APPENDIX B

SIGNIFICANT DEVELOPMENTS IN PUBLIC EMPLOYMENT DISPUTES SETTLEMENT DURING 1977*

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Introduction

This report covers statutory, judicial, and related public-employment dispute-settlement developments at the federal, state, and local levels in 1977. It contains a state-by-state analysis of legislation enacted over the past year, a summary of developments in the federal sector under the Executive Orders, and a digest of selected appellate and high-court decisions. In addition, a brief section has been added to the report chronicling research and training activity in the public-employment dispute-settlement area.

There was considerable legislative activity during the year. In general, legislation enacted in 1977 was supportive of dispute-settlement systems including those terminating in arbitration. New Jersey joined the states providing a procedure for the settlement of police and firefighter disputes; its law specifies six acceptable forms of terminal arbitration in interest cases. Wisconsin was the first state to adopt an explicit med-arb law. In Massachusetts, a police and firefighter collective bargaining law was enacted over a governor's veto. The Massachusetts law established a labor-management committee with a neutral chairman; this committee has broad powers, including the right to

*Report of the Committee on Public Employment Disputes Settlement. Members of the committee are Robert J. Ables, Arvid Anderson, Neil Bernstein, Walter F. Eigenbrod, Dana E. Eischen, Philip Feldblum, Jacob Finkelman, Irvine L.H. Kerrison, Leo Kotin, Harold B. Lande, Edward Peters, William B. Post, Paul Prasow, Charles M. Rehmus, Marshall J. Seidman, James J. Sherman, Abraham J. Siegel, James L. Stern, Joseph M. Sinclitico, Dallas M. Young, and Walter Gershenfeld, chairman.

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delay or refer disputes to arbitration and to specify the form of arbitration. New York State extended its police and firefighter law with modifications. Collective bargaining laws and/or dispute-settlement procedures were found illegal in four states. A number of states made housekeeping amendments to their laws.

As has been true in earlier years, the number and variety of court and administrative developments were large. Last year's committee report noted that the message from the courts was loud and clear: "Not only has the volume of litigation affecting public-sector labor relations been growing, but increasingly courts have been establishing or enforcing standards that limit the scope and authority of grievance and interest arbitrators." Three distinct patterns or types of decisions affecting dispute settlement were present during 1977. The first can be labeled supportive and includes decisions that were pro-trilogy or pro-deferral or which found interest arbitration legal. The second type includes decisions which may be considered hostile to terminal, neutral dispute-resolution procedures, interests or rights. A large number of cases fell into the third type—clarifications. These decisions stressed the role of bargaining and arbitration vis-à-vis civil service rules, education codes, home-rule charters, and other laws.

There is no question but that public-sector arbitration is a much more circumscribed activity than arbitration in the private sector. One important activity is jurisdiction-by-jurisdiction codification of roles and responsibilities of public-sector parties and neutrals. In part, this development is a concomitant of the rush to enact laws without adequate consideration of the consequences of such laws on existing legislation and codes.

The section of the report on research and training efforts is new. This section will expand in the future if readers find the summary information useful. During 1977, the most important development in this area was the establishment of the Public Employment Relations Service under the direction of Dr. Robert D. Helsby, former chairman of the New York State Public Employment Relations Board. The project, funded by the Carnegie Corporation of New York, with the cooperation of the American Arbitration Association, will provide assistance and training to public-employment-relations boards and commissions in the United States. On the research side, one noteworthy development was the increasing reliance on research by legislatures contemplating enactment or extension of public-employment dispute-settlement laws.

Statutory and Related Developments

Significant activity took place in 19 states. Broad new laws were established in California, New Jersey, and Wisconsin. A limited right-to-strike was established for local government employees and teachers in Wisconsin. Existing laws were extended in Massachusetts and New York. Michigan provided additional meet-and-confer rights for classified state employees. Florida made extensive revisions of its public-employee bargaining law, and Nevada amended its law to provide for binding final-offer arbitration by package for firefighters. Dispute-settlement provisions were extended to schools and community colleges in Kansas. Final-offer arbitration was made permissible for public employees in Nashville, Tennessee. An attorney-general's opinion found interest arbitration constitutional for police and firefighters in Texas. An Iowa attorney-general's opinion held that civil service appeal regulations take precedence over a contractual grievance procedure. Public-employee bargaining laws were set aside by courts in Indiana and Utah. De facto bargaining was declared illegal in Virginia. The Colorado Supreme Court set aside the use of compulsory arbitration in a Colorado city. Developments in Colorado, Indiana, Utah, and Virginia are mentioned briefly below, but are discussed further in the section on "Judicial Developments." A comprehensive law was passed in Ohio, but vetoed by the governor. A task force recommended legislation in Maryland, and Pennsylvania continued the life of a commission studying existing legislation. Specific discussion by state follows.

California

Meet-and-confer rights for local public employees fall under the Meyers-Milias-Brown Act. School labor relations are under the Rodda Act. On September 30, 1977, Governor Brown signed the California State Employer-Employee Relations Act (CSEERA) covering state employees.

The new law provides meet-and-confer rights for more than 100,000 state employees and is effective July 1, 1978; it will be administered by a Public Employee Relations Board (PERB). The existing Educational Employment Relations Board (under the Rodda Act) became PERB on January 1, 1978, and was given six months to prepare for its new duties.

The CSEERA establishes procedures for unit determinations, election of exclusive representatives, processing of unfair labor practice charges, and mediation of impasses. The parties are required to meet and confer in good faith on wages, hours, and other terms and conditions of employment, but the California legislature must approve any resulting memorandum of understanding that requires expenditure of public funds. Mediation is the terminal impasse-resolution tool. Maintenance-of-membership clauses are permissible. Supervisors may have presentations made on their behalf by employee organizations, but they are not entitled to units per se.

Colorado

Following its lead in a previous case *(Greeley Police Union* v. *City Council of Greeley,* cited *infra),* the Colorado Supreme Court held that collective bargaining with public employees is constitutional, but compulsory arbitration is not. In the *City of Aurora* v. *Aurora Firefighters Protective Association* (cited *infra*), the court found that compulsory arbitration involved an illegal delegation of authority by elected officials to arbitrators. Advisory fact-finding had been found legal by the court in 1976.

Indiana

Public Law 217, enacted in 1973, provides bargaining rights for teachers in elementary and secondary institutions. Public Law 254, enacted in 1975, extended these rights to public employees except police, firefighters, professional engineers, university faculty members, certified employees of school corporations, confidential employees, and employees of municipal or county health-care institutions. The latter law provided that determination and certification of an employee organization as a bargaining representative was excluded from judicial review. In *Indiana Education Employment Relations Board* v. *Benton Community School Corp.,* decided July 12, 1977 (cited *infra*), the Indiana Supreme Court found the above provision unconstitutional. Lacking a severability provision, the entire statute was invalidated. New legislation is pending which tracks Public Law 254 but provides for judicial review of the certification process.

Maryland

A special task force on collective bargaining has recommended legislation to the Maryland general assembly that would provide collective bargaining rights for state employees. County and municipal employees would be covered only if the local jurisdiction chose to be bound by the statewide legislation or if the local jurisdiction adopted a procedure in substantial agreement with the law. Existing collective bargaining procedures would remain in effect in local jurisdictions.

Massachusetts

On June 23, 1977, Governor Dukakis vetoed extension of the existing final-offer arbitration law for police and firefighters. The state legislature overrode his veto and extended the life of the law for two more years. The law was modified to provide an arbitrator or a tripartite board of arbitration with a third option; in addition to the final offers of the parties, the arbitration board may consider the fact-finder's report. Fact-finding may, however, be waived by agreement of the parties. Additionally, the law specifies detailed ability-to-pay considerations for arbitration boards and eliminates some staffing and work-assignment issues from arbitration. Later in the year, Chapter 730 was passed, which creates a joint Labor-Management Committee to oversee municipal police and firefighter collective bargaining and arbitration proceedings. The committee has broad authority to assume jurisdiction over cases; it may order the parties to continue bargaining, or it may attempt to mediate a settlement, require conventional arbitration, or permit the case to proceed under statutory final-offer arbitration.

Tennessee

The Nashville city council amended its public-employee bargaining ordinance, making final-offer arbitration permissible in the event the parties voluntarily agree to take an impasse to arbitration.

Florida

Substantial changes were made in the Florida Public Employee Collective Bargaining Act. The Public Employee Relations Commission (PERC) was established as a full-time, three-

member (one alternate) body. The courts were given the right to enforce PERC orders, and the distinction between good- and bad-faith bargaining was detailed. Check-off is a statutory right so long as the union is certified, but employees are not required to join a union or an employee organization. Students in public higher education are given legal-observer status in bargaining. Strike funds are illegal, and pensions are excluded from the scope of bargaining.

Iowa

According to an attorney-general's opinion, civil-service rules and regulations may be superseded by collective bargaining agreements except in those areas which are specifically reserved to the Civil Service Commission under state law. Inasmuch as appeal rights are specified in the Civil Service Code, the provisions of the code take precedence over a collectively bargained grievance procedure.

