APPENDIX C

# SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1974*

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## Introduction

By the end of 1974, 36 states [1] had enacted collective bargaining statues covering all or some categories of public employees.[2] There are only 10 states with no laws, executive orders, or attorney generals' opinions authorizing public sector bargaining.[3]

During 1974 several jurisdictions enacted or amended public employee bargaining laws. Florida and Iowa adopted comprehensive collective bargaining statutes that included provisions for impasse resolution. In Florida, the impasse procedures include mediation, fact-finding, and final determination by the legislature; in Iowa, the impasse procedures culminate in issue-by-issue final-offer arbitration with the arbitrator having the option of selecting the fact-finder's recommendations. The new Maine law sup-

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[1] Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Washington, Wisconsin, and Wyoming.

[2] Attorney-general opinions authorize collective bargaining for certain public employees in Arkansas, Utah, and Virginia. In Illinois, state employees may bargain under a 1973 governor's executive order.

[3] Arizona, Colorado, Louisiana, Mississippi, New Mexico (although the state personnel board has issued regulations authorizing bargaining and establishing procedures), North Carolina, Ohio, South Carolina, Tennessee, and West Virginia.

plements the 1969 law, which provides for municipal employee bargaining, and extends collective bargaining rights to state employees. The Montana legislature amended its public employee bargaining statute with respect to union security agreements. It also passed a statute extending organizing and bargaining rights to professional educational employees of the university system and community colleges. In New Jersey, the Employer-Employee Relations Act was amended to give the Public Employment Relations Commission jurisdiction to determine unfair labor practice charges and to decide what subjects fall within the scope of bargaining. New York's Taylor Law was amended to provide for binding arbitration in disputes involving police and firefighters. At the federal level, there are amendments to the Hatch Act governing political activities of public employees.

A state-by-state analysis of the significant characteristics of the new 1974 laws follows. None of the new statutes or amendments to existing statutes recognizes a right to strike by public employees. The Iowa and Florida laws contain harsh strike penalties.

Following the summary of 1974 legislation is a brief analysis of dispute settlement in the federal sector. The report also contains highlights of 1974 Federal Mediation and Conciliation Service activities in the public sector. As more jurisdictions adopt public sector bargaining laws, the volume of judicial and agency activity expands. It would be impossible in this report to summarize all of the decisions affecting public employees that were rendered in 1974. The report digests several key court and board cases dealing primarily with scope of bargaining and arbitration.

An important and controversial question is whether the Federal Government should enact a public sector bargaining law covering state and local employees. The report discusses several bills that have been submitted to Congress and highlights some of the points of view that have been expressed by labor, management, and neutral organizations with respect to the issue of federal legislation.

The last section of the report cites three studies on the impasse resolution experience of Wisconsin, Michigan, and Eugene, Oregon. These jurisdictions provide final-offer arbitration to resolve impasses involving certain public employees. James L. Stern of the University of Wisconsin and Charles M. Rehmus of the Uni-

versity of Michigan have performed their research as part of a U.S. Department of Labor study. The experience of Eugene, Oregon, is analyzed in an article written by Gary Lang and Peter Feuille, which was published in the *Industrial and Labor Relations Review*.

## Public Sector Legislation

*Florida*

(§§447.001–447.023, Part II of Ch. 447, as enacted by Ch. 74–100, L. 1974. Effective date: January 1, 1975.)

Heeding a warning from the Florida Supreme Court that public sector bargaining legislation be enacted in 1974, the Florida legislature enacted a comprehensive bargaining law covering all public employees.

Salient features of the Act include strong sanctions against strikes, the right to work without joining or participating in a labor organization, and the application of the state's "sunshine law" to collective negotiations and impasse procedures that include mediation, fact-finding, and final determination by the legislature.

The scope of bargaining is wages, hours, and terms and conditions of employment. The employer, however, retains the right: "to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion of its organization and operations." The employer may also direct its employees, take disciplinary action, and relieve employees for lack of work. Employees retain the right to grieve, however, should they feel the exercise of any management prerogatives violates a contract or a civil or career service regulation.

The Act provides for a Public Employees Relations Commission, composed of five members who are appointed by the governor. The commission is charged with handling representation matters, determining units, and investigating charges of prohibited practices and strikes.

A strike is defined in the law as a concerted failure to report to duty, to be absent from positions, to stop work, to submit resignations, or to abstain in whole or in part from full and faithful per-

formance of employment duties. Circuit courts may enjoin strikes, and employee organizations may be fined up to $20,000 a day for striking. Individuals also may be fined. If an organization strikes, PERC may issue cease-and-desist orders, suspend or revoke its certification, and revoke its check-off privileges.

Impasses in bargaining are declared if no agreement is reached within 60 days after negotiations begin, or at least 70 days before the public employer must submit his budget to the legislature. Either or both parties may appoint or secure the appointment of a mediator to assist in impasse resolution. (The mediators used are from the Federal Mediation and Conciliation Service.) If no mediator is appointed, or if the impasse persists until 60 days before budget submission, PERC appoints a special master and submits unresolved items to him, although the parties may continue using a mediator. The special master holds fact-finding hearings and, 20 days after completion of the hearings, submits his recommendations to the parties.

Should the recommendations be rejected by either party, the chief executive officer of the government employer submits to the legislature a copy of the special master's fact-finding report along with his recommendations for resolving the dispute. Then the legislature, or an authorized committee, conducts a public hearing at which the parties explain their positions. Finality is achieved through the legislature, which ultimately takes whatever action it deems to be in the public interest, "including the interest of the public employees involved."

The Act mandates that each public employer and employee representative negotiate a grievance procedure including final and binding arbitration as its terminal step. The Act explicitly states that employees have the right to refrain from being represented. Employees may at any time present their own grievances to their employer without the intervention of the bargaining representative.

It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees exercising their statutory rights; to discriminate against an employee because of his union membership; to refuse to bargain in good faith; to discriminate against an employee giving testimony under the Act; to assist employee organizations; and to refuse to discuss grievances in good faith.

Employee organizations have similar prohibitions. Additionally, it is an unfair labor practice for employee organizations to participate in or support a strike and, with respect to teachers, for their organizations to instigate or advocate support for their activities from students.

The bargaining statute does not repeal or amend civil service laws or the merit system. However, if the merit or civil service system laws or regulations conflict with any provisions of the bargaining law, the latter shall take precedence.

Local jurisdictions may adopt their own bargaining ordinances as long as the provisions of the local laws are substantially equivalent with those of the state statute.

*Iowa*

(SF 531, L. 1974, SLL 25:121, *et seq.*)

The Iowa legislature enacted a comprehensive bargaining law covering all public employees. The new statute prohibits strikes; penalizes violators with job loss, fines, and jail terms; and provides for bargaining impasses to be settled by compulsory, binding, final-offer arbitration.

The act is administered by a Public Employment Relations Board whose three members are appointed by the governor.

The scope of negotiations is defined as "wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training and other matters mutually agreed on."

The law includes, however, a management-prerogatives provision protecting the employer's right to direct employees' work; hire, promote, demote, assign, and retain workers; suspend or discharge for proper cause; maintain efficient operations; relieve employees for lack of work or other legitimate reasons; determine methods and assignments by which to conduct operations; and prepare and administer its budget. Check-off and grievance procedures are negotiable, but nothing in the law is intended to diminish the authority and power of departments covered by the

merit system or civil service commission established by law to recruit employees; prepare, conduct, and grade examinations; and rate candidates for appointments, promotions, and reclassifications. Additionally, state retirement systems are excluded from bargaining.

The Act sets forth eight employer prohibited practices, including refusing to bargain in good faith or to participate in impasse procedure and engaging in a lockout. Employee organization prohibited practices include refusing to bargain or participate in impasse procedures, striking, or picketing that interferes with access to employer's facilities. The PERB has jurisdiction over prohibited practices.

