy matters or whether it would require the policy maker to submit its decisions to the scrutiny of a third party after they are made. In either case, the effect is to restrict the policy making role which the employer was elected to fulfill...

Could such a third party "review" affect the substance of these permissive matters? We believe it not only possible, but probable. An arbitrator cannot "rule" on an alleged policy/rule violation without first deciding what the particular policy or rule does, or does not require (i.e., without determining the substance or content of the language at issue). In so deciding, the arbitrator gives a policy its meaning -- a meaning which might well be at variance with the district's own interpretation.

At the crux of this issue is an inescapable point of procedural reality: the act of interpreting a law or contract language has the ultimate effect of formulating that law or language. Myron Lieberman, in Public Sector Bargaining, makes this point:

In a general way, policymaking in grievance arbitration is analagous to judicial legislation. Judges frequently have to interpret and apply legislation. When this happens, the judges are in effect acting as lawmakers. The argument over whether they are merely interpreting the law or formulating the law is largely a semantic issue... The fact is, however, that the power to interpret the law is also the power to formulate the law.

By the same token, the power to issue binding interpretations of collective agreements is also the power to formulate such agreements... And since such agreements constitute public policy for their duration, the power to make binding interpretations of them is a de facto power to make public personnel policy. A crucial difference, however, is that arbitrators instead of judges are making the policy.

Placing this kind of decision making power in the hands of an individual with no political accountability does violence to the concept of democratically constituted representative government.

CONCLUSION

In summary, the overwhelming weight of evidence holds binding arbitration, both interest and grievance, to be an unsatisfactory method of resolving labor disputes in the public sector. The process is inordinately expensive to governments both in terms of eventual settlements and administrative costs. Arbitration contains a built-in-bias toward the union position.

Most importantly, compulsory binding arbitration does violence to the concept of representative government. Turning over decision making authority to an outside third party accountable to no one, deprives citizens of their right to a voice in the running of their government. In a democratic society, this is intolerable.

APPENDIX I

The following nineteen states have compulsory binding arbitration legislation:

1. ALASKA - compulsory for police, fire, correctional and hospital unions which are denied the right to strike. Unions granted limited strike rights are also subject to compulsory arbitration when those strikes are enjoined.
2. CONNECTICUT - compulsory for municipal and teacher unions. For municipal unions a three-member panel engages in issue-by-issue final offer arbitration 90 days after expiration of current agreement. For education unions, a three-member panel selects between last best offers of both sides 20 days before school budgets are due at local boards of finance.
3. HAWAII - disputes involving firefighters are submitted to compulsory arbitration if differences persist 15 days following declaration of an impasse. A three-member panel selected in the traditional manner shall render a binding decision on a total package final offer basis.
4. IOWA - binding arbitration for all public unions at the request of either party if an impasse persists following fact-finding. The parties may use a single arbitrator or a three-member panel. The arbitrator or panel may choose on an issue-by-issue basis from among the final offers of each party or the fact-finder's recommendation.
5. MAINE - statutes in Maine cover state unions, municipal unions (including teachers) and University of Maine employees. They provide for arbitration of unresolved issues remaining after mediation and fact-finding. If both parties can agree, a single arbitrator may be used. Otherwise, a three-member panel picked in the traditional manner will resolve the dispute. The award is advisory on economic matters and binding on all others.
6. MICHIGAN - binding arbitration covers police, firefighters, state police and certain emergency medical personnel unions. Impasses not resolved by mediation or fact-finding within 30 days are submitted to a three-man arbitration panel. A decision is rendered on an issue-by-issue final offer basis.
7. MINNESOTA - arbitration for all public unions. Upon declaration of an impasse, parties submit final offers of unresolved items to a single arbitrator if they so choose or to a three-member panel. To select a panel, the parties alternately strike names from a list of seven arbitrators until three remain. Teacher unions are granted a choice between striking or arbitration. The remaining public unions are permitted to strike only if the employer refuses to submit unresolved items to arbitration or refuses to abide by an arbitration award.
8. MONTANA - legislation in 1979 applicable to firefighters and some state employee unions. Either party may request last best offer, issue-by-issue arbitration.
9. NEBRASKA - all public employee unions covered with a unique impasse resolution device. A Court of Industrial Relations considers all disputes and issues a binding decision. The court is a permanent body whose members are employed by the state.
10. NEVADA - covers local government employee unions, including teachers and state nurses unions, and provides that the parties may agree in advance to make all or parts of a fact-finder's report binding.

11. NEW JERSEY - police and firefighters unions are covered by compulsory arbitration. The parties have a choice on the form of arbitration to be used, either a single arbitrator or a panel. Arbitration can be conventional or final offer, and final offer may be issue-by-issue or total package.
12. NEW YORK - police and firefighters unions are covered by compulsory arbitration with a conventional, three member panel. These provisions are renewable on a two year basis. The present extension expires July 1, 1983.
13. OREGON - compulsory arbitration for police, firefighters, and prison guard unions who are legally prohibited from striking. The parties may choose a single arbitrator or a panel of three selected by striking names from a list of seven. Arbitration is conventional. In cases where otherwise legal strikes are enjoined, remaining unresolved issues must be submitted to arbitration.
14. PENNSYLVANIA - compulsory arbitration for police, firefighters, guards at prisons and mental hospitals and court employees. Each party selects one member of the three-man panel, and these two select the chairman. Arbitration is conventional and is invoked at the request of either party or if no agreement is reached after 30 days of negotiations.
15. RHODE ISLAND - several statutes provide for arbitration for all public unions. In the case of police and firefighters, all issues unresolved after 30 days of negotiations are submitted to a three-member panel for conventional arbitration. Arbitration is instituted for others if mediation fails to settle all impasses. For state employee unions this is compulsory. For municipal employees and teachers unions it is instituted at the request of either party.
16. VERMONT - compulsory arbitration for municipal employee, police, and firefighter unions on a local option basis. Municipalities may opt by a referendum vote to provide the binding procedures. Arbitration is instituted if an impasse persists 20 days following a fact-finder's report. The three-member panel engages in conventional arbitration.
17. WASHINGTON - compulsory for uniformed personnel if an impasse persists 45 days after mediation and fact-finding commences. A three-member panel engages in conventional arbitration.
18. WISCONSIN-compulsory binding arbitration for municipal unions. At the request of either party, disputes involving police and firefighters unions are submitted to compulsory binding arbitration. A single arbitrator is selected by each party alternately striking names from a list of five. Unless conventional arbitration is specified by the parties, the decision will be rendered on a total package final offer basis. Compulsory binding arbitration for municipal employees created by 1979 legislation allowing parties to agree to binding arbitration or strike option. A single arbitrator, selected as above, decides between final offers. The statute will expire July 1, 1987.
19. WYOMING-the firefighter bargaining statute provides for compulsory arbitration if no agreement is reached within 30 days. Arbitration is by a three-member panel.

APPENDIX II

Compulsory arbitration statutes were overturned by the supreme courts of the following states:

CALIFORNIA-*Barry Bagley, et al. v. City of Manhattan Beach, et al.*; Supreme Court of California, Case No. L.A. 30523, September 16, 1976.

COLORADO-*Greeley Police Union and Donald O'Leary v. City Council of Greeley, et al.*; Colorado Supreme Court, Case No. 26922, August 23, 1976--and later in *City of Aurora v. Aurora Firefighters' Protective Association, et al.*; Colorado Supreme Court, Case No. 27227, August 2, 1977.

