the public officials in the United States are altruists and men of courage.

Public employees are prescient enough to think that some public officials are not altruistic. They don't like oppression and they are fighting it. That is the reason for the whole series of strikes that now take place. Fundamental responsibility lies in decency and fair play, not in oppression.

II. THE USE OF FACT-FINDING IN DISPUTE SETTLEMENT

ARVID ANDERSON *

Many years ago a distinguished mediator and arbitrator, William H. Davis, observed that it was foolish to argue about a fact because ". . . we can only be ignorant about it." Mr. Davis's sage advice has not been followed, for there is a great deal of argument and ignorance about the facts or, at least, the role of fact-finding in dispute settlement. Some have suggested that the term "fault-finding" would be more accurate. Others prefer the term "impasse panels"; others feel the term "advisory arbitration" would more fittingly describe fact-finding because the process is more than fact-finding and involves judgment with recommendations.

Less flattering definitions of "fact-finding" may be found in word and cartoon in the January 17, 1969, issue of the *Public Employee Press,* published by District Council 37 of AFSCME, a labor organization that represents some 60,000 New York City employees, wherein fact-finding is compared to the medieval rack. The city employee is depicted as being on the rack with the fact-finders busily at work tightening the screws. The caption under the cartoon states that fact-finding is recommended by city officials who are worried about union demands that will stretch the city's budget. If the district council publication accurately reflects the views of the international union led by Jerry Wurf, we'll be in for a rough afternoon.

The term "fact-finding," as used in this discussion, refers to the findings of fact and the nonbinding recommended solutions made

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by a third-party neutral as a method of public-employment dispute settlement, although many of the principles would also be applicable in private employment. This paper discusses some of the theories of fact-finding, describes some of these statutes that have been enacted, gives a brief summary of the experience under the various state and municipal statutes, describes the role of the fact-finder, discusses the scope of fact-finding and some of the criteria used by fact-finders, and lastly discusses some of the pros and cons of the fact-finding process.

In the preparation of this paper, I was troubled somewhat by the fact that I was relying on the papers prepared by several scholars and members of this Academy and feared that I would be charged with plagiarism. However, I have been assured by one of my colleagues that as long as I was copying the work of more than one writer, I was engaged in "research." Therefore, I want to acknowledge as co-authors, whether they want to be or not, the paper of Jean McKelvey, delivered last month before the IRRA; the not-yet-published Ph.D. thesis of Edward Krinsky of the University of Wisconsin; the prior research of Professor James Stern of the University of Wisconsin; and the recent papers given by Professsors Russell Allen of Michigan State and Ted Schmidt of the University of Rhode Island before the Association of Labor Mediation Agencies and the National Association of State Labor Relations Agencies.[1]

Theories of Fact-Finding

The use of fact-finding as a means of dispute settlement in the public sector grew out of the experience in the private sector, where fact-finding panels were used under the emergency-board procedures of the Railway Labor Act and of the Taft-Hartley Act. The Taft-Hartley provisions do not empower the fact-finder to

[1] Charles T. Schmidt, Jr., "Observations on the Process of Fact-Finding in Michigan Public Education Teacher—School Board Contract Disputes," in *Public Employee Organization and Bargaining* (Washington: BNA Books, 1968), p. 81; Russell Allen, "1967 School Disputes in Michigan," *id.*, p. 73; James Stern, "The Wisconsin Public Employee Fact-Finding Procedure," *Industrial and Labor Relations Review* 20 (Oct. 1966), p. 19; Jean T. McKelvey, "Fact Finding in Public Employment Disputes: Promise or Illusion?" paper delivered at the Annual Meeting, Industrial Relations Research Association, Dec. 2, 1968 (mimeo); Edward Krinsky, unpublished final draft of doctoral dissertation on fact-finding, mediation, and strikes, University of Wisconsin, Department of Economics, 1969.

make public recommendations, but only to find facts. Whether these experiences in the private sector commend themselves to the public sector has been a matter of debate, but there are different circumstances in public-sector bargaining. The resolution of a public-employee dispute is essentially a political decision.

By the term "political decision," I refer to the process of decision-making rather than political partisanship. This is in contrast to the economic decision process in private-sector dispute settlement. While there is an interrelationship of political and economic factors in both public- and private-sector bargaining, the emphasis in public-sector dispute settlement is on political considerations, while in the private sector economic considerations must be foremost. For example, the decision to have a fire department, a police department, a school system, a park system, is essentially political even though these services cannot be provided without economic resources, without tax revenues.

