CHAPTER VII

CRITERIA IN PUBLIC SECTOR INTEREST DISPUTES

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Introduction

The difficulties of addressing oneself to a subject as paramount and as broad as the title of this paper can hardly be overstated. Although many of the basic interest criteria developed in the private sector are often applicable in public employment, dispute settlement criteria for the public sector are, on the whole, still in the trial-and-error stage. Considering the relative inexperience of the parties in collective negotiations (or collective bargaining, if you will), the problem of formulating interest criteria for the newly transformed public sector is two-fold in nature. Not only must the criteria be *realistic,* but, however unpalatable to those adversely affected, they must be ultimately *acceptable* to the protagonists.

That interest criteria, meaning realistic standards for resolving disputes over new terms and conditions of employment, will often be denounced and resisted in the public sector is not surprising. Three decades of sophisticated bargaining in the private sector have not resulted in a ready acceptance of interest criteria, not when contrasted with private industry consensus of basic standards for resolving disputes during the term of a written collective agreement.

The private sector can, of course, afford the luxury of disagreement on interest criteria. After all, the weapon of a threatened or an actual strike contest is readily at hand for determined, committed negotiators to strive for a settlement on their own minimum terms. But public management and those who legislate still lean heavily toward a stringent prohibition of public employee strikes. Even if recent legislation by Pennsyl-

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vania and Hawaii legalizing strikes for most state employees augurs a reverse trend, and I think it does, the basic situation will, for the foreseeable future, remain unchanged. Public sector strikes, legal or not, bear within themselves a potential for political crisis—an unsettling tendency to rend the social fabric —even for European democracies, accustomed as they are to highly politicized labor strife. Perhaps the United States will be an exception in this regard, as it has been in other basic aspects of labor relations.

At the present time, we live in a halfway house, as is evidenced by the insistence of so much of public management that dealings with employee organizations be designated as collective negotiations, a designation widely believed to be a euphemism for collective bargaining. I do not share this belief; I do think that management's refusal to call a rose a rose is motivated, at least partially, by a concern that the adoption of the word "bargaining" might lead to an undesirable linkage of the public sector with labor laws, administrative rulings, and precedents of the private sector. However, a close analysis of the semantic differences between the two terms suggests a much more basic reason for public management's overwhelming preference for the term "collective negotiations." The term "bargaining" inescapably implies an exchange of consideration between negotiating parties. The bargain in the private sector has for its consideration the union's giving up its *legal* right to strike for a defined period of time in return for acceptable conditions of employment and rates of pay. But, what can a public employee organization offer as meaningful consideration in bargaining when it has no *legal* strike weapon to relinquish? Any other consideration offered by unions, public or private, such as improved employee morale and more efficient work performance, can be obtained through other methods, such as enlightened personnel policies, outside the bargaining relationship. There is a precise difference in meaning between the term "negotiations" and the term "bargaining." Collective negotiations, the argument goes, is merely a quantitative pooling of individual interests of separate employees—a collective lobbying as it were—without producing the element of coercion that would be present if the employee group were bargaining in the accepted sense of the word.

Whatever the future trends, the fact remains that if the parties in the public sector are unable, with the help of mediation, to resolve their differences over new terms and conditions of employment, they must turn to the alternatives of interest arbitration or fact-finding as a substitute for a strike contest. Let me stress immediately, however, that interest arbitration in the public sector cannot be the exceptional expedient it is in our private economy. Within a milieu where the right to strike is generally proscribed, arbitration or fact-finding will unavoidably become the rule for the settlement of troublesome interest disputes, and not a seldom-used emergency measure. It seems to me that the expertise which has fashioned workable rights criteria for stabilizing the contractual relationship in the private sector is still present to a sufficient degree and extent for the development of interest criteria that will be ultimately acceptable to the parties in the public sector.

I share the point of view described by Professor Russell Smith, in his analysis of the New York ("Taylor Committee") Report of March 1966: ". . . that since novel approaches may be required to deal with the unique problems in the public sector, the necessary expertise should be permitted to develop unhampered by any preconceptions associated with the administration of private sector legislation." [1]

Currently, innovative applications of interest criteria are undergoing severe trials in a number of public jurisdictions, most notably perhaps in Detroit where cumulative dissatisfactions by the city administration with a number of arbitral findings on cost items have become acute. But more on this later. Suffice it to say that those of us, beset by timidity, who are called upon to impart their wisdom to the parties embroiled in public sector conflict will find the area of decision-making brilliantly delineated for them in the following extract from Mr. Justice Cardozo's classic inquiry into *The Nature of the Judicial Process:*

> ". . . What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule

[1] "State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis," 67 *Mich. L. Rev.* 891, 899 (1969).