Strikes are banned, and the public employer is prohibited from paying any increase in compensation or benefits to public employees in response to or as a result of a strike. While parties may renew negotiations following a strike, they may not bargain on suspension or modification of any strike penalties or request a court to take such action. Any citizen may seek a court injunction restraining a strike or an immediately threatened strike without showing that the strike or threat would cause irreparable injury. Failure to comply with injunctions constitutes contempt and is punishable by jail sentences and individual and organizational fines. An employee held in contempt is to be immediately discharged and rendered ineligible for employment by the same public employer for one year.

The first step in the parties' duty to bargain is agreeing to an impasse procedure to use if they have not reached agreement by 120 days before the employer's certified budget submission date. If they have failed to agree or to use the procedure, either party may ask the board to appoint a mediator, and if the impasse persists 10 days more, the board shall appoint a fact-finder. If the parties reject the fact-finder's recommendations, they may continue negotiating, or either may ask the board to arrange for binding arbitration, under which each submits a "final offer on the impasse items." The law stipulates:

> "Each party shall also submit a copy of a draft of the proposed collective bargaining agreement to the extent to which agreement has been reached and the name of its selected arbitrator. The parties may continue to negotiate all offers until an agreement is reached or a decision rendered by the panel of arbitrators.

"As an alternative procedure, the two parties may agree to submit the dispute to a single arbitrator. . . .

"The submission of the impasse items to the arbitrators shall be limited to those issues that had been considered by the fact finder and upon which the parties have not reached agreement. With respect to each such item, the arbitration board award shall be restricted to the final offers on each impasse item submitted by the parties to the arbitration board or to the recommendation of the fact finder on each impasse item."

The arbitration panel consists of one employer and one union-appointed member, the two of whom either choose the panel chairman or alternately strike names from a board-supplied list. The panel may not mediate, and it is directed to consider the parties' past contracts; comparisons of employees' wages, hours, and employment conditions with those of other public employees doing comparable work; the public interest and welfare; the employer's ability to finance economic adjustments and their effect on normal service standards; and the employer's power to levy taxes and appropriate funds for its operations.

A majority of the arbitration panel selects what it considers to be the most reasonable of the final offers on each impasse item submitted by the parties, or the recommendation of the fact-finder on each item. Panel decisions are final and binding unless they are inconsistent with statutory limits on employer funds, spending, or budget or would impair the performance of its statutory duty.

A contract or arbitration award may provide for benefits conditional on funds to be obtained by the employer. However, the agreement must provide either for automatic reduction of conditional benefits or for additional bargaining if no or fewer funds are obtained. The law states that employees and unions may not attempt to bargain directly with a member of the governing board of an employer if it has appointed a representative.

In addition to sections dealing with legal actions, notice, and service, the law prescribes procedures on internal conduct of employee organizations, under which a certified union must file a registration report including its constitution and bylaws with PERB and an annual report on its financial affairs and internal election procedures. PERB prescribes rules to govern establishment and reporting of trusteeships over employee organizations.

*Comment on the New Iowa Public Employment Relations Act.* In a letter to Arvid Anderson, dated April 9, 1973, Anthony V. Sinicropi [4] commented on the newly enacted Iowa public sector bargaining law and on other legislative developments in Iowa. Excerpts from that letter follow:

> "Here are some observations and critical comments. First, this is the first statute allowing 'final offer' interest arbitration for all public employees. The others are limited to protective service people. Secondly, it is the first statute allowing the arbitrator to select the fact-finders report as well as the last position of either party. That provision seems to add to the confusion. For example, is the fact-finder option a good one or a bad one? In addition, the provision of allowing only unresolved items to the next step causes confusion. It assumes that bargaining is orderly and the parties' 'good faith' will resolve issues and leave only unresolved items for the next step. Another problem is that time limits are too stringent in this impasse procedure. . . . Finally, the law might be interpreted to mean that if either party does not agree to any item and moves only unresolved ones to the next step, they might be in bad faith.
>
> "I should also mention that the parties might want to use regular interest arbitration if they set up their own procedure."

*Maine*

(§§979–979–N, of Ch. 9–B, Title 26, as enacted by Ch. 774, L. 1974.)

Supplementing its 1969 law covering municipal employees, Maine enacted a new statute extending collective bargaining rights to state employees.

The State Employees Labor Relations Act expressly grants employees the right to join, form, and participate in labor organization activities for representation and bargaining purposes. State employees and their organizations are prohibited from interfering with these rights, refusing to bargain, or engaging in a work stoppage, slowdown, strike, or the "blacklisting of the public employer for the purpose of preventing it from filling employee vacancies."

Employers are prohibited from interfering with employees' guaranteed rights; encouraging or discouraging union membership; dominating or interfering with the formation of an em-

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ployee organization; discriminating against an employee because he filed an affidavit, petition, or complaint under the statute; refusing to bargain; or blacklisting employee organizations or their members to deny employment.

The statute requires the parties to bargain; execute written agreements that may not exceed two years; participate in good faith in mediation, fact-finding, and arbitration procedures; and negotiate on wages, hours, working conditions, and contract arbitration.

The scope of bargaining provision states:

> "All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining, except those matters which are prescribed or controlled by public law. Such matters appropriate for collective bargaining to the extent they are not prescribed or controlled by public law include but are not limited to:
>
> "(a) wages and salary schedules to the extent they are inconsistent with rates prevailing in commerce and industry for comparable work within the state; (b) work schedules relating to assigned hours and days of the week; (c) use of vacation or sick leave, or both; (d) general working conditions; (e) overtime practices; (f) rules and regulations for personnel administration, except the following: rules and regulations relating to applicants for employment in state service and classified employees in an initial probationary status, including an extension thereof, provided such rules and regulations are not discriminatory by reason of an applicant's race, color, creed, sex, or national origin."

The law adds that designation of these negotiable items "shall not be construed to be in derogation of or contravene the spirit and intent of the merit system principles and personnel laws," and that cost items must be submitted for the governor's budget 10 days after ratification of an agreement. If the legislature rejects any of them, they "shall be returned to the parties for further bargaining."

The law states that agreements may contain provisions for binding grievance arbitration. If a contract does not contain such a provision, the parties must submit their dispute to the State Employees Appeals Board.

The Public Employees Relations Board, which administers the municipal bargaining law, is designated as the administering agency of the state statute as well. Mediation of bargaining im-

passes may be requested by either party or on motion of the board. Parties to a mediated or unmediated dispute may jointly seek the assistance of the Maine Board of Arbitration and Conciliation for fact-finding, or pursue another mutually acceptable fact-finding procedure. If they do neither, the board's executive director may appoint a fact-finding panel at either party's request.

If the parties have not resolved their impasse 45 days after submission of the fact-finding report, either party may petition the board to initiate compulsory final and binding arbitration of the impasse. The parties are to select the arbitrator. If they do not, the board orders each party to name one arbitrator; these two then name a third to serve as panel chairman or alternately strike names for the chairman from a list of arbitrators submitted by the board.

Arbitrators must consider the following criteria in making their determinations: (1) the interests and welfare of the public and the financial ability of the state to pay; (2) comparison of wages, hours, and working conditions of the employees involved in the proceeding with those of other public and private employees performing similar work in jurisdictions competing in the same labor market; (3) the overall compensation presently received by employees, including fringe benefits; and (4) factors normally considered in the determination of wages, hours, and working conditions, including (a) the consumer price index, (b) the need of state government for qualified employees, (c) conditions of employment in similar occupations outside of state government, (d) the need to maintain appropriate relationships between different occupations in state government, and (e) the need to establish fair and reasonable conditions in relation to job qualifications and responsibilities.

With respect to disputes on salaries, pensions, and insurance, the arbitrator is to *recommend* terms of settlement and may make findings of fact. Such recommendations are advisory only. The determinations by the arbitrator on all other issues are final and binding. Either party may seek superior court review of an arbitration award, but any award is final and binding in the absence of fraud, and the court may only reverse or modify a determination based on an erroneous ruling or finding of law.

The board's executive director makes determinations on appropriate bargaining units and decides disputes over inclusion and

exclusion of employees from bargaining units. Unit determinations of the executive director may be appealed to the board, and board decisions on units are subject to superior court review.

