IV. INTEREST-ARBITRATION LAWS IN WISCONSIN

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Statutory Framework

In my remarks today, I would like first to describe briefly the three separate and distinct interest-arbitration laws in Wisconsin and, second, to discuss some of the problems either encountered or anticipated under our most recent interest-arbitration law which became effective January 1, 1978.

The first of the three laws[1] I want to describe applies to all law-enforcement and firefighting personnel employed in localities with populations of 2,500 or more, except for the City of Milwaukee. Said law has been in existence since 1972 and provides for final-package-offer arbitration. Accordingly, the arbitrator is limited to selecting one or the other party's entire package without modification. Statistics compiled since the enactment of said law establish that the parties settle approximately two thirds of their disputes on their own, without outside assistance; about 20 percent have settled through the use of mediation provided by the Wisconsin Employment Relations Commission (WERC); 2 percent settle after the appointment of an arbitrator, but before the issuance of an award; and the remaining 10 to 11 percent go to arbitration for an award.

Based on available statistical information and my own experience with the process, I believe that final-offer arbitration has been successful in Wisconsin. If we accept the proposition that interest arbitration should not replace collective bargaining but rather provide a reasonable and acceptable method of resolving impasses, as I do, then the ultimate test of any impasse-resolution procedure should be measured by the extent the procedure strengthens the collective bargaining process. In my opinion, interest arbitration in Wisconsin has served its intended purpose because it does provide a reasonable method of resolving impasses and at the same time has not adversely affected meaningful bargaining. In Wisconsin, the number of cases going to arbitration, as a percentage of all negotiations, is approximately

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[1]Section 111.77, Wis. Stats.

10 to 11 percent. Therefore, even with a final and binding method of dispute settlement, the parties have shown an ability and willingness to resolve their own differences. This, I think, can be attributed to the final-package-offer type of interest arbitration and the sophistication of the parties in collective bargaining. The final-package method forces the parties to make realistic final offers, and in so doing, in many cases it forces the parties so close to settlement that one or both of the parties are reluctant to proceed to arbitration over the unresolved issues. This, coupled with the general bargaining expertise of the parties and their ability to assess realistically their packages and chances of prevailing in arbitration, has led to a low rate of use of arbitration as compared to other states.

The second of our interest-arbitration laws[2] applies solely to police personnel employed in the City of Milwaukee. This law has also been in existence since 1972 and provides the conventional wide-open type of interest arbitration. Since the enactment of this law, the police and the City of Milwaukee have entered into three collective bargaining agreements; two were arbitrated agreements and one was a negotiated agreement.

The parties' first agreement was the result of an arbitration involving 150 issues and 32 days of hearing. Their second agreement was also a product of arbitration. In that case the parties, by stipulation, invoked arbitration after only two or three negotiation meetings and with a monetary difference of approximately $99 million.

Obviously on those two occasions the interest-arbitration procedure did very little to encourage a settlement through collective bargaining. An encouraging sign, however, is that the parties reached a settlement, through mediation, in their most recent negotiations which hopefully signifies the beginning of a trend.

Our most recent law,[3] which became effective January 1, 1978, covers all other public employees except the Milwaukee firefighters, law-enforcement and firefighter personnel in localities with populations of less than 2,500, and state employees. The impasse-resolution procedure adopted by said law is what

[2]Section 111.70(4)(jm), Wis. Stats.
[3]Section 111.70(4)(cm), Wis. Stats.

is commonly referred to as med-arb. The important features of this procedure are as follows:

Unlike the two existing interest-arbitration laws, the new law contains an open-meeting requirement. Fortunately, however, said requirement is limited to the parties' initial meeting or meetings held for the purpose of exchanging and explaining initial bargaining proposals. Once this is accomplished, subsequent meetings are closed unless mutually agreed otherwise.

If the parties are unable to reach a negotiated settlement after a reasonable period of time, they may, of course, as in the past request the services of a WERC mediator. If mediation does not result in agreement, then one or both parties may petition for mediation-arbitration at which time an investigator who is a member of the commission's staff is assigned to determine if an impasse exists. Normally, the person appointed investigator is the same person who mediated the dispute if the parties utilized mediation prior to the filing of the med-arb petition. If not, then this will be the first appearance of a third-party neutral. The duties of the investigator are (1) to determine if an impasse exists; and (2) if so, then obtain the final-package offers of the parties. In so doing, the investigator will undoubtedly attempt to mediate the dispute, and hopefully resolve the dispute short of arbitration.