> that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. . . . The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis." [2]

One of the most compelling reasons which makes it necessary for neutrals in public interest disputes to strike out on their own is the dearth of public bargaining history. The main citadels of unionism in private industry have a continuity of bargaining history going back at least to the 1930s. Public sector collective negotiations, on the other hand, is still a fledgling growth. In many instances its existence is the result of an unspectacular transition of unaffiliated career organizations responding to competition from AFL-CIO affiliates. As we know, a principal guideline for resolving interest disputes in the private sector is prevailing industry practice—a guideline expressed with exceptional clarity by one arbitrator as follows:

> "The role of interest arbitration in such a situation must be clearly understood. Arbitration in essence, is a quasi-judicial, not a legislative process. This implies the essentiality of objectivity—the reliance on a set of tested and established guides.
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> "In this contract making process, the arbitrator must resist any temptation to innovate, to plow new ground of his own choosing. He is committed to producing a contract which the parties themselves might have reached in the absence of the extraordinary pressures which led to the exhaustion or rejection of their traditional remedies.
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> "The arbitrator attempts to accomplish this objective by first understanding the nature and character of past agreements reached in a comparable area of the industry and in the firm. He must then carry forward the spirit and framework of past accommodations into the dispute before him. It is not necessary or even desirable that he approve what has taken place in the past but only that he understand the character of established practices and

[2] New Haven: Yale University Press, 1921, at 10.

rigorously avoid giving to *either party* that which they could not have secured at the bargaining table." [3]

Viewed in the light of the foregoing principles, the public sector neutral, I submit, does not wander in an uncharted field even though he must at times adopt an approach diametrically opposite to that used in the private sector. More often than in the private sector, he must be innovative; he must plow new ground. He cannot function as a lifeless mirror reflecting pre-collective negotiation practices which management may yearn to perpetuate but which are the target of multitudes of public employees in revolt.

Comparisons—The Fundamental Criterion

These observations are not meant to suggest that the whole slate of pre-collective negotiation standards in the public sector for setting salaries and other conditions is wiped clean. Far from it. The prevailing wage concept of comparison of similar occupational classifications in appropriate enterprises and areas, though honored today more in the breach than in the observance, will always remain, at the very least, as a useful frame of reference. Prevailing wage, of course, is one aspect of the general operating concept of comparisons. Let me stress, at this point, that comparisons are still, and in all likelihood will remain, the predominant criterion for setting salaries.

Comparisons, as UCLA Professor Irving Bernstein expounded in his authoritative book on wage arbitration:

". . . are preeminent in wage determination because all parties at interest derive benefit from them. To the worker they permit a decision on the adequacy of his income. He feels no discrimination if he stays abreast of other workers in his industry, his locality, his neighborhood. They are vital to the union because they provide guidance to its officials upon what must be insisted upon and a yardstick for measuring their bargaining skill. In the presence of internal factionalism or rival unionism, the power of comparisons is enhanced. The employer is drawn to them because they assure him that competitors will not gain a wage-cost advantage and that he will be able to recruit in the local labor market. Small firms (and unions) profit administratively by accepting a ready-made solution; they avoid the expenditure of time and money needed for working one out themselves. Arbitrators benefit no less from comparisons. They have 'the appeal of precedent and . . . awards

[3] *Des Moines Transit Co.*, 38 LA 666, 671 (1962), John J. Flagler et al.

based thereon are apt to satisfy the normal expectations of the parties and to appear just to the public.'" [4]

I should add on this subject that comparisons provide a much wider range of choice for the interest neutral than might appear at first blush. For example, at a particular stage of a Los Angeles transit strike some time ago, the parties cast about for an arbitrator to decide the rate of pay for auto mechanics. Had the issue gone to arbitration, and had the arbitrator been held to the single criterion of comparison, the following interesting choices would have presented themselves: (a) the mechanics' rates for transit systems in comparable cities such as Chicago, Detroit, and Philadelphia; (b) the transit rates for high-wage Pacific Coast areas as far north as Seattle; (c) the San Francisco Bay Area transit rates; and (d) the general rate paid in the Los Angeles community labor market for truck repair mechanics.