If an unfair practice complaint before the board alleges an employee strike, the complainant may simultaneously seek injunctive relief in superior court pending final adjudication by the board. Parties may also seek court review of a board decision or order within 15 days.

*Montana*

(§§1601–1616, Title 59, Ch. 441, L. 1973, amended by Ch. 244, L. 1974. Effective date: July 1, 1974.)

(§59–1603 (5), as amended by Ch. 244, L. 1974. Effective date: July 1, 1974.)

The Montana legislature amended its public employee bargaining law to provide that any agreements involving union security must protect the rights of nonassociation of employees based on bona fide religious beliefs. The law states that an employee who is a member of a bona fide religious sect, the tenets of which oppose compulsory membership or financial support of any labor organization, may pay, in lieu of periodic union dues and fees, an equivalent sum of money to a nonreligious, nonunion charity designated by the labor organization.

An employee wishing to avail himself of the right of nonassociation must apply to the chairman of the board of personnel appeals. After a hearing before a committee consisting of a clergyman, a labor official, and a public member, said committee determines by majority vote whether the employee applicant qualifies for the right of nonassociation.

(§§1–12, as enacted by H.B. 1032, L. 1974. Effective date: July 1, 1974.)

The Montana legislature also passed a statute extending organizing and bargaining rights to professional educational employees of the university system and community colleges.

The law's definition of professional educational employees includes "all resident personnel working half time or more who are classified as teaching staff, librarians, counselors, researchers, chairmen and deans, and who are not registered as students. . . ."

"Administration" means the central administrative offices of the units of the university system and community colleges.

Under the statute, these employees may bargain on grievances, salaries, rates of pay, fringe benefits, and other conditions of employment; engage in concerted activities for the purpose of bargaining or other mutual aid or protection; and "express any view or opinion on an academic subject, in accordance with the concept of academic freedom." The Act does not, however, limit the legislature's authority to appropriate, nor the constitutional authority of the board of regents, higher education commissioner, and institution presidents.

Administrator unfair labor practices include interference with employee rights, refusal to bargain, encouraging or discouraging union membership—except that agency shop agreements are permitted. (However, the law protects the right of nonassociation on the basis of religious reasons and establishes procedures for payment to charities of equivalent union fees and dues.) Labor organizations may not coerce employees or employers in the selection of representatives and may not refuse to bargain.

The board of personnel appeals investigates and determines unfair-labor-practice complaints, unit questions, and representation matters.

As to bargaining duty and scope, the law declares: "The president of the individual university units and the commissioner of higher education, or their designated authorized representatives, shall represent the board of regents in collective bargaining. All issues that relate to conditions of employment, with the exception of academic freedom, may be bargained."

Parties may submit a bargaining dispute to mediation at any time, but if no agreement is reached after 60 days have elapsed, the board shall call for mediation, and if the impasse is still unsettled after 30 more days, the board shall appoint a fact-finder or panel who shall recommend settlement of the dispute and whose expenses are divided by the parties and the board.

Parties also may submit an impasse to voluntary binding arbitration, with the proviso that the arbitrator's decisions that would require legislative enactment to be effective shall be considered advisory only. The state assumes one-half of the arbitrator's fees and expenses, and the parties split the other half.

At a college or university with a contract, the law requires the parties to establish a grievance procedure which may culminate in final and binding arbitration. Individuals or groups have the right to present grievances to their supervisors either personally or through chosen representatives, and to have them adjusted without the bargaining agent's intervention—provided any adjustment is not inconsistent with the terms of the contract and the agent is notified of the adjustment.

*New Jersey*

(§§34:13A-1–34, as amended by Ch. 303, L. 1968, by Ch. 326, L. 1973, and as last amended by Ch. 123, L. 1974.)

The New Jersey state legislature amended the Employer-Employee Relations Act to give the Public Employment Relations Commission jurisdiction to determine employer and employee organization unfair labor practice charges and to decide what subjects fall within the scope of bargaining.

Improper employer practices include interfering with, restraining, or coercing employees in the exercise of guaranteed rights; dominating or interfering with the formation or administration of an employee organization; discriminating in hire, tenure, or employment conditions to encourage or discourage employees in exercising guaranteed rights; discharging or discriminating against an employee for filing an affidavit, petition, or complaint or for testifying under the Act; refusing to sign or reduce a negotiated agreement to writing; and violating any PERC rules or regulations.

Employee organizations are prohibited from interfering with, restraining, or coercing employees in exercising guaranteed rights; interfering with, restraining, or coercing a public employer in its selection of representatives for negotiating or handling grievances; refusing to negotiate in good faith; refusing to sign or reduce a negotiated agreement to writing; and violating PERC rules.

Under the 1974 amendments, PERC gained exclusive authority to prevent and remedy unfair labor practices. The amendments further provide: "The Commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations."

Any PERC determinations on the scope of bargaining may be appealed to the Appellate Division of the Superior Court. PERC may seek enforcement of its unfair practice and scope of bargaining orders at the Superior Court.

PERC is also required to adopt rules "to regulate the conduct of representation elections, and to regulate the time and commencement of negotiations and of institution of impasse procedures. . . ."

Added to the section of the law allowing negotiation of binding grievance arbitration, the amendments state: "notwithstanding any procedures for the resolution of disputes, controversies, or grievances, established by any other statute, grievance procedures established by agreements between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement." The former provision that no section of the law shall annul or modify any statute is amended to read "nor shall any provision hereof annul or modify any pension statute or statutes of this state."

*The Study Commission.* The New Jersey legislature also passed a companion bill that creates a Public Employer-Employee Relations Study Commission. The commission consists of four members of the senate, appointed by its president; four members of the assembly, appointed by its speaker; and four state citizens, appointed by the governor. The commission is charged with studying the bargaining law and its implementation and with suggesting statutory changes where necessary.

*New York*

(§§200–214, Civil Service Law, as last amended by Chs. 724 and 725, Ls. 1974.)

*Police and Fire Arbitration.* The Taylor Law was amended to provide for binding arbitration in police and fire contract disputes on a three-year experimental basis.

The amended law provides for submission to an arbitration panel of a dispute involving members of any organized fire or police force or department of a county, city, town, village, or fire or police district, if the dispute has not been settled within 10 days

after submission of a fact-finder's report. New York City, which has its own collective bargaining procedures, including arbitration, is specifically excluded from the amendment.

The arbitration panel consists of one member appointed by the employer, another by the employee organization, and a third jointly selected by the employer and employee organization.

The panel decides issues by majority vote. Before voting, however, if the employee and employer representative make a joint request, an issue can be referred back to the parties for further negotiation. In making its determinations, the arbitration panel must consider statutory criteria that include: the interests and welfare of the public; the employer's ability to pay; comparison of peculiarities in regard to other trades or professions including specifically (1) hazards of employments, (2) physical qualifications, (3) educational qualifications, (4) mental qualifications, (5) job training skills.

The panel's decision is final and binding for a maximum of two years from the day the previous contract expires, or, in the absence of a prior contract, two years from the date of the panel's decision.

*Teacher Bargaining Impasses.* The 1974 state legislature also passed an amendment to the Taylor Law modifying impasse procedures in school districts.

Previously, if fact-finding recommendations failed to bring about a settlement, the school board was authorized to conduct a legislative hearing and ultimately set salaries and working conditions unilaterally, even though it was one of the parties in the dispute. The law has now been amended to provide that if a fact-finder's recommendations are rejected by either party, instead of a public legislative hearing, PERB is to bring the parties together to explain their positions regarding the fact-finding report. Thereafter, the school board may take "necessary and appropriate" action to reach agreement, and PERB may continue its efforts to provide "such assistance as may be appropriate" to resolve the dispute.

In effect, the amendment officially authorizes PERB to make efforts to conciliate bargaining impasses that are not resolved through mediation and fact-finding.

*Assistant District Attorneys Excluded from Bargaining.* On the eve of a representation election, the New York legislature amended the Taylor Law to exclude as managerial "assistant district attorneys and law school graduates employed in titles which promote to assistant district attorney upon admission to the bar of the state of New York." This legislative action was taken after the New York City Office of Collective Bargaining had found that assistant district attorneys were eligible for collective bargaining and had directed a representation election.

