CHAPTER 7

DECISION-MAKING IN PUBLIC-SECTOR INTEREST ARBITRATION

I. LEGISLATED ARBITRATION IN MICHIGAN—A LATERAL GLANCE

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As one who has tried to maintain a polite distance from Michigan's system of legislated, issue-by-issue, final-offer, police- and fire-service arbitration, I propose to discuss it somewhat impolitely with you.

Labor relations in the public sector in Michigan have generally been governed since 1965 by what has been known as the Public Employment Relations Act,[1] which can be roughly characterized as a rehash of the original Wagner Act, flavored with a strong prohibition against strikes. The organized firefighters of the state and their counsel had a vital role in bringing that statute into being. But a chance for collective bargaining and appeal to mediation and fact-finding procedures did not long satisfy them and, with some assistance, they succeeded in persuading the legislature in 1969 to afford supplemental special treatment to essential public services in what is commonly referred to as Act 312, a measure providing "compulsory arbitration of labor disputes in municipal police and fire departments."[2] Originally, the act contemplated that the municipality and the union would each select a delegate who would together select an impartial chairman, the three to serve as an arbitration board empowered to determine any dispute submitted in accord with prescribed statutory guidelines. In 1972 the original act was amended[3] to provide for arbitration of economic issues, as distinct from noneconomic issues, by presenting the arbitration

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[1]M.C.L.A. 423.201 *et seq.*, M.S.A. 16.455(1) *et seq.*
[2]P.A. 1969, No. 312, M.C.L.A. 423.231 *et seq.*, M.S.A. 17.455(31) *et seq.*
[3]P.A. 1972, No. 127.

panel with a choice between the final offers of each party on an issue-by-issue basis. In its present form the act does not cover grievances, but only interest disputes.[4]

The Michigan system has been widely propagandized before this assembly and in the literature.[5] Accordingly, I pause only to remind you of some of its salient features. A legislative statement of policy suggests that this statutory arbitration system is designed as an alternative to the strike, yet it is available to employers and employees alike. If at the outset only unions sought to invoke its provisions to spare themselves from the adverse or fruitless consequences of a strike, recently employers are finding that an arbitration panel may assist them in changing entrenched contract language which the unions continue to cherish, and they are just beginning to invoke the statute.

Originally the act covered "employees engaged as policemen or in fire fighting or subject to the hazards thereof."[6] In 1975 our court of appeals refused to extend its coverage to police officers employed at Eastern Michigan University who performed functions similar to municipal police officers because they were not working "in" a municipal police or fire department.[7] In 1976 [8] coverage was broadened by amendment to include emergency medical-service personnel employed by a police or fire department, as rather elaborately defined, and in 1977 [9] by further amendment, it was expanded to include an "emergency telephone operator employed by a police or fire department." Other public employees who answer telephones do not enjoy the blessings of the system.

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[4]Three-judge panels of the court of appeals concluded that a dispute over an existing contract could be arbitrated under the act. *Local 1325, AFSCME* v. *McKervey*, 62 Mich. App. 689, 233 N.W.2d 836, 90 LRRM 2954 (1975); *Local 1518, AFSCME* v. *Meharg*, 77 Mich.App. 145, 258 N.W.2d 168, 96 LRRM 3047 (1977); as well as the contrary, *Grosse Pointe Farms Police Officers Ass'n* v. *Howlett*, 53 Mich.App. 173, 218 N.W.2d 801, 86 LRRM 2171 (1974). A recent amendment, P.A. 1977, No. 303, expressly excludes grievance arbitration from Act 312.

[5]*See, e.g.*, Stern, Rehmus, Loewenberg, Kasper, and Dennis, Final-Offer Arbitration (Lexington, Mass.: D.C. Heath and Co., 1975), particularly 37–69; Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 Cincinnati L. Rev. 47 (1973); Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, in The Future of Labor Arbitration in America (1976).

[6]As such, it was held inapplicable to "detention officers" employed by a police department in *Lincoln Park Detention Officers* v. *City of Lincoln Park*, 76 Mich.App. 358, 256 N.W.2d 593, 96 LRRM 2619 (1977).