As it turned out, the parties negotiated their own figure with the aid of mediators, fixing the mechanics' rate at the average level paid in large garages throughout Los Angeles County and its environs, which resulted in a substantial increase for the transit mechanics.

Wage comparisons, it must be added, are not to be taken as an assortment of mirrors in a closed circle endlessly reflecting one another without a primary image. In each of the basic categories of our economy—manufacturing, service trades, building and construction, etc.—primary settlements are reached which provide guidelines or reference figures for other negotiations that take place in these respective categories. The term "guideline" or "reference figure" is just that: an approximation, not an inflexible figure. It might be useful to take an overview of our experience with wage patterns, guidelines, and reference figures in the private sector during the past three decades because it seems quite likely that administrative guidelines and reference figures will play an even larger role in the public sector than they have in the past.

During World War II, wages were generally held to the Little Steel Formula limiting increases to 15 percent above the January 1941 level. Increases over and above that formula depended

[4] *Arbitration of Wages,* Publications of the Institute of Industrial Relations (Berkeley: University of California Press, 1954), 54.

for the most part on a showing of increased productivity on a plant-wide basis. Wages in the immediate aftermath of that war centered on an 18½-cent "reconversion figure" won in steel and auto industry strikes in early 1946. For five years following World War II, steel and auto settlements provided pace-setting guidelines for most industries. From 1951 to 1953, wage controls were instituted by the Federal Government to combat the inflationary spiral generated by the Korean War. From 1953 to 1961, very loose wage guidelines were adopted by private industry, most of them inspired by steel or auto settlements.

In 1961, a 3.2-percent Administration guideline formulated by Labor Secretary Arthur Goldberg became an established annual national average for wage settlements in manufacturing which prevailed until 1966. Since 1966, a stepped-up rise in the consumer price index has blurred the overall picture. Nevertheless, some kind of comparison is still the governing criterion even when there is no recognized guideline. Many, if not most, negotiators in manufacturing rely heavily on average wage settlement figures published monthly by the Bureau of Labor Statistics, or those published by The Bureau of National Affairs, Inc. Public management, however, can take no solace from the fact that the burden of pace-setting is not thrust upon them. They have all they can do to cope with increasing employee pressures, as wage settlements in the public sector lag further and further behind those in the private economy. This lag has been accentuated in recent years by the steep rise in the cost of living, a factor that has given substantial impetus to the organizational efforts of public employee organizations.

Although one cannot overstress comparisons as the primary criterion for resolving interest disputes over economic issues, other criteria of major importance should not be ignored. Several states that have enacted dispute settlement procedures in the public sector have equipped interest neutrals with a broader range of criteria for their use. The criteria listed in Michigan's Public Act 312 (1969), providing for compulsory arbitration of police and fire disputes, are a good representative selection. Section 9 of the Act sets forth the following criteria:

"(a) The lawful authority of the employer.

"(b) Stipulation of the parties.

"(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

"(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

"(i) In public employment in comparable communities.

"(ii) In private employment in comparable communities.

"(e) The average consumer prices for goods and services, commonly known as the cost of living.

"(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

"(g) Changes in any of the foregoing circumstances during the pendancy of the arbitration proceedings.

"(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

Arvid Anderson's summary analysis of the foregoing criteria is worth repeating here:

"The enumeration of the criteria seems designated not to limit the arbitrators, but to allow them the broadest scope in considering whatever factors they deem important in the particular case so long as they pay attention to the other factors. The long list of criteria would also seem to offer insurance that the award of arbitration boards could not be easily upset upon judicial review. While judicial review is provided by the Michigan statute, the grounds for reviewing or modifying the award are narrow. Awards of arbitration boards will be difficult to upset in litigation in Michigan. The aggrieved party must prove that the award 'is unsupported by competent, material and substantial evidence on the whole record,' a difficult task. Additional grounds for reversal of the award of arbitrators are that the panel exceeded its jurisdiction or that the order was procured by fraud, collusion or unlawful means. Such problems of proof are most difficult as the record in private grievance arbitration attests." [5]

[5] "Compulsory Arbitration Under State Statutes," New York University Twenty-Second Annual Conference on Labor (New York: Matthew Bender, 1969).