### *Hatch Act Amendments*

Congress amended the federal Hatch Act to eliminate the provision that had prohibited voluntary political campaign activities by state and local employees working in agencies that receive federal funds.

The Hatch Act amendments are part of a comprehensive campaign spending reform bill designed primarily to limit the influence of large amounts of money and prevent the kind of abuses that occurred during the 1972 campaign. Under the amendments, which became effective on January 1, 1975, state and local officers and employees may take an active part in political campaigns on personal time, although they still may not be candidates for partisan elective office. A state or local employee may, however, run for election to a school board, city council, or state constitutional convention, so long as he runs as an independent and is not affiliated with a party which participated in the last elections.

Public employees may serve as officers of national, state, or local political parties and organize or reorganize political clubs. Additionally, they may sell tickets to political fund-raising functions, manage campaigns, solicit votes, act as challengers or poll watchers during elections, or help in car pools, taking voters to and from polling places.

Left intact in the Hatch Act is that section which prohibits management from forcing those who work under their supervisors to contribute to or work for a candidate. Also unchanged is that provision prohibiting state and local employees from using the authority of their offices to influence nominations or elections.

## Dispute Settlement in the Federal Sector

Since August 1970, the Federal Service Impasse Panel has been assisting labor organizations and agencies in the executive branch of the federal government in the resolution of negotiation impasses. The panel was established pursuant to Section 5 of Executive Order 11491, and its members are appointed by the President. It is composed of seven individuals who are experienced in the field of labor-management relations and who devote some or a major part of their time to the arbitration of labor disputes. Five of its members belong to the National Academy of Arbitrators. Members of the panel are: Chairman Jacob Seidenberg, Lloyd H. Bailer, Richard L. Epstein, Albert L. McDermott, Jean T. McKelvey, Arthur Stark, and James C. Vadakin. They serve on a part-time basis to the extent dictated by caseload and administrative responsibilities. Although three or more members constitute a quorum, the entire panel has been meeting on a regular basis in its Washington, D.C., office. The panel is supported by a full-time staff consisting of an executive secretary and three associates.

Under Sections 5 and 17 of Executive Order 11491, the panel is granted broad authority that includes the right to "take any action it considers necessary to settle an impasse" or "settle the impasse by appropriate action." The majority of disputes coming before the panel, however, have been settled voluntarily by the parties prior to fact-finding. That is, as of December 31, 1974, 96 of 116 closed cases were resolved through voluntary resumption of negotiations by the parties, further mediation assistance by the Federal Mediation and Conciliation Service, at joint conferences conducted by panel staff, or at prehearing conferences prior to fact-finding. In 19 other cases, post fact-finding recommendations by the panel served as the basis for resolution of the disputes. In 1974, however, the panel found it necessary for the first time to take "appropriate action" to resolve an impasse by directing a settlement through a *Decision and Order* after fact-finding procedures had been exhausted.[5]

On February 6, 1975, Executive Order 11491 was amended for the third time since its inception. The principal changes include

[5] *General Services Administration, Region III, Washington, D.C., and Local 2151, American Federation of Government Employees, AFL-CIO,* Case No. 73 FSIP 18 (July 11, 1974).

the following: (1) establishment of procedures to facilitate the consolidation of existing bargaining units within an agency; (2) expansion of the scope of bargaining by providing that only those internal agency regulations issued at the agency headquarters level or at the level of a primary national subdivision for which a "compelling need" exists, under criteria to be established by the Federal Labor Relations Council, may bar negotiations with respect to a conflicting proposal; (3) expansion of the scope of bargaining to permit negotiation on the scope of the grievance procedure with statutory appeal procedures as the sole mandatory exclusion; (4) authorization to the Assistant Secretary of Labor to resolve negotiability issues that have arisen in the context of unfair labor practice proceedings resulting from unilateral changes in established personnel policies, practices, and matters affecting working conditions; (5) authorization to the Assistant Secretary of Labor to independently investigate unfair labor practice complaints; and (6) most questions as to whether a matter is arbitrable under the terms of the negotiated grievance and arbitration procedure may, by mutual agreement of the parties, be submitted to an arbitrator for resolution, or referred to the Assistant Secretary for decision. The amendments, which broaden the scope of negotiations in the federal sector, should lead to an increased workload for the panel.

## Highlights of Federal Mediation and Conciliation Service Activity in Public Employment [6]

*Federal Sector Mediation*

In August 1973, the FMCS announced a new policy for providing assistance to federal agencies and labor organizations in the resolution of bargaining disputes under Executive Order 11491 as amended. The Service assigned all new Department of Labor unit certifications and all notices of bargaining to FMCS as cases for mediator following. The Service committed itself to becoming an active advocate of bargaining in certified federal employee units. In particular, it expressed an intention of investigating the reason why nearly 1,200 federal employee bargaining units had been certified but still lacked initial contracts. As a result of the new policy, the number of federal employee cases with which the

[6] Extracted from the FMCS 27th Annual Report, Fiscal Year 1974.

FMCS professional staff had contact increased from less than 200 in 1973 to more than 500 in 1974.

The increased caseload prompted several organizational changes within FMCS. The position of Assistant Director of Mediation Services was created and was given responsibility for public sector mediation. A deputy assistant director was appointed to assist in the mediation of significant federal disputes in particular. Seven mediators were named regional coordinators to assist mediators in federal cases.

Of the 507 cases monitored by FMCS in fiscal year 1974, 284 were closed during the fiscal year—236 by negotiated agreements and 48 through various other dispositions (referral to Federal Services Impasses Panel, Federal Labor Relations Council, etc.). In the remaining 223 cases, negotiations continued into fiscal year 1975. A total of 390 joint conferences were held in 140 of the 284 closed cases, with agreements being reached in 120 of them. Thus, the statistics indicate that parties bargaining under Executive Order 11491 are using FMCS in almost 50 percent of the cases.

Significant cases in which FMCS assistance helped to bring about settlements involved the U.S. Customs Service in Boston; McGuire Air Force Base in New Jersey; Keesler Air Force Base in Biloxi, Miss.; the Army-Air Force Exchange Service in Charlestown, Ind.; Federal Aviation Administration Academy in Oklahoma; and the General Services Administration in San Francisco.

*State and Local Mediation*

On August 10, 1973, the FMCS announced a policy of involvement in labor negotiations in state and local jurisdictions that lack adequate dispute resolution capability. To give further direction to the policy, FMCS established a Coordinator for Technical Services and Public Sector Mediation at each regional office.

With respect to state and local disputes in fiscal year 1974, the Service closed 140 cases—21 state and 119 local. FMCS also participated in 69 cases that remained unsettled on June 30, 1974. The closed cases alone affected over 70,000 employees. In more than 75 percent of the cases, the parties reached full agreement. The rest were closed when the cases were referred to other government agencies, fact-finding, etc. Almost half of the cases origi-

nated in two states, Illinois (51 cases) and Ohio (16 cases). A substantial proportion involved school boards and teachers or maintenance personnel.

The FMCS played a key role in effectuating settlements in disputes between the New Hampshire Department of Education and State Employees Association; Wilmington, Del., School Board and Local 762, American Federation of Teachers; Hillsborough Community College (Tampa, Fla.) and the Faculty Bargaining Council; Mad River Township Schools (Dayton, Ohio) and the Mad River Classroom Teachers Association; Eastern Illinois University and Local 981, AFSCME; Kansas City Schools and Local 691, AFT; City of San Antonio and Amalgamated Transit Union (bus drivers); and the State of Alaska and Alaska Public Employees Association.

## Court and Agency Decisions

*New York*

*City of Albany and Albany Police Officers Union Local 2841 AFSCME, AFL-CIO,* New York State Public Employment Relations Board, 7 PERB 3078, at 3132 (1974).

*City of Albany and Albany Permanent Professional Firefighters Association Local 2007, AFL-CIO,* New York State Public Employment Relations Board, 7 PERB 3079, at 3142 (1974).

Late in 1974, PERB issued two companion scope-of-bargaining decisions involving the City of Albany and the Albany police officers and professional firefighters unions.