If the premise of political decision-making is correct, then a system of dispute settlement based on the political process using reason and persuasion ought to be an effective substitute for the strike weapon in the private sector. The rationale is that, if the issues in dispute and the recommendations for their resolution are clearly set forth and well reasoned, then the recommendations will be persuasive upon the public employer and the public employee organization. The purpose of the fact-finder's recommendation is to bring the pressure of public opinion to bear upon the body politic, the city council, county board, or state legislature, or the chief executive thereof, and also upon the leadership and members of the employee organization involved. To borrow Walter Reuther's phrase, fact-finding depends upon the power of persuasion rather than the persuasion of power.

There is a disagreement among some practitioners and administrators as to whether the fact-finding process should be one of arbitration or mediation, of compulsion or compromise. This debate is similar to the early disputes over the proper role for grievance arbitration in private employment. The fact-finder, after reviewing the pertinent facts, bargaining history, and the labor market, usually looks towards persuasion, voluntary agreement, and acceptability rather than adjudication as the primary means of settlement.

If the fact-finder's recommendations represent the predictable expectations of the parties, the chances of acceptability of the recommendations are substantially increased. Miscalculation as to the reasonable expectations of the other party is a common cause of strikes. Thus a process which apprises both parties of the possible and reasonable terms of settlement should make them more receptive to the recommended terms. The emphasis is on acceptability rather than on the equities of the parties' positions. This is not to say that equity and acceptability may not converge at a number of points. The nature of the inquiry, the scope of the parties' submission, and the criteria to be applied may be the same whether the dispute-settlement method is fact-finding or arbitration. However, the fact-finder's role gives him greater flexibility than is to be expected in an arbitration process.

Fact-finding has served both as a method of adjudication and as a method of adjustment. Fact-finders have served as arbitrators and as mediators, sometimes in the same case. I believe it is quite proper for them to do so unless, of course, the parties make it expressly clear that they want only a judicial decision. However, I do not look upon the fact-finding process as an end in itself, but as an aid to the negotiating process. By that I do not necessarily mean a continuation of the bargaining after the fact-finder's decision, but more on that later.

Sometimes fact-finding is used where the public-employer representatives and the employee organization are not in disagreement, but the negotiators need the endorsement of the fact-finding process as an aid in persuading the budgetary authority or a higher governmental level to accept the terms to which they have tentatively agreed. This procedure is consistent with our democratic and political experience, which often has seen legislative and administrative actions based upon recommendations of outside experts.

Fact-finding has been designed as a substitute for the strike weapon. I do not intend in this discussion to engage in a debate about the right to strike in public employment; that is not the purpose of this paper. Nor do I wish to make the argument that collective bargaining in the public sector could not be effective if the strike were legalized in some situation. I do suggest that the

results of fact-finding to date justify the conclusion that it is possible to have effective collective bargaining without the right to strike. Let's look at the record in the nearly 500 fact-finding proceedings in some six jurisdictions to see whether the results support that conclusion.

Statutes

Seventeen states have enacted comprehensive labor relations laws affecting public employees, and nine provide for fact-finding if collective bargaining and mediation are not successful in resolving impasses.[2] In addition, New York City and Los Angeles County have enacted comprehensive statutes providing for fact-finding as a means of dispute settlement.[3]

The states of Connecticut, Massachusetts, Michigan, New York, and Wisconsin, as well as New York City, have had sufficient experience to make some tentative evaluations of the fact-finding process to date. The record in these states shows that fact-finding has been a real aid to the collective bargaining process. Of course, the record is not all positive, and we'll discuss some of the shortcomings later.

In the states of Wisconsin, Massachusetts, and Connecticut, and in New York City, the parties are required to share the cost of fact-finding. In the states of Michigan and New York, fact-finding is paid for by the state. The requirement that the parties should pay for fact-finding is based upon the premise that the fact-finding process, as a substitute for the strike weapon, ought to cost the parties something and ought not to be too readily available as a means of dispute settlement. Experience to date in Wisconsin and New York

[2] These states are Connecticut, Massachusetts, Michigan, Minnesota, New York, Rhode Island, Vermont, Wisconsin, and, most recently, New Jersey. Good comparative summaries of these statutes can be found in 1967 Executive Committee, National Governor's Conference, *Report of Task Force on State and Local Government Labor Relations* (Chicago: Public Personnel Association, 1967); J. P. Goldberg, "Labor-Management Relations Laws in Public Service," *Monthly Labor Review* 91 (June 1968), pp. 48-55; R. S. Rubin, *A Summary of State Collective Bargaining Law in Public Employment,* New York State School of Industrial and Labor Relations, Public Employee Relations Reports No. 3, 1968; and "State by State Summary of Public Employee Collective Bargaining Laws," Government Employee Relations Report (GERR) No. 285, p. X:13 (Feb. 24, 1969).