SOUTH DAKOTA-*City of Sioux Falls v. Sioux Falls Firefighters Local 814, Fraternal Order of Police, Lodge No. 1, et al.*; South Dakota Supreme Court, Case Nos. 11406, 11411, and 11424, October 9, 1975.

UTAH-*Salt Lake City, et al. v. International Association of Firefighters Locals 1645, 593, and 2064*; Utah Supreme Court, Case No. 14689, April 25, 1977.

Uhlman: Rather a Strike Than . . .

BY MARIBETH MORRIS
P-I Labor Writer

Mayor Wes Uhlman said yesterday he'd rather go through a strike by public employes than wind up with a binding agreement made by an "irresponsible" arbitrator whose decision could bankrupt the city.

Uhlman, speaking here at a forum discussion on the right of public employes to strike, emphasized he wasn't supporting workers' walkouts by any means.

"If the rules are right, binding arbitration is the answer," the mayor said, "but only in cases where the public's health and safety is at stake."

Uhlman cited a case involving a California city which tried to reduce the firefighters' force by 36. An arbitrator not only cut the work week but added 66 additional men.

"This cost the city \$3 million more a year and other services had to be cut back because of this irresponsible decision."

Uhlman referred often to the 100-day City Light strike this winter after which, he said, neither side came out the "clear and total winner."

The mayor termed

prohibition of public employe strikes as "not reasonable, paternalistic and unfair."

At the same time, however, Uhlman said cities cannot afford to give in to "outrageous demands."

"New York City found that the chaos of a strike was nothing compared to the chaos of a pending bankruptcy," Uhlman said.

A gentlemen's debate on public employe strikes preceded Uhlman's presentation at the forum, co-sponsored by the American Arbitration Association and the Seattle-King County Municipal League.

George Masten, executive director of the Washington Federation of State Employees, defended the "inherent right" of public employes to strike.

"Public employes have a right to withhold their services to pursue their goals," Masten said. "There is the hue and cry that the people will suffer."

"The suffering is no different if a strike is called by private doctors or public doctors."

Seattle management consultant C. Carey Donworth took the opposing side saying public employes shouldn't

have the legal right to strike because the public ends up being the principal victim.

Legalizing public employe strikes will increase strike activity and the public will suffer even more, Donworth said.

"If you legalize murder, you will have more murders," Donworth said. "It's that simple."

Seattle Post-Intelligencer March 7, 1976

"Best Last Offer" Referendum - A Viable Alternative

By Joseph H. Weil

In late 1975, before his appointment as Secretary of Labor, W. J. Usery, Jr., then director of the Federal Mediation and Conciliation Service, anticipated a crucial year in 1976 for labor relations when he said, "In the public sector, we are sitting atop a tinder box."¹ He referred to the difficulties in labor relations in the public sector and added, "Such ingredients are a recipe for chaos." The potential for conflict in public sector labor relations during 1976 was also pointed out by representatives of both labor and public management.²

In June of 1976 the United States Supreme Court conclusively dealt with the question of the Federal Government's power to regulate the relationship between state and local governments and their public employees, as raised by the challenge to the 1974 amendments to the Fair Labor Standards Act by the National League of Cities.³ A majority opinion specifically receded and overruled the Court's prior opinion which upheld earlier FLSA provisions as they applied to schools and hospitals,⁴ stating that the earlier decision in *Wirtz v. Maryland* may no longer be regarded as "authoritative."



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collective bargaining, published in the May 1976 Florida Municipal Record and reprinted in the August 1976 Municipal Attorney. He is also a member of the National Institute of Municipal Law Officers and a member of the executive committee of the Local Government Section of The Florida Bar.

Mr. Justice Rehnquist, speaking for the majority, held

that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, cl. 3.

and further stated:

We agree that such assertions of power, if unchecked, would indeed allow "the National Government [to] devour the essentials of state sovereignty."

The broad language of this decision in placing a real limit on the power of Congress to control state and local government employee relationships effectively blunts the drive in Congress for a federal public employees labor relations law and "may bring states and cities additional benefits in their labor-relations battle with public-employee unions."⁵

It now appears that neither labor nor public management is satisfied with the existing formulas that are presently provided by most state laws.⁶ Although several states have yet to enact legislation dealing with labor relations in the public sector,⁷ most have adopted either "meet and confer" laws such as Missouri,⁸ local option plans such as California,⁹ or compulsory bargaining schemes such as the Florida law¹⁰ which contains complex provisions for impasse resolution that ultimately leave final determination as a unilateral decision of the public employer.¹¹ A few states have experimented with the concept of compulsory arbitration in public sector collective bargaining,¹² or the possibility of permitting strikes and job action on a limited basis within the public sector.¹³

George Meany and the Public Employees Department (PED) of the AFL-CIO take the position that strikes should be legalized in the

public sector,¹⁴ although Jerry Wurf, president of the American Federation of State, County and Municipal Employees (AFSCME), the AFL-CIO's largest union of public employees, stated in a recent interview:

As for all the other fields of public employment, our Union is willing to agree in advance that if we get into bargaining impasse we will go to arbitration voluntarily, rather than be forced into it as a matter of law.

I think the wage-arbitration system in the steel industry offers an excellent example that can be followed in the public services.¹⁵

The validity of binding compulsory arbitration laws in the public sector is presently in a state of confusion and somewhat in doubt.¹⁶

The Florida law, Part Two of Chapter 447, Florida Statutes, known as the "Tucker Act" is illustrative of the approach taken by a great man of states in regulating collective bargaining in the public sector.¹⁷ This law provides an illusory equality of bargaining by introducing the concept of a special master,¹⁸ whose function is that of both fact-finder and arbitrator, but whose recommendations are without real force or effect. The recommendations of this special master must be considered by the legislative body of local government at a public hearing.¹⁹ Compliance by the legislative body with this statutory requirement has not engendered any great interest on the part of the general public, and as a result, such a hearing has no effect on the parties except perhaps to encourage indirect political pressure which does not serve the public interest.²⁰

Most state laws provide some prohibition against "strikes" or "job actions," such as the Florida law which states:

No public employee or employee organization may participate in a strike against a public employer by instigating or

supporting, in any manner, a strike. Any violation of this section shall subject the violator to the penalties provided in this part.²¹

Such "no strike" provisions do not prevent labor disruptions in the public sector, for if the employee organization remains dissatisfied, even after the impasse is resolved, it may still resort to the "illegal strike."²² Generally when such "illegal strikes" are settled, one of the conditions demanded by the employee organization is that the public employer take no retaliatory action against the union for participating in an illegal strike.²³ Thus, the statutory prohibition against strikes has little apparent impact on the incidence of strikes in the public sector²⁴ and the question of how such "no strike" provisions of the law should be enforced has recently been addressed in Florida by the appellate courts in the litigation that resulted from the alleged illegal strike of Broward County school teachers in late 1975.²⁵

Disregarding the problem of the "illegal strike," it now appears that the majority of the general public supports the position taken by most public employers that strikes in the public sector should not be permitted since the concept of "public service" of the government, employees and the plight of the cities has been a strong factor in the current taxpayers' revolt.²⁶ Therefore, in view of the unacceptability of "strikes," "job actions" or other disruptions of service in the public sector, labor, management and the public have all sought some alternative procedure for impasse resolution.²⁷

Public employers are almost unanimous in their opposition to legally binding compulsory arbitration for impasses in the public sector.²⁸ They take the position that such arbitration is really only binding on the public employer, as the employees may still resort to "illegal strikes" or "job actions" if they are not satisfied with the arbitrators' award.²⁹ The principal objection of the public employer to compulsory binding arbitration is that public officials lost control of policy making and their ability to determine the priorities in dealing with the problems of local government.³⁰ Thus when compulsory binding arbitration is used as the method for

impasse resolution, decisions affecting the needs of local government are made by "labor experts" rather than by elected public officials, and the decisions result from adversary proceedings rather than from the political process.³¹