In the police case, PERB determined the bargainability of union proposals on such topics as discipline and discharge, seniority, promotions and vacancies, layoffs, agency shop, paid time-off for union activities, labor-management and joint safety committees, leaves of absence, retirement plan, pistol permits and equipment, and manning. The board's findings are briefly summarized below.

Discipline and discharge was held to be a mandatory subject of negotiations except to the extent that the union's proposal attempted to replace certain statutory rights and procedures set forth in the Civil Service Law (Sections 75 and 76) which, accord-

ing to the board, cannot be eliminated by a collective bargaining agreement.

The board held that duration of an employee's probationary period is a nonmandatory bargaining subject. "A decision to dismiss a probationary employee, however, and the procedures by which such a decision might be accomplished are . . . subject to mandatory negotiations."

With respect to a demand on promotion and filling of vacancies in noncompetitive titles, the board held: "To the extent to which promotion is sought into higher paying positions that are within the negotiating unit represented by Local 2841, [the demand] is a mandatory subject. . . . To the extent that positions into which promotion is sought are not within the negotiating unit, this section is not a mandatory subject. . . ." As to the problem of promoting and filling vacancies in the competitive class, the board recognized that this subject is, in large part, covered by mandatory provisions of the Civil Service Law and is therefore not negotiable. But that part of the union's proposal that fell within the employer's discretionary authority was declared to be mandatory.

The union's demands concerning layoffs on the basis of seniority and rights of recall were found to be nonmandatory subjects in as much as these subjects are specifically covered by Civil Service Law. The board also reaffirmed earlier findings that a management decision to curtail or limit services is not a mandatory subject of negotiations. However, the board held that procedures relating to layoff and reasonable notice of layoff were mandatory items in as much as they do not unduly interfere with the employer's right to eliminate a service, and they are "not unreasonably related to the requirement that a public employer negotiate over the impact of such decisions."

The union's demand on agency shop stated that this provision would be implemented only after the state had enacted enabling legislation. PERB, nevertheless, found the demand to be nonmandatory, stating that "given the current status of the law, to mandate negotiations on such a matter would unnecessarily impede negotiations."

Other demands declared to be mandatory subjects pertained to paid time-off for union activities, the establishment of labor-man-

agement committees (to the extent that the matters to be discussed by such committees are mandatory subjects), paid and unpaid leaves of absence, a retirement plan (to the extent the subject is not preempted by other state law), and the manning of police patrol cars (to the extent that the proposal deals with safety of employees).

The board declared nonmandatory a proposal that employees be allowed to obtain individual pistol permits. Additionally, the union's demand that "each patrol car will be equipped with one shotgun" was held to be nonmandatory. PERB stated: "Even if . . . this demand has safety implications, those implications are overcome by the consideration . . . that the manner and means by which a city should render services to its constituencies is a management prerogative."

Challenged subjects in the firefighters case included work schedules, minimum manpower, seniority, leaves of absence, changes in department rules and procedures, and parity.

With respect to work schedules, PERB held that the union's demand on extra duty assignments was mandatorily negotiable except to the extent it would compel the employer to call in off-duty personnel and would preclude the reassignment of on-duty personnel. Also found to be mandatory subjects were union proposals on minimum manpower on a rig, the use of seniority in filling jobs, and leaves of absence for union representatives.

A proposal that the union be notified and be given a chance to bargain in advance on all proposed changes in department rules, procedures, and policies was determined to be "too broad" in that it could possibly involve the mission of the department. The board concluded, however, that if the proposal were restricted to work rules, it would be mandatorily negotiable.

Perhaps the most significant aspect of the *Firefighters* decision was the Board's determination on the bargainability of parity. The union demanded that if during the life of the contract "any disparity in dollar benefits occurs between police and firefighters in the City of Albany, the agreement may immediately be reopened and that said disparity shall be corrected." PERB declared:

> "To the extent it is a demand for a wage reopener and for subsequent negotiations, it is a mandatory subject of negotiations. How-

ever, if the demand is not to reopen the agreement for negotiations but to reopen it for the mechanical change of instituting the dollar value of benefits obtained later by the police in their negotiations, it is not negotiable. . . . Such a demand concerns terms and conditions of employment outside [the firefighters'] negotiating unit. In effect, the firefighters seek to be silent partners in negotiations between the employer and employees in another negotiating unit."

*California*

*Fire Fighters Union Local 1186, IAFF* v. *City of Vallejo,* 12 Cal.3d 608, 116 Cal. Rptr. 507, 87 LRRM 2453 (1974).

In *Fire Fighters Union Local 1186, IAFF* v. *City of Vallejo,* the California Supreme Court, interpreting the Vallejo city charter provisions governing public employee labor relations, held that union proposals on vacancies and promotions and schedule of hours are within the scope of mandatory bargaining and therefore are subject to binding arbitration. The court also held that demands on manning schedules and personnel reduction were arbitrable to the extent that they affect employees' working conditions and safety.

Judge Tobriner, writing for a unanimous court, stated that the court's task was to reconcile statutory clauses that seemingly overlap: a provision granting city employees the right to bargain on wages, hours, and working conditions but withholding that right as to matters involving the "merits, necessity or organization of any governmental service." The case was significant, added Judge Tobriner, because the state's Meyers-Milias-Brown Act governing public employee labor relations contains identical language on the scope of bargaining. Therefore, an interpretation of the Vallejo charter "necessarily bears upon the meaning of the same language" of the state law.

The court observed that although it was rendering a preliminary decision on the scope of arbitration, "normally an arbitrator, rather than a court, will narrow and define the issues, rejecting those matters over which he cannot properly exercise jurisdiction because they fall exclusively within the rights of management." The court added that it was reluctant to restrict unduly the *scope* of the arbitration by an overbroad definition of "merits, necessity or organization." Judge Tobriner observed:

"Nor does this cautious judicial approach expose the city to an excessive assertion of the arbitrator's jurisdiction; the city council *after* the rendition of the award may reject any award that invades its authority over matters involving 'merits, necessity or organization' since the charter itself limits the scope of the arbitration decision to that which is 'consistent with applicable law.' "

Turning to the specific items in dispute, the court concluded that the issue of schedule of hours where the union proposed a maximum of 40 hours a week for firefighters on 8-hour shifts and 56 hours a week for those on 24-hour shifts was "clearly negotiable and arbitrable." Despite the city's argument that schedule of hours involves the "organization" of fire services, the court pointed out the Vallejo charter explicitly provides that city employees have the right to bargain on matters of "hours." Also, hours and work days have been held to be bargainable under NLRA.

Similarly, the union's proposal on vacancies and promotions concerned firefighters' job security and opportunities for advancement and therefore related to their "terms and conditions of employment" and was arbitrable. But the court instructed the arbitrator to additionally hear facts to determine whether the position of deputy fire chief is a supervisory one and thus excluded from the bargaining unit. If so, the vacancies and promotions proposals cannot apply to the deputy fire chief position, it ruled.

The union's manning proposal stated that "the manning schedule presently in effect be continued without change during the term of the new Memorandum of Agreement." The city argued that the manpower issue involved the organization of the fire department and standards of fire prevention in the community, which lie exclusively within the province of management. The union contended that its proposal was not directed at fire prevention policy but involved matters of workload and safety. The court agreed that in so far as the manning proposal did, in fact, relate to questions of workload and safety, decisions under the NLRA supported the union's contention that the demand was arbitrable.

Given the parties' divergent characterizations of the manning proposal, either one of which could have been accurate, the court ordered that the issue be submitted to arbitration so that a factual record could be established to disclose whether the issue pri-

marily involved workload and safety or fire prevention policy. On the basis of such a record, the arbitrators could decide in the first instance whether or not, and to what extent, the manning demand was arbitrable.

The union's personnel reduction demand would have required the city to bargain on any decision to reduce the number of firefighters. Additionally, it stated that layoffs would be on a least-seniority basis, and no new employees could be hired until all those laid off were given an opportunity to return.