[3] Los Angeles County Employee Relations Ordinance, Approved September 3, 1968, GERR No. 261, p. F-1 (Sept. 9, 1968); New York City Collective Bargaining Law, Administrative Code, Chapter 54; Local Law 53-1967.

City would indicate that the fact-finding process has not been overused. Whether paying for the process is a significant factor in limiting the use of fact-finding is still speculative. However, the recent research by Edward Krinsky would indicate that where fact-finding is free, it is a factor in the parties' willingness to go directly to fact-finding as contrasted to trying to resolve the dispute by mediation or direct bargaining.[4]

In most of the states with fact-finding procedures, the right to fact-finding is not automatic. The administrative agency must be persuaded that a dispute exists which justifies the designation of a fact-finding panel. This can be done by joint agreement of the parties or at the request of one of the parties, provided that the administrative agency is satisfied that a real dispute exists. The process of invesigation as to whether or not a real dispute exists has been very effective in Wisconsin, where over one half of some 113 petitions for fact-finding, which were filed in a six-year period, were resolved through mediation and informal investigations by the staff of the Wisconsin Employment Relations Board without the appointment of a fact-finder. In these circumstances, the form of investigation often took the path of mediation.[5] This record does not include 128 mediation cases where no request for fact-finding was made initially.

Has the Fact-Finding Process Worked?

According to the study prepared by Ed Krinsky, in 90 percent of the 50 cases in which formal fact-finding reports have been issued in Wisconsin, they have been accepted wholly or partly. There were three strikes after fact-finding—in one instance the union had rejected the findings, and in two others the employer had refused to accept the report. Thus, the early fears that the fact-finding process in Wisconsin would become an automatic step and destroy collective bargaining have not been realized, at least as yet.[6] There is some recent evidence that unions are bypassing fact-finding in favor of the strike weapon.

Michigan has had intensive experience with the fact-finding process. There were 81 fact-finding cases in 1967, 56 percent of which

[4] Krinsky, *supra*, note 1.
[5] *Ibid.*
[6] *Ibid.*

were resolved prior to any recommendation. In the first nine months of 1968, 66 cases went to fact-finding.[7] In the summer of 1967, there were 28 fact-finding reports issued by 23 different fact-finders in 36 teacher strikes.[8] Because of the urgency of the teacher-strike situation, the fact-finders engaged in what was called "instant fact-finding," issuing their reports within an average of 26 calendar days from the date of the initial request for fact-finding. The acceptance rate during this intensive period, where a full report was issued, was 66 percent. The Michigan experience also indicates that fewer cases were settled by mediation prior to going to fact-finding than in Wisconsin. Professor Russell Allen, in his study, pointed out that in 20 of the 25 fact-finding cases the school board's final offer was increased by the fact-finder; and he observed that this was an obvious danger to the process, because if fact-finding should become a totally predictable process, meaning that the offer always would be increased, then the school boards and teacher organizations would hold back their genuine final offers to allow some room for the fact-finder.

In Connecticut, some 57 cases were submitted to fact-finding during the period 1965 to 1968; 36 of those cases were resolved prior to the issuance of recommendations. While there were seven strikes in Connecticut during approximately the same period of time, none occurred where fact-finding had been used.[9]

In New York State, some 150 fact-finding cases were filed under the Public Employment Relations Board's procedure during the first year of operation; 33 of these were resolved prior to the issuance of recommendations. Of the seven strikes that occurred outside New York City, only three occurred where fact-finding was used, and those followed rejection by the employer of the fact-finder's recommendation.[10]

In Massachusetts, during a two-year period involving some 200 dispute cases, 140 were resolved prior to the issuance of recommendations, or a 70-percent settlement figure. There were four strikes in disputes where fact-finding had been used in Massachusetts.[11]

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[7] *Ibid.*
[8] Allen, *supra*, note 1, at 73.
[9] Krinsky, *supra*, note 1.
[10] McKelvey, *supra*, note 1.
[11] Krinsky, *supra*, note 1.