Kansas

Provisions of the 1971 law for public employees were extended to professional employees of school districts, area vocational-technical schools, and community colleges. Mediation is available, and fact-finding may be utilized if an impasse is found present by a local court. Finality is in the hands of the board of education unless the parties agree to permissible binding arbitration.

Ohio

The Ohio legislature passed a comprehensive public-employee labor-relations bill which was vetoed by Governor Rhodes. As of this writing, the veto has been overridden in the Senate, but the House had taken no position.

Michigan

Michigan's 60,000 classified state employees, although well organized, have operated under limited meet-and-confer rights provided by the rules of the state Civil Service Commission (CSC). In August 1977, the CSC adopted a broad revision of meet-and-confer policies for these employees.

The classified employees are entitled to exclusive-representa-

tion units organized along occupational lines. A formal meet-and-confer system was established for issues except employer rights and monetary matters. Fact-finding may be used in the determination of wages, but the decision of the CSC on the subject is final. Agreements may be placed in writing. The CSC will provide rules for the resolution of both interest and grievance disputes.

Additionally, the Police-Firefighter Arbitration Act was amended (1977 Pa. 303) to exempt grievance disputes from coverage under the law and to permit arbitration panels to award retroactive increases when deemed appropriate.

New Jersey

New Jersey enacted Senate No. 482, an addition to the state's Employer-Employee Relations Act. The law provides an innovative approach to the arbitration of police, firefighter, and related employee-interest disputes.

The law calls for mediation assistance by the New Jersey Public Employment Relations Commission (PERC) and fact-finding upon request of either party. Should the parties fail to settle, they may adopt an approvable method of arbitration for the resolution of their dispute. Listed as approvable methods are conventional arbitration, final-offer-by-package, final-offer-by-package inclusive of the fact-finder's report, final-offer-by-issue, final-offer-by-issue inclusive of the fact-finder's report, and final-offer-by-package on economic matters and issue-by-issue on noneconomic matters. The parties are free to devise other settlement approaches, but these must be approved by PERC. Should the parties fail to agree on a terminal dispute-settlement approach, the last of the options listed above automatically applies.

Thus the law intends to provide the parties with flexibility in the settlement of their interest disputes, but specifies a mandatory approach should they fail to reach agreement voluntarily on a method for settlement.

New York

Four separate pieces of legislation were enacted in 1977. The Taylor Law of 1974, calling for compulsory binding arbitration of interest disputes for police and firefighters (outside of New York City), was extended for a two-year period. The major debate in the legislature focused on review of arbitration decisions.

Governor Carey urged the legislature to permit legislative bodies to review the outcome of interest-arbitration cases, but the legislature elected to have these issues go to the courts. The governor noted some reluctance in signing the measure, but indicated his satisfaction with standards and procedures specified in the law permitting meaningful judicial review.

The new law eliminates a fact-finding step, requires an equal sharing in the nonpartisan cost of arbitration, and also requires the panel to specify the basis for its findings. The panel must consider "the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security."

Legislation was enacted that amends the Taylor Law to expand the state Public Employment Relations Board's powers to remedy findings of improper practices. PERB is also authorized to order the reinstatement of employees, with or without back pay, but it cannot order payment of exemplary damages. Of particular significance to arbitrators is a clause in the legislation that provides that PERB "shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice." PERB has cited this provision as a basis for its policy, developed during 1977, of deferring certain refusal-to-bargain charges to the grievance-arbitration procedure agreed to by the parties. Also included in the PERB-powers legislation was the adoption of the National Labor Relations Act definition of the duty "to negotiate collectively."

The third bill enacted during 1977 legalized the agency shop for employees of the state and local governments for a two-year period beginning September 2, 1977. The Taylor Law amendment requires that employee organizations establish a procedure to reimburse that portion of the agency fee used for "causes of a political or ideological nature" or "causes only incidentally related to terms and conditions of employment" to employees requesting same. Agency-shop deductions are forfeited by an employee organization that strikes in violation of the Taylor Law and loses its right to dues-checkoff as a result.

The state education law was amended with regard to hearing procedures for tenured teachers who are brought up on charges under the education law. Hearings are held by a three-member panel. The employee and the school board each select a member from a list maintained by the Commissioner of Education, and the third member is chosen by mutual agreement or, absent agreement, by the Commissioner of Education from a list supplied by the American Arbitration Association. Panel determinations are binding, but may be appealed to the Commissioner of Education or to the courts.

Nevada

The Nevada Local Government Employee-Management Relations Act, the Dodge Act, was enacted in 1969 and provides for a form of compulsory arbitration under the rubric of binding fact-finding. Upon petition, the governor decides which unresolved issues will be subject to the binding determination of a fact-finder.

Important changes in the law were made during 1977. For local employees other than firefighters, mediation was made mandatory rather than voluntary. Firefighters and local-government bodies may submit unresolved contract-negotiations matters to binding final-offer arbitration by package. It is an unfair labor practice for an employer or union not to provide prebargaining information. Some housekeeping changes in the law also were made.

Pennsylvania

The Governor's Study Commission on Public Employee Relations (William J. Atkinson, executive director) continued study and hearings on Act 111, the police-firefighter interest-arbitration law, and Act 195, the Public Employee Relations Act. The commission is expected to deliver its report in 1978.

Texas

The Texas attorney-general ruled that the Texas Fire and Police Employee Relations Act provision for delegation of the determination of pay and other conditions of employment to an arbitration board was constitutional. Other provisions of the law delegating authority to make such determinations to the courts

when a political subdivision elects not to arbitrate were held to be unconstitutional by the attorney-general.

Utah

The Utah Supreme Court found the state's sole public-employee bargaining law, which provided firefighters with the right to negotiate and take disputes to binding arbitration, to be an unconstitutional delegation of authority to private arbitration panels.

A new law was enacted, providing for a five-step grievance procedure for state employees, terminating in a binding decision by a state hearing officer. The law does not apply to public-school districts and institutions of higher education.

Virginia

The Virginia Supreme Court, in a unanimous decision, held that public employees in the state were not entitled to enter into collective bargaining agreements with local government bodies and school boards. The court found that de facto agreements violated the clear intent of the legislature that no such bargaining take place.

Wisconsin

A limited right-to-strike law for local government employees and teachers was enacted in Wisconsin; the law is effective for a three-year period beginning January 1, 1978. Under the law, the Wisconsin Employment Relations Commission provides mediation. At impasse, the parties select a mediator-arbitrator, who endeavors to mediate the dispute but has arbitration power in reserve. The form of arbitration is final offer by package. Strikes are permissible only in those situations where *both* parties, having reached impasse, decline to go to final-offer binding arbitration. The union must give 10 days' notice of intention to strike when both parties agree to withdraw their final offers. Penalties are prescribed for illegal strikes. The legislative council is to study the effects of the law and deliver a final report to the legislature on February 1, 1981. "Sunshine" provisions in the law provide the public with information at three different points in the bargaining process.

Federal-Sector Developments[1]

The past year was one of great expectations but few results as far as changes in the federal-sector labor relations program were concerned. At this time, the Administration's legislative package, which is due to go to Capitol Hill for reform of the Government's personnel system, contains no labor-management provisions. The report of the Federal Personnel Management Project,[2] however, which will serve as the basis for most of the Administration's legislative proposals, contains two items of particular interest to Academy members: In the first instance, the Task Force on Improving Labor-Management Relations recommended the establishment of a central administrative body, composed of three full-time neutral members, to carry out functions now performed by the part-time Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations. The Federal Service Impasses Panel, it recommended, should be continued as a discrete entity within such a Federal Labor Relations Authority to take independent actions to settle negotiations impasses, or, in the alternative, those functions could be the direct responsibility of the Federal Labor Relations Authority, with the panel discontinued.

In a related matter, the Task Force on Protecting Merit Principles and Protecting Employees recommended reducing the array of alternative appeal procedures so that the major avenue for resolving complaints among employees in units covered by labor agreements would be the negotiated grievance procedure, culminating in binding arbitration. Exceptions from its scope would be limited to matters of position classification, equal employment opportunity, political activities, Fair Labor Standards, examination ratings, and strictly technical administrative reviews. Thus, the task force sought to make the negotiated grievance procedure fully equivalent to the appeals process under laws and regulations. In so recommending, it expressed the view that such an approach—an incremental expansion in the scope of the negotiated grievance and arbitration procedures—is con-

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[1]Provided to the Committee on Public Employment Disputes Settlement by Howard W. Solomon, Executive Secretary, U.S. Federal Service Impasses Panel, Washington, D.C.