Best Last Offer Concept

This objection would apply to both conventional arbitrational awards, as well as "best last offer" arbitration.³² The "best last offer" concept has been introduced recently as a variation of traditional arbitration proceedings. Since the arbitrator is "frozen" and must accept either one of the two "best offer" proposals that are submitted to him, it places pressure on each of the parties to place before the arbitrator his most reasonable proposal.³³

As an alternative to either illusory collective bargaining, compulsory arbitration, or "strikes and job action," the newest approach appears to be a referendum election to resolve the issues. Such a procedure has been promulgated recently by one of the outstanding experts³⁴ in public sector collective bargaining. The proposal is to give

either party by law the right to take the contested issue to public referendum, hitching the fact-finders' recommendation on the next regular or special election ballot, whether it is for choice of municipal officials, a decision on bond issues, selection of state officials or similar public referendum.³⁵

A related new concept recently adopted by the City of Englewood, Colorado, provides:

RESOLUTION OF IMPASSES COMMISSION RECOMMENDATIONS VOTER APPROVAL

If the appropriate city representative and the representative of a certified employee organization reach an impasse, the matter shall be submitted to the commission for fact-finding and mediation. The commission may at its discretion appoint or employ one or more mediators or fact-finders to assist the commission or the parties involved.

Within thirty (30) days after submission to the commission for fact-finding and mediation, the commission shall render its findings and recommendations to both the city and to the affected employee representation unit.

Should either the city or the employee representation unit decline to accept the recommendation of the commission, or to otherwise agree, then either of said parties shall within thirty (30) days notify the council of its decision.

Within thirty (30) days after written notice to the council by either party of its refusal to

accept the recommendations of the commission, the council shall call a special municipal election by ordinance or resolution, submitting the recommendation of the board to a vote of the qualified electors of the city for their approval or disapproval. Furthermore, if requested to do so by the appropriate employee unit, the city council shall submit the proposal of the employee unit at the same election. The city council may, at its discretion, submit its proposal at the same election.

The proposal receiving the highest number of votes, if approved by a majority of the qualified electors voting thereon, shall be deemed approved.

Said election shall be held consistent with the provisions of Article II, Section 14 of this charter.

Expenses of any special municipal election called under this section, shall be borne by the city. All fees and expenses by the board of its appointees incurred hereunder shall be shared equally by the city and the appropriate employee representation unit.

The city shall furnish meeting space and recording and transcribing services when requested for such proceedings.³⁷

A unique flexibility is available under such a "best last offer" referendum provision, not only to the employee organization and public management, but also to the general public. Under the terms of such a provision, the public must, by its election, determine a choice, which should be binding on both of the parties. Both sides can attempt to influence the result of the referendum through the traditional political process of education and campaigning. Ultimately, the taxpayer who pays the bill will have the right to make the choice.³⁸

More recently, in San Francisco, "a citadel of trade-unionism for four decades ... the old alliance between city hall and the building trades came undone in a strike by ten craft unions that brought many city services to a halt and prompted labor leaders to threaten a general strike by all union members."³⁹ However, it was clear that the elected officials were facing a taxpayers' revolt and they were seeking new solutions.

In November of 1975 the electorate amended the city charter by rescinding the automatic "prevailing wage" for craft unions, removing from the mayor the authority to unilaterally negotiate with city employees and authorizing future salaries and benefits to be negotiated by the board of supervisors.⁴⁰ In the face of the strike by the craft union, the board of supervisors used its new authority to regain control by

considering the "best last offer referendum" concept.

When public sector labor disputes reach an impasse, 'last best offer referendum' offers an alternative to strikes and compulsory binding arbitration...

When An Impasse Occurs

A draft charter amendment which was presented before the board of supervisors would enable a majority of the board to submit the question to the voters if the employees and public management are unable to agree.⁴¹ This proposed amendment provides that in the event of an impasse:

If prior to April 15, a majority of the board of supervisors request that the schedule of compensation based on the aforementioned last demands of recognized employee organizations be submitted to the voters, a special election shall be called for said purpose and shall be held not less than 30 days from the date of the call. At the special election the ballot shall contain the following two alternatives:

1. Approval of the schedule of compensation based upon the employee organization's last demands.

2. Disapproval of the schedule of compensation based upon the employee organization's last demands.

If a majority of the valid votes cast in said special election favor paying the additional rates set forth in the schedule of compensation based upon the last demands of the recognized employee organizations which engaged in the meet-and-confer process, it shall be the duty of the board of supervisors to amend the salary standardization ordinance for the ensuing fiscal year to reflect said increased rates and the same shall be in lieu of said annual compensation and notwithstanding any other provisions of this charter to the contrary. Said rates shall become effective at the beginning of the succeeding fiscal year.⁴²

The strategy of the San Francisco Board of Supervisors was to place on the June 1976 primary election ballot two propositions which would provide "a small cost-of-living increase" to the striking craft unions over a two-year period and embody the "last best offer" of the Board of Supervisors.⁴³

The pressure of the impending June 8, 1976, referendum election proved sufficient to force unions to give up the strike and submit the issues to a fact-finding board of 11 members, consisting of five labor representatives and five appointed

by the supervisors and the mayor.⁴⁴ The settlement was reached on Saturday, May 8, 1976, the last day the supervisors could remove the referendum questions from the ballot. It resulted in victory for the Board of Supervisors.⁴⁵ Although in removing the issues from the ballot, the supervisors did not in the final analysis use the "best last offer referendum," the action did prove a most effective deterrent in allowing management to successfully conclude the strike.⁴⁶

Advantages of Best Last Offer

Although nothing contained in the proposal itself will prevent "illegal strikes or job action" by employee organizations that are dissatisfied with the result of the referendum, as a practical political matter, it will be mandatory that they abide by the result in order to preserve their future political credibility. A condition precedent for placing the "last best offer" of the employees upon the ballot would be an agreement to be bound by the result of the referendum. Another advantage of the proposal is that each of the parties would be able to "frame" his own question, as opposed to a referendum on a special master's or arbitrator's recommendation which could possibly cause the parties to contest the language in which the question was presented.⁴⁷

The most telling argument against this procedure is that the public, as the ultimate taxpayers, will refuse to approve any proposal, no matter how reasonable. Our experience, at least in the City of North Bay Village, proves that this is not the case. In 1974, a proposed two-year contract between the city and the Fraternal Order of Police was tied to a referendum election involving an increase in the millage in order to fund the agreement.⁴⁸ After a spirited public debate, but with the support of both the political leadership of the community and the employee organizations, the agreement was ratified and a millage increase was authorized by the voters at a special election.⁴⁹

As the legislatures of many states, including Florida, will be addressing the problem of impasse resolution of public sector labor disputes in the very near future, it is suggested that there is a viable alternative to strikes and job actions

on the one hand and compulsory binding arbitration on the other hand. This alternative, last best offer referendum, seems to be molded for public sector collective bargaining and should be given a long and thorough look by the lawmakers. □

FOOTNOTES

¹ *Big Drive Ahead for Praises*, U.S. NEWS & WORLD REPORT, January 5, 1976, at 62.

² *Id.*, where a spokesman for AFSCME stated: "We're girding ourselves, and developing strategies to assist our locals as they go into negotiations," and Sam Zagoria, labor relations consultant for the National League of Cities and Director of the Labor Management Relations Service, who stated that 1976 will be "Not better but worse" for government bargaining.