In New York City during the first year of operation of the Office of Collective Bargaining, some 22 impasse cases were closed; nine of these were settled by the parties, by mediation and by arbitration prior to the hearing stage. Twelve of the 22 cases were finally settled by the issuance of the fact-finding report and recommendations which were accepted by the parties. There have been three cases where the recommendations initially were rejected by the unions, but strikes did not result and the unions subsequently accepted the recommendations.[12]

The combined data compiled by Ed Krinsky for the states of Wisconsin, New York, Connecticut, Michigan, and Massachusetts show that between 60 and 80 percent of the mediation cases (the figure varies with each jurisdiction) were resolved without resort to fact-finding and that approximately 50 percent of the cases where fact-finding was initiated were settled prior to the issuance of recommendations. Krinsky further finds that in the great majority of completed fact-finding cases, work stoppages were avoided and the reports were accepted.[13]

It does not necessarily follow, of course, that the existence of the fact-finding procedure itself was responsible in all instances for the resolution of the dispute. Some disputes undoubtedly would have been settled in the absence of either mediation or fact-finding. It should also be pointed out that the fact-finder's recommendations did not resolve the dispute in all instances where the procedure was invoked. Many disputes were resolved short of the fact-finder's recommendations by direct negotiation or by mediation. Furthermore, the fact that some of the disputes were ultimately settled by fact-finding would not necessarily mean that there was a failure of the mediation process or of the collective bargaining process. In some instances in the New York City experience, the same persons who had served as mediators were also requested by the parties to continue to serve as impasse panel members and to make recommendations for the solution of the dispute. While such continuity is not always desirable or acceptable, it has proved effective in a number of cases.

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[12] *First Annual Report, Office of Collective Bargaining* (New York: 1969).
[13] Krinsky, *supra*, note 1.

Who Are the Fact-Finders?

As many in this audience are aware, the fact-finders are largely professional labor relations experts, otherwise known as arbitrators and mediators. Fact-finders are equipped, as articulate and persuasive men, to describe the reasonable expectations of the parties, to identify the issues, and to state them in clear terms for the benefit of the rank-and-file employees and for the benefit of the community.

The role of the fact-finder will involve all of the talents of the professional, whether as mediator, arbitrator, or combination of the two. He will have to learn the nature of government and civil service procedures, and, while he is being educated, he will in turn have to educate the parties to the collective bargaining process.

The fact-finder is required to consider the existence of other statutes which may influence his recommendations, such as those governing civil service procedures in promotions, job classifications, and disciplinary matters.

In evaluating relevant criteria as well as other issues facing him, the private-sector arbitrator will find that as a public-employment fact-finder he has to learn a new language—the civil service jargon, the lexicon of education, the semantics of public personnel administration—if he is to comprehend the issues involved. In short, even if he is an Academy member experienced in the private sector but without public-sector experience, he is an old dog who has to learn new tricks.

A unique feature of the New York City law is the process by which the fact-finders are chosen. The rules of the agency provide that if the parties are unable to agree on a choice of the impasse-panel members, the Office of Collective Bargaining will submit to the parties a list of names for their selection, in order of preference, from a list of persons whose qualifications have been previously approved by the labor and city members. The reason for the procedure is obvious. The acceptability of the panel members may be a major factor in determining whether their recommendations are acceptable. The skill and know-how of Deputy Chairman Eva Robins in administering the impasse-panel registers have been most valuable.

Under the New York City statute, the impasse-panel members not only have the authority to conduct formal hearings and to compel the attendance of witnesses, but they also have the power to mediate and to take whatever action they consider necessary to resolve the impasse.

The Role of the Fact-Finder

A recent dramatic example of the use of impasse panels to resolve public-employer disputes was the special panel headed by Justice Arthur Goldberg in a dispute involving fire, police, and sanitation unions of New York City. Justice Goldberg was aided by Vincent D. McDonnell, chairman of the New York State Mediation Board; Eric J. Schmertz, impartial member of the OCB; Walter L. Eisenberg, of Hunter College, and Father Philip A. Carey, of Xavier Institute of Industrial Relations. The proceedings were consolidated, with the consent of the parties, because of the relationships between the three uniformed forces. The results of that procedure, which was essentially a mediation effort, demonstrated that public employees will be treated equitably, if not generously, by neutrals in impasse procedures.