[2]The President's Reorganization Project, Personnel Management Project, Final Staff Report (Washington: 1977), 68–72, 167–72.

sistent with the philosophy expressed in the 1975 amendments to Executive Order 11491.[3]

The Federal Service Impasses Panel, granted broad powers under Sections 5 and 17 of Executive Order 11491, as amended, to bring disputes to settlement through whatever means appropriate, had reached an analogous conclusion earlier in the year when it was called upon to issue Decisions and Orders in two cases where the dispute concerned the scope of the grievance and arbitration procedures. In *Department of Transportation, Federal Railroad Administration, Washington, D.C. and Local 2814, American Federation of Government Employees, AFL-CIO,*[4] the union held nationwide recognition to represent all eligible employees working for the employer and proposed that the parties' grievance and arbitration procedures culminate in binding arbitration with their scope as broad as permitted by Section 13 of Executive Order 11491, as amended.[5] The employer sought to limit the scope of binding arbitration to disputes over the interpretation and application of agency policies and regulations subject to advisory arbitration.

The panel found that the scope of the grievance and arbitration procedures in the parties' two prior contracts was as broad as permitted under the order and culminated in binding arbitration. Moreover, in the first agreement their scope included matters arising both under and outside of the agreement; yet the record reflected no problems that had arisen thereof. There being no justification in the record for the exclusion of any agency policies or regulations from the scope of the grievance and arbitration procedures, the panel recommended that the parties adopt the substance of the union's proposal. While the union accepted these recommendations, the employer did not.

Following a final-action hearing before the panel, it issued a Decision and Order incorporating its earlier recommendations. In response to concerns raised by the employer, however, the panel added clarifying language to the effect that an arbitrator would be prevented from changing the content of the agreement or published agency policies and regulations. Further-

[3]Those amendments permitted the negotiation of grievance and arbitration procedures excluding only matters for which a statutory appeal procedure exists, so long as the resultant procedures do not otherwise conflict with laws or the order.

[4]Case No. 76 FSIP 7 (January 19, 1977), Panel Release No. 74.

[5]*Supra* note 3.

more, it noted that the procedures could not cover grievances over matters otherwise excluded from negotiations by the management-rights provisions of Executive Order 11491, as amended.

In a second case, *Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey and Local 2335, American Federation of Government Employees, AFL-CIO,*[6] the union represented a unit of 18 firefighters at the facility. Its proposal was essentially the same as that in the aforementioned *Federal Railroad Administration* case. The employer, on the other hand, proposed that the scope of the grievance and arbitration procedures be limited to the interpretation and application of the agreement. The panel found that the parties in 1971 had agreed upon broad procedures such as those proposed by the union. In concluding that a broad negotiated grievance procedure with a coextensive provision for binding arbitration was an appropriate basis for resolving the impasse, the panel found the employer's justification for excluding published agency policies and regulations from their reach to be unpersuasive. The employer declined to accept the panel's recommendations for settlement, although they were acceptable to the union. At a subsequent final-action hearing before the panel, the employer made contentions that paralleled those raised by its counterpart in the *Federal Railroad Administration* case. Accordingly, the panel issued a Decision and Order similar to that issued in the other case. In both instances, however, the panel stated that its decision was based upon the particular facts of the cases before it and was not intended to have any great impact.

The past year saw a greater willingness on the part of parties requesting the assistance of the Federal Service Impasses Panel to negotiate with respect to procedures for resolving disputes. While the panel's rules of procedure have provided for such flexibility, until recently there has been reluctance on the part of the parties to avail themselves of this approach. In *General Services Administration, Region III, Washington, D.C. and Local 2456, American Federation of Government Employees, AFL-CIO,*[7] the panel granted the parties' motion for a final and binding procedure to

[6]Case No. 76 FSIP 9 (January 24, 1977), Panel Release No. 75.
[7]Case No. 77 FSIP 21 (June 21, 1977), Panel Release No. 82.

resolve seven issues in dispute. The approved procedure provided for panel selection of either party's final-offer package following a hearing conducted by a panel staff member, but the parties reached a negotiated agreement prior to the hearing. In *Department of the Army, Fort Leonard Wood, Missouri and Local R14-32, National Association of Government Employees*[8] and *Department of the Army, U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky and Local 2303, American Federation of Government Employees, AFL-CIO,*[9] the panel agreed, upon joint requests from the parties, to issue binding decisions rather than post-fact-finding settlement recommendations. In the latter case a settlement was reached at the prehearing conference. In *Department of the Army, Philadelphia District, Corps of Engineers, Philadelphia, Pennsylvania and Local 902, American Federation of Government Employees, AFL-CIO,*[10] the panel, having directed a negotiation impasse to fact-finding, granted the parties' joint request that the panel's recommendations for settlement be based upon written submissions. The dispute therein involved the same parties and issue, and essentially the same facts as those in a case previously considered by the panel.[11] *Department of the Interior, Bureau of Reclamation, Sacramento, California and Local 1245, International Brotherhood of Electrical Workers, AFL-CIO,*[12] concerned a wage dispute involving 300 wage-board employees. Since the parties had (1) jointly requested the panel, in writing, for authority to resort to outside arbitration; (2) agreed upon what issues were at impasse, the method of selecting the arbitrator, and arrangements for paying the cost of the proceedings; and (3) exhausted other voluntary efforts to resolve the matter, the panel granted their request to have a private arbitrator resolve the interest dispute.

As in prior years, the majority of cases closed by the panel required no post-fact-finding recommendations. This was due in large part to further negotiations undertaken with Federal Mediation and Conciliation Service or panel staff assistance at various stages of the panel's procedures. The panel's case-handling was affected, however, by the receipt of 28 requests for

[8]Case No. 77 FSIP 89 (January 25, 1978), Panel Release No. 91.
[9]Case No. 77 FSIP 83 (January 27, 1978), Panel Release No. 91.
[10]Case No. 77 FSIP 60 (September 30, 1977), Panel Release No. 86.
[11]*Department of the Army, Corps of Engineers, Philadelphia, Pennsylvania and Local 902, American Federation of Government Employees, AFL-CIO,* Case No. 74 FSIP 12 (February 7, 1975), Panel Release No. 46.
[12]Case No. 77 FSIP 84 (January 12, 1978), Panel Release No. 91.

assistance with disputes concerning whether or not National Guard technicians should be required to wear their military uniforms while performing their day-to-day technician tasks. (Three Decisions and Orders have now been issued, and 21 cases involving the same issue are pending at earlier stages of the panel's procedures.)

Howard G. Gamser was designated member and chairman of the Federal Services Impasses Panel by President Carter in February 1978. In addition, Irving Bernstein, James E. Jones, Jr., Charles J. Morris, and Beverly K. Schaffer were appointed as members along with the reappointment of members Jean T. McKelvey and Arthur Stark.

With regard to grievance arbitration in the federal sector, the Federal Labor Relations Council continued to review arbitrators' awards under authority set forth in Executive Order 11491, as amended. Relatively few awards were modified, set aside, or remanded. One award which was upheld at the council level but later overturned by the Comptroller General deserves special attention.

On December 21, 1977, exactly one year after an arbitrator ruled that a grievant was entitled to retroactive promotion and back pay, the Comptroller General held that the agency may not comply with the award.[13] The case had been appealed to the council under Section 2411.32 of the council's rules of procedure. The council denied the agency's petition, noting that the arbitrator had found the contract provision to be violated and had considered the Back Pay Act of 1966 and relevant Comptroller General decisions in the course of resolving the grievance.[14]

In making this ruling, the Comptroller General emphasized that, in interpreting the language of a collective bargaining agreement, the arbitrator is bound by applicable laws and regulations. In the instant agreement, the applicable language incorporated a provision of the Classification Act. Accordingly, the Comptroller General held that the arbitrator was bound by court decisions and Comptroller General decisions to the effect

[13]Comptroller General Decision B-190408 (December 21, 1977).

[14]*New York Regional Office, Bureau of District Office Operations, Social Security Administration, Department of Health, Education, and Welfare, and Local 3369 New York-New Jersey Council of Social Security Administration District Office Locals, American Federation of Government Employees, AFL-CIO* (Robins, Arbitrator), FLRC No. 77A-13 (August 2, 1977), Report No. 132.

that employees in "career ladder" positions have no vested right to promotion at any specific time.

The arbitrator had concluded that the aforementioned decisions were distinguishable because (1) the parties had stipulated that but for the misplacement of the recommendation for a "career ladder" noncompetitive promotion, the grievant would have been promoted on the same date as the other coworker whose recommendations had been received by the approving authority, and (2) the clear intent of the agency to promote had been established. But the Comptroller General disagreed. He found no regulation, instruction, or policy of either the employer or the parent agency making such promotions obligatory. He ruled that, since an administrator's intent to promote at any particular time can be established only by after-the-fact statements, that factor is insufficient to create an exception to the general rule against retroactive personnel actions so as to increase the right of an employee to compensation. Thus, the authority of the Comptroller General to review arbitration awards—even those that have withstood the scrutiny of the Federal Labor Relations Council—must be considered by arbitrators in fashioning remedies involving the expenditure of appropriated funds.

During the year, the Department of Defense issued rules prohibiting recognition of a union or collective bargaining in the armed forces. The American Federation of Government Employees, by referendum, voted against enrolling members of the armed forces.