[7]*Ypsilanti Police Officers Ass'n* v. *Eastern Michigan University*, 62 Mich.App. 87, 233 N.W.2d 497 (1975).

[8]P.A. 1976, No. 203.

[9]P.A. 1977, No. 303.

"Whenever in the course of mediation of a public police or fire department employee's dispute," the statute reads, the dispute has not been resolved, the employees or the employer may initiate binding arbitration proceedings by prompt request therefor. Does this mean that mediation on the very issues to be submitted must precede consideration by an arbitration panel? Under the accepted principle that self-restraint is for the parties and not the arbitrator, the answer is that few seem concerned whether Michigan's mediators have ever looked at the question before it goes to arbitration and is determined by a panel. Unlike the Iowa system, for example, fact-finding is not a prerequisite to "compulsory arbitration" in Michigan although it is available under our general labor law.

Within 10 days after arbitration is requested, the employer and the union select a delegate to an arbitration panel, advising the Michigan Employment Relations Commission (MERC) and each other of their choices. These representatives are personnel officials of the governmental unit, union officials, or their attorneys. It is common for one member of a law firm to present the case and another member to act as an arbitrator, and in a few instances the system has become so refined that the same person presents the case to the panel and then proceeds to participate in its deliberations as a panel member. Whatever may have been the tradition in consensual arbitration,[10] the delegates named by the parties under Act 312 are now regularly and unabashedly acting in their behalf.

Within seven days after the parties have designated their representatives,[11] the commission selects, from a panel of arbitrators which it maintains, three persons as nominees. Within five days each party may peremptorily strike the name of one nomi-

[10]"Since arbitrators are selected, not as agents of the parties, but to act in a quasi-judicial capacity in place of a court, they must ordinarily be impartial and nonpartisan so as to render exact justice to the parties." 65 A.L.R.2d 755, 56 A.L.R.3d 697. At least one court has suggested that where the arbitration procedure "is purely statutory," and judicial review is limited to determining whether the decision was arbitrary or capricious, the "appearance of fairness doctrine" has no application. Four posthearing, predecision drinks with one side and without the other did not there impair the validity of the impartial chairman's award. *Union Local 1296, IAFF* v. *City of Kennewick,* 86 Wash.2d 156, 542 P.2d 1252 (1975).

[11]Refusal by a party to appoint a panel representative does not vitiate an award by the other party's representative and the impartial chairman. *Dearborn Fire Fighters* v. *City of Dearborn,* 42 Mich.App. 51, 53–54, 201 N.W.2d 650, 81 LRRM 2826 (1972), *affirmed by equally divided court,* 394 Mich. 229, 231 N.W.2d 226, 90 LRRM 2002 (1975). But failure of the panel to agree would presumably not produce a "majority decision" required by Section 10. *Cf.,* A.L.R.2d 1346.

nee. The commission thereupon within seven days designates an impartial chairman from the name or names not stricken. In point of fact, these time limits are usually construed in a Pickwickian sense.[12] Parties either waive them with grace or swallow the inevitable.

Though the statute contemplates that the whole procedure should be "expeditious"—the hearing not to extend more than 30 days and the decision to follow within 30 days from the close of the hearing—I doubt that this timetable is achieved in 5 percent of the cases. Completion of proceedings within six months from the date of appointment of the chairman represents "expeditious" handling. There are numerous proceedings which have taken a year or a year and a half.

The present procedure for selection of the impartial chairman/arbitrator was introduced after our supreme court in 1975 was critical of the former procedure which enabled the parties themselves to select a delegate of governmental power who served, in the chief justice's phrase, as a "hit and run arbitrator" without political accountability.[13] Under the new system our commission maintains a panel of arbitrators acceptable to it and willing to serve at the $200 per-diem rate currently fixed by the commission. At least in the eyes of the commission chairman, these arbitrators are deemed "impartial, competent and reputable," as the statute requires. Their accountability or responsibility to the political process and republican government is apparently hinged on the discretion of a commission which I dare say has neither the time nor the inclination to inspect their product and performance—at least in the absence of a volcanic public outcry.[14]

After the impartial chairman is chosen because he—or she—

[12]This appears to follow the trend of judicial decisions dealing with the arbitration of labor disputes. *See, e.g.,* 56 A.L.R.3d 869–880.