The court agreed with the city that a reduction in staff, based on the city's decision that as a matter of policy the force was too large, would not be arbitrable. The court pointed to decisions under the NLRA that held that an employer may unilaterally decide to lay off employees, although it must bargain with the union on the impact of its decision.

On the other hand, the court observed that because of the nature of firefighting, a reduction of personnel may affect firefighters' working conditions by increasing their workload and endangering their safety. The court concluded that to the extent that a decision to lay off some employees affects the workload and safety of the remaining workers, the union's proposal was arbitrable. Additionally, matters of seniority and reinstatement included in the personnel reduction demand were also held arbitrable.

*Wisconsin*

*Beloit City School Board and Beloit Education Association,* Wisconsin Employment Relations Commission, Case V, No. 16732 DR(M)–43, Decision No. 11831–C (1974), 578 GERR B–11 (10/28/74).

The Wisconsin Employment Relations Commission made important findings on the scope of bargaining under the Municipal Employees Relations Act in *Beloit City School Board and Beloit Education Association.* The case arose after the Beloit school board and education association asked for a declaratory ruling to resolve their dispute over the negotiability of several teacher proposals. Intervening before WERC were the Wisconsin Association of School Boards, Inc.; League of Wisconsin Municipalities; Milwaukee Teachers' Education Association; Madison Teachers, Inc.; and Green Bay Teachers Education Association.

In its decision, WERC summarized and responded to all of the arguments that had been presented by the parties and intervenors.

The commission recognized that matters affecting basic education policy "lie at the core of a school district's governmental control, which is analogous to entrepreneurial control in the private sector," and therefore are not mandatory subjects of bargaining. Where basic educational policy matters have an effect on wages, hours, and working conditions, however, the impact of decisions in such matters is mandatorily bargainable, WERC ruled.

The Beloit school board had argued that the constitution and laws of Wisconsin required an accommodation between bargaining rights of teacher organizations "and the right of the public in school system government by elected officials," and that "in striking the balance, the preservation of representative school government should have priority." WERC agreed that it had to attempt to harmonize existing school statutes and the provisions of MERA, and also to recognize that certain matters are reserved to management. At the same time, the commission was mindful that MERA requires bargaining on wages, hours, and conditions of employment and further requires that municipal employers, in exercising their powers and responsibilities, must do so "subject to those rights secured to public employees . . . by this subchapter."

WERC concluded:

> "To accept the School Board's argument, that all the duties and responsibilities delegated to, and required of, school districts and their agents are not subject to mandatory collective bargaining, would emasculate the provisions of MERA as applied to employees of a school district, rather than harmonize MERA with school statutes. We hold that matters, not concerning basic educational policy, which primarily affect wages, hours and conditions of employment, are subject to mandatory bargaining. We further hold that matters which do concern basic educational policy, but by their impact secondarily affect wages, hours, and conditions of employment, are subject to mandatory bargaining as to said impact."

As to the specific subjects in dispute, the commission held that the following subjects fall within the scope of *mandatory* bargaining: (1) orientation of new teachers to evaluation procedures and standards expected by the employer; (2) length, frequency, and openness of observation periods and the number of evalua-

tions (but not the selection and qualifications of evaluators); (3) copies of observation reports, teacher objections to same, and possible defenses to evaluations, and complaints made against a teacher by parents, students, and others; (4) teacher files and records, with notice to a teacher of additions to his personnel file and opportunity to refute them; (5) right of representation prior to reprimand, warning, or other discipline; (6) a "just cause" standard for dismissal or other discipline, suspension with pay, copies of the charges, and a hearing; (7) teacher layoffs and recalls, their order, qualifications for recall, and retention of previous service credits; (8) misbehavior of students that involves threats to physical safety; and (9) school calendar, which establishes number of teaching days, in-service days, vacation periods, convention dates, and length of school year (but not the content of the in-service day program, which is a matter of educational policy).

The commission concluded that the following items were *permissive* subjects of bargaining. The employer is not required to bargain on them except in so far as they have an impact on teachers' salaries, hours, and working conditions. The impact must be bargained with regard to (1) class size, (2) development and institution of a reading program, and (3) initiation of a summer school program.

*Oak Creek-Franklin Joint City School District No. 1 and Oak Creek Education Association,* Wisconsin Employment Relations Commission, Case III, No. 16717 DR(M)-42, Decision No. 11827-D (1974), 578 GERR B-11 (10/28/74).

On the same day it handed down its *Beloit* decision, WERC issued its findings in the companion case of *Oak Creek-Franklin Joint City School District No. 1 and Oak Creek Education Association.* The case, like *Beloit,* arose as a result of a request by the school board and education association for a declaratory ruling on the bargainability of certain subjects in dispute.

The commission noted that its discussion in the *Beloit* decision presented its views on the basic contentions of the parties herein and that its remarks in *Beloit* were specifically included in the *Oak Creek* determination by reference.

WERC went on to conclude that the following proposals were *permissive* subjects of bargaining:

1. Class size, although the impact of class size on hours, conditions of employment, and salaries must be bargained.

2. Teacher-pupil contact hours and the number of preparations that may be required of a teacher, although the impact of these matters is subject to mandatory bargaining.

3. Establishment of a Committee on Resource Centers, except to the extent that if the district established such a committee, it would be required to bargain on the impact thereof.

4. Additional librarians. However, the association may bargain on the impact of the lack of such personnel where their absence requires teachers to perform extra duties.

5. Pilot program for emotionally disturbed students. But if the district expects teachers to participate in such a program, the association may bargain the impact of the program on wages, hours, and working conditions of the teachers involved.

6. Curriculum studies. But if teachers are expected to participate in curriculum development, the association may bargain on the impact of such participation as it affects wages, hours, and working conditions.

7. Formation of a committee to investigate and sponsor in-service programs and the participants therein. However, if teachers are expected to participate in an in-service program, the impact of such participation is bargainable. Additionally, the matter of credits for advancement on the salary schedule and the number of credits earned by participating in in-service programs are mandatory bargaining subjects.

8. Establishment and reimbursement of department and unit chairmen, but if such positions are established and incorporated in the bargaining unit, the board would have to bargain on promotions to such positions and the salaries, hours, and working conditions of such positions.

The commission held that the matter of whether teachers should perform typing and duplicating duties was a mandatory subject of bargaining. However, that portion of the teachers' proposal that required the district to employ clerical aides in schools was held to be a nonmandatory subject.

*Other Court and Agency Developments*

*City of Amsterdam* v. *Helsby,* 79 Misc.2d 676, 591 GERR E-1 (Sup. Ct. County of Montgomery, Nov. 30, 1974) and *City of*

*Corning* v. *Corning Police Department Unit,* 362 N.Y.S.2d 698, 591 GERR E-1 (Sup. Ct. County of Steuben, Dec. 17, 1974).

Two New York Supreme Courts issued decisions dealing with the constitutionality of the 1974 Taylor Law amendments, which provide for compulsory arbitration of police and fire disputes. In *City of Amsterdam* v. *Helsby,* the court ruled that the arbitration statute was unconstitutional. The court stated: "While municipalities in New York are free to agree to submit to compulsory arbitration as New York City has done, their forced submission abridges the most fundamental concept of our state and federal government—that is, consent of the governed."

In the court's view, the amendments interfere with municipalities' authority to regulate their taxes and violate the one-man-one-vote principle and equal protection clauses of the New York and federal Constitutions. The fault with the amendments is not that they provide no safeguards as to how an arbitration panel exercises delegated power, but rather that "they allow an official body to exercise a general and substantial legislature power without substantial equality of representation for the citizens of Amsterdam," as required by the state and federal Constitutions.

In contrast to the Montgomery County Supreme Court, the Steuben County Supreme Court, in *City of Corning* v. *Corning Police Department Unit,* upheld the legality of the statute based upon the rationale that the strong presumption of constitutionality had not been rebutted by the City of Corning.