Judicial and Related Developments

Constitutionality of Interest Arbitration and Collective Bargaining Laws

During 1977, several state courts struck down as unconstitutional statutes providing for public-employee collective bargaining and interest arbitration.

In 1975, Utah enacted a Fire Fighters' Negotiation Act granting firefighters the right to organize and bargain. Under the law, unresolved bargaining impasses were submitted to a tripartite interest-arbitration panel whose decisions were binding on all matters in dispute except wages, which were subject to advisory arbitration only.

Salt Lake City filed a suit challenging the constitutionality of the act, and the Utah Supreme Court, in *Salt Lake City* v. *International Association of Firefighters,*[15] found the statute to be an illegal delegation of authority from municipalities to private arbitration panels. The court also found that the legislature failed to provide any statutory standards in the act or any protection against arbitrariness, such as hearings with procedural safeguards, legislative supervision, and judicial review.

For the second time in two years, the Colorado Supreme Court held that elected municipal officials may not delegate their authority by participating in impasse arbitration with public employees. The 1977 case, *City of Aurora* v. *Aurora Firefighters Protective Association,*[16] involved a city-charter amendment, by a majority vote of the qualified electors of the city of Aurora, granting members of the fire department the right to bargain collectively and to have unresolved issues submitted to arbitration. After a bargaining impasse occurred, the city refused to submit the dispute to arbitration.

The Colorado Supreme Court, affirming the lower court, held that its 1976 decision in *Greeley Police Union* v. *City Council of Greeley,*[17] was dispositive of the issues raised in *Aurora.* In *Greeley,* the court held that collective bargaining is a matter of both statewide and local concern, and a city may legislate on such matters in the absence of conflicting statutory provision. The court also ruled that the charter amendment in *Greeley* was not unconstitutional in providing for collective bargaining, but that the amendment provisions for binding arbitration constituted an unconstitutional delegation of authority, and that these provisions were severable from the rest of the charter amendment. In *Aurora,* the court reached the same result.

In the case of *Indiana Education Employment Relations Board* v. *Benton Community School Corp.,*[18] decided July 12, 1977 (rehearing denied September 27, 1977), the Indiana Supreme Court held that Public Law 254 was unconstitutional, being violative of Article 1, Section 12 of the Indiana constitution because it specifically prohibited judicial review of the certification by the agency of the bargaining status of an employee organization

[15] 563 P.2d 883, 94 LRRM 3187 (1977).
[16] 556 P.2d 1356, 96 LRRM 2252 (1977).
[17] 553 P.2d 790 (1976).
[18] 95 LRRM 3084 (1977).

through its processes. In so doing, the court voided the entire act, because it lacked the usual severability clause. The result is that in Indiana today there is no administrative agency or board having the power to certify an employee organization as the exclusive collective bargaining representative for public employees other than public-school employees or to deal with employer unfair labor practices.

In January 1977, the State Supreme Court of Virginia found that "collective negotiations as practiced by a number of Virginia jurisdictions was unconstitutional." It held that all such activity should cease.

Judicial Review and Enforcement of Interest-Arbitration Awards

A significant New York decision was *Bethlehem Steel Corp.* v. *Fennie as Comptroller of the City of Lackawanna, Lackawanna P.B.A., et al.*[19] The holding of the appellate division was that a city taxpayer has standing to bring suit to vacate a compulsory interest-arbitration award on the ground that the arbitration panel was improperly and illegally constituted.

Janus, the city's representative on the arbitration panel, was a police captain on leave to fill a mayoral appointment as safety commissioner. Between the appointment of the panel and its first meeting, a new mayor, of a different political party, was elected, presaging Janus's removal as safety commissioner and his return to the police department. Thereafter, Janus reversed his prior position and voted with the PBA representative for salary increases substantially in excess of those which had been recommended by a fact-finder. The *public* member of the panel dissented.

On the merits, it was held that Janus intentionally had misled the city in promising to uphold the fact-finder's report; that the facts before the panel were no different from those presented to the fact-finder; that Janus misled the city for his and his fellow policemen's personal benefit; and that there had been a direct and irrefutable conflict of interest which made the arbitration a sham.

The significant holding, however, is that Bethlehem, which pays 71 percent of the city's property taxes, had standing to

[19] 55 A.D.2d 1007, 391 N.Y.S.2d 227, 95 LRRM 2099 (1977), *aff'g* 383 N.Y.S.2d 948, 92 LRRM 3470 (1976).

attack the award although it had been confirmed in another proceeding to which Bethlehem was not a party and of which it had not been aware.

The court's opinion did not elaborate the rationale for the decision. However, it raised the possibility of further third-party suits against public-sector interest-arbitration awards. The decision went beyond statutory ground for vacating an award, that is, fraudulent and biased conduct of a member of an arbitration panel.

In *City of Buffalo* v. *Rinaldo,*[20] the New York State Court of Appeals unanimously reversed the appellate division and ordered reinstatement of an award made by an interest-arbitration panel under the Taylor Law. The court reaffirmed the principle that judicial review of arbitration awards is limited to determining whether the award is "rational or arbitrary and capricious." Finding that the arbitration panel had considered numerous statutory criteria in formulating its award, including testimony regarding the city's financial problems and "identified nonspeculative sources of additional revenue," the court held that the award was not irrational.

Suggesting that interest arbitration ought to "imitate the range of negotiation which it supersedes," the Supreme Judicial Court of Massachusetts ruled, in a dispute between the School Committee of Boston and the Boston Teachers Union, that the subjects of severance pay, a health-welfare fund, and remedial-reading staffing were proper subjects for a binding arbitration award, whether or not all of them were mandatory topics of bargaining.

In *School Committee of Boston* v. *Boston Teachers Union Local 66, AFT,*[21] the supreme court upheld a lower court decision affirming the binding award, which was issued under the parties' voluntary agreement for arbitration of impasses. The school committee challenged the award on the ground that it was too broad in scope. The high court disagreed, however, concluding that the statutory language permitting voluntary interest arbitration does not restrict arbitrable issues to those which are also mandatory subjects of negotiations. Moreover, the court suggested that the "interplay" and compromises on mandatory and non-

[20] 41 N.Y.2d 764, 364 N.E.2d 817, 95 LRRM 2776 (1977).
[21] 13 N.E.2d 485, 95 LRRM 2855 (1977).

mandatory subjects "have their place in voluntary arbitration of the terms of a labor contract and will tend to improve and make more livable the arbitrable result."

The court did agree with the school committee that sometimes nonmandatory subjects that teachers might include in the scope of interest arbitration are matters of educational policy that by law may not be submitted to an arbitrator. Pointing out that in teacher bargaining, many subjects are "composites" of matters having to do with both the employment relationship and educational policy, the court asserted that in some cases the "ingredient of educational policy" will outweigh the factor of employment relationship so that "even voluntary arbitration would be excluded." In the instant case, however, the court determined that none of the disputed issues had "the prerogative quality that should exclude submission to arbitration."

In *Lincoln Fire Fighters Association Local 644* v. *City of Lincoln,*[22] the Nebraska Supreme Court reversed an order of the court of industrial relations increasing the wages of Lincoln firefighters. The court of industrial relations increase was based upon firefighters' wages in eight cities of comparable size outside Nebraska. The supreme court held that the court of industrial relations should have "weighed, compared and adjusted" these data for "economic dissimilarities" that might have a bearing on the prevalent firefighters' wage rates.

In *Town of Tiverton* v. *Fraternal Order of Police Lodge 23* and *Fraternal Order of Police Lodge 23* v. *Town of Tiverton,*[23] the Rhode Island Supreme Court ruled that police-union proposals did not have to be honored since they were presented less than 120 days before the town's regular annual financial meeting. The court also voided a pension plan subsequently awarded by an arbitration panel in binding impasse arbitration because the award directed implementation of the plan after the one-year period covered by the award.

The first issue involved the court's interpretation of a statutory provision requiring the submission of bargaining proposals at least 120 days prior to the last day on which the town could appropriate money. The union's bargaining notice fell one day short of the statutory requirement. The town argued that the

[22]198 Neb. 174, 252 N.W.2d 607 (1977).
[23]372 A.2d 1273, 95 LRRM 2993 (1977).

120-day provision is mandatory; the union contended that it is directory in nature, merely serving as a guide. The court agreed with the town, declaring that the purpose of the 120-day notice is not simply to regulate the flow of bargaining, but rather to afford the town sufficient time to consider matters affecting town finances. This, held the court, is the very essence of the statutory provision at issue. Moreover, the insertion of the words "at least" in the law evinced a legislative intent to provide 120 days as a bare minimum. The court thus concluded that notice was untimely, and the town need not have negotiated with the union on any issues falling within the purview of the 120-day notice provision in the general law.