[13]*Dearborn Fire Fighters* v. *City of Dearborn,* 394 Mich. 229, 231 N.W.2d 226, 90 LRRM 2002 (1975). The views of Mr. Justice Levin, challenging the statute, have been more sympathetically received in Utah. *Salt Lake City* v. *International Ass'n of Fire Fighters,* 95 LRRM 2383 (Utah Sup. Ct. 1977). Constitutional issues are reviewed in Weisberger, *Constitutionality of Compulsory Public Sector Interest Arbitration Legislation: A 1976 Perspective,* in Labor Relations Law in the Public Sector, ed. Andria S. Knapp (1977); *Comment, Binding Interest Arbitration in the Public Sector: Is It Constitutional?,* 18 William & Mary L. Rev. 787 (1977). Change in the manner of appointment of the chairman was effected by P.A. 1976, No. 203.

[14]The MERC chairman, Charles M. Rehmus, assures me that surveillance has been sufficiently diligent to have resulted in "pruning" of the panel by some 20 percent in the last 15 months.

is the least distasteful to the parties of the three names submitted, he is then to proceed to call a hearing within 15 days of his appointment. He is to preside over the hearing and take testimony.[15] The statute provides that "any oral or documentary evidence and other data deemed relevant" by the panel "may be received." The proceedings shall be informal and technical rules of evidence shall not apply. In view of the breadth of the standards prescribed to guide decision, a panel would be foolhardy indeed to exclude proffered evidence on the ground of relevancy.[16] Consequently, most arbitration panels suffer in mute silence the procession of witnesses who offer their views on the psychological impact of a food allowance on firefighting morale, the competency of a local bar association to select a grievance arbitrator, and the diminution of a police officer's status if he has to check the gas and oil levels in his scout car. This grandiose spirit of evidential hospitality produces days of hearing, builds massive and expensive stenographic transcripts —for which the parties pay if they wish copies—and elongates surprisingly the time said to be required by the chairman to confer with his colleagues, meditate over the evidence, and prepare an opinion justifying a choice of one offer or another.

Final-offer arbitration has not seemed to alleviate the enormous burden of making up the arbitral mind. Fees of the chairman/arbitrator, shared by each party and the state, not infrequently run into two or three thousand dollars per case, regardless of the size of the bargaining unit. The MERC has calculated the average payment to the impartial chairman at $1,800 per case. All of this can be viewed positively and constructively if you subscribe to the theory that protracted boredom and fatigue are often the best stimulants to resolution of labor disputes and that painful fees are as indispensable to successful arbitration as to psychoanalysis.

In a 1975 case our court of appeals held that one not a party to an arbitration proceeding under the act is not bound by the

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[15]Some chairmen have construed this authority to permit or require the convening of a prehearing conference at which issues are narrowed, initial statements of position are formulated, and provision is made for the exchange of documentary evidence and stipulations required concerning the authenticity of relevant documents and similar matters. Other chairmen seem to disdain such "activism."

[16]Invalidation of an arbitration award because of an arbitrator's refusal to consider evidence is relatively rare. *See* 75 A.L.R.3d 132. Some parties complain that under Act 312 excessive liberality in admitting all proffered evidence has substantially increased the size and costs of hearings.

award and may challenge its adverse effect upon him in court.[17] One with a "substantial interest" may be granted leave to intervene in the arbitration hearing under Section 6 of the act. While there has been little or no such activity to date, labor organizations competing for municipal funds with police or fire employees or taxpayer groups with their own conception of the public interest may in the days ahead be expected to demand a voice which will add spice as well as complication to these proceedings.