The acceptance of the Goldberg panel recommendations and those of other panels by the city and other public employers demonstrated that the use of the impasse-panel recommendations is a powerful weapon on the part of the public employee organizations. As for the argument that voluntary and binding arbitration or fact-finding with recommendations destroys the collective bargaining process, there is evidence to the contrary on the basis of the experience of the Goldberg panel. The report states that a number of the recommendations of the panel were substantially confirmations of the agreements negotiated by the parties with the panel's assistance. This is not to imply that the panel members merely approved the agreement of the parties. In fact, they ably assisted the parties in reaching agreement on a number of issues and thus were willing, at the parties' request, to endorse items agreed upon in order to increase the probability of acceptance by the city and the public employee organizations.

There was also a serious and successful effort in the police, fire, and sanitation negotiations in New York to reduce the number of

issues by direct negotiations and with the aid of mediation prior to submitting those issues to the special panel. In fact, the persons who had served as mediators in the individual negotiations were added to the overall panel. Eric J. Schmertz was the mediator in the firemen's negotiations; Father Philip A. Carey was the mediator in the police negotiations; and Walter L. Eisenberg was the mediator in the sanitation negotiations. Each of them continued to play key roles in the panel procedures. Thus, in this instance, fact-finding was an extension of the collective bargaining process. The term "impasse panel" or "fact-finding panel" was not used to describe the panel, but the panel had full authority, under the OCB procedures and by the agreement of the parties, to make recommendations and did so when requested by the parties. Unquestionably, the prestige and ability of the panel were calculated to enhance the acceptability of the results of the negotiations and the recommendations.

Several fact-finders have felt compelled to state the role of the fact-finder at some length. An example is the statement by James Altieri in a dispute involving the firemen and police in New York in March 1967. The parties had hammered out an agreement that was rejected by the membership. At the point of rejection, fact-finding was invoked. Under the circumstances, there was a possibility that collective bargaining would become the process by which a floor is reached and the sole function of fact-finding would be to increase the cost of settlement. Alternatively, fact-finding might provoke the parties to take a polarized position without any effort on their part to reach agreement short of the recommendations. Jim Altieri stated the dilemma this way:

> We cannot make the fact of agreement completely decisive, to the exclusion of all other considerations. To do so would mean abdication of the responsibility of broader review clearly implicit in our appointment and render fact finding meaningless.
>
> On the other hand, we reject the hypothesis that the agreement that failed of ratification constitutes a floor and that our inquiry should be directed only to how much more should be granted to the employees. Acceptance of such a premise would destroy any chance of the parties presenting their maximum positions at the bargaining table. . . . In practical application fact-finding would become a sub-

stitute for good faith bargaining instead of a sparingly used adjunct to it.[14]

Philip Marshall has made some pertinent observations concerning fact-finding and its relationship to collective bargaining and the right to strike. Mr. Marshall stated:

> Collective bargaining can never be completely free unless accompanied by the right to strike. It has been found necessary to impose reasonable restraint on the right to strike of government employees. Consequently, within the framework of bargaining by government employees, it becomes the duty of responsible government officials to make a prediction of the results which could reasonably be expected to follow if the process were completely free. . . . [The fact-finder's] sole function is to supply [government] officials . . . with a prediction of the probable results of free collective bargaining on the issues involved in the form of recommendations.[15]

Mr. Marshall has a current opportunity to put this thesis to the test, as he has just been named a fact-finder in a strike involving the Milwaukee Institute of Technology and a teacher organization.

The impact of public fact-finders' recommendations on private-sector bargaining should not go unnoticed. The recent Consolidated Edison negotiations in New York City were influenced, both in the size of the wage package and the pension benefits negotiated, by the recommendations of the Goldberg panel in the police, fire, and sanitation dispute.

Criteria Used by the Fact-Finder

In the absence of statutory guidelines, fact-finders have formulated their own criteria. On salary matters, they have compared similar jobs in public and private employment. The experience with prevailing wage rates, particularly for skilled and craft employees, is the best example. Similar comparisons may be made for white-collar jobs. Comparisons are not as readily available for police, fire, and teaching services or other occupations that are unique to government. In these instances, comparisons are made

[14] In The Matter of the Fact Finding Between: the UFA, the PBA and the City of New York, AAA Case No. 1330-0941-66, M. Berkowitz and James Sovern (members), J. Altieri (chairman).

[15] Marshall F.F. Report No. 29, July 20, 1964, *City of Watertown* v. *International Brotherhood of Teamsters, Local 695.*

with other governmental employees. Comparisons concern not only qualifications and duties of the employees, but the length of the work week, fringe benefits, and promotional opportunities.