With respect to the pension plan awarded by the panel, the court recognized that the arbitrators had been guided by testimony indicating that the plan could not be implemented until July 1, 1977. Therefore, they ordered the parties to undertake the necessary steps to assure that the plan would be implemented as of that date. The union urged that the town had to take steps to adopt the plan *before* July 1, 1977, in order for it to have been operative on that date. Disagreeing, the court concluded that the panel stated "in plain and simple English that the pension plan was to be effective as of July 1, 1977. Just as the notice to negotiate was one day too late, so also is the implementation of the award."

In a case presenting the first challenge to binding interest-arbitration procedures under the New York City Collective Bargaining Law, the supreme court, New York County, upheld the powers of the Board of Collective Bargaining to review and modify appealed awards. The court also affirmed a board ruling which applied the mandates of the Financial Emergency Act for New York City to an arbitration award. The tripartite board, in a unanimous decision, had modified an award, established by the City of New York as a 58 percent increase, to conform with the 6–8 percent guidelines established by the Emergency Financial Control Board.

Judicial Review and Enforcement of Grievance Arbitration Awards

There continues to be a substantial amount of litigation with respect to the enforceability of both grievance and impasse-arbitration awards. There is no discernible pattern in the court decisions, however.

In *Yonkers Federation of Teachers* v. *Board of Education of Yonkers City School District,*[24] the appellate division of the New York supreme court affirmed a lower court and upheld an arbitrator's award requiring the reinstatement of some 300 teachers with back pay plus 6 percent interest.

The arbitration concerning the layoff of teachers was ordered in 1976 by a ruling of the state's highest court, upholding the validity of a job-security clause in the Yonkers teachers' contract. (That decision had reversed a lower court's determination invalidating the job-security provision as against public policy.)

According to the court of appeals in the instant case, the "arbitrator did not exceed his authority," the "award was not irrational or incapable of being implemented," and the "6 percent interest in this arbitration proceeding was solely a matter within the arbitrator's discretion."

The court found that the city had the financial ability to comply with the award even though it might mean raising taxes or cutting services.

In another New York case, the supreme court's appellate division (Third Department) reversed a lower court and overturned an arbitration award reinstating a Binghamton city employee who was found to have taken bribes from a city vendor. In *Binghamtown Civil Service Forum* v. *City of Binghamton,*[25] the court majority concluded that the arbitrator had exceeded his authority by mitigating the penalty, particularly after the arbitrator had found that the employee was fired for "just cause" in accordance with the agreement. The court also found that the award violated public policy against holding of office by persons found guilty of criminal conduct. The court held that municipalities are entitled to discharge employees "who participate in criminal acts in the absence of a clear and express waiver of that power."

Two dissenting judges pointed out that the contract did not define "just cause" nor did it limit the power of an arbitrator, except to bar actual modification of the agreement. Although it was "internally flawed," the award was not "irrational," in the view of the dissenters.

Reversing a lower court, the Wisconsin Supreme Court, in *Milwaukee Professional Firefighters Local 215, IAFF* v. *City of Mil-*

[24]58 A.D.2d 607, 395 N.Y.S.2d 484, 95 LRRM 3110 (1977).
[25]393 N.Y.S.2d 462, 57 A.D.2d 27, 95 LRRM 2783 (1977). Reversed by court of appeals, February 22, 1978.

waukee,[26] found that an arbitrator exceeded his authority in requiring the maintenance of past practices when the contract between the City of Milwaukee and the Milwaukee Professional Firefighters Local 215, IAFF, did not contain such a provision.

The dispute stemmed from the implementation of new rules for 1975 and 1976 regarding the scheduling of special-duty overtime work, vacation days, and off days, which differed from those in effect in 1974. After the IAFF grieved, an arbitrator held that "the chief's orders and special notice violated the collective bargaining agreement," and he ordered that scheduling be conducted as it was prior to the issuance of the new orders.

The supreme court found that the arbitrator's decision directing the maintenance of past practice was not based on his interpretation of the agreement but, rather, on his understanding of the wishes of the parties. For the arbitrator to state that "there was no alternative but to direct that the past practice be maintained" was considered "erroneous logic" by the court or an indication of "a complete misunderstanding of his authority in respect to this issue."

The court found that the arbitrator's ruling resulted in the addition of language not included in the agreement, explaining:

> "The arbitrator was to determine the question of whether past practice was required under the contract. He had already concluded that the orders and special notice were void and unenforceable. If he decided that the contract did not require the maintenance of past practice, then his answer should have been simply that past practice was not necessarily required. If he concluded past practices were required by the agreement, the proper course could be to direct their maintenance. The arbitrator did not, however, find that the agreement required the maintenance of the past practice, yet he directed that they be maintained. By doing so, the arbitrator has added to the labor agreement a provision compelling the implementation of the scheduling practices utilized for the year 1974."

The court vacated the award, holding that the arbitrator's award did not draw its essence from the collective agreement.

In *State of Minnesota et al.* v. *Euclid Berthiaume et al.,*[27] the Minnesota Supreme Court held that a grievance arbitration award involving the state as employer must stand unless the arbitrator clearly exceeded his or her authority.

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[26]253 N.W.2d 481, 95 LRRM 2684 (1977).
[27]96 LRRM 3240 (1977).

The case involved an employer's challenge of an arbitrator's award on grounds that the arbitrator had erred in finding the grievance arbitrable. Reversing the lower court, which had vacated the award, the Minnesota Supreme Court held that only when a party believes it can be proven that an arbitrator exceeded his or her authority and the arbitrability of the grievance is "reasonably debatable" is that party entitled to challenge the award in court. Although a court may weigh the disputed award in determining arbitrability, the proceeding becomes *de novo* and the charging party, which may introduce new evidence, bears the burden of proving invalidity.

An arbitrator's award was also upheld in *Community College of Beaver County* v. *Community College of Beaver County, Society of the Faculty.*[28] The challenged arbitration award had held that full-time employees who were retrenched had displacement rights vis-à-vis new part-time positions that had been created. The commonwealth court vacated the award on the ground that the arbitrator's decision was erroneous. The supreme court reversed, however, finding that the arbitrator's decision was reasonable. Since the arbitrator drew his opinion from the essence of the parties' agreement, the commonwealth court erred in substituting its opinion for that of the arbitrator.

A Michigan court of appeals, in *Board of Commissioners for the County of Wayne* v. *National Union of Police Officers Local 502-M,*[29] upheld an arbitration award of almost $28,000 in damages to a Wayne County police union because of the county's persistent refusal to follow the parties' grievance procedure. The arbitrator's award of damages—totaling $27,816 in union arbitration costs during the 1972–1974 contract term, attorneys' fees, and administration expenses—did not exceed the arbitrator's authority, the court held. The contract contained the "standard type" of arbitration clause, which permitted the arbitrator to fashion that kind of remedy.

The court found that the county had frequently refused to file written responses to grievances and that the union was forced to take many grievances to arbitration inasmuch as they could not be settled at the lower steps of the grievance procedure.

The final judicial-review case involved the New York Court of

[28] 375 A.2d 1267, 96 LRRM 2375 (1977).
[29] 75 Mich.App. 375, 254 N.W.2d 896, 95 LRRM 3396 (1977).

Appeals and a nontenured-teacher case. In *Candor Central School District* v. *Candor Teachers Association,*[30] the school district sought to vacate an arbitration award which directed the district to reinstate a probationary teacher to her former position with back pay and all fringe benefits. The union argued that the school district violated a "just cause" provision in the contract and failed to follow the contractual procedure in denying grievant tenure.

The court reviewed the arbitrator's interpretation of the dismissal clause, which contained substantive provisions and procedural requirements. As to the substantive "just cause" provisions, the court, citing its decision in *Cohoes City School District* v. *Cohoes Teachers Association,*[31] stated that it is "beyond the power of a board of education to surrender its responsibility and authority to make tenure decisions, and thus any agreement purporting to limit or restrict the unfettered right to terminate a probationary employee at the close of the probationary period would be unenforceable as against public policy."

The court also found that "the school district's commitment to the procedural aspect of the dismissal clause is not to be set aside as against public policy," and that grievant was entitled to remedy for such violation. The court, unable to determine whether the relief ordered was or was not based on the alleged violation of the substantive "just cause" provision, remitted the matter to the arbitration panel "for determination by it of the remedy suited to its finding that there was a violation of the procedural requirements."

Arbitrability

One of the most significant cases decided in 1977 was *Matter of the Acting Superintendent of Schools of Liverpool Central School District and United Liverpool Faculty Association.*[32] In that case, the court of appeals, the state's highest court, in effect created a rebuttable presumption of nonarbitrability of public-sector grievances and explicitly rejected application of the holdings of the *Steelworkers* trilogy to public-sector grievance arbitration. The court held that in arbitrations which proceed under the

[30] 42 N.Y.2d 266, 397 N.Y.S.2d 737, 95 LRRM 2985 (1977).
[31] 40 N.Y.2d 774, 390 N.Y.S.2d 53, 94 LRRM 2192 (1976).
[32] 42 N.Y.2d 509, 399 N.Y.S.2d 189, 96 LRRM 2779 (1977).

authority of the Taylor Law "the agreement to arbitrate must be express, direct and unequivocal; anything less will lead to a denial of arbitration."