³ *National League of Cities v. Usery*, ___ U.S. ___, 48 L.Ed. 2d 245, 96 S.Ct. 2465, 44 U.S.L.W. 4974 (1976).

⁴ *Wirtz v. Maryland*, 392 U.S. 183 (1968) upholding the validity of earlier amendments to the Fair Labor Standards Act.

⁵ *The Wall Street Journal*, June 25, 1976, at 3.

⁶ *See, Backlash Against City Workers*, U.S. NEWS AND WORLD REPORT, December 22, 1975, at 31 and *Public Workers Under Fire*, Interview with Jerry Wurf, President AFSCME, U.S. NEWS & WORLD REPORT, December 29, 1975, at 49 and an interview with John Dunlop, former Secretary of Labor, U.S. NEWS & WORLD REPORT, December 15, 1975, at 78.

⁷ "Whatever the diminution of bargaining prospects in New York City, we have seen the enactment in 1975 of additional statutes, which bring to over forty the number of states that by statute, judicial determination, or local ordinance, authorize some form of collective bargaining. Thirty of those states have fact-finding procedures, and twenty states have legislated arbitration for some or all of their public employees: Alaska, Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Washington, Wisconsin and Wyoming. In seven states the strike, subject to limitation, is legalized or authorized: Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania and Vermont. Thus, we see that collective bargaining in public employment is here to stay and is likely to survive the current fiscal and political crisis."

Quoted from Anderson, *New York City Fiscal Crunch Rattles Labor Relations*, LABOR-MANAGEMENT RELATIONS SERVICE (LMRS) NEWSLETTER, Vol. 7, No. 1, January 1976.

⁸ VERNON'S ANNOTATED MISSOURI STATUTES, *Public Officers*, §105.500 *et seq.* Provisions of statute excluding police officers from Collective Bargaining upheld *Vorbeck v. McNeal*, 407 F. Supp. 733, (E.D. Mo. 1976); *Aff'd* ___ U.S. ___, 49 L.Ed.2d 1180, 96 S.Ct. 3160 44 U.S.L.W. 3734 (1976).

⁹ Chapter 10 WESTS ANNOTATED CALIFORNIA CODES; Government Vol. 32 §3504.5 *et seq.* is basically a "meet and confer" law with an additional local option provision contained in §3500 as follows:

"Nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter."

Thus under the California law there are numerous and varied statutory plans for dealing with public employee labor relations established by almost every individual public employer. The law should be designated as "authorization to negotiate."

¹⁰ FLA. STAT. Ch. 447, Part II, originally enacted as Chapter 74-100, Laws of Florida.

¹¹ FLA. STAT. §447.403(c).

¹² Report of the Labor Relations Committee, 39 NIMLO MUNICIPAL LAW REVIEW 11-16 (1975).

¹³ An example of this type legislation is found in the 1972 Alaska Public Employment Relations Act; A.S. 23.40.070-23.40.260 (1972).

¹⁴ LMRS NEWSLETTER, Vol. 6, No. 11, November 1975.

"The AFL-CIO, after a floor fight at its annual convention, last month endorsed Federal Legislation to provide collective bargaining rights for all public employees, including the right to strike. A lone effort was made by Jerry Wurf, president of the American Federation of State, County and Municipal Employees, to substitute compulsory arbitration in disputes involving police and firemen, but the amendment was resoundingly defeated, according to the New York Times. Wurf urged that failure to adopt such an amendment would doom federal or state legislation since legislative bodies would not vote to give public safety employees a legal right to strike. He said "The time has come to recognize some harsh realities. What we are in effect doing by insisting that there is an unlimited right to strike by public safety officers is in effect saying we don't want a Federal collective bargaining law."

The President of the AFL-CIO, George Meany, and others, responded Meany: "I hope I never see the day that the AFL-CIO, sitting in convention, will ask Congress to impose compulsory arbitration on anybody, anywhere, at any time." The President of the Service Employees International Union, George Hardy, said, "We must always have the right to strike. Without it, you have no freedom. The right to strike is basic, fundamental to the labor movement."

¹⁵ Interview with Jerry Wurf, U.S. NEWS & WORLD REPORT, December 29, 1975, at 50, and note 14, *supra*.

¹⁶ Compulsory binding interest arbitration statutes have been upheld in New York *City of Amsterdam v. Helsby*, 37 N.Y. 2d 19, 371 N.Y.S. 2d 404, 332 NE 2d 290 (Ct. App. 1975), Rhode Island *City of Warwick v. Warwick Regular Firemen's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969), Wyoming *State v. City of Laramie*, 437 P.2d 295 (1969) and Maine *City of Beddeford v. Beddeford Teachers Ass'n*, 304 A.2d 387 (1973). The Wyoming and Maine cases, do not really deal directly with the "delegation of power" issue directly as the New York and Rhode Island cases do. The most recent pronouncement of the Michigan Supreme Court is not conclusive, *Dearborn Fire Fighters Etc., v. City of Dearborn*, 394 Mich. 299, 231 N.W.2d 226 (1975). The majority of the court cast a cloud upon the validity of the Michigan law MCL §423.321 §17.455 (31) *et. seq.* Mich. Stats Anno. based upon its failure

to require political accountability of the arbitrators. The 1976 Michigan Legislature enacted Public Act No. 84 amending the Compulsory Arbitration Law to meet the requirements of the criteria established by the court; see Mich. Stats Anno; Current Material, Stats p. 416. Pennsylvania validated the concept of binding arbitration by a 1967 amendment to the state constitution that is now incorporated into Article III, Section 31 which specifically authorized that such arbitration findings were binding. The South Dakota Supreme Court held that compulsory binding arbitration was unconstitutional and struck down the entire law providing for arbitration of police and firefighters labor disputes in *City of Sioux Falls v. Sioux Fall Firefighters*, 234 N.W. 2d 35 (1975).

¹⁷ The Tucker Act was originally adopted as Chapter 74-100, Laws of Florida, and is now contained in FLA. STAT. §§447.201 - 607 (1975).

¹⁸ FLA. STAT. §§447.403 - 407 (1975).

¹⁹ FLA. STAT. §447.403(b).

2. The employee organization may submit to such legislative body its recommendations for settling the dispute:

3. The legislative body or duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the report of fact-finding board; and

4. Thereafter, the legislative body shall take such action as it deems to be in the public interest including the interest of the public employees involved.

²⁰ "From the standpoint of fostering a viable collective bargaining system, bypassing is undesirable in several respects. Initially, it evidences a breakdown in the bargaining system and, by shifting the attention of the parties from bargaining to political involvement, it makes future negotiations more difficult. On the union side, if lobbying meets with greater success than negotiation, the union will be encouraged to abandon bargaining entirely and rely solely on political action. On the management side, bypassing is perceived as highly unfair, particularly if management has made important concessions to achieve what it thought would be a final settlement. This perceived unfairness in turn, destroys the relationship of trust between management and union needed to cement a continuing bargaining relation. Finally, bypassing at the state level can result in demands being placed on local government that it cannot easily meet, thereby further straining relations between union and management. For instance, enactment of a maximum hours law for firemen will necessitate the hiring of additional firemen. But if the hours proposal were rejected at the local level for that reason, the result could well be that other services provided by the local government would have to be curtailed." (Citations and footnotes omitted) as quoted LMRS Special Report entitled *The Role of Politics in Local Labor Relations* (1973) excerpted from *Project: Collective Bargaining and Politics in Public Employment*, 19 UCLA LAW REVIEW 887 (1972).

²¹ FLA. STAT. §447.505 (1975).