Ability to Pay: The Problem of Priorities

Nowhere in the public sector is the problem of interest criteria more critical than in the major urban areas of the nation. Municipal governments are highly dependent, vulnerable public agencies. Their options for making concessions in collective negotiations are at best limited, and are often nullified by social and economic forces which command markets, resources, and political power extending far beyond the city limits. City and county administrations are buffeted by winds of controversy over conflicting claims upon the tax dollar. On the federal level, the ultimate source of tax revenues, the order of priorities between military expenditures and the needs of the cities are a persistent focus of debate. On the state level, the counterclaims over priorities in most states seem to be education over all others.

The source of most local government revenue, as any homeowner will irately confirm, is the property tax. In urban areas, the political thrust of municipal government is to ease somewhat the utterly disproportionate tax levied on homeowners and to turn more insistently to state and federal sources for funds. On a personal note, I live in Orange County, Calif., and it has been some years since I have seen the once-prevalent bumper sticker, "Please Uncle Sam, I want to do it myself." I doubt if the problem can be better summarized than in the choice comment of Detroit Mayor Gribbs: "The money is in Washington, the power is in Lansing, and the human problems are at the local level of government." [6]

Thus, the unique aspect of applying interest criteria to local government negotiations becomes clear. When an employer in private industry argues inability to pay, he implies that if his labor costs are forced above a tolerable level, he will liquidate his holdings and reinvest his capital in another enterprise affording him a more acceptable rate of return. In short, he will go out of business. We have witnessed the same economic forces at work in the past—when federal and state minimum wages were enacted and subsequently raised, large numbers of marginal enterprises closed their doors.

One other example will illustrate why ability to pay is seldom

[6] BNA, *Government Employees Relations Report* No. 361, B-12 (Aug. 10, 1970).

controlling in the private sector. Some 20 years ago there were 175 retail hand bakeries in Long Beach, Calif., and its environs. Gradually, their number dwindled as these bakeries were forced to the wall by competition from frozen pastries and ready-mixed type of powders sold in the supermarkets. Each year or two the survivors met with the Bakers' Union to renegotiate wages and other cost items. The union's demands were modest, but firm. They remained impervious to the depressed conditions of the industry. As the local union president put it, "What would be the point of forgoing a wage increase? Next year they won't be any better off, or the year after. We can't keep them in business. They've got to solve that themselves. In the meantime, for as long as the jobs last, we're going to maintain a decent wage." It is only necessary to add that arbitral findings in the private sector disclose a substantial concurrence with the reasoning expounded by this representative. In the relatively few instances in which inability to pay has been given significant weight, it has usually been relied upon to justify some postponement of wage adjustments called for by the labor market but not to deny them permanently.

Unlike private management, an assertion by government of inability to pay will rarely be a prelude to closing its doors. For government to go out of business is not a very realistic alternative. Even curtailment or elimination of government services because of a budgetary squeeze is often more than offset by the necessity of providing additional benefits to meet growing social problems, or by the assumption of new government services such as interurban transit systems that private enterprise can no longer operate at a profit. The point is, operating decisions of the private sector are economic in nature, rooted in the profit motive. Identical decisions in a public enterprise are political; that is, economic factors are often dominated by political considerations. Harvard Professors Dunlop and Bok have perceptively contrasted the impact of economic constraints in the public and private sector in their recent book from which the following extract is highly pertinent to this discussion:

> "In the private sector, union demands are usually checked by the forces of competition and other market pressures. Negotiators are typically limited by such restraints as the entry of nonunion competitors, the impact of foreign goods, the substitution of capital for higher-priced labor, the shift of operations to lower-cost areas,

> the contracting out of high-cost operations to other enterprises, the shut down of unprofitable plants and operations, the redesign of products to meet higher costs, and finally the managerial option to go out of business entirely. Similar limitations are either nonexistent or very much weaker in the public sector. While budgets and corresponding tax levies operate in a general way to check increases in compensation, the connection is remote and scarcely applicable to particular units or groups of strategically located public employees. Unhampered by such market restraints, a union that can exert heavy pressure through a strike may be able to obtain excessive wages and benefits."[7]

At any rate, whatever the complexities presented by the ability-to-pay argument on state and federal levels, it is on the local level that the problem is most resistant to a solution. The current experience of the City of Detroit with compulsory arbitration of police and fire wage disputes exemplifies the difficulties for the entire nation in all their awesome proportions. How does an arbitration panel respond to a municipal government that says, "We just don't have the money"?