At or before the end of the hearing, the three-member arbitration panel is required to identify the economic issues in dispute and direct each party to submit its last offer of settlement on each economic issue so that the panel can choose between them. When the panel fixes the final, ultimate, and last moment for a final and ultimate offer varies considerably. Some chairmen require final offers after preliminary settlement discussions break down and the taking of evidence begins. Others require it when the testimony is completed, and others set a deadline even after that. Since the panel has the authority to remand particular issues to the parties for further negotiations, it may be some time before genuinely final "final offers" are in fact exchanged. It is this flexibility which conduces to med-arb or arb-med and which most participants regard as the distinctive advantage of Michigan's present system.

What is or is not an economic issue is somewhat metaphysical. In one case, first-aid training and firearms' qualification were recognized as matters of economics, while promotional procedures were not economic at all. In another case, after identifying call-in pay, pay for attending court, going on vacation, and cleaning one's uniform as economic items, the panel felt that allowable sick days, protection against layoff, and subcontracting were noneconomic. Retirement programs are sometimes regarded as economic and sometimes not. Direct elements of the wage package are presumably economic, but it would not be too cynical to conclude that arbitration panels often classify other items by deciding first whether they do or do not want their own judgment to be limited to the final offers of the respective parties. A panel which is reluctant to undertake composition

[17] *Genesee County Prosecuting Attorney* v. *City of Flint,* 64 Mich.App. 569, 571, 236 N.W.2d 146 (1975).

of an agency-shop provision is perhaps well advised to find that internal union-security provisions are plainly an economic issue between the union and the public employer. Here again the statute subordinates logic to majority rule and makes the panel's determination of economic and noneconomic issues "conclusive."

Although the three arbitrators are to consider "the interest and welfare of the public," they are also to consider the "stipulations of the parties." With two passionate partisans on the panel, the chairman's conception of the public interest necessarily has to be tempered by his ability to command at least the grudging support of one of them to obtain a majority decision. The chairman is now assumed to be a public agent of indeterminate tenure who is required to take the same constitutional oath as a governor or judge. His "impartiality," however, is to be cabined by what at least one of the two parties wants. While this state of affairs may be tolerable in a consensual system, whether it will cause uneasiness in courts reviewing a legislated system remains to be seen. One distinguished arbitrator has suggested that the system would be bettered if the parties' nominees were nonvoting advisers rather than *eminences grises.*

Grievance arbitrators, who traditionally enjoy the womb-like security of the four corners of a collective bargaining agreement, will find themselves cruelly wrenched by our legislature into a wider and more uncertain universe if they accept appointment under Act 312. They are directed from the start to make legal judgments. The first standard for decision in Section 9 of the act is that the arbitration panel consider the "lawful authority of the employer." Does the governmental unit have authority to deviate from provisions of the city charter or the special statute governing appointment of the sheriff's deputies or local civil-service legislation? Can it accept and implement an award of the panel which overrides such provisions? The impartial chairman without aptitude in dealing with such questions of constitutional and public law can hardly meet contemplated standards of competence.

In an order dated August 30, 1977, in *Matter of Compulsory Act 312 Arbitration Between City of Jackson and Jackson Fire Fighters,* No. 77-2990, a panel of our court of appeals, apparently treating the chairman of the panel like an administrative law judge, recognizes the right of a litigant to test his qualifications under the statute. "*Voir dire* and challenge for cause is a proper method for

challenging" the appointment, the court held, but it should be done at the outset of the proceedings if the basis for disqualification is then known. The court went on:

> "We note that the statute creating the panel of arbitrators provides ample standards to guide the Commission in making appointments thereto, and it is the burden of the objecting party to establish a record, through the *voir dire* on the arbitration record, which would permit this Court to determine that the Commission's appointment of a particular arbitrator was not supported by competent, material and substantial evidence on the whole record."

Leave to appeal was denied by our supreme court January 25 of this year. This recent contribution to our jurisprudence now provides a delicious opportunity to probe the arbitral psyche on the record. And since the press and anyone else is free to attend these hearings, the quality of Michigan entertainment, if not justice, may well be strengthened. The chairman/arbitrator must not only be impartial and free from bias or prejudice but, presumably, give the appearance of being so. He must be a reputable citizen—junkets to New Orleans notwithstanding—and most appalling of all, he must be "competent." The difficulties which the MERC has been experiencing in recruiting suitable names for its panel may well be augmented in the months ahead.