²² Alley, *Checklist for Preparation for Strikes in the Public Sector*, 48 FLA. B. J. 7, at 578, (September 1974).

²³ This problem was recently the subject of

proceedings before the Florida Public Employees Relations Commission (PERC) where such an agreement between the School Board and the Broward County Classroom Teachers Association was challenged by the PERC staff. PERC Case No. 5H-SC-754-1001, and see Note 25 *infra*.

²⁴ Burton and Crider, *THE INCIDENCE OF STRIKES IN PUBLIC EMPLOYMENT*, (1976).

²⁵ *Broward County Classroom Teachers Association Inc., v. Public Employees Relations Commission*, 331 So.2d 342 (1st D.C.A. Fla., 1976).

²⁶ *Backlash Against City Workers*, U. S. NEWS AND WORLD REPORT, December 22, 1975, at 31-33

²⁷ *Chances for Labor Peace in '76 and the Price*. Interview with former Secretary of Labor, John T. Dunlop, U. S. NEWS & WORLD REPORT, December 15, 1975, at 78; see also interview with Jerry Wurf, (Note 15, *supra*), and Zagoria, *The U.S. Cities Tackle Impasses* (Note 29, *infra*)

²⁸ See excerpts of testimony of Eugene Berrodin, former executive director of the Internal Personnel Management Association to Michigan Senate Committee, reprinted in LMRS NEWSLETTER, Vol. 6, No. 5 (May 1975) and report of National Commission for Industrial Peace; for a contrary view see *Final Offer Arbitration*, the effects on public safety employee bargaining published by D.C. Heath & Co., Lexington, Massachusetts 02173, and the article by Professor James L. Stern appearing in LMRS NEWSLETTER, Vol. 6, No 9 (September 1975)

²⁹ "Other objections are that the process has diminished actual bargaining and that the implicit and explicit assurance that an award will mean 'no strike' has been violated on occasion;" Zagoria, *The U.S. Cities Tackle Impasses*, PROCEEDINGS INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 25th Annual Meeting, (September 1973) reprinted LMRS NEWSLETTER, Vol. 4, No. 9, at 50-55; Witt *The Public Sector Strike, Dilemma of the Seventies*, 8 CAL. WEST. L. REV. 102, 116 (1971)

³⁰ This was expressed by former I '30r Secretary, John Dunlop in a recent interview where he responded to the question: "Is Arbitration the answer to bargaining with public employees?" as follows:

"I have some reservations about that. First of all, if people are compelled to arbitrate, you don't really get the support of both sides for a settlement. It isn't their settlement; it's the arbitrator's settlement. And they don't have the same interests in carrying it out. They didn't have a part in shaping it. They don't know quite what it means and they have become more anxious to litigate to fight in court or otherwise over the fine points instead of trying to work it out.

The problem that worries me philosophically is that the government - the management side - is yielding to an arbitrator a very major component in the setting of taxes and charges in the public sector. I think that it is the responsibility of the elected representatives rather than of the arbitrator." (See Note 27, *supra*).

³¹ See Notes 28, 29 and 30 (*supra*)

³² The three basic forms of interest arbitration are distinguished by the treatment by the arbitrator of the final last positions of both parties to the dispute. Under the procedure termed conventional arbitration parties submit their final offers to the arbitrator who hears the evidence and fashions an award based on his best

judgement. The arbitrator is not confined by the final offer of either party in making his decision, although the offers of the parties generally serve as perimeters to the arbitrator. The second form is referred to as final last offer on the package arbitration. Under this procedure the arbitrator must choose either the employer's or the union's offer totally and without deviation. The third form is final last offer issue by issue arbitration whereby the arbitrator must choose either the employers position or the union's position on each individual issue presented for arbitration by the parties. While there are variations on these three basic models, most legislated interest arbitration in the United States adheres fairly strictly to one of these forms. Mulcahy and Smith, *Last Best Offer, How to Win and Lose, Special Report, LABOR MANAGEMENT RELATIONS SERVICE 1976* at 3.

²² *Final Offer Arbitration*, the effects on public safety employee bargaining, (Note 28, *supra*) And even arbitrators are beginning to recognize this problem. Public sector arbitrators are under serious attack for lack of concern or understanding of municipal government's arguments on ability to pay, Muriel M. Morse Personnel Director for the City of Los Angeles, told the annual meeting of the National Academy of Arbitrators.

She said state and local negotiators "find relatively few arbitrators with expertise in, or understanding of governmental processes." According to the Government Employee Relations Report, she hinted that arbitrators might find themselves subject to the check of voters' referenda on their decisions, but conceded that this approach would pose serious logistical and other problems.

A similar view about the inadequacy of public sector arbitrators and/or fact-finders has been expressed publicly by Mayor Henry W. Maier of Milwaukee, Wisc., on several occasions. LMRS NEWSLETTER Vol. 7., No. 7, (July 1978) at 1.

²⁴ Sam Zagoria, Director of Labor Management Relation Service, a former member of the National Labor Relations Board; he has had experience in many aspects of labor relations. At various times he has represented management of labor, assisted in drafting legislation, served as a neutral mediator and as an adjudicator. He has appeared on many platforms as a speaker and trainer and has written numerous articles, edited a book *PUBLIC WORKERS AND PUBLIC UNIONS* and led a series of national and regional discussions for the American Assembly.

²⁵ Zagoria, *The U.S. Cities Tackle Impasses*, at 53 (Note 29, *supra*).

²⁶ Adopted as an Amendment to the Home Rule Charter of Englewood, Colorado on November 7, 1972.

²⁷ The background of implementation of the

Englewood plan is interesting. This is not a true "Last Best Offer Referendum" provision (*see* Note 47, *infra*);

"So far our historical data is brief. In the past two years we have gone only so far as the impasse hearing and decision. One in 1974 was for the Fire and in 1975, the Police. Both times the impasse decision followed exactly the cities' proposal and neither group was willing to test the election process. The impasse decision was therefore accepted by both sides. We have found that the unions have a fear of trying to sell to the public on an election basis a greater package than decided by the mediator. They also fear receiving less if the city decides to put on the ballot a low package that could be acceptable to the taxpaying public." Extracted from a letter to the author, dated December 19, 1975 from Richard A. Long, Personnel Director City of Englewood, Colorado.

²⁸ "A final alternative for dealing with the problem of union power might be to make bargaining settlements subject to voter approval by referendum. This would give the public a direct and controlling voice in labor relations matters. It is reported that in San Francisco, where the city charter permits wage rates to be submitted to a referendum, the threats of the Chamber of Commerce to use the referendum device are the substantial restraint on the ability of the public employee unions to achieve their demands through political pressure. Requiring referendum approval of every settlement, however, would incorporate needless uncertainty and expense into the bargaining process. In addition, it might prove too effective a restraint on the unions. Experience in several cities indicates that even justified cost increases in government are likely to arouse a great deal of opposition where the specific items are subject to voter approval. To avoid these problems and still retain the beneficial aspects of the referendum procedure, the availability of the referendum could be conditioned on the gathering of a sufficient number of voter signatures on a petition calling for the referendum." (citations omitted); *The Role of Politics in Local Labor Relations* LMRS SPECIAL REPORT (Note 20, *supra*).

²⁹ *Where City Workers Ran Into a Taxpayers Revolt*, U.S. NEWS AND WORLD REPORT, April 19, 1976, at 79-80.

³⁰ *San Francisco Voters Indicate Unhappiness*, LMRS NEWSLETTER, Vol. 6, No. 12 (December 1975) at 5 *San Francisco Voters Indicate Unhappiness*.