Pioneering decisions of interest neutrals have assigned no greater weight to such an assertion than they have to an inability-to-pay position by private management. An arbitration panel constituted under Michigan's Public Act 312 rejected an argument by the City of Detroit which would have precluded the panel from awarding money because of an asserted inability to pay. What would be the point of an arbitration, the panel asks in effect, if its function were simply to rubber-stamp the city's position that it had no money for salary increases? What employer could resist a claim of inability to pay if such claim would become, as a matter of course, the basis of a binding arbitration award that would relieve it of the grinding pressures of arduous negotiations? While the panel considered the city's argument on this point, it was not a controlling consideration.

Inability to pay may often be the result of an unwillingness to bell the cat by raising local taxes or reassessing property to make more funds available. Arnold Zack gives a realistic depiction of the inherent elasticity of management's position in the following comment:

"It is generally true that the funds can be made available to pay

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[7] Derek C. Bok and John T. Dunlop, "Collective Bargaining and the Public Sector," in *Labor and the American Community* (New York: Simon & Schuster, 1970), 334-335.

> for settlement of an imminent negotiation, although the consequences may well be depletion of needed reserves for unanticipated contingencies, the failure to undertake new planned services such as hiring more teachers, or even the curtailment of existing services, such as elimination of subsidized student activities, to finance the settlement." [8]

The very fact of this elasticity places an additional burden on public management to hold the line against treasury raids by strong aggressive employee groups, who are able to gain a disproportionate share of available funds at the expense of the weak and the docile. Understandably, management will be prone to assert an inability to pay rather than to antagonize an employee group needlessly by declaring it has the money but will not make one-sided disbursements to accommodate partisan interests.

Also, an inability-to-pay declaration, or at least a restricted ability-to-pay stance, has another useful purpose: that of enabling public management to maintain a bargaining position. The very concept of bargaining carries with it as a logical corollary the necessity for the bargaining teams to limit the extent of information furnished to each other and to justify withholding possible concessions until they can be made at strategic times in order to exact reciprocity from each other. With budgetary information a matter of public record, management often has to overcome this inherent disadvantage by stubbornly refusing to revise allocations or redistributing reserve funds until an acceptable economic package can be agreed upon at the bargaining talks.

The dilemma of the interest neutral became nowhere more conspicuous than in the fallout from an arbitral award in the early summer of 1970 which granted fifth-year Detroit patrolmen an 11.1-percent salary increase.[9] The city announced a major austerity plan necessitated by the cost of the increase. Hundreds of layoffs in other departments followed, while the workweek for all city employees was increased from 35 to 40 hours a week. Because of the layoff, the city teetered on the brink of a sanitation strike, which might have triggered an all-city-employee strike. Eight employee organizations immediately

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[8] "Ability to Pay in Public Sector Bargaining," New York University Twenty-Third Annual Conference on Labor (New York: Matthew Bender, 1970).

[9] BNA, *Government Employee Relations Report* No. 361, B-9 (Aug. 10, 1970).

filed unfair labor practice charges before the Michigan Employment Relations Commission, not to speak of a group lawsuit filed in the Wayne County Circuit Court by other aroused employees.

Uniform Wage Policy v. Inequities

The near upheaval following the Detroit award is not atypical. In many, if not most, inability-to-pay situations, the impasse is not due to the economic cost of reaching an agreement with the employee group directly involved in the negotiations. With some notable exceptions (for example, teachers), such a cost is often easily absorbed in the budget. The underlying problem for management is to avoid a settlement figure with one group which arouses unrealistic expectancies among large numbers of other employees who are being pressed to go along with a uniform wage policy pegged at a lower figure. In estimating the cost of an award higher than the uniform figure, interest neutrals must evaluate the validity of an argument by management that an award which overturns the uniform figure for one group will irresistably become a new pattern for everyone else. Public management has in the past been accustomed to making judicious inequity adjustments in response to employee organizations who pursue their objective by patient and persistent lobbying. But employee relations of that day are a far cry from the aggressive, militant campaigns of strong employee organizations today, campaigns which culminate, in an increasing number of localities, in binding impasse procedures.