If settlement is not reached during investigation, the commission will certify an impasse and submit a panel of five mediator-arbitrators to the parties for the selection of a mediator-arbitrator. When a mediator-arbitrator has been selected, an opportunity is provided for the public to petition for a public hearing. This is accomplished by any five citizens filing a petition with the commission, within 10 days after the appointment of the mediator-arbitrator, requesting that the initial mediation-arbitration session be held in public hearing. Such hearing is to be conducted by the mediator-arbitrator and is for the purpose of providing an opportunity to both parties to explain or present supporting arguments for their positions, and to provide an opportunity for members of the public to offer their comments or suggestions.

Once the public hearing has been conducted, the law requires the mediator-arbitrator to endeavor to mediate the dispute. If the parties fail to resolve the deadlock after a reasonable period of mediation, as determined by the mediator-arbitrator, then the mediator-arbitrator must notify the parties in writing of his/her

intent to resolve the deadlock by final and binding arbitration. Said notice shall set a date, not to exceed 10 days of said notice, by which either or both parties may withdraw their final offers. If both parties withdraw their final offers and the labor organization gives 10 days' written notice to the municipal employer and the commission of its intent to strike, the mediator-arbitrator or the commission's agent shall again endeavor to mediate the dispute. In other words, the statute allows a limited right to strike in instances where both parties withdraw their final offers. If no such withdrawal occurs, the matter is then submitted to the arbitrator who must accept one or the other of the final offers submitted by the parties. The statute specifically provides that the mediator-arbitrator, in making a decision, shall give weight to the following factors:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interest and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours, and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public employment in the same community and in comparable communities and in private employment in the same community and 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 municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

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

In summary, then, all public employees in Wisconsin except

state employees, Milwaukee firefighters, and law-enforcement and firefighter personnel in localities with populations of less than 2,500, are covered by a form of interest arbitration.

Of those covered, the police employees employed in the City of Milwaukee are subject to the conventional wide-open form of arbitration, while all other employees are subject to final-package-offer arbitration.

Decision-Making Under Med-Arb

On January 1, 1978, Wisconsin became the first state to adopt med-arb as a dispute-settlement procedure. Whether med-arb will prove to be effective in settling disputes has yet to be determined. With only three months' experience under the new law, the lack of sufficient feedback precludes any meaningful conclusions.[4] I would, however, like to share my thoughts on the new procedure and discuss some potential problems I foresee with med-arb.

With the adoption of our new law, the third-party-neutral's role as a decision-maker has been expanded to include mediation, as well as arbitration, and additionally the responsibility of conducting a public hearing if necessary.

The Public Hearing

The mediator-arbitrator will be required to conduct a public hearing if such a hearing is petitioned for by the public. This hearing is separate and distinct from the arbitration hearing, which follows if mediation by the mediator-arbitrator does not result in a negotiated settlement. The interest-arbitration law specifically grants the public a right to a public hearing, and accordingly in those situations the initial mediation-arbitration session will be in the nature of a public hearing. Therefore, the public hearing under such circumstances is the mediator-arbitrator's first order of business. It will be his/her responsibility to conduct the hearing and take reasonable steps to ensure that the public hearing is orderly and that it does not result in undue delay or cost to the parties. The statute states that the purpose

[4]From January 1, 1978, through May 10, 1978, 97 petitions for mediation-arbitration were filed with the Wisconsin Employment Relations Commission; of the 97 petitions, 14 settled after mediation by a commission investigator; 31 were certified initiating mediation-arbitration; one settled after certification; and no awards have yet been issued.

of said hearing is to provide both parties with the opportunity to explain or present supporting arguments for their positions and to provide an opportunity to members of the public to offer their comments and suggestions.

A question which immediately arises is, what effect does the public hearing have on the arbitrator's decision? Will the arbitrator, and can the arbitrator, rely on facts presented by the public? Will the public hearing be maintained as a simple procedure for explaining positions and obtaining the public's reaction to the dispute, or will it resolve in an "arbitration hearing"? If the hearing has no bearing on the results of arbitration, does it serve a useful purpose?

The statute does not specifically address these problems. The statute, however, does specifically provide criteria or factors which the arbitrator must rely on in issuing his/her decision, and it provides for an arbitration hearing at which time the parties must be prepared to supply evidence and arguments relevant to the criteria.

It would appear to me from the statutory scheme that the primary purpose of the public hearing is for the parties to apprise the public of the nature of the dispute and to provide the public with an opportunity to apprise the parties of community sentiment.

My guess is that the benefit arbitrators will derive from the public hearing is that they will (1) use the hearing to become thoroughly familiar with the parties' dispute, and (2) use the public's reaction to the dispute and the parties' arguments in support of their positions in his/her mediation efforts and to pressure the parties to reach a settlement. It may be that once the parties become aware of the criteria and data relied upon by the opposing party, as well as the public sentiment, they will reevaluate their positions and chances of prevailing in arbitration and in so doing may be willing to engage in serious bargaining.