³¹ Letter to Author from Honorable Dianne Feinstein dated April 29, 1976.

"Attached please find a copy of a draft Charter Amendment, now pending in Committee, which enables a majority of the Board of Supervisors to submit to the voters the additional rates of compensation above

that adopted by the Board of Supervisors in the event it is not possible to reach an agreement through the meet-and confer process.

"The intent of the Charter Amendment is to provide a mechanism whereby additional rates of compensation beyond a 'last best offer' by the Board of Supervisors can be submitted to the electorate for a 'yes' or 'no' vote."

⁴² Extracted from proposed Charter Amendment, presently pending before the California Board of Supervisors.

⁴³ Argument in support of proposition K, material prepared by Supervisor, Dianne Feinstein, enc. in letter to author, April 29, 1976.

⁴⁴ LMRS NEWSLETTER, June 1976, at 6

⁴⁵ Wall Street Journal, May 10, 1976, at 7

In what was hailed as a victory for the city's board of supervisors, some 1,700 striking municipal craft workers agreed early Saturday morning to go back to work after the supervisors withdrew two antilabor measures from the June 8 ballot. One would have given the city the right to fire city employees who strike and the other would have allowed voters to decide on specific wage proposals for the craft workers who struck. Yesterday was the last day the measures could have been removed from the ballot.

⁴⁶ Letter to author dated June 3, 1976 from Supervisor Dianne Feinstein.

"I agree the Propositions "E" and "K" were important bargaining tools. In this way, we could use these propositions as negotiable items rather than relying on economic issues.

⁴⁷ Such a procedure is contained in the Englewood, Colorado Charter Provision: "(At) the referendum election 'best last offer' is not necessarily on the ballot. Actually three proposals could appear, which are: (a) Unions proposal not necessarily 'last best'; (b) Impasse decision of career service board, which is step one in the impasse process; and (c) an offer by the City not necessarily the 'last best'. Part of the reasoning behind the above is to put the union in the position of losing perhaps considerable fringes and wages if the electorate decide (c) and the city decides to use only a minimal package on the ballot."

Extracted from letter to author; *see* Note 37, *supra*.

⁴⁸ Resolution No. 2292 adopted by the City of North Bay Village, Florida on April 27, 1974, provided a referendum election on the question of whether the City of North Bay Village should be permitted to increase millage for fiscal 1974-75 one additional mill.

⁴⁹ The results of the special election held June 25, 1974, in the City of North Bay Village were set forth in Resolution No. 2295, adopted June 26, 1974, as follows:

In favor of the increase:	490
Against the increase:	416

Reprinted from the Florida Bar Journal

Volume 50, Number 8, October 1976

by Britt L. Polley

Binding Arbitration

Many local communities are losing, or are about to lose, more control of their public education systems. Legislatures are enacting impasse resolution legislation (binding arbitration, for example) which in effect removes school boards and other government officials from their decision-making roles.

The genesis of this movement is a sincere legislative response to the increasing number of strikes by public employes. Legislators hope that the enactment of binding arbitration will eliminate labor unrest. **Arbitration is erroneously seen as a trade-off for the right to strike.**

The reasoning behind compulsory binding arbitration is basically as follows:

- Public-sector bargaining impasses often result in strikes, legal and illegal.
- Strikes in the public-sector are generally undesirable, and therefore, an alternative to them must be found.
- Reliance upon an outside, neutral, third party who decision is binding on both parties is an equitable solution to this problem.¹

As a rationale, this all works nicely. As a reality, the ramifications call for alert and immediate reaction by all school board members and other local government officials to assure that binding arbitration does not displace their responsibility to govern.

No one faults the goal sought by mandated binding arbitration (i.e., the end to teacher strikes); however, it is erroneously assumed that teacher strikes are the worst outcome of collective bargaining. **They are not!**

The central concern and most

damaging aspect of binding arbitration is its **removal of responsibility and authority** from local school boards. How is this so? When an arbitrator comes onto the school scene, the board no longer has the authority to determine the educational, fiscal, and other public policy issues that will fall within the purview of the arbitrator's authority. By the time the arbitrator has arrived, it is too late for school boards to consider their responsibilities in representing the community by determining what kind of educational program they're going to provide. The arbitrator will do this for them.

The arbitrator's authority may be exercised in such a way as to transfer the board's power and responsibility to the teachers' unions through language in the contract. Thereafter, it will be extremely difficult, **if not impossible**, for the community to regain control lost through arbitration awards. **The rate of transfer of community control has been swift in areas where school boards have been caught unaware of the ramifications of binding arbitration.** In the future, the ability of the local citizenry in such situations to influence changes in policies, rules, or procedures may be more difficult and more costly to the public than to endure strikes.

While there is obvious merit in the desire to ensure labor peace, it appears that legislators are responding in an overly simplistic manner when they mandate binding arbitration as the best solution to the problem. Such judgment is not based upon the larger and more serious ramification that binding arbitration has regarding public schools. That comes back to the title of this arti-

cle: **'They're Answering the Wrong Question.'**

"They" are the advocates or proponents of binding arbitration who think this is a central answer to the question of how to ensure labor peace. And while that is a very important question, the relevant question that must be asked is a more basic question: **Do local communities want their public schools to continue to reflect the values, ideals, goals and quality of education desired by those whose children are in the public schools and by those who pay the bill? Or, do local communities want special-interest groups and disinterested outsiders, such as unions and arbitrators, usurping more and more decision-making responsibility in local school districts, thereby reflecting goals, values and educational programs for which those who impose them are not answerable for financing or implementing? The legislating of binding arbitration will more nearly guarantee the latter situation.**

The form, substance and procedure of binding arbitration varies with the "creativity" of every legislature that has followed this path. Some use a single arbitrator, others use a panel, and still others offer a choice. Some arbitrators are allowed a "free ride;" that is, to make whatever awards they wish. Others must make awards on an issue-by-issue basis, accepting one of the advocates' positions or forging one of their own; or one may have last, best offer or final-offer selection in which the arbitrator selects the last, best offer of one of the parties, either on an issue-by-issue basis, or on a complete package basis. **Regardless of the variety of the form and process of**

Proponents of binding arbitration are answering the wrong question

binding arbitration, the basic concern of informed school officials remains the same: **Does the school board (community) want to give up its control over deciding its position on issues which are bargained at the table?** Translated into other terms, the question becomes: **Do we want to significantly alter one of our most directly representational forms of government, namely school boards? Is binding arbitration worth it? Do the facts justify it?**

The history of binding arbitration in the public sector is rather brief. At the present time, at least 20 states have binding arbitration for some of their public employes. (Pennsylvania has such legislation for police and firemen.) At least seven states now require some form of binding arbitration which affects public school employes. Proposed legislation is at various stages of consideration in several other states.

After a relatively brief experience with compulsory binding arbitration, **more and more officials are seeing less and less harm in weathering a strike rather than going to binding arbitration.** There is little evidence to refute that strikes diminish, at least temporarily, when binding arbitration is instituted as a part of impasse resolution. No one is surprised that binding arbitration will resolve disputes; the fallacy, however, is that the results are called an "agreement" or a "settlement." More accurately, it is a **forced compliance** arrangement thrust upon the local citizenry by an outsider; a disinterested, third party representing no one and responsible to no one.

Michigan's experience with binding arbitration is best expressed by **Mayor Young** of Detroit. He said that he has "become painfully aware, based upon bitter experience, that Act 312 (affecting Michigan police and fire personnel) has not worked, will not work, and

very possibly could bankrupt the very cities it was established to serve." Mayor Young, who once voted for the enactment of compulsory arbitration when he was in the state legislature, is now aggressively opposing Act 312 as its impact continued to strangle the public sector.