In current salary disputes, the apprehension that an inequity adjustment for one group may have a disastrous impact upon a uniform wage policy is often well founded. I do not think that a rigid application of the prevailing wage principle which results in a disproportionate increase for a favored group, an attitude of let-the-chips-fall-where-they-may, is the answer. I have no sweeping alternative approach to offer, other than the thought that a uniform wage policy merits a high degree of support from interest neutrals. I do not mean that I would rule out inequity increases in every instance in which a uniform wage policy is endangered. I would try to steer a highly flexible course. Much would depend upon how big a tail was trying to wag how big a dog. Most important would be an assessment of whether the repercussions of an inequity award to one group could be contained,

while all others are being held to a uniform wage increase. In recent years, for example, there has been a broad national consensus on the need for substantial increases to policemen and firemen and, in some jurisdictions, for teachers. Many times, an arbitral award is the only way an inequity can be remedied without arousing other employee groups to challenge a uniform wage policy. Arvid Anderson makes the point: "The employer may want arbitration as a means of settlement in order to persuade other employee organizations that he had no choice but to accept the terms ordered by the Arbitrator."[10]

Funding the Findings

The interest neutral finds himself in an unenviable position. If he simply accepts, uncritically, the claim of inability to pay as presented to him by management, he abandons all pretense of carrying out his quasi-judicial function. On the other hand, if he makes findings which compel a significant redistribution of funds in the budget, or a search for new sources of revenue, his position can become analogous to that of Will Rogers when he advanced a plan for combating the German submarine menace during World War I. The thing to do, said Rogers, was to heat the Atlantic Ocean to the boiling point, which would force the U-boats to surface where they could be picked off by Allied naval vessels.

"Very good," his listeners replied, "very ingenious. But just how do we go about heating the whole ocean?"

"That's your problem," said Will. "I've given you the solution. You work out the details."

My own experience in the past year as an interest neutral trying to cope with inability-to-pay impasses has not suggested any single basic criterion I can offer with self-assurance. Obviously, interest arbitration or fact-finding would be a mere ritual, unacceptable to employee organizations, if neutrals were to permit a management financial statement to become a privileged sanctuary—a document to be reviewed only as to its internal consistency. I am inclined to agree with those who insist that when a neutral rules out inability to pay as a valid defense, he should also assume some responsibility for suggest-

[10] Anderson, "Compulsory Arbitration Under State Statutes," at 12.

ing where to find the funds to implement his award, provided the parties have authorized him to do so. The preferable way to make clear his authority on this issue is in the submission agreement.

In suggesting that the parties impose this responsibility upon the neutral, I am fully aware that the expertise which he brings to these economic matters will rarely equal that of the persons entrusted with making up the budget. Nonetheless, the interest neutral must venture upon this uncertain terrain. His function does not permit him to shirk the responsibility of suggesting the possible sources of funds to implement his award. His insight into the fiscal aspects of the problem may be inferior to those of the negotiators, but they are objective insights. Because the neutral provides an *impartial* expertise, it becomes the only viewpoint acceptable to both parties.

Los Angeles Teachers' Dispute

In the public sector any controversy over ability to pay invariably focuses on priorities in public spending. Major disputes on the local level often become staging grounds for assaults on priorities of spending on state and federal levels of government. Nowhere was this phenomenon more featured than in the Los Angeles teachers' strike in the spring of 1970. The point should be made at once that the principal issues of the strike were meaningful recognition of the teachers union (United Teachers of Los Angeles) and the teachers' insistence on a substantive participation in decision-making on salaries, class size, and other matters vital to their profession. These issues, however, were not the focus of public concern until the final phase of the strike, when the resistance of school administrators brought them to the fore. Until then, the problem of the school board's inability to pay and the legality of the strike dominated the stage.

Prior to the strike, a tax override for education was voted down overwhelmingly by the electorate. Even persons who had previously regarded tax appropriations for education as sacrosanct voted "No," in order to keep the pressure on the state legislature to provide needed funds. When the strike began, if there was one fact unquestioned by both parties, it was that the Los Angeles city school board had no money to make any basic economic concessions. When Don Baer, the executive director of

the Teachers Union (UTLA), was asked on television: "Why are you striking?" he replied with unexpected candor: "To create a crisis."