Governmental units tend to make comparisons with other taxing units of similar size or in the immediate geographical vicinity. Comparisons are also made with salaries for state and federal employees. The Federal Government has a major comparability wage study under way. The question of longevity pay is commonplace in government employment. Differentials for special skills or for educational attainment are frequently raised.

A matter of vital importance is the question of ability to pay. One of the most interesting fact-findings, which took place during the past year, was that headed by Russell Smith and aided by Charles Killingsworth and Ronald Haughton in the Detroit Police fact-finding case. The year 1968 has been labeled the year of the "cop." The Detroit panel agreed and concluded that it was the time "to support your local police." At the specific request of the city, the fact-finders made recommendations as to the city's ability to pay the recommended increases. The Detroit Police Panel said, in effect, that any inability to pay was a self-imposed inability. The panel concluded that the real issue was one of priorities, either to raise taxes to pay policemen higher salaries or to curtail or eliminate other governmental services.[16]

A reading of the Detroit Police fact-finding case is a must for anyone who wants to understand the whole nature of the fact-finding process, for it emphasizes that what the collective bargaining business in public employment is all about is the priorities to be assigned in the allocation of our public resources. In simpler language, "who gets how much and when."

In view of the substantial improvements in economic benefits recommended by fact-finders, it has been asked whether the fact-finding process, which is akin to de facto arbitration, has resulted in the unconstitutional delegation of legislative authority to enact budgets and levy taxes. I don't think so, for the reason that the legislative body, in order to implement the recommendations of the fact-finder or, for that matter, the determinations of an arbitra-

[16] *Detroit Police Dispute Panel Report*, GERR No. 235, p. D-1 (March 11, 1968).

tor, must ultimately decide whether it is willing to pay for the benefits. Thus, the legislative body has the last word on whether it will approve the recommendations and appropriate the necessary funds.

What Issues Can Go to Fact-Finding?

Disputes have arisen over what matters may be submitted to fact-finding. This is likely to be a serious problem as collective bargaining develops in public employment. The New York City law provides that disputes over the scope of bargaining are to be submitted to the Board of Collective Bargaining. As a matter of policy, the Board of Collective Bargaining has decided that it will reserve to itself the responsibility of determining what issues can go to an impasse panel if the parties cannot agree, rather than assigning to impasse panels the responsibility for determining the limits of their authority to make recommendations.

The New York City statute contains a broad management rights clause:

> §5c. It is the right of the City, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. The City's decisions on those matters are not within the scope of collective bargaining, but notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of work-load or manning, are within the scope of collective bargaining.

However, the clause is qualified by a provision which states that while the city's managerial decisions are not within the scope of bargaining, questions concerning the practical impact of those decisions on employees, such as questions of workload or manning, are within the scope of collective bargaining. In a decision interpreting this provision, the Board of Collective Bargaining has determined that an impasse panel ultimately would have the authority to make recommendations on the number of men to be employed

in the Fire Department; but it must first be established that a practical impact exists, which is defined as a workload which is unduly onerous or excessive as a continuing and regular condition of employment, and that the employer has had an opportunity to correct the condition unilaterally.[17]

The Board of Collective Bargaining has also determined that, while disputes over mandatory subjects of bargaining may be submitted to an impasse panel for recommendations, mutual consent is required for the submission of any voluntary or permissive subject of bargaining to an impasse panel.[18] This determination was required as a result of a challenge made by the City of New York to some 151 of the 244 bargaining demands made by social workers. The city, while willing to discuss any lawful bargaining subject with the union, did not want to prejudice its right to limit the matters which could be the subject of an impasse panel's recommendation. How effective the New York guidelines will prove to be in establishing appropriate criteria for determining the scope of bargaining remains to be seen. The purpose of the decision was to give the parties a great deal of latitude in bargaining without prejudicing their right to limit the subjects that could go to an impasse panel. It seems likely that other administrative agencies, the legislature, and the courts will have similar problems of defining the scope of authority for fact-finders.

The New York City statute also provides for the maintenance of the status quo during the period of negotiations, which includes the period of time during which an impasse panel is serving and 30 days after the filing of its report. The status-quo proviso bars strikes or slowdowns by the union or unilateral changes in conditions of employment by the employer.

The Canadian federal statute limits the subjects of fact-finding and arbitration, except for economic matters, to those which do not require legislative approval.