The arbitration panel is directed to consider a mélange of factors, seemingly aimed at economic issues, such as vacations, holidays, excused time, insurance and pensions, medical and hospitalization benefits and overall compensation, the cost of living, and the financial ability of the governmental unit to meet what are somewhat ambiguously referred to in the act as "those costs."[18] Also, a comparison of wages, hours, and working con-

[18]Section 9 directs the panel to consider the "following factors as applicable: (a) The lawful authority of the employer. (b) Stipulations of the parties. (c) The interests and welfare of the public and the financial ability of the unit of government to meet these 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 suitability of employment, and all other benefits received. (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings."

ditions in public and private employment in what are labeled "comparable communities" is to be made, and other factors, not enumerated but traditionally considered in making these decisions, shall likewise be given weight by the panel. Ever since the Supreme Court held[19] that Congress could validly direct that coal prices under the Guffey Act be "just and equitable as between producers" and yet simultaneously reflect "due regard to the interests of the consuming public," such Janus-faced standards seem to satisfy constitutional requirements but they quicken, rather than limit, the creative imagination of delegees of political power.

Comparisons, we are told, can be both odorous and odious. With a little pain, a bush can be supposed a bear. Two cities, side by side, have been rejected as noncomparable because of differences in population, or size, or historical development, or geography, or the criminal predispositions of the inhabitants. Instructive parallels in deciding Michigan cases have been seen, on the other hand, in the states of Washington and Colorado and even in Germany. Obviously, each side's notions of comparability are dictated by the results it wishes to reach, and in between there is a further range of communities susceptible to comparison.[20] The panel is empowered *sua sponte* to summon witnesses to give relevant testimony if the parties do not. There is thus an unlimited spectrum of possibilities in finding defensible comparisons to justify acceptance of one final offer or the other. One can still agree with Professor Bernstein's conclusion of a generation ago that "the criteria of wage determination are something less than definitive."[21] There are few Daniel Boones in the arbitration fraternity; pioneering awards do not come often. Most panels look for what they conceive to be the middle of the road and, I think, then draw the map accordingly.

The written results vary considerably in method and analytic technique. A few opinions emanate from the "brevity is the soul of wit" school. The panel indicates that it is familiar with the

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[19] *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 397 (1940).

[20] One acute management representative, Ronald J. Santo, has suggested that evidence of "at least" the following factors bears upon comparability: regional groupings, population size, commercial/industrial, residential land use and/or zoning, state equalized value, per capita income of residents, population density, crime and fire statistics, municipality's potential for growth, size of department, conditions of employment, departmental organization.

[21] Bernstein, Arbitration of Wages (Berkeley: University of California Press, 1954) at 106.

statutory criteria, refers to the mountainous testimony and exhibits offered, gives assurance that everything has been duly considered, and then announces that it accepts final offer A or B. Since this follows a pattern of analysis frequently utilized by our appellate courts, it may well survive the judicial review that our statute permits.[22] In fact, in one case what was no more than an arbitral mutter was deemed adequate and enforced.[23]

Law-school professors, former judges, and assorted scholars, who are accepting public-service responsibilities as impartial chairmen under Act 312 with decreasing frequency these days, tend to set forth the reasoning that led to their conclusions with considerably more care and detail. An explanation is offered why some communities are deemed comparable and others are not, and why those regarded as instructive have induced the panel to conclude one way or the other.

There has also emerged from these panels the "waltzing Mathilda" school of opinion-writing. Typically, in determining which of two proposed three-year wage packages will be accepted, the panel rehearses for about 20 pages the superiority of the position of party A with respect to the first year; another 20 pages are devoted to why party B's proposal for the second year is superior. Twenty more pages are needed to show that the proposals for the third year are about equal, and then 40 pages strike the balance for the entire package on one side or the other. It is not surprising that such essays do not absorb the leisure of the practicing bar. Mercifully, the opinions are not regularly or currently published or circulated. They are hidden in a filing cabinet at the MERC's offices.