The court observed that it has always been within the legislature's power to provide by general laws, such as the Taylor Law, expenditures for local governments, including minimum salaries and maximum hours for specific categories of employees. "In the present context, the Legislature has elected to mandate the settlement of terms and conditions of employment in the public safety services in a manner which must be acceptable to all parties. It has done this through Civil Service Law, Section 209 (4), compulsory and binding arbitration. The Legislature can mandate terms and conditions of employment of municipal employees directly by general law without violating home rule," just as it can, in the interests of public health and welfare, require settlement of disputes in nonprofit hospitals through the medium of compulsory arbitration, and also require the same in municipal police and fire services.

Both the *Amsterdam* and *Corning* decisions are being appealed to the New York Court of Appeals, the state's highest court.

*State of Montana* v. *Public Employees Craft Council of Montana,* 529 P.2d 785, 88 LRRM 2012 (Mont. S. Ct., Dec. 9, 1974).

The Montana Supreme Court held that employees' concerted activities, authorized by the Montana Public Employees Collective Bargaining Act, include the right to strike, since there is no statutory provision prohibiting strikes. The court was persuaded by (1) federal precedent under the Taft-Hartley Act that concerted activities include the right to strike; and (2) the presence of strike limitations and prohibitions in legislation covering nurses and teachers, which is absent in the Public Employees Collective Bargaining Act.[7]

*Cheltenham Township* v. *Cheltenham Township Police Department,* 86 LRRM 2428 (Pa. Commonwealth Ct., Dec. 3, 1973).[8]

An arbitrator exceeded his jurisdiction when he awarded a contract provision directing a township to continue the practice of picking up and delivering policemen at their homes within the township incident to going on and off duty. The court held that the practice is not a term and condition of employment and, therefore, "not a bargainable issue as one of the 'other benefits' within the meaning of the Act."

*Milwaukee Deputy Sheriffs' Assn. and Milwaukee County,* 64 Wis.2d 651, 221 N.W.2d 673, 88 LRRM 2169 (Oct. 1, 1974).

The issue in this case before the Wisconsin Supreme Court was whether, after a petition for final and binding arbitration is filed, pursuant to the municipal police and fire final-offer arbitration statute, one of the parties may amend its "final offer" to include a

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[7] The supreme court relied on a California case, *Los Angeles Metropolitan Transit Authority* v. *Brotherhood of Railroad Trainmen,* 8 Cal. Rptr. 1, 355 P.2d 905, where the California Supreme Court held that the Transit Authority Act gave to both public and private employees the right to engage in concerted activities, including the right to strike. The Montana court did not consider the distinction between proprietary governmental functions and governmental functions. See *Tate* v. *Philadelphia Transportation Co.,* 190 A.2d 316, 53 LRRM 2031 (Pa.Sup.Ct. 1963), involving a public transit strike, and *Celina, Ohio* v. *NOW,* 9 LRRM 789 (Ohio Ct. of Com. Pls. 1941), involving a strike by municipal electric light and water works. These distinguish the governmental functions from the proprietary functions of state and local governments.

[8] This case was not reported until 1974 in the BNA services.

contract period that was not the subject of collective bargaining prior to petitioning for final and binding arbitration. The court concluded that "neither the statute nor public policy permits such amendment and that the amendments contemplated by the statutes refer to matters and to contract periods which had previously been the subject of collective bargaining negotiations." The court, therefore, affirmed the trial court's decision setting aside that portion of an arbitration award which adopted the county's final offer to include a two-year contract period, a subject that had not previously been bargained between the parties.

*City of Sioux Falls* v. *Sioux Falls Firefighters Local 813,* 85 LRRM 2066 (S.D. Cir. Ct., Nov. 5, 1974).

This case is currently pending before the South Dakota Supreme Court. Oral argument was held in November 1974. The circuit court held that the state's Firemen's and Policemen's Arbitration Act is legal in so far as it provides that fire or police department employees engaged in dispute with a municipality over wages, hours, and working conditions may obtain an arbitration board to decide the dispute following a public hearing. That section of the statute, however, which provides that the arbitration board's decision is binding upon both parties unless appeal is taken to state circuit court was declared to be an unconstitutional delegation of legislative authority to an arbitrator.

*City of Alpena* v. *Alpena Firefighters Association,* 224 N.W.2d 672, 88 LRRM 3304 (1975).

The Michigan court affirmed a circuit court's order enforcing a legislated arbitration award over the city's contention that the award was defective because the arbitration panel failed to consider all the statutory criteria. The court held that an arbitration panel may act on the evidence presented and need not consider each and every standard set forth in the statute.

*Wills Eye Hospital and Albert Einstein Medical Center and Temple University Hospital* v. *Commonwealth of Pennsylvania and Philadelphia Association of Interns and Residents,* Pa. Commonwealth Ct., 87 LRRM 2778, 583 GERR B-1 (Dec. 2, 1974).

In a split decision, the Commonwealth Court of Pennsylvania held that interns, residents, and clinical fellows at Philadelphia Wills Eye and Temple University's Hospitals and Albert Einstein

Medical Center primarily fulfill educational aspirations in their service at the respective hospitals and, therefore, are not public employees covered by the Pennsylvania Employee Relations Act.

According to the court, statutes analogous to the PERA classify individuals as employees or students dependent on the primary purpose of the individual's association with the institution, i.e., "whether the individual is engaged primarily to advance his education or is an ordinary job holder and wage earner."

In the instant case, the court found that the main purpose of the doctors' affiliation was to "continue their medical education and not to render service to the hospital." According to the court, inherent in PERA is the desire for a continuous employer-employee relationship. The court stated that doctors lack this interest since they do not contemplate a long relationship with the employer. Furthermore, interns and residents "were not selling their services in the marketplace as would the traditional employee." Thus, they could not be considered employees under PERA.

*West Irondequoit Teachers Association* v. *PERB,* 35 N.Y.2d 46, 87 LRRM 2618 (1974), (N.Y. Ct. App.), *aff'g* 346 N.Y.S.2d 418, 87 LRRM 2313.

The New York Court of Appeals ruled that the determination of class size in public schools is a nonmandatory subject of bargaining, thereby affirming a unanimous decision of the appellate court and upholding an earier PERB ruling. The impact, however, of school board decisions on class size are mandatorily bargainable. Thus, the court distinguished between the determination of class size and the compensation teachers are due for instructing different size groups, the former being a matter of school policy and the latter a mandatory subject of bargaining.

*Pennsylvania Social Services Union, SEIU* v. *PLRB and Commonwealth of Pennsylvania,* Pa. Commonwealth Ct., 87 LRRM 2482 (1974).

The number of cases assigned to employees of the Department of Public Welfare is not a bargainable matter, ruled the Commonwealth Court of Pennsylvania, affirming a decision of the PLRB. In the court's view, employees' caseloads involve inherent

managerial policy rather than terms and conditions of employment.

The court's ruling was based on the 1973 decision in *PLRB* v. *State College Area School District,* 306 A.2d 404 (1973), 510 GERR B-5, in which it was determined that maximum class size was an issue of managerial policy to be handled through the "meet and discuss" procedures provided in the bargaining statute. In the instant case, the court merely affirmed its prior ruling without additional comments on the basic issue.

*New Jersey Turnpike Employee's Union, AFTE Local 194* v. *New Jersey Turnpike Authority,* 64 N.J. 579, 319 A.2d 224, 86 LRRM 2842 (1974).

Affirming a lower court decision, the New Jersey Supreme Court ruled that a proposed agency shop clause in a contract between the New Jersey Turnpike Authority and the American Federation of Technical Engineers Local 194 contravenes the right-to-work provisions of the state's public employee bargaining law. The statutory language on which the decision rests provides that public employees "shall have and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity."

*Mineral County Classroom Teachers Association* v. *Mineral County School District,* 570 GERR B-3 (Sept. 2, 1974).

The Nevada Local Government Employee Management Relations Board held that the determination of when a reduction in force is necessary, the number of employees to be terminated, and the areas in which reductions are to occur are management prerogatives and, therefore, nonmandatory subjects of bargaining. But the board also ruled that the order in which individuals are terminated as well as any reemployment rights they may possess are subjects of mandatory bargaining.