Criticisms of the Fact-Finding Process

Professor Allen has pointed out that the "instant fact-finding" which occurred during the rash of teacher strikes in Michigan in

[17] BCB-16, Decision 11, GERR No. 271, p. G-1 (Nov. 18, 1968).
[18] BCB-22, Decision 16, GERR No. 280, p. C-1 (Jan. 20, 1969).

the fall of 1967 was really crisis mediation with recommendations, and hardly permitted an orderly consideration of the relevant facts and merits in a dispute. Furthermore, he expressed concern that the too-ready accessibility of the fact-finding process would tend to push it to the center of the stage and to submerge collective bargaining.[19] On the other hand, Chairman Bob Howlett of the Michigan Labor Mediation Board has characterized the overall role of fact-finding in Michigan as highly successful.[20]

In Michigan there has been a suggestion that the fact-finders should divorce themselves from the mediation process on the grounds that otherwise they serve as a second mediator and, since the state policy is that there cannot be fact-finding until the mediator has certified that the parties have exhausted every effort to resolve the dispute, it is inappropriate for the fact-finder to mediate.[21] I am not sure that it is possible to draw hard-and-fast lines on the role of the mediator and the fact-finder. Even if the statute under which the procedure operates doesn't specifically empower the fact-finder to serve also as mediator, I believe that the circumstances, the experience, ability, and personality of the fact-finder, and the familiarity of the parties with the bargaining process will influence the result. For example, Harry Casselman, the most experienced of the Michigan fact-finders, has resolved 29 of 30 cases assigned to him without the necessity of making formal recommendations.

The Michigan Labor Mediation Board has recommended that the parties be required to frame the issues in advance of the hearing, subject to amendment at the discretion of the fact-finder. This is a highly desirable goal, but a most difficult one to accomplish because there is a tendency to start all over again with the introduction of a new procedure.

Another criticism of the fact-finding process is the lack of criteria in some statutes to serve as guidelines for the fact-finder. This problem can be met in part by including criteria in the submission agreement, but it can be a serious problem where no statutory standards exist.

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[19] Allen, *supra*, note 1, at 78.
[20] Robert Howlett, "Experience Under Public Employment Relations Act," *Labor Relations Yearbook—1967* (Washington: BNA Books, 1968), p. 175.
[21] Allen, *supra*, note 1, at 76.

Other criticisms concern the question of delay and the absence of deadlines in public employee collective bargaining. The problem is not limited to fact-finding, but is inherent in governmental processes and is related to the no-strike policy of dispute settlement. Budgetary deadlines for some units of government, such as school districts, exert pressures for settlement. Similarly, the anticipation of a fact-finder's recommendation, as seen from the experience recited above, has induced some settlements.

The charge has been made that the fact-finding process is a costly one that imposes excessive costs on small bargaining units in paying for fact-finders, transcripts, and attorneys. While some costs of presentation can be avoided by careful preparation, there is a question of whether it would be good public policy to reduce substantially the cost of the procedure. If fact-finding is a substitute for the strike, it ought to cost something.

Critics complain that the process has failed to resolve the really difficult disputes. The failure of fact-finding has been particularly criticized where the employer rejects the recommendations. The rejection by a school board in Huntington, Long Island, of a fact-finder's recommendation is cited as evidence that the procedure is inequitable and unbalanced and weighted unfairly in favor of the employer. Professor Donald Wollett argues that the risk of fact-finding is greater for the employee organization than for the employer, since the employer is free to reject or accept the recommendations of the fact-finder while the employee organization is barred from striking. Wollett argues that an employee organization should be free to strike in the event that the employer rejects the recommendations.[22] Similar proposals have been advanced in other jurisdictions.

The Taylor Committee has recommended a procedure for New York whereby the legislature would conduct an order-to-show-cause hearing as to why the recommendations of the fact-finder had not been accepted.[23] The Taylor law now provides that if the employer rejects the recommendations, the chief executive of the municipality shall submit to the legislative body his recommenda-

[22] Donald Wollett, "The Taylor Law and the Strike Bar," in *Public Employee Organization and Bargaining, supra,* note 1, p. 35.
[23] *Report of Governor Rockefeller's Committee on Public Employee Relations* (March 31, 1966), p. 40.

tions for a solution to the dispute as well as the recommendations of the employee organization; however, this procedure has not been followed. One may question how practicable such a procedure is if the legislative body to whom the recommendations are submitted is the same one that rejected the fact-finder's recommendations initially. Furthermore, the automatic introduction of the legislature into dispute-settlement procedures may negate the effort of the impasse panel with its recommendations because there is another avenue of appeal.[24]

Problems have arisen because some employers have failed to take action on the fact-finder's report, merely placing the report on file. This development has prompted the suggestion that the legislature or rules of the administrative agency should require the parties to tell each other and the appointing authority, within a specific time period, what action has been taken to accept or implement the fact-finder's recommendations. There appears to be merit to this suggestion because it would require the governmental employer to take some affirmative action either accepting or rejecting the recommendations in whole or in part. The feeling is that legislators or chief executives, if required to take a position on the report, would be likely to accept it, or at least to propose a compromise. Another version of this suggestion is to provide in legislation that the recommendations are to become law within a reasonable time period, 60 to 90 days, unless the legislative body votes to reject them in whole or in part.