The court stated that under the Taylor Law, it is for the courts to determine whether a grievance is arbitrable. In making such determinations, courts are to apply a two-tier test: "Initially it must be determined whether arbitration claims with respect to the particular subject matter are authorized by the terms of the Taylor Law." The court noted that the permissible scope of arbitration under the Taylor Law has been limited by decisions of the courts and stated, "The enactment of the Taylor Law, establishing authority for the use of voluntary arbitration, confirmed rather than restricted the principle of the nondelegable responsibility of elected representatives in the public sector." Thus, at the first level, if the subject matter of the grievance falls outside the permissible scope of the Taylor Law, arbitration is, "of course," barred.

However, if arbitration of the subject matter is authorized by the Taylor Law, "inquiry then turns at the second level to a determination of whether such authority was in fact exercised and whether the parties did agree by the terms of their particular arbitration clause to refer their differences in this specific area to arbitration." The court continued:

> "In the field of public employment, as distinguished from labor relations in the private sector, the public policy favoring arbitration —of recent origin—does not yet carry the same historical or general acceptance, nor as evidenced in part by some of the litigation in our court, has there so far been a similar demonstration of the efficacy of arbitration as a means of resolving controversies in governmental employment. Accordingly, it cannot be inferred as a practical matter that the parties to collective bargaining agreements in the public sector always intend to adopt the broadest permissible arbitration clauses. Indeed, inasmuch as the responsibilities of the elected representatives of the taxpaying public are overarching and fundamentally nondelegable, it must be taken, in the absence of clear, unequivocal agreement to the contrary, that the board of education did not intend to refer differences which might arise to the arbitration forum. Such reference is not to be based on implication."

The case concerned an elementary-school teacher on sick leave who, upon seeking to return to work, was advised that, as a condition of her return, the education law required her to submit to a medical examination by the school-district physician. The school board's physician was a male and the teacher

requested that she be examined by a female physician. The teacher refused to comply with the school district's directive that she be examined by the district's physician and, after the dispute continued for several months, the board of education passed a resolution directing the teacher to be examined by the school-district physician before returning to her teaching responsibilities. The teacher again refused to be examined by the school-district physician and, subsequently, was placed on leave of absence without pay until the matter was resolved.

The teacher grieved the district's action and the teachers' association sought arbitration pursuant to the parties' collective bargaining agreement. Shortly after the request for arbitration was made, the teacher appealed the district's action to the State Commissioner of Education under statutory appeal procedures. The commissioner denied the teacher's appeal and the school district sought a stay of arbitration.

At issue before the court was whether the grievance concerned a health matter, which the parties agreed to arbitrate, or a disciplinary matter, which the parties agreed to exclude from arbitrable determination. The court recognized that "a very reasonable assertion can be made that this particular controversy falls within both the included and excluded categories" and held that since it could not "conclude that the present dispute falls clearly and unequivocally within the class of claims agreed to be referred to arbitration," a stay of arbitration was properly granted by the court below.

One month after its *Liverpool* decision, the court found in *South Colonie Central School District* v. *South Colonie Teachers Association*[33] that a contract clause defining an arbitrable grievance as one "based upon an event or condition which affects the terms and conditions of employment of a teacher or group of teachers and/or the interpretation or meaning of any of the provisions of this Agreement . . ." to be "sufficiently 'express, direct and unequivocal as to the dispute to be submitted [to arbitration],' " citing *Liverpool, supra.* The court, in *South Colonie,* stated: "The District [by this clause] undertook to commit a very broad range of issues to ultimate arbitral determination."

The court went on to apply, in reverse order, the first of the two-tier test enunciated in *Liverpool.* The court found that the

[33]43 N.Y.2d 136, 400 N.Y.S.2d 798 (1977).

clause which was the basis of the grievance—a no-reprisal-for-job-action clause—was authorized under the Taylor Law and was not prohibited by "public policy, whether derived from or whether explicit or implicit in other statute or decisional law, or in neither."

While the *South Colonie* decision did not directly set aside the finding in *Liverpool* that there is no presumption of arbitrability under the Taylor Law comparable to that which prevails in the private sector, *South Colonie* does hold that a broad arbitration clause will have the effect of requiring arbitration of disputes which arguably fall within its ambit despite the fact that the clause makes no specific mention of the particular type or class of dispute presented in a given case.

As evident in the threshold test of arbitrability stated in *Liverpool,* and encountered in past holdings and in other cases decided by the court in 1977, it appears that New York State's highest court is primarily concerned with protecting the public employer's authority and management rights whether based in public policy—derived from statute or decisional law—or in contract provisions.

The Pennsylvania Supreme Court also decided significant cases involving arbitrability in 1977. The Portage Area School District and Portage Area Education Association had agreed in their contract that the school-code provisions would "represent their complete agreement" on the issue of job security. Under the code, tenured teachers can be suspended (1) when pupil enrollment substantially decreases, (2) educational programs are altered or curtailed, (3) schools are consolidated, and (4) new districts are formed. In determining suspensions, the school code also requires the employer to consider professional evaluations and seniority of individual teachers.

In *Patricia Rylke* v. *Portage Area School District,*[34] the Pennsylvania Supreme Court, Western District, held that "the parties incorporated the relevant sections of the school code into [their] agreement to allow, *inter alia,* an arbitrator to decide whether the school district has complied with those sections in suspending professional employees." Further, the court rejected the school district's contention that allowing arbitration over the propriety of suspensions "would be the implementation of a

[34]Pa. Sup.Ct., Western Dist. No. 43, February 28, 1977, 94 LRRM 3136 (1977).

provision inconsistent with a statute enacted by the General Assembly."

The court found that a dispute is arbitrable if it is "a matter of fundamental concern to the employees' interest in wages, hours, and other terms and conditions of employment." Issues in this category, the court continued, may not be excluded from arbitration unless applicable statutory provisions clearly prohibit the employer from making an agreement.

In *Association of Pennsylvania State College and University Faculties* v. *Commonwealth of Pennsylvania,*[35] the commonwealth court held that the Pennsylvania Labor Relations Board erred when it determined that an issue was not arbitrable "because one of the possible remedies which an arbitrator might fashion could infringe on the decision-making authority of the governor."

The Association of Pennsylvania State College and University Faculties (APSCUF) initiated a grievance alleging violation of the contract provision which states that when legislative action is necessary to implement a contract provision, the parties "mutually agree to make such recommendation to the legislature which may be necessary to give force and effect to the provisions of this agreement." Specifically, the association alleged that the commonwealth failed to request sufficient money to give "force and effect" to the agreement. The PLRB dismissed the association's unfair labor practice charge (brought on the basis of the commonwealth's refusal to arbitrate) on the ground that the adequacy of a budget proposal made by the governor was not a proper subject of arbitration "because the judgment as to what budget proposals must be made to comply with the state's legal obligations is vested exclusively in the office of the governor and is not delegable."

The court disagreed, holding: "In light of the act's unequivocal language that arbitration is mandatory, and if the complaint which APSCUF attempted to have arbitrated was a 'grievance,' it is clear to us that the board must then conclude, without considering other factors, that the matter at hand was properly the subject of arbitration."

The Michigan courts have adhered to the general rule that questions of arbitrability are to be resolved by the court. While judicial activity in such instances is more limited in scope than

[35] 373 A.2d 1175, 95 LRRM 2771 (1977).

in New York, the court will determine when a particular dispute is clearly not covered by the arbitration clause of a collective bargaining agreement. Thus, in *Brown* v. *Holton Public Schools,*[36] the Michigan Supreme Court could find no language in a collective agreement giving a probationary teacher a right to file a grievance relative to the school board's refusal to renew his contract. As such, the Michigan courts will closely examine the collective bargaining agreements for contractual exclusions.[37]

Several significant cases concerned the relationship between grievance arbitration and the scope of bargaining. Public employers have attempted to enjoin arbitration or overturn awards on the basis that the subject involved in the grievance was a nonmandatory item for bargaining or an item expressly covered by a preemptive statute. The supreme courts of Michigan and Massachusetts recently decided cases involving such claims.

In *Pontiac Police Officers Association* v. *City of Pontiac,*[38] the Michigan Supreme Court held that grievance and related disciplinary mechanisms and "other terms and conditions of employment" fall within the meaning of the Public Employment Relations Act and thus constitute mandatory subjects of bargaining. In this case, the court determined that establishment in a city charter of a civilian review board for discipline of police-officer misconduct did not relieve the city of its obligation to bargain with a police officers' union relative to grievance procedures for disciplined officers.