### Proposed Federal Legislation Covering Public Employees

The question of whether the federal government should enact a public sector bargaining law covering state and local employees was widely debated in 1974. Several bills were presented in the

Congress and have been reintroduced in the 94th Congress. One would administer public sector labor relations through a new Federal Public Employment Relations Commission (H.R. 8677 and companion bill S. 3295); one would remove the exclusion of states and their political subdivisions from Section 2 (2) of the National Labor Relations Act (H.R. 77); and one would deny public funds to a state that does not meet specified standards of civil service and authorize collective bargaining (H.R. 4293, the National Public Employee Merit System Act).

The Coalition of American Public Employees (CAPE)—an association of the American Federation of State, County, and Municipal Employees, the National Education Association, and the National Treasury Employees Union—has actively supported the enactment of federal legislation covering public employees. In opposition have been organizations such as the National League of Cities, the United States Conference of Mayors, and the National Association of Counties. A compromise position, which calls for federal-state cooperation to bring about nationwide public sector bargaining, has been advocated by the Association of Labor Mediation Agencies (ALMA). At its July 1974 convention, ALMA issued the following resolution that favors the enactment of a nonpreemptive federal law:

> "Be it resolved hereby that ALMA supports the following positions with regard to Federal legislation on public employee labor relations:
>
> "1. The overriding consideration should *not* be to engage in the far too frequent dispute process of Federal vs. State jurisdiction; rather emphasis should be on Federal-State cooperation to achieve the best possible program to provide meaningful participation for employees in bilateral determination of their conditions of employment at the same time preserving the necessary rights and responsibilities of democratic government.
>
> "2. Any such legislation should give equal rights and responsibilities to all Federal, State and Local government employees.
>
> "3. Federal legislation should provide minimum standards and guidelines for collective negotiations. Such standards should, as a minimum, contain the following: Public employees should be granted the right to organize, to join employee organizations, and to bargain with respect to their terms and conditions of employment. Standards should be provided for resolution of representative disputes, unit determinations, and elections to determine bargaining agents. Broadly defined unfair labor practices should be included and should be applicable to both employers and employee

organizations. A framework for the resolution of impasses should be mandated, but wide latitude for experimentation should be permitted. At the state or local level, a neutral and politically independent administrative agency should be required to implement the foregoing standards.

"4. Wide latitude for specific interpretation of the foregoing guidelines should be provided the state and local governments.

"5. If a state or local government chooses to administer and implement its own public employee labor relations statute or other enabling acts or orders which shall provide for a system whereby collective bargaining systems are created within the broad, general Federal standards, it shall be permitted to do so without Federal preemption. Any controversy as to whether a specific provision in a state or local statute or other enabling acts or orders which shall provide for a system whereby collective bargaining systems are created is not consistent with the broad general standards should be resolved in the Federal Courts and such proceedings may only be initiated by the Federal agency.

"6. If any state or local government chooses to *not* administer its own public employee program, the appropriate Federal agencies will do so in keeping with the basic Federal standards."

Many observers question the wisdom or necessity of imposing a preemptive uniform bargaining law on all jurisdictions, especially since several states have enacted their own comprehensive statutes and have been experimenting with different resolution procedures. Additionally, serious questions have been raised concerning the constitutionality of a federal statute that would "take precedence over all ordinances, rules, regulations, or other enactments of any state, territory, or possession of the United States or any political subdivision thereof." (Both H.R. 8677 and S. 3295 contain this provision.) The Supreme Court held in *Maryland* v. *Wirtz*[9] that the minimum wage provisions of the Fair Labor Standards Act apply to employees of state-operated schools and hospitals and that Congress has broad powers under the Commerce Clause to regulate intrastate activities that affect interstate commerce. The enactment, however, of a broad federal bargaining statute covering state and local employees arguably would invade an area of state sovereignty historically protected by the Tenth Amendment.

The Supreme Court is currently considering a case that undoubtedly will shed light on the question of whether the federal

[9] 392 U.S. 183 (1968).

government may properly regulate the labor relations of state and local employees. *Ernest Fry, et al.* v. *United States* involves the application of the Economic Stabilization Act to wages of Ohio state employees. The case arose when the Ohio general assembly enacted a pay bill, which took effect on January 20, 1972 and provided state employee wage and salary increases that averaged 10.6 percent for all employees. The state filed application with the Pay Board, which was implementing the Economic Stabilization Act of 1970, for permission to pay the increases. The Pay Board denied the state's application to the extent the requested increase exceeded the Board's guidelines of 7 percent for that year. On June 20, 1973, the Ohio Supreme Court determined that state officials must pay the entire salary increases provided in the bill on the ground that Congress was not authorized to regulate state salaries and wages. The U.S. Temporary Emergency Court of Appeals, however, permanently enjoined payment of the increases, and in 1974 the U.S. Supreme Court granted certiorari. Decision is pending.

A similar question is pending in the Court as to the applicability of the 1974 amendments to the federal Fair Labor Standards Act to state and local government employees.[10]

### Reports on Impasse Resolution Experience

Following up on their presentations to the 27th Annual Meeting of the National Academy of Arbitrators, Professors James L. Stern of the University of Wisconsin and Charles M. Rehmus of the University of Michigan reported on experience with final-offer arbitration in Wisconsin and Michigan in two articles appearing in the September 1974 issue of the *Monthly Labor Review*.

The Wisconsin law was amended in 1972 to provide for resolution of disputes between local governments and police, firemen, and county law enforcement officers by package final-offer arbitration. According to Stern, the law has not discouraged the parties from bargaining. In 1973, only 9 percent of 173 negotiations concerning police and firemen were affected by arbitration awards,

[10] See *National League of Cities* v. *Brennan*, discussed in 590 GERR B-15 (1/27/75).

and in the first quarter of 1974 "the experience was similar." Apparently, parties are "eager to settle by themselves rather than have an outsider impose on them a binding decision."

As to whether final-offer arbitration brings parties closer to settlement than conventional arbitration, examination of 24 awards published by April 1, 1974, suggests that the final-offer procedure persuades the parties to reduce the number of issues to be arbitrated. And despite problems in multiple-issue disputes where the arbitrator finds himself in agreement with one party on one major economic issue and with the other party on an equally important noneconomic issue, most Wisconsin arbitrators favor continuation of the final-offer procedure rather than a shift to conventional arbitration or issue-by-issue final-offer arbitration.

Reporting on the Michigan experience, Rehmus says that the final-offer procedure in that state (tripartite panel) "begins to look more and more like that powerful neutral hybrid known as mediation-arbitration."

Final offers frequently are not and do not stay final, comments Rehmus, because the statute, which covers police, firefighters, and deputy sheriffs and applies only to economic issues, does not require the parties to specify their final offers at any time in the arbitration hearing.

> "In short, many of the parties in Michigan view the final offer arbitration hearing as a continuation of the negotiation process. Each seeks at least the opportunity to modify its offers in line with changes in the other party's position and with whatever inferences can be drawn or information obtained as to the likely opinion of the neutral member of the panel."

This flexibility in the nature and timing of offers has encouraged arbitrators to mediate, especially since the statute permits the arbitrator to remand the dispute to the parties for three weeks of further bargaining. Thus, the unanticipated result of final-offer arbitration has been the encouragement of negotiated settlements reached with the mediation assistance of the arbitrators.

Gary Long, a management representative in Eugene, Oregon, and Peter Feuille, a professor of management at the University of Oregon, reported on the history of final-offer arbitration in

Eugene, where it has been the impasse procedure provided by municipal ordinance.[11]

The Eugene experience is similar to that of Michigan in that the final-offer ordinance has prevented frequent resort to the procedure, and arbitration panels have issued relatively few awards. Continued bargaining and/or mediation occur during the arbitration hearing, and this has often resulted in a settlement without the necessity of an award. As Rehmus observes, "In both Eugene and Michigan, it appears, the interaction between the partisan panel members and the neutral member on the one hand and between both parties' bargaining committees on the other is crucial to the mediation-arbitration process."

[11] "Final Offer Arbitration: Sudden Death in Eugene," 27 *Ind. & Lab. Rels. Rev.* 186 (1974); reprinted in 547 GERR E-1 (1974).