The problem of rejection has not been confined to employers; unions have also rejected recommendations. In New York City, the employer so far has accepted every fact-finding recommendation with minor variations, and regards the process as de facto arbitration. On the other hand, the memberships of some employee organizations have rejected the recommendations in anticipation of improved terms of settlement—but rejection by the membership has become a problem in all contract ratifications. Thus, the lack of finality in the fact-finding process offers some flexibility, as com-

[24] The Taylor law as amended in March 1969 by the New York legislature provides that, in the event of the rejection of a fact-finder's recommendation, the legislative body or a duly authorized committee thereof shall forthwith conduct a hearing at which time the parties shall be required to explain their positions with respect to the fact-finder's report. Thereafter the legislative body is to take such action as it deems to be in the public interest.

pared to arbitration, but it has the liability of not terminating the negotiations.

The problem of implementing the recommendations, once they have been issued, can be troublesome. If parties were to resume bargaining routinely or engage in further mediation, the acceptability of the fact-finding process would be weakened. Sometimes further mediation may be useful in making adjustments within the guidelines of the original recommendations. However, if such adjustments result in any significant gain, the process is threatened. On the other hand, if fact-finding has come to be considered an aid to the bargaining process rather than an end in itself, this is not an unhealthy development.

As a suggested solution to the problem of finality, the Governor of Pennsylvania has submitted a proposal to the Pennsylvania legislature which would specify that if a collective bargaining impasse remains after mediation and fact-finding, the dispute must be submitted to compulsory and binding arbitration.[25]

Some Concluding Observations

The fact-finding process has found increasing acceptance with the development of public-sector collective bargaining, and there is every reason to believe that it will play a continuing, significant role in public-sector dispute settlement. The record, to date, indicates that it has made a useful contribution to dispute settlement, that it has been an aid to and an extension of the bargaining process and not a substitute for it. The number of disputes settled by mediation short of fact-finder's recommendations and the mediation efforts performed by fact-finders testify to this. The failures of fact-finders to settle some disputes and other shortcomings of the process evidence that fact-finding is not a panacea for all dispute resolutions, but it has proved its usefulness. This is not only because the threat of recommendations has been a stimulus to settlement but, in a more positive sense, because the parties have been able on the basis of their bargaining experience to predict or anticipate the probable recommendations of the fact-finder and, thus,

[25] GERR No. 267, p. G-1 (Oct. 20, 1968).

arrive at settlement terms without submitting the dispute to the fact-finders for their recommendations.

The record of acceptability of fact-finders' recommendations in whole or in part also suggests that even where parties have agreed to use the fact-finding procedures as de facto final and binding arbitration, it has not had a deadening effect on the collective bargaining process as a method of dispute settlement. There is reason to believe that voluntary arbitration of contract terms will also gain acceptability—if only as a means of meeting the problems of ratification by employees and rejections by employers.

It is possible, as some predict, that repeated use of fact-finding may eventually render it ineffective. If this prospect comes to pass, the various state legislatures will have to decide between legalizing the strike and compulsory arbitration, unless they want to go the Canadian federal route of doing it both ways. Meanwhile, the debate over the right to strike and the viability of the fact-finding process will continue for some time to come. In the interim, many of you will find full-time employment as fact-finders for public-employment disputes which will not wait for ultimate public policy determinations of the legality of the strike and compulsory arbitration questions.

The role of the fact-finder is most demanding and presents a special opportunity to the members of this profession and of this Academy to demonstrate that they are uniquely qualified to perform this vital public service.

The fact-finder has the chance to prove that reason can be as effective as muscle in making the transition of the collective bargaining process from the private to the public sector an orderly one, and one which will work in the public interest by providing equitable treatment for employees and, at the same time, promoting the efficiency and effectiveness of our democratic government.

I believe the profession is demonstrating that even in this tempestuous period, it is equal to the challenge.