Processing of cases under the statute seems generally to satisfy most of the parties most of the time. Official statistics from our commission indicate that between January 1, 1973, when the final-offer, issue-by-issue system became effective, and June 30,

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[22]Under traditional analysis, of course, one line of decisions emphasizes that arbitrators must "pass on all matters submitted," 36 A.L.R.3d 649, while another makes clear that detailed findings of fact and conclusions of law are not required unless the arbitrator's engendering authority explicitly so demands, 82 A.L.R.2d 969.

[23]*City of Alpena* v. *Alpena Fire Fighters Ass'n,* 56 Mich.App. 568, 573, 224 N.W.2d 672, 88 LRRM 3304 (1974). Section 12 provides that an order of the arbitration panel shall be reviewable by a circuit court "but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or similar unlawful means." *See* generally, *Compulsory Arbitration: The Scope of Judicial Review,* 51 St. Johns L. Rev. 604 (1977).

1977, there were 403 cases submitted of which about half, 201, were settled without an award. Awards were issued in 129, and 73 cases were listed as pending at the end of the fiscal year. Thus, during the three-and-one-half year period, in which an estimated 1,400 negotiations subject to the act took place, filings averaged between nine and ten a month and yielded a little more than three decisions a month. Roughly the same pace has continued throughout calendar year 1977.

In the face of these statistics, lamentations for the murder of collective bargaining by legislated arbitration seem decidedly premature. The "conventional wisdom" solemnly proclaimed a few years ago has proved more conventional than wise, at least on the basis of Michigan's experience thus far. Rarely have parties who have survived a 312-arbitration one year seriously sought a return engagement. Especially where collective bargaining was unrecognized or primitive, a single running of the statutory gauntlet often yields long-term sobriety as well as a short-term settlement. The availability of third-party dispute resolution has generally seemed to encourage rather than to discourage the bargaining process, even though both sides have not hesitated to utilize the statutory machinery for whatever opportunities it was seen to provide.

While originally it was established unions in the larger centers which invoked the statute, in recent years locals of the IAFF, the FOP, AFSCME, and the Teamsters as well as independent organizations have sought arbitration from big cities and small villages, townships, and urbanized and rural counties in both of our peninsulas. Issues presented have ranged from paid lunches, false-arrest insurance, and a "most favored nation" or parity clause, to a residency requirement, a "maintenance of standards" provision, or whether any management rights or ban on strikes should be recognized in the labor contract.

In 1972 the constitutionality of the statute as it then existed was upheld by the court of appeals[24] and the four justices of our supreme court who heard the appeal divided 2-to-2, thus leaving in effect the decision upholding the act.[25] Despite the inconclusiveness of this result in a court with seven justices, no one has

[24] *Dearborn Fire Fighters* v. *City of Dearborn*, 42 Mich. App. 51, 201 N.W.2d 650, 81 LRRM 2826 (1972).

[25] *Dearborn Fire Fighters* v. *City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226, 90 LRRM 2002 (1975).

seriously challenged the validity of the act since. It has become constitutional by acquiescence. This in itself would seem to attest to its general acceptability.

The Michigan Municipal League has consistently pronounced the statute a "disaster" and has warned the California legislature to avoid the same doom.[26] Recently, it has adopted an official manifesto which says the act has destroyed collective bargaining, imposed excessive cost burdens and arbitrary solutions through arbitrators' having no responsibility to implement their awards or accept the consequences of them. The league suggests repeal of Act 312 even at the price of legalizing strikes throughout the public sector. This seems mostly gestural flamboyance built upon uncertain premises. The claim that awards have been substantially higher than negotiated settlements was disputed in a 1974 study;[27] a more recent analysis is under way which will seemingly show a tendency of arbitrators to accept the final offers of unions on economic matters and reject other demands, with a more modest rate of increase now than in former years.

There have been a number of cases where the parties have brought 40 or 50 unresolved issues to the arbitration panel. This may suggest that the bargaining process has broken down or that it never existed in the first place. It may also bespeak nothing more than the common phenomenon that when experienced bargainers sense an impending impasse, they "throw everything back on the table." In such circumstances, strong chairmen have often told the parties they will simply not entertain such a multitude of issues and directed them to get back to the table and sort out the critical points of dispute. I understand that the MERC is also taking steps to remand the parties to mediation when they have invoked arbitration before winnowing their demands. The commission's figures indicate that an average of 12 disputed issues go to arbitration in each case under the act.