If the dispute proceeds to arbitration, most arbitrators will probably be reluctant to risk an attack on their award by relying on the public hearing, but rather will base their decision on evidence and arguments adduced at the arbitration hearing.

In closing, let me reiterate that a public hearing is not required in all cases, but only when a petition is filed by five citizens. I do not think this option will be exercised in many cases.

Med-Arb

First, let me state at the outset that I believe med-arb can be a useful and effective impasse-settlement procedure in those situations where the parties to the dispute have a meaningful working relationship with the third-party neutral. I think of med-arb as more of an outgrowth or by-product of a relationship rather than a procedure which can easily be complied with in any given situation. For said reason, it remains questionable to me whether med-arb can be effective by making the procedure available to parties but without knowing if the necessary relationship needed to make the procedure work will materialize.

Without a preestablished relationship with the mediator-arbitrator, success of med-arb will greatly depend on the sophistication of the parties and their ability to recognize the value and advantages of med-arb. Parties without such sophistication may very likely bypass mediation entirely in favor of immediately proceeding to arbitration. Also when confronted with the unfamiliar med-arb process, the parties may find it extremely difficult to disclose the necessary information concerning their proposals in an attempt to arrive at a mediated settlement when they know the mediator may ultimately decide their dispute in arbitration. If the parties do engage in mediation, they may spend most of their time trying to justify and convince the mediator-arbitrator of the reasonableness of their offer rather than trying to reach a settlement short of arbitration. On the other hand, they may say as little as possible for fear that any information will be conveyed to the opposing party, thereby weakening their case in arbitration.

Frankly, in my opinion, I find it unrealistic to assume that the parties will readily disclose areas of movement in situations where the mediator-arbitrator is a stranger to the parties. The parties may feel that an indication of flexibility may be interpreted as a sign of weakness, which will be taken into consideration by the arbitrator, consciously or unconsciously, if the dispute goes to arbitration.

Much of the success of the med-arb process will also depend on the mediator-arbitrator. Success of the process not only requires the selection of a competent arbitrator who is also an effective mediator. Whether a sufficient supply of competent

mediator-arbitrators exists in Wisconsin remains a concern of the commission. If the mediator-arbitrator does not have an established reputation as a mediator, he/she must then have the ability to cultivate the necessary relationship and create the necessary atmosphere for effective mediation in a relatively brief period of time. This task is more difficult under med-arb than typical mediation because the mediator may ultimately decide the merits of the parties' respective offers. This inherent power present in the med-arb process must be exercised in a delicate manner to enhance the chances for a negotiated agreement, but at the same time cannot, by its use, destroy the mediator-arbitrator's credibility as an arbitrator should the dispute require arbitration. The need for a skillful mediator is a must under such circumstances.

Further complicating matters is that at the med-arb step of the statutory procedure, the parties will have already exchanged their final-package offers. Therefore, the flexibility usually present at the outset of mediation is hampered by the fact that the parties are unable to make any changes whatsoever without the consent of the other party. One can logically assume that all of the serious bargaining for a negotiated settlement has taken place in the previous step of the procedure at the time final-package offers were formulated. It seems clear the legislative intent in providing for med-arb was to promote negotiated settlements, rather than arbitrated settlements, but requiring the parties to enter the med-arb stage of the procedure committed to final offers does not enhance the chances of a negotiated settlement through med-arb. I want to quickly state, however, that I am not suggesting that final offers should be made at the med-arb step because I think this would weaken the commission's mediation efforts for a negotiated settlement, but I only point this out to highlight a problem which must be contended with by the mediator-arbitrator in attempting to mediate a settlement.

The upshot of my discussion, then, is the recognition that the role of the decision-maker in interest arbitration in Wisconsin has been expanded and is unique in that the decision-maker is also mandated by statute to first conduct a public hearing, if necessary, and to mediate as well as arbitrate the dispute, and, further, a recognition that certain problems may flow from the mediation-arbitration process. Whether the parties and the mediator-arbitrator can on a case-by-case basis establish the

necessary relationship to make the mediation aspect of the mediation-arbitration process meaningful remains to be seen. I think that the success of med-arb as an impasse-resolution procedure will depend on (1) the parties' recognition that as a general proposition a negotiated agreement is preferable to an arbitrated agreement, (2) the sophistication of unions and municipal employers in recognizing the problems created by the med-arb process and their ability to use the process constructively in an attempt to reach a negotiated agreement, and (3) talented arbitrators who are also skillful mediators and their willingness to devote the time needed to accomplish a mediated settlement.