The court cited two previous decisions. In *Detroit Police Officers Association* v. *Detroit,*[39] it had held that residency was a mandatory subject of collective bargaining. "In *DPOA* v. *Detroit,* this court declared that under the PERA, as under the National Labor Relations Act (NLRA), there are three categories of subjects of collective bargaining: mandatory, permissive and illegal. In *Rockwell* v. *Crestwood District Board of Education,*[40] we said that this court had 'consistently construed that PERA was the dominant law regulating public employee labor relations' and that the 'supremacy of the provisions of the PERA is predicated on the Constitution . . . and the apparent legislative intent that the

[36] 258 N.W.2d 51, 96 LRRM 2784 (1977).
[37] *See, e.g., Thomas* v. *Schools of the City of Kalamazoo,* 74 Mich.App. 560, 254 N.W.2d 576 (1977).
[38] 397 Mich. 674, 246 N.W.2d 832, 94 LRRM 2175 (1976).
[39] 391 Mich. 44, 214 N.W.2d 803, 85 LRRM 2536 (1974).
[40] 393 Mich. 616, 629, 630, 227 N.W.2d 736 (1975).

PERA be the governing law for public employee labor relations.' "

The court in *Pontiac* also noted that a civilian review board for discipline of police officers is a permissible charter provision, not mandatory, and pointed out that *DPOA* v. *Detroit* "held that a public employer's collective bargaining obligation prevails over a conflicting, permissive charter provision."

In contrast, the Michigan Supreme Court held in *Council No. 23* v. *The Recorders Court,*[41] that the specific provisions of a state statute (MCLA 771.10; MSA 28.1140) containing procedures for the removal of probation officers prevailed over the general bargaining obligation set forth in the PERA. On this basis, the court ruled, in a split decision, that the judges of the Recorders Court of the City of Detroit were not obligated to arbitrate the discharge of a probation officer.

The majority opinion noted that "probation officers perform duties particularly central to the administration of criminal justice" and that judges "must place great reliance on the ability of their probation officers to prepare accurate reports for use at sentencing."

The court observed:

> "In the private sector, the grievance procedure is necessary to guarantee that an employee cannot be terminated at the whim of an employer. . . . In the present case, MCLA 771.10; MSA 28.1140 serves that function. It guarantees the probation officer a full hearing at which the court must determine if the probation officer was guilty of incompetence, misconduct, neglect of duty or refusal to carry out the order of the court before it can recommend removal."

The court concluded that if the dispute were submitted to arbitration, the result could be reinstatement of a probation officer in whom the court could no longer place trust and confidence. In the majority's judgment, the legislature in adopting the PERA (and, in particular, the section outlining the employer's duty to bargain) did not mean "to encumber the judicial process in such a manner."

The Massachusetts Supreme Court, in *Bradley* v. *School Committee of Boston,*[42] held that the transfer requests of incumbent principals is not an exclusive managerial prerogative and that

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[41] 399 Mich. 1, 248 N.W.2d 220, 94 LRRM 2392 (1976).
[42] 364 N.E.2d 1229, 96 LRRM 2542 (1977).

the School Committee of Boston must comply with an arbitration award ordering the approval of the transfers.

The arbitrator had found, on the basis of past practice, that the school committee's refusal to approve the transfer of 16 principals violated the agreement with the Boston Association of School Administrators. The school committee challenged the arbitrator's award, contending that the arbitrator exceeded his authority and, further, that the collective bargaining agreement did not prevent the committee from changing the manner in which it selected school principals because selection of principals was a nonnegotiable, nonarbitrable management prerogative.

The court recognized that the manner in which principalships are filled is "a composite of issues affecting conditions of employment and issues affecting educational policy." But in the instant case, the court was of the opinion that "questions relating to committee action on incumbents' transfer requests lack the prerogative quality required to prevent enforcement of a valid agreement thereon." Thus, the committee's agreement to follow past practices in handling transfer requests of incumbent principals and its agreement to arbitrate any disputes arising over the terms of its agreement were found binding and enforceable.

In *School Committee of Danvers* v. *Anne Tyman,*[43] the Massachusetts Supreme Judicial Court vacated a lower court's order that granted a stay of arbitration of a teacher's grievance charging the Danvers school committee with failure to abide by evaluation procedures. The court determined that while a school committee may not delegate its power to decide on tenure, it may bind itself to follow procedures that precede the decision-making process. The Danvers school committee "agreed to submit to arbitration on a wide range of subjects," and, the court continued, "no occasion for a stay of arbitration arises merely from the possibility of an arbitrator's award which might purport to intrude into the school committee's inviolate authority." The court concluded that an arbitrator could not grant tenure, but might devise a remedy that "falls short of intruding into the school committee's exclusive domain."

[43]360 N.E.2d 877, 94 LRRM 3182 (1977).

In a related case involving the same theme—the arbitrability of teacher-evaluation procedures—the Massachusetts Supreme Court, citing its *Danvers* decision, set aside an arbitrator's award that found that nonrenewal of a nontenured teacher's contract was arbitrable.[44] However, the court ordered the parties to proceed to arbitration on the school committee's alleged failure to follow evaluation procedures.

In a third case involving the same issue, *School Committee of West Bridgewater* v. *West Bridgewater Teachers Association,*[45] the Massachusetts Supreme Court upheld an arbitration award that found the school committee in breach of contract for failing to abide by negotiated evaluation procedures. The lower court had vacated the award, which ordered the school committee to reinstate the teacher with back pay. Applying its reasoning in *Danvers* and *Dennis-Yarmouth,* the supreme court held that the nonrenewal was not arbitrable, but that the alleged bypassing of the evaluation procedures was arbitrable. It confirmed the arbitrator's award "in so far as it granted the teacher pay for the subsequent year for which she was not rehired."

The Montana Supreme Court held that before the Silver Bow County Board of Education could substitute time clocks for sign-in sheets as a means of reporting attendance, it was required to submit the issue to arbitration. In *Butte Teachers' Union No. 332* v. *Board of Education of School District No. 1, Silver Bow County,*[46] the court rejected the school board's contention that the change was a nonmandatory arbitration matter and the "implementing of time clocks constituted a mere substitution of one procedure for another" as allowed under the contract.

Under the school board's prior policy, one half of the professional employees were required to sign in, while the remaining professionals were not. In the court's view, had the board established a uniform policy, the subsequent unilateral implementation of a more reliable method of keeping attendance would have been a mere change from previous practice and not a departure from the established rule. Such action would have been a nonarbitrable managerial prerogative.

In the instant case, however, the school board failed to show

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[44] *Dennis-Yarmouth Regional School Comm.* v. *Dennis Teachers Ass'n,* 360 N.E.2d 883, 94 LRRM 3187 (1977).
[45] 360 N.E.2d 886, 94 LRRM 3189 (1977).
[46] 95 LRRM 3272 (1977).

that a single attendance-procedure rule existed to which each employee was subject. Instead, new rules governing employee attendance were unilaterally promulgated, which substantially changed old rules on the same subject. In such a situation, the court found the matter arbitrable.

The Duty and Scope of Bargaining

Disputes concerning the duty and scope of collective bargaining continue to be litigated throughout the country. A significant New York decision is *Board of Cooperative Educational Services of Rockland County* v. *New York State Public Employment Relations Board and BOCES Staff Council,*[47] decided by the court of appeals. Unanimously overturning a PERB determination, the high court held that "after expiration of an employment agreement, it is not a violation of a public employer's duty to negotiate in good faith to discontinue during the negotiations for a new agreement, the payment of automatic annual salary increments, however long-standing the practice of paying such increments may have been."

In years prior to 1974, when a contract expired, even if a successor agreement had not yet been reached, BOCES paid the automatic step increments to returning unit employees. But as of June 1975, BOCES discontinued this practice and was charged with an improper practice for unilaterally withdrawing a previously enjoyed benefit while a successor contract was being negotiated.

PERB sustained the improper-practice charge on the basis of its *Triborough* doctrine, which required an employer to maintain terms and conditions of employment during negotiations, including a long-standing practice of paying automatic step increments. In reversing PERB, the court alluded to the distinctions between private and public employment and observed: "In thriving periods the increment of the past may not squeeze the public purse, nor may it on the other hand be even fair to employees, but in times of escalating costs and diminishing tax bases, many public employers simply may not be able in good faith to continue to pay automatic increments to their employees."

[47] 41 N.Y.2d 753, 395 N.Y.S.2d 439, 95 LRRM 3046 (1977).

Although PERB agreed that the payment of increments merely preserves the existing relationship between the parties until different conditions are established through bargaining, the court disagreed, asserting that the payments, in fact, change the parties' relationship:

> "To say that the *status quo* must be maintained during negotiations is one thing; to say that the *status quo* includes a change and means automatic increases in salary is another. The matter of increments can be negotiated and, if it is agreed that such increments can and should be paid, provision can be made for payment retroactively. The inherent fallacy of PERB's reasoning is that it seeks to make automatic increments a matter of right, without regard to the particular facts and circumstances. . . ."

In the *Matter of International Association of Firefighters of the City of Newburgh, Local 589 (City of Newburgh),*[48] the New York Public Employment Relations Board held that a demand for "minimum number of men that must be on duty at all times per piece of firefighting equipment" was not a mandatory subject of bargaining. The board found the predominant characteristic of the demand was the establishment of manpower needs and the deployment of personnel, which are management prerogatives. PERB added, however, that "the general subject of safety as a means of protecting employees beyond the normal hazards inherent in their work is a mandatory item of negotiations" and suggested that disputes concerning such safety issues are best resolved by the parties on an ad hoc basis through the contractual grievance procedure.