Although administrators are unlikely to be pleased when decisional responsibilities are taken from them—especially when the results are perceived to be worse than what they could have

[26]Transcript of proceedings before Assembly Public Employees and Retirement Committee, March 1, 1977.

[27]*See* Bezdek and Ripley, *Compulsory Arbitration versus Negotiations for Public Safety Employees: The Michigan Experience,* 3 J. Coll. Neg. in the Public Sector 167-76 (1974).

done for themselves—I have encountered surprisingly little strident antagonism to the statute from individual management representatives. Lawyers representing managements, like lawyers representing unions, as well as Act 312 arbitrators, have often substantially elevated their standards of living under this act. Their satisfaction, or at least acquiescence, may be touched with self-interest, but none I know says he favors outright repeal of the law. Members of our commission, relieved by this statute from midnight rousings by the governor when essential services are interrupted or threatened, like it fine, since there have been no significant strikes since its passage among employees subject to its terms. For similar reasons, legislators seem to like it, too.

It is hardly necessary to emphasize to this audience that "arbitration" under Michigan's Act 312 has no discernible relation to traditional grievance arbitration other than a seductive identity of sound. The panel interprets no contract. It does not seek to extend what has already been agreed to by the parties to interstices left by inadvertence or design. Instead, it frames a new deal, regardless of "past practices." The chairman is not a "creature of the parties" if he takes seriously his constitutional oath; he is a civil servant. He should not measure his decision by what the parties want, but by what the legislature has provided.

Having said this, I do not ask you to believe it. It may be that some arbitrators really think they are conducting a quasi-judicial adjudication, treat the final offers of both sides as common-law pleadings, and determine which has better evidentiary support. But those arbitrators who conceive of the statute as providing a vehicle for settling a dispute, which might otherwise result in a strike, tend to regard themselves as mediators with some statutory clout. They are more concerned that the dispute be resolved than that right answers be attained. What has been spoken of as the "search for truth" is then not only evanescent but irrelevant. Among Michigan impartial chairmen/arbitrators we have our formalists and our empiricists and lots of shades in between.

I have heard 312-arbitration analogized to judging a beauty contest; what to some eyes is a callipygian nymph to others has all the magnetism of a dumpling. And, of course, at least half the fun of the spectacle is second-guessing the umpire. In Michigan there is a great variety in the approach of arbitrators to the whole interest-arbitration process, the techniques of conducting the hearings, recessing the hearings, and encouraging and dis-

couraging what goes on and off the record. The institution is preeminently the lengthened shadow of the arbitrator/chairman guiding the proceedings. How the process is evaluated thus becomes a function of the critic's own notions as to what interest arbitration ought really to be like. For example, what might seem to a reviewing court a brash and mindless effort to undermine a city charter adopted by the voters in a democratic election has been welcomed by the union as a fair determination of working conditions, and endured by municipal authorities as a relatively painless solution to a thorny political problem. Such a deep incursion by an arbitrator into the political thicket, on the other hand, could cause consternation among those of us with more modest assessments of our competencies as Platonic guardians.

Aside from a few union representatives whose skills have brought them a string of successes under the system, I have found no one who regards the statute with unalloyed enthusiasm. A few think they prefer final-package-offer selection to issue-by-issue consideration. Some prefer more formality and restriction upon the time that a final offer may be submitted to reduce during the arbitration process the "poker playing" which characterizes collective bargaining itself. Some complain about excessive formality and not enough mediation. Some find the hearings too formless. But no one has seriously suggested a constructive alternative to some sort of third-party resolution of disputes in critical areas of the public service.

Our experience thus far confirms that under our present system there is considerable plasticity and diversity in these proceedings. Many different wines can be accommodated in the statutory bottle. It is too soon to appraise the vintage, but presently pending in our legislature are bills to extend a compulsory arbitration system to other areas of the public service. Whatever is really in the bottle, you can see that it is heady stuff.