Eugene F. Berrodin, Michigan Municipal League, said of his state's experience with binding arbitration:

- There has been a loss of public management control of local police and fire forces.
- There has been a severe reduction in free collective bargaining among police and fire departments.
- Compulsory arbitration has resulted in significantly higher wages and fringe benefits for public employes and higher cost to the taxpayer than would have otherwise resulted from free collective bargaining. This conclusion was based upon a tabulation of 177 last-offer compulsory arbitration cases that indicated bias in favor of the unions' last offers as compared to those of the employers.
- Compulsory arbitration is procedurally costly and a time-consuming process. (Berrodin says that the average time from filing arbitration to the issuance of an award is about 12 months. Administrative fees

to attorneys and to arbitrators commonly range upwards of \$50,000 and more per case.)

Berrodin concludes his arguments against compulsory binding arbitration by pointing out that arbitrators routinely ignore the public in fashioning their awards; they are insulated from the taxpayers.²

Last year Governor Milliken in his "State of the State" message called for a reexamination of compulsory arbitration and the costly impact of the arbitration awards in Michigan.

Other critical evaluations of binding arbitration come from Rhode Island, Wisconsin, Montreal and Australia.

A report on police/fire arbitration in Rhode Island indicates that "salary rates have gone up more rapidly since the institution of compulsory arbitration in 1968. Even if the two parties have agreed on many, if not most of the issues, they may both return to their initial position when the arbitration board is appointed. As a result, an expensive time-consuming process begins. A further problem in Rhode Island is that the entire collective bargaining process is so time-consuming that when compulsory arbitration is added, proceedings must continue almost all of the time in the case of a one-year contract."³

A report on the Wisconsin experience with compulsory arbitration (final offer on the package, not on each issue) includes the observation that "it is apparent that arbitration is causing the wages of the

(continued on page 14)

Dr. Britt L. Polley is associate executive director of the Indiana School Boards Association. This article was based upon comments made by Dr. Polley to the Pennsylvania School Boards Association at its 1980 summer program at Bucknell University.



Binding Arbitration

(from page 13)

public employes to increase more than they would have under fact-finding."⁴

The widely publicized Montreal policemen's strike occurred in spite of that dispute's having been subject to binding arbitration. The Connecticut School Boards Association found in its research that in Australia, where public-sector binding arbitration has existed since 1904, there is a proportionately greater incidence of strikes than has occurred in Connecticut without binding arbitration. Obviously, binding arbitration does not guarantee labor peace.

It is also interesting to note one union's point of view on binding arbitration. Gordon Cole writes in the *AFL-CIO American Federationist*, "Arbitration has taken away the initiative of trade unions. It has made it easy for union officials to escape responsibility. Arbitration has been a crutch and a scapegoat. With it, union and management have avoided responsibility. They are able to avoid new approaches. In compulsory arbitration, labor disputes become cases to be argued in legal form in a courtroom atmosphere, there are long delays to ascertain the facts...it has failed to achieve its primary purpose"⁵

After considering the problems with binding arbitration, school boards are probably concerned because it places far-reaching power in the hands of a person not elected, not accountable to elected officials, and not necessarily a resident of the community or even the state.

Because this transfer of power contravenes the fundamental nature of our democratic government, in several states binding arbitration legislation has been contested. In at least five such states, binding arbitration has been declared unlawful.

It is apparent that compulsory arbitration offends the equal protection clause of the U.S. Constitution when the right of voters to cast

effective ballots is violated because governmental decisions are made by politically unaccountable individuals — arbitrators.

The Colorado Supreme Court noted that the Colorado law would seriously conflict with basic tenets of representative government. The fundamental concern in this litigation is that officials engaged in governmental decision-making must be accountable to the citizens they represent.

Another concern that was alluded to earlier is that binding arbitration discourages honest, good-faith collective bargaining. Interest arbitration awards generally attempt to present a compromise among issues at dispute. This can only work to encourage unions to extend and expand their demands. Given the not uncommon "laundry list" of demands that public-employee unions bring to the bargaining table and given the presence of binding arbitration as an impasse procedure, there is no reason to expect a teachers' union to drop any of its demands. It is more probable that a union will hold its position through arbitration, since it risks nothing by such a strategy. The union may well gain more through the arbitrator than it could possibly achieve at the bargaining table.

It is also of significant concern that the arbitrator's role is that of an *ad hoc* appointee who is not responsible for implementing the contract and therefore is not compelled to make awards that are

based upon effective, efficient management of public schools.

There are many other concerns board members can and do raise regarding binding arbitration, including the lack of required standards for arbitrators or for their training; the tremendous costs in time and dollars resulting from arbitration; and the concern for compromise instead of merit.

The prospects for binding arbitration are widely touted by some as a panacea for solving labor unrest, but it appears that binding arbitration in education labor relations raises some extremely serious questions. We can see the damage binding arbitration can do to representational government now operating in our schools. It is urgent for all concerned board members and their local communities to forewarn legislators that binding arbitration is not the answer for public schools.

FOOTNOTES

1. Public Service Research Council, "Compulsory Binding Arbitration And Public Sector Labor Disputes," *Issue Analysis*, February 1979, p.1.
2. Berrodin, Eugene F., "What's Wrong with Compulsory Arbitration," Michigan Municipal League.
3. *Public Personnel Management*, January 1973, pp. 6-7.
4. Stern, James L., *Monthly Labor Review*, September 1974, p. 39.
5. Cole, Gordon, *AFL-CIO American Federationist*, June 1972, p. 19.

LANGUAGE OF ARBITRATION

The term **binding arbitration** is used in this article to refer to the more technically correct phrasing, **compulsory binding interest arbitration**. Other terms used in this area:

- **Arbitration**: A method of settling a labor-management dispute by having an impartial third party hold a formal hearing, take testimony, and render a decision. The decision may or may not be **binding** upon the parties. If arbitration is prescribed by law as a method of settling disputes, it is usually preceded by mediation and fact-finding. Arbitration is **compulsory** if it is legislated.

- **Interest Arbitration** is the arbitration of disputes that arise during the course of contract negotiations, when an arbitrator determines the final contents of the contract. This should not be confused with **rights arbitration** which deals with the interpretation or application of the existing contract, not the negotiation of a new one.

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NEA-ALASKA

AFFILIATED WITH THE NATIONAL EDUCATION ASSOCIATION

*file
HB 130*

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March 20, 1986

TO: NEA-Alaska HB 130 Coordinators
Legislative Contacts
Local Presidents
NEA-Alaska Board of Directors
NEA-Alaska Staff

FROM: Chip Tassone, HB 130 Project Coordinator *Chip*

SUBJECT: Plans for Escalation of Activities

For those in attendance at the March 15 meeting, Thank You! It was good meeting you, and your enthusiastic participation gives great hope for success in the project.

For those unable to attend the meeting, Gayle's memo (attached) fills you in on the relevant information.

The significant repeated message from all the meeting activities and reports, is that our project is creating change, but we need to do more; we need to escalate our activities.

This packet includes five sets of "notes from" - - These notes resulted from a planning activity at the March 15 meeting, and can provide ideas for those locals where the planning of activities for May 3 is not yet complete.

When your plans are complete, both for May 3 and subsequent picketing or other activities, we would very much appreciate having copies of your plans sent to the Anchorage office.

The list of "on-going project activities" (also attached), was incorporated into the March 15 meeting, again with the pounding message, "we need to escalate all project activities".