He meant, of course, exactly what he said. Since both sides agreed that there were no funds, the issue on this point was totally political. The target of the strike was avowedly the state's contribution to Los Angeles schools, which was 28 percent of the budget, as against a state contribution for other school districts averaging 35 percent. A succession of governors, including the incumbent, had at one time or another endorsed the principle of a 50-percent state contribution for all school districts as a millennial objective, but none of them had ever come close.

On the June primary ballot, to be voted on more than a month later, was an initiative measure making a 50-percent contribution by the state a constitutional requirement. The crisis the teachers' leaders had in mind was no softening-up process to reintroduce the rejected tax override. They were going for the jackpot—a majority vote of the electorate for the initiative measure requiring a 50-percent state contribution. A four-week strike produced a crisis, but not one which would overcome widespread opposition to the initiative measure. There was opposition even from the labor movement which supported the other goals of the strike.

UCLA Law Professor Benjamin Aaron was asked by the parties to mediate the bargaining issues of the strike. After a period of extensive exploration with the parties, Aaron made written recommendations, which doubtless he had good reason to believe would encompass the expectations of the teachers' leaders and a majority of the school board. The school board majority was less cohesive than had been foreseen. It very nearly collapsed under the impact of opposition from school administrators who declared that the recommendations would result in an unacceptable diminution of their authority and function.

To comprehend fully the inner nature of the marathon discussions which ensued between the parties, one will be greatly helped by Ida Klaus's account in the *Michigan Law Review* of March 1969 describing the New York City experience with teacher unionism. Curiously, the Los Angeles discussions tele-

scoped in a matter of days the essential problems that had been encountered in New York City's then-seven-year history of teacher bargaining. Of particular interest is Miss Klaus's account of the evolution of the New York situation from the pioneering first stage of the bargaining relationship when ". . . the parties negotiated from knowledge of the amount of money available, and the Board was not committed to promoting improvements beyond its budgetary capacity . . ." [11] to the next stage where the teacher organization asked for definite commitments on salaries and working conditions:

> ". . . without conditioning their extent on the availability of funds. In other words, the teachers now wished to negotiate directly for improvements in their welfare. They wanted the substance of change and were leaving the financial means and budgetary consequences to the Board's ingenuity." [12]

The transition to the second stage of their evolving relationship was marked by the Board's acceptance of the teachers' approach. Miss Klaus summed up the turning point:

> "In order to obtain a two-year contract and to absorb most of the increased salary costs in the second year, the Board was prepared to take its chances that its estimates of future financial ability were accurate. If necessary, it would have to divert to salaries and other negotiated items funds that would otherwise be utilized for educational needs and services. *The result was a shift in the order of priorities.*" [13] (Emphasis added.)

She added in a footnote:

> "The Board in fact negotiated with the Union the order of priorities for the disbursements of the moneys that would be made available to the Board in its budget for the second year of the agreement." [14]

Returning now to the Los Angeles teachers' strike, the settlement proposed by Professor Aaron very nearly foundered on a similar problem of priorities. At issue was the positioning of a single word, "if," which had been moved up to the beginning of a key sentence at the insistence of the school board. Aaron proposed that the board restore $41 million in budget cuts for 1970-1971, reduce class sizes, and establish special reading courses,

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[11] "The Evolution of a Collective Bargaining Relationship in Public Education; New York City's Changing Seven Year History," 67 *Mich. L. Rev.* 1033, 1040 (1969).

[12] *Id.* at 1041.

[13] *Id.* at 1042.

[14] *Id.* at 1042.

along with some other measures advanced by the teachers to make up a quality education program.

As reported by Harry Bernstein, the labor editor of the *Los Angeles Times* (May 17, 1970):

> "But Aaron had a big 'if' in his recommendation—all of his proposed expenditures would be cancelled if money was not available from the State or some other source.
>
> "Unlike Aaron's recommendation, the final agreement simply put the 'if' first, saying that if money became available, the 'quality education' program would be adopted.
>
> "For many teachers, and for the School Board majority, the placement of the word 'if' was crucial, apparently on the theory that the Board would be more firmly committed to spend money under Aaron's plan than under the final settlement plan."