In another PERB case, *Matter of the City of New York,*[49] the Patrolmen's Beneficial Association charged the city with refusing to negotiate in good faith in resisting the PBA's wage-increase demands by reliance on a "parity" or "most favored nation" clause in the city's contracts with unions representing firefighters, correction officers, and sanitation workers. PERB, in a two-to-one decision, found that bargaining for, or agreeing to, a parity clause, while not expressly prohibited by statute, is "implicitly prohibited by reason of its inhibiting effect upon related collective negotiations," and thus violative of the Taylor Law.

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[48] 10 PERB 3001 (1977).
[49] 10 PERB 3003 (1977).

Other Constitutional Issues

The scope of the U.S. Supreme Court's *National League of Cities*[50] decision was at issue in *Usery* v. *Charleston County School District.*[51] There the Fourth Circuit Court of Appeals held that the provisions of the federal Equal Pay Act apply to state and local governments, despite the Supreme Court's holding in *National League of Cities* that federal minimum wage and overtime requirements cannot be enforced against states and localities. (Previously, the Third Circuit reached the same result in *Allegheny County Institution District* v. *Marshall,*[52] and the Court declined to review that decision.)

Affirming the district court, the Fourth Circuit held that, unlike the Fair Labor Standards Act's minimum wage and overtime provisions, the Equal Pay Act (a 1963 amendment to the FLSA) is an antidiscrimination measure and "as such, may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law." According to the appeals court, in contrast to the commerce power, congressional authority to enforce the provisions of the Fourteenth Amendment is not restricted by the Tenth Amendment.

Finding the Equal Pay Act is severable from the minimum wage and overtime provisions, the court stated: "Although enacted as an amendment to the FLSA, the Equal Pay Act is separate legislation, aimed at a different evil. It was 'piggybacked' onto the FLSA only for administrative convenience and economy."

In reaching its decision, the court also cited *Fitzpatrick* v. *Bitzer*[53] wherein the Supreme Court, shortly after deciding *National League of Cities,* held that congressional power under the Fourteenth Amendment supported application of the sex-discrimination provisions of Title VII of the 1964 Civil Rights Act to state employers.

The U.S. Supreme Court also acted in a case involving the First Amendment rights of a public employee. In *Norbeck* v. *Davenport Community School District,*[54] the Court declined to re-

[50]426 U.S. 893, 96 S.Ct. 2465 (1976).
[51]U.S. Dist. Ct., S.C. No. CA-76-248, August 24, 1976.
[52]544 F.2d 148, 13 FEP Cases 1188 (3d Cir. 1976).
[53]427 U.S. 445, 96 S.Ct. 2666, 12 FEP Cases 1586 (1976).
[54]431 U.S. 917, 95 LRRM 2326 (1977).

view an Eighth Circuit Court of Appeals decision which held that a federal district court properly instructed the jury concerning the First Amendment rights of a school principal. The principal's contract was not renewed by the school board because of his unsatisfactory performance and "poor judgment" in serving as chief negotiator for the teachers' union, which was bargaining with the school district. In reaching its decision, the court concluded that the school district's interest in efficient administration outweighs any right the principal may have to bargain on behalf of teachers whom he has hired and whom he supervises, evaluates, and disciplines, and that nonrenewal of his contract does not infringe his First Amendment rights and should not have been submitted to a jury as a possible basis for recovery under 42 U.S.C. par. 1983. The court noted that although freedom of association is basic and closely allied to freedom of speech, the right to associate or speak freely "is not absolute. . . . Even a significant interference with an individual's freedom of association may be sustained if there exists a sufficiently important state interest, and the means employed are narrowly drawn to avoid unnecessary abridgement of associational freedoms."

The agency fee was upheld by the U.S. Supreme Court in *Abood* v. *Detroit Board of Education.*[55] The majority opinion, written by Justice Stewart, found agency-fee arrangements covering public employees to be constitutional as long as employees can receive a rebate for that portion of the fee or dues spent on activities unrelated to collective bargaining. The Court unanimously found that a state may not constitutionally require public employees to contribute to union political activities which they oppose.

Training and Research Notes

Training and research activities in the public-employment dispute-settlement area continue to increase, and it was the judgment of the committee that a brief roundup of some noteworthy programs and research would be helpful to users of this report.

One of the most important developments in 1977 was the establishment of the Public Employment Relations Services

[55]431 U.S. 209, 95 LRRM 2411 (1977).

(PERS). PERS is a national project funded by the Carnegie Corporation in cooperation with the American Arbitration Association; its principal thrust is to provide various types of assistance to state boards and commissions with jurisdiction over public-sector labor relations. The project will be concerned with organizational research and specialized training needs. A national compilation of administrative orders, decisions, and opinions in public-sector labor relations is contemplated. A focal point of PERS activity is colleges and universities. The project is headed by Robert Helsby, former chairman, New York State Public Employment Relations Board; the Academy's representative to PERS is Walter Gershenfeld.

The American Arbitration Association continued to expand its education seminars in the public sector. A significant growth area is the AAA's new skill-building training packages, specifically in the training of both management and union advocates for collective bargaining and arbitration at the local, state, and federal levels. Simulation and role-playing were important parts of these programs. During the year, the AAA ran a conference on "The State of the Art of Dispute Resolution Training" at the Wingspread Conference Center in Racine, Wisconsin. The proceedings are being published. The AAA also established a national advisory dispute-resolution panel.

The U.S. Department of Labor's Division of Public Employee Labor Relations also has expanded its training programs to include seminars on fact-finding, the use of economic data, and advanced collective bargaining. Previous seminars were targeted at beginners to acquaint them with the process; the new seminars are directed toward experienced practitioners and will emphasize substance. Simulation and role-playing continue to be the preferred teaching methodology.

The Federal Mediation and Conciliation Service continues to sponsor training programs for members of its roster of arbitrators. Programs are designed to meet the needs of both inexperienced and well-established arbitrators. A number of the programs were on subjects pertinent to public-employment dispute resolution. FMCS joined with AAA in planning and conducting one-day workshops on interest arbitration in the public sector, with a focus on the problem aspects of the subject. One need uncovered by FMCS was for the training of neutrals in the intricacies of public finance. Additionally, Wayne Horvitz, director of FMCS, announced that the agency planned to develop a

cadre of some 30 mediators with special expertise in the federal sector.

Two competitive research contracts of interest were let by the U.S. Department of Labor. One, "A Study of Impasse Procedures in the Public Sector," is being conducted by Case Western Reserve University. The second contract, "Analysis and Evaluation of the Impact of Adjustments in, and Alternative Approaches to Grievance Resolution," was awarded jointly to Ohio State University Research Foundation and the Wisconsin Center for Public Policy. Academy member Howard Bellman, director of the Employment Relations Studies Division of the Wisconsin Center, is participating in the second project.

Academy members James L. Stern and Edward B. Krinsky are involved in a Wisconsin interest-arbitration project. The components are (1) to determine the current and future supply of arbitration services in Wisconsin, (2) to estimate the projected demand for such services, and (3) to develop and implement a program for training new interest arbitrators if the demand for such arbitrators is greater than the supply. Stern is the principal investigator and Krinsky is coinvestigator.

The growing policy role of research and analysis was illustrated by the exactment or extension of dispute-settlement laws in the public sector in New Jersey and New York following research and reports. In New Jersey, the report of the Public Employer-Employee Relations Study Commission with regard to arbitration arrangements for police and firefighters was adopted in the law enacted in 1977. The commission was led by Richard Lester of Princeton University, assisted by William Weinberg of Rutgers University. In New York, Thomas A. Kochan of Cornell's School of Industrial and Labor Relations conducted a study that was sponsored by the New York State Public Employment Relations Board and the National Science Foundation. The study was an evaluation of the impact of the change from fact-finding to interest arbitration in police and fire disputes, and the findings were important in the debate on the bill that the New York legislature passed in 1977.

There was also activity in the training of staff members of public-employment relations boards and commissions, and growing interest in fact-finding led to the convening of a number of conferences and training sessions on the subject. Illustrative here was a training program for fact-finders in public educa-

tion sponsored by the California Educational Employment Relations Board.

Rutgers University introduced a new concentration in neutral training to its master's degree program in industrial relations. The courses and internship emphasize theoretical formulations, decision-writing skills, mediation techniques, aspects of public administration and finance, psychological and organizational aspects of bargaining and dispute settlement, and techniques and rules associated with holding a hearing.

Among the numerous training programs during the year, one of particular interest was conducted by the School Administrators' Association of New York State; the sessions were designed to provide local school principals with an understanding of their decision-making choices during a school strike.

The Fifth Annual Meeting of the Society of Professionals in Dispute Resolution took place in October 1977 in New York City. An important topic under consideration was the public-interest role of the neutral in public-sector dispute settlement.