To assist you in intensifying efforts and participation, we will be sending out more specific information and direction for some of the activities.

In the meantime, if you have any questions about any activities in the project, don't hesitate to call me or your Uni-Serv staff. I can be reached at the Anchorage office.

A final note: in planning any and all activities, REACH OUT! Try to involve all school employees, parents, groups and organizations in your area who are, or can be persuaded to support HB 130.

A REMINDER: "FLY-IN", April 4, 5, 6
Focus of "Fly-In" this year is HB 130

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There will be an all-night vigil at the State Capitol Saturday night with all our people and others participating....more details, later.

ESCALATE....ESCALATE....ESCALATE....ESCALATE

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Alaska State Legislature

file HB 130

SENATOR
ROBERT H ZIEGLER, SR
307 BAWDEN STREET
KETCHIKAN ALASKA 99901



Senate

MEMBER
SENATE JUDICIARY COMMITTEE
SELECT COMMITTEE ON LEGISLATIVE ETHICS
WESTERN STATES LEGISLATIVE
FORESTRY TASK FORCE
EXECUTIVE COMMITTEE
WESTERN LEGISLATIVE CONFERENCE
COUNCIL OF STATE GOVERNMENTS

WHILE IN JUNEAU
POUCH V
JUNEAU ALASKA 99811

ALTERNATE MEMBER
NATIONAL CONFERENCE OF STATE LEGISLATURES
STATE AND FEDERAL ASSEMBLY
COMMITTEE ON
FEDERAL TAXATION TRADE AND ECONOMIC DEVELOPMENT

April 10, 1986

All Members of the Senate
Alaska State Legislature
Juneau, Alaska

Dear Colleagues:

Obviously this note and the attachments have been distributed by the undersigned.

Irrespective of how you may feel about HB 130, the attached copy of the Lew Williams ("Ketchikan Daily News") editorial should prove of interest.

More importantly, the second attachment, which is authentic, gives you the NEA-Alaska game plan for the remainder of the session. It's too bad that President Bennett has to receive 1,000 letters of remonstrations; it's also a sort of a minor tragedy that the homes of Senator Faiks and Senator Abood are going to be picketed on May 3rd. This is no way, in my opinion, to win friends and influence people.

At least they're not going to picket my home in Ketchikan, as far as I can tell; I'm miffed about that.

Very truly yours,

3-

Robert H. Ziegler, Sr.

Attachments

Editorial

No time for HB 130

Teachers from around the state flew into Juneau for a weekend demonstration on the Capitol steps. It's part of an organized campaign by NEA-Alaska to push for passage of HB 130, which requires binding arbitration in the event of disputes between school boards and teachers.

We are going to see more demonstrations. There will be letters to the editor, information booths at malls, direct mail pushes to influence parents and use of kids in the program. We object to the use of youngsters for a strictly political action by a teachers' union. It's blatantly unethical.

This is strictly a union battle to gain an advantage in negotiations of salaries and working conditions for teachers. It's not a quality of education issue. It has nothing to do with curriculum or the welfare of students.

It's a poorly timed idea especially with the reduction in oil revenues to the state and local governments.

Under HB 130, if a school district and a group of teachers are unable to agree on a contract a mediator will be brought in and the school district will be bound by the decision of the mediator. It's not hard to see that in all situations the teachers will benefit from this. The districts will pay more, whether or not they can afford it. Control of local districts will go from the taxpayers, who elect the school boards, to the teachers. If such was not the case, we are sure that NEA-Alaska wouldn't be putting on its push for passage of HB 130.

Some states have passed binding arbitration laws. Sitka School Superintendent A. [unclear] house last week said that Michigan has such a law. He formerly worked there and said that districts lose control of employee payroll costs with binding arbitration. Losing control of any cost in Alaska in this tight money situation is unwise.

Alaska teachers should have no complaint. They make about \$16,000 more per year than the average teacher pay in the U.S. They make higher average salaries than any other union group in Alaska except for maybe ferry skippers and airline pilots. And many get automatic raises each year above what they negotiate in salary increases.

State Sen. Mitch Abood, R-Anchorage, says HB 130 isn't going to move out of his committee in its current form. He is willing to compromise with the teachers. Knowing the teachers' union, they won't compromise. In fact, according to their plan of attack, they are going to especially target Abood's district with petitions and mailers.

That doesn't sound much like compromise.

Sen. Bill Ray, D-Juneau, says that the chances of HB 130 passing this year are slim to none. It's inappropriate for it to even have a slim chance. But it may have that chance if citizens aside from teacher union members don't advise their legislators accordingly.

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March 18, 1986

TO: Ron Binkley, Bev Gulliksen, Sandy Peotter, Larry Trani,
Allen Wintersteen

FROM: Gayle Pierce, Chip Tassone

RE: Coordinator Meeting March 15th

Hello,

We missed you at the meeting but hope to catch up to you soon with these materials and by phone.

The agenda for the meeting is enclosed. As you know, Chip is assuming the role of HB 130 coordinator as I move into my new job as Uniserv Field Staff. So the morning of our meeting had three purposes - Introductions to Chip and vice versa, assessment of where we are compared to where we hoped to be last June when the project was conceived and analysis of what is happening in Juneau.

In a nutshell, our efforts are having the desired effect. Senator Abood has spent and continues to spend quite a lot of time on the Bill and it seems he sincerely wants to address the problem of finality in some way. He is hoping for a compromise position from both parties. The problem is the School Boards Association can say no forever, preserve the status quo and thereby protect the unfair advantage they currently enjoy in negotiations. It is becoming clearer to everyone that the effort to negotiate a compromise bill is a replication of the experience of Locals at the bargaining table. We've suggested Binding Arbitration as a mechanism to resolve the dispute.

It is Bob's assessment that the constituent pressure on Bennett and the other Legislators by mail and especially at constituent teleconferences has changed votes to "yes" and, most importantly, is affecting the priority status of the Bill. Our work with Senator Abood is slow, frustrating, but there are signs that it is having the desired effect.

The important message is hang in there! The Bill could sit in Committee until the last day and still go through all the necessary steps to be signed into law. Bob, Jean and Bob Cooksey are more optimistic now than ever - but we've got to keep the pressure on and be successful in our escalation plans as we move toward the end of the session.

The afternoon of our meeting focused on plans from now until when the session adjourns. Please review the list and note especially, the teleconferences, the postcards, Fly In plans, the petition drive which will take considerable organization on your part, and finally, May 3rd and informational picketing.

We spent the last 2 hours brainstorming activities for May 3rd. I'm enclosing what the groups came up with in the hope that will give you some ideas of activities that will be effective and will involve as many of the school employees and parents, and others as possible.

We handed out a blank calendar to use for planning and to underscore our eight week time frame.

Chip will be in touch with you soon. Hope this memo helps to catch you up a little.

Thank you for all you have done.

GP1:27/sc

LET'S FINISH THE JOB
LOCAL COORDINATORS MEETING

MARCH 15TH, 1986
SHERATON HOTEL, ANCHORAGE

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| I | INTRODUCTIONS | GAYLE |
| II | GET AQUAINTED EXERCISE | CHIP |
| III | OUR GOALS WHEN THE PROJECT BEGAN
WHERE WE ARE NOW | GAYLE |
| IV | HB 130 - WHAT IS HAPPENING IN JUNEAU | BOB |
| V | COLLECTIVE POWER | CHIP |
| | LUNCH | |
| VI | ONGOING ACTIVITIES/ESCALATION | CHIP/GAYLE |
| VII | PLANNING FOR ACTIVITY IN THE LOCAL | CHIP |