The importance attached by the parties to the positioning of the word "if" may have been due to an overemphasis on the psychological factors in the dispute, because as Aaron himself pointed out, under either his own proposal or the final agreement, the Board could not spend money it did not have. At any rate, the entire episode graphically illustrates how inability to pay and a struggle over priorities are opposite sides of the same coin.

A parting comment on the matter of priorities. Although I have tended to dwell on inability to pay as a form of conflict over priorities in spending, I would not want to leave the impression that a local or state government cannot, in a very real and practical sense, be dead broke. To cite a highly pertinent analogy, even an enterprise that goes bankrupt—especially one that goes bankrupt—produces a conflict among creditors over priorities in the disbursement of the remaining assets.

The Combination Mediator/Fact-Finder

Early in my remarks, the point was made that where the right to strike is legally proscribed or effectively inhibited, arbitration and fact-finding will inevitably become more frequently resorted to by the parties to resolve impasses rather than seldom-used emergency measures. A close observation of Professor Aaron's role in the Los Angeles teachers' strike suggests another type of impasse procedure that merits serious consideration as a standard technique.

Descriptively, the role calls for a person to begin as a mediator, to function entirely as an intermediary, a go-between, exploring the issues in depth as a confidant of both parties. It should be reiterated: He is at this stage a mediator, no more and no less. If the parties are responsive to his efforts, as they often are to those of any competent mediator, all well and good. He will have enabled them to bridge the gap and effect a settlement.

If the deadlock cannot be resolved by his role as an intermediary, he is still in a position to make another effective move with the consent of the parties. Possessing an insider's knowledge obtained as an intermediary, he is in a peculiarly advantageous position to make fact-finding recommendations which should encompass both the equities and the realistic expectancies of the parties.

The objection will probably be raised that the parties will be less than cooperative with a mediator who has the reserved powers to make a finding of fact. The parties will not level with a mediator, they will argue, because to make premature disclosures of areas of compromise may prejudice the outcome of his fact-finding if mediation fails. Even if that assumption were valid (which I do not concede), the reticence of the parties to cooperate with a mediator often results from the fact that his role and function are terminated if the talks are unproductive. Not so with a mediator/fact-finder. It has been demonstrated on many occasions that the parties are highly motivated to cooperate with him precisely because he combines both functions in one person. They tend to respond positively to his mediation efforts if for no other reason than because of a desire to influence his findings should he assume his ultimate role as a fact-finder. I do not advocate the use of a mediator/fact-finder as a solution for any and all disputes in the public sector. I would stress only that there are situations where it is workable, and that alternatives to strikes in the public sector are not in such abundance that we can afford to ignore any technique which offers promise.

Conclusion

Some closing thoughts of a more general nature concerning public sector developments are in order. There was a time, and it seems only recently, that labor relations in public and private

employment were sealed off from each other by disparate benefits and challenges. Ideally, the public sector offered civil service, a term synonymous with job security, substantial vacations, holidays, sick-leave plans, and other generous fringe benefits. Salaries, of course, always lagged behind the private sector.

In less than 30 years, "Big Labor" has set a pace for all of private industry which has outstripped the public sector in overall fringe benefits and widened the salary gap. The one area in which the public sector still offers a substantial advantage is that of job tenure. The incidence of layoffs, although on the increase in public employment, is still negligible when compared to the conditions prevalent in private industry.

Another major contributing factor to developments in the public sector is that the proportion of white-collar and professional employees in public employment has shifted from the offspring of middle-class parents with status hangups about joining unions to the offspring of higher paid blue-collar parents who accept unions as much a part of their lives as the church, the PTA, or the local Legion post.

The one constant factor in the linkage between the public and private sectors is the long-range pull of the applicable prevailing wage in private industry. It is a primary fact of life for both sectors that they compete in the same labor market for competent personnel. The public sector tends to lag behind the private sector, even far behind, in salaries and other benefits when unemployment is more than 4 percent. But let the labor market become tight, as it has been during periods of great industrial activity, and then the public sector is compelled to make accelerated adjustments to bring their salaries and benefits much closer to the average prevailing conditions in private industry. This long-term regulative aspect of the labor market, I suggest, will never become obsolete.

Comment—

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Mr. Block's observations concerning the subject of his paper, "Criteria in Public Sector Interest Disputes," are interesting and provocative, and I have a few reactions to some